

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Pickens County  
Honorable Robin B. Stilwell, Circuit Court Judge  
Appellate Case No. 2019-000904

---

**RECEIVED**  
DEC 12 2019  
SC Court of Appeals

THE STATE,

Respondent,

vs.

TONY AVELLA SANDERS,

Appellant.

---

**INITIAL BRIEF OF RESPONDENT**

---

ALAN WILSON  
Attorney General

MARK R. FARTHING  
Assistant Attorney General

Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

WILLIAM W. WILKINS, III  
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325  
Greenville County Courthouse  
Greenville, SC 29601  
(864) 467-8282

ATTORNEYS FOR RESPONDENT

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS .....3

ARGUMENT .....5

The trial judge did not abuse his broad discretion by declining to grant the extreme remedy of a mistrial in response to the solicitor’s closing arguments remarks because those remarks did not constitute a comment on Appellant’s decision not to testify and, even if those remarks could be construed as such an improper comment, any possible prejudice that could have resulted from them was eliminated by the trial judge’s repeated instructions to the jury both before and after the solicitor’s closing argument that expressly and unambiguously explained Appellant had a right to remain silent, the burden of proof was solely upon the State, and Appellant’s decision not to testify could not be considered in any manner whatsoever. ....5

Relevant Facts. .....6

Standard of Review. .....9

Analysis. .....10

CONCLUSION.....18

## TABLE OF AUTHORITIES

### South Carolina Cases:

<u>Gill v. State</u> , 346 S.C. 209, 552 S.E.2d 26 (2001). .....	13
<u>Humphries v. State</u> , 351 S.C. 362, 570 S.E.2d 160 (2002). .....	11
<u>Johnson v. State</u> , 325 S.C. 182, 480 S.E.2d 733 (1997). .....	13, 16
<u>McFadden v. State</u> , 342 S.C. 637, 539 S.E.2d 391 (2000). .....	11
<u>Simmons v. State</u> , 331 S.C. 333, 503 S.E.2d 164 (1998). .....	10
<u>State v. Beckham</u> , 334 S.C. 302, 513 S.E.2d 606 (1999). .....	16
<u>State v. Byers</u> , 392 S.C. 438, 710 S.E.2d 55 (2011). .....	10
<u>State v. Carlson</u> , 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005). .....	16
<u>State v. Copeland</u> , 321 S.C. 318, 468 S.E.2d 620 (1996). .....	10
<u>State v. Durden</u> , 264 S.C. 86, 212 S.E.2d 587 (1975). .....	11
<u>State v. Edgeworth</u> , 239 S.C. 10, 121 S.E.2d 248 (1961). .....	12
<u>State v. Gilstrap</u> , 205 S.C. 412, 32 S.E.2d 163 (1944). .....	10
<u>State v. Grovenstein</u> , 335 S.C. 347, 517 S.E.2d 216 (1999). .....	16
<u>State v. Harris</u> , 340 S.C. 59, 530 S.E.2d 626 (2000). .....	15
<u>State v. Hill</u> , 382 S.C. 360, 675 S.E.2d 764 (Ct. App. 2009). .....	16
<u>State v. Johnson</u> , 306 S.C. 119, 410 S.E.2d 547 (1991). .....	13
<u>State v. Patterson</u> , 324 S.C. 5, 482 S.E.2d 760 (1997). .....	9, 10
<u>State v. Rice</u> , 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007). .....	10
<u>State v. Rudd</u> , 355 S.C. 543, 586 S.E.2d 153 (Ct. App. 2003). .....	9, 10
<u>State v. Shuler</u> , 353 S.C. 176, 577 S.E.2d 438 (2003). .....	16
<u>State v. South</u> , 285 S.C. 529, 331 S.E.2d 775 (1985). .....	14

<u>State v. Truesdale</u> , 285 S.C. 13, 328 S.E.2d 53 (1984). .....	13
<u>State v. Weaver</u> , 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004). .....	12, 13, 17
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001). .....	9
<b><u>United States Supreme Court Cases:</u></b>	
<u>Berger v. United States</u> , 295 U.S. 78 (1935). .....	11
<u>Darden v. Wainwright</u> , 477 U.S. 168 (1986). .....	10
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637 (1974). .....	12, 14
<u>Doyle v. Ohio</u> , 426 U.S. 610 (1976). .....	11
<u>Herring v. New York</u> , 422 U.S. 853 (1975). .....	11
<u>Truesdale v. Aiken</u> , 480 U.S. 527 (1989). .....	13
<u>United States v. Robinson</u> , 485 U.S. 25 (1988). .....	12
<u>United States v. Young</u> , 470 U.S. 1 (1985). .....	17
<b><u>Other State and Federal Cases:</u></b>	
<u>Bates v. Lee</u> , 308 F.3d 411 (4th Cir. 2002). .....	11
<u>Choate v. State</u> , 75 A.3d 1003 (Md. Ct. Spec. App. 2013). .....	14
<u>United States v. Anderson</u> , 481 F.2d 685 (4th Cir. 1973). .....	12
<u>United States v. Isaacs</u> , 493 F.2d 1124 (7th Cir. 1974). .....	11
<u>Wellons v. State</u> , 463 S.E.2d 868 (Ga. 1995). .....	14
<b><u>Other Authorities:</u></b>	
U.S. Const. amend. V. ....	12
S.C. Const. art. I, § 12. ....	12

## STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse his broad discretion by declining to grant the extreme remedy of a mistrial in response to the solicitor's closing arguments remarks because those remarks did not constitute a comment on Appellant's decision not to testify and, even if those remarks could be construed as such an improper comment, any possible prejudice that could have resulted from them was eliminated by the trial judge's repeated instructions to the jury both before and after the solicitor's closing argument that expressly and unambiguously explained Appellant had a right to remain silent, the burden of proof was solely upon the State, and Appellant's decision not to testify could not be considered in any manner whatsoever.

## STATEMENT OF THE CASE

In February of 2018, Appellant Tony Avella Sanders was arrested in connection to a domestic violence incident that had occurred roughly eight months earlier. In February of 2019, the Pickens County Grand Jury indicted Appellant for one count of second-degree domestic violence. On May 20, 2019, a jury trial was commenced in the Pickens County Court of General Sessions with the Honorable Robin B. Stilwell, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a term of imprisonment of thirty months. Appellant then filed a timely notice of appeal.

## STATEMENT OF FACTS

Shortly before 12:45 p.m. on June 8, 2017, a woman named Rebecca Crunkleton (“Victim”) came into the administrative building on the campus of Clemson University and asked to use the phone so she could call her mother. (Tr. p. 53; pp. 80-82). At that time, Victim was crying and shaking, appeared to be frightened, and had bruising to her face along with what appeared to be fresh scratch marks on her arms. (Tr. p. 81). Based on Victim’s condition, Michelle Cato, one of the university’s employees, quickly moved Victim into a small conference room in the building and then alerted the Clemson University Police Department of the situation that was unfolding. (Tr. p. 53; p. 81; pp. 76-78; pp. 84-85).

In response, Officer Christopher Evans headed to the administrative building and met with Victim at that location. (Tr. pp. 53-54; p. 85). During the meeting, Victim, who was very upset and still crying, reluctantly reported the details of what led her to Clemson University’s campus that day. (Tr. pp. 53-54; pp. 85-88). Specifically, on that date, Victim reported she got into an argument with Appellant Tony Avella Sanders, who was the father of her child and her live-in boyfriend at that time, at a store and, once they left the store, he drove her over to the Clemson area from their shared apartment in Wahalla, South Carolina. (Tr. pp. 46-47; pp. 49-51; pp. 85-86; p. 97). As they neared the university’s campus, Victim stated she and Appellant again engaged in an argument, Appellant struck her with his fist several times, and she responded by striking him back in retaliation. (Tr. p. 50; p. 60; pp. 85-86; p. 96). At that point, Victim reported Appellant told her she was going to die that day and, frightened for her life, she jumped from the moving vehicle to escape. (Tr. p. 50; p. 52; p. 62; pp. 73-74; p. 86). After that, Victim stated she hid in some nearby bushes until Appellant left the area and, once he was gone, ran to the administrative building for help. (Tr. p. 50; p. 53; pp. 86-87).

After receiving that information from Victim, Officer Evans documented her injuries by photographing them and then waited with Victim until her mother and stepfather arrived to take her home. (Tr. pp. 87-88; State's Ex. # 4 (Photographs)). In addition to those actions, Officer Evans obtained a description of Appellant's vehicle from Victim, and he relayed that description to other officers in an attempt to track Appellant down. (Tr. p. 87). Ultimately though, those efforts proved to be unsuccessful, and the officers were unable to locate Appellant until several months later. (Tr. p. 87; p. 93).

Once Appellant was finally located and arrested, he was indicted for second-degree domestic violence, and he elected to proceed forward to trial. (Tr. pp. 5-7; p. 69; Arrest Warrant; Indictment). During the course of trial, Victim offered the only eyewitness testimony about the incident, and a few other witnesses testified about their interactions with Victim after she entered Clemson University's administrative building subsequent to the crime. (Tr. pp. 45-78; pp. 80-82; pp. 84-97; pp. 107-108). Beyond that, the parties stipulated to the existence of Appellant's prior conviction for domestic violence, and that conviction was introduced solely for the limited purpose of proving a required element of the indicted offense. (Tr. pp. 108-110; pp. 132-134). At the conclusion of the trial, the jury convicted Appellant as indicted, and the trial judge sentenced Appellant to a term of imprisonment of thirty months for the conviction. (Tr. p. 140; p. 147).

## ARGUMENT

**The trial judge did not abuse his broad discretion by declining to grant the extreme remedy of a mistrial in response to the solicitor's closing arguments remarks because those remarks did not constitute a comment on Appellant's decision not to testify and, even if those remarks could be construed as such an improper comment, any possible prejudice that could have resulted from them was eliminated by the trial judge's repeated instructions to the jury both before and after the solicitor's closing argument that expressly and unambiguously explained Appellant had a right to remain silent, the burden of proof was solely upon the State, and Appellant's decision not to testify could not be considered in any manner whatsoever.**

Appellant contends the trial judge abused his discretion by ruling the solicitor's closing argument remarks did not constitute an impermissible comment upon Appellant's right not to testify while further appearing to contend the trial judge should have granted a mistrial in response to those remarks. In support of those contentions, Appellant maintains the solicitor's reference during closing argument to the fact only Appellant and his victim were capable of testifying about what happened during the incident was an indirect reference to Appellant's failure to testify and was sufficiently prejudicial under the circumstances to render the trial fundamentally unfair. To the contrary, the solicitor's remarks during closing argument about the fact only two people knew and could recount what happened during the incident was merely a comment on the evidence presented that was designed to explain to the jury why the victim's testimony was the only eyewitness testimony offered by the State as to what occurred. However, even if the solicitor's remarks in that regard could have somehow been construed as an improper comment on Appellant's failure to testify, those remarks nonetheless could not have resulted in any prejudice to Appellant or rendered Appellant's trial unfair in light of the fact the trial judge repeatedly instructed the jury Appellant's decision not to testify could not be used against him in any manner. Accordingly, in light of the fact the solicitor's remarks—even if improper—could not have resulted in any improper prejudice to Appellant under the circumstances involved, the

trial judge properly declined to grant the extreme remedy of a mistrial in Appellant's case. Appellant's conviction should be affirmed.

### **Relevant Facts**

Towards the outset of Appellant's trial, the trial judge presented some preliminary remarks to the jury. (Tr. pp. 20-30). Through those remarks, the trial judge explained to the jurors they had a duty to decide whether the State proved Appellant's guilt beyond a reasonable doubt, affirmed Appellant was presumed to be innocent until his guilt had been established, and specifically noted neither the opening statements nor closing arguments of counsel constituted evidence. (Tr. pp. 21-22; p. 26). Furthermore, the trial judge expressly instructed the jurors Appellant did not have to offer any evidence "at all," Appellant was not required to present any testimony or offer anything else into the record, and Appellant possessed a constitutional right to remain silent, which meant the defense had no burden of proof whatsoever. (Tr. p. 26).

Thereafter, during the evidentiary phase of trial, the State offered the testimony of Victim and just three other witnesses. (Tr. p. 45; p. 76; p. 80; p. 84). Notably, Victim was the only one of the witnesses to offer an account of the actual incident involving Appellant while the other witnesses, who were not eyewitnesses to what had transpired, merely recounted the details of their interactions with Victim after the crime had already been committed. (Tr. pp. 47-55; pp. 60-67; pp. 73-74; pp. 76-78; pp. 80-82; pp. 84-97).

Following the presentation of the witnesses' testimony, the trial judge again reminded the jurors the defense did not have to offer any evidence and Appellant had a right to remain silent. (Tr. p. 98). The solicitor then rested the State's case, and the defense also rested without introducing any testimony or evidence. (Tr. pp. 105-107; p. 110). After that, the trial judge once again noted the defense was not required to introduce any evidence during trial while cautioning

the jurors the appropriate consideration for them was whether the State met its burden of proving each and every element of the indicted offense beyond a reasonable doubt. (Tr. p. 110).

Subsequently, the solicitor presented the first of the parties' closing arguments to the jury. (Tr. pp. 114-119). During that argument, the solicitor began by reminding the jurors there were no outside witnesses to the crime, which meant the only two people that knew or could tell what happened were Victim and Appellant. (Tr. p. 115). Specifically, the solicitor stated: "There were no eyewitnesses to this crime. The only two people that can tell you what happened were [Victim] and [Appellant]. The only two people that know what happened that day are those two. And she got up here and told you what she remembered happening that day." (Tr. p. 115). At that point, defense counsel objected, and the trial judge conducted a brief bench conference on the matter. (Tr. p. 115). The solicitor then resumed her closing argument, noted Victim's testimony was corroborated by the photographs of her injuries, and encouraged the jurors to convict Appellant after hearing the testimony and observing the witnesses. (Tr. pp. 117-119).

Following the solicitor's remarks, defense counsel presented his closing argument to the jury. (Tr. pp. 119-125). In doing so, defense counsel asserted the jurors could only find the State met its burden of proof from what they "heard and saw from the witness stand," called the jurors' attention to the fact no witness other than Victim saw Appellant or placed him at the crime scene on the date of the crime, and contended the type of incident Victim described was "never a one-way street." (Tr. pp. 120-121). He then concluded his argument by alleging no one truly knew if Appellant actually was at the scene of the incident due to the fact no other witnesses saw him there while urging the jurors to acquit Appellant unless they believed Victim's testimony. (Tr. p. 122; pp. 124-125).

Thereafter, following some brief reply remarks from the solicitor, the trial judge instructed the jury on the applicable law.<sup>1</sup> (Tr. pp. 125-136). Through his jury instructions, the trial judge advised the jurors they must accept the law as he instructed it to them, reaffirmed Appellant was presumed to be innocent until they had determined the State proved all the elements of the indicted offense beyond a reasonable doubt, defined reasonable doubt for the jurors, instructed the jurors on evaluating witness credibility, defined the elements of second-degree domestic violence, and explained to the jurors their verdict must be a unanimous one. (Tr. pp. 126-134). Beyond that, the trial judge—consistent with his earlier remarks—reminded the jurors the defense did *not* have any burden of proof and did not have to say or prove anything during trial. (Tr. p. 127). Furthermore, the trial judge explained the jurors could not hold the fact Appellant elected to exercise his constitutional right not to testify against him and noted the right was so “sacred” they could not even discuss it during their deliberations. (Tr. p. 127).

At the conclusion of those instructions, the trial judge excused the jury from the courtroom and gave defense counsel an opportunity to discuss his earlier objection to the solicitor’s initial closing argument remarks on the record. (Tr. pp. 136-137). At that point, defense counsel asserted the solicitor’s remarks about only two people being able to say what had happened constituted a comment on Appellant’s failure to testify and contended the grant of a mistrial was the only possible remedy under the circumstances. (Tr. p. 137). In response, the

---

<sup>1</sup> Specifically, during her brief reply remarks, the solicitor stated: “Ladies and gentlemen, I do understand [defense counsel]’s point and I only agree with him on one thing. Human relationships are complicated. We all know someone who is in a complicated relationship. [Victim] got up there and told you about her complicated relationship. She got up there and told you that they had been together for five years and they have a child in common and she loves him. I should say loved. She said all she wanted from him was for him to love her. And, ladies and gentlemen, this is [Appellant’s] love for [Victim]. I’m going to ask you what I asked you a few minutes ago. Based on everything you’ve heard today, you are firmly convinced that this happened, I’m asking you to return a verdict of guilty. Thank you.” (Tr. pp. 125-126).

solicitor asserted her comments were merely a statement of the circumstances of the case and indicated she did not believe they were improper or burden shifting. (Tr. pp. 137-138). After considering the arguments of counsel, the trial judge denied defense counsel's request for a mistrial. (Tr. p. 138). In doing so, the trial judge found the solicitor's remarks did not shift the burden of proof and were "fairly innocuous." (Tr. p. 138). Furthermore, the trial judge determined the remarks were not capable of resulting in any actual prejudice to Appellant in light of his careful instructions to the jurors ensuring they understood the burden of proof was on the State while Appellant had a constitutional right to remain silent and not testify. (Tr. p. 138).

Subsequently, the case was submitted to the jury, and, at the conclusion of their deliberations, the jurors convicted Appellant of second-degree domestic violence as indicted. (Tr. p. 140). Following the verdict, the trial judge sentenced Appellant to a thirty-month term of imprisonment. (Tr. p. 147).

#### **Standard of Review**

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from a ruling related to a solicitor's closing argument remarks, an appellate court will review the allegedly improper comments in the context of the entire record and must determine whether those comments so infected the trial with unfairness such that the resulting conviction was a denial of the defendant's due process rights. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003); see State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) ("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."). When conducting that particular analysis, an appellate court should be "careful and critical" in finding allegedly improper statements of counsel to warrant reversal, 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 order for a solicitor’s remarks to rise to the level of reversible error, it is not enough for the remarks to be “undesirable or even universally condemned.” Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations omitted). Instead, the remarks must have denied the defendant a fair determination of guilt or innocence and rendered his trial unfair, and the defendant bears the burden of proving such prejudice occurred. State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007), overruled on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011); see Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (“The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.”). Ultimately, absent a clear abuse of discretion, an appellate court will not disturb a trial court’s ruling regarding the propriety of a solicitor’s closing argument remarks. Rudd, 355 S.C. at 548, 586 S.E.2d at 156; see Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (recognizing a trial judge’s rulings on the propriety of a solicitor’s argument remarks “ordinarily” will not be disturbed on appeal); 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, 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.” (citations omitted)).

### Analysis

Closing arguments are a basic and important element of the adversarial fact-finding process in a criminal trial, and such arguments serve “to sharpen and clarify the issues for resolution by the trier of fact in a criminal case” while also providing both the solicitor and

defense counsel with an opportunity to advocate for their respective positions, argue for certain inferences to be drawn from the evidence presented, and identify the weaknesses in the other side's positions. Herring v. New York, 422 U.S. 853, 862 (1975). When presenting a closing argument, a solicitor generally possesses "wide latitude" as to the substance of his remarks to the jury and is fully permitted to prosecute with earnestness and vigor. Bates v. Lee, 308 F.3d 411, 422 (4th Cir. 2002); Berger v. United States, 295 U.S. 78, 88 (1935) ("[A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so."); see also United States v. Isaacs, 493 F.2d 1124, 1164 (7th Cir. 1974) ("The closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture . . . because to shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice." (citations and internal quotations omitted)).

Pursuant to the wide latitude afforded in regard to the substance of a closing argument, the solicitor—amongst other things—is allowed to state and discuss the State's version of the testimony, to comment on the weight to be given to such testimony, and to point out the matters the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); 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." (citation and internal quotations omitted)). However, in light of the constitutional prohibition against compelled self-incrimination, a solicitor is obviously not permitted to comment during a closing argument—either directly or indirectly—on a defendant's silence, failure to testify, or failure to present a defense. McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000); see Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[W]hile it is true that

the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.”); see also U.S. Const. amend. V (prohibiting a criminal defendant from being “compelled in any criminal case to be a witness against himself[.]”); S.C. Const. art. I, § 12 (“[N]or shall any person be compelled in any criminal case to be a witness against himself.”).

When analyzing the issue of whether a solicitor’s remarks constituted an improper comment on a defendant’s failure to testify, the pertinent inquiry generally is: “Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?” United States v. Anderson, 481 F.2d 685, 701 (4th Cir. 1973). Significantly, in answering that particular inquiry, the solicitor’s remarks must necessarily be evaluated in the context in which they were made, and the most damaging meaning or interpretation should not be “lightly drawn” from those remarks. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974); see United States v. Robinson, 485 U.S. 25, 33 (1988) (instructing “prosecutorial comment must be examined in context”); State v. Weaver, 361 S.C. 73, 89, 602 S.E.2d 786, 794 (Ct. App. 2004) (“In making this determination, we must examine the alleged impropriety in the context of the entire record.”); see also State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961) (recognizing “[i]t is sometimes difficult to draw the line between proper and improper argument” and explaining “some latitude must necessarily be allowed”).

Furthermore, the mere mention of a defendant’s decision to exercise his right to remain silent or failure to testify during trial does not automatically constitute reversible error. Weaver,

361 S.C. at 89, 602 S.E.2d at 794; see State v. Truesdale, 285 S.C. 13, 17, 328 S.E.2d 53, 56 (1984) (“When such a violation occurs, the question remains . . . whether it is cause for reversal or is harmless error beyond a reasonable doubt.”), rev’d on other grounds by Truesdale v. Aiken, 480 U.S. 527 (1989). To the contrary, such a situation only requires reversal when it results in actual prejudice to the defendant. Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001); see State v. Johnson, 306 S.C. 119, 129, 410 S.E.2d 547, 553 (1991) (declining to reverse Johnson’s conviction as a result of the introduction of testimony establishing Johnson invoked his right to counsel after determining the admission of that testimony was not prejudicial to Johnson’s case). Critically, the burden rests upon the defendant to establish the purported error deprived him of a fair trial. Gill, 346 S.C. at 221, 552 S.E.2d at 33; see Weaver, 361 S.C. at 89, 602 S.E.2d at 794 (“[A]lthough it is improper for the solicitor to indirectly comment on a defendant’s failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.”).

In the case sub judice, the solicitor’s closing argument remarks—when viewed in the proper context—did not constitute either a direct or indirect comment on Appellant’s failure to testify. Instead, by calling the jurors’ attention to the fact the only two people who knew and could recount the details of the incident were Appellant and Victim, the solicitor was merely commenting on the evidence presented and attempting to offer an explanation as to why Victim’s testimony was the *only* eyewitness testimony offered by the State, which was particularly important under the circumstances due to the fact defense counsel heavily focused his own remarks on the fact no witness other than Victim had placed Appellant at the crime scene. See Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (“In context, the comment was simply a statement of the evidence which was before the jury, rather than a comment on

Johnson's failure to testify. As such, it is distinguishable from the typical 'comment' in which the clear implication is that the defendant has failed to explain the circumstances of the crime or has shown no remorse." (footnote omitted)); cf. Choate v. State, 75 A.3d 1003, 1014 (Md. Ct. Spec. App. 2013) ("[T]he prosecutor's comments were not susceptible of the inference that the jury should consider the appellant's silence as evidence of guilt. The entire thrust of this portion of the prosecutor's discussion, which continued for four transcript pages, was that the victim was a credible witness. The remarks that '[t]here [were] only two people there' and that one of those people, the victim, 'came in and . . . sat here and . . . told you what happened,' are properly read as a submission that the victim should be believed because she was the only eyewitness other than the appellant. The prosecutor did not suggest that the jury should take any negative inference from the fact that the appellant chose not to testify, or that the appellant had any burden to tell his side of the story. The court did not abuse its discretion in denying the appellant's . . . motion for mistrial." (brackets in original)). Significantly, since the solicitor's remarks merely commented on the evidence presented and did not encourage the jurors to consider Appellant's silence as actual evidence of his guilt, those remarks did not constitute a comment on Appellant's decision to exercise his constitutional rights and would not likely have been interpreted as such by a reasonable juror. See State v. South, 285 S.C. 529, 536, 331 S.E.2d 775, 779 (1985) ("Viewed in context, this argument does not appear to be highly inflammatory. We will defer to the discretion of the trial judge, whose ruling will not ordinarily be disturbed."); see also Donnelly, 416 U.S. at 647 (instructing courts "should not lightly infer" a jury will draw the most damaging meaning from closing argument remarks); cf. Wellons v. State, 463 S.E.2d 868, 879 (Ga. 1995) ("Wellons contends that the prosecutor improperly commented on Wellons' failure to testify. In closing argument in the guilt-innocence phase of trial, the prosecutor said that 'only

two people know what went on in that apartment,’ and ‘there’s only two people who can tell us how long that horror lasted.’ We find no error. . . . In context, the prosecutor’s comments were but a small part of a summary of the evidence best understood as conceding the ambiguities therein and were unlikely to be interpreted as comments on Wellons’ failure to testify. Furthermore, the trial court appropriately charged the jury that no adverse inferences were to be drawn from Wellons’ silence.”). Thus, the trial judge committed no conceivable error by declining to grant the extreme remedy of a mistrial in response to those inoffensive remarks. See State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) (“A mistrial should only be granted when absolutely necessary.”).

However, even assuming the solicitor’s closing argument remarks could somehow be construed as constituting an improper comment on Appellant’s failure to testify, those remarks nonetheless still would not have warranted the grant of a mistrial because—just as the trial judge recognized—the instructions presented to the jury throughout the trial ensured the jurors would not improperly consider Appellant’s silence during their deliberations. Critically, at three separate points during the trial *before* the closing arguments, the trial judge instructed the jurors on Appellant’s constitutional right to remain silent and lack of a burden to offer anything at all in his own defense. Then, *after* the parties presented their closing arguments to the jury, the trial judge instructed the jurors on the relevant and applicable law and, in doing so, included a thorough instruction on the fact they could not consider Appellant’s decision not to testify in any manner during their deliberations.<sup>2</sup> In light of those express instructions, the trial judge ensured

---

<sup>2</sup> Precisely, the trial judge presented the following instruction regarding Appellant’s constitutional right to remain silent and not testify: “I told you The State has the burden of proof. The Defense does not have the burden of proof. The Defense doesn’t have to do say or prove anything to you. And The Defense in this case, The Defendant elected not to testify. Now, understand that that is his Constitutional right. And because that’s his Constitutional right,

the jurors, who must be presumed to have followed the instructions presented to them, would *not* consider Appellant's failure to testify when deciding his case. See State v. Shuler, 353 S.C. 176, 187-188, 577 S.E.2d 438, 444 (2003) ("While the State may not comment on the defendant's right to remain silent, an improper reference is subject to harmless error analysis. The trial court's instruction to the jury that it could not consider appellant's failure to testify in any way and could not use it against him cured any potential error."); Johnson, 325 S.C. at 188, 480 S.E.2d at 735-736 ("[E]ven assuming arguendo the comment was improper, we find the trial court's instruction to the jury that it could not consider Johnson's failure to testify in any way and could not use it against him sufficient to cure any potential error."); see also State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."). As a result, the solicitor's closing argument remarks—even if improper—could not have resulted in any prejudice to Appellant and did not warrant a grant of a mistrial in Appellant's case. See State v. Carlson, 363 S.C. 586, 607, 611 S.E.2d 283, 294 (Ct. App. 2005) ("If the trial judge charges the jury during jury instructions that the burden of proof is fully on the State, and that the jury may not consider a defendant's failure to testify in its deliberations, any prejudicial effect can be cured."); see also State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."); cf. State v. Hill, 382 S.C. 360, 370, 675 S.E.2d 764, 769 (Ct. App. 2009) ("[T]he trial court instructed the jury the defendant's silence could not be considered 'in any manner whatsoever' and the defendant has no burden of proof and is not required to prove

---

you can't hold his failure to testify against him. As a matter of fact, that is such a sacred Constitutional right that all of us enjoy, that you cannot even discuss it in your jury room." (Tr. p. 127).

his innocence. Therefore, even if the solicitor's comment was improper, the trial court's jury instruction should be deemed to have cured any error or prejudice that may have resulted from it.”).

Because the solicitor's closing argument remarks could not have reasonably been construed as improperly encouraging the jurors to hold Appellant's decision not to testify against him and because the trial judge's repeated instructions ensured the jurors would not do so, Appellant could not—and cannot—satisfy his burden of establishing the solicitor's remarks rendered his trial fundamentally unfair. See Weaver, 361 S.C. at 89, 602 S.E.2d at 794 (“[A]s a prerequisite to reversal, [an appellant challenging an improper comment on his failure to testify] must demonstrate the effect of the solicitor's closing argument was to deny him a fair trial.”). Accordingly, there is no proper basis upon which to disturb Appellant's conviction on appeal. See United States v. Young, 470 U.S. 1, 11 (1985) (“[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.”). Appellant's conviction should be affirmed.

**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

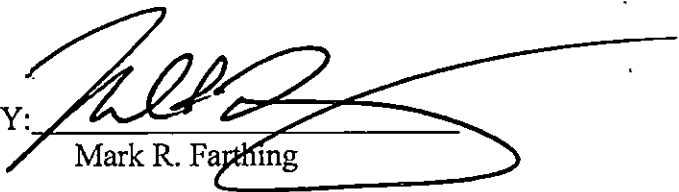
Respectfully submitted,

ALAN WILSON  
Attorney General

MARK R. FARTHING  
Senior Assistant Attorney General

WILLIAM W. WILKINS, III  
Solicitor, Thirteenth Judicial Circuit

BY:



Mark R. Farthing

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 12, 2019

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Pickens County  
Honorable Robin B. Stilwell, Circuit Court Judge  
Appellate Case No. 2019-000904

**RECEIVED**  
DEC 12 2019  
SC Court of Appeals

THE STATE,

Respondent,

vs.

TONY AVELLA SANDERS,

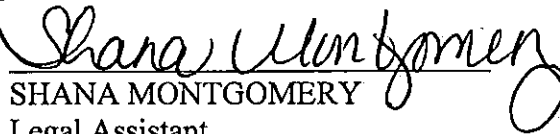
Appellant.

**PROOF OF SERVICE**

I, Shana Montgomery, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Sarah E. Shipe, Esq.  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify all parties required by rule to be served have been served.  
This 12th day of December, 2019.

  
SHANA MONTGOMERY  
Legal Assistant  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727



ALAN WILSON  
ATTORNEY GENERAL

December 12, 2019

**RECEIVED**  
DEC 12 2019  
SC Court of Appeals

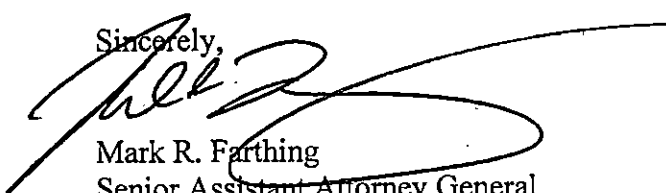
Sarah E. Shipe, Esq.  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

RE: State v. Tony Avella Sanders – Appellate Case No. 2019-000904

Dear Ms. Shipe:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

  
Mark R. Farthing  
Senior Assistant Attorney General  
Bar Number 76901

MRF/  
Enclosures

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