

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

George C. James, Jr., Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DAVID N. RHOAD,

APPELLANT

APPELLATE CASE NO. 2011-202989

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL.....3

STATEMENT OF THE CASE.....4

ARGUMENT.....5

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

| | |
|---|---|
| <u>State v. Coleman</u> , 301 S.C. 57, 389 S.E.2d 659 (1990) | 9 |
| <u>State v. Council</u> , 335 S.C. 1 515 S.E.2d 508 (1999)..... | 8 |
| <u>State v. Culbreath</u> , 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008)..... | 8 |
| <u>State v. Liberte</u> , 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999) | 8 |
| <u>State v. Northcutt</u> , 372 S.C. 207, 641 S.E.2d 873 (2007)..... | 8 |
| <u>State v. Patterson</u> , 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)..... | 8 |

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant's motion for a mistrial because his trial was infected with unfairness when the solicitor inappropriately told the jury that the state "expected" the jury to return a verdict of guilty which was threatening to the jury?

STATEMENT OF THE CASE

On July 26, 2010, the Aiken County Grand Jury indicted David Nathaniel Rhoad on the charge of criminal domestic violence (CDV) third offense. On October 24-25, 2011, Rhoad proceeded to trial before the Honorable George C. James and a jury. Rhoad was represented by Wallis A. Alves, and the state was represented by David Miller and Kevin N. Molony. The jury returned a verdict of guilty as indicted. Judge James sentenced Rhoad to four and one-half years. Rhoad's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in denying Appellant's motion for a mistrial because his trial was infected with unfairness when the solicitor inappropriately told the jury that the state "expected" the jury to return a verdict of guilty which was threatening to the jury.

David Rhoad and Lisa Honea had been in a ten year turbulent relationship. There were numerous occasions when the police were called to an altercation between them. They had a child that was in the custody of the Department of Social Services. R. 127, ll. 22 – 25; R. 128, ll. 1 – 11.

On May 15, 2010, Lisa Honea was released from incarceration at the Aiken County jail. Prior to her incarceration, she lived in a trailer owned by her friend Nicky DeLoach on Aspen Court. She knew that Nicky allowed Rhoad to live there while Lisa was incarcerated. R. 17, ll. 10 – 25; R. 18, ll. 1 – 23; R. 60, ll. 1 – 25; R. 61, ll. 1 – 25; R. 62, ll. 1 – 24; R. 64, ll. 17 – 18.

A friend picked Lisa up from jail and took her to Nicky's house. Nicky and her father, George DeLoach, then took Lisa to the trailer on Aspen Court because Lisa insisted on going there according to George and Nicky. R. 18, ll. 13 – 25; R. 64, ll. 5 – 18; R. 34, ll. 9 – 24; R. 36, ll. 1 – 25. When they arrived at the trailer, Rhoad came out to meet the car because he worked for George DeLoach, and would come to meet him because Mr. DeLoach had a bad knee. R. 19, ll. 7 – 25; R. 20, ll. 1 – 9; R. 37, ll. 1 -7.

Lisa's testimony was that as soon as she stepped out of the back seat, Rhoad hit her in her mouth. Then he hit her across her face and she fell to the ground. Rhoad then started kicking her until George got out of the car, walked around and told Rhoad to stop, or "she'll

have you arrested.” R. 20, ll. 6 -25. Rhoad stopped, and Lisa ran to a neighbor’s house and called 911. R. 20, 1, ll. 8 – 25.

George Deloach testified that he did not see Lisa and Rhoad as they were at the back of the car until George got out of the car and spoke to Rhoad. The only thing George heard was a squeal from Lisa. R. 38, ll. 1 – 25.

Nicky DeLoach testified that she did not see anything between Lisa and Rhoad as they were behind her at the back of the car, and she did not see them. R. 66, ll. 14 – 21. Nicky said that Lisa owned a house on Myrtle Street but it was rented. R. 62, ll. 23 – 25; R. 63, ll. 1 – 21.

The police arrived in about twenty minutes. R. 22, ll. 1 – 4. Deputy William Tucker responded to the call on May 15, 2010. After talking with Lisa and taking pictures of her injuries, they looked for Rhoad. They found him under some brush near the wood line drinking a beer. They placed him in handcuffs and took him into custody. Rhoad allegedly told Deputy Tucker that Lisa had just been released from jail and should not have been at the trailer as she was on trespassing notice. When she arrived at the trailer, she began hitting him with her purse. He pushed her to defend himself, and she fell off of the porch. When the deputy asked him again, Rhoad denied saying he pushed her. R. 52, ll. 1 – 25; R. 53, ll. 1 – 25; R. 54, ll. 1 – 25; R. 55, ll. 1 – 25; R. 56, ll. 1 – 25; R. 57, ll. 1 – 5.

In trial, Lisa admitted that she was convicted in 2007 of two counts of providing false information to the police accusing Rhoad of committing criminal domestic violence against her. R. 27, ll. 7 – 25; R. 28, ll. 1 – 25; R. 29, ll. 1 – 24.

Deputy Tucker reported that Lisa’s injuries consisted of redness, swelling of her mouth with some blood. R. 58, ll. 21 – 25; R. 59, ll. 1 – 2.

At the end of his closing argument, the solicitor told the jury:

Ladies and gentlemen, Mr. Rhoad is guilty of criminal domestic violence. When you get to the jury room, the State expects you to find that.

R. 98, ll. 7 – 10.

Following the judge's charge to the jury, defense counsel told the judge she had a matter. She made a motion for a mistrial based on a comment the solicitor made at the end of his closing argument. Counsel said the solicitor told the jury that the "State expected a verdict of guilty." R. 115, ll. 1 – 25; R. 116, ll. 1 – 25. Counsel argued that those words "expected a verdict of guilty" could be threatening to the jury. Counsel said that arguments to the jury could not be personalized. R. 117, ll. 1 – 25.

The state denied any intent to threaten the jury or personalize the argument. R. 117, ll. 11 – 23. The judge said he remembered the solicitor's comment as he noted it too. However, the judge ruled that in its proper context, the comment was based on what the state considered to be the overwhelming evidence. The judge warned the solicitor to avoid using that terminology in the future. R. 118, ll. 1 – 13.

Following the verdict, defense counsel moved for a new trial. Counsel argued that the trial was infected with unfairness due to the solicitor's comment at the end that he expected the jury to return a verdict of guilty. Counsel argued that the comment violated Rhoad's due process rights. Counsel continued to argue that the comment told the jury that they had to base their verdict on something other than the evidence in the trial. The judge denied the motion. R. 120, ll. 8 – 25; R. 121, ll. 1 – 25.

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of

discretion amounting to an error of law. State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); citing State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999). In order to receive a mistrial, a defendant must show error and resulting prejudice. Id.

The party moving for a mistrial has the burden to show not only error, but resulting prejudice. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

In State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999), the Court of Appeals held that the trial court is vested with broad discretion when considering the propriety of the solicitor's closing argument, including the question of whether to grant a defendant's mistrial motion; the trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant. The Court also wrote that a new trial will not be granted on the ground of improper comments by the prosecutor in closing argument unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. State v. Liberte, id. A solicitor's closing argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Liberte, id.

In State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), the Supreme Court held that the solicitor's comment during closing argument of the sentencing phase of this capital murder trial, in which the solicitor repeatedly told the jury he "expects" the death penalty, was improper imposition of the solicitor's personal belief. The solicitor's two other improper actions during closing argument which included his comment that it would be

open season on babies if the death penalty was not imposed, and placing a black shroud over a bay crib in the courtroom, constituted reversible error. The case was remanded for a new sentencing phase.

In State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990), the Supreme Court held that the prosecutor's comment in his closing argument that nothing probative existed in the statements made by uncalled potential witnesses presented the jury with testimony of the prosecutor as if he had taken the stand himself which unfairly prejudiced the defendant's right to a fair trial, and required a remand for a new trial.

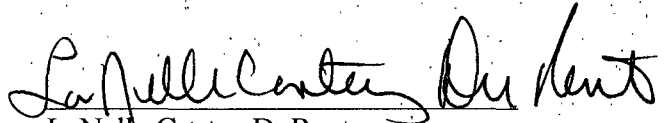
Rhoad was denied a fair trial by the solicitor telling the jury that the state "expected" a guilty verdict. The state was paying the jurors' per diem to be on the jury. The solicitor was a person of authority with the state.

The trial judge charged the jury on self defense and defense of habitation. R. 109, ll. 4 – R. 112, ll. 22. Therefore, there was not overwhelming evidence of Rhoad's guilt. The solicitor injected his own opinion into the case when he said the state "expects". The trial judge should have granted the mistrial.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "LaNelle Cantey DuRant".

LaNelle Cantey DuRant
Appellate Defender

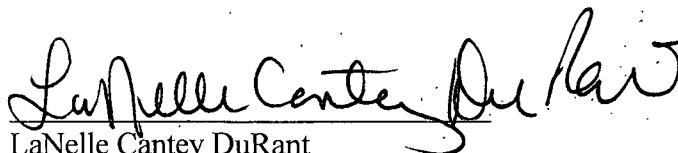
ATTORNEY FOR APPELLANT

This 20th day of November, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

November 20, 2012



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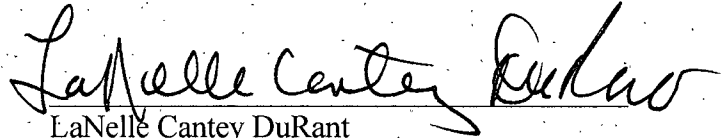
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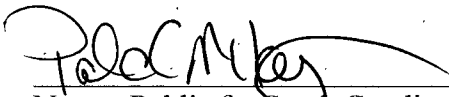
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of November, 2012.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of November, 2012.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.