STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2013-001885
Lower Court Case No. 2010-CP-07-2396

SUSAN TAPPEINER, 338050,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

REPLY TO BRIEF OF RESPONDENT

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ATTORNEY FOR PETITIONER.

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ARGUMENT IN REPLY

Petitioner relies on the arguments and authorities presented in the Brief of Petitioner, as well as her Petition for Writ of Certiorari. In response to the arguments presented by the State in their Brief of Respondent, Petitioner would address the following points.

QUESTION

I

Respondent seeks to refute Petitioner's position on this issue by noting that Trial Counsel asserted a theory of defense in both his opening statement and closing argument to the jury. Brief of Respondent, pp. 6-8; referencing App. p. 151, ll. 5-14 and App. p. 335, ll. 13-16. The line of argument by the Respondent overlooks the fact that opening statements and closing arguments do not constitute evidence. The trial court effectively charged this jury on this principal. App. p. 351, ll. 4-8. The State acknowledged this fact in its closing argument. App. p. 326, ll. 20-25.

Petitioner would assert that these isolated arguments were no substitute for a well prepared and presented defense. If anything, these arguments, presented without any evidence to back them up, would likely have been prejudicial to Petitioner in that they would likely have been seen as hollow promises that Petitioner did not present actual evidence to support. The lower court erred in failing to grant relief on this allegation.

II

Respondent has asserted that Petitioner has failed to support her assertion that the prosecution made "repeated references" to the fact that she was arrested after her lengthy interview by the police. *Brief of Respondent,* unnumbered fn., page 8. The Respondent

references a portion of the record below at App. pg. 280, l. 21 – 281, l. 8. Their brief fails to mention a second portion of the trial record wherein the prosecution, in fact, repeated this highly improper and prejudicial assertion. The following testimony clearly *repeated* the earlier testimony:

> Okay. An so at the time that the defendant came to speak to you, was she under -- did you place her under arrest when she walked in the door or is it that after speaking to her for that time, then the decision was made to place her under arrest?
>
> Yes. She came down. We spoke for about 2 hours. And then based on my investigation, I placed her under arrest." App. pg. 283, ll. 4-10.

This improper line of testimony was not only repeated, it was emphasized by the prosecution during closing arguments. *See*, Question III, Brief of Appellate, pp. 45-46. The lower court erred in failing to grant relief on this allegation.

III

The portion of State's closing argument acknowledged by Respondent in its brief actually highlights the prejudice to Petitioner caused by the improper testimony discussed, *supra,* in question II. In that portion of the State's closing argument the prosecution stated:

> She came down the testimony I think said around 2:00 o'clock in the afternoon and talk to the police. That was her face to face, eye to eye. Victim had his turn. She had her turn. She was not under arrest. She was not under arrest. She voluntarily came in to speak. I want to make that clear. This was still an investigation. After the faced to face, eye to eye a determination was made. She was charged that day with criminal sexual conduct second degree. App. p. 342, ll. 6-16.

This argument punctuated the fact that the case was still under investigation at the time of the interview and that Petitioner was not under arrest at the time her statement was given. Thus, this argument hammered home the prosecution's point that only after

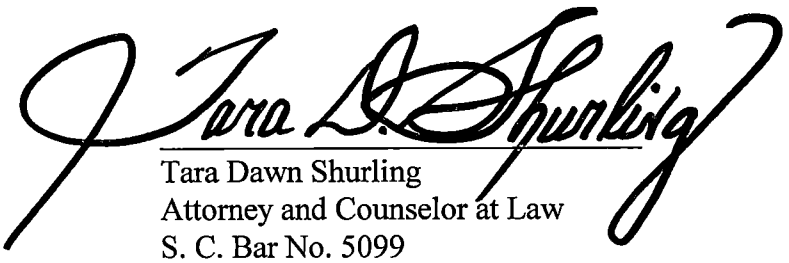
her own words during that interview "a determination was made" and "she was charged *that day* …".

The prejudice arising from this argument is clear and undeniable. The lower court erred in failing to grant relief on this allegation.

CONCLUSION

For the reasons stated herein, as well as those advanced in the Brief of Petitioner, the Petitioner's conviction and sentence should be reversed and her case be remanded for a new trial.

Respectfully submitted,



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February 1, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Reply to the Brief of Respondent in the above entitled case has been served upon opposing counsel, this the 1st day of February, 2016, by mailing in an envelope with postage prepaid, properly addressed as follows:

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SWORN TO BEFORE me this 1st day of February, 2016.

Sharon H McWhirter (L.S.)
Notary Public for South Carolina
My Commission Expires: Jan 16, 2017