ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Lexington County
The Honorable Eugene C. Griffith, Circuit Court Judge
Appellate Case No. 2017-000205

The State, Respondent,

v.

Yul Graham,

Appellant.

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# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

## STATEMENT OF FACTS

On August 10, 2015, the Lexington County Grand Jury indicted Appellant Yul Graham on one count of shoplifting. The matter was called for a jury trial on January 25, 2017, before the Honorable Eugene C. Griffith, Jr., Circuit Court Judge.

Prior to trial, Appellant moved to suppress statements he made to the responding law enforcement officer. After a hearing, the circuit court denied the motion to suppress, ruling all but one of Appellant's statements contained the same information the officer received from the store manager, and the remaining statement was directed at the store manager rather than the officer. (Trial Transcript [TT], pp. 27-61; Record on Appeal [R.], pp. 12-46).

Irving Lewis, a manager at a Bi-Lo store in West Columbia (the "manager"), testified he was working on June 21, 2015, and observed Appellant Yul Graham reach into a seafood freezer, remove bags of frozen shrimp, and place them inside an empty Bi-Lo bag in his cart. The manager continued observing Appellant as he went through the store, and saw him put other items in his cart in plain sight. He followed Appellant to the check-out line, and saw him pay for the items that were in plain sight in the cart, but he did not pay for the items he had placed in the Bi-Lo shopping bag. (TT, pp. 72-80; R., pp. 54-62).

After Appellant left the check-out area and proceeded out of the store, the manager stopped him just before he exited the last set of doors (the "vestibule"), and asked Appellant to show a receipt for the items in Bi-Lo bag. Appellant responded that he had purchased the frozen items earlier at a different Bi-Lo, which was approximately a twenty-five minute drive away. The manager then checked the items in the bag, which were still completely frozen, and he gave Appellant the option to pay for the items, or the police would be called. When Appellant refused

to pay for the items, the manager had store personnel call the police, and an officer arrived approximately three minutes later. (TT, pp. 80-83; R., pp. 62-65).

The manager told the responding officer what he had observed Appellant do inside the store. Appellant then stated he would pay for the items, but the manager refused because the police were already on the scene. The manager remained in close proximity while the officer talked to Appellant, but did not hear the entire conversation. (TT, pp. 84-88; R., pp. 66-70).

Officer Chris Yarborough of the West Columbia Police Department testified he was working on June 21, 2015, and received a dispatch to respond to the West Columbia Bi-Lo. He was already in the area, and arrived at the store approximately one and a half minutes after he received the call. (TT, pp. 91-92; R., pp. 73-74).

Officer Yarborough joined the manager and Appellant in the store vestibule, and after the manager told him what had occurred, Officer Yarborough asked Appellant what had happened. Appellant stated the manager had accused him of stealing, but he had purchased the items at a different Bi-Lo. While Officer Yarborough was talking with Appellant, Appellant continued directing comments to the store manager, stating he wanted to pay for the items, and he did it to try and "get one over on him" (the manager). (TT, pp. 93-97; R., pp. 75-79).

Based on the information he gathered, Officer Yarborough arrested Appellant for shoplifting. He testified the Bi-Lo bag in question contained a bag of trail mix and three bags of frozen seafood (shrimp and crawfish), which were still frozen, valued between $45 and $50 in total. (TT, pp. 97-102; R., pp. 79-84).

At the close of the State's case-in-chief, Appellant moved for a directed verdict, arguing the State failed to present sufficient evidence to submit the case to the jury. The circuit court

denied the motion, finding the evidence created a question of fact for the jury. (TT, p. 107; R., p. 89).

Appellant testified he saw the Bi-Lo bag inside a shopping cart when he entered the store, and he thought someone had left one of their bags, so he picked it up, without looking in it, and put it in his cart. He knew there was something in the bag, he did not tell anyone in the store about the bag, and he did not attempt to pay for the items it contained when he checked out. He stated he offered to pay for the items after the manager confronted him in the store vestibule, and denied saying he was trying to get one over on someone. (TT, pp. 110-125; R., pp. 92-107).

During a charge conference, Appellant objected to a permissible inference charge based on the language of the shoplifting statute, contending it was an impermissible charge on the facts, and there was insufficient evidence to warrant such a charge. The circuit court ruled the charge from the statutory inference language was appropriate. (TT, pp. 130-134; R., pp. 112-116).

During closing arguments, the solicitor stated it was important that the verdict be the truth. Appellant objected on the ground of burden shifting, and the court instructed the solicitor not the shift the burden. The solicitor then stated "[a]ll we're doing here today is to making (sic) a determination of what's the truth for you." After another burden shifting objection, the court stated "they're going to answer the questions of fact, and that's probably a better way to word it." (TT, pp. 146-148; R., pp. 128-130).

The solicitor then talked about common sense, and argued common sense indicated Appellant's statements about his actions did not make sense, and stated it was for the jury to determine the facts and "decide what's the truth." Appellant again objected to the statement as

burden-shifting, and the court overruled the objection, finding the argument was proper. (TT, pp. 148-149; R., pp. 130-131).

The court charged the jury regarding the State's burden of proof beyond a reasonable doubt and the elements of shoplifting, and stated the jury's job was to consider the believability and credibility of the witnesses and evidence. The court further charged the jury it "may consider" willful concealment of unpurchased good or merchandise as evidence of intent to convert the merchandise to the defendant's own use without paying for it. (TT, pp. 152-164; R., pp. 134-146).

The jury convicted Appellant of shoplifting, and the court sentenced him to seven years imprisonment, suspended to three years and three years probation, and denied Appellant's post-trial motion for a new trial. (TT, pp. 166-174; R., pp. 148-156). This appeal followed.

## ARGUMENT

### I. The solicitor's statements to the jury did not improperly shift or dilute the State's burden of proof.

Appellant contends the circuit court erred by overruling his objection to the solicitor's references to "the truth" during closing argument. There is no legal authority holding prosecutors cannot mention "the truth" when addressing the jury.

In reviewing the propriety of the solicitor's remarks to the jury, the trial court has wide discretion in ruling on the appropriateness of a closing argument. State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390, 393 (1995); *see* State v. Copeland, 321 S.C. 318, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument."). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. State v. Rudd, 355 S.C. 543, 586 S.E.2d 153, 156 (Ct. App. 2003). "It is sometimes difficult to draw the line between proper and improper argument, but counsel's remarks must be confined within the record. However, some latitude must necessarily be allowed and it must, to a large extent, be left to the wide discretion of the Circuit Judge." State v. Edgeworth, 239 S.C. 10, 121 S.E.2d 248, 250 (1961).

Appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights. Rudd, 586 S.E.2d at 157. The appellant has the burden of proving the allegedly improper argument rendered the trial fundamentally unfair. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164, 166 (1998). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). "[I]t is not enough that the remarks were

undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1999). Appellate courts should be "careful and critical" in finding allegedly improper statements of counsel to be reversible error, and "[e]very case must necessarily depend upon its own particular circumstances." State v. Gilstrap, 205 S.C. 412, 32 S.E.2d 163, 164 (1944); *see also* Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.").

The South Carolina Supreme Court has cautioned trial judges to avoid using language instructing the jury to "seek the truth" due to the risk such language could potentially shift the burden of proof to the defendant in an unconstitutional manner. State v. Beaty, 2016 WL 7474479, *2 (S.C. Sup. Ct. 2016) (*rehearing granted* March 24, 2017); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248, 251 (2000). In addition, trial judges should not instruct jurors their verdicts "would represent truth and justice for the parties" due to the risk such language could distract the jury from its core functions. State v. Daniels, 401 S.C. 251, 737 S.E.2d 473, 477 (2012) (Toal, C.J., concurring for the majority). The Supreme Court has specifically declined, however, to hold any mention of "the truth" in jury charges is unconstitutional. *See* Aleksey, 538 S.E.2d at 252 ("Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is unconstitutional."); *see also* State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869, 874 (1994) (holding a reasonable doubt jury charge including "in seeking the truth" language constituted a correct definition of reasonable doubt when read as a whole and did not shift the burden of proof to the defendant).

Appellant maintains the restriction on judicial instructions to seeking the truth and rendering a just verdict should also be imposed on prosecutors because the prosecutor is an "officer of the court" and "represents authority to the jurors." Understandably, Appellant cites no authority for such a position.

A solicitor is permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. *See* State v. Pitts, 256 S.C. 420, 182 S.E.2d 738, 742 (1971) ("The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such."); *see also* Johnson v. State, 325 S.C. 182, 480 S.E.2d 733, 735 (1997) (solicitor's comment during closing argument was simply a statement of the evidence which was before the jury); State v. Durden, 264 S.C. 86, 212 S.E.2d 587, 590 (1975) (a prosecuting attorney may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider); State v. Liberte, 336 S.C. 648, 521 S.E.2d 744, 746 (Ct. App. 1999) ("Certainly, a prosecutor is entitled to call into question the credibility of a defense.").

Appellant's contention fails to recognize the substantial difference between a trial judge's role as the neutral arbiter of the law, and a prosecutor's role as an advocate for the State, a distinction the Supreme Court recognized in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). While holding a charge allowing an inference of malice from the use of a deadly weapon was improper, the court noted "some matters appropriate for jury argument are not proper for charging," and specifically stated: "we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard." *Id.* at 810, n. 9 (2009); *see also* State v. Cottrell, Op. No. 27754, 2017 WL6503904 (S.C. Sup. Ct., filed December 20,

2017) (Belcher holding was narrowly tailored to apply to the jury charge only, and did not restrict the State and defendant from arguing the use of a deadly weapon either did, or did not, support a finding of malice). When the solicitor's statements at issue in this case are considered in context, the statements were related to the credibility of the testimony and evidence, something the parties have the right to discuss during closing argument, and the jury does have to consider in reaching a verdict.

The first statement at issue, "it's important that your verdicts be the truth," immediately followed the statement "[the jury is] the only ones that are going to make this decision about who's telling the truth." After Appellant's objection, the court advised the solicitor not to shift the burden, but made no finding the solicitor's statement was improper. (TT, p. 147; R., p. 129).

The solicitor then stated: "[a]ll we're doing here today is to making (sic) a determination of what's the truth for you, that's it." When Appellant objected again, the court suggested alternative language, again without specifically finding the solicitor's language was improper. (TT, pp. 147-148; R., pp. 129-130).

The third statement at issue was in the context of discussing the use of common sense in comparing the State's evidence to Appellant's testimony. After summarizing Appellant's "story," the solicitor stated: "And I submit to you, in common sense, that's not the truth, and that doesn't make sense. That's for you to call, that's your determination about the facts in this case. You have to decide what's the truth." Appellant again objected on the ground of burden shifting, and the court overruled the objection, finding the solicitor was "arguing proper (sic)." (TT, pp. 148-149; R., pp. 130-131).

Following closing arguments, the court fully charged the jury regarding the State's burden to prove each element of the shoplifting offense beyond a reasonable doubt, including the

responsibility to resolve any doubt in Appellant's favor. The court also charged the jury regarding its responsibility to consider the believability and credibility of the testimony and evidence, and determine what the facts were based on the evidence and testimony. (TT, pp. 152-162; R., pp. 134-144).

None of the solicitor's statements were related to the State's burden of proof beyond a reasonable doubt in any way, or were intended to dilute that burden. The context of the challenged statements reveals the solicitor was simply advocating the strength of the State's case over Appellant's "story," rather than attempting to shift the burden of proof.

Restricting prosecutors' ability to advocate on behalf of the State by discussing the strength and credibility of the State's evidence, especially in comparison to the defendant's evidence if presented, will essentially mean a prosecutor can do nothing during closing arguments but recite the State's evidence by rote and sit down. While the defendant's right to a fair trial must be protected, the State's equal right to a fair trial cannot be ignored, and the prosecutor's ability to advocate on behalf of the State before the jury should not be impacted by restrictions imposed on the judiciary when instructing the jury on the law.

The solicitor did not attempt to shift the burden of proof during his closing arguments. Accordingly, the circuit court's denial of Appellant's objection should be affirmed.

**II. The circuit court properly charged the statutory law regarding shoplifting, including the statutory permissive evidentiary inference.**

Appellant asserts the circuit court erred in allowing the solicitor to argue the statutory permissive evidentiary inference of S.C. Code §16-23-120 (2015) during closing argument, and then charging the jury on the permissive inference.[1] The cases Appellant cites as support are distinguishable, and the basis for their holdings no longer applies.

A trial court is required to charge the current and correct law of South Carolina. State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462, 472-73 (2004). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 583(2010) (citations omitted). Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 377 S.E.2d 570, 572 (1989).

On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 649 S.E.2d 41, 50 (Ct. App. 2007). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786, 788 (2009).

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[1]Appellant also contends the statute as written is unconstitutional, but the constitutionality of the statute was not challenged in the circuit court, and therefore, is not preserved for appellate review. *See e.g.,* State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691, 693–94 (2003) (issue must have been raised to and ruled about by trial judge in order to be preserved for appellate review, and issues not raised and ruled upon in the trial court will not be considered on appeal). Further, Appellant did not object to the solicitor's reference to the permissive inference during closing argument, so that issue is likewise unpreserved.

Appellant cites State v. Wells, 282 S.C. 12, 316 S.E.2d 409 (1984), and State v. Burriss, 281 S.C. 47, 314 S.E.2d 316 (1984), in support of his position. He admits, however, these cases are distinguishable from the instant case because they involved an earlier version of the shoplifting statute, which provided certain evidence constituted ***"prima facie"*** evidence of intent to deprive the owner of his property. The version of the statute at issue in this case does **not** contain the words "*prima facie;*" rather, it provides it is "**permissible to infer**" the finding of unpurchased goods of merchandise on the person or in his belongings is evidence of willful concealment, and it is "**permissible to infer**" the intent to convert the goods or merchandise to his own use if the unpurchased goods or merchandise are willfully concealed on the person. §16-13-120 (emphasis added). This statutory language does no more than codify the well-established legal concept that "'proof of intent necessarily rests on inference from conduct.'" McMillian v. State, 383 S.C. 480, 680 S.E.2d 905, 908 (2009) (*quoting* State v. Haney, 257 S.C. 89, 184 S.E.2d 344, 345 [1971]).

During closing argument, the solicitor talked about permissive inferences, and stated the jury could accept or reject such inferences. (TT, pp. 139-142; R., pp. 121-124). The circuit court then charged the jury "you **may consider** [willful concealment] as evidence that the defendant concealed the merchandise with the intent to convert it to his own use without paying for it." (TT, p. 161; R. p. 143). Thus, the jury knew it **could** infer certain things from the evidence presented, but it was not **required** to do so, and the circuit court should be affirmed on this issue.

**III. The circuit court properly admitted Appellant's voluntary statements made in the presence of the responding law enforcement officer.**

Appellant contends the circuit court erred in admitting statements Appellant made in Officer Yarborough's presence, arguing the statements should have been excluded because Officer Yarborough did not advise Appellant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). The evidence presented belies Appellant's argument.

Appellant correctly asserts Miranda warnings are required when a suspect is in custody and subject to law enforcement questioning resulting in incriminating statements by the subject. In this case, however, Appellant was not in custody, and even assuming *arguendo* he was in custody for purposes of Miranda, the statements at issue were not in response to questions from Officer Yarborough, but were directed to the manager.

Statements made to private persons are not subject to Miranda requirements. State v. Lynch, 375 S.C. 628, 654 S.E.2d 292, 295-296 (Ct. App. 2007). Further, spontaneous statements made by a defendant that are not in response to custodial interrogation are admissible without Miranda warnings. Rhode Island v. Innis, 446 U.S. 291, 300 (1980) (volunteered statements of any kind are not barred by the Fifth Amendment); *see also* State v. Von Dolen, 322 S.C. 234, 471 S.E.2d 689, 696 (1996) (defendant's incriminating statements made to employer were admissible because they did not occur during custodial interrogation by police or police agents). State v. Primus, 312 S.C. 256, 440 S.E.2d 128, 128 (1994) (statement defendant blurted out when he first saw police officer was admissible because it was not in response to interrogation).

When Officer Yarborough arrived at the scene, the manager told him what he observed Appellant do inside the store, and then the manager remained "in close proximity" to Appellant and Officer Yarborough while they talked. The manager heard Appellant ask him (the manager)

several times if he could just pay for the items in the bag, but he did not hear everything said by Appellant and Officer Yarborough because he was taking care of store matters while he stood there. (TT, pp. 84-86; R., pp. 66-68).

Officer Yarborough testified Appellant maintained his innocence during their direct conversation, but the majority of Appellant's statements after Officer Yarborough's arrival were directed to the manager. In addition to multiple offers to the manager to pay for the items, Appellant stated "he did it to try to get one over on [the manager]." Officer Yarborough testified the statement was directed at the manager rather than him. (TT, pp. 95-97; R., pp. 77-79).

At the time Appellant made the statement about getting one over on the manager, he was not under arrest. Officer Yarborough testified he did not make the decision to arrest Appellant until he received some information about Appellant he had requested earlier.[2] (TT, pp. 97-98; R., pp. 79-80). Further, there is no evidence Officer Yarborough ever told Appellant he was not free to leave, or made any effort to stop Appellant from leaving, until he actually placed Appellant under arrest.

In short, the statements Appellant directed to the manager were not in response to custodial (or even non-custodial) police interrogation. They were completely spontaneous statements made in Officer Yarborough's presence, and as such were admissible. Therefore, the circuit court ruling on the issue should be affirmed.

[2]In accordance with routine police procedure, Officer Yarborough probably requested a record check on Appellant.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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February 9, 2018

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 14, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and other Sensitive Information in Appellate Court Filings."

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