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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID LANCE STEADMAN,

Appellant.

Appellate Case No. 2020-000336

FINAL BRIEF OF RESPONDENT

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I. Whether the trial judge erred in failing to grant Appellant's motion for a mistrial where the state's lead investigator testified that Minor had brittle bones and had previously broken both legs after the judge ruled such testimony inadmissible and the unfair prejudice which resulted could not be cured with a curative instruction?

II. Whether the trial judge erred in failing to grant Appellant's motion for a mistrial where the assistant solicitor argued in closing that the jury had a "noble opportunity" to "strike back against injustice" which was improper closing argument and the unfair prejudice could not be cured with a curative instruction?

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. The detective's testimony that Appellant told the detective Victim had brittle bones and other health issues, and she broke both her legs in the past, did not imply malfeasance by anyone, and any prejudice was cured with the trial court's specific instruction to disregard the testimony. Therefore, the trial court did not err in denying the motion for mistrial and Appellant was not prejudiced by the testimony.

II. Appellant failed to provide applicable case law to support the assertion that the prosecutor's closing argument advising the jury of its opportunity to strike back against injustice was improper. The argument was proper and merely called for the jury to administer a just verdict. Nonetheless, the trial court struck the comment and subsequently instructed the jury on their duty to confine their verdict to the evidence presented in the courtroom, so no prejudice resulted from the alleged impropriety during closing argument.

STATEMENT OF THE CASE

A jury convicted Appellant of homicide by child abuse following trial before the Honorable Eugen C. Griffith, Jr., on February 10-14, 2020. Judge Griffith sentenced Appellant to twenty years' imprisonment.

STATEMENT OF FACTS

John McKinley of the Lexington County Fire Service arrived at 9:14 p.m. to Appellant's residence and was led to Victim, later shown to be about four years old, who laid unconscious on the ground with vomit in her mouth. According to the occupants, Victim walked around after eating, fell down, and that was how they found Victim. R. pp. 45-47. McKinley noted Victim's stomach appeared distended. R. pp. 48-49. The occupants told him that was how Victim looked whenever she ate. The person providing the information was a young Hispanic woman – Appellant's wife, Cynthia Lopez. Victim was not breathing and McKinley attempted to clear Victim's airway. EMS personnel performed CPR at the scene and all the way to the hospital. R. pp 49-52. They arrived at Lexington Medical Center at 10:21. McKinley testified rigor had not set in yet. R. pp. 53-55. Zikia Smith, an EMT, testified that EMS was never able to find a heartbeat for Victim. Victim's hair was wet and no rigor had set in on the body. R. pp. 72-74.

When Detective Scott Zylstra arrived, EMS and the fire department were already at the residence. R. p. 77. Upon the emergency personnel's departure, Detective Zylstra asked Appellant what happened. Appellant advised he arrived home between 6:30 and 7:00 p.m. and, "as normal," the children were already in bed. Appellant claimed when Appellant checked on the children, Victim was awake and thirsty, so Appellant brought her water. He then watched television in the living room with the youngest child and nothing was abnormal with Victim, Appellant claimed. He then

later heard his wife scream. R. p. 80. Jumping up to see what happened, he found Victim laying in the hallway looking slightly blue. He attempted CPR. He claimed while performing CPR, Victim upchucked some food. He ran next door to get relatives, returned, and tried more CPR before EMS arrived. R. pp. 81-82.

Chandler Clardy from the Coroner's Office became involved in the investigation that night, arriving at the hospital at 11:25 p.m., only two hours and twenty minutes after the 911 call. Victim showed no signs of rigor mortis at that point. Clardy asked the parents what happened. Cynthia claimed Victim ate beans and rice that night. Victim's clothes were soiled, so she took them off. While she went to the bedroom to retrieve clean clothes for Victim, she heard a thump and found Victim unresponsive. Appellant was present during the conversation and did not contradict Cynthia. He added Victim plays rough with her brothers. Clardy later spoke with Appellant directly. Appellant advised Victim had a big appetite. He arrived home at 7 p.m. that night. He brought Victim water before watching television with his son. R. pp. 93-95. Clardy attended the autopsy. There was noticeable vomit under the chin and Victim's stomach was bloated. She observed bruising on the upper torso and lower back of the body. R. pp. 101-02.

Appellant also spoke with Detective Joseph Andaloro on July 31 and provided a similar story to the detective as the one he told Clardy and Zylstra. R. pp. 180-81. Appellant and his mother provided the detective with some information as to Victim's medical history, including that she was born prematurely at twenty-four weeks and spent the first five months of her life in the hospital. R. p. 182, lines 10-15. Appellant spoke with Cynthia while she was in jail and their conversation was recorded. Appellant told Cynthia he wished he did not listen to her and called the doctor. R. p. 216-17. On cross-examination, Detective Andaloro confirmed tape was placed over Victim's mouth and

the child died of asphyxiation. Some dispute existed over what time the tape was put on Victim's mouth. The detective also confirmed Victim's brother told the forensic interviewer that Cynthia put tape on Victim's mouth. R. p. 220; p. 239.

Following the reception of more information during a forensic interview of Victim's older brother, Sergeant Rawl executed the second search warrant on the residence on August 10. Deputies recovered tape described by the child during the interview. R. p. 126. Sergeant Rawl asked Appellant about the tape, and Appellant admitted his wife used it to restrain Victim in her bed. Sergeant Rawl then read Appellant his Miranda warnings (see Miranda v. Arizona, 384 U.S. 436, 444 (1966)). R. pp. 127-28.

Appellant disclosed he arrived home at 7 p.m., and found Cynthia aggravated. She complained the children were fighting and Victim hit one of her brothers with a light saber. Appellant checked on the children, discovering Victim lay in bed with vomit on her chest. She was taped to the bed. Appellant said Victim breathed slowly and heavily, her eyes were dilated, and her stomach was "really big." Appellant claimed he immediately took off the tape and carried her to the bathroom where Appellant and Cynthia squeezed more vomit out of Victim. He described Victim as lifeless, but breathing slowly and heavily. R. pp. 129-30. Appellant explained he wanted to call 911, but Cynthia said Victim would be alright, so Appellant watched Netflix on his phone in the living room. R. p. 131. His written statement was published to the jury. In the written statement, Appellant claims, "I wanted to call 911 and take her to the hospital. My wife got mad and said no, she's fine, and that I always give in to the kids, especially [Victim]." R. pp. 162-63. According to Appellant, Cynthia called out his name and said Victim was not breathing. Victim appeared pale and Appellant claimed to attempt CPR – vomit came out of Victim's mouth. R. pp. 163-64. Appellant

ran next door and also called 911. R. p. 164. Appellant admitted it took him two hours to call 911 because "I was scared to face the truth." R. p. 165, lines 6-7. Appellant gave a similar statement to Chantay Ravenell with the Department of Social Services on August 14. R. pp. 325-28.

During the first search, law enforcement seized Victim's bed. Inspection of this bed led to the discovery of duct tape on the side railing of the bed. R. p. 147; p. 159. Lieutenant Douglas Novak testified a roll of tape, similar to tape found on Victim's bed, was found on the dryer when the search warrant was executed on August 10. There also were brand new clothes, neatly folded up, placed in a trash can. Law enforcement recovered pieces of tape and a bottle of melatonin placed in the trash can. R. pp. 149-51.

Investigator Brenda Snelgrove was involved in executing the search warrant on August 10. She observed by that point, Victim's bedroom was "completely cleaned out" except for a bucket, a paint pan, and a paint roller. The walls were recently painted and the room was empty of furniture. R. p. 303.

Dr. Janice Edwards was the pathologist who performed the autopsy. Victim had a distended stomach, multiple bruises in the mid-back area, bruises on the head, and a bruise under the chin. There was bloody fluid in the vaginal area and food material deep into the lung tissue. The cause of death was asphyxia due to duct tape over the mouth. R. pp. 283-89.

Appellant called seven witnesses and testified in his own defense. He testified about Victim being born prematurely and at some point, receiving a swallow study. R. pp. 483-84. Appellant also testified he was scared of his wife. R. p. 492. He admitted when he arrived home and checked on the children, he found Victim taped to the bed with her wrists taped to the headboard. She was lying in bed in a diaper and no sheets or a blanket. He claimed there was no tape on Victim's mouth, but

there was vomit. Appellant claimed Victim's eyes were open, but she was not alive. He claimed he lied to police because he was in shock. R. pp. 492-94. Appellant admitted he should have called 911, but also insisted, despite all his previous statements, that Victim was not alive when he discovered her. R. pp. 490-98.

ARGUMENT

I.

The detective's testimony that Appellant told the detective Victim had brittle bones and other health issues, and she broke both her legs in the past, did not imply malfeasance by anyone, and any prejudice was cured with the trial court's specific instruction to disregard the testimony. Therefore, the trial court did not err in denying the motion for mistrial and Appellant was not prejudiced by the testimony.

During trial, a detective testified that Appellant provided him with a medical history and that Appellant told him Victim had brittle bones and broke both legs in the past. The trial court provided a curative instruction to disregard the testimony when Appellant objected. The prejudice therefore was readily cured even though the testimony did not suggest Victim's broken bones resulted from malfeasance.

Prior to trial, Appellant moved to limit any extrinsic acts pursuant to Rule 404(b), SCRE. In response, the prosecution advised, "Other than the injuries that were present at autopsy, which I've already explained it, and the defense is aware of, we do not pursue – we do not intended to pursue any of the prior injuries because we're prohibited by case law for even going there." R. p. 19, lines 17-22. However, the prosecutor advised "if Ms. Zmroczek chooses to go into – I believe there was two broken legs, we just want on the record that that's the defense strategy and they're choosing to go into it." R. p. 19, line 24 – p. 20, line 2.

During trial, Detective Andaloro testified he was speaking with Appellant in his patrol vehicle. During the conversation, Appellant's mother showed up and was present for the remainder of the conversation. Detective Andaloro asked Appellant and his mother about Victim's medical conditions. R. pp. 181-82. At this point, the prosecutor asked, "did he provide you a medical history

for [Victim]?" The detective answered:

> They both did. [Appellant's] mother was beside him, but they advised me that [Victim] was born at twenty-four weeks as a premature baby, weighing in at one pound eight ounces. [Victim] spent the first five months of her life in the hospital. [Victim] has brittle bones and has broken both of her legs at different times. [Victim] had a G-tube.

R. p. 182, lines 10-15.

Appellant objected. The prosecutor admitted, "I didn't advise him not to say anything – " R. p. 182, line 23 – p. 183, p. 4. The prosecutor observed there was no allegation of misconduct in the testimony elicited and suggested the mistake could be cured, especially in conjunction with the testimony about Victim's brittle bones. R. p. 183, lines 3-25. After further discussion, the trial court advised it would offer a curative instruction. R. p. 187, lines 9-16.

When the jury was brought back into court, the trial court instructed the jury:

> All right, folks. Just a brief instruction. The parties discussed a bunch of aspects of this case prior to trial. Y'all's issue to decide and questions of fact to answer are what happened on the day of July 31st as a result of whatever happened that day. Prior medical history is really not relevant, there was some mention of that, but y'all's focus is on the events of July 31st and since.

R. p. 190, lines 1-8. While Appellant did not place an objection on the record concerning the sufficiency of the curative instruction, the trial court did immediately state after the curative instruction, "All right. Your objection is noted for the record. We'll continue on." R. p. 190, lines 9-10.[1]

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[1] "A contemporaneous objection to the sufficiency of a curative charge must be made to preserve the issue for appellate review." State v. Greene, 330 S.C. 551, 556, 499 S.E.2d 817, 822 (Ct. App.

Mistrial case law and standard of review/the potential for prejudice was cured

"A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). "The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

An appropriate curative instruction is generally considered to cure any error. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). On appeal, a denial of a motion for mistrial will not be reversed absent a showing that the trial court abused its discretion. Id. at 483-85, 374 S.E.2d at (1988) (finding curative instruction admonishing the jury to disregard co-defendant's inadmissible testimony that murder defendant was involved in an earlier homicide was sufficient to cure error and mistrial was not warranted).

In the instant case, the testimony elicited as a whole referred only to Victim's medical history and did not allege or suggest the broken bones resulted from malfeasance, but only that Victim was susceptible to injury due to brittle bones. Therefore, there is little likelihood the jury imputed the

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1997).

prior injuries to Appellant. Cf. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) ("While these general observations [concerning closing arguments] in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."). Further, the risk of this occurring was cured by the trial court's direct admonishment to the jury to disregard the testimony. Howard, 296 S.C. at 483-85, 374 S.E.2d at 285-86 (finding a curative instruction admonishing the jury to disregard co-defendant's inadmissible testimony that murder defendant was involved in an earlier homicide was sufficient to cure error and mistrial was not warranted); State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) (Jurors are presumed to follow the trial court's instructions).

Testimony that Victim's bones were brittle and she broke her legs merely suggests she was susceptible to injury and was a victim of an accident. Given the most oblique suggestion, if any, that the injuries resulted from malfeasance, and also considering the trial court's stern curative instruction, Appellant was not prejudiced by the testimony elicited, and the trial court did not abuse its discretion by denying the motion for mistrial.

II.

Appellant failed to provide applicable case law to support the assertion that the prosecutor's closing argument advising the jury of its opportunity to strike back against injustice was improper. The argument was proper and merely called for the jury to administer a just verdict. Nonetheless, the trial court struck the comment and subsequently instructed the jury on their duty to confine their verdict to the evidence presented in the courtroom, so no prejudice resulted from the alleged impropriety during closing argument.

Appellant claims the trial court erred in denying Appellant's motion for mistrial because the prosecutor argued the trial was the jury's opportunity to strike back at injustice. In other words, the prosecutor argued that a guilty verdict would be a just verdict. The closing argument was not improper, and it did not present the danger of prejudice requiring a mistrial. Therefore, the trial court did not err in denying the motion for mistrial.

How the issue arose

The prosecution closed first, followed by the defense. The reply argument presented by the prosecutor concluded as follows:

> [Prosecutor]: That, ladies and gentlemen, is proof beyond a reasonable doubt. Proof that leaves you firmly convinced. That's the only requirement under the law. Not beyond all doubt and every possible doubt as your Honor will charge you, proof beyond a reasonable doubt is proof that leaves you firmly convinced of his inaction, of his neglect.
>
> You have before you the most noble of opportunities. The chance to strike back against injustice and deliver a verdict –
>
> [Defense counsel]: Your Honor
>
> The Court: I think that was an improper comment.
>
> [Defense counsel]: It was absolutely improper.

> [Prosecutor]: Yes, sir, Your Honor.
>
> When considering all the evidence in this case, the testimony of Dr. Lamb, someone who knows, someone who works these cases, and what the evidence at the scene tells us, I submit the correct verdict in this case is guilty of homicide by neglect.
> Thank you.

R. p. 576, line 20 - p. 577, line 14.

Immediately at the conclusion of the argument, the trial court sua sponte advised the jury:

> Again, I'm gonna tell you the lawyers' arguments are just arguments and summaries and that's their job to advocate. Y'all are gonna evaluate the evidence, the testimony, exhibits and whatnot, and so my instruction will be to that end, all right?

R. p. 577, lines 21-25.

Appellant moved for a mistrial, claiming the Supreme Court has been clear such comments were improper and that "I wish I could count on one hand how many times cases have been overturned for comments like that from this circuit, but I can't because its more than that." R. p. 578, lines 13-18. However, Appellant did not offer any cases to the trial court to support his argument. Nonetheless, Appellant claimed, "[T]hey know it's improper." Appellant never explained why the comments were improper, but nonetheless claimed "that bell cannot be un-rung." R. p. 578, lines 19-23.

The Prosecution responded, "And, Your Honor, what I argued was strike back against injustice. That's a line that has been used multiple times and there is no case that would say that is improper, striking back against injustice . . . ." R. p. 579, lines 6-12. The prosecution added, "[I]t is certainly proper to remind the jury that they evaluate what's just and unjust." R. p. 579, lines 14-16. The trial court denied the motion for mistrial, finding its curative instruction was sufficient. R. p.

579, line 20 – p. 580, line 5.

The jury returned to the courtroom for the trial court's general instructions. The trial court advised the jury that Appellant was "clothed in the presumption of innocence and this presumption of innocence continues throughout the case and entitles him to a verdict of not guilty, unless and **until it's dispelled by evidence satisfying you, the jury, beyond a reasonable doubt that he is, in fact, guilty of that offense charged**." R. p. 581, line 20 – p. 582, line 2. The trial court advised the jury they were the finders of fact while the trial court was the instructor of law and the jury must apply the law they are provided regardless of what the trial court or the jury believes the law should be. R. p. 582, lines 11-18. Reiterating they were the finders of the fact, the trial court told the jury, "so when you hear a person's testimony, it [is] . . . your responsibility to evaluate and judge a person's credibility or believability." R. p. 583, lines 4-14.

The trial court reiterated the State bears the burden of proof beyond a reasonable doubt and the Appellant bore "no burden whatsoever as the [Appellant] is presumed innocent." R. p. 584, line 19-23. The trial court told the jury that Appellant was entitled to a verdict of not guilty if the State failed to meet its "high burden." R. p. 585, lines 2-4. The trial court also explained reasonable doubt and the elements of the offense to the jury. R. pp. 318-20; pp. 594-95.

The trial court advised the jury it was their job "to make certain the verdict reached is just." R. p. 595, lines 15-24. The trial court advised the jury that the trial court tries to be fair and impartial to both sides and likewise, the jury must "confine" its verdict to the testimony and evidence heard in the courtroom. R. p. 595, line 25 – p. 596, line 8.

Standard of Review

"The trial judge is vested with a broad discretion in dealing with the propriety of the

argument of the solicitor to the jury." State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). "Once the trial judge has allowed the argument to stand . . . the defendant must bear the burden of demonstrating that the argument in effect denied him a fair determination of his guilt or innocence." Id. "[T]he trial judge is allowed a wide discretion in dealing with the range and propriety of argument of the solicitor to the jury, and ordinarily his rulings on such matters will not be disturbed." State v. Durden, 264 S.C. 86, 91, 212 S.E.2d 587, 590 (1975). "The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent he was denied a fair trial." Id. at 93, 212 S.E.2d at 590-91 (as quoted for the parenthetical to the citation in Fortune v. State, 428 S.C. 545, 556, 837 S.E.2d 37, 43 (2019)).

Appellant failed to cite any applicable cases in his brief

In support of his position, Appellant merely collects cases in which our appellate courts found reversal necessary due to a prosecutor's argument for a variety of reasons, none of which apply to the present case. For instance, Appellant cites State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). In that case, the solicitor, during the sentencing phase of a capital prosecution, draped a black shroud over the victim's crib and staged a mock funeral procession during closing argument. Such an exhibition, described in the concurring opinion as "histrionic gamesmanship," was not present in this case. See id. at 229, 641 S.E.2d at 885 (J. Pleicones concurring). In Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), the prosecutor called the defendant, who was of Muslim faith, a "domestic terrorist." Obviously arguments stoking religious intolerance are not present in the current case. Other cases collected by Appellant deal with vouching on the part of the prosecution or assurances that prior procedural history relieves the jury of some of its burden. Fortune v. State, 428 S.C. 545, 547, 837 S.E.2d 37, 38 (2019) (prosecutor advises the jury he was bound to dismiss a case

if he thought the defendant was innocent but required to not dismiss a case if he believed the defendant was guilty); State v. Thomas, 287 S.C. 411, 412-13, 339 S.E.2d 129, 129 (1986) (finding solicitor's comments that could serve to lessen a jury's sense of responsibility were improper during which the solicitor told the jury the case was already reviewed by a magistrate and a grand jury); State v. Woomer, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981) (in reversing sentence of death, finding prosecutor's statement that he already made the decision for death and asked the jury to make the same decision). In the current case, the prosecutor never vouched or advised the jury of prior determinations that would serve to lessen a jury's responsibility to find guilt beyond a reasonable doubt. To conclude, while Appellant presented cases that happened to find error for various reasons during a prosecutor's opening or closing argument, none of those cases support a finding of error in the instant case on any particular theory that Appellant might be presenting now on appeal.

The prosecutor may appeal to the jury's duty to return the verdict the prosecutor believes it is their duty to return based on the evidence, and may ask for justice.

Far more applicable, but contrary to Appellant's position is State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). In that case, the Supreme Court found the trial court did not abuse its discretion in denying mistrial despite the defendant complaining that the solicitor argued to the jury that what it does in that case would serve as a deterrent to others and that if the jury turned "every man loose simply because you are afraid of convicting an innocent man, you're not doing your job." Id. at 91, 212 S.E.2d at 590. The Supreme Court noted arguments "similar to that of the solicitor in this case" were addressed in C.J.S. as follows:

> So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he

> the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.

Id. at 92, 212 S.E.2d at 590 (quoting 23A C.J.S. Criminal Law § 1107).

In Hicks v. Collins, 384 F.3d 204, 219 (6th Cir. 2004), Hicks complained by way of a habeas petition that the government's closing argument asked the jury to act as the community's conscience by postulating, "it is time you sent a message to the community" and "the people in the community have the right to expect that you will do your duty." The Sixth Circuit Court of Appeals, analyzing through the lens of federal habeas review, observed, "These statements were arguably proper general references to the societal need to punish guilty people . . . ." The court ultimately offered a more forceful conclusion, "These remarks were not misleading, inflammatory, or prejudicial." Id. In the instant case, the prosecutor's metaphorical call to arms is merely a statement that the prosecutor conceived the correct and just verdict to be guilty.

In People v. Horne, 473 N.E.2d 465, 469 (Ill. App. Ct. 1984), a district attorney's comment that "you the jury" stood between the defendant and "the streets" where the defendant could "reek more havoc on today's society" was not improper because "[s]uch comments . . . dwelling on the results of crime and urging a fearless administration of the law, are not improper."

Likewise, this Court found the prosecutor's request to the jury to give the victim's wife peace and the victim justice could be viewed as consistent with the prosecutor's duty not merely to convict the defendant but "to see justice done." State v. Rice, 375 S.C. 302, 336, 652 S.E.2d 409, 426 (Ct. App. 2007) *overruled on other grounds by* State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). "Viewed from that perspective, the prosecutor merely asked the jury to do the duty that was already required of them." Id. Striking back against injustice likewise merely reflects an emphatic request for the jury to do its duty to ensure justice either by returning a verdict of guilty if the State proved its case beyond a reasonable doubt, or by returning a verdict of not guilty to avoid the danger of convicting an innocent man – which of course would be another form of injustice.

Ultimately, the prosecutor's statement was not even objectionable, even though defense counsel objected and it was sustained. However, following the trial court's admonishment, the prosecutor verbally assented to the ruling before the jury and concluded argument shortly afterwards. Therefore, immediately on the heels of the objection, the trial court directed a curative instruction to the jury reminding them that they were tasked with evaluating the evidence. Accordingly, the trial court did not abuse its discretion in denying the motion for mistrial.

Further, the alleged improper argument did not prejudice Appellant. "An appellate court must review the argument in the context of the entire record." State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct. App. 2009) (citation omitted). "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." Id. (citation and internal quotation marks omitted). In Goodwin, this Court found the trial judge's instructions on the law used to determine the voluntariness of a defendant's statements was sufficient to cure the solicitor's argument that allegedly shifted the burden of proving

the voluntariness of a defendant's statement. Id. at 605-606, 683 S.E.2d at 509-10. By the same token, any impropriety in the prosecutor's statement was ameliorated by the trial court's stern instructions to find Appellant guilty only on evidence establishing guilt beyond a reasonable doubt. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) (Jurors are presumed to follow the trial court's instructions).

More to the point, in Rice, this Court opined that even if the solicitor's request for peace for the victim's wife and justice for the victim was improper, any potential for prejudice was cured by the trial judge's general instructions on (1) the burden of proof beyond a reasonable doubt, (2) the admonishment for the jury to consider only competent evidence admitted at trial, (3) the requirement juror's accept the law as stated by the judge to them, (4) their task of judging the credibility of witnesses, and (5) their duty to decide the effect, value, weight, and truth of the evidence presented. Rice, 375 S.C. at 336, 652 S.E.2d at 426.

In the present case, the trial court likewise (1) instructed the jury on reasonable doubt (R. pp. 581-82; pp. 587-89); (2) advised the jury to consider only evidence presented in the courtroom, disregarding, of course, stricken testimony (R. p. 596; p. 601); (3) required the jury to accept the law as the trial court stated (R. p. 582, lines 11-18); (4) tasked the jury with judging the credibility of witnesses (R. p. 583); and (5) advised the jury of the duty to weigh the evidence (R. p. 583; p. 585). Additionally, the trial court's instructions advised the jury to be fair and impartial, and ensure it reached a just verdict. R. pp. 595-96.

Therefore, the trial court did not abuse its discretion by denying the mistrial and Appellant was not prejudiced by the alleged improper argument. The conviction and sentence should be affirmed.

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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Appellate Case No. 2020-000336

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."

Respectfully submitted,

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