

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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JAN 16 2015

SC Court of Appeals

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GONZALES R. WARDLAW,

APPELLANT

APPELLATE CASE NO. 2014-000343

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing the solicitor to make a “golden rule” argument when he asked the jury, “Is this a proper thing to happen in our county?” and telling the jury, “You speak for the people, the community?”

STATEMENT OF THE CASE

During its June 2012, term, a Lexington County grand jury indicted appellant for murder. R. 426-27. On February 10, 2014, appellant was tried before the Honorable Thomas A. Russo, Sr., and a jury. R. 1. Samuel R. Hubbard, III, and David Shawn Graham represented the State. R. 1. Elizabeth C. Fullwood represented appellant. R. 1. The jury convicted appellant. R. 410, ll. 1 – 10. Judge Russo sentenced appellant to life imprisonment. R. 424, ll. 9 – 14. This appeal follows.

ARGUMENT

The trial court erred in allowing the solicitor to make a “golden rule” argument when he asked the jury, “Is this a proper thing to happen in our county?” and telling the jury, “You speak for the people, the community.”

Appellant testified in his own defense. Appellant and the decedent were friends. R. 309, ll. 12 – 13. Appellant had purchased marijuana from the decedent “a couple times.” R. 308, l. 21 – 309, l. 4. On the night of the shooting, appellant called the decedent to arrange a marijuana purchase. R. 310, ll. 12 – 17. Appellant was going to purchase 2 ½ ounces of marijuana, with half an ounce of the purchase consisting of “kush,” which is a more potent and expensive variant of the plant. R. 310, ll. 12 – 23. The decedent was farther up the marijuana distribution chain than appellant and was appellant’s supplier. R. 311, ll. 7 – 12.

Appellant traveled to the Olive Garden restaurant on Harbison Boulevard to meet the decedent. R. 311, ll. 13 – 19. Appellant did not take a weapon. R. 312, ll. 13 – 14. The decedent gave appellant marijuana, but the weight was less than requested and also contained no kush. R. 312, l. 15 – 313, l. 8. Appellant said he did not want it. R. 313, ll. 9 – 10. The decedent told appellant, “No, these your drugs now. I just want my money.” R. 313, ll. 11 – 14. Appellant again attempted to reject the purchase, but the decedent, “pulled out a gun on [appellant] and said, ‘Nigger, I’ll kill your ass.’” R. 313, ll. 15 – 20.

Appellant was afraid for his life. R. 313, ll. 21 – 22. He knew the decedent was about to shoot and kill him. R. 313, ll. 21 – 24. Appellant knew if he ran, the decedent would shoot him in the back. R. 314, ll. 2 – 6. Appellant “reached for the gun to try to

wrestle it away from” the decedent. R. 314, ll. 7 – 11. During the struggle, the “gun just went off.” R. 314, ll. 20 – 24.

Appellant was afraid. R. 315, ll. 19 – 24. He said, “I never been into nothing like that before my life. I just was acting off instinct, and I was just, just pick the stuff up and go and get out of there.” R. 315, ll. 19 – 24. He ran. R. 316, ll. 1 – 5. He threw the gun in the Broad River. R. 316, l. 10 – 317, l. 3.

The forensic evidence showed that the decedent died from a gunshot wound to the chest. R. 195, l. 23 – 196, l. 5. R. 198, ll. 7 – 10. The State’s case largely rested on two pieces of evidence. The first was the testimony from appellant’s stepfather, Lindsey Glover (“Glover”). R. 257, ll. 11 – 13. After the shooting, appellant called Glover and asked him for help getting a motel room for the night because he had a girl with him. R. 260, l. 3 – 261, l. 22. Glover claimed that appellant told him that when he went to purchase marijuana from the decedent, they exchanged words, “so he pulled it out. He said when he pulled it out, [the decedent] reached for it and it went off.” R. 268, ll. 20 – 25. Glover claimed that when he asked appellant why he shot the decedent, appellant replied, “He wasn’t going to let him take nothing from him.” R. 270, ll. 1 – 3. Appellant’s testimony contradicted his stepfather’s version, pointing out that Glover was half-asleep and “didn’t quite hear everything” appellant was saying. R. 319, ll. 14 – 21.

The State’s other piece of evidence was rap lyrics written by appellant. R. 320, ll. 20 – 22. R. 251, ll. 6 – 252, l. 13. On cross-examination, the solicitor attempted to make it seem that the lyrics admitted that appellant had meant to shoot the decedent and bragged about it. R. 346, l. 25 – 358, l. 20. Appellant strenuously rejected the solicitor’s interpretation of his lyrics. R. 346, l. 25 – 358, l. 20. Appellant explained that

the lyrics were just his way of “processing everything that was going on.” R. 347, ll. 2 – 7. Appellant apologized for the vulgarity of the lyrics and admitted that he “should have found a better way to express myself,” but never agreed with the solicitor that the lyrics described the actual circumstances of the shooting. R. 320, l. 20 – 321, l. 5. R. 346, l. 25 – 358, l. 20.

The solicitor made the following closing argument which drew an objection and subsequent ruling from the trial judge:

And, folks, I’m not here to justify selling drugs. It’s wrong. You aren’t here to judge the victim either, though. Who the victim is ultimately doesn’t matter for you. **Your verdict speaks about us. Is this a proper thing to happen in our county?**

MS. FULLWOOD: Objection, Your Honor, Golden rule.

MR. HUBBARD: Absolutely not.

(Whereupon, a bench conference was held off the record, in the presence of the jury, but out of the hearing of the jury.)

THE COURT: Overruled.

MR. HUBBARD: Y’all aren’t here to punish anybody, have mercy on anybody. You aren’t here to judge anybody, but determine the facts. And a verdict is a verdict regardless of who a victim is, regardless of who’s out there in this courtroom right now. **You speak for the people, the community.**

R. 382, l. 18 – 383, l. 10.

Solicitors may not argue that the jury must speak for the community against criminal activity. Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). The State invited the jurors to take sides against criminals as a whole and the argument was not addressed to the evidence in appellant’s case. A solicitor’s argument is bound by rules of fairness and may not be calculated to arouse a juror’s passions or prejudice. Id. at 458, 698 S.E.2d at 566;

State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). A solicitor cannot inject material outside of the evidence or the judge's charge, but must confine himself to the record in the case presented to the jury. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence."); State v. Copeland, 321 S.C. 318, 486 S.E.2d 620 (1996); State v. McAlister, 133 S.C. 99, 130 S.E. 511 (1925) (holding it is improper in closing argument for the State to refer to and comment about facts of other cases to indicate or suggest the same results).

In White, the solicitor told the jury, "Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do?" White at 504, 144 S.E.2d at 482. The Court reversed, holding that the effect of such an argument is to "completely destroy and nullify all sense of impartiality in a case of this kind." Id. at 506, 144 S.E.2d at 482.

The solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This determination requires the Court to look to "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." Bennett v. Angelone, 92 F.3d 1336, 1345-46 (4th Cir. 1996) (internal quotation marks omitted).

The State had last argument. These comments were error and the trial judge overruled appellant's objection; therefore, no curative instruction was given to disregard the inflammatory argument. The solicitor did not just make an isolated remark, but immediately

capitalized on the judge's erroneous ruling and again told the jury that they "speak for the people, the community." R. 383, ll. 5 – 10. In this case where the defendant testified the shooting was in self-defense, the prejudice from the solicitor's golden rule argument likely made the difference between conviction and acquittal. This Court should reverse and grant appellant a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse and grant appellant a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Thomas A. Russo, Circuit Court Judge

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SC Court of Appeals

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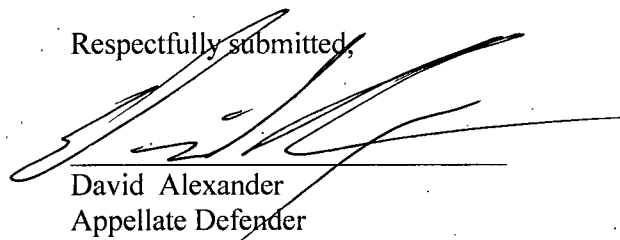
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gonzales R. Wardlaw 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 Thomas A. Russo, which was held on February 14, 2014, 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 Gonzales R. Wardlaw.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of January, 2015.

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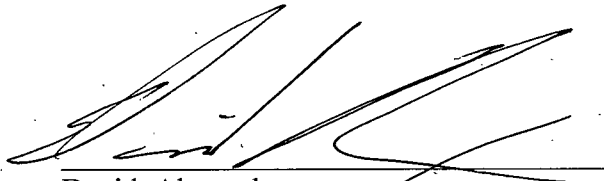
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Trial transcript.

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

January 16th, 2015



David Alexander
Appellate Defender

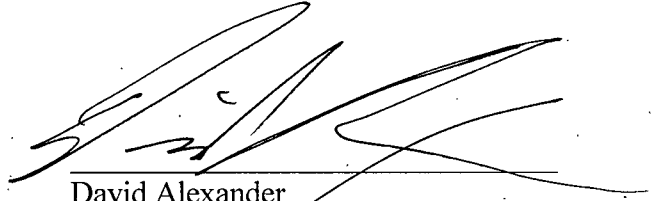
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(803) 734-1343

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."

January 16, 2015



David Alexander
Appellate Defender

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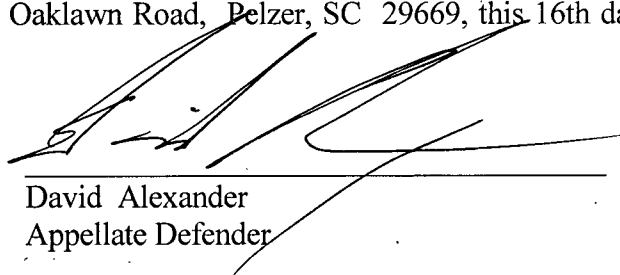
V.

GONZALES R. WARDLAW,

APPELLANT

CERTIFICATE OF SERVICE

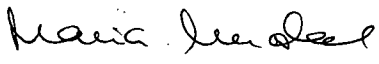
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Gonzales R. Wardlaw, #343782 at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 16th day of January, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of January, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.