

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case Tracking No. 2011-195627

The State,

Respondent,

vs.

Rondell Leon Carter,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in finding Appellant opened the door thereby allowing the State to solicit hearsay testimony to explain the testimony brought out on cross-examination.
- II. The trial court did not err in denying Appellant's objection during the State's closing argument because the solicitor never shifted the burden and was solely commenting on the lack of evidence in the record.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

The victim arrived home late at night after having been out at a club. (T.88; R. 9). The victim was dropped off at her home by her cousin. (T.89-90; R. 10-11). She testified she got into bed and was asleep only a short time when she felt someone in there with her. She awoke to find Appellant in the bed with her. (T.92-93; R. 13-14).

The victim testified she asked him what he was doing in her house and if he was going to rape her. (T.92-93; R. 13-14). The victim testified Appellant grabbed her around her neck and started choking her. She testified they fought as he was choking her. Then Appellant raped her. (T.93; R. 14). She testified when he finished raping her he got up like he was looking for something, but instead of leaving, he returned and raped her a second time. (T.93-94; R. 14-15).

The victim testified, after Appellant fell asleep in her bed, she managed to get out of the house and ran to her grandmother's house. When no one answered, she ran next door to Marie Dunbar's house. (T.94; R. 15). Ms. Dunbar testified when she opened the door the victim collapsed into her arms. She testified the victim was crying and saying that Appellant raped her. (T.72-73; R. 4-5).

The victim was taken to the hospital where she saw Dr. Morad. Dr. Morad testified she was obviously traumatized. (T.171; R. 50). The doctor noted scrapes, scratches, and swelling indicating the victim had been assaulted. (T.172; R. 51). The doctor testified the victim had significant trauma to her neck, including bruising and swelling. The doctor stated the victim wheezed from the swelling and it was something that could not be faked and was a good sign of trauma to the neck. (T.178-179; R. 57-58). The doctor indicated the stridor, or altered breathing and wheezing, was caused by

swelling in the neck and required significant trauma. (T.184; R. 63). The doctor indicated she also had flame hemorrhaging in her right eye, which made it look bloodshot from the broken blood vessels in the eye. The doctor testified the hemorrhaging would occur as a result of forceful pressure to the neck, such as the victim being choked. (T.184-185; R. 63-64). The doctor further testified the victim had swelling, irritation, and redness in and around the genital area. The doctor indicated it was a sign that something traumatic occurred. (T.180-181; R.59-60).

ARGUMENT

I. The trial court did not err in finding Appellant opened the door thereby allowing the State to solicit hearsay testimony to explain the testimony brought out on cross-examination.

Appellant contends the trial court erred in allowing hearsay testimony from the victim's mother. Appellant opened the door when he questioned whether the mother's actions were based on what her daughter said to her or not. The State had the right to have the mother explain what she was told because Appellant opened the door.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). Otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence. State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004). "[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999); see also, State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005).

During his cross-examination of the victim's mother, Appellant sought to obtain her basis for attacking and beating Appellant. The following colloquy occurred between Appellant's counsel and the victim's mother:

- Q. All right. Now, you beat him - - -
A. - - - when I saw him.
Q. You said you beat him for about ten minutes?
A. I surely did. I did.

Q. Based on what, based on what your daughter said, right?

A. No. Based on what I said.

.....

Q. You were going to kill him, right?

A. I was.

Q. Based on what your daughter said?

A. My daughter didn't say that. I did.

(T.148-149; R. 36-37).

On redirect, the State asked the victim's mother:

Q. [Appellant's counsel] asked you based upon what your daughter said. What did your daughter tell you?

A. My daughter couldn't tell me anything but . . . Rodriques raped her.

(T.149; R. 37). Appellant's counsel objected, and the State asserted he opened the door. The court never ruled and instead just asked the State to move on. Appellant never moved to strike or otherwise have the testimony removed. As a result, it is likely the issue is not preserved for review on appeal. See State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (to be preserved for appeal, issue must be raised to and ruled on by trial court); State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (party cannot acquiesce to issue at trial and then complain on appeal) (citing Ex parte McMillan, 319 S.C. 331, 461 S.E.2d 43 (1995)); State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("Appellate courts have recognized that an issue will not be preserved for review where the trial court sustains a party's objection to improper testimony and the party does not subsequently move to strike the testimony or for a mistrial.").

Further, the testimony was clearly admitted in order to explain the questions presented by Appellant's counsel on cross-examination. He asked the victim's mother went after Appellant because of what the daughter said. The jury had a right to know

what the daughter said if Appellant was so intent on making it the basis for why he was beaten by the victim's mother. The State was merely seeking to explain the issue raised by Appellant's counsel and had the right to do so under Beam and Jackson.

The State then asked the victim's mother why she got upset. She responded "Because my daughter - - ." The solicitor then interrupted and told her not to say what the victim said. The victim's mother replied: "I'm not telling you what she said. I said because of my daughter. My child was raped. That was my reason of being upset." (T.150; R. 38). Appellant's counsel objected and moved to strike because "she has no basis in fact for that from her own personal - - ." (T.150; R. 38). The trial court overruled Appellant's objection without further discussion.

The testimony was properly admitted because it was not hearsay. It did not contain a statement by the victim or anyone else. The testimony was merely the victim's mother's explanation for why she was upset. It went to her state of mind, and, to the extent it could be construed as a statement or as implying a statement by the victim, it was not admitted for the truth of the matter asserted but instead as the basis for the mother's actions. See Rule 801(c), SCRE ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.). Further, the statement she was raped does not go beyond the exception to the hearsay rule found in Rule 801(d)(1)(D), SCRE. Accordingly, the testimony was not improperly admitted by the trial court.

Finally, any admission of the testimony was entirely harmless in light of other testimony in the record. "The key factor for determining whether a trial error constitutes reversible error is 'whether it appears beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained.” State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (citations omitted). “An error is harmless if the defendant’s guilt has been conclusively proven by competent evidence, such that no other result could have been reached.” State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). Further, the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003); see also, State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

In the instant case, the neighbor, Ms. Dunbar testified that when the victim arrived at her home: “She stated that - - she started crying that - - well, she started crying harder and said I can’t believe he did this to me. [Appellant] raped me.” (T.73; R. 5). This testimony has not been challenged as inadmissible on appeal. Further, the testimony is merely cumulative to the victim’s testimony. In State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), a majority of the Supreme Court believed Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994), which is relied on by Appellant to contend the error is *per se* prejudicial, should be overturned to the extent it creates the *per se* rule and instead allow traditional harmless error analysis to apply. Further, in this case, the testimony is not merely cumulative to the victim’s; it is also cumulative to testimony by Ms. Dunbar and supported by the medical testimony from Dr. Morad. As a result, any error in its admission is entirely harmless in light of the evidence appearing in the record.

II. The trial court did not err in denying Appellant's objection during the State's closing argument because the solicitor never shifted the burden and was solely commenting on the lack of evidence in the record.

Appellant maintains the trial court erred in denying his objection that the State's closing argument shifted the burden of proof to Appellant. The State's argument was in direct response to Appellant's closing argument. The argument did not shift the burden onto Appellant, but instead merely made note of the lack of evidence as a whole in the record.

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. See U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in any criminal case to be a witness against himself[.]"); S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."). Accordingly, this right forbids both comments by the prosecution on a defendant's silence and instructions by the trial judge indicating a defendant's silence constitutes evidence of guilt. Griffin v. California, 380 U.S. 609, 615 (1965). "As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant's failure to testify at trial is constitutionally impermissible." State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004).

"Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense." McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). In determining whether a solicitor's remarks constitute a comment on a defendant's failure to testify, courts generally ask: "Was the language used manifestly intended to be, or was it of such character that the

jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?" United States v. Anderson, 481 F.2d 685, 701 (4th Cir. 1973). In considering this issue, the solicitor's remarks must be evaluated in the context in which they were made. See Weaver, 361 S.C. at 89, 602 S.E.2d at 794 ("In making this determination, we must examine the alleged impropriety in the context of the entire record."). "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).

The trial court has wide discretion in ruling on the appropriateness of a closing argument. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). 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, 548, 586 S.E.2d 153, 156 (Ct. App. 2003).

During his closing statement, Appellant's counsel argued:

Now, where's the testimony of the DNA my client had for this criminal sexual conduct? My client allegedly had not once but twice unprotected sex with this woman. Finally after doctors say yes, there were vagina swab taken, okay, there's no evidence, okay, about those vaginal swabs that when they were tested that they came back with any sperm that match my client. Did you hear about any doctor testify, any forensic scientist testified that there was sperm found in this alleged criminal sexual conduct? Remember she testified it was twice.

There is no evidence that this even happened. Where is the evidence? Is it only her word?

(T. 342; R. 92). Counsel for the State then responded to Appellant's closing argument by stating:

[Appellant's counsel] made mention of the fact that there was no sperm found in her. You know something? And again, y'all help me remember because I'm getting old and I wore out, and my memory ain't so good. But do y'all remember anybody asking anybody whether that's true or not? Do you remember anybody--and that be either me or [Appellant's counsel]--do you remember either one of us asking anybody they got on that stand whether or not they found sperm in [the victim]? Anybody?

(T. 356-357; R. 106-107).

Initially, the solicitor's statement that there was no evidence of whether there was sperm matching Appellant was simply a comment on the evidence presented during trial in response to Appellant's counsel's argument. It was not a comment on Appellant's constitutional right to remain silent and not present a defense. Unquestionably, the solicitor was 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, 428, 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."). Looking to the context in which the remarks were made, the solicitor did not state Appellant failed to present any evidence, did not claim Appellant did not present a defense, did not shift the burden of proof onto Appellant and did not suggest to the jury an adverse inference should be drawn against Appellant based on his failure to present evidence or failure to testify. See Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) ("In context, the comment was simply a statement of the evidence which was before the jury, rather than a comment on Johnson's failure to testify.").

Viewed in the proper context, the solicitor's remarks were designed to comment on the evidence presented along with absence of evidence regarding any sperm collected

from the victim and did not improperly shift the burden of proof or suggest Appellant's guilt could be inferred from his failure to testify or present a defense. See State v. Shuler, 353 S.C. 176, 187, 577 S.E.2d 438, 443-444 (2003) ("In any event, the solicitor's statement did not refer to appellant's decision to remain silent. Instead, the statement was a comment on the evidence which had been presented[.]"). The remarks merely clarified for the jury what they should and should not properly consider during their deliberations. Therefore, viewing the remarks in the appropriate context consistent with the natural inferences to be drawn from them, the solicitor's closing argument did not infringe upon Appellant's constitutional rights or render his trial fundamentally unfair.

In addition, Appellant's counsel's closing statement injected the extraneous consideration of whether a match to sperm was found into the case. As a result, the solicitor was fully permitted to comment on the lack of evidence regarding that issue. See State v. Ellenberg, 367 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 does not unfairly prejudice the defendant."); see also, Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (finding solicitor's closing argument comments were an invited response and did not render the trial fundamentally unfair); State v. Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding solicitor's statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial, and did not improperly shift the burden of proof or suggest that the defendant's guilt could be inferred from his failure to testify or present a defense.).

Finally, even if the solicitor's remarks during closing argument were somehow improper, Appellant did not suffer any prejudice and his trial was not rendered

fundamentally unfair by the comments. See Weaver, 361 S.C. at 89, 602 S.E.2d at 794 (“[A]lthough it is improper for the solicitor to indirectly comment on a defendant’s failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.”). Appellant’s counsel first raised the issue of the lack of evidence regarding a sperm match. The solicitor merely responded to the argument. The comment, especially in light of the substantial record of evidence including physical evidence supporting the criminal sexual conduct, was entirely harmless and did not render the trial fundamentally unfair. Additionally, the trial court thoroughly charged the jury on the burden of proof and Appellant’s presumption of innocence. (T.360-362; 366-367; R. 110-112; 116-117). Accordingly, the trial court did not abuse her discretion in overruling Appellant’s objection because the comments did not unfairly shift the burden and because Appellant was not prejudiced by the comments so as to receive an unfair trial.

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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December 13, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County
Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case Tracking No. 2011-192646

The State,

Respondent,

vs.

Rodriques Carter,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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December 13, 2012

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Appeal from Hampton County
Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case Tracking No. 2011-192646

The State,

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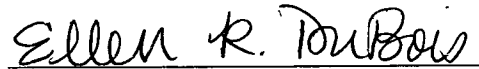
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, 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:

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I further certify that all parties required by Rule to be served have been served.
This 13th day of December, 2012.



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