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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Appellate Case No. 2015-000184

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SC Court of Appeals

The State, Respondent,

v.

Derek Vander Collier, Appellant.

FINAL REPLY BRIEF OF APPELLANT DEREK VANDER COLLIER

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ARGUMENTS

I. The trial court committed reversible error when it improperly limited Appellant's closing argument and prohibited Appellant from responding to the State's bolstering of Justin Kirkman's credibility.

The State contends that Appellant has not preserved his challenge to the solicitor's bolstering of Kirkman. While the solicitor's comments to the jury unquestionably constitute illegal bolstering, Appellant's trial counsel did not object at trial. That is of no import here, for Appellant is not challenging the bolstering directly.¹ Instead, Appellant argues that the State's bolstering of Kirkman's credibility and motivation not to lie opened the door and invited a response from Appellant's counsel.

When a party argues or introduces evidence of a particular matter, in closing statement or otherwise, the other party is entitled to explain it or rebut it, even if the latter evidence or argument would have been incompetent, improper, or irrelevant had it been offered initially. *State v. Dunlap*, 353 S.C. 539, 541–42, 579 S.E.2d 318, 319–20 (2003).

Here, the solicitor stated:

What further motivation does Justin have to tell the truth? Well, at least for a little while longer, he's doing well, he might get off probation early but as of right now he's still on probation. If he were to be convicted of lying to the police or lying to the Court, he could go to jail; he could go to prison. He has a lot of incentive to tell the truth. . . . Justin has *no motivation to lie*.

(R. p. 297, lines 13–19; R. p. 298, lines 7–8).

In light of the solicitor's comments regarding Kirkman's motivation to lie, it was entirely within bounds for Appellant's counsel to claim that Kirkman plainly had a motivation to lie. *See Ellenburg v. State*, 267 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it

¹ That is a challenge that must be raised in PCR proceedings.

does not unfairly prejudice the defendant.”). This improper limitation on Appellant’s closing argument was error and prejudicial, for closing arguments are a party’s last opportunity to persuade the trier of fact of their innocence. Here, Appellant was deprived of the opportunity to rebut the bolstering and buttressing of Kirkman’s motive to tell the truth. Thus, this Court should reverse.

II. The trial court erred by allowing Justin Kirkman’s in-court identification when the pretrial identification was unduly suggestive.

The State argues that Appellant did not preserve his challenge to Kirkman's in-court identification. While counsel did not contemporaneously object to the identification, the admissibility of that identification was thoroughly discussed prior to trial and, in fact, served as the basis for the mistrial in Appellant's first trial. "[A]ll [that] this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court." *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (quoting *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939)). Here, that was done as the trial court judge plainly ruled that the in-court identification was admissible. To find Appellant's argument unpreserved, particularly in light of the highly suggestive nature of the lineup, would result in an unjust and hypertechnical application of this State's error preservation rules. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing "concerns about a hypertechnical application of a procedural bar to appellate arguments); *see also id.* at 332–33, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part) ("[A]n over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice . . . [particularly because]

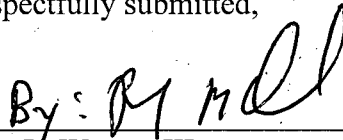
behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests.").

CONCLUSION

For the reasons stated above, this Court should reverse the conviction and sentence of Appellant Derek Vander Collier.

Respectfully submitted,

April 27, 2016

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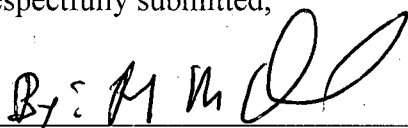
Derek Vander Collier, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

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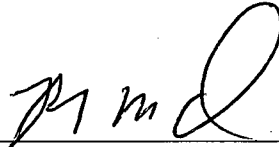
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of April, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of April, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.