ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Aiken County
The Honorable Doyet A. Early, III
Appellate Case No 2013-002259

THE STATE,

Respondent,

v.

DAVID EUGENE ROSIER, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On May 13, 2013 the Aiken County Grand Jury indicted Appellant David E. Rosier on one count of murder and one count of possession of a weapon during the commission of a crime of violence. The charges arose from an incident on November 10, 2012, during which Appellant shot and killed Donnie James ("D.J.") Davis (the "Victim"). The case was called for a jury trial on October 7, 2013, before the Honorable Doyet A. Early, III, Circuit Court Judge.

Prior to trial, Appellant moved to suppress recordings of telephone calls he made from the Aiken County Detention Center, asserting the recordings constituted an illegal wiretap under the South Carolina Homeland Security Act, and law enforcement was only allowed to intercept communications with a court order. The State argued Appellant consented to the recordings by using the jail telephones in light of signs at the telephones and an audio recording advising the parties the call will be recorded. The circuit court denied the motion to suppress, finding the jail calls were not subject to the Homeland Security Act. (Trial Transcript [TT], pp. 42-60), Record on Appeal [R.], pp. 15-33)

The pathologist who performed the Victim's autopsy testified the Victim had a gunshot wound in the chest, and the bullet went through the heart and the aorta. In addition, the Victim had "incise wounds" on the right side of his head. The pathologist determined the cause of death was exsanguination due to the laceration of the Victim's heart and aorta. (TT, pp. 133-140; R., pp. 44-51).

Appellant's son, Joshua Rosier ("Josh"), testified he was in jail for five days prior to the murder, and identified the recordings of phone calls he made to his brother and Appellant from the jail. Josh stated his brother and Appellant "declared war" on Carlton "C.J." Shaw (Appellant's nephew), Donnie "D.J." Davis (the Victim), Colby Reed and

Russell Blackmon, which meant "we was going to go beat their ass." (TT, pp. 146-154; R., pp. 52-60).

On the morning of November 10th, Josh bonded out of jail. His brother and Appellant picked him up, and they spent the early evening drinking and watching college football, then picked up Josh's girlfriend and her friend. Josh testified they eventually drove to Russell Blackmon's house "to get the dope that they had and jump on D.J. and Russell and Colby." When asked to clarify what he meant by "jump on" he stated "whoop their ass." (TT, pp. 155-158; R., pp. 61-64).

Josh and the Appellant walk to the house. Josh testified neither man had a gun, but Appellant handed him a blue box-cutter knife, "in case I needed it." (TT, pp. 159-162; R., pp. 65-68).

Appellant knocked on the door and identified himself as "Dollar," which was an abbreviated version of his nickname, "Dollar Bill." Appellant's nephew and the Victim were in the living area when they entered the house, and Josh got into a fist fight with the Victim. According to Josh, Blackmon entered the room holding a gun, and Appellant hit him and knocked the gun to the floor. Josh pulled out the box cutter Appellant gave him, and repeatedly cut the Victim with it until he heard a gunshot. Josh testified he turned and saw Appellant holding the gun. When Appellant pointed the gun at Josh's cousin, Josh begged him not to shoot because he was related to them. (TT, pp. 163-168; R., pp. 69-74).

Josh and Appellant then fled the house, and Appellant still had the gun used in the shooting. Josh testified he realized he had been shot in the hand, and when he told Appellant, Appellant replied, "next time move out of the f**king way." (TT, pp. 168-171; R , pp. 74-77)

They drove to a gas station, and Josh gave the box-cutter knife to his girlfriend to get rid of it. The girlfriend gave it to her friend, who rinsed the blood off, wrapped it in paper towels and dropped it in the trash. They ultimately drove to a house in Augusta, Georgia, "to get away from the cops." (TT, pp. 172-174; R., pp. 78-80).

Appellant sold the murder weapon to a man at the house in Augusta, and Josh took a shower and put his blood-stained clothes in a burn barrel. Appellant subsequently left the house on foot, and the girlfriend's father picked the others up the next day to take them home Josh was arrested at his home the following day, and took police to the house in Augusta where the truck they drove was still parked. (TT, pp 175-178; R., pp. 81-84).

A forensic scientist with SLED testified she analyzed several swabs SLED received from the Aiken County Sheriff's Department, including swabs from the truck, the porch of the home where the shooting occurred, a swatch of khaki shorts fabric, and a folding knife, as well as a sample of the Victim's blood for DNA comparison purposes. She further testified the blood found in the vehicle was the Victim's blood, and the probability of randomly selecting an unrelated individual with a matching DNA profile was one in ninety-five trillion. (TT, pp. 267-272; R., pp. 85-90).

Appellant's nephew, Carlton "C.J." Shaw ("Shaw"), testified he let Josh and Appellant into Blackmon's house, and went to the back of the house to tell Blackmon that "Dollar" was there. When the fight broke out, he and Blackmon came into the living area and saw Josh punching the Victim, and Appellant pointing a gun. Appellant shot the Victim when he got up to run away, and when Shaw tried to run out the front door, Appellant grabbed him and threw him against the front door, but Josh stopped Appellant from shooting him Shaw testified the gun used in the murder belonged to him, it was

laying on a table in the living area when he went to get Blackmon, and he saw Appellant shoot it that night. (TT, pp. 312-326; R., pp. 107-121).

The jury convicted Appellant of voluntary manslaughter and possession of a weapon during a crime of violence, and the circuit court sentenced him to concurrent prison terms of thirty years and five years, respectively. (TT, pp. 444-445, 457; R., pp. 206-207, 219). This appeal followed.

ARGUMENT

I. The circuit court properly denied Appellant's motion to suppress the recorded telephone calls made from the county jail.

Appellant asserts the circuit court erred in denying his motion to suppress the recordings of calls he made from the Aiken County jail telephone. He contends the recording of the phone calls by jail staff constituted an illegal wiretap in violation of the South Carolina Homeland Security Act. In addition, Appellant argues the circuit court should have granted a continuance so he could move for a hearing before the South Carolina Court of Appeals, as the "reviewing authority" under the Homeland Security Act, to determine the legality of the calls.

In 2002, the South Carolina General Assembly enacted the Homeland Security Act, expressly finding legislative enhancements were required to ensure the safety of South Carolina's citizens, including enhancement of tools available to law enforcement, in light of "the tragic events of September 11, 2001, involving acts of terrorism against the people of the United States and . . . continued threats against the peace and safety of our nation." 2002 Act. No. 339, §2. Thus, the **express** purpose of the Act was to enhance, not restrict, law enforcement's ability to conduct investigations

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature, and all statutory construction rules are subservient to the rule that legislative intent must prevail if it is reasonably discoverable from the statutory language as construed in light of the statute's intended purpose. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861, 863-864 (2012). "'Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial

gloss interpreting that legislation.'" *Id* at 864 (*quoting* Orr v. Clyburn, 277 S.C. 536, 290 S.E.2d 804, 806 [1982]).

The wiretap provisions of the Homeland Security Act (hereinafter "the Wiretap Act") are patterned after the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §2510).[1] *Id* at 863. The Wiretap Act is violated when a person intercepts oral communications not otherwise **exempt**, or subject to an **exception**, and evidence intercepted in violation of the Wiretap Act must be suppressed pursuant to S.C. Code §17-30-110 (2014). When a party to a communication gives consent for the communication to be intercepted, however, the recording does **not** violate the law. *Id* at 864; *see also* S.C. Code Ann §17-30-30 (2014) (exceptions)

Code §17-30-30 (B) provides: "It is **lawful** under this section for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication **or one of the parties has given prior consent to the interception**." (emphasis added)[2] In addition to information regarding the telephone system provided to all new inmates, before an inmate's telephone call from the jail is allowed to proceed, the jail's telephone system plays a recorded message informing inmates and the people they call from the jail their conversations are subject to recording and monitoring. (State's Exhibits 19, 20 and 21 [Telephone Call CDs]; Defendant's

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[1]The federal law applies to jail telephone call recordings. *See* United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002) ("Although the argument has been made that Title III was not intended by Congress to apply to prisons, it is well accepted that its protections do apply to that context ")

[2]The statute essentially codifies the one party consent doctrine. *See* State v. Andrews, 324 S.C. 516, 479 S.E 2d 808 (Ct. App. 1996) (recording of conversation when one party to the conversation consents does not violate constitutional or statutory rights).

Exhibits 1 and 2 [Telephone Call CDs]).[3] Continuing the call after that warning constitutes **both** parties' consent to the call being recorded by the jail for any purpose.

As argued by the State before the circuit court, even if the Wiretap Act applies to jail telephone call recordings, Appellant consented to the recordings, which is an express exception to the Wiretap Act's requirements. Therefore, the recordings were expressly lawful under §17-30-30(B), obviating the need for a court order and reviewing panel determination, and the circuit court properly admitted them as evidence.

[3]These Exhibits will be transported to the Court for consideration.

II. The circuit court properly overruled Appellant's objections to portions of the solicitor's closing argument.

Appellant contends the circuit court erred in overruling his objections to the solicitor referring to him as "Dollar" during closing argument, and telling the jury its decision was important for the community, arguing the statements violated his right to a fair trial because they tended to destroy the jurors' impartiality. As a threshold matter, the issue is not preserved for appellate review as to either statement Even if preserved, however, Appellant's contentions are patently meritless.

It is well established in South Carolina that an issue must be raised to and ruled on by the trial court to be preserved for appellate review. Roberts v. State, 408 S.C. 123, 757 S.E.2d 744, 748 (Ct. App. 2014) (*citing* State v. Jennings, 394 S C. 473, 716 S.E.2d 91 [2011)]. "Moreover, in order to preserve the issue for appeal, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." Wilder Corp v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 733 (1998). *See also* State v. Patterson, 324 S.C. 5, 482 S E 2d 760 (1997) (failure to state specific grounds for objection to solicitor's closing argument did not preserve any issue for appellate review); Jean H. Toal, Shahin Vafai & Robert Muckenfuss, Appellate Practice in South Carolina, 2nd ed. 73-74 (2002) (same). A party may not argue one ground at trial and another on appeal. State v Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 661 (2013).

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record." Simmons v. State, 331 S C. 333, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v.

State, 351 S.C. 362, 570 S.E.2d 160, 166 (2002).

A. Use of Appellant's nickname "Dollar"

During trial, several witnesses, including Appellant, referenced Appellant's nickname "Dollar" or "Dollar Bill," and the solicitor used this nickname during closing argument. Appellant objected, asserting it was "improper character to keep referring to Dollar." The circuit court overruled the objection. (TT, pp. 409-410; R , pp. 172-173). Citing Vasquez v. State, 388 S.C. 447, 698 S.E 2d 561 (2010), Appellant now asserts use of this nickname was unfairly prejudicial and tended to destroy the impartiality of the jury. Appellant did not raise this issue in the circuit court, and therefore, it is not properly before this Court for review. In any event, Appellant's assertion is meritless.

In Vasquez, a death penalty case, the solicitor: (1) referred to the defendant, a Muslim, as a "domestic terrorist," drawing a correlation between his indicted conduct and the events of September 11, 2001; and (2) urged jurors to imagine the fear and terror of one of the murder victims. 698 S.E.2d at 563. The South Carolina Supreme Court reversed the denial of post-conviction relief as to the penalty phase, finding trial counsel was ineffective in failing to object to the solicitor's comments, which were "inflammatory," and "used in conjunction with the solicitor's extensive reference to the events of September 11, 2011." *Id* at 567, 570.

In this case, two witnesses testified, without objection, that Appellant identified himself as "Dollar" when he knocked on the door at Blackmon's house. (TT, pp. 162, 320-321, R , pp. 68, 115-116). Appellant also testified, without objection, that his nickname is "Dollar." (TT, pp. 373-374; R., pp. 145-146). Thus, the solicitor merely repeated Appellant's undisputed nickname, with no commentary or editorial added. There simply is no comparison between the reference to a Muslim defendant as a

"domestic terrorist" in Vasquez, and merely referencing a nickname Appellant himself provided in this case, which has no particular negative connotation.[4] At best, Appellant's contention the reference unfairly prejudiced the jury is conclusory and unsupported.

B. Comment regarding importance of jury's decision

Relying on State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009), Appellant argues the solicitor's comment in closing argument regarding the importance of the jury's decision to the family and the community violated the "Golden Rule" doctrine, and denied him a fair trial.[5] Appellant only objected to the comment as "improper argument," and did not otherwise raise this issue in the circuit court.[6] Therefore, it is not preserved for appellate review, but even if preserved, Appellant's argument has no merit.

The "Golden Rule Argument" asks the jury to put themselves in the victim's place, and is generally improper for criminal prosecutions because it tends to destroy the jury's impartiality, and appeal instead to personal bias. 674 S.E.2d at 539. "Such an argument tends to destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice, thereby encouraging the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Id*

In Harris, the solicitor told the jury if it believed the defendant's version of the events, "don't leave this jury room, don't leave this jury box and he charges you and just let him go right now." *Id* The Court of Appeals found the statement was not a "Golden

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[4]Unlike "domestic terrorist," "Dollar" does not indicate a propensity for violence of any kind.

[5]Appellant conveniently ignores the solicitor's subsequent comment that it was an important case for Appellant as well.

[6]Arguably, the circuit court did not even rule on Appellant's general objection. All the court stated after the objection was. "All right. Go ahead." (TT, p. 417; R., p. 180). If this is construed as a ruling, the objection was overruled.

Rule Argument," because it did not ask the jurors to put themselves in the victims' place. *Id* at 540

Similarly, the solicitor in this case did not make a "Golden Rule Argument." Merely stating the jury's decision was important to the community did not suggest any specific verdict, or ask the jurors to put themselves in the Victim's shoes. Rather, it simply reminded the jurors their service as jurors was important to the community. Therefore, the circuit court properly overruled Appellant's general objection.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction should 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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