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December 7, 2012

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S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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RE: State v. David N. Rhoad
Appellate Case Tracking No. 2011-202989

Dear Ms. DuRant:

I am enclosing two (2) copies of the Final Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General
S.C. Bar No. 15608

WMB/erd
Enclosures

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

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SC Court of Appeals

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable George C. James, Circuit Court Judge
Appellate Case Tracking No. 2011-202989

The State,

Respondent,

vs.

David N. Rhoad,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The issue raised is not preserved for review on appeal. Further, the trial court correctly denied Appellant's motion for a mistrial.

STATEMENT OF THE CASE

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

ARGUMENT

I. The issue raised is not preserved for review on appeal. Further, the trial court correctly denied Appellant's motion for a mistrial.

Appellant contends the trial court erred in denying his motion for a mistrial due to comments made at the close of the solicitor's closing argument. The issue was not contemporaneously raised to the trial court and therefore is not preserved for review on appeal. Further, taken in the context of the argument, any prejudice is not sufficient to warrant the extreme consequence of a mistrial.

First, the issue is clearly not preserved for review on appeal. The allegedly improper comment came at the conclusion of the State's closing argument. Counsel did not object at the time the comment was made, nor did counsel ask for a mistrial at that time. (T.226; R. 98). Instead, after the trial court charged the jury, counsel stated: "I think - - I've given it some thought while you were doing your charge, and at this point I need to make a motion for a mistrial." Counsel then admitted she did not even remember the exact language used by the solicitor which caused her to move for the mistrial. (T.244; R. 116).

Appellant failed to contemporaneously raise any objection to the allegedly improper comment. As a result, the issue is not preserved for review on appeal. See In re McCracken, 346 S.C. 87, 93, 551 S.E.2d 235, 238-239 (2001) (finding issue of improper comments during closing argument not preserved for review on appeal absent a contemporaneous objection); State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing

to contemporaneously object . . . , Appellant is procedurally barred from raising these issues for the first time on appeal.”); State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (“A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.”); State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (“Failure to contemporaneously object . . . cannot be later bootstrapped by a motion for a mistrial.”); White v. Southern Ry. Co., 140 S.E. 560, 567 (1927) (finding “it is proper and necessary that the court’s attention be called to [improper] argument by timely objection on the part of opposing counsel, and failure to make such objection ‘is a waiver of the right to object afterwards.’”); State v. Moultrie, 316 S.C. 547, 555-556, 451 S.E.2d 34, 39 (Ct. App. 1994) (“Our courts have held a ‘failure to contemporaneously object’ . . . ‘cannot be later bootstrapped by a motion for a mistrial.’”) (citations omitted). Accordingly, because counsel did not contemporaneously object at the time of the solicitor’s comment, but instead moved for a mistrial after the judge’s charge to the jury, the issue is clearly not preserved for review on appeal.¹

On the merits, a trial judge’s ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

¹ Appellant clearly knew the need to contemporaneously object during closing argument because he had already objected to other comments at the very beginning of the solicitor’s closing argument. (T.211; R. 83).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). “A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons.” Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

“A solicitor’s closing argument must not appeal to the personal biases of the jurors. In addition, the 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. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). The trial court is vested with broad discretion when considering “the propriety of the solicitor’s 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.” Id. (Citation omitted). A review of the closing argument is based upon the standard of “whether the prosecutor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due

process.” State v. Hawkins, 292 S.C. 418, 421, 357 S.E.2d 10, 12 (1987), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

In the instant case, the solicitor’s comments, especially when viewed in context, did not arise to the level that they infected the trial with unfairness. The solicitor reviewed the evidence presented at trial which supported Appellant’s conviction for criminal domestic violence and also discussed the evidence negating his claims of self-defense. (T.211-226; R.83-98). His comment that the State expects the jury to find him guilty merely was a comment on the weight of the evidence. *See* State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976) (solicitor may comment on the weight of the evidence); 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.”). The solicitor did not interpose his personal belief into the argument as was clearly done in the cases cited by Appellant.

Further, upon a review of the entire record, there was ample evidence to support the jury’s conviction of Appellant for criminal domestic violence. The victim testified George DeLoache and his daughter Nicole took her to a residence to retrieve her belongings. (T.89; R. 18). She testified as soon as she got out of the car, Appellant came at her, hit her in the mouth, hit her again across her face, and when she fell to the ground began kicking her. (T.91; R. 20). When George approached Appellant, Appellant stopped the beating and the victim was able to run to another house to call 911. (T.92; R. 21).

George testified Appellant exited the residence and approached the victim when they arrived. (T.108-109; R. 36-37). He testified he did not believe that was a good sign,

so he started to get out of the car. (T.109; R. 37). George testified he heard the victim squeal, and when he arrived to the back of the car, she was on the ground “scooting away from [Appellant].” (T.110; R. 38). He testified Appellant was standing in front of her and he told Appellant “don’t, David, don’t or stop.” (T. 110-111; R. 38-39). He testified the victim ran off to the neighbor’s house. (T.111; R. 39). Appellant was later apprehended lying back behind some bushes in the woods near the residence drinking a beer. (T.123; 128-129; R. 50; 52-53). There was more than ample evidence of Appellant’s guilt in this case. After a review of the entire record, the comment by the solicitor during closing argument in this case, simply did not rise to the level that so infected the trial with unfairness so as to render the conviction a denial of due process.

Finally, as the trial court noted in denying the motion for a mistrial, he charged the jury immediately after the solicitor’s allegedly improper comment that it was their duty to “take the evidence in this case, give it the weight and the value that you think it is entitled to and in the end you put your common sense together with your view of the evidence and my charge to you on the law and you reach a verdict.” (T.229; R. 101). Prior to the closing arguments, the trial court explained the arguments were the lawyers’ “opportunity to argue to you the conclusions they believe the evidence or lack of evidence compels you to reach in this case.” He further charged: “Now the lawyers aren’t witnesses” and explained the jury was to use their own memory of the evidence for deliberations. (T.196; R. 68). As a result, any possible prejudice from the solicitor’s comment regarding his belief of the weight and overwhelming nature of the evidence was so minimal as to not require a mistrial. Therefore, even if the issue were properly

preserved for review on appeal, the trial court properly denied the extreme measure of granting a mistrial under the facts of this case.

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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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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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 7th day of December, 2012.

Ellen R. DuBois
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