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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Pickens County
The Honorable William P. Keesley, Circuit Court Judge (Trial)
The Honorable Alex Kinlaw, Jr., Circuit Court Judgment (PCR)

Justin Ryan Cone,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appellate Case No. 2022-001498

PETITION FOR REHEARING

On August 14, 2024, this Court reversed the conviction of Petitioner Justin Ryan Cone for first-degree criminal sexual conduct with a minor in a published opinion. *Cone v. State*, Op. No. 28230 (S.C. Sup. Ct. filed August 14, 2024) (Howard Adv. Sh. No. 31 at 18). This Court found that the solicitor’s recitation of state law was improper because it “elevated the victim’s testimony above that of other witnesses.” *Id.* at 25.

Pursuant to Rule 221(a), SCACR, Respondent respectfully petitions this Court for rehearing because this Court has seemingly overlooked or misapprehended three points in rendering its decision. First, Respondent respectfully argues that the Court misapprehended the intent of the Legislature with its interpretation of section 16-3-657 of the South Carolina Code, and that its interpretation could have a chilling effect on sexual assault prosecutions in this state.

Second, Respondent contends that Petitioner’s counsel opened the door for the statute to be referenced with his closing argument. Finally, Respondent believes that even if error occurred, it was without a doubt harmless in this case.

ARGUMENT

I. Respectfully, Respondent would argue that this Court has misapprehended the General Assembly’s intent for section 16-3-657 in a way that undermines the General Assembly’s purpose.

Extrapolating from its findings in *Stukes*, this Court held:

In dissent in *State v. Rayfield*—which a majority of this Court found persuasive in *Stukes*—Justice Pleicones adopted the view that section 16-3-657 “merely serves to guide trial and appellate courts in analyzing the sufficiency of evidence.”

Cone, Op. No. 28230 (Howard Adv. Sh. No. 31 at 24) (internal citation omitted) (quoting *Stukes v. State*, 416 S.C. 493, 499, 787 S.E.2d 480 (2016)).¹ Respondent contends that this court has misapprehended why the South Carolina no longer requires corroboration of sexual assault.

Laws like South Carolina’s noncorroboration statute were a response to the past legal treatment of rape. *See, e.g., Note: Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967) (“Surely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false. . . . A woman may accuse an innocent man of raping her because she is mentally sick and given to delusions; or because, having consented to intercourse, she is ashamed of herself and bitter at her partner; or because she is pregnant, and prefers a false explanation to the true one; or simply

¹ Respondent has not moved to argue against precedent as it relates to *Stukes*. However, Respondent would argue that the language referring to legislative intent in *Stukes* is *dicta*, as the Court’s main concern in that instance was the fact that remarks by the trial court amounted to a charge on the facts and could have “confused the jury.” *See Stukes*, 416 S.C. at 499–500, 787 S.E.2d at 483.

because she hates the man whom she accuses. Since stories of rape are frequently lies or fantasies, it is reasonable to provide that such a story, in itself, should not be enough evidence to convict a man of crime.” (footnotes omitted)); *id.* (“It is important that the conflict be resolved automatically because a jury—or even a judge—cannot always be trusted to resolve it fairly.”). *See also* I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 839 (2013) (“Feminists responded to these weighted scales by pushing for legal reforms. The result was nothing short of a full-scale revision of existing rape law. Many of these changes were substantive, but feminists also secured evidentiary changes as well, such as the elimination of the requirement that a complainant's testimony be corroborated.” (footnotes omitted)).

As a result, South Carolina appears to be in the minority in barring noncorroboration instructions. *See* Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 TULSA L. REV. 1, 3 (2017) (finding “[a] slight majority of courts approve noncorroboration instructions” as of publication); *State v. Kraai*, 969 N.W.2d 487, 495 (Iowa 2022) (rejecting noncorroboration instruction); *Pitts v. State*, 291 So.3d 751, 757–59 (Miss. 2020) (allowing noncorroboration instruction). At least one author has contended that the instructions are necessary not to elevate the victim’s testimony above other evidence, but to equalize it by offsetting social biases.

These [rape] myths impose real barriers to successfully prosecuting all types of sex crimes. But they are arguably most damaging to the prosecution of child sex abuse. The sexual abuse of children is notoriously difficult to prosecute, and rape myths play a powerful role in thwarting successful prosecutions.

Buller, *supra*. Courts that have allowed noncorroboration instructions have expressed similar concerns. *See People v. Gammage*, P.2d 682, 687 (Cal. 1992) (“Although the ‘historical imbalance between victim and accused in sexual assault prosecutions’ has been partially redressed in recent

years, there remains a continuing vitality in instructing juries that there is no legal requirement of corroboration.” (citation omitted) (quoting *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1353 (Cal. 1991) (Arabian, J., concurring))).

Respondent does not seek to overturn *Stukes*. However, expanding that ruling to also bar solicitors from arguing the noncorroboration statute could have a chilling effect on sexual assault cases, the exact opposition of what the Legislature attempted to accomplish with the statute. However, the Court need not reach this issue because the alleged error was either invited or not prejudicial in this case.

II. Respectfully, this Court overlooked the fact that Petitioner’s counsel opened the door for the prosecutor’s remarks with his closing statement.

As this Court found in its opinion, “Cone argued extensively during his closing argument that the only evidence of victim’s account came from the victim herself.” *Id.* at 24. However rather than illustrate that the prosecutor’s alleged error was not harmless—Respondent will later address how it was—this shows that the defendant opened the door to the prosecutor’s statement.

This Court has on occasion addressed the ability of prosecutors to respond when the defendant “opens the door” to a statement that might otherwise be improper.

Conduct that would otherwise be improper may be excused under the “invited reply” doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense. . . . [T]he idea of an invited response is used not to excuse improper comments, but to determine their effect on the trial as a whole.

Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). An “invited reply” leads to reversal when it “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* at 170, 607 S.E.2d at 75 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642

(1974)). This occurs when a prosecutor misrepresents the evidence or the role of those within the criminal justice system. *See generally id.*; *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019).

For example, in *Vaughn*, this Court reversed a conviction when the prosecutor’s arguably invited response hinted that absent witnesses might have provided testimony supporting the defendant’s guilt. *Id.* at 168–170. This Court reasoned that the response had prejudiced the defendant given the general lack of other evidence. *Id.* at 170. As this Court has later found in considering invited response, part of the problem with the prosecutor’s statements in *Vaughn* is that “there was no evidence to support them.” *See Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 336 (2006) (in parenthetical).

In *Fortune*, this Court reversed a conviction where the solicitor argued that it was his responsibility “to present the truth,” while “defense attorneys’ jobs are to manipulate the truth.” *Fortune*, 428 S.C. at 550–51, 837 S.E.2d at 40. This Court found that the comments were not only “improper,” but “absolutely inexcusable.” *Id.* at 551, 837 S.E.2d at 41. The Court documented at length how the arguments amounted to prosecutorial misconduct. *Id.* at 552–57, 837 S.E.2d at 41–43.

Here, the solicitor did not use his remarks to suggest that there was evidence beyond what the jurors had heard. Nor did he weaponize an improper description of the role of courtroom advocates or engage in other forms of misconduct. The solicitor simply gave the jury a legal standard for evaluating the defendant’s arguments that the victim’s testimony in this case was not corroborated. Nothing about the prosecutor’s comments rendered the trial unfair. Allowing the prosecutor’s statements to stand was not error.

III. Even if the solicitor’s comments were in error, they were without a doubt harmless.

Finally and relatedly, even if reading the law was an error, it was without a doubt harmless.

This Court held the error was not harmless.

As argued by Cone, the paramount issue for the jury was whether it should believe the victim's uncorroborated testimony that Cone sexually assaulted her. Allowing the State to argue section 16-3-657 to the jury elevated the victim's testimony above that of other witnesses. The solicitor's assurance to the jury that the trial court would correct him if he incorrectly stated a point of law heightened the jury's consideration of the victim's testimony even more, especially after the trial court did not instruct the jury on the statute. Therefore, the error in allowing the State to argue the statute to the jury was not harmless, even though the trial court instructed the jury that the jury could believe one witness over many, or many witnesses over one.

Cone, Op. No. 28230 (Howard Adv. Sh. No. 31 at 25).

First, Respondent argues that it is not at all clear that the solicitor's comments that the judge would correct him were tethered specifically to his argument about the noncorroboration statute. (App. p. 351, lines 1–13). Immediately after saying this, the solicitor added: "But if I'm not mistaken, he will make plain to you that you can believe one person over many." *Id.*

Second, to the extent that the solicitor's comments were prejudicial, Respondent argues it could only be because of the reference to the statute. Certainly, a prosecutor could tell the jury that they do not need corroboration to convict. As a result, the error was simply in naming the statute and specifically reading the statute. Naming the statute, instead of simply discussing the same legal concept, could not be something that would meaningfully alter the jurors' deliberations.

Furthermore, there was additional evidence in the record that was probative of whether or not the victim was telling the truth. Her parents and therapist discussed the impact of the abuse on the victim's behavior and academic performance. *See Stukes*, 416 S.C. at 501, 787 S.E.2d at 483–84 (Kittredge, J., dissenting) ("Contrary to the majority's portrayal, the evidence presented in this

case was much more than ‘he said, she said.’ Multiple witnesses testified to the assault’s physical and emotional impact on the victim.”). At a minimum, the Court should revise its opinion to make it clear that prosecutors may reference correct law in closing arguments.

CONCLUSION

For all the above reasons, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court grant rehearing and reinstate Petitioner’s conviction for criminal sexual conduct.

Respectfully submitted,

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