

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM ROSS,

APPELLANT

APPELLATE CASE NO. 2011-190816

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by permitting the State to discuss first and second degree criminal sexual conduct during its closing argument when Appellant was on trial for third degree criminal sexual conduct, and no evidence was present in the record regarding first or second criminal sexual conduct?

STATEMENT OF THE CASE

Appellant William Cameron Ross was indicted by the Charleston County Grand Jury on May 11, 2009, for third degree criminal sexual conduct (CSC 3rd). R. 4, ll. 3-5; R.316 (Indictment). His case proceeded to trial before the Honorable Deadra L. Jefferson and a jury from April 7 through 12, 2011. Appellant was represented by Leigh Hunter (Counsel), while the State was represented by Timothy Finch and Jennifer Shealy. R. 1.

The jury found Appellant guilty as charged. R. 369, ll. 1-9; R.318 (Sentence sheet). The trial court imposed a sentence of three years incarceration, suspended upon the completion of eighteen months plus three years of probation. R. 384, ll. 6-8.

ARGUMENT

The trial court reversibly erred by permitting the State to discuss first and second degree criminal sexual conduct during its closing argument when Appellant was on trial for third degree criminal sexual conduct, and no evidence was present in the record regarding first or second criminal sexual conduct.

During closing arguments, the state impermissibly injected comments to the jury regarding the higher offenses of first and second degree criminal sexual conduct. The context in which the comments were made indicated an intent by the State to lessen its burden of proof. Moreover, Appellant was prejudiced by the trial court's error because the case that depended largely upon the credibility of one witness, Kaitlyn Moriarty (Moriarty), on a theory that the complaining witness, Tuesday Philbrook, was sexually assaulted while incapacitated. Therefore, by introducing comments unsupported by the evidence in a manner intended to lower its burden in the eyes of the jury, the error likely affected the outcome of the trial. Accordingly, Appellant requests reversal of his convictions, and a new trial.

“It is most certainly proper, especially in criminal cases, that counsel, in addressing the jury, should keep themselves strictly within the record. This rule is essential, and must be strictly enforced.” State v. Cannon, 229 S.C. 614, 618, 93 S.E.2d 889, 891 (1956) (reversing and remanding case where Solicitor's remarks to the jury were improper and prejudicial). Simply stated, “[a] solicitor may not rely on statements not in evidence during closing argument.” State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (citing State v. Gains, 271 S.C. 65, 244 S.E.2d 539 (1978)). Rather, “[t]he State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.” See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72,

75 (2004). Accordingly, “[t]he rule that it is the duty of the prosecuting attorney to always treat the defendant in an impartial manner applies to his argument to the jury, and he should at all times confine himself to the evidence adduced in trial.” Id.

In the present case, the State made improper comments during its closing argument. Specifically, the State comment to the jury as follows:

The fact that you don't go out the door, and turn right back around with a jury verdict, that's not hesitation, that's doing your job, weighing the evidence, weighing the credibility of the witnesses, weighing that evidence that has been submitted, and does that prove the State's case beyond a reasonable doubt that the defendant is guilty of criminal sexual conduct in the third degree.

Keep in mind, this isn't first degree. This isn't second degree. There is no weapon. The State is not alleging that anybody was threatened. That anybody was held with a gun.

R. 335, ln. 18—R. 336, ln. 4 (emphasis added).¹ Based on the language used, the State's comments regarding higher offenses occurred in the context of its discussion attacking whether the reasonable doubt standard was met. Nowhere in the trial was there any evidence presented to the jury regarding the higher offenses of first or second degree CSC. Accordingly, this was the first time either first or second degree CSC was mentioned by the State, and it was in an effort to assuage the jury that its burden was significantly low by comparing it to other laws and facts not in evidence.

Yet, over Counsel's objection, the trial court erroneously held the State's comments were appropriate. The court first held that the State only made reference to the other offenses once, and that he was distinguishing between the three. R. 336, ll. 12-15. The trial

¹ Counsel timely objected by interrupting the State's argument and asserting a matter of law. At the recorded bench conference, Counsel argued that “[t]he CSC first, CSC second, none of that is in evidence.” R. 336, ll. 10-11.

court further stated the comment was proper because the State was “saying that these things are not required of the State to prove their case beyond a reasonable doubt.” R. 336, ln. 23—R. 337, ln. 2. Then, after Counsel argued that the other offenses “have nothing to do with this case,” the court reasoned “that if the jury, based the way the case was argued in closing, that if they want to draw that distinction, it’s appropriate. In other words, that they’re not required to prove that force, that any kind of violence was involved. It only requires that she was incapacitated.” R. 337, ll. 5-10. However, no instructions from the trial court regarding the requirements of either first or second degree CSC were ever given to the jury, or at issue in the case. As such, the jury was left to believe the State’s burden was low in comparison to a vacuum of undefined terms and offenses. Accordingly, the trial court erred by permitting the State to make comments regarding higher, uncharged offenses during its closing argument in an attempt to lower its burden of proving CSC 3rd beyond a reasonable doubt.

Further, Appellant was also prejudiced by the State’s improper comment to the jury. “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.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 167 (1998) (reversing PCR court and remanding for new trial due solicitor’s inappropriate comments in closing argument). To determine whether an improper argument merits a new trial, the litigant must show four requirements: (1) a timely objection was interposed to the argument; (2) the substance of the objectionable language; (3) the failure of the trial court to sufficiently warn the jury not to consider the improper argument; and (4) that the result was materially prejudicial to the right of the

defendant to obtain a fair and impartial trial. See Cannon, 229 S.C. at 618, 93 S.E.2d at 891.

In the case at bar, the factors readily show that a new trial is merited. First, an objection was timely made by Counsel during the State's closing argument. R. 336, ll. 10-11. Second, as indicated above, the substance of the objectionable language served to lower the State's burden of proof. Moreover, the effect of indicating the present offense faced by the Appellant was not as severe as the other higher, undefined offenses likely served to mute the significance of the CSC 3rd charge in the eyes of the jury. In essence, because charges for first and second degree CSC could only be levied against Appellant by the Solicitor making such a decision in the role of a quasi-judicial official, the State's comments indicating Appellant is not facing more severe offenses served to diminish the jury's sense of responsibility. See, e.g., State v. Woomer, 277 S.C. 170, 174-75, 284 S.E.2d 357, 359-60 (1981) ("Here, the solicitor attempted to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he himself had already made the same decision that he was now asking them to make."); see also Thompson v. Aiken, 281 S.C. 239, 240, 315 S.E.2d 110, 110-11 (1984); State v. Rudd, 355 S.C. 543, 549-50, 586 S.E.2d 153, 156-57 (Ct. App. 2003) ("Our supreme court has repeatedly condemned closing arguments that lessen the jury's sense of responsibility by referencing preliminary determinations of the facts.") (citing State v. Thomas, 287 S.C. 411, 412, 339 S.E.2d 129 (1986)).

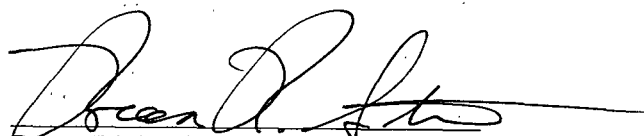
Third, the trial court failed to give any curative instruction to the jury regarding the State's improper comments during closing argument. Finally, the instruction was aimed squarely at debasing the State's burden of proof. As such, the result was materially

prejudicial to the right of the defendant to obtain a fair and impartial trial. Accordingly, Appellant was prejudiced by the State's improper comment, and a new trial is merited.

CONCLUSION

For the foregoing reasons, Appellant William Cameron Ross respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens
Appellate Defender

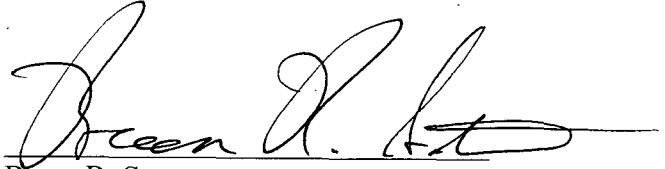
ATTORNEY FOR APPELLANT

This 7th day of December, 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."

December 7, 2012



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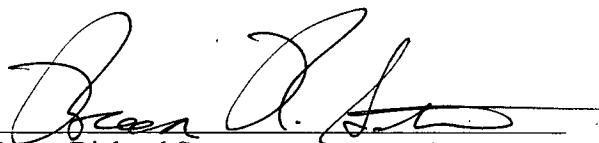
WILLIAM ROSS,

APPELLANT

APPELLATE CASE NO. 2011-190816

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at the Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 7th day of December, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of December, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.

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