STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TONY AVELLA SANDERS,

APPELLANT.

APPELLATE CASE NO. 2019-000904

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion in ruling the solicitor's remarks during closing were not an impermissible comment on Appellant's right to remain silent where the solicitor argued only two people could tell the jury what happened, the alleged victim testified, and Appellant did not?

STATEMENT OF THE CASE

Appellant was indicted by the Pickens County Grand Jury for the offense of domestic violence in the second degree. R. 134. His case was called to trial on May 20, 2019, before the Honorable Robin B. Stillwell, and a jury. David Cantrell represented Appellant. Assistant solicitor Megan Owen represented the state. R. 1.

On May 21, 2019, the jury found Appellant guilty. R. 121, ll. 3-6. Judge Stillwell sentenced Appellant to thirty months' imprisonment. R. 128, ll. 8-10.

This appeal follows.

STANDARD OF REVIEW

"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." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "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." *Id.* "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record." *Id.* at 324, 468 S.E.2d at 625. "The appellant has the burden of proving she did not receive a fair trial because of the alleged improper argument." *Id.* at 324, 468 S.E.2d at 625.

ARGUMENT

The trial judge abused his discretion in ruling the solicitor's remarks during closing were not an impermissible comment on Appellant's right to remain silent where the solicitor argued only the alleged victim and Appellant could tell the jury what happened, the alleged victim testified, and Appellant did not.

Introduction

At the time of the incident Appellant and Rebecca Crunkleton were involved in a romantic relationship. R. 27. They lived together in an apartment with their son. R. 27-28. Crunkleton told police that on June 8, 2017, she and Appellant were in his car and got into an argument. Crunkleton alleged the fight got physical and Appellant verbally threatened her life. Crunkleton jumped out of the car and ran to a nearby building on the campus of Clemson University where police responded. R. 30, l. 18 – 31, l. 16.

Subsequently, Appellant was arrested and charged with domestic violence in the second degree.

Relevant Facts

At trial, Crunkleton testified about the incident. R. 26-57. Appellant elected not to testify or present a defense. R. 87, ll. 12-16; 91, ll. 5-12. During the state's closing the solicitor made the following remarks:

> There were no witnesses to this crime. *The only two people that can tell you what happened were Rebecca Crunkleton 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.

R. 96, ll. 2-7. (emphasis added).

Defense counsel objected and a bench conference was held. R. 96, ll. 8-14. The state finished closing and then defense counsel gave closing remarks.

On reply the solicitor said the following:

> *Rebecca Crunkleton 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 Rebecca Crunkleton.

R. 106, ll. 18-23. (emphasis added).

Outside the presence of the jury defense counsel argued the state's comments during closing impermissibly referenced Appellant's failure to testify and moved for a mistrial. R. 118, ll. 5-15. The solicitor argued her remarks did not shift the burden of proof and that she was simply "stating as a matter of course that Rebecca Crunkleton had given her version, the only two people that would have known anything about that were the two of them." The solicitor suggested if the judge found the comments improper, he should strike them from the record and give a curative instruction to the jury. R. 118, ll. 18-25. The trial judge disagreed with defense counsel finding the statements were "fairly innocuous" and any prejudice was corrected through his general instruction to the jury regarding the state's burden.[1] The trial judge also denied defense counsel's motion for mistrial. R. 119, ll. 2-14.

Discussion

The state may not directly or indirectly refer to or comment on a defendant's exercise of a constitutional right, namely his right to remain silent. *Johnson v. State*, 325, S.C. 182, 480

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[1] During jury instructions, the judge charged the following:

> I told you [t]he [s]tate has the burden of proof. The [d]efense doesn't have to do or say or prove anything to you. And the [d]efense in this case, the [d]efendant elected not to testify. Now, understand that [] is his constitutional right, 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.

R. 108, ll. 6-16.

S.E.2d 733 (1997); *see also Doyle v. Ohio*, 426 U.S. 610 (1976) (an accused has the right to remain silent and the exercise of that right cannot be used against him); *Griffin v. California*, 380 U.S. 609 (1965) (Fifth and Fourteenth Amendments forbids comment by the prosecution on the accused's silence). However, improper comments on a defendant's failure to testify do not automatically require reversal unless they are prejudicial to the defendant. *Gill v. State*, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001). "The defendant bears the burden of demonstrating that improper comments on his refusal to testify deprived him of a fair trial." *Id.* Moreover, "a curative instruction emphasizing the jury cannot consider [the] defendant's failure to testify against him will cure any potential error." *Id.*

In *State v. Cockerham*, 294 S.C. 380, 365 S.E.2d (1988), the Supreme Court held the solicitor's closing statements improperly focused on Appellant's exercise of his right to remain silent. In that case, during closing arguments the solicitor invited the jury to "imagine what kind of mood that young man was in the night the victim was killed, as he sits here today quiet as can be." *Cockerham*, 294 at 381, 365 at 22-23. The court found that the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 382, 365 at 23.

In *State v. Moore*, 377 S.C. 299, 659 S.E.2d 256 (2008), the Supreme Court found harmless error where the trial court did not declare a mistrial when the solicitor suggested during closing arguments that defendant had an affirmative duty to modify his statement to police and defendant's failure to do so could be considered evidence of a guilty mind. *Moore*, 377 at 311-12, 659 at 262-63. In that case, the trial court gave a curative instruction stating that defendant did not have the duty to report or call the police and reiterated the defendant's right to remain silent and that the defendant's silence may not be considered against him. *Id.* Conversely, in

State v. McIntosh, 358 S.C. 432, 595 S.E.2d 484 (2004), the Supreme Court reversed the court of appeals finding the solicitor's questions regarding defendant's post-*Miranda*[2] silence violated defendant's right to due process and that the violation was not harmless error and was not cured by the judge's curative instruction. *McIntosh*, 358 at 439-42, 595 at 487-89. The court found the trial court' error in allowing solicitor to comment on defendant's right to remain silent was not harmless even where the trial court gave a curative instruction immediately following the comment. *Id.*

Here, the state's remarks during closing were impermissible comments on Appellant's exercise of his constitutional right to remain silent. In *Cockerham*, the solicitor pointed out that Appellant did not testify when he invited the jury to imagine what mood defendant was in the night of the incident "as he sits here quite today as quiet as can be." Here, the solicitor intimated to the jury, twice during her closing and then again on reply, that only Appellant and Crunkleton knew what happened that day. The solicitor highlighted to the jury that Crunkleton testified, leaving the jury to wonder why Appellant did not testify. It is true, the solicitor did not come right out and say, Appellant failed to testify, but her multiple references to the fact that only Appellant and Crunkleton could tell the jury what happened clearly point to the fact that Appellant was the only one of the two who did not tell the jury what happened. Like *Cockerham*, these comments, while indirect, were unmistakable references to Appellant's silence at trial.

The trial judge seemingly did not see anything objectionable in solicitor's statements because, after the bench conference, on reply the solicitor again indirectly referenced Appellant's failure to testify. Later, the solicitor mentioned a curative instruction might be given. However,

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2 *Miranda v. Arizona*, 384 U.S. 436 (1966).

the trial judge saw no error finding the remarks "fairly innocuous" and stating that if there was any prejudice it was cured by his general instruction to the jury regarding the state's burden of proof and Appellant's constitutional right to remain silent and not to testify. These comments are not "fairly innocuous" they are constitutionally impermissible comments on Appellant's exercise of his right to remain silent. In *Moore*, the trial judge repeatedly instructed the jury that the defendant's right to remain silent should not be held against him. Unlike, *Moore*, there was no immediate curative instruction given to the jury in this case. The jury was generally instructed only one-time regarding Appellant's right to remain silent.

The constitutionally impermissible inference the jury may have drawn from the solicitor's closing is Appellant was guilty simply because he chose not to testify. Appellant had the right to a fair trial and these indirect comments to the jury regarding his failure to testify violated that right.

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Pickens County Court of General sessions for a new trial.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of February, 2020.

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 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."

February 3, 2020.

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