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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Jocelyn J. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN ART LINCOLN,

APPELLANT.

APPELLATE CASE NO. 2021-000863

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse her discretion by denying Appellant's motion for a mistrial after the assistant solicitor argued facts not in evidence during her closing argument, specifically that Appellant admitted during his testimony that scales found in the car were his and that these scales were found in the same bag as the drugs, when there was no evidence to support the solicitor's claims, and where Appellant was prejudiced because the evidence presented was purely circumstantial and the state relied on constructive possession to convict Appellant?

STATEMENT OF THE CASE

An Aiken County grand jury indicted Appellant on December 7, 2020 for possession with intent to distribute cocaine, possession with intent to distribute heroin, trafficking methamphetamine, failure to stop for a blue light, and resisting arrest. R. 231-236. Appellant's case was called to trial on July 22, 2021 before the Honorable Jocelyn Newman, and a jury. R. 1. Solicitor Bill Weeks and Assistant Solicitor Ashley Hammack represented the state. R. 1. Suzanne Hayes and Barry Thompson represented Appellant. R. 1.

On July 23, 2021, the trial judge directed a verdict for resisting arrest. R. 160, l. 4 – 162, l. 24. The jury subsequently acquitted Appellant of failure to stop for a blue light. However, the jury found Appellant guilty of possession with intent to distribute cocaine, possession with intent to distribute heroin, and trafficking methamphetamine. R. 220, l. 9 – 221, l. 16. He was sentenced to thirty years for each offense to be served concurrently. R. 228, ll. 19-24.

This appeal follows.

STATEMENT OF FACTS

On the night of February 26, 2020, Sergeant Brandon Knight with the Aiken County Sheriff's Office was stationed on Interstate 20 Eastbound at the 25 mile marker. R. 41, l. 24 – 42, l. 9. He was parked perpendicular to the roadway. R. 42, ll. 14-15. Sometime before midnight, Knight observed a white Dodge Durango "cross [his] view." R. 42, ll. 10-13; R. 49, ll. 7-12. The tint on the windows was so dark Knight could not "see a silhouette of anybody in the vehicle." R. 42, ll. 10-13. Suspecting the window tint was darker than permitted by law, Knight pulled out behind the vehicle with the intent of stopping the car. The Durango switched lanes from the fast lane to the slow lane "without signaling" and "reduced speed drastically." R. 43, ll. 1-5. Knight "ran the tag" and "initiated [his] blue lights." R. 43, ll. 6-8. The Durango did not stop. Knight turned on his sirens. The vehicle still did not stop. R. 43, ll. 11-14.

The Durango exited the interstate at Exit 29 onto Wire Road. R. 43, ll. 15-19. The driver gave no indication he was going to stop. R. 43, ll. 20-23. Knight advised dispatch and the Highway Patrol that the vehicle was not stopping. R. 43, l. 25 – 44, l. 5. A trooper with the Highway Patrol was parked at Exit 29 and temporarily "took over the pursuit." R. 44, ll. 1-8. Sergeant Frances Palmer also responded. Palmer was certified to use the Pursuit Intervention Technique (PIT). R. 67, ll. 13-15. Palmer explained that when using the technique, the front of his car, which is equipped with a specialized bumper, "pushes the rear of the subject vehicle into a controlled spin, ending most pursuits." R. 44, ll. 2-21; R. 67, ll. 13-25. When Sergeant Palmer caught up to the Durango, he took over "lead of the pursuit." R. 44, ll. 13-14; R. 68, ll. 1-6. Palmer ultimately did not perform the "PIT maneuver" during the chase because the "conditions" were never safe to do so. R. 50, l. 22 – 51, l. 5; R. 71, l. 21 – 72, l. 20.

Law enforcement pursued the vehicle for thirty miles reaching speeds up to ninety miles per hour. R. 50, l. 9-10; R. 51, l. 9; R. 73, ll. 18-21; R. 78, ll. 1-8. During the pursuit, the officers did not know who was driving the car or how many people were inside. R. 45, ll. 19-22. Eventually, the Durango pulled off into a "plowed cornfield" in a rural part of Aiken County. R. 46, ll. 9-10; R. 47, ll. 12-24; R. 74, ll. 6-9. The field was "saturated" with water because there had been "a lot of rain." R. 79, ll. 10-16. Several law enforcement vehicles, including Sergeant Knight's, got stuck in the field after they attempted to follow the Durango. R. 47, ll. 16-19. Once his car became stuck, Knight ran to the Durango, which had stopped near the back right corner of the field. The driver's door of the Durango was open and no one was inside. R. 47, l. 20 – 48, l. 7. The driver had fled. Knight observed shoes on the ground and footprints leading to the wood line. R. 49, ll. 22-23. He claimed "the vehicle was so full of stuff" on the front and rear passenger seats that no one else could have fit in the car besides the driver. R. 49, ll. 18-21.

Knight called the "Aiken County tracking team to come to the scene." R. 49, ll. 24-25. The tracking team used bloodhounds to try to locate the driver of the Durango, but was unsuccessful. R. 50, ll. 1-6. While the tracking team looked for the driver, Knight searched the Durango in the cornfield. The vehicle was never processed and no photographs were taken. Knight claimed he found "a bag" on the *front* passenger seat with narcotics inside. R. 51, ll. 12-20 (emphasis added). He further claimed he found scales "*in the front* passenger seat of the vehicle with the narcotics" and Ziplock bags "in the vehicle along with the narcotics." R. 53, ll. 9-20 (emphasis added); R. 54, ll. 19-21. Knight was not more specific as to where the drugs, scales, and plastic bags were allegedly found and, again, no photographs were taken to show where the items were located in the car. He also did not describe the bag in which the drugs were allegedly found. Significantly, later during cross-examination, Knight claimed he found

the drugs "in the passenger seat *in the back*" contradicting his earlier testimony. R. 62, ll. 12-19 (emphasis added).

The drugs were later identified as 49.1 grams of methamphetamine, 1.56 grams of cocaine, and 1.49 grams of heroin. R. 110, l. 14 – 115, l. 16.

Appellant did not dispute that the Durango was his car. It was registered to Appellant and there was mail addressed to Appellant inside as well as two prescription drug bottles with Appellant's name on them. R. 51, ll. 17-20; R. 53, ll. 9-11; R. 54, ll. 9-15; R. 56, ll. 7-11.

After the tracking team failed to locate the driver, Sergeants Knight, Palmer, and Blackwater roamed the area searching for the suspect. They searched the woods and walked along the entire length of Anderson Road, which was the road on the other side of the wood line. R. 57, ll. 10-23. They cleared all the buildings on that road, but also did not locate the driver. R. 75, ll. 26-23.

Sometime between 5:00 and 5:30 in the morning on February 27, 2020, Colt Woody, a peanut and corn farmer who lived on Anderson Road, woke to find a man, later identified as Appellant, sitting on the steps of his carport. R. 81, l. 8 – 83, l. 16; R. 97, ll. 4-16. Woody called the police. R. 83, ll. 21-24. A patrol officer with the Aiken County Sheriff's Office responded to the home and found Appellant sitting on the steps. R. 90, ll. 1-5. Appellant's hands and arms were inside his shirt. His face was also tucked inside his shirt. He was wet and dirty and appeared to be cold. R. 90, l. 6 – 91, l. 6. The officer claimed Appellant refused to show his hands when ordered. Appellant merely waved his fingers through the neck hole of his shirt. R. 91, ll. 7-21. Consequently, the officer and another deputy who responded, forced Appellant to the ground and tased him twice allegedly in an effort to gain control of his hands and arms. R. 91, l. 22 – 95, l. 24.

Law enforcement ultimately charged Appellant with resisting arrest. The underlying offense was supposedly disorderly conduct. R. 98, l. 12 – 99, l. 3. The trial judge directed a verdict for resisting arrest after finding Appellant's conduct did not constitute disorderly conduct and therefore there was no lawful arrest to resist. R. 160, l. 11 – 162, l. 24.

Appellant testified in his defense. He explained that he was in the process of moving and most of his personal belongings were in his car as a result. R. 128, ll. 2-9. Before leaving town, Appellant stopped at his nephew's house to see if his nephew wanted to ride with him to his new place. R. 129, ll. 3-8. Appellant's nephew, while an adult, lived with his mother. When Appellant arrived at his nephew's mobile home, he needed to use the bathroom. However, because of the lateness of the hour, Appellant did not want to go inside and disturb his nephew's mother. R. 129, l. 9 – 130, l. 5. Consequently, after parking his car in the driveway, Appellant walked several feet away to urinate outside. R. 130, l. 9 – 131, l. 1. While he was going to the bathroom, Appellant noticed the lights on the trees were moving and turned around. He saw his car backing out of the driveway. R. 131, ll. 1-10. Appellant assumed at the time that his nephew was playing a joke on him. R. 131, ll. 11-23.

Appellant waited about ten or fifteen minutes for his nephew to return with his car, but he never did. R. 132, l. 19 – 133, l. 1. Appellant then walked to the main road. R. 133, ll. 13-22. He had his tablet with him. He had been using it earlier to control the music in his car. Appellant was trying to use a feature on his tablet to track his phone, which was still in his car, but he did not have access to Wi-Fi. R. 133, l. 23 – 135, l. 21. Once out on the main road near his nephew's house, Appellant was able to flag down a car. The driver of the car allowed Appellant to use the Wi-Fi hotspot on her phone to access the internet. Appellant was finally able to locate his car. The good Samaritan agreed to give Appellant a ride to where his tablet

said his car was located. She dropped him off in the general area where his tablet showed his car to be. R. 135, l. 22 – 137, l. 24. Appellant walked for hours, but was never able to find his car. R. 138, l. 4 – 140, l. 2. He eventually saw a house that had a light on under the carport. He approached the house to obtain help from the homeowners. No one answered the door when he knocked so Appellant sat down to wait. He was "balled up" because it was very cold outside. R. 140, l. 3 – 141, l. 11. Appellant testified that he initially did not cooperate with the police because they were treating him like a criminal when he was really a victim. R. 143, ll. 12-25.

Appellant denied the drugs found in the car were his. The drugs were not in his car when he arrived at his nephew's house. R. 143, ll. 2-8. He said the police never questioned him and conducted zero investigation. R. 144, ll. 1-6.

STANDARD OF REVIEW

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Mazique, 419 S.C. 282, 296, 797 S.E.2d 730, 737 (Ct. App. 2016) (quoting Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)) (internal quotation marks omitted). "[I]mproper comments do not require reversal if they are not prejudicial to the defendant." Id. (quoting State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003)) (alternation in original) (internal quotation marks omitted). "On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Id. (quoting Rudd, 355 S.C. at 550, 586 S.E.2d at 157) (internal quotation marks omitted).

ARGUMENT

The trial judge abused her discretion by denying Appellant's motion for a mistrial after the assistant solicitor argued facts not in evidence during her closing argument, specifically that Appellant admitted during his testimony that scales found in the car were his and that these scales were found in the same bag as the drugs, when there was no evidence to support the solicitor's claims, and where Appellant was prejudiced because the evidence presented was purely circumstantial and the state relied on constructive possession to convict Appellant.

Relevant Facts

During her closing argument before the jury, the assistant solicitor argued, "And, **importantly*, in that bag in the front passenger seat, is scales***. **He [Appellant] answered Solicitor Weeks on cross-examination, Yeah, it's possible I left my scales in my truck**. These don't measure out hamburger meat or chicken." R. 173, ll. 20-24 (emphasis added). She later continued, "But when you're thinking about possession with intent to distribute or trafficking, you don't have to just consider weight. You can consider how the drugs were packaged and you can consider what else was with them. In this case, these drugs were found in a bookbag in the Defendant's car in the passenger seat. **But that bookbag didn't just have drugs in it. That bookbag had these scales that are commonly used to weigh drugs**, to weigh drugs, to measure out how much you're going to sell." R. 184, l. 14 – 185, l. 16 (emphasis added). The solicitor subsequently exclaimed, "Everything else in the car is his, but not this. **These scales are his that he left in his truck*, that were found in the same bag as his drugs*. So the scales are his, but the drugs aren't?**" R. 187, ll. 2-5 (emphasis added).

Defense counsel ultimately interrupted the assistant solicitor and informed the judge that he had an objection and a matter of law that needed to be addressed outside the presence of the

jury. R. 187, ll. 10-12. Once the jury was excused, counsel asserted that the solicitor was arguing facts not in evidence. Specifically, he argued there was no testimony that the scales were found on the passenger seat of Appellant's car. Evidence the scales were "right there with the drugs" would be "very damning" to Appellant and "critical" to the state's case. However, counsel maintained such evidence was not presented during trial. Consequently, he moved to a mistrial. R. 187, l. 13 – 188, l. 11.

The assistant solicitor claimed her recollection was that Sergeant Knight testified there was a bookbag on the passenger seat that contained both the scales and the drugs. R. 188, ll. 13-17; R. 189, ll. 5-8. She further maintained that while Appellant did not testify as to the location of the scales in the car, he did admit that they were his. Specifically, she asserted, "Mr. Weeks [the solicitor] asked him [Appellant] a two part question. A, are these your scales; and B, were they in your truck? He said, Yes, they are my scales and it's possible they could have been in my truck." R. 188, l. 25 – 189, l. 4. She further argued that the judge would later instruct the jury that arguments of counsel are not evidence and the jurors must rely on their own recollection of the testimony. R. 188, ll. 21-24.

Defense counsel argued the dispute would be "easy" to "resolve" if the court reporter looked back at the testimony. R. 189, ll. 13-15. He stated, "I would argue that unless the officer testified that the scales were found on the passenger seat with the drugs - - because the argument was that they were actually in a bag with the drugs. Unless there's testimony to that effect, then the argument that the scales were physically right there with the drugs, I would tell you that as a juror, I don't know that I would be able to overcome anything like that. I don't think there's any jury instruction to fix that. And I would ask for a mistrial." R. 189, ll. 16-24.

The judge merely said, "Let's go off the record briefly." R. 190, l. 24. A recess was then taken. R. 190, l. 25. When the record continued, the judge immediately asked for the jury and, once the jury entered the courtroom, the state's closing argument resumed. R. 191, ll. 1-6. What occurred during the remainder of the time the jury was out of the courtroom was never put on the record.

Discussion

The trial judge abused her discretion by denying Appellant's motion for a mistrial after the assistant solicitor argued in closing that Appellant admitted during his testimony that scales found in the car were his and that these scales were found in the same bag as the drugs, when there was no evidence to support the solicitor's claims. Appellant was prejudiced because the evidence against Appellant was purely circumstantial and the state relied on constructive possession to convict him.

"A solicitor may not rely on statements not in evidence during closing argument." State v. Webb, 389 S.C. 174, 181, 697 S.E.2d 662, 666 (Ct. App. 2010) (quoting State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997)) (internal quotation marks omitted). "Arguments must be confined to evidence in the record (and reasonable inferences therefrom), although failure to do so will not automatically result in reversal." Id. (quoting Huggins, 325 S.C. at 107, 481 S.E.2d at 116) (internal quotation marks omitted); See State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.").

In State v. Cannon, 229 S.C. 614, 618, 93 S.E.2d 889, 891 (1956), our Supreme Court exclaimed, "The rule that it is the duty of the prosecuting attorney to always treat the defendant in an impartial manner applies to his argument to the jury, and he should at all times confine himself to the evidence adduced in the trial. 'It is most certainly proper, especially in criminal cases, that counsel, in addressing the jury, should keep themselves strictly within the record. This rule is essential, and must be enforced.'" Id. (quoting State v. McDonald, 184 S.C. 290, 192 S.E. 365, 370 (1937)).

Sergeant Knight, who was the only witness to testify about where the drugs and scales were allegedly located inside Appellant's car, claimed he found "a bag" on the front passenger seat with the drugs inside. R. 51, ll. 12-20. He further claimed he found scales "in the front passenger seat of the vehicle with the narcotics." R. 53, ll. 9-20. However, not once did Knight say the scales were found in the same bag as the drugs, which is what the assistant solicitor argued during closing. Knight merely maintained that the scales were on the same seat as the drugs. Significantly, Knight later contradicted himself and claimed he found the drugs "in the passenger seat *in the back*." R. 62, ll. 12-19 (emphasis added). For whatever reason, no photographs were taken during the search of Appellant's car to show where the items were located in the vehicle, which would have resolved any discrepancy.

Moreover, Appellant never testified that the scales were his as the solicitor argued. Instead, the record shows that when questioned by the state Appellant said he "assumed" the scales were in the vehicle since Sergeant Knight maintained they were and that it is possible he (Appellant) put the scales in the vehicle. R. 148, ll. 5-9.

The assistant solicitor's misrepresentation of the record during her closing argument was unfairly prejudicial to Appellant and denied him a fair trial. The evidence against Appellant was

far from overwhelming. See Mazique, 419 S.C. at 296, 797 S.E.2d at 737 (On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including . . . whether there is overwhelming evidence of the defendant's guilt."). The state relied solely on circumstantial evidence and constructive possession to convict Appellant. Significantly, the jury acquitted Appellant of failure to stop for a blue light demonstrating the state did not prove beyond a reasonable doubt that Appellant was the driver of the vehicle that night. Additionally, the judge failed to instruct the jury during her charge on the law that the closing arguments of counsel are not evidence. Consequently, the judge's instructions could not possibly have cured the improper argument made by the solicitor in closing. See Mazique, 419 S.C. at 296, 797 S.E.2d at 737 (On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument . . ."). While the judge told the jury during her opening remarks that "[w]hat the attorneys tell you during their *opening statement* is not evidence in this case," she did not similarly instruct the jury during her charge on the law that the arguments of counsel during trial, or more specifically closing, are not evidence. See R. 29, ll. 12-17.

Respectfully, because Appellant was denied due process of law as a result of the assistant solicitor's improper closing argument, in which she clearly argued facts not in evidence in order to obtain a conviction in this purely circumstantial evidence case, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of March, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Jocelyn J. Newman, Circuit Court Judge

THE STATE,

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V.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jonathan A. Lincoln states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial, which was held on July 22-23, 2021 before the Honorable Jocelyn J. Newman, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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, she asks the Court to relieve her as counsel for Jonathan A. Lincoln.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of March, 2022.

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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) Complete Trial Transcript Dated July 22-23, 2021;
(2) State's Exhibit No. 1 (Knight Dash Cam);
(3) State's Exhibit No. 12 (Palmer Dash Cam);
(4) True-Billed Indictments;
(5) Sentence Sheets.

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

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

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ATTORNEY FOR APPELLANT

March 2, 2022

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."

s/ Lara M. Caudy
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