STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2017-001669

THE STATE,

Respondent,

v.

OSCAR JAMES SMALL, JR.,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In July 2017, the Orangeburg County Grand Jury indicted Appellant for one count of criminal sexual conduct with a minor first degree and one count of exposing another person to the HIV virus. On July 24-27, 2017, a jury trial was held in the Orangeburg County Court of General Sessions with the Honorable R. Ferrell Cothran, Jr. presiding. Appellant was represented by Scott Palmer, Esq. Respondent (the State) was represented by Assistant Solicitors Ashley Cornwell and Phil Giese of the First Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of both counts. Following the verdict, the trial judge sentenced Appellant to a term of twenty five years' imprisonment for criminal sexual conduct with a minor first degree and a consecutive term of ten years' imprisonment for exposing another person to the HIV virus, resulting in an aggregate term of thirty five years' imprisonment. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

The victim (Victim) in this case was born in 2009. (Tr. v1, 93). Victim lived with her aunt (Aunt) for most of her life and continued to live with her until the date of trial. (Tr. v1:57). Victim's mother (Mother) suffered from a variety of mental health issues, including ADHD, bipolar disorder and schizophrenia. (Tr. v1: 58). When Mother was younger, she lived occasionally with her grandmother (Victim's great grandmother) in Holly Hill. (Tr. v1: 59). During the time Mother lived in Holly Hill, she met Dedra Small and Deborah Robinson while attending the Greater Target AME Church. (Tr. v2: 84-85). Mother maintained a relationship with Small and Robinson and when Victim was born, Small and Robinson asked to become Victim's godparents. (Tr. v1: 60). Small and Robinson lived in separate residences. Victim occasionally stayed with Small or Robinson in Holly Hill, usually on the weekends and holidays. (Tr. v1: 61, v2: 86). Small was married to Appellant. (Tr. v1: 60).

Starting in August 2015, Victim stopped wanting to visit Small, Robinson, and Appellant in Holly Hill. (Tr. v1: 62). Also in August 2015, Victim began engaging in inappropriate sexual behavior with Aunt's daughter. (Tr. v1: 63-64). Aunt disclosed Victim's behavior to Mother over the phone. (Tr. v1: 64). During the phone call, with Mother on speakerphone, Victim disclosed to Aunt and Mother that she was sexually assaulted by Appellant at Small's house. (Tr. v1: 65). Neither Aunt nor Mother reported Victim's disclosure to law enforcement that night. (Tr. v1: 66). Approximately two weeks later, Aunt met with Victim's teachers after Victim was caught engaging in inappropriate sexual behavior with male students. Aunt then told Victim's teachers about Victim's disclosure and the teachers called law enforcement. (Tr. v1: 67-68). Aunt took Victim to the Orangeburg County CASA office for a forensic interview on December 10, 2015. (Tr. v1: 72).

At trial, Victim said Appellant carried her to his bedroom where he engaged in vaginal intercourse with her. (Tr. v1: 105-08). Victim alleged at trial and in her forensic interview that Appellant engaged in vaginal intercourse with her on more than one occasion. (Tr. v1: 105, 108, State's Exhibit #21). However, Victim also stated on direct examination that Appellant assaulted her only once. (Tr. v1: 108). Victim said Appellant assaulted her while Small and Robinson were at church. (Tr. v1: 107, State's Exhibit #21). Victim described Appellant's penis as being "yellow and got black spots on it." (Tr. v1: 107, line 11). Appellant stipulated prior to trial that Victim's forensic interview was admissible under S.C. Code Ann. § 17-23-175, and the interviewer's questions were proper under State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). (Tr. v1: 5, v2: 4-5).

Dr. Carol Swiecicki and Dr. Susan Lamb testified on behalf of the State at trial. Swiecki testified as a blind expert in the field of child abuse dynamics. (Tr. v1: 156). Appellant offered no objection to Swiecicki's qualifications. (Tr. v1: 156). Swiecki did not meet with Victim, nor did she know any of the facts or allegations in the case. (Tr. v1: 155-56). Swiecicki testified generally about cases of sexual assault where no physical evidence of assault is found, situations where children engage in inappropriate sexual behaviors, and delayed disclosure by child victims. (Tr. v1: 157, 159, 164). Dr. Lamb testified as an expert in the field of child sexual abuse and neglect. The solicitor clarified that Lamb's expertise was specifically "in the areas of examination, review, and diagnosis of child sexual and physical abuse. (Tr. v2: 14). Dr. Lamb performed a physical examination of Victim and testified that Victim's physical exam was normal. (Tr. v2: 45). However, Dr. Lamb also advised that ninety-five percent of examinations of children who claim to have suffered sexual abuse reveal normal findings. (Tr. v2: 45). Appellant did not offer a contemporaneous objection to Lamb's qualifications at trial, but did

move to suppress Lamb's testimony pre-trial on the basis of relevance. (Tr. v2: 15, v1: 8-9). Appellant's motion was denied.

Appellant called Mother, Small, and Robinson in his defense. Appellant attacked Mother's credibility by questioning her about her previous attempts to get child support from an individual who was not Victim's father and filing a report with law enforcement that accused Small and Robinson of kidnapping Victim. (Tr. v2: 82-84, 88-90). Mother admitted she didn't proceed with criminal charges against Small and Robinson and that she made false claims regarding who Victim's father was. (Tr. v2: 82-84, 88-90). Small and Robinson testified regarding Mother's past behavior and their dealings with her. Specifically, they testified about conflicts with Mother regarding an alleged kidnapping of Victim and claiming Victim as a dependent for tax purposes. (Tr. v2: 100-02, 141-42). At the conclusion of trial, the jury found Appellant guilty of both counts.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial courts have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial court's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). "The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011).

The Supreme Court of South Carolina "has routinely held the plain error rule does not apply in South Carolina state courts." Id. "Instead, it is the responsibility of trial counsel to preserve issues for appellate review. Only limited exceptions to this rule have been recognized." Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997). Our Supreme Court has recognized that, in the absence of a contemporaneous objection, "a new trial motion should be

granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994). However, "the issue of inflammatory argument must be raised to the trial judge by way of post-trial motion to preserve the issue for appeal." Dial v. Niggel Associates, Inc., 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998).

ARGUMENT

I.

The issue of whether the solicitor engaged in impermissible bolstering of Victim's testimony is not preserved for appeal because Appellant did not make a contemporaneous objection or receive a ruling from the trial court on the admissibility of any of the alleged bolstering. Even if this Court determines this issue is preserved for appellate review, the solicitor did not engage in improper bolstering of Victim because the solicitor merely qualified Victim as a competent witness.

Appellant contends the trial court erred by allowing the solicitor to engage in impermissible bolstering of Victim's testimony through multiple witnesses. Specifically, Appellant alleges the solicitor improperly bolstered Victim's testimony through: (1) the solicitor's own statements, (2) the testimony of Dr. Swiecicki, (3) the testimony of Dr. Lamb, (4) the testimony of Dedra Small elicited on cross examination, (5) the testimony of Deborah Robinson elicited on cross examination, and (6) the testimony of Aunt. Other than during the testimony of Dr. Lamb, Appellant did not object to any of the aforementioned witnesses' testimony on the grounds of improper bolstering or any other basis, nor did Appellant object to any of the solicitor's questions of these witnesses. Therefore, Appellant failed to preserve this issue for appeal. Even assuming for the sake of argument that Appellant preserved the issue of improper bolstering, Appellant's argument lacks merit. None of the questions asked by the solicitor improperly bolstered the testimony of Victim. Each witness offered admissible testimony helping to establish Appellant's guilt beyond a reasonable doubt. Appellant's convictions and sentences should be affirmed.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the

argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). "The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011).

"Witnesses are generally not allowed to testify whether another witness is telling the truth." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "Even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). It is improper for an expert to "comment on the veracity of a child's accusations of sexual abuse." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 95 (2011).

Here, although Appellant failed to preserve the issue of improper bolstering for appeal in regards to any witness except Dr. Lamb, it is instructive to review Appellant's assignments of error individually.

Solicitor

Appellant initially alleges the solicitor improperly bolstered Victim's testimony with comments made during her opening statement and through questions asked of Victim on direct examination. As an initial matter, this issue is not preserved for appeal because Appellant did not object to the solicitor's opening statement nor did he object during solicitor's direct examination of Victim. In fact, counsel for Appellant admitted that he didn't object to the solicitor's opening statement and offered the following rationale for his decision: "the solicitor did something that I consider improper...It's not proper. Why did I let it happen? Because I want you to see how

desperate they are for a conviction." (Tr. v1: 47, lines 9-18). During the State's direct examination of Victim, Appellant did not object to any particular questions until the end of the examination when the solicitor asked Victim to tell the truth when counsel for Appellant cross examined her. (Tr. v1: 122).

However, Appellant objected on the grounds the solicitor was coaching the witness, not on grounds it was improper bolstering. (Tr. v1: 122). Even if Appellant had objected based on improper bolstering, Appellant's objection was not contemporaneous to the questions he now complains about on appeal. The solicitor had completed her entire direct examination of Victim before Appellant offered a single objection. (Tr. v1: 91-122).

Assuming, for the sake of argument, that Appellant properly preserved this issue for appeal, the solicitor did not engage in improper bolstering of Victim. The South Carolina Supreme Court has previously cautioned that forensic interviewers are not allowed to offer their opinion of whether a child witness is being truthful or whether a disclosure is credible. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Here, the State did not present testimony from a forensic interviewer. The State didn't need to call a forensic interviewer because Appellant stipulated to the admissibility of Victim's forensic interview. (Tr. v1: 5, v2: 4-5). Appellant also stipulated that all questions asked of Victim during the interview were proper under Kromah. (Tr. v1: 5, v2: 4-5). Asking Victim whether she agrees to tell the truth is not the same thing as bolstering by a third party witness. A Victim cannot bolster her own testimony. Bolstering occurs when a third party offers their opinion on whether a particular witness is telling the truth. Here, the solicitor's questions of Victim were designed to make sure Victim was a competent witness under rule 601 SCRE. The solicitor's questions of Victim were simply not improper bolstering.

Dr. Swiecicki

Appellant next alleges the solicitor improperly bolstered Victim's testimony through the expert testimony of Dr. Swiecicki. As noted above, this issue is not preserved for appeal because Appellant did not object to any of the questions posed to Swiecicki by the solicitor. (Tr. v1: 151-182). Assuming that Appellant properly preserved this issue for appeal, Dr. Swiecicki's testimony did not improperly bolster Victim's testimony.

It is well settled in South Carolina that an expert may not comment on the credibility of a child's disclosure of sexual abuse. State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). However, it is proper for an expert to testify about the behavioral characteristics of sex abuse victims. State v. Jones, Opinion No. 27822 (S.C. Sup. Ct. filed July 5, 2018) (Shearhouse Adv. Sh. No. 27 at 18). See also State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015).

Here, Swiecicki testified as a blind expert in the general field of child abuse dynamics. (Tr. v1: 156). Swiecicki had not met Victim, nor was she aware of any facts or details about the case. (Tr. v1: 155-56). Accordingly, Swiecicki did not offer any opinions about the allegations and did not comment on the credibility of Victim. Rather, Swiecicki testified generally about cases of sexual assault where no physical evidence of assault is found, situations where children engage in inappropriate sexual behaviors, and delayed disclosure by child victims. (Tr. v1: 157, 159, 164). Swiecicki was also asked general questions about forensic interviews and how they are conducted. (Tr. v1: 173-78). Appellant alleges these questions were asked to use Swiecicki as a "surrogate forensic interviewer." (Initial Brief of Appellant, 13). Appellant misapprehends the nature the of the solicitor's questions. Impermissible bolstering only occurs when the State asks a forensic interviewer whether a child's disclosure is credible. Asking an expert witness general questions about the forensic interview process does not ask the expert to comment on the

veracity of the child's disclosure. Here, Swiecicki never commented on Victim's credibility. Therefore, Swiecicki never bolstered Victim's testimony.

Dedra Small

Appellant also alleges the solicitor bolstered the testimony of Victim through her cross examination of Small. This issue is not preserved for appeal because Appellant did not object during the State's cross examination of Small. Even if this issue were preserved for appeal, Appellant opened the door to this testimony through the questions asked of Small on direct examination. See State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012). Among other things, Appellant asked Small about her prior experiences with Mother and Mother's reputation for truthfulness. (Tr. v2: 100-02). Small was also asked about her desire to adopt Victim and how often Victim would stay at her house (Tr. v2: 99-100). The implication of Appellant's questioning was that Mother had previously been dishonest with law enforcement and previously used the court system to her advantage and therefore may have influenced Victim to lie about Appellant's abuse to gain an advantage. (Tr. v2: 82-84, 88-90). Indeed, Appellant repeatedly attacked Mother's credibility in his closing argument. (Tr. v3: 38-39). Therefore, when the solicitor asked Small whether she had raised Victim to be truthful, the State was merely asking Appellant's witness about a subject Appellant had opened the door to: namely whether Victim was coached into lying by Mother.

Deborah Robinson

Appellant also alleges the solicitor bolstered the testimony of Victim through her cross examination of Robinson. Like the alleged bolstering by Small, this issue is also not preserved for appeal because Appellant did not object during the State's cross examination of Robinson. Even if this issue were preserved for appeal, just as Appellant did with his direct examination of

Small, Appellant opened the door to this testimony through the questions he asked of Robinson. (Tr. v2: 138-42). Specifically, Appellant asked Robinson if she knew Mother to be a manipulative person. (Tr. v2: 138). Robinson also described a conflict with Mother over who would claim Victim as a dependent for tax purposes. (Tr. v2: 141-42). Like the questions posed to Small, the implication of Appellant's questions of Robinson was that Mother had previously been manipulative in dealing with law enforcement and had used the court system to her advantage. Therefore, Appellant opened the door to the Solicitor's questions about Victim's truthfulness. See State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012). ("When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.").

Aunt

Appellant alleges the solicitor improperly bolstered the testimony of Victim through the testimony of Aunt. Again, this issue is not preserved for appeal because Appellant did not object to any of Aunt's testimony. Assuming for the sake of argument that this issue is preserved for appeal, the question asked by the solicitor did not improperly bolster the testimony of Victim. Appellant alleges the following question by the State improperly bolsters Victim's testimony: "So despite all of this, [Victim]'s still never said she made it up or recanted?" (Tr. v1: 74, lines 16-17). Aunt was called primarily as an outcry witness by the State. Accordingly, Aunt appropriately testified about the time and place of Victim's disclosure. Asking an outcry witness whether a disclosure was ever recanted does not bolster a victim's testimony. Only a statement by an outcry witness about the credibility of Victim's disclosure would be improper bolstering.

Here, Aunt did not comment on Victim's credibility or offer an opinion on her disclosure. Therefore, Aunt did not improperly bolster Victim's testimony.

Dr. Lamb

Finally, Appellant alleges the solicitor improperly bolstered Victim's testimony through the testimony of Dr. Lamb. Unlike each of the previous witnesses whom Appellant alleges improperly bolstered Victim's testimony, Appellant actually did make two objections to bolstering during Dr. Lamb's testimony. First, Appellant objected to following question by the solicitor: "Okay. And would there ever be an occasion where a child could see blood or red on a perpetrator's penis?" (Tr. v2: 28, lines 21-22). The solicitor's question was not intended to bolster the testimony of Victim. Rather, the solicitor asked an expert witness a proper hypothetical question based on facts in the record. This Court has previously held "An expert may give an opinion based upon personal observations or in answer to a properly framed hypothetical question that is based on facts supported by the record." State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999). (quoting State v. Evans, 316 S.C. 303, 311, 450 S.E.2d 47, 52 (1994)). Here, Victim had already described Appellant's penis as being "yellow and got black spots on it." (Tr. v1: 107, line 11). Therefore, the State asked Dr. Lamb a proper hypothetical question based on a description Victim had already given the jury of Appellant's penis.

Appellant also objected to Dr. Lamb's answer to the following question: "Were you able to make any type of diagnosis in this case?" (Tr. v2: 46, lines 17-18). Dr. Lamb answered the question by saying that Victim's exam "is consistent with her behavior, meaning that what she said could have happened--" (Tr. v2: 46, lines 21-22). Appellant properly objected before Lamb could finish her answer. Appellant did not suffer any prejudice from Dr. Lamb's testimony

because the solicitor withdrew her question after Appellant's timely objection. Accordingly, Dr. Lamb did not complete her answer to the allegedly offending question and the jury did not hear the answer. Additionally, the solicitor's question was entirely proper for an expert in the field of examination, review and diagnosis of child sexual and physical abuse. The solicitor asked a broad question directly related to Dr. Lamb's field of expertise. The question was not designed to bolster Victim's testimony in any way. Despite the trial judge overruling Appellant's objection, the solicitor properly did not seek to expand on Lamb's answer or otherwise risk any additional offending testimony regarding the credibility of Victim's disclosure. Appellant's convictions and sentences should be affirmed.

II.

The issue of whether the solicitor improperly made inflammatory arguments to the jury is not preserved for appeal because Appellant did not make a contemporaneous objection to any of the State's alleged inflammatory arguments and nor did the trial judge rule on the allegedly improper arguments. Even if the solicitor's arguments had resulted in clear prejudice to Appellant, Appellant still did not preserve the issue for appeal, because Appellant did not raise the issue in a post-trial motion.

Appellant contends inflammatory comments made by the solicitor during closing argument entitle Appellant to a reversal of his conviction even in the absence of a contemporaneous objection. Appellant concedes that this issue is not appropriately preserved for appeal, but nonetheless asks this Court to reverse Appellant's convictions anyway because of clear prejudice to Appellant. Appellant essentially argues for this Court to adopt the plain error rule. Because the plain error rule is not recognized in South Carolina, Appellant's argument is without merit. The arguments made by the solicitor were not so prejudicial and inflammatory to qualify as an exception to the plain error rule. Even if this Court concludes the comments by the solicitor were of such a prejudicial nature to warrant reversal, the issue is still not preserved for appeal, because Appellant did not raise the issue in a post-trial motion.

The Supreme Court of South Carolina "has routinely held the plain error rule does not apply in South Carolina state courts." State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). "Instead, it is the responsibility of trial counsel to preserve issues for appellate review. Only limited exceptions to this rule have been recognized." Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997). In the absence of a contemporaneous objection, "a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994). However, "the issue of inflammatory argument must be raised to the trial judge by way of post-trial motion to preserve the issue for appeal." Dial v. Niggel Associates, Inc., 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998).

Appellant points to several arguments made or questions asked by the solicitor that he maintains unduly prejudiced him. Among the arguments or questions cited by Appellant were questions asked of Dr. Lamb about Appellant's penis and statements made during the solicitor's closing argument. Appellant only objected to one of the solicitor's questions and did not move for a new trial, or make any other post-trial motion based on the solicitor's comments. The only objection made by Appellant to any of the statements or questions he now complains of was made during the testimony of Dr. Lamb. Appellant objected to the aforementioned hypothetical question about whether a child could see blood on a perpetrator's penis. Appellant did not object to this question on the grounds that the question was inflammatory, but rather that the question improperly bolstered Victim's testimony. (Tr. v2: 29). However, notwithstanding Appellant's lone objection, Appellant concedes this issue is not preserved for appeal. In the absence of a contemporaneous objection, Appellant asks this court to reverse his conviction because the

solicitor made an allegedly vicious, inflammatory argument that resulted in clear prejudice to Appellant.

In rare instances, South Carolina appellate courts have deemed that a new trial should be granted in the absence of a contemporaneous objection if a vicious or inflammatory argument results in clear prejudice to one party. It is notable that Appellant cites to only two cases in support of his position: Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E.2d 611, 615 (1994) and State v. Mazique, 419 S.C. 282, 797 S.E.2d 730 (Ct. App. 2016). In Lynch, the South Carolina Supreme Court considered whether to grant a new trial in a civil case where counsel for Toyota did not object during Lynch's closing argument. Counsel for Lynch produced various posters in closing argument that depicted oriental individuals paying off witnesses, shredding documents, and maps depicting mushroom cloud explosions. Lynch at 314 S.C. at 262-63, 442 S.E.2d at 615. The Court found there was a clear attempt by Lynch to depict the defendants as being Japanese and thereby appeal to racial stereotypes. Accordingly, the Court determined it "could hardly conceive of a more outrageous argument than that made here" and therefore found the prejudice to the appellant to be clear. Lynch at 314 S.C. at 263, 442 S.E.2d at 615.

The only criminal case cited by Appellant in support of his position is State v. Mazique. In Mazique, this Court considered whether a solicitor commenting on his personal belief that a defendant was guilty and commenting on facts not in evidence in closing argument rose to the level of a vicious and inflammatory argument that would require a reversal in the absence of a contemporary objection. This Court held the solicitor's comments did not warrant granting Mazique a new trial. Mazique 419 S.C. at 295, 797 S.E.2d at 737. In Mazique, like other cases where this Court has considered the same issue, this Court declined to find the State made an argument that resulted in clear prejudice to the defendant. Even in cases where a solicitor does

make an inflammatory argument, the issue must still be raised to the trial court via a post-trial motion. See State v. Young, 364 S.C. 476, 494, 613 S.E.2d 386, 395-96 (Ct. App. 2005) (holding even though solicitor asked racially inflammatory questions of Young, the issue was not preserved for appeal because Young did not make a post-trial motion).

Here, the issue of the solicitor making inflammatory arguments to the jury is not preserved for appeal for multiple reasons. Just as Appellant concedes in his brief, Appellant did not make a contemporaneous objection when the allegedly offensive arguments were made. In spite of the issue not being preserved for appeal, Appellant still asks this Court to find that the solicitor's arguments were egregious enough to cause clear prejudice. However, even in the limited egregious examples our appellate courts have recognized, an appellant must still raise the issue via a post-trial motion. Here, Appellant failed to make a post-trial motion on these grounds. This issue is not preserved for appeal under any circumstance. Appellant's convictions and sentences should be affirmed.

III.

The issue of whether the solicitor improperly characterized the burden of proof for the State is not preserved for appeal, because Appellant did not make a contemporaneous objection to the State's characterization of the burden of proof and did not receive a ruling from the trial court. Even if this Court determines that Appellant preserved this issue for appeal, Appellant suffered no prejudice from the solicitor's comments because the trial court properly instructed the jury on reasonable doubt. Even if the solicitor's arguments had resulted in clear prejudice to Appellant, Appellant still did not preserve the issue for appeal, because Appellant did not raise the issue in a post-trial motion.

Appellant contends the solicitor's incorrect summation of the State's burden of proof requires this Court to reverse Appellant's convictions even in the absence of a contemporaneous objection. Like Appellant's previous assignment of error, Appellant admits that trial counsel did not make a contemporaneous objection to the solicitor's definition of reasonable doubt offered in her closing argument. Thus, Appellant concedes this issue is not preserved for appellate review.

However, Appellant still urges this Court to reverse his convictions because of the prejudice caused by the solicitor's misstatement of the law. Appellant's argument lacks merit. Appellant correctly identifies the solicitor's description of reasonable doubt as being incorrect. However, Appellant did not suffer any prejudice from the solicitor's remarks because the trial court ultimately gave the jury the proper definition of reasonable doubt and the State's burden of proof in the court's jury instructions.

The solicitor incorrectly described reasonable doubt in her closing argument, saying among other things, that reasonable doubt could be thought of as "probable cause beyond a reasonable doubt." (Tr. v3: 68, line 18). However, immediately after the solicitor's closing argument, the trial judge gave a correct summation of reasonable doubt in his instructions to the jury. The trial judge gave the following reasonable doubt instruction:

> The Court: A reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act. Proof beyond a reasonable doubt must therefore be proved by such a convincing character that a reasonable person would not hesitate to allow and act upon it, the most important of his or her own affairs. Proof beyond a reasonable doubt can also be described as proof that leaves you firmly convinced of the defendant's guilt. Now there are very few things in the world that we know with absolute certainty. In a criminal case, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there's a real possibility he is not guilty, you must give him the benefit of that doubt and find him not guilty.

(Tr. v3: 73-74, lines 23-14). The trial judge's thorough reasonable doubt instruction cured any defect that may have been caused by the solicitor's closing argument.

The primary case cited by Appellant is distinguishable from the facts of this case. Appellant cites State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999) as an example of a case where a defendant's conviction was reversed because of improper commentary by the solicitor in closing argument. In Liberte the solicitor asked the jurors

to consider whether reasonable doubt was being used as a sword to attack law enforcement. This Court rightfully held that this argument was designed to appeal to the passions and prejudices of the jury. Here, the solicitor made an incorrect statement of law; not an argument designed to appeal to the passions and prejudices of the jury. Additionally, in Liberte the defendant actually objected to the Solicitor's improper argument, appropriately preserving, that issue for appeal. Here, Appellant failed to object to the solicitor's characterization and thus failed to preserve this issue for appeal. Even if we assume for the sake of argument that the solicitor's argument clearly prejudiced Appellant, Appellant still did not preserve this issue for appeal because he did not raise the issue in a post-trial motion. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 31, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-001669

THE STATE,

Respondent,

v.

OSCAR JAMES SMALL,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Elizabeth Franklin-Best, Esquire
Blume Franklin-Best & Young
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.
This thirty-first day of July, 2018.

Sally Ellison

SALLY ELLISON
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

July 31, 2018

Elizabeth Franklin-Best, Esquire
Blume Franklin-Best & Young
900 Elmwood Avenue, Suite 200
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RE: State v. Oscar James Small
Appellate Case No. 2017-001669

Dear Ms. Franklin-Best:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Scott Matthews

Scott Matthews
Assistant Attorney General
Bar # 101464

JSM/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services