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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Pickens County

Honorable Alex Kinlaw, Circuit Court Judge

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-0001498

BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

South Carolina Cases

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ISSUE PRESENTED

Whether the Court of Appeals erred in finding unpreserved Petitioner's argument that the trial court erred in allowing the solicitor to argue that the complainant's testimony need not be corroborated pursuant to S.C. Code Ann § 16-3-657 after the trial court found that instructing the jury on that statute was improper, because Petitioner did not object contemporaneously at trial but did object both prior to and after closing arguments and where the trial court ruled on the objections?

STATEMENT OF THE CASE

In May 2012, Petitioner was indicted by the Pickens County Grand Jury for one count of criminal sexual conduct with a minor first degree. App. 460-461. An amended indictment was later true billed during the August 2014 Grand Jury term, revising the time frame[1] in which the allegation was said to have occurred. App. 457-458.

On November 17, 2014, Petitioner proceeded to trial on the amended indictment in front of the Honorable William P. Keesley and a jury. App. 30. Sam Tooker appeared on behalf of the State and Steven Sumner represented Petitioner. Id. After a two-and-a-half-day trial, the jury found Petitioner guilty as indicted. App. 383. Judge Keesely sentenced Petitioner to a term of imprisonment for thirty years. App. 388.

Defense counsel did not file a notice of intent to appeal Petitioner's conviction or sentence. App. 409. On August 1, 2017, Petitioner filed a PCR application alleging, *inter alia*, that trial counsel was ineffective for failing to file a direct appeal. App. 391-408. The State made its return on January 12, 2018. App. 408-415. An amended return and motion to dismiss was filed by the State on February 22, 2018. App. 416-425.

An evidentiary hearing was held before the Honorable Alex Kinlaw, Jr., on February 21, 2019. App. 426. R. Mills Ariail, Jr., represented Petitioner and Kelly Oppenheimer appeared on behalf of the State. Id. Judge Kinlaw's order granting belated appellate review pursuant to White v. State[2] was filed on March 12, 2019. App. 447-455. A brief pursuant to White v. State, and a petition for writ of certiorari were filed on September 20, 2019. Respondent filed an

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1 The original indictment alleged a sexual battery occurred on or about December 16, 2011. The amended indictment provided a date range of January 1, 2010, to January 1, 2012.

2 263 S.C. 110, 208 S.E.2d 35

informal return to the petition for writ of certiorari and a brief of respondent pursuant to White v. State on February 3, 2020.

By order dated February 4, 2020, this Court transferred the matter to the Court of Appeals for consideration. On August 3, 2022, the Court of Appeals granted certiorari and affirmed Petitioner's conviction and sentence in an unpublished[3] opinion. Cone v. State, Op. No. 2022-UP-323 (S.C. Ct. App. filed August 3, 2022), COA Cert. App. 1-3. Petitioner filed a petition for rehearing on August 16, 2022. COA Cert. App. 4-13. The State filed a return to the petition for rehearing on September 8, 2022, and an amended return to the petition for rehearing on September 20, 2022. COA Cert. App. 4-23 The Court of Appeals denied the petition for rehearing on September 22, 2022. COA Cert. App. 24. Petitioner filed a petition for writ of certiorari to the Court of Appeals on October 24, 2022, raising two issues. The State filed a return on December 12, 2022. On May 24, 2023, this Court granted certiorari as to Petitioner's Question 1.

This brief of petitioner follows.

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3 This case was decided without oral argument pursuant to Rule 215, SCACR

STANDARD OF REVIEW

"The trial court has broad discretion when dealing with the propriety of the solicitor's argument..." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." Id. "On appeal, the appellate court will view 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." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 167 (1998). "The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument" Id. "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." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

ARGUMENT

The Court of Appeals erred in finding unpreserved Petitioner's argument that the trial court erred in allowing the solicitor to argue that the complainant's testimony need not be corroborated pursuant to S.C. Code Ann § 16-3-657 after the trial court found that instructing the jury on that statute was improper, because Petitioner did not object contemporaneously at trial but did object both prior to and after closing arguments and where the trial court ruled on the objections.

Relevant Facts

Petitioner met Mr. and Mrs. Miller, the parents of Minor, in the early 2000s through a shared interest in stockcar racing. App. 283, ll. 18; 20-25. The three adults eventually became good friends, with Mr. Miller describing the relationship between himself and Petitioner as "close as brothers." App. 284, ll. 1-4; App. 221, ll. 21. Petitioner spent many weekends overnight at the home of the Millers. App. 178; App. 285.

Over the course of the friendship, a sexual relationship developed between Mrs. Miller, Mr. Miller, and Petitioner. App. 179, ll. 1-8. The three would engage in "threesomes" which typically began with Mrs. Miller and Petitioner engaging in the sex act known as the "sixty-nine" position. App. 179, ll. 18; App. 200, ll. 16-18. The sex acts occurred regularly over the course of six to eight years and either took place in the Miller's master bedroom or the living room of the home. App. 179, ll. 1-8; App. 180, ll. 10-12. None of the bedrooms in the home had doors, but the bedrooms belonging to the children had sheets tacked up over the doorways. App. 194, ll. 1-3 & ll.15-25; App. 195, ll. 6-12.

Shortly before Christmas 2011, Mrs. Miller noticed her youngest daughter playing with a doll in a "sexually inappropriate" manner. App. 183, ll. 10-11. When she asked her youngest

daughter where she had learned this behavior, she indicated from her older sister, Minor. App. 183, ll. 15-17. Mrs. Miller informed Minor there was something she wanted to discuss with her after Christmas and subsequently had a conversation with Minor on January 1, 2012. App. 183, ll. 21-23; App. 184, ll. 6-7. During the conversation, Minor claimed that she had been sexually abused. App. 185, ll. 2-4. Minor repeated the allegation to her father and a family friend, Robert Odom. App. 96-97.

Minor was referred to the Julie Valentine Center to undergo a forensic interview and a medical exam. App. 207. During the forensic interview, Minor alleged that Petitioner would have her sit on top of him facing his feet while she was naked, and his pants and underwear were pulled down. (State's Exhibit 2 – Forensic Interview DVD). Petitioner would then have Minor perform oral sex on him while he "licked her butt." Id. At trial, Minor testified that Petitioner made her "suck" his "private part" but stated that Petitioner did not touch her in any way during the incidents. App. 84, ll. 1-23; App. 86, ll. 1-6. Minor stated this first occurred when she was four or five and stopped when she was nine when she told her mother. App. 85, ll. 4-12. The medical exam did not reveal any acute or chronic changes to Minor's genital area and no sexually transmitted diseases were found. (State's Exhibit 3 – Stipulation regarding report of Dr. Mary Fran Crosswell).

Prior to the start of the presentation of evidence, the trial judge gave a preliminary instruction to the jury panel where he outlined both the juror's duties and his duties. App. 55-65. In explaining his role, he stated,

> The law comes from me. **It's my job to decide what law applies to the case and to tell it to the jury at the end of the trial**...at the end of the case, I'll tell you the law and you will determine the facts...I'm the judge of the law.

App. 57, ll. 7-9; ll. 11-12; ll. 15 (emphasis added).

Towards the end of his opening remarks, the judge admonished the jurors to not do any independent research into the case. He again clarified his role in the proceedings stating,

> Don't go look up the law. One of my favorite expressions is a little knowledge is a dangerous thing. **You have to be able to understand the context, and the law has all kind of nuances and things in it.** And that's why they put me here, to sort through all that. And if I'm wrong, there's a procedure for that. **But I tell you the law.** So don't go look up law.

App. 61, ll. 14-23 (emphasis added).

At trial, Petitioner took the stand in his own defense. App. 282. Petitioner denied the allegations and testified that when he was confronted by Minor's father about the allegations, Petitioner had "no idea what he was talking about." App. 282, ll. 1-3; App. 289, ll. 20-25; App. 290, ll.1-3; App. 291, ll. 1-7. Petitioner also testified to the sexual encounters that occurred at the home, inappropriate images, such as sex scenes, on the television that Minor may have seen, and the amount of time he spent around Minor. App. 286; App. 287-289; App. 290.

At the close of the evidence, the trial court held a charge conference. It inquired whether the State was requesting that the jury be charged the "specific statute that it is not required that the victim's testimony be corroborated." App. 308, l. 20-App. 309, l. 7. The State confirmed it was requested that the trial court charge the jury that pursuant to S.C. Code Ann. § 16-3-657 the testimony of a victim need not be corroborated because the State intended to argue that charge to the jury. App. 309, ll. 1-13. The trial court replied that it "wouldn't stop anybody from arguing the law regardless of whether it's stuff that I repeat that's the law or not." App. 309, ll. 14-16. Counsel Sumner objected to the charge as an improper comment on the facts from the bench. App. 310, ll. 7-10. The trial court stated it would decide overnight whether it would charge the jury with S.C. Code Ann. § 16-3-657, but that it would not stop the State from arguing it to the

jury because "[i]t's the law and it's proper to argue anything that's in the law." App. 310, ll. 15-18.

The following morning, the trial court ruled that it would not charge section 16-3-657, noting in a thoughtful discussion that:

> That instruction has always bothered me and that language there is from charges I've given before... And it bothers me that I'm going to single out one witness and talk about one witness. I tell the jury that they may believe one witness against many or many against one. Which is the same thing... The last couple of times I have not charged this, I believe that's my recollection is I have not charged this, and my intent is not to charge it in this case. But if the state objects and the state request the charge and it's denied. Now, that doesn't stop you from arguing it. It's the law. You can argue it to the jury. You can tie it into what I said earlier about what I am going to charge the jury.

App. 326, l. 22- App. 328, l. 3.

The State then asked for permission to specifically reference the code section and statutory language during its closing. App. 328, ll. 8-10. Defense counsel again objected to the State arguing the specific statute and statutory language stating, "I would object to him opening on that point of law. I do respect the Court's ruling that either of us can argue it, and he can argue that. But I don't think that opening on the law is proper for anything other than the charge against Mr. Cone." App. 328, ll. 13-19. The court ruled that the solicitor could argue § 16-3-657, the "no corroboration" statue, overruling defense counsel's objection. App. 328, ll. 20-24. Defense counsel further stated "I don't want to waive this just purely for appellate purposes. I do object to him referencing that in his opening on the law for the reasons I've stated. And as long as you say the records are protected, I'm not going to object during his actual opening statement." App. 329, l. 23-App 330, l. 4.

After a short break, the State decided not to open on the law, and defense counsel presented his final argument. App. 331, ll. 1-2; App. 332, ll. 10-16. The State then presented its closing argument during which the solicitor stated

> "Now I'll give you this in a minute but if you determine that she's telling the truth, that Minor is telling the truth, the elements are satisfied. So your decision them becomes is she telling the truth? So there was sexual batter [sic], as is testified, and she was less than eleven years of age at the time as the testimony shows. **Now, there's another section in our law. Section 16-3-657, criminal sexual conduct, testimony of a victim need not be corroborated. The testimony of the victim need not be corroborated in prosecutions under section 16-3-652 to 658, which are the sections governing criminal sexual conduct. And I've said this before and I'll say it again, if anything I've misstated, His Honor will correct me. If I've said something wrong about the law, His Honor will correct me.** But if I'm not mistaken, he will make plain to you that you can believe one person over many. You can put whatever weight on any piece of testimony you want to put. That's your prerogative. That's what you're permitted to do as jurors. And that's what we expect you to do."

App. 350, l. 20-App. 351, l. 13 (emphasis added). The court took a short recess before it charged the jury on the law. After the charge on the law, defense counsel renewed his objection to the State reciting S.C. Code Ann. §16-3-657 during closing arguments. App. 379, ll. 12-14.

Discussion

Preservation

The Court of Appeals found that Petitioner's argument on appeal regarding the impropriety of the State arguing the specific statutory language of S.C. Code Ann. §16-3-657 was unpreserved, because Petitioner failed to object contemporaneously and conceded the issue during trial. Respectfully, under the rules of error preservation, Petitioner's objection is preserved for review and should be addressed on the merits.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342,

373, 628 S.E.2d 902, 919 (Ct. App. 2006). "The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Jean Hoefer Toal et al., Appellate Practice in South Carolina (2016) 184. "However, [the error preservation requirement] is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

"To preserve an issue for appellate review, an appellant must object at his first opportunity." State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993). "There are four basic requirements to preserving issues at trial for appellate review." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Id.

Generally, for an issue to be preserved, a party must make a "contemporaneous objection that is ruled upon by the trial court." State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). "However, there is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence. The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling." State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) (internal citations and quotations removed). "[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C.

323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in part and dissenting in part). Additionally, this Court has observed "it may be good practice for us to reach the merits of an issue when error preservation is doubtful." Id. at 330, 730 S.E.2d at 285.

The requirements of error preservation were met in Petitioner's case. Defense counsel objected at the first opportunity to the State referencing the statute and the statutory language of S.C. Code Ann. §16-3-657 during its closing argument. The objection was raised with specificity to, and ruled upon by, the trial court prior to closing arguments. The court had ruled the State could argue the statute in closing arguments immediately before closing arguments began. Therefore, defense counsel was not required to object during the closing argument to preserve the error for review as there was nothing introduced between the trial court's ruling and the solicitor's closing argument that would have changed the ruling. See, State v. Jones, *supra.* As this Court noted in State v. Simmons, 432 S.C. 552, 562, 816 S.E.2d 566, 571-72 (2018) counsel was not required to be a jack-in the box, repeatedly objecting, to successfully preserve the issue for appellate review. Further, defense counsel renewed his objection after closing arguments to the State referencing the statute during its closing arguments. As Circuit Judge Wynn wrote in his partial concurrence in United States v. Cone, 714 F.3d 197, 225 (4th Cir. 2013)

> Although we have not previously had occasion to apply this rule in the context of motions *in limine* to preclude the jury from considering a particular legal theory, the same logic applies: Because counsel is restricted to arguing the law in accordance with the principles espoused in the court's instructions, United States v. Trujillo, 714 F.2d 102, 106 (11th Cir.1983), if a party moves *in limine* to bar the jury from considering a particular legal theory and the court rules on that motion, it need not renew its objection when the opposing party argues the legal theory at trial, see Lacy v. CSX Transp. Inc., 205 W.Va. 630, 520 S.E.2d 418, 427 (1999) ("[T]o preserve error with respect to closing arguments by an opponent, a party need not contemporaneously object where the party previously objected to the trial court's *in limine* ruling permitting such argument, and the argument

subsequently pursued by the opponent reasonably falls within the scope afforded by the court's ruling.")

Cone at 224-225 (4th Cir. 2013). A contemporaneous objection was not needed for the matter to be preserved for appellate review.

The Court of Appeals also found that defense counsel waived his objection, presumably when he stated, "I do respect the court's ruling that either of us can argue it, and he can argue that." App. 328, ll. 13-19. This, however, was not a waiver of the objection, rather a recognition of the trial court's ruling and acknowledging that the State could argue, generally, that corroboration of Minor's testimony was not required. Further, Counsel renewed his objection shortly after that statement and again objected after closing arguments. App. 329, l. 23-App. 330, l. 4; App. 379, ll. 12-14. Notable, Counsel explicitly stated that he wanted to ensure he was not waiving the issue for appellate review. App. 329, l. 23-App. 330, l. 4. Admittedly, the State did not do a separate opening on the law. That, however, does not change the posture of the objection made by Counsel Sumner because his objection was to the referencing of the statute in anyway by either the bench or the State. A fair reading of the record supports the conclusion that Petitioner's argument regarding the impropriety of the State's use of S.C. Code Ann. §16-3-657 during closing arguments is preserved for appellate review.

Merits

The trial judge improperly allowed the solicitor to recite and argue S.C. Code Ann. § 16-3-657, the "no corroboration" statute, to the jury during closing arguments after ruling that it would not charge that principal of law to the jury. Allowing the solicitor to argue the specific statute that was not included in the jury charge injected improper legal considerations into the jury's deliberations as the statute was enacted for judicial guidance. The solicitor misstated the law in his closing argument by arguing § 16-3-657 to the jury which indicated that the legislature

had singled out the testimony of the victim in criminal sexual conduct cases and that such testimony was to be viewed differently than the testimony of other witnesses. The solicitor framed the recitation of the statute by telling the jury it only had to decide if the alleged victim was lying or not. This argument effectively told the jury to ignore all other evidence and focus solely on whether the uncorroborated statement of the alleged victim was true.

While a solicitor has broad latitude in making arguments to the jury, the practice is not without limits. See State v. Cartwright, 425 S.C. 81, 93 n.3, 819 S.E.2d 756, 762 n.3 (2018) (noting that the law provides limits to a party's jury argument, as enhanced by Due Process protections). A solicitor cannot inject material outside of the evidence but must confine their argument to the evidence in the record and the reasonable inferences that may be drawn from the evidence. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). "Solicitors are bound to rules of fairness in their closing arguments." State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). As this Court stated in State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) "[w]hile 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 upon this principle."

It is the exclusive role of the trial judge to declare the law, and in doing so, inform the jury of all the law that applies to a given case. S.C. Const. Art. V § 21 (Judges shall not charge juries in respect to matters of fact, but shall declare the law). "[T]he judge shall state the controlling principles of law applicable to the case in the light of the pleadings and the evidence." Trexler v. McIntrye, 216 S.C. 469, 474–75; 58 S.E.2d 887, 889 (1950). A thorough review of South Carolina jurisprudence reveals that this Court has yet to directly rule on the propriety of a party arguing law that is not charged to the jury. Based on the constitutional

mandate that the law applicable to the case comes from the trial judge, it follows that South Carolina should adopt the rule that while no party is banned from arguing the general law applicable to a case, a party cannot misstate or misinterpret the law and is confined to arguing the principles that will be later charged to the jury. See U.S. v. Williams, 526 F.3d 1312 (11th Cir. 2008); Conklin v. State, 254 Ga. 558, 570–71, 331 S.E.2d 532, 543 (1985) (Counsel have every right to refer to applicable law during closing argument (i.e., law that the court is going to give in charge). There is no justification, however, for allowing an attorney to supplement the court's charge by reading, in the jury's presence, law that the court is not going to charge).

During the charge conference, the trial court properly concluded that it would not charge the "no corroboration" statute but then permitted the solicitor to argue the statute during closing arguments. App. 327-328. This was error. In directly citing the legislative code and repeating the statute verbatim, the solicitor injected improper legal considerations into the jury's deliberations. The "no corroboration" statute was not intended to be a jury consideration but was enacted to be a guide to the judiciary in reviewing the sufficiency of the evidence in criminal sexual conduct cases. State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 482 (2016). In reciting the statute to the jury, the solicitor gave the impression that the Legislature singled out Minor's testimony to be believed over all others.

Allowing the solicitor to argue the specific statutory section and language would be akin to allowing the solicitor to argue that the rules of admissibility meant that the evidence the State presented was trustworthy simply because it was admitted. A solicitor could not argue to the jury that a statement, admitted pursuant to a Jackson v. Denno[4] hearing, was found by the judge to be voluntary by a preponderance of the evidence and therefore the jury should find the

[4] Jackson v. Denno, 378 U.S. 368 (1964).

statement voluntary. Nor could a solicitor argue to a jury that in admitting a prior bad act, the judge ruled the prior bad act occurred through clear and convincing evidence.

This is not to say that the solicitor could not have argued that there is no need for corroboration if the evidence in the record supported the argument. As this Court recently noted in State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 583 (2019), while it was improper for the court to charge inferred malice the State and defense were "free to argue the existence or nonexistence of malice based on the evidence in the record." The solicitor was free to argue the in general terms that Minor's testimony did not have to be corroborated, but citing the legislative enactment and stating the statute verbatim created error in this case.

A review of this Court's holdings in cases[5] dealing with the propriety of a trial judge charging § 16-3-657 are instructive in analyzing the propriety of a solicitor arguing the statute to a jury when it will not be included in the charge on the law. In Schumpert, this Court ruled that when the jury charge, which included the no corroboration charge, was reviewed as a whole, it contained no reversible error. This Court did not, at that time, make a specific ruling about the propriety of charging the statute, but then Justice Finney found that the "no corroboration" charge was not meant to be given to a jury, in part because it singled out the testimony of one witness over other. Schumpert at 510, 435 S.E.2d at 864 (1993) (Finney, J., dissenting).

This Court again examined the propriety of charging the "no corroboration" statute in Rayfield. In again holding the charge as a whole was proper, this Court expanded the legislative intent of the statute finding that it was the intent of the legislature to signal to both the judge and the jury that a defendant can be convicted solely on the basis of a victim's testimony. Rayfield at 117, 631 at, 250 (2006). However, then Justice Pleicones dissented, arguing, that "Section 16–

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5 State v. Schumpert 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Rayfield, 396 S.C. 106, 631 S.E.2d 355 (2006); State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016)

3–657 prevents courts...from finding a lack of sufficient evidence to support a conviction because the alleged victim's testimony is uncorroborated." Rayfield at119, 631 S.E.2d at 251 (2006) (Pleicones, J., dissenting) citing James Cranston Gray, Jr., Criminal Law—Rape Reform in South Carolina, 30 S.C. L.Rev. 45, 55–60 (1979) (discussing the no-corroboration rule as governing judicial review of the sufficiency of the evidence); cf. Ludy v. State, 784 N.E.2d 459, 463 (Ind. 2003) (holding that the no-corroboration rule is a legal standard for a court reviewing a conviction).

Finally, this Court reexamined the propriety of charging S.C. Code Ann. §16-3-657 in Stukes. There, this Court found the dissent from Rayfield to be persuasive and held that the "no corroboration" charge was not proper. This Court reasoned that,

> By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim...Specifying this qualification applies to one witness creates the inference the same is not true for the others.

Stukes, at 499, 787 S.E.2d at 483 (2016).

The trial judge, anticipating Stukes, properly declined to charge the "no corroboration" statute to the jury. However, the court permitted the solicitor to achieve an end-run around the Stukes' reasoning by allowing the solicitor to argue the specific statue to the jury during closing arguments. First, the legislative intent of §16-3-175 is to signal the judicial bench that it should not direct a verdict or overturn a conviction when there is no corroboration of a victim's statement. Stukes, at 499. The statute is not appropriate for a jury and should not be a part of jury deliberations.

Second, this law does not help the jury in fulfilling its function of "deciding the facts and determining whether the state has proved the charged offense beyond a reasonable doubt." Rayfield, at 120, 631 S.E.2d. at 251. As then Justice Pleicones noted in his dissent in Rayfield,

placing the statute before the jury actually "has the potential for creating more problems than solutions," for it might cause confusion when read with the general charge on witness credibility. Id. citing State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980).

Third, arguing the "no corroboration" statutory citation to the jury creates a "strong possibility of biasing the jury against the defendant." Rayfield, at 120, 631 S.E.2d. at 251. The statute singles out the alleged victim's testimony and appears to "express an opinion on the alleged victim's credibility." Id. See also, State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d. 805, 818 (2001) (stating prosecutors cannot vouch for a witnesses' credibility).

A solicitor's words carry the prestige of the government in the view of a jury. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (stating that improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit or implicit assurances of a witness' veracity). In allowing the solicitor to specifically cite and argue the "no corroboration" statute, the trial judge effectively lowered the state's burden of proof. Just prior to reciting the code section and statute the solicitor stated,

> "Now I'll give you this in a minute but if you determine that she's telling the truth, that Minor is telling the truth, the elements are satisfied. So your decision then becomes is she telling the truth? So there was sexual batter [sic], as is testified, and she was less than eleven years of age at the time as the testimony shows."

App. 350, ll. 20-25. The solicitor then proceeded to say that "there is a section in our law" which says that a victim's testimony does not require corroboration in prosecutions for criminal sexual conduct. The solicitor further stated that if he was wrong about the law, the trial judge would correct him during his charge. App. 351, ll. 1-9.

Later in his closing the solicitor reiterated,

> So first, what do we have? And again, let me say this too. The question seems to be is the victim telling the truth? I mean that's what this boils down to, is the

> victim telling the truth in this case? Like I said before your verdict has got to speak the truth. Veritas dico, to speak the truth. So is the victim telling the truth? What did her emotions say? When she talks to her mom she's crying, she's trembling, she's communicating things physical that people don't communicate with words. She's not saying, oh, yeah, this happened, he did this to me. I mean people lie in courts, put people don't lie with emotions. She's crying and she's trembling."

App. 353, ll. 8-19. The solicitor's argument told the jury to merely determine whether the alleged victim was telling the truth because her testimony need not be corroborated. The solicitor effectively told the jury that the case "boiled down" to the truthfulness of the victim's statement, regardless of the other evidence. Further, the solicitor improperly suggested that the judge would correct him if he misstated the law when he was already aware that the judge would not be including S.C. Code Ann. § 16-3-657 in the charge on the law that was ultimately given to the jury.

Petitioner testified that he did not sexually abuse Minor, and his testimony mirrored that of Minor's mother regarding their relationship, the setup of the house, and where the sex acts between the adults usually occurred. App. 282-291. However, in arguing the "no corroboration" statute, the solicitor indicated to the jury that they were to value the testimony of Minor over that of Petitioner or any other witness. The solicitor argued that the legislature did not require corroboration of a victim's statement, thereby "inviting the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Stukes at 499. The standard in the criminal courts of this state is not "what is true" but "beyond a reasonable doubt."

By arguing the "no corroboration" statute, when it would not be charged to the jury, the solicitor entered the purview of the judge, usurping the judge's role to declare the applicable law, and interjecting into deliberations an improper legal consideration. The solicitor appropriated

the prestige and power of the legislature to circumvent the trial judge's charge on the law, prejudicing Petitioner and denying him a fair trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and remand the case to the Court of General Sessions of Pickens County for a new trial.

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This 23rd day of June, 2023.