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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Abbeville County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2014-UP-266 (S.C. Ct. App. filed June 30, 2014)

09-CP-01-00304

MARK R. BOLTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark R. Bolte, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-186252

ON WRIT OF CERTIORARI

Appeal From Abbeville County
Wyatt T. Saunders, Trial Court Judge
Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Unpublished Opinion No. 2014-UP-266
Heard June 5, 2014 – Filed June 30, 2014

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General James Rutledge Johnson, both of Columbia, for Respondent.

PER CURIAM: In this post-conviction relief (PCR) action, Mark R. Bolte argues his trial counsel's assistance was rendered ineffective when counsel (1) failed to object to the solicitor's statements in closing argument that the facts of the case were "undisputed," (2) failed to object to the solicitor's remarks in closing argument that the jury was the "conscience of the community," (3) failed to move to challenge and strike a certain juror, and (4) failed to object to the trial court's "moral certainty" instruction. Bolte further contends counsel's errors had the cumulative effect of denying him of effective legal representation to the extent that prejudice was presumed in his case. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to counsel's failure to object to the solicitor's statements in closing argument that the facts of the case were "undisputed": *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."); *id.* (stating an appellate court gives great deference to the PCR court's findings of fact and conclusions of law); *Pauling v. State*, 350 S.C. 278, 283, 565 S.E.2d 769, 772 (2002) ("The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value."); *State v. Sweet*, 342 S.C. 342, 347, 536 S.E.2d 91, 93-94 (Ct. App. 2000) ("Prosecutorial comment, whether direct or indirect, on the defendant's failure to testify is impermissible."); *State v. McClure*, 342 S.C. 403, 407, 537 S.E.2d 273, 274 (2000) ("This constitutional prohibition, however, does not preclude a prosecutor from making 'a *fair* response to a claim made by defendant or his counsel.'" (emphasis in original) (quoting *United States v. Robinson*, 485 U.S. 25, 32 (1988))); *State v. Raffaldt*, 318 S.C. 110, 115, 456 S.E.2d 390, 393 (1995) ("The solicitor has the right to give his version of the testimony and to comment on the weight to be given to the testimony of the defense witnesses."); *State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs."); *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument."); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) ("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 . . . ."); *State v. Wilkins*, 217 S.C. 105, 111-12, 59 S.E.2d 853, 855 (1950) (finding that where the solicitor's remark in closing argument that evidence was not disputed was "close to the border

line," any possible prejudice was cured by the trial court's jury instruction that the jury was not to consider the defendant's failure to testify).

2. As to counsel's failure to object to the solicitor's remarks in closing argument that the jury was the "conscience of the community": *Kolle*, 386 S.C. at 589, 690 S.E.2d at 79 ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."); *id.* (stating an appellate court gives great deference to the PCR court's findings of fact and conclusions of law); *Pauling*, 350 S.C. at 283, 565 S.E.2d at 772 ("The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value."); *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166 ("Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and 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."); *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166 ("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 . . . ."); *State v. Bell*, 293 S.C. 391, 403, 360 S.E.2d 706, 712 (1987) (stating that the function of a jury in the sentencing phase of a capital case is to "express the conscience of the community on the ultimate question of life or death" (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968))); *State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) ("[T]he duty of a solicitor is not to convict a defendant, but to see that justice is done. At the same time, the solicitor should prosecute vigorously."); *id.* ("'So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence . . . .'" (quoting 23A C.J.S. Criminal Law § 1107)); *id.* (stating that a prosecuting attorney "'may employ any legitimate means of impressing on [the jurors] their true responsibility'" in enforcing the law (quoting 23A C.J.S. Criminal Law § 1107)), *id.* (noting that a prosecuting attorney "'may in effect tell [the jurors] that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law'" (quoting 23A C.J.S. Criminal Law § 1107)).

3. As to counsel's failure to move to challenge and strike a certain juror: *Magazine v. State*, 361 S.C. 610, 618, 606 S.E.2d 761, 765 (2004) (noting that the PCR applicant, in seeking relief on the ground that counsel prejudiced his case by

failing to use all peremptory strikes during jury selection, failed to present evidence supporting a finding that counsel's error violated the applicant's right to a trial by a competent and impartial jury); *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) ("[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury."); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (stating a PCR applicant bears the burden of proving the allegations in his application).

4. As to counsel's failure to object to the trial court's "moral certainty" instruction: *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) ("In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in [a] way that violates the Constitution."); *id.* at 204, 675 S.E.2d at 740 (finding no reasonable likelihood that "moral certainty" language in a trial court's jury instructions caused the jury to apply those instructions in a way that violated the Constitution, as the trial court repeatedly emphasized the State's burden to prove respondent's guilt beyond a reasonable doubt); *Todd v. State*, 355 S.C. 396, 403, 585 S.E.2d 305, 308-09 (2003) (noting that where a trial court mentions "moral certainty" language in its jury instructions, "'the moral certainty language cannot be sequestered from its surroundings'" (quoting *Victor v. Nebraska*, 511 U.S. 1, 16 (1994))); *id.* at 403, 585 S.E.2d at 309 (finding that, despite the inclusion of moral certainty language, "the trial judge's careful and exhaustive articulation of the reasonable doubt and circumstantial evidence standard, when examined in its entirety, effectively communicated the high burden of proof that the state was required to establish by the Constitution"); *State v. Zeigler*, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." (internal citation omitted)).

5. As to Bolte's contention that counsel's errors had the cumulative effect of denying him of effective legal representation to the extent that prejudice was presumed in his case: *Lorenzen v. State*, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (holding that where none of the errors alleged by the PCR applicant were meritorious, the alleged errors did not have the cumulative effect of denying the applicant of effective legal representation to the extent that prejudice was presumed); *Nance v. Ozmint*, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006) (finding that absent the narrow circumstances of presumed prejudice under *United*

States v. Cronic, 466 U.S. 648 (1984), a PCR applicant alleging ineffective assistance of counsel must show actual prejudice); *id.* ("Actual prejudice requires the defendant to 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984))); *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) ("While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors.").

AFFIRMED.

HUFF, THOMAS, and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

MARK R. BOLTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-186252

Appeal from Abbeville County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2014-UP-266

PETITION FOR REHEARING

Pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, the undersigned counsel would petition for rehearing in this appeal because the Court may have overlooked prejudicial error regarding the solicitor's closing comment that the facts were "undisputed" in light of the unique **nature** of this case, i.e., a criminal sexual conduct case involving a swearing contest between the prosecutrix and petitioner (no eyewitnesses), where the word "undisputed" improperly communicated to the jury petitioner's failure to testify at trial, which in turn was an unconstitutional and prejudicial comment on his right to remain silent. In support of this petition, the undersigned counsel would submit the following information.

1.) The state's case consisted of four witnesses and the case for the defense consisted of two witnesses. Petitioner did not testify at trial. The female prosecutrix testified that she was in the ninth grade when her family[1] moved to South Carolina and that from that year (1998) until she graduated from high school (2002) her father, who is petitioner, touched her private parts inappropriately (inserted his finger into her private parts), and made her touch and put her mouth on his private parts, and ultimately performed sexual intercourse upon her. App. 119, l. 1 – p. 190, l. 22. Therapist and counselor Cherry McTaggart testified about the reasons for children's delay in disclosing sexual abuse. App. 333, l.14 – p. 352, l. 5. Ruth Burton, who was the dorm director at Erskine College, where the prosecutrix attended college, testified that petitioner violated trespassing warnings by appearing on the college campus to talk to the prosecutrix during her freshman year. App.363, l. 1 – p. 373, l. 25. Also, victim service director testified that she received and turned over to police the tapes of recorded telephone messages of petitioner's calls to the prosecutrix. App. 378, l. 1 – p. 383, l. 20.

2.) The two defense witnesses who testified on behalf of petitioner's case were Ester Lopez, who was petitioner's ex wife and the prosecutrix's mother, and Lopez's divorce attorney Velvet Moore. Ms. Lopez admitted that she and petitioner were going through a divorce during the time the prosecutrix claimed the sexual abuse occurred and that Lopez received possession of the house and cars during that process. App. 403, l. 1 – p.443, l. 3. Note that one of petitioner's arguments in his defense at trial was that the divorce battle spawned these allegations of sexual abuse as a strategy for the mother to gain an advantage in family court. Attorney Velvet Moore testified that she represented Lopez in her divorce proceeding. Moore explained that Lopez was opposed to

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[1] The family under one roof in South Carolina consisted of the prosecutrix, two siblings, and her father (petitioner) and mother.

petitioner's requests for reconciliation, joint custody, and visitation, but that ultimately, the divorce was granted and Lopez received full custody of the children. App. 480, l. 1 – p. 493, l. 11.

3.) During her closing argument, the solicitor made the following impermissible remarks in question:

> And finally I would just like to address the issue of reasonable doubt. Reasonable doubt can be defined in a lot of ways and when I'm done speaking at the very close of this case the judge will charge you on exactly what reasonable doubt is, <u>but I submit to you ladies and gentlemen that throughout this case, from the witnesses supplied by the State and the witnesses supplied by the defense, the facts of this case are undisputed.</u> One thing stands like stone. He did it and there is no other reasonable explanation for why we're here.

App. 529, l. 18 – p. 30, l. 4.

4.) In response to petitioner's PCR assertion that trial counsel erred in failing to object to the solicitor's argument that the evidence was "undisputed," trial counsel admitted that he "should have objected to the solicitor's "undisputed" remark. Counsel could not give a reason as to why he failed to object to this, and further stated that this would have been a good issue for appeal. App. 689, lines 5-23; App. 690, lines 6 – 19; App 693, lines 12 – 25; App. 717 lines 13 -25. The PCR judge held that the remark at issue this was not an improper comment on petitioner's right to remain silent, but rather an overall assessment of the case that "was based on [the solicitor's] version of the testimony presented by the state and the defense as opposed to a suggestion that [petitioner] was under any duty to testify at trial". App. 758-763.

5.) On appeal, this Court affirmed the ruling of the PCR judge and held that no prejudice resulted from the solicitor's closing "undisputed" remark based on the following points:

> a.) That a solicitor may make a fair response to a claim made by the defense;

b.) That a solicitor has a right to give his version of the testimony and comment on the weight to be given to the testimony of the defense witnesses;

c.) That a solicitor is allowed at closing to argue the record evidence and reasonable inferences; and

d.) That improper comments do not automatically require a reversal if they are not prejudicial or if the improper argument is cured by judge's instructions.

However, none of these points listed above were applicable due to the unique **nature** of this case to the extent that this was a criminal sexual conduct case that boiled down to a swearing contest between the prosecutrix and petitioner; and therefore, a comment that the facts were "undisputed" in this instance undoubtedly implied that petitioner did not take the witness stand to refute the sex allegations. Additionally, the prejudice that resulted from this comment made by the solicitor on his (petitioner's) right to remain silent clearly infected the trial with sufficient unfairness as to deny him a fair trial. Moreover, the Court's points raised in its opinion did not support the holding in the case.

A.) <u>A Solicitor Has A Right To Respond To The Defense's Claims</u>

This Court ruled in effect that the solicitor's "undisputed" remark was a response to the defense's claim that the allegations of sexual misconduct were fabricated in order to expedite the divorce action filed by petitioner's wife as she sought to gain an advantage in the divorce proceedings.[2] This Court cited to <u>State v. McClure,</u> 342 S.C. 403, 537 S.E.2d 273 (2000), and <u>United States v. Robinson,</u> 485 U.S. 25 (1988), in support of this rationale. However, the solicitor's "undisputed" remark was connected to the witnesses' testimony only (particularly petitioner's missing testimony) and not an attempt to highlight the divorce motive theory. Also, to the contrary, <u>Robinson</u> and <u>McClure</u> support petitioner's case.

In Robinson, the prosecutor's comment on the defendant's silence, i.e. that the defendant "could have taken the stand," was in response to defense counsel's closing argument that the government did not allow the defendant to testify. In the case at bar, petitioner's counsel did not address petitioner's silence at closing, but rather, the solicitor on her own initiative, which was an act condemned by the Robinson Court, raised the jurors' awareness of the fact that petitioner did not testify at trial and respond to the prosecutrix's allegations. Also, in McClure, the Court reversed and held the state's comments regarding the defendant's lack of remorse were unfair comments and "a far cry from the restrained rebuttal sanctioned by the Supreme Court in Robinson."

B.) **The Solicitor May Comment On His Version of the Testimony and Its Weight**

This Court ruled in effect that the solicitor's "undisputed" remark was in effect "based on her version of the testimony presented by the state and the defense rather than a suggestion that [petitioner] was under any duty to testify,"[3] and cited to State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995) in support of its position. Clearly, a comment on the version of the testimony would constitute statements indicating that the defense's witnesses' testimony corroborated the state's case, or statements ridiculing the defense's theory of the case (divorce motive spawned the sex allegations). However, since petitioner did not testify at trial, there was no comment to be made by the solicitor on any version on nonexistent testimony. Therefore, the solicitor's "undisputed" comment was a comment on petitioner's failure to testify.

Compare Raffaldt, which is inapplicable to the case, where the issue concerned the pitting of a witnesses by the solicitor. Raffaldt, who was on trial for trafficking in cocaine, testified at trial declaring that his association with the state's witnesses centered around chicken fighting rather than

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[2] The PCR judge's ruling on the point was that the solicitor was permitted to respond in closing argument to the [petitioner's] theory that the allegations were motivated by divorce for instance." App. 762.

drug sales. Hence, the solicitor's comments questioning the defendant's testimony was upheld. However, petitioner did not testify in the case at bar.

C.) <u>The Solicitor's Closing Was Within Reasonable Record Inferences</u>.

This Court held that the solicitor's "undisputed" remark was a comment on reasonable inferences in the record presumably to the extent that the remark was a "reflect[ion] on the content and consistency of the testimony presented by the witnesses for both the state and the defense,[4] and a reference to the "defense witnesses whose testimony did not dispute the testimony and evidence presented by the state."[5] Clearly, there was a difference between arguing that the testimony of the defense witnesses corroborated the testimony of the state's witnesses and going further and arguing that there was a missing witness who could have cleared up the sex allegations against him. Again, due to the **nature** of this case, i.e. a criminal sexual case involving a swearing contest between the prosecutrix and petitioner, the solicitor went beyond drawing inferences from the record and went so far as to highlight the inference that "undisputed" meant that a key witness, i.e., petitioner, failed to testify in order to end the obvious missing link in the case.

This court cited <u>State v. New</u>, 338 S.C. 313, 526 S.E.2d 237 (1999), in support of a solicitor being able to argue reasonable evidentiary inferences at trial. <u>New</u> was inapplicable to this case because the holding there concerned the solicitor's bolstering of a witness, who was an accomplice, by giving him laud for testifying because he would later be regarded as a snitch and face danger in prison. In <u>New</u>, the witness (accomplice) in question testified. In the present case, petitioner did not testify at trial. Rather, the solicitor's closing argument in question here highlighted the fact that only one witness (prosecutrix) in the swearing contest had come forth and that the only other

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[3] PCR judge's Order of Dismissal at 761.
[4] See PCR Order of Dismissal at App. 761.
[5] See PCR Order of Dismissal at App. 762.

witness in the swearing contest who could refute the prosecutrix's testimony was petitioner, who did not testify, and thus the facts were "undisputed" according to the solicitor.

D.) Closing Comments Cured By A Judge's Charge Result In A Fair Trial

This Court held in effect that the solicitor's "undisputed" remark was not prejudicial[6] and had been cured by the judge's instructions regarding the burden of proof and petitioner's right to exercise his right not to testify.[7] In support of this ruling, this Court cited to Humphries v. State, 35 S.C. 362, 570 S.E.2d 160 (2002); Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998); and State v. Wilkins, 217 S.C. 105, 59 S.E.2d 853 (1950). Again, due to the **nature** of this case, that being a criminal sexual conduct case where a swearing contest existed where only the prosecutrix and the defendant only knew for certain what happened, a comment that the facts are "undisputed" spotlight clearly petitioner's silence so vividly that the prejudice remains despite any instructions given to the jury. Additionally, the cases cited by the Court did not support its holding.

In the Humphries death penalty case, the solicitor's comments regarding the life of the deceased and the life of the defendant (with the inference being that the deceased's life was worth more) did not deprive the defendant of a fair trial and were not prejudicial because the defendant presented character evidence in his case in mitigation. In the case at bar, petitioner had no other witness other than himself to testify on his behalf. Thus, in Humphries, the defendant presented his case via character witness, but here, petitioner could not present his case without testifying at trial,

[6] See PCR judge's ruling that the "undisputed" comment was not prejudicial.." and was instead " a clear reference to the defense witnesses whose testimony did not dispute the testimony and evidence presented by the state [rather than] to [petitioner's] right to or failure to testify in anyway. App 761 – 762.

[7] See the PCR judge's ruling the comment at issue was not prejudicial to the extent it denied petitioner a fair trial and where the trial judge emphasized the burden of proof and explained that petitioner's decision not to testify was not a factor to be considered by them. App. 762.

which he did not do, and was in effect prejudiced for his silence as the case was incomplete based on the solicitor's assessment that the facts were "undisputed." Moreover in Simmons, the Court held that the defendant was deprived of a fair trial after improperly injecting parole considerations into the jury's sentencing decision during closing arguments. Finally, in Wilkins, which was an attempted rape case wherein the defendant did not testify, the court held that the solicitor's closing that the evidence "[was] not disputed," referenced whether there was any intent to commit rape since identity had been established already in the case. Here, attempt was not at issue, but rather, credibility was the central issue in the case. This prosecutrix testified that the crimes were actually committed and the solicitor reminded the jury that petitioner's silence, which was his constitutional right to exercise, in failing to testify that the prosecutrix lied was "undisputed" proof that he was guilty as charged.

6.) The presumption of innocence and the state's burden of proving the accused guilty are principles embedded in our federal and state constitutions. The defendant has a right to put the state to its burden of proof in a criminal case. Doyle v. Ohio, 426 U.S. 610 (1976). Additionally, a defendant has a Fifth Amendment right to remain silent and not testify at trial; and as a result, the state cannot comment upon the defendant's exercise of his right to remain silent and the same cannot be used against him. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (2004); Brown v. State, 375 S.C. 464, 652 S.E.2d 765 (2007). It is error for a solicitor to attempt to elicit an adverse inference from the defendant's failure to testify at trial. Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998). As a rule, the solicitor may never argue an adverse inference based on the defendant's failure to present any defense at all where he presents no evidence at all. State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977); State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002).

Nonetheless, in cases where the defendant presents witnesses and where there are other witnesses who are available to him to present, the solicitor is allowed to comment on the same. Douglas v. State, supra; State v. Shackelford, 228 S.C. 9, 88 S.E.2d 778 (1955); State v. Bamberg, 270 S.C. 77, 240 S.E.2d 639 (1977). Here, petitioner did present two witnesses in his defense to show that the pending divorce led to these charges as a way to remove him from the home. However, although petitioner presented witnesses in his defense, the solicitor did not argue that certain witnesses were not produced as allowed via Douglas and its progeny; but rather, the solicitor ventured beyond the accepted boundaries and went directly to the issue of petitioner's personal silence with reference to the case as if he (petitioner) were the **only** witness who could have been presented that mattered. The instant violation was identical to the violation in State v. Sweet, 342 S.C. 342, 536 S.E.2d 91 (Ct. App. 2000), where the Court reversed due to the solicitor's comment that certain evidence was "uncontradicted and that the defendant [was] the **only** person who could contradict the evidence" in question in the case because this was a prejudicial comment on the defendant's failure to testify and because the error was not harmless. Similarly, in the instant case, the "undisputed" remark was akin to the remark in the Sweet case as the implication was that **only** petitioner could settle this case once and for all.

Hence, the Solicitor's "undisputed" remark was a direct attack on petitioner's personal failure to testify in the case and refute the prosecutrix's testimony sans any other interpretation. In other words, since there were no witnesses to the sexual acts that occurred, the case boiled down to the prosecutrix's verbal testimony versus petitioner's silence. Hence, if the prosecutrix testified and petitioner did not testify, then the resulting "undisputed" comment made by the solicitor could only mean that the remark at issue was intended for the jury to draw an adverse inference from petitioner's failure to testify at trial.

CONCLUSION

In summary, the solicitor's "undisputed" facts closing argument comment was improper, prejudicial, and denied petitioner of the right to a fair trial; and contrary to this Court's ruling, the "undisputed" comment cannot be accepted as a response to any of petitioner's claims, or a comment on the witnesses' testimony, or a comment on any version of the facts, or a comment on reasonable inferences from the record. Furthermore, the prejudice in question remained despite the trial judge's instructions.

WHEREFORE, since this Court may have overlooked how the unique **nature** of this case (criminal sexual conduct swearing contest) amplified the error and prejudice of the solicitor's closing "undisputed" comment, which in turn constituted an unconstitutional and impermissible attack on petitioner's right not to testify and remain silent, then counsel for petitioner would request a rehearing in the case.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

This 15th day of July, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Eugene C. Griffith, Jr., Circuit Court Judge

MARK R. BOLTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of July, 2014.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 15th day
of July, 2014.

______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

Mark R. Bolte, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-186252

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APPELLATE DEFENSE

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Few C.J.

Thomas E. Huff J.

Paul E. Short Thomas J.

Columbia, South Carolina

cc:
James Rutledge Johnson, Esquire
Wanda H. Carter, Esquire
Alan McCrory Wilson, Esquire

FILED
August 20, 2014