

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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ORIGINAL

Appeal from Oconee County

Honorable R. Scott Sprouse, Circuit Court Judge

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RECEIVED

OCT 16 2019

SC Court of Appeals  
RESPONDENT,

THE STATE,

V.

BILLY CHRISTOPHER WHITMIRE,

APPELLANT

APPELLATE CASE NO 2019-000388

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ANDERS BRIEF OF APPELLANT

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VICTOR R SEEGER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the lower court erred when it overruled trial counsel's objection to the solicitor's comments during closing argument that Appellant was "on top" of the complaining witness during the alleged altercation where that comment was not a fair inference from any of the evidence presented?

## STATEMENT OF THE CASE

During the June 2016 term, the Oconee County Grand Jury indicted Appellant for domestic violence in the second degree. R. 105.

On February 25, 2019, Appellant proceeded to trial before the Honorable R. Scott Sprouse, and a jury. R. 1. David W. Plowden represented Appellant. Id. Bethany A. Blundy represented the state. Id.

Appellant was found guilty of the lesser included offense of criminal domestic violence in the third degree. R. 94, ll. 5 – 12. Judge Sprouse sentenced Appellant to ninety days' imprisonment suspended upon two years' probation. R. 102, ll. 7 – 14.

## **STANDARD OF REVIEW**

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

## ARGUMENT

The lower court erred when it overruled trial counsel's objection to the solicitor's comments during closing argument that Appellant was "on top" of the complaining witness during the alleged altercation where that comment was not a fair inference from any of the evidence presented.

### **Relevant Facts**

On February 15, 2016, Appellant and Amie Ellison, the complaining witness, got into an altercation. R. 32, l. 3 – 35, l. 14. Appellant and Ellison had been in a relationship for eighteen years, cohabitated, and had two children together. R. 30, l. 24 – 31, l. 10.

The night before to the incident, Ellison decided she was going to leave Appellant and went to her mother's house to stay the night. R. 32, l. 3 – 35, l. 14. The morning of the incident, Ellison drove to the family home to pick their children up to bring to then school. Id. Ellison met Appellant in his bedroom and told Appellant that she was leaving him. Id. When Appellant heard that, the altercation started where he allegedly struck and choked Ellison. Id.

At trial during the closing arguments, the solicitor went outside the record when she commented that Appellant was "on top" of Ellison during the alleged incident. R. 75, l. 20 – 76, l. 8. Appellant was then found guilty of the lesser included offense of criminal domestic violence in the third degree. R. 94, ll. 5 – 12.

### **Discussion**

In the present case, the solicitor's comments during her closing argument that Appellant was "on top" of the complaining witness during the alleged incident were not based on the evidence presented during trial. R. 75, l. 20 – 76, l. 8. Accordingly, the trial court erred when it overruled trial counsel's objection because Petitioner was prejudiced by the solicitor's comment

as it made the incident seem more serious than it was and made it seem that Ellison suffered injuries more serious than she did.

A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998).

In State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), the South Carolina Supreme Court held that the solicitor's comments at closing were improper where the solicitor did not keep his arguments confined to the record or to the reasonable inferences from it. Id. at 223 – 224, 641 S.E.2d at 881. The solicitor stated that it was “open season on babies in Lexington County” if the jury did not sentence Northcutt to the death penalty. Id. The solicitor also stated that he expected the jury to impose the death penalty and even wheeled the crib into the courtroom in “a staged funeral procession.” Id. The Court determined that any one of those “miscues” warranted reversal because “the [death] sentence was imposed under the influence of passion and prejudice.” Id. at 223, 641 S.E.2d at 881 – 882.

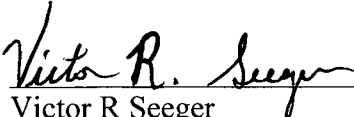
In Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004) the Supreme Court of South Carolina reversed Vaughn's drug convictions because trial counsel provided ineffective assistance of counsel for failing to object to the solicitor's comments during the closing arguments. Id. at 171, 607 S.E.2d at 72. The solicitor's comments bolstered the testimony of the police officer by referring to an uncalled witness. Id. The solicitor's informed the jury that the uncalled witness would have testified in accord with a police officer who did testify at trial; thereby bolstering the police officer's testimony from evidence not presented at trial. Id.

The Court determined the solicitor's comments were an "invited response" because Vaughn's closing argument opened the door to them. Id. at 170, 607 S.E.2d at 75. However, the Court held that even when a party opens the door to a response, the responding party cannot go outside of the evidence presented in the record. Id. It was going outside the evidence presented at trial itself that made the solicitor's improper comments prejudice Vaughn. Id. at 171, 607 S.E.2d at 76.

Here, the solicitor went outside of the record when she commented during her closing argument that Appellant was "on top" of Ellison during the alleged altercation. R. 75, l. 20 – 76, l. 8. That comment likely influenced the jury into believing that the incident was more serious than it was, and that Ellison suffered more serious injuries than she did. Moreover, Appellant was only found guilty of the lesser included offense of criminal domestic violence in the third degree. R. 94, ll. 5 – 12. Therefore, this case was a close call and the solicitor's improper comment tipped the scales to convict Appellant.

**CONCLUSION**

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate his conviction and remand his case to the Oconee County Court of General Sessions for a new trial.

  
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Victor R Seeger  
Appellate Defender

ATTORNEY FOR APPELLANT

This 16<sup>th</sup> day of October, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Oconee County

Honorable R. Scott Sprouse, Circuit Court Judge

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THE STATE,

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V.

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APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

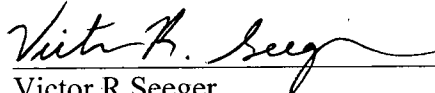
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Counsel for Billy Christopher Whitmire states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge R. Scott Sprouse, which was held on February 25, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Billy Christopher Whitmire.

Respectfully Submitted,



Victor R Seeger

Appellate Defender

ATTORNEY FOR APPELLANT

This 16<sup>th</sup> day of October, 2019.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

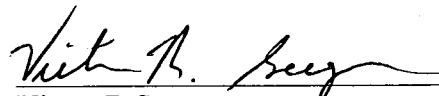
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Appellant proposes the following be included in the Record on Appeal:

- (1) Trial Transcript Dated February 25, 2019;
- (2) True-billed indictment and sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

October 16, 2019

  
Victor R Seeger  
Appellate Defender

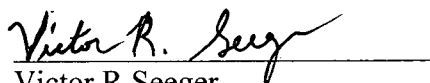
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ATTORNEY FOR APPELLANT

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 16, 2019.



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Appellate Defender

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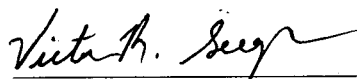
V.

BILLY CHRISTOPHER WHITMIRE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Billy Christopher Whitmire, at 1355 Cobb Bridge Road, Westminster, SC 29693, this 16<sup>th</sup> day of October, 2019.



Victor R Seeger  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 16<sup>th</sup> day of October, 2019.



(L.S)

Notary Public for South Carolina

My Commission Expires: September 30, 2029