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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Newberry County

Honorable J. Mark Hayes, II, Circuit Court Judge

CARROL TREMAYNE WASHINGTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000754

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when he failed to object to the solicitor's closing argument, which improperly bolstered the complaining minor witness, where the case was a credibility battle and where the jury instruction failed to inform the jurors they were the sole arbiters of credibility and arguments of counsel were not evidence?

STATEMENT OF THE CASE

A Newberry County grand jury indicted Petitioner on October 9, 2015 for first degree criminal sexual conduct (CSC) with a minor. App. 526-527. His case was called to trial on February 29, 2016 before the Honorable Donald B. Hocker, and a jury. Assistant Solicitors Dale Scott and Taylor Daniel represented the state. Charles Verner represented Petitioner. App. 1. On March 2, 2016, the jury found Petitioner guilty. App. 370, l. 19 – 371, l. 5. He was sentenced to the mandatory minimum of twenty-five years' imprisonment. App. 378, ll. 16-22.

The Court of Appeals dismissed Petitioner's appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Washington, 2018-UP-241 (S.C. Ct. App. filed June 13, 2018); App. 399-400.

On September 10, 2018, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this brief. App. 401-419. The state filed a return to this application dated December 14, 2018. App. 423-429. With the assistance of counsel, Petitioner filed an amended application on January 8, 2021 again raising the claim argued in this brief. App. 431-434. An evidentiary hearing was held on January 27, 2021 before the Honorable J. Mark Hayes, II. App. 435. Brianna Schill represented the state. Ashley McMahan represented Petitioner.

By order filed June 21, 2021, the PCR court denied Petitioner relief. App. 505-525. On February 22, 2022, Petitioner filed a petition for writ of certiorari with the Supreme Court. The state filed a return to this petition on May 25, 2022. By order filed June 14, 2022, the Supreme Court transferred the appeal to this Court pursuant to Rule 243(l), SCACR. This Court granted the petition for writ of certiorari as to Petitioner's Question 2, but denied certiorari as to Question 1 by order filed April 5, 2024.

This brief of petitioner follows.

STATEMENT OF FACTS

Minor's grandmother lived in an apartment complex in Whitmire, South Carolina. Minor, who was ten years old at the time of trial, and her two sisters would frequently visit their grandmother on the weekends and during the summer months. App. 98, l. 2 – 99, l. 23. Petitioner lived in the same apartment complex as Minor's grandmother with his girlfriend, Tonya, and his girlfriend's ten year old son. App. 100, l. 11 – 102, l. 14; App. 290, l. 25 – 291, l. 5. Tonya and Minor's mother are second cousins. App. 100, ll. 11-18; App. 121, ll. 15-20.

Minor, her sisters, and several other neighborhood kids would often play at Tonya and Petitioner's apartment. App. 298, l. 24 – 299, l. 23. The children loved to play at the couple's apartment largely because the family had a Wii U, a videogame console. App. 202, ll. 8-25; App. 275, ll. 3-11. When the neighborhood children came over, including Minor, they would be "in and out playing" all day long. App. 277, ll. 12-16. Tonya, Minor's grandmother, and other neighbors would sit out on the porch and socialize while the children played. App. 278, l. 19 – 279, l. 12. Sometimes the children were inside playing videogames or dancing and other times they were outside playing baseball, basketball, football, and other sports. App. 277, ll. 22-24; App. 301, ll. 22-25.

Petitioner worked odd hours during the day, but if he was home, he was usually upstairs in a spare bedroom playing on his Xbox, another videogame console. App. 286, ll. 4-20; App. 287, ll. 24-25. Petitioner loves children and would occasionally play with the children when he was not working or playing on his Xbox. App. 280, ll. 5-6.

Minor claimed that when she was eight years old, while the children were playing hide and seek inside Tonya and Petitioner's apartment, Petitioner "took [her] to the bathroom" and "touched [her] heinie . . . under [her] pants." App. 203, l. 8 – 204, l. 17. Minor was very hesitant

and wavered regarding whether Petitioner touched her on the “outside” or “inside” of her “heinie.” The following exchange took place between Minor and the assistant solicitor:

Q: When he touched your heinie did he touch the outside of it.

A: Yes.

Q: Did he touch any other part of it?

A: *Now that I think about it, no.*

Q: No? [Minor] what was - - where did he touch your heinie?

A: In the - - inside of my pants.

Q: Inside of your pants, okay. Once he touched the inside under your pants what part of your heinie did he touch was the question.

A: Mostly the outside.

Q: Mostly? What was the other part that he touched?

A: Once he did it - - I felt pressure on my heinie, so *I thought the inside.*

Q: Did it feel like he touched the inside?

A: Yes.

App. 205, ll. 5-21 (emphasis added).

Minor later claimed that when Petitioner touched her it felt “hard” and “weird” and “cold.” App. 205, l. 24 – 207, l. 1. The solicitor then asked Minor the following leading question, “How many times did that happen where he put his hand on the inside of your heinie?” Minor responded “I think twice.” App. 207, ll. 9-14. However, Minor said she “kind of like forgot” how old she was when the second time happened, but then later claimed the “second time was like one month before I turned nine.” App. 207, l. 19 – 208, l. 208, l. 6.

Minor alleged that the second time happened in Tonya and Petitioner's upstairs bedroom while the other children were "mostly downstairs." She said another neighborhood child came into the bedroom before "it happened" to ask Minor a question and then after she left Petitioner "forced [her] to pull [her] pants down." App. 208, l. 7 – 209, l. 6; App. 212, l. 13 – 213, l. 2. However, Minor claimed on this occasion Petitioner "was just looking at [her]." App. 213, ll. 5-8.

Lastly, Minor explained a third occasion when Petitioner allegedly touched her "inappropriately." She claimed that while the other children were outside playing, she was inside with Petitioner who did "a hand movement that he does a lot." She said he was "pulling on . . . his pants" and she thought it meant he wanted her to pull her pants down. She was "terrified" but did not pull her pants down and nothing happened because by then she was "not that afraid to say no." App. 215, l. 5 – 218, l. 21.

Despite claiming Petitioner touched on her two occasions, Minor could not describe the second occasion and admitted she was "[k]ind of rusty on it." App. 219, l. 3 – 221, l. 21. She later contradicted herself and said Petitioner only touched her one time. App. 221, ll. 17-21.

Petitioner testified in his defense. He adamantly denied the allegations and firmly stated that he never touched Minor improperly. App. 311, ll. 13-24. He also said he was never alone with Minor in his apartment and that there were always children and adults in and out of the house. App. 309, l. 7 – 310, l. 10.

Tonya, Petitioner's girlfriend, also testified. She said she never witnessed any sort of "inappropriate behavior" between Petitioner and the neighborhood children who frequently came to visit and play. App. 280, ll. 13-19; App. 284, ll. 20-22; App. 288, ll. 11-12. She also testified

that even after these allegations surfaced, the other neighborhood kids still came over to play at her apartment. App. 281, l. 18 – 282, l. 4.

The Solicitor's Closing Argument

During his closing argument, the assistant solicitor improperly vouched for Minor's credibility.¹ App. 349, ll. 3-17. The solicitor exclaimed:

This [Minor's] story has been consistent from the very get go from the initial allegation to the times - - you all [are] going to get to watch that forensic interview as much as you all want to, by the way, and you're going to find, and you can compare it to her testimony yesterday, that its wholly consistent. **Is a nine, 10-year-old capable of doing that. You know, if you're lying, you got to be good at it. If you're lying you got to remember what the lie is so you can carry it on.** You know what I'm saying? But if you tell the truth you don't have to do all that because you remember what happened. If you're telling the truth your story is going to be consistent. The big part's going to be consistent, and that's what you're going to find when you watch that forensic interview and you remember how she testified yesterday.

...

Is that something that you think the average nine, 10-year-old is capable of doing, coming in here and swearing on the Bible telling that story like that in front of you all. In front of everyone here. In front of that judge. **I submit to you she was wholly credible. That she's only capable of telling the truth. She's not capable of carrying on a lie to that degree for that long. A child just isn't capable of doing that.** And they tried to crack her under pressure. They have cross-examination at one of their - - they question her and question her until she cracks and they catch her in a lie. They couldn't do it. **And a child will fold under a cross-examination because they're not capable of lying to that degree and to that extent and her story was consistent.**

App. 349, ll. 3-17 (emphasis added); App. 354, ll. 10-23 (emphasis added).

¹ The solicitor also repeatedly argued in his opening statement and closing argument that under South Carolina law Minor's testimony does not need to be corroborated. App. 90, ll. 12-21; App. 351, ll. 8-19. The court likewise charged the jury "that the testimony of the victim need not be corroborated in prosecutions under Section 16-3-655 Code of Laws for South Carolina." App. 366, ll. 15-18. Trial counsel did not object to the solicitor's arguments or the court's erroneous charge. See State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (holding that instructing the jury that the victim's testimony need not be corroborated by additional evidence or testimony pursuant to S.C. Code Ann. § 16-3-657 is an impermissible charge on the facts and, therefore, unconstitutional).

Trial counsel did not object to the solicitor's closing argument.

PCR Proceedings

Charles Verner, Petitioner's trial counsel, testified at the evidentiary hearing that he reviewed the assistant solicitor's closing argument and, while the solicitor made "aggressive prosecutorial statements," he did not believe the statements "individually and collectively . . . crossed the line." App. 473, l. 14 – 474, l. 17. When specifically asked about the solicitor's argument in which he addressed Minor's credibility, Verner maintained he "looked at those statements" and did not believe the solicitor improperly vouched for Minor's credibility. He testified that he interpreted the solicitor's statements as "saying that children can be credible witnesses." He maintained the solicitor "did not say anything like we have, I have examined this child's story and it is correct or he is not arguing that he has vouched for or corroborated the statements of the victim. So I do not think that he is bolstering or corroborating the victim witness's testimony." App. 484, l. 16 – 485, l. 20. Accordingly, trial counsel did not object to the solicitor's argument.

The PCR court found the assistant solicitor did not improperly vouch for Minor's credibility during his closing argument. Accordingly, the court concluded trial counsel was not deficient for failing to object. While the court acknowledged the solicitor stated, "I submit to you she [Minor] was wholly credible," it maintained "the solicitor made no personal assurances as to the witness's credibility, nor did he directly or indirectly refer to any information outside of the record." App. 521. Finally, the court found Petitioner failed to prove he was prejudiced by counsel's failure to object to the solicitor's closing argument because the solicitor's statements did not so "infect the trial with unfairness as to make his [Petitioner's] conviction a denial of due process." App. 521.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

Trial counsel provided ineffective assistance of counsel when he failed to object to the solicitor's closing argument, which improperly bolstered the complaining minor witness, where the case was a credibility battle and where the jury instruction failed to inform the jurors they were the sole arbiters of credibility and arguments of counsel were not evidence.

Introduction

Petitioner's case was a "he said, she said" credibility battle. App. 89, ll. 11-13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. There was no physical evidence of abuse, no confession of guilt, and no eyewitness testimony alleging to have seen Petitioner assault Minor. App. 478, l. 12 – 479, l. 1. Accordingly, the credibility of the witnesses was paramount. In an effort to tip the scales in the state's favor, the solicitor made comments in his closing argument regarding the truthfulness of Minor and his personal belief that Minor was telling the truth. Those comments could only be reasonably interpreted as improper vouching of Minor's testimony.

The solicitor's closing argument excessively leaned on Minor's testimony. App. 343, l. 25 – 344, l. 15; App. 346, ll. 21-23; App. 347, ll. 8-9; App. 349, ll. 8-13; App. 354, l. 14 – 354, l. 23; App. 356, ll. 2-7. The solicitor began his closing by imploring the jury to be a champion for Minor who was a "voice that cried out from the dark begging to be heard, to be believed." App. 343, l. 25 – 344, l. 4. He continued, "Will you believe the soft voice of the meek whose message rings out the loudest, or are you going to believe the voice of the taker? The taker who has taken away so much from [Minor]?" App. 344, ll. 11-14.

That colorful language was just the setup, unfortunately, for the egregious vouching statements that came next. The solicitor repeatedly insinuated that Minor, like all "eight, nine,

10-year-olds,” was *physically incapable of lying*. App. 346, ll. 21-23; App. 349, ll. 8-13. Then he went so far as to explicitly tell the jury he believed Minor’s testimony. The solicitor declared, “I submit to you [Minor] was *wholly credible*. That *she’s only capable of telling the truth*. *She’s not capable of carrying on a lie* to that degree for that long. *A child just isn’t capable of doing that*.” App. 354, ll. 14-18. (emphasis added). He then reiterated, “A child will fold under a cross-examination because *they’re not capable of lying to that degree*.” App. 354, ll. 21-23 (emphasis added). Trial counsel failed to object because he did not see any comments that “crossed the line.” App. 473, l. 14 – 474, l. 17.

The trial court’s jury instruction did not cure counsel’s failure to object, nor did it cure the resulting prejudice because the charge failed to explicitly instruct the jurors that they were the sole arbiters of credibility.² The closest the trial court came to informing the jurors they were the sole arbiters of credibility was when it said, “as jurors it is your duty to determine the affect, value, weight and truth of the evidence presented during this trial.” App. 358, l. 5 – 359, l. 16. The court reiterated that same sentiment when it said it was the jury’s duty to analyze and evaluate evidence and determine which evidence convinces them of its truth. App. 362, ll. 4-19.

The instruction did not tell the jury to ignore the attorneys’ opinions regarding the credibility of witnesses. The trial court also failed to explicitly inform the jury that arguments of counsel were not evidence. Consequently, even when the trial court informed the jurors that it was their duty to judge the credibility of the witnesses and evidence, the solicitor’s comments that Minor was literally incapable of lying had a reasonable likelihood of affecting the jury’s credibility determinations, and thus, the outcome of Petitioner’s trial. App. 346, ll. 21-23; App. 349, l. 8; App. 354, ll. 10-18. Accordingly, trial counsel’s failure to object to the improper

² In contrast, the court did specifically tell the jury it was the exclusive judge of the “facts.” App. 358, l. 5 – 359, l. 16.

vouching by the solicitor was ineffective assistance of counsel that prejudiced Petitioner in this “he said, she said” case.

Discussion

Petitioner’s case was a credibility battle between Minor and Petitioner. App. 89, ll. 11-13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. Trial counsel’s failure to object to the solicitor’s improper vouching of Minor constituted deficient performance that prejudiced Petitioner because the solicitor’s comments improperly bolstered the key witness’s testimony in a case where there was no physical evidence of abuse, no eyewitnesses, and no instruction by the trial court that the jury was the sole arbiter of witness credibility. See State v. Reyes, 432 S.C. 394, 408-09, 853 S.E.2d 334, 342 (2020) (holding the trial court cured a solicitor’s improper bolstering questions with instructions to the jury that it was the sole arbiter of witness credibility).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability

sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

Generally, “the assessment of witness credibility is within the exclusive province of the jury.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). The closing argument of a solicitor, “must be carefully tailored so as not to appeal to the personal biases of the jury.” Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007) (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). The argument “must be confined to evidence in the record and the reasonable inference that may be drawn from the evidence.” Id. at 522-23, 654 S.E.2d at 531. Although a solicitor may argue the credibility of a witness based on the record and its reasonable inferences, a solicitor may not vouch for the credibility of a prosecution witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

“It is inappropriate for the State to assure the jury of a witness’ credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record.” Id. Generally, “a prosecutor improperly vouches for a witness’ credibility and places the government’s prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony.” Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The question for a reviewing court is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). A reviewing court examines the impropriety of the

prosecutor's closing argument in the context of the entire record. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2003), our Supreme Court held Gilchrist's counsel was ineffective for failing to object to the solicitor's opening statement where he informed the jury that the state's key witness had a "clean" soul, meaning he was worthy of belief. The Court held the solicitor's statement was a personal assurance of the witness's veracity, and trial counsel should have objected. Id. Further, the Court held counsel's error prejudiced Gilchrist because the witness was the prosecution's "key witness" and his "credibility was crucial to the government's case." Id. at 228, 565 S.E.2d at 285.

Our Supreme Court defined when a solicitor vouches for the credibility of a witness in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), *rev'd on other grounds*, Kelly v. State, 534 U.S. 246 (2002):

Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence is not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 368-69, 540 S.E.2d at 860 (quoting United States v. Walker, 155 F.3d 180 (3d Cir. 1998)).

See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), *cert. denied*, 534 U.S. 977 (2001) ("A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a

witness' veracity . . . ") (internal citations omitted). Accordingly, "because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility." Gilchrist, 350 S.C. at 227, 565 S.E.2d at 285 (2002) (quoting Kelly, 343 S.C. at 369, 540 S.E.2d at 861).

In this case, trial counsel provided deficient performance when he failed to object to the solicitor's numerous statements during closing argument that vouched for Minor's credibility and truthfulness. See App. 343, l. 25 – 344, l. 15; App. 346, ll. 21-23; App. 347, ll. 8-9; App. 349, ll. 8-13; App. 354, ll. 14-354, l. 23; App. 356, ll. 2-7. Trial counsel stated that he did not object because, in trial counsel's mind, none of the solicitor's comments "crossed the line." App. 473, l. 14 – 475, l. 17. However, the record clearly showed the solicitor violated the holdings of Matthews and Gilchrist when he *explicitly assured the jury* that Minor was "wholly credible." App. 354, ll. 10-18. Even more egregious, the solicitor used first person pronouns when declaring Minor was "wholly credible" and claimed that Minor was incapable of lying. Those comments were exactly the kind that South Carolina courts have held to be improper. See Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007), *abrogated by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (discouraging use of the pronoun "I" in closing argument).

As to prejudice, trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 692. When the solicitor told the jury that in his opinion Minor was "wholly credible," he improperly expressed his personal opinion regarding the complaining witness's truthfulness. See Gilchrist, at 227, 565 S.E. 2d at 285 (2002). The solicitor's opinion carried with it "the imprimatur of the Government" and induced the jury to trust his judgment rather than its own view of the evidence. See Kelly, 343 S.C. at 368, 540 S.E.2d at 860. The vouching in this case was

particularly harmful because the solicitor knew the case would turn on whether or not the jury believed Minor's testimony and he improperly told the jury during closing that Minor was incapable of lying.

The trial court was unable to cure the prejudice created by the solicitor's improper vouching because trial counsel failed to object and request the trial court issue a curative instruction. *Cf. Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997) (finding a solicitor's improper comments may be cured by the judge's instructions to the jury). As a result, the solicitor's improper comments during the state's closing argument, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Vaughn*, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)).

The trial court's jury instruction did not cure the prejudice in this case because the jury was not informed that it was the "sole arbiter" of witness credibility. *Cf. State v. Reyes*, 432 S.C. 394, 408-09, 853 S.E.2d 334, 342 (holding that the solicitor's improper vouching was harmless because the trial court instructed the jury that it was the sole arbiter of witness credibility). Moreover, this was case distinguishable from *Reyes* in two more key aspects. The impropriety here was far more egregious.³ App. 354, ll. 10-18; App. 349, l. 8; App. 354, ll. 21-23. The solicitor in this case explicitly assured the jury that Minor was "wholly credible" and incapable of lying, whereas in *Reyes* the solicitor simply asked the minor witness during direct examination if she knew to tell the truth while testifying. App. 354, ll. 10-18; *Reyes*, 432 S.C. at 399-400, 853 S.E.2d at 337. In this case, there was also no physical evidence of guilt, whereas in *Reyes*, the six-year-old complainant and Reyes both tested positive for herpes simplex virus type one. *Reyes*, 432 S.C. at 401, 853

³ The solicitor also arguably made a "golden rule argument" at closing. See App. 347, ll. 8-9. While he did not explicitly tell the jury to put themselves in Minor's shoes, he did implicitly invite them to do so when he stated, "I can't imagine being in [Minor's] shoes." See *State v. Harris*, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009).

S.E.2d at 337. Therefore, the jury instruction from the trial court given here did not cure the prejudice from the improper vouching as it did in the close call three-to-two decision in Reyes. Reyes, at 409, 853 S.E.2d at 342.

In Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016), our Supreme Court held that trial counsel was ineffective for failing to object during the solicitor's closing argument where she improperly vouched for the credibility of the minor witness because her comments amounted to her telling the jury that she believed the minor's version of events. The Court determined that Tappeiner was prejudiced by his trial counsel's deficient performance because the dearth of direct or circumstantial evidence, outside of the minor's allegation, meant that the evidence of Tappeiner's guilt was not overwhelming. Id. at 253, 785 S.E.2d at 478. Accordingly, there was a reasonable probability that but for the solicitor's improper vouching the outcome of Tappeiner's trial would have been different. Id. at 250, 785 S.E.2d at 476.

Here, the solicitor invaded the province of the jury and usurped its fact finding function when he asserted that the state's key witness was incapable of lying and "wholly credible." App. 354, ll. 10-18. That invasion into the jury's province was improper because "the jury is charged with assessing the credibility of witnesses." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

As in Tappeiner, the evidence of Petitioner's guilt in this case was not overwhelming. Trial counsel admitted at the PCR hearing that the case was largely a "he said, she said" matter. App. 89, ll. 11-13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. Since there was no physical evidence of guilt nor any eyewitness testimony, the case came down to a credibility battle between Minor and Petitioner. Consequently, trial counsel's ineffective

assistance in failing to object to the solicitor's improper vouching of the state's key witness prejudiced Petitioner.

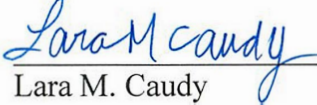
In conclusion, the PCR court erred when it found trial counsel's failure to object to the solicitor's improper vouching of the state's key witness was not deficient performance and did not prejudice Petitioner. App. 518-521. Counsel's deficient performance created "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688) (internal quotation marks omitted).

Respectfully, this Court should reverse Petitioner's conviction and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of June, 2024.

RECEIVED

Jun 11 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County

Honorable J. Mark Hayes, Circuit Court Judge

CARROL TREMAYNE WASHINGTON,

PETITIONER,

V.

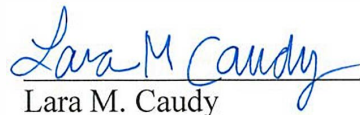
STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000754

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above referenced case has been served upon Zachary W. Jones, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 11th day of June, 2024.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

From: [Mcinnis, Sara](#)
To: [Zachary Jones](#)
Cc: [Zilcia Williams](#); [Caudy, Lara](#)
Subject: 2021-000754 Carrol Washington v. State Brief of Petitioner
Date: Tuesday, June 11, 2024 2:02:00 PM
Attachments: [2021-000754 - Carrol Washington v. State - Brief of Petitioner.pdf](#)

Good Afternoon Mr. Jones,

Please find attached for service in the above-referenced case the Brief of Petitioner, which will be filed with the Court of Appeals today, June 11, 2024, via email filing.

Thank you!

Sara McInnis

Administrative Assistant
South Carolina Commission on Indigent Defense
Appellate Division
(803) 734-1330