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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions
Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-000391

THE STATE,

Respondent,

v.

THOMAS HAROLD SAILORS, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Attorneys should not comment on facts not in evidence. In this case, Sailors was tried jointly for two counts of forgery. Evidence showed Sailors attempted to cash a check at Walmart prior to presenting a forged check at a bank. The court directed a verdict of not guilty on the forgery charge arising from the Walmart incident. Did the trial court err by permitting the solicitor to comment on the Walmart incident in closing?

STATEMENT OF THE CASE

On October 16, 2017, Thomas Sailors presented a payroll check drawn on the account of AAA Union Tree Service at Park Sterling Bank in Union. (R.p.18).

Brenda Keith owned the business and had been a customer at the bank for many years. (R.p.28–30). The check was written in two different color inks and made payable to “cash to Thomas Sailors.” (R.p.19–20). The teller knew Keith and knew she did not make out her checks that way. (R.p.19, line 25). She checked Keith’s signature card on file at the bank and saw the signatures did not match. (R.p.20, lines 5–7). The teller contacted Keith, who confirmed that she did not write the check. (R.p.20–21).

The teller asked Sailors to wait in the lobby for Keith to arrive. Sailors claimed he was going outside to smoke but he got into a truck with another person, later identified as Amy Patrick. (R.p.14). The truck struck another car in the parking lot and Sailors got out and left on foot. (R.p.21).

Keith arrived with her checkbook. The check Sailors attempted to cash was taken out of sequence, with the preceding and subsequent checks still in the book. (R.p.24). The teller observed “trace numbers” on the check suggesting there had been a previous attempt to cash the check. (R.p.26).

Keith testified she was familiar with Sailors because he was related to her sister’s husband, but that she hadn’t seen him in years. (R.p.29–30). She testified she normally kept her checkbook at her sister’s store. (R.p.30). She did not give anyone permission to write the check. (R.p.30). Sailors had never worked for her.

(R.p.31). However, Amy Patrick (the getaway driver) worked for Keith's sister and would have had access to the checkbook. (R.p.33).

Investigator Jerome Beatty was assigned to the case. Through a conversation with another officer, Mark Gregory, he learned Sailors had attempted to cash a check at a Walmart on the previous day. (R.p.40). Gregory testified he was standing in line behind Sailors and had observed a Walmart employee refuse to cash a check he presented. (R.p.47–48). Beatty obtained video surveillance from the Walmart and he and Gregory identified Sailors attempting to cash a check. (R.p.41). The video showed the clerk running the check through a machine before telling Sailors she could not cash the check. (R.p.111, lines 21–23).

A Union County grand jury indicted Sailors for two counts of forgery, one count for presenting the check at the bank and one count for presenting the check at Walmart. He proceeded to jury trial before the Honorable William McKinnon on February 26–27, 2019. At the conclusion of the State's case, Sailors moved for a directed verdict. The trial court granted a directed verdict on the forgery charge arising from the Walmart incident, reasoning that the State did not prove that the check Sailors presented in Walmart was the same forged check he subsequently presented at the bank, and thus had not proved the Walmart incident was a forgery. The State nonetheless argued the Walmart incident showed Sailors acted with fraudulent intent when he presented the check at the bank. Sailors was convicted of the forgery count arising from the incident at the bank and was sentenced to four years' incarceration. This direct appeal follows.

STANDARD OF REVIEW

An appellate court will not disturb a trial court's ruling regarding a solicitor's argument unless there is an abuse of that discretion. Improper comments do not 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. State v. Webb, 389 S.C. 174, 178, 697 S.E.2d 662, 664 (Ct. App. 2010).

ARGUMENT

The solicitor's closing argument properly emphasized the probative value of facts in evidence.

Sailors claims the trial court erred by failing to prohibit the solicitor from mentioning the Walmart incident in her closing argument, alleging this amounted to a comment on facts not in the record. His argument is meritless. The solicitor properly based her argument on facts in evidence. Even though the trial judge granted a directed verdict on the forgery charge arising from the Walmart incident, the incident was still relevant to prove Sailors' criminal intent. Moreover, Sailors never moved for mistrial or to sever the cases, and cannot show prejudice from the comment on properly-admitted evidence of the Walmart incident. This Court should affirm.

A. Issue preservation.

The issue as raised on appeal is not preserved for review. First, Sailors' never objected or moved to prohibit the solicitor from commenting on the Walmart incident. It was the solicitor who raised the issue out of an abundance of caution. In response, the trial court asked defense counsel "what she [thought]," and counsel responded that her "concern is just trying to bolster a case. . . . Trying to bolster it with, you know, this we're saying it happened twice even though it didn't. It might not have happened. We're not sure." (R.p.68). The court responded, "I think I will allow it." The solicitor proposed a jury instruction to the effect that the jury should only consider the evidence as it related to the count relating to the bank incident, and defense counsel responded, "[t]hat is fine." (R.p.70). The defense then

presented its case and no further mention was made of the scope of the State's closing argument. Sailors did not object during the solicitor's closing.

Sailors failed to articulate at trial a valid legal basis why the solicitor should be precluded from mentioning the Walmart incident in her closing argument. Sailors never alleged the Walmart incident equated to propensity or character evidence, as he does in his brief. Nor did he object at any point in the State's closing argument, or move for a mistrial following the trial court's grant of a directed verdict on the Walmart count. Accordingly, the issue is not preserved for review. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999) (explaining the ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial); State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) (explaining "the proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object").

B. The solicitor's closing argument properly emphasized the probative value of facts in evidence.

In his brief, Sailors cites cases prohibiting arguments that include comments on facts not in evidence. See, e.g. State v. Gaines, 283 S.C. 65, 244 S.E.2d 539 (1978). These cases are completely inapposite because the solicitor in this case did not comment on facts not in evidence. Her comments about the Walmart incident were all based on properly admitted evidence.

Furthermore, the facts were relevant. Even though the trial court ultimately directed a verdict of not guilty on the Walmart forgery charge, the incident still had probative value. The State did not offer the Walmart incident as an unrelated

“prior bad act,” but as evidence of a continuous course of conduct leading to the fraudulent presentation of the check at the bank. Sailors’ apparent failed attempt to cash Keith’s check at Walmart tended to show his subsequent attempt to cash the check at the bank was made with fraudulent intent. See State v. Lyle, 125 S.C. 406, 118 S.E. 803, 808 (1923) (holding temporally connected incident of forgery was admissible to establish criminal intent). The solicitor emphasized the prior attempt to cash the check along with other facts—the two-tone writing on the check, Sailors’ hesitation to give the teller his license, and his flight from the bank—to show Sailors’ criminal intent. (R.p.114–15). Furthermore, the Walmart incident provided relevant context and was thus part of the *res gestae* of the crime. Id.

In this way, this case is distinguishable from the cases cited in Sailors’ brief where the State introduced prior uncharged criminal acts without a factual connection to the offense for which the defendant was on trial. Compare State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (finding error in solicitor’s cross-examination concerning uncharged prior arson unconnected to charged crime where there was no “probative evidence linking the appellant to the prior act”). The case cited by Sailors that is most analogous is from out of state—Cole v. State, 356 So. 2d 1307 (Fla. Dist. Ct. App. 1978). In that case, the State tried Cole for three counts of sexual abuse against three victims that occurred on the same day. One of the victims could not identify Cole at trial and the trial court granted a directed verdict on that count, but allowed the prosecutor to argue that the abuse against that victim proved Cole assaulted the remaining two victims. The appellate court held

the prosecutor's argument was improper because the State had not proved Cole was the person who assaulted the third victim. Cole, 356 So. 2d at 1309 ("A necessary predicate for permitting such testimony is a showing that the accused perpetrated the acts sought to be introduced under the rule."). By contrast, in this case there was no question Sailors was the person who attempted to cash a check at Walmart. Sailors admitted this on cross-examination. (R.p.78–79). Even if the State failed to prove the Walmart incident constituted a forgery, there was no question that the event happened. Accordingly, it was relevant and there was no reason to prohibit comment on it.

Sailors' argument—that the trial court should have prevented the solicitor from discussing relevant facts merely because the trial court found the State failed to prove they constituted a separate count of forgery—is not supported by authority. It is not error for the solicitor to emphasize the probative value of facts in evidence. This Court should affirm.

C. Prejudice.

Even if the trial court erred by refusing to prohibit the solicitor from commenting on the Walmart incident, Sailors has failed to show this had any impact on the outcome of the case. See State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (explaining improper comments do not warrant reversal unless they "so infected the trial with unfairness as to make the resulting conviction a denial of due process"). Regardless of the solicitor's comments, the jurors had already heard and seen the actual evidence. Defense counsel did not object when the solicitor questioned Sailors about the Walmart incident in cross-examination.

(R.p.78–79). Both lawyers—including defense counsel—commented on it in closing. (R.p.121–52). Prohibiting the solicitor from discussing the evidence would not have erased it from the jurors’ memories. If Sailors wanted to cure the supposed prejudice caused by evidence of his actions at Walmart, he should have moved to sever the cases at the outset, or for a mistrial after the directed verdict was granted. He did not. Accordingly, he has not shown prejudice resulted from the solicitor’s comments on the facts in evidence. This Court should affirm.

CONCLUSION

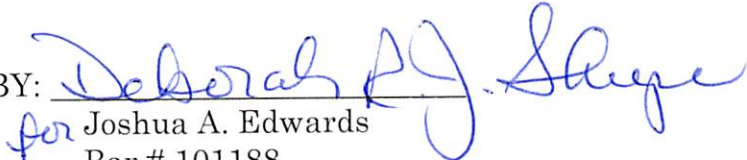
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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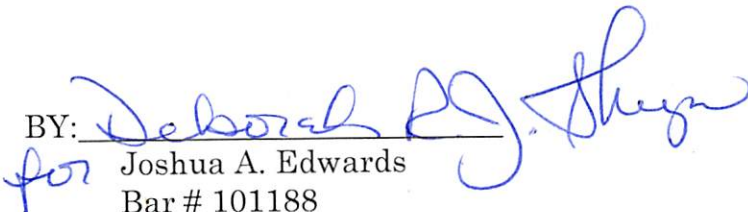
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the 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."

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