

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Richland County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN LAMAR GARY,

APPELLANT

APPELLATE CASE NO 2016-001603

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Our Supreme Court's revised opinion in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), supports Appellant's argument that the trial judge committed reversible error where his failure to exercise discretion in the denial of the defense's request to require the prosecution to open in full on the law and facts and reply only in rebuttal during closing argument constitutes an abuse of discretion.

At the time of the initial filing of the Brief of Appellant, our Supreme Court's opinion in *State v. Beaty*, No. 2015-000718, 2016 WL 7474479 (S.C. Dec. 29, 2016), was just three months old and cross-petitions for rehearing were pending. See Brief of Appellant, p. 12-13. This Court granted Respondent's motion to hold Appellant Gary's case in abeyance pending a final decision in *Beaty*. On April 25, 2018, our Supreme Court withdrew its prior opinion and filed a superceding opinion in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), *reh'g denied* (May 25, 2018). The revised *Beaty* decision supports reversal in the present case.

The relevant issue before the Court in *Beaty* related to the rules governing the content and order of closing argument in criminal cases. *Beaty*, 423 S.C. at 26, 813 S.E.2d at 505. Our Supreme Court discussed the history and development of the law regarding closing argument, determining that “[w]ith the repeal of Circuit Court Rule 58 by Rule 85(c), SCRCP, and with the adoption of Rule 39, SCRCrimP, there is no codified or otherwise duly adopted court rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence.” *Beaty*, 423 S.C. at 26, 813 S.E.2d at 507-09. Rather, the only applicable rule is “the ‘constitutional rule’ that a defendant’s right to due process cannot be violated at any stage of a trial.” *Id.* at 26, 813 S.E.2d at 512. The Court ultimately concluded that *Beaty* did not suffer prejudice from the state’s closing argument such that there was no due process deprivation in his case. *Id.* at 26, 813 S.E.2d at 512. However, the Court explained:

[T]rial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage. Absent authority to formally adopt procedural rules, our authority—and the authority of the trial court—is but to address due process considerations as they arise. **In cases in which a defendant introduces evidence, trial judges *clearly* have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing.** This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial.

Id. at 26, 813 S.E.2d at 513 (emphasis added).

Here, defense counsel's basis for requesting that the prosecution open in full on the law and facts and reply only in rebuttal was not limited to the pendency of the proposal for the addition of Rule 21, governing closing arguments, to the Criminal Rules of Procedure. Rather, defense counsel noted the underlying reasoning for the suggested addition of Rule 21, including the outdatedness of the common law practice, changes to previously applicable civil rules, and the defendant's rights to due process and to present a complete a defense. Tr. 434, l. 13 – 436, l.

10. The trial judge noted that no addition to the criminal rules had been adopted and ruled:

I don't know why the proposed rule changes or at least some of them have not been adopted. I know the committee worked very hard on those things. Whether the powers that be agree with what the committee recommended or not is a different issue, but they certainly haven't adopted them and they've certainly had plenty of time to do it. The procedure is that if the defense puts up evidence, the State goes last. Now, this thing about opening on the law causes me more concern, but she said she'll waive that. So the procedure is the defense goes first and the State goes last. The objection is noted and overruled.

Tr. 436, l. 24 – 437, l. 12.

The trial judge's explanation evidences the trial judge's erroneous view that, absent the passage of proposed Rule 21, he lacked the authority to require the State to open in full on the facts and the law and restrict the State's reply argument to matters raised by the defense in closing. The failure to exercise discretion is itself an abuse of discretion. Samples v. Mitchell,

329 S.C. 105, 495 S.E.2d 213 (Ct.App. 1997); see also Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (“It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.”). The trial judge’s failure to exercise his discretion was an error of law.

Appellant was not required to renew his objection to the order of closing arguments during or following the prosecution’s final argument in order to preserve the issue for appellate review.

Respondent’s preservation argument is a red herring. “There are four basic requirements to preserving issues at trial for appellate review.” S.C. Dep’t of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefler Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). “The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” Id. Pursuant to Rule 18 of the South Carolina Rules of Criminal Procedure, “Counsel shall not attempt to further argue any matter after he has been heard and ruling of the court has been pronounced.”

Here, defense counsel explained the basis of her argument that the prosecution should be required to open in full on the law and facts and reply only in rebuttal and further asserted:

[F]ailure to do it in this manner violates my client’s **due process rights** and the right to present his defense and needlessly prejudices him in these proceedings. He has a right to present a full defense. I believe he has a right to know what the State is arguing against him in order to respond appropriately. And I believe without doing so, it denies him a meaningful opportunity to present a complete defense.

Tr. 435, l. 22 – 436, l. 5 (emphasis added). The trial judge ruled, stating: “The objection is noted and overruled.” Tr. 437, ll. 11-12. It was not necessary for trial counsel to object again during

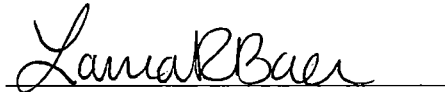
or after the prosecution's closing argument.¹ See State v. Simmons, 2018 WL 3131542, *4, Op. No. 27819 (S.C. Sup. Ct. filed June 27, 2018) (Shearouse Adv. Sh. No. 23 at 29) ("The State attempts to push issue preservation too far." "A second objection was not necessary in this case. Petitioner was not required to be a jack-in-the-box to Dr. Simmons' response to this question to preserve his objection."); State v. Burroughs, 328 S.C. 489, 504 n.4, 492 S.E.2d 408, 415 n.4 (Ct. App. 1997) ("...Burroughs was not required to re-urge his objection after the trial court ruled.").

Respondent's argument appears to suggest that it was necessary for defense counsel to point out everything in the solicitor's closing argument to which she was unable to preemptively respond in order for the trial court to evaluate prejudice. However, "it is clearly improper for the trial court to perform a harmless error analysis on its own evidentiary ruling." State v. Bruce, 412 S.C. 504, 772 S.E.2d 753, 755-56 (2015). "Trial courts cannot sit in judgment of their own rulings and proceedings." Id. at 504, 772 S.E.2d at 756. "Furthermore, the harmless error analysis is an appellate doctrine arising from the principle that 'appellate courts will not set aside judgments due to insubstantial errors not affecting the result.'" Id. (quoting Way v. State, 410 S.C. 377, 384, 764 S.E.2d 701, 705 (2014)). It is this Court's responsibility to review the record and evaluate prejudice, which is why Appellant properly argued the specific matters within the prosecution's closing that the defense was unable to address. See State v. Hughes, 419 S.C. 149, 161, 796 S.E.2d 174, 181 (Ct. App. 2017) (wherein this Court conducted a "review of the record" to determine whether denial of the defense motion on the order of closing was harmless beyond a reasonable doubt.; Brief of Appellant, pp. 13-14. Appellant's Issue I is preserved for appellate review.

¹ It is notable that the prosecution in this case waived its opening on the law and argued in full only after the defense's closing. Tr. 436, ll.17-19; Tr. 438, l. 24 – 439, l. 6; Tr. 439, l. 15 – 478, l. 16.

CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Appellant Kevin Lamar Gary respectfully requests this Court reverse his conviction and grant him a new trial.

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of July, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Kevin Lamar Gary, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 2906, this 9th day of July, 2018.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of July, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027.