Question IV

Did the trial court err failing to require the state to open fully on the law and the facts and then reply to the argument of the defendant?

Summary of Argument

In a trial, the State has the burden of proving the issue. In keeping with this burden, the State should be required to open fully on the law and facts and then only reply to matter brought up by the defense in its closing. The trial court erred in failing to require the state to open fully on the law and facts.

Argument

In South Carolina no Rule of Criminal Procedure address the question of the order of argument to the jury. The long practice of the State opening on the only the law and then closing fully after the defendant has given the closing argument is long on tradition but short on law to support that position. The early practice in South Carolina was for the state to open fully on the law and the facts. In *State v. Atterberry,* 129 S.C. 464, 124 S.C. 648 (1924) the Supreme Court held that the failure to require the state to open fully on the law and facts was reversible error. At that time Circuit Court Rule 59 provided "The party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the points made, and authorities cited by the opposite party."[1] In reversing the conviction the Court said "The defendant moved the court to require the solicitor to make the opening speech to the jury before the defendant's attorney's were required to make their arguments. This was refused. This

[1] Rule 59 in 1924 was part of the Code of Civil Procedure. The concurring opinion by Acting Associate Justice Aycock makes reference to the fact that nothing in the Code of Civil Procedure limits the application to civil cases. The South Carolina Rules of Civil Procedure today does limit their application to civil cases.

was error." *Atterberry*, 129 S.C. ___, 124 S.E. at 651. In his concurring opinion Acting Associate Justice Aycock stated the principle best when he said "It is but fair that the party who has the advantage of the last address to a jury should be required to open and apprise the opposing party of his views as to his entire case." *Id*. at ___, 124 S.E. at 651. As a matter of tradition, the State in South Carolina was required to open fully on the law and the facts.

The more recent tradition developed when the Circuit Court Rules were changed. This change was noted in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). Again the defense counsel requested that the state be required to open fully on the law and the facts. This was denied by the trial judge. The Court noted that since the decision in *Atterberry* Rule 59 of the Circuit Court Rules had been changed to Rule 58 and the rule read "The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." The Court in *Lee* concluded that "It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact." [2] This begun the more recent tradition of requiring the state to open only on the law and not the facts.

Today Rule 43 (j) of the South Carolina Rules of Civil Procedure controls the order of argument in civil cases. This rule now provides that the plaintiff shall have the right to open and close at the trial of the case. The rule then concludes "The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter." With Rule 43(j) of the South Carolina Rules of Civil Procedure, the long practice in civil cases of plaintiff's lawyers "sandbagging" and saving their real argument for their last

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[2] Again this was a change in the Code of Civil Procedure which the court had no problem applying to a criminal case.

argument, came to an end. But the practice, without any support in the law, continues in the general sessions court not based upon law, but upon tradition.

The practice of "sandbagging" in a closing argument was a basis for reversal of a criminal conviction in Delaware. In *Bailey v. State*, 440 A.2d 997 (Del. 1982) the court noted that "Closing argument is 'an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment.'" *id.* at 1004. The court further held "Application of these authorities to the facts at hand comales us to reverse and remand the case for a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial "sandbagging" trial strategy." *Id*.

The majority of states and the federal court require the prosecutor to open fully on the law and the facts. *See*, *e.g.* Fed. Rul Cr. Proc. 29.1; ARK. CODE ANN. 16-89-123; GA. CODE ANN. § 17-8-71; NEV. REV. STAT. ANN 175.141; TENN. RULES OF CRIM. PROC. Rule 29.1; In Re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) *but see*, *Degadillo v. State*, 262 S.W.3d 371 (Tex. Ct. App. (2008). The treatise writers also support the requirement that the state open fully on the law and evidence. *See*, JACOB STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) and 75A AM. JUR. 2D *Trial* § 448 (2010). In revising its rules as to closing argument the Florida Supreme Court noted "The statute provides that in accord with the common law, the prosecuting attorney shall open the closing arguments, defendant or his or her attorney may reply, and the prosecuting attorney may reply in rebuttal." *In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE- FINAL ARGUMENTS*, 957 So.2d at 1166.[3]

South Carolina should break with a tradition that has no support in logic or the

[3] The Florida Supreme Court also noted that forty-seven states follow the common law.

law and require that the State be required to open fully on the law and the facts. The current procedure in South Carolina simply permits the State to legally "sandbag" its argument and not afford the defense the opportunity to reply to new arguments that the State used in its closing.