ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Tracking No: 2011-190816

THE STATE,

Respondent,

vs.

WILLIAM ROSS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

The trial judge properly overruled Appellant's objection to the solicitor's comment during the State's closing statement because the solicitor was merely explaining the elements of third-degree criminal sexual conduct. Regardless, even if the trial judge erred in overruling Appellant's objection, any error was harmless.

STATEMENT OF THE CASE

On May 11, 2009, a Charleston County Grand Jury indicted Appellant for third-degree criminal sexual conduct. On April 7, 2011, Appellant proceeded to trial. Leigh Hunter represented Appellant at trial, and Assistant Solicitors Timothy Finch and Jennifer Shealy represented the State.

On April 12, 2011, the jury found Appellant guilty as charged. The Honorable Deadra L. Jefferson sentenced Appellant to three years of imprisonment, which was suspended upon the completion of eighteen months plus three years of probation.

STATEMENT OF FACTS

In the early morning hours of April 2, 2008, Appellant raped twenty-one year old Tuesday Philbrook while she was incapacitated. Kaitlyn Moriarty saw Appellant, completely naked, on top of Philbrook. (R. pp. 57-59.) Appellant's pelvis was pushed up against Philbrook as if he was having intercourse with her from behind. (R. pp. 58-59.) Philbrook's dress was pulled up, and she was not wearing any underwear. (R. p. 57.)

Earlier that night, Moriarty and Philbrook decided to go to a bar in downtown Charleston. Moriarty testified that Philbrook was extremely intoxicated. (R. pp. 43-47.) Philbrook could not walk and needed help up the stairs. With help from a friend, Moriarty put Philbrook in bed. (R. p. 51.) Philbrook was lying on her stomach in the bed when she passed out. Moriarty told Appellant not to go upstairs where Philbrook was sleeping. (R. p. 49.) However, Appellant went upstairs anyway and raped Philbrook. (R. p. 57.)[1]

Around 1:00 p.m., Philbrook woke up, and Moriarty informed her of what happened. (R. pp. 64-65; R. pp. 156-158.) Philbrook felt irritated in her vaginal area, and she had a bruise on her thigh. (R. pp. 157-158.)

During closing arguments, Appellant's trial counsel argued: "We don't have any clothes. We don't have any torn clothes." (R. p. 260.) Moreover, Appellant's trial counsel argued:

> If all of this, which I have just gone over, is enough evidence and testimony to convict any person alleged to have committed rape, then our judicial system is in a whole of problems. Because that's all you got. And that there is a lot of reasonable doubt.

[1] Appellant testified that the intercourse was consensual.

> If one person can come to the police and say, this is what I saw, and try to render a medical opinion, and then you get a warrant, and then you have to go through a jury trial, we have problems with our judicial system, real bad problems. Because anybody can get accused wrongfully, or truthfully, I will admit that, of doing something wrong and have to go through this process."

(R. p. 265.)

Therefore, during the State's closing argument, the solicitor responded to defense counsel's remarks by stating:

> The fact that you don't go out one door, and turn right back around with a 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. pp. 273-274.)

At that point, Appellant's trial counsel objected and argued that first and second degree criminal sexual conduct was not in evidence. (R. p. 274.) Appellant's trial counsel argued that referencing the other crimes was confusing to the jury. However, the trial judge ruled that the State was merely distinguishing between the three different offenses and pointing out that the State was not alleging a weapon was used. Thus, within the context of the entire record, the State's comment was proper.

ARGUMENT

I.

The trial judge properly overruled Appellant's objection to the solicitor's comment during the State's closing statement because the solicitor was merely explaining the elements of third-degree criminal sexual conduct. Regardless, even if the trial judge erred in overruling Appellant's objection, any error was harmless.

Appellant claims the trial court erred by permitting the State to discuss first and second degree criminal sexual conduct during its closing argument because there was no evidence in the record regarding first or second degree criminal sexual conduct. However, the State was merely explaining the "absence of aggravating circumstances" and the absence of "aggravated force or aggravated coercion" elements of third-degree criminal sexual conduct. Furthermore, the solicitor's comment was an invited response to Appellant's argument during his closing statement. Regardless, even if the trial judge erred in overruling the objection, any error was harmless.

A. The trial judge did not abuse her broad discretion when she overruled Appellant's objection to the State's comment regarding first and second degree criminal sexual conduct during the State's closing argument.

"[A] trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. [An appellate court] must review the argument in the context of the entire record." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). Moreover, [t]he appellate has the burden of showing that any alleged error in argument deprived him of a fair trial. 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." Id.

In reviewing the propriety of the solicitor's remarks to the jury, it is a well-settled principle that the trial court has wide discretion in ruling on the appropriateness of a closing argument. State v. Raffaldt, 318 S.C. 110, 114-115, 456 S.E.2d 390, 393 (1995); see State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument."). 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). "It is sometimes difficult to draw the line between proper and improper argument, but counsel's remarks must be confined within the record. However, some latitude must necessarily be allowed and it must, to a large extent, be left to the wide discretion of the Circuit Judge." State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961).

Appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights. Rudd, 355 S.C. at 550, 586 S.E.2d at 157. The appellant has the burden of proving the allegedly improper argument rendered the trial fundamentally unfair. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "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." Patterson, 324 S.C. at 17, 482 S.E.2d at 766. "[I]t is not enough that the remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1999). Appellate courts should be "careful and critical" in finding allegedly improper statements of counsel to be reversible error, and "[e]very case must necessarily depend upon its own

particular circumstances." State v. Gilstrap, 205 S.C. 412, 415, 32 S.E.2d 163, 164 (1944).

In the case at hand, the trial court correctly determined that the solicitor's comment during closing argument was proper. Because the elements of third-degree criminal sexual conduct could involve the use of "force or coercion to accomplish the sexual battery in the absence of aggravating circumstances" or the absence of "aggravated force or aggravated coercion[,]" the State was free to explain what those elements mean.[2] In other words, the solicitor's comment regarding the fact the State did not need to prove Appellant used a weapon or threats to complete the sexual battery was merely an explanation of the "absence of aggravating circumstances" and absence of "aggravated force or aggravated coercion" elements of third-degree criminal sexual conduct.[3] See State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (" '[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.' " (citations omitted)).

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[2] Section 16-3-654 of the South Carolina Code Annotated provides the following:

> (1) A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
>
> (a) The actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.
>
> (b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.
>
> S.C. Code Ann. § 16-3-654.

[3] Notably, the trial judge charged both subsection (a) and (b) of South Carolina's third-degree criminal sexual conduct statute. (R. p. 287.)

Furthermore, the solicitor's comment was an entirely proper invited response to the argument Appellant made during his closing statement. See Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (finding no denial of due process rights because the solicitor's comment was in response to an argument appellant made during his closing statement). In arguing to the jury that the evidence presented was not sufficient to establish Appellant committed the offense of third-degree criminal sexual conduct, Appellant's trial counsel argued that the State did not submit any torn clothes. Thus, the State was merely responding to Appellant's comment by stating that the State did not have to prove there were any aggravating circumstances/aggravating force or coercion for the jury to be able to convict Appellant of third-degree criminal sexual conduct.

In summary, the trial court did not abuse its broad discretion when it overruled Appellant's objection because the solicitor's comment did not render the trial fundamentally unfair.

B. Even if the trial judge erred, any error was harmless.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223(2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "When guilt has been conclusively proven

by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In the case at hand, the challenged comment by the solicitor in the State's closing statement was merely cumulative to similar remarks made without objection during the State's opening statement. (R. p. 26); see State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.").

In summary, the solicitor's comment during the closing statement could not have possibly affected the verdict. The solicitor merely pointed out that the State did not have to prove Appellant used a weapon or used threats to accomplish the sexual battery, which was a completely accurate statement of the law. Furthermore, when considered in the proper context, the solicitor's remarks in no way rendered the trial unfair, minimized the State's burden of proof, or constituted an attack on whether the reasonable doubt standard was met as Appellant contends on appeal.[4] (App. Br. p. 6; p. 5; p. 8.)

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[4] Notably, Appellant raised those grounds for the first time on appeal. See Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial."). At trial, Appellant only argued that the solicitor's comments were confusing to the jury.

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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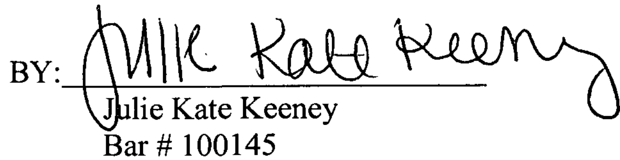
BY: 
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December 13, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Tracking No: 2011-190816

THE STATE,

Respondent,

vs.

WILLIAM ROSS,

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

STATE OF SOUTH CAROLINA

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Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Tracking No: 2011-190816

THE STATE,

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vs.

WILLIAM ROSS,

Appellant.

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:

Breen Richard Stevens, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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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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ALAN WILSON
ATTORNEY GENERAL

December 13, 2012

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RE: State v. William Ross
Appellate Tracking No: 2011-190816

Dear Mr. Stevens:

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

Sincerely,

Julie Kate Keeney
Assistant Attorney General
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JKK/erd
Enclosures

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

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SC Court of Appeals