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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JEFFREY S. OWENS,

APPELLANT

APPELLATE CASE NO. 2021-000812

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it denied Appellant's motion for a new trial after the assistant attorney general made comments during his closing argument that were calculated to inflame the passions and prejudices of the jury where the trial court did not provide a curative instruction to the jury to disregard the state's prejudicial remarks?

STATEMENT OF THE CASE

On January 28, 2020, the state filed a petition to have Appellant involuntarily committed as a sexually violent predator ("SVP") pursuant to S.C. Code Ann §§ 44-48-90 -100. R. *. On July 19 – 20, 2021, in Spartanburg County, Appellant proceeded to an SVP trial before the Honorable Grace Gilchrist Knie, and a jury. Tr. 1. Christopher S. Runyun represented the state. Id. Don Thompson represented Appellant. Id.

The jury found that Appellant was an SVP. Tr. 310, ll. 1 – 11. In an order filed on July 20, 2021, Judge Knie committed Appellant to the custody of the South Carolina Department of Mental Health. R.*.

This appeal follows.

STANDARD OF REVIEW

"While it is true that the trial judge has very broad discretion in the conduct of trial, the rule does make exception for 'flagrant cases and where prejudice clearly appears.'" S.C. State Highway Dep't v. Nasim, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). "The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion." State v. King, 349 S.C. 142, 160, 561 S.E.2d 640, 659 (Ct. App. 2002) (citing State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996)). "The appellate tribunal will not disturb the trial court's ruling regarding closing argument unless there is an abuse of that discretion." King, 349 S.C. at 160, 561 S.E.2d at 659 (citing State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981)).

"A review of a solicitor's closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Von Dohlen v. State, 360 S.C. 598, 609 – 10, 602 S.E.2d 738, 744 (2004) (citing State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990)). However, "the [solicitor's] argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

ARGUMENT

The trial court erred when it denied Appellant's motion for a new trial after the assistant attorney general made comments during his closing argument that were calculated to inflame the passions and prejudices of the jury where the trial court did not provide a curative instruction to the jury to disregard the state's prejudicial remarks.

Relevant Facts

At Appellant's SVP trial, the state presented testimony from Dr. Marie Gehle in its effort to show Appellant needed to be involuntarily committed to the custody of the South Carolina Department of Mental Health's custody as an SVP pursuant to S.C. Code Ann. §§ 44-48-90 -100. Tr. 71, l. 16. Dr. Gehle was admitted as an expert in forensic sex offender evaluations. Tr. 76, l. 5 – 77, l. 18.

Gehle made an in-court identification of Appellant as the patient she evaluated to determine if he "has a mental abnormality or a personality disorder that makes him likely to engage in acts of sexual violence." Tr. 78, ll. 15 – 22; Tr. 80, l. 14 – 22. Gehle testified that Appellant consented to the evaluation. Tr. 80, ll. 12 – 13.

Gehle relied on Appellant's prior criminal record and psychological evaluations in making her assessment. Tr. 81, l. 22 – 84, l. 12. Appellant was convicted of prior[1] "sexually violent offenses." Tr. 92, ll. 9 – 12. Gehle also took into account charges against Appellant for which he was never convicted. Tr. 92, l. 16 – 93, l. 16.

[1] The qualifying convictions used in the state's petition to have Appellant tried as an SVP were: a conviction in 2004 for criminal sexual conduct in the third degree and a 2006 conviction for criminal sexual conduct in the second degree. R. *. The state also cited other prior convictions that were not sexual in nature. R.*.

Gehle further considered Appellant's "static" and "dynamic" risk factors. The static risk factors included: age, offense history, violent offenses, victim characteristics, and the relationship to the victim. Tr. 137, l. 20 – 142, l. 13. The dynamic risk factors included: sexual preoccupation, sexualized violence, multiple paraphilias, lack of emotionally intimate relationships, lifestyle impulsiveness, poor problem solving, resistance to rules and supervision. Tr. 149, l. 10 – 156, l. 8.

Ancillary considerations also affected Gehle's evaluation. Gehle stated that because Appellant did not complete sexual offender classes while on probation, and while incarcerated, he was more likely to reoffend such that he should be involuntarily committed as an SVP. Tr. 113, l. 13--115, l. 7. Gehle also stated Appellant had an alcohol and cocaine problem that, while not a cause of Appellant's purported mental abnormality, exacerbated his likelihood to reoffend. Tr. 115, l. 10 – 117, l. 6. Furthermore, Gehle claimed that Appellant was at higher risk for reoffending because he never admitted to committing the sexual crimes for which he was convicted. Tr. 158, ll. 2 – 15.

Based on her examination, Gehle diagnosed Appellant with the paraphilic disorder "biastophilia." Tr. 130, l. 21 – 131, l. 10; Tr. 158, l. 25 – 159, l. 2. "Paraphilic disorder" was defined as "any intense or persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature consenting human partners." Tr. 129, ll. 14 – 21. "Biastophilia" was defined as "a specific deviant sexual interest… in coercive sexual acts with non-consenting persons." Tr. 133, ll. 22 – 25. Gehle concluded Appellant had a brain abnormality that made him likely to reoffend such that he needed to be involuntarily committed to the custody of the South Carolina Department of Mental Health pursuant to the SVP Act. Tr. 158, l. 22 – 159, l. 25; S.C. Code Ann. §§ 44-48-90 -100.

Defense counsel cross examined Gehle on the ambiguity of the dynamic factors for reoffending and what "likely" to reoffend meant in the context of the static factors. Gehle admitted that since 2006 Appellant did not reoffend and had no disciplinary incidents while incarcerated. Tr. 163, ll. 4 – 18. When pressed by defense counsel, Gehle explained her opinion that Appellant was "likely" to reoffend was not a guarantee that he would reoffend. Tr. 172, ll. 4 – 7. Upon redirect examination Gehle stated that her purpose is not to say Appellant will reoffend with certainty, it is only to show that Appellant had a brain abnormality and that he is "likely to engage in acts of sexual violence" where "likely" means "to such a degree as to pose a menace to the health and safety of others." Tr. 171, l. 23 – 172, l. 7; Tr. 209, l. 18 – 210, l. 7; S.C. Code Ann. § 44-48-30(9).

Gehle used the Static-99 and Static-2002R tests as part of her evaluation of Appellant's static factors for reoffending. Tr. 140, l. 6 – 142, l. 3; Tr. 142, l. 19 – 143, l. 6. Appellant scored a seven and an eight on the two tests respectively, which Gehle characterized as being "in the group that is likely [to reoffend]." Tr. 178, l. 23 – 179, l. 21; Tr. 188, l. 18 – 189, l. 10. Defense counsel pointed out that, despite Gehle's characterization that Appellant's scores showed he was likely to reoffend, Appellant only presented a 27.7% and a 34.3% chance of reoffending respectively. Tr. 170, l. 25 – 171, l. 12; Tr. 178, l. 23 – 179, l. 21; Tr. 188, l. 18 – 189, l. 10. Defense counsel pointed out that meant, according to the Static-99 and Static-2002R, there was a 72.3% and a 65.7% likelihood that Appellant would not reoffend. Tr. 178, l. 23 – 179, l. 21; Tr. 188, l. 18 – 189, l. 10.

Appellant testified at his SVP trial to rebut several of the reasons Gehle gave to justify her determination that Appellant had a mental abnormality that meant he needed to be involuntarily committed. Appellant explained that he was incarcerated at the McCormick facility, which did not offer sexual offender classes. Tr. 217, ll. 7 – 17; Tr. 254, ll. 11 – 21. Accordingly, Appellant did

not refuse to complete a sexual offender treatment program while incarcerated; rather, Appellant did not have the option to participate in the program. Evincing his desire to change his life, Appellant did take other classes that were available at the facility. Tr. 217, l. 18 – 218, l. 11.

Appellant also explained that while he was on probation he did not refuse to complete the sex offender treatment program, but was unable to complete the program because it conflicted with his work schedule and his probation officer assured him it was okay to postpone the treatment to a later date. Tr. 224, l. 9 – 225, l. 16; Tr. 231, l. 5 – 236, l. 22. Thus, Appellant's testimony undermined Gehle's claim that his inability to complete the sexual offender program was evidence that he was likely to reoffend.

While Gehle did not testify that Appellant's alleged paraphilic disorder was caused by his drug and alcohol dependence, she did say that his substance abuse problem exacerbated his paraphilic disorder. Tr. 115, l. 8 – 117, l. 6. However, Appellant aptly explained that he no longer had alcohol and drug problems. Tr. 218, l. 15 – 219, l. 11. Appellant's drug and alcohol problems were behind him. Appellant had zero citations for alcohol or drug use for the *fifteen years* he was incarcerated, despite drugs and alcohol being "just as available" inside of prison as outside of prison. Tr. 218, l. 15 – 219, l. 11. Accordingly, Appellant showed that he no longer had substance abuse problems which directly undercut Gehle's assertions that those past problems affected his likelihood to reoffend *in the future*.

Appellant grew from his time in SCDC. Tr. 219, l. 22 – 220, l. 21. Appellant had a living plan in place for when he was got out of prison where he was going to live with his dad and stepmom. Tr. 216, l. 15 – 217, l. 3. He also had fulltime employment ready when he got home. Id. Appellant specifically denied enjoying non-consensual sex and explained that his two criminal sexual conduct convictions were the result of botched transactions with prostitutes rather than a

desire for coercive sex. Tr. 245, l. 16 – 249, l. 25. Accordingly, the crux of Appellant's defense was well made; despite what Appellant may have done in the past, he was not a danger to the community in the future such that he did not need to be involuntarily committed.

The assistant attorney general knew he had to change tactics in his closing argument because defense counsel's adept cross-examination effectively used the state's expert witness as an expert witness for the defense when he elicited testimony that Appellant had a 72.3% and 65.8% likelihood of *not reoffending*. Tr. 289, ll.1 – 10. It was with that in mind that the assistant attorney general resorted to inflaming the passions and prejudiced of the jury, "It's one thing to say that 60 percent [of] people don't reoffend. *It's another thing to say, say would you put your loved one with someone who has a 30 percent chance at reoffending*." Id. (emphasis added). He kept pressing on jury's personal fears, "*You know would you do that? Would you put your wife, or your daughter, or your spouse* [with Appellant]?" Id. (emphasis added).

Defense counsel properly objected. Tr. 289, l. 11. The trial court sustained the objection but did not issue a curative instruction. Tr. 289, ll. 15. After the conclusion of the trial, defense counsel moved for a new trial because the state's improper closing argument was prejudicial to Petitioner. Tr. 311, l. 18 – 312, l. 7. The assistant attorney general admitted that it "might've been an error" but claimed that the error from his inflammatory closing argument was harmless. Id. The court denied defense counsel's motion for a new trial without an explanation. Tr. 312, ll. 19 – 20. As a result, the jury's deliberation continued, and Appellant was found to be a sexually violent predator such that he was involuntarily committed. Tr. 310, ll. 1 – 11; R.*.

Discussion

A loved one suffering severe harm is one of the deepest fears every person has. In this case the assistant attorney general played on that fear in his closing argument when he intimated that

the jury's wives and daughters were at risk of being sexually assaulted in the future unless they found Appellant was a sexually violent predator. Tr. 288, l. 17 – 289, l. 10. That closing argument was calculated to inflame the passions and prejudices of the jury as a means to secure Appellant's involuntary commitment on an improper basis. Accordingly, Appellant's commitment as an SVP should be vacated and he should be granted a new trial.

A solicitor's closing argument must not appeal to the personal biases of the jury. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). A closing argument cannot exceed the confines of the evidence in the record and the reasonable inferences that may be drawn from the evidence. Id. Furthermore "[s]olicitors are bound to rules of fairness in their closing arguments," as our Supreme Court explained:

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

As a threshold matter, it is important to point out that the argument here was preserved for review. Defense counsel objected after the state made an improper closing argument that was calculated to "completely destroy and nullify all sense of impartiality" by insinuating Appellant might sexually assault the jury's daughters and wives if he was not involuntarily committed. Tr. 288, l. 17 – 289, l. 10; State v. Gilstrap, 205 S.C. 412, 417 – 18, 32 S.E.2d 163, 165 (1944). Defense counsel's objection was sustained, but no curative instruction was given. Tr. 288, l. 17 – 289, l. 10. The trial proceeded, the jury determined Appellant was an SVP, and defense counsel moved for a new trial, which was denied. Tr. 310, ll. 1 – 11; Tr. 311, l. 18 – 312, l. 7.

Under South Carolina jurisprudence, a post-verdict motion for a new trial preserves for review the issue of whether an improper closing argument prejudiced a defendant's trial. In Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994) Lynch's attorney made a closing argument where he presented hand drawn posters that depicted the opposing party with "all black hair and vaguely oriental features" paying off witnesses and shredding documents. Toyota, at 262 – 63, 442 S.E.2d at 615. The opposing attorney failed to make a contemporaneous objection, but after the verdict made a motion for a new trial on the basis that the closing argument made by Lynch's attorney was improper. Id. Our Supreme Court granted a new trial and held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious inflammatory argument results in clear prejudice." Toyota, at 263, 442 S.E.2d at 615 (citing South Carolina State Highway Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971)).

The rule promulgated from Toyota was that in the face of highly prejudicial closing arguments, a post-verdict motion for a new trial *on its own* was sufficient to render the issue reviewable on appeal. Our Supreme Court held that heightened prejudice existed when inflammatory closing arguments constitute an "abuse of a *party or witness*." See Dial v. Niggel Associates Inc., 333 S.C. 253, 260, 509 S.E.2d 269, 272 (1998) (emphasis added). Accordingly, defense counsel's motion for a new trial in this case, made after the verdict was rendered, preserved for review the issue of whether the state's inflammatory closing argument warranted a new trial because the assistant attorney general's highly prejudicial closing argument abused Appellant, who was *both a party and a witness*. Id.

Since trial counsel properly preserved the issue with the post-trial motion for a new trial, it is necessary to determine if the state's closing argument was improper and, if it was improper, whether the resulting prejudice necessitated a new trial. A closing argument must not inflame the

passions and prejudices of the jury. Vasquez v. State, 388 S.C. 447, 460, 698 S.E.2d 561, 567 (2010). Making the argument that the jury's families would be in danger if they did not convict a defendant squarely fits into the definition of inflaming passions and prejudices of the jury such that the closing argument in this case was wrongful. See State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). Therefore, the sole issue here is whether the prejudice resulting from the assistant attorney general's inflammatory comments necessitated a new trial such that the SVP court erred when it denied defense counsel's motion for a new trial.

In South Carolina State Highway Dept. v. Nasim, the South Carolina State Highway department appealed a judgement for Nasim. Nasim, at 408, 179 S.E.2d at 211. During Nasim's trial, counsel for the highway department did not object Nasim's counsel during closing arguments. Id. Nasim's counsel argued to the jury that the highway department's expert witness was a "quizzling[2] quivaler" who was deliberately lying to "steal property from [Nasim]." Id., at 409 – 10, 179 S.E.2d at 212. After a verdict was entered for Nasim, counsel for the highway department moved for a new trial due to the inflammatory closing argument. Nasim, at 408, 179 S.E.2d at 211.

Our Supreme Court determined that the rule requiring a contemporaneous objection should be waived due to the prejudice resulting from Nasim's counsel giving to the jury his personal opinion on several occasions. Id., at 412 – 13, 179 S.E.2d at 213 – 14. Further the Court held, "whether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made. Here the remarks were so vicious and the likelihood of prejudice so strong that we are persuaded that the

[2] Nasim's counsel explained to the jury that "quizzlers" were people in Germany and France that sided with the Axis during World War Two. Nasim, at 409, 179 S.E.2d at 212.

highway department did not receive a fair and impartial trial which is the inherent right of every litigant." Nasim, at 411–12, 179 S.E.2d 211, 213.

The case of State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965), while in the death penalty context, presented a strikingly similar situation to the circumstances of this case. White was convicted of rape and sentenced to death, but appealed his conviction successfully because of an error in the jury charge. White, at 504, 144 S.E.2d 481. White was retried where he was again convicted and sentenced to death. Id. However, during White's retrial the solicitor made an inflammatory closing argument that closely resembled the state's closing argument in this case. White, at 504, 144 S.E.2d at 481 – 82. White appealed his conviction and death sentence again. White, at 504, 144 S.E.2d 481.

During his closing argument, the solicitor in White insinuated that White would harm the jury's loved ones when he asked the jury if they were comfortable letting White back into Williamsburg County and "let him come into your wife's bedroom or your mother or daughters, any of them?" Id., at 504, 144 S.E2d at 482. The solicitor continued to raise the possibility that the jury's loved ones could be harmed by White, "[The victim] is a daughter, she is a sister, she is a wife. And but for the grace of God that could be your sister, your daughter or your wife." Id.

The Court explained the closing argument in White was of the type that, "tends to completely destroy and nullify all sense of impartiality in a case of this kind. Its logical effect is to *arouse passion and prejudice*." White, at 505 – 506, 144 S.E.2d at 482 (quoting State v. Gilstrap, 205 S.C. 412, 417 – 18, 32 S.E.2d 163, 165 (1944)) (emphasis added). Our Supreme Court then reversed White's conviction and remanded the case for a new trial because "*in asking the jury to determine such issue by relating the circumstances of the case to their loved ones*, the Solicitor

injected into the case considerations foreign to the record and calculated to take from the trial the necessary element of impartiality." White, at 507, 144 S.E.2d at 483 (emphasis added).

In Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004), "Bud" Von Dohlen was convicted of murder and armed robbery and sentenced to death. Von Dohlen, at 602, 602 S.E.2d at 740. Von Dohlen filed a post-conviction relief (PCR) appeal where he alleged, inter alia, his attorneys were ineffective for failing to object to the solicitor's closing argument, during the penalty phase of the trial, that urged the jurors to put themselves in the victim's shoes. Id.

In Von Dohlen, the victim's tennis shoes were entered into evidence, identified by two witnesses, and "the solicitor mentioned [the victim's] shoes four times during closing argument in the guilt phase of the trial." Id., at 608, 602 S.E.2d at 743. Subsequently, during closing arguments in the penalty phase, the solicitor urged the jurors to "put yourself in [the victim's] shoes, size six." Id. Von Dohlen argued that this was a "golden rule argument" that urged the jurors to place themselves in the position of the victim or victim's family. Id., at 609, 602 S.E.2d at 743 – 44. That argument potentially caused the jurors to decide his case "based on passion and prejudice instead of a reasoned, impartial consideration of evidence presented to them." Id.

In its reasoning for holding Von Dohlen's defense counsels provided ineffective assistance of counsel, the Court extensively quoted State v. White, supra. Von Dohlen, at 610, 602 S.E.2d at 744 – 45. The Court stated that although the inflammatory closing argument made in White was not a "golden rule argument" per se, the effect was the same. Id.

Both the closing argument in White and the "golden rule argument" in Von Dohlen "indisputably asks jurors to abandon their impartiality and view the evidence and potential from [the victim's] viewpoint" and, as the Court recognized in White, "jurors should decide... based on

an impartial, rational, and careful evaluation of all the facts and circumstances... presented at trial." Id., at 613, 602 S.E.2d at 746.

However, the ineffective assistance provided by Von Dohlen's defense counsel was harmless[3] because there was overwhelming evidence against Von Dohlen. Id., at 613 – 14, 602 S.E.2d at 746. "Nonetheless, [the Court] strongly disapprove[d] of such arguments because *their only possible use [was] to improperly arouse the passions and prejudices of the jurors, urging them to abandon their sworn role as fair and impartial arbiters of the facts and view the evidence from an improper perspective*." Id., at 614, 602 S.E.2d at 746 (emphasis added).

Whether a closing argument is "so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." Nasim, at 411–12, 179 S.E.2d 211, 213. In Dial, the Court explained that closing arguments that disparage "a party or witness" are highly prejudicial. Dial, at 260, 509 S.E.2d at 272. In this case Appellant was both a party and a witness, further heightening the prejudice resulting from the already inflammatory comments.

In addition to disparaging both a party and a witness, the severe prejudice from the assistant attorney general's improper closing argument was compounded for the same reason as the closing argument in White, supra. Here the state, as it did in White, asked the jury to identify the facts of Appellant's case with their female family members. Tr. 288, l. 17 – 289, l. 10. Thus, in this case, the assistant attorney general putting into the jurors' minds that their family members were in danger of being sexually assaulted in the future if they did not find Appellant was an SVP

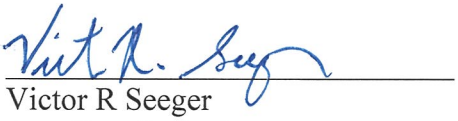
[3] Von Dohlen's death sentence was vacated because his defense counsel failed to adequately prepare and present expert testimony during the penalty phase about Von Dohlen's mental illness. Von Dohlen, at 614, 602 S.E.2d at 746.

"destroyed and nullified" the jury's sense of impartiality. See White, at 505 – 506, 144 S.E.2d at 482 (quoting State v. Gilstrap, 205 S.C. 412, 417 – 18, 32 S.E.2d 163, 165 (1944)).

A reasonable likelihood existed that the assistant attorney general's wrongful, inflammatory closing argument undermined the outcome of Appellant's SVP trial because "in asking the jury to determine such issue by relating the circumstances of the case to their loved ones, the Solicitor injected into the case considerations foreign to the record and calculated to take from the trial the necessary element of impartiality." White, at 507, 144 S.E.2d at 483. Accordingly, the lower court erred when it denied trial counsel's motion for a new trial.

CONCLUSION

By reason of the foregoing arguments, Appellant requests that this Court vacate the order involuntarily committing Appellant to the South Carolina Department of Mental Health pursuant to S.C. Code Ann. § 44-48-100(A) and remand his case to the Spartanburg Court of Common Pleas for a new trial.



Victor R Seeger
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This 11th day of April, 2022.

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APPELLANT

APPELLATE CASE NO. 2021-000812

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Jeffrey S. Owens, at 4546 Broad River Road, Columbia, SC 29210, this 11th day of April, 2022.

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT