THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2018-000201

The State of South Carolina, Respondent,

v.

CRAIG CARL BUSSE Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February 5-7, 2018 Appellant proceeded to trial before the Honorable Donald B. Hocker and a jury. Busse was represented by Anna Browder, and the state was represented by Dale Scott and Taylor Daniel.

Busse was alleged to have committed criminal sexual conduct with a minor, second degree, with his step-daughter. There was no forensic evidence presented by the State, simply relying on the testimony of officers, individuals the alleged victim spoke with, and the alleged victim. The jury found the Appellant Busse guily of the charge as indicted. The judge sentenced Busse to a period of 15 years and to be added to the sex offender registry. Busse's trial attorney filed a notice of appeal.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusion of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

III. THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S OBJECTION WHEN THE SOLICITOR ARGUED DURING CLOSING ARGUMENTS THAT HE FOUND THE VICTIM'S TESTIMONY TO BE COMPELLING.

During closing arguments, one of the prosecuting attorneys Mr. Scott made comments to the jury which improperly bolstered the testimony of the victim's testimony. The relevant excerpt from his closing is as follows:

> "But you know, he didn't have intercourse with her. You know why. He can't have intercourse with her. He's impotent, cannot sustain an erection. *What I want you to ask yourselves and what was compelling to me, how does she know that.*"

(Emphasis added). R. p. 318, lines 15-16. Defense counsel timely objected with "objection as to anything about what he believes and if it's compelling to him or not. It's improper." *Id.* at lines 17-19. The trial judge overruled the objection without offering any opportunity to the defense to argue the merits of the objection. Nor did the judge ask the prosecutor why it should not be considered improper witness bolstering. The trial court's response to the defense objection was, "Well, you know, I'm pretty liberal with closing arguments. I'll overrule your objection and allow him to argue it. Certainly, afford you the same rights." *Id.* at lines 20-22. Once the court overruled the objection the prosecutor was allowed to continue with,

> "I'm going to repeat what was compelling to me and should be to you, was how did she know that." R. 318, lines 23-24.

In State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (S.C. 2001), our Supreme Court addressed the issue of improper witness bolstering by prosecutors. A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion

concerning a witness' truthfulness. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805 (S.C. 2001) (citing Elmer v. Maryland, 353 Md. 1, 724 A.2d 625 (1999). Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. *Id.*, See State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001); 75A AM.JUR. Trial § 700 (1991). Vouching occurs when a prosecutor implies that he has facts that are not before the jury for their consideration. *Id.*, Missouri v. Wolfe, 13 S.W.3d 248 (Mo.2000).

It is immediately apparent that in this case, during closing argument, the prosecution engaged in improper bolstering that is precisely what our precedent has prohibited. Here, the prosecution argued during closing about a consequential fact in the case- the defendant's inability to sustain an erection- and directly connected this fact with his personal opinion regarding the victim's truthful testimony. In essence, the prosecutor here provided his own testimony about the facts of the case to the jury. His statement regarding the veracity of the victim's testimony planted into the minds of the jury a new fact that had not been testified to by the victim herself during the trial. His assertion that this fact was *compelling to him*- the fact being victim's knowledge of the defendant's impotence- told the jury what weight (if any at all) they should place on this fact in their deliberations. The evaluation of the witness's credibility, which is for the jury to determine, was undermined by the prosecution's improper bolstering during closing arguments.

The prosecutor did two things simultaneously which together should be regarded as improper witness bolstering. First, he addressed the fact of consequence from his personal point of view by stating "What I want you to ask yourselves and what was compelling to me...." Second,

in that same sentence, he concluded with, "how does she know that." This statement went far beyond arguing the facts presented during trial; it assured the jury that the prosecutor himself believed she *must be* credible since the only way the victim would know such a consequential fact about the defendant would be if she were telling the truth.

In State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (S.C. 2001) our Supreme Court agreed that the prosecution's manner of questioning a state witness resulted in improper bolstering of that witness's credibility. In that case, the prosecutor asked the state's witness on direct examination (during the sentencing phase of the case):

> [Assistant Solicitor]: What did I tell you that I absolutely required regarding your testimony to this jury today?
>
> [Witness]: Uh—excuse me?
>
> [Assistant Solicitor]: Did I tell you to tell the truth to this jury— [McCormack]: Of course.

Id. at 343 S.C. 350, 368, 540 S.E.2d 851 (S.C. 2001). Following a defense objection which the trial court overruled, the prosecution in Kelly continued:

> [Assistant Solicitor]: What did I tell you regarding your testimony to this jury today? The only thing the State wanted from your testimony was what?
>
> [Witness]: The truth.

Id.

Typically, vouching occurs when the prosecution comments on a witness's credibility in its opening statement or closing argument. *Id.* at 343 S.C. 350, 369, 540 S.E.2d 851 (S.C. 2001). The defense in Kelly argued this point even during direct examination- that the prosecution's method of questioning its witness amounted to improper bolstering because it placed the prestige of the government behind the testifying witness. *Id.* at 343 S.C. 350, 368, 540 S.E.2d 851 (S.C. 2001).

The defense also argued that this questioning effectively made the prosecutor a witness in the case who was vouching for the credibility of the testifying witness. *Id.* The court agreed: In our opinion, the State's questions served to improperly bolster McCormack's credibility. *Id.* at 343 S.C. 350, 369, 540 S.E.2d 851 (S.C. 2001). The Kelly relied on United States v. Walker, 155 F.3d 180 (3d Cir. 1998) in concluding that the state did engage in improper witness bolstering.

In United States v. Walker, 155 F.3d 180 (3d Cir. 1998), the Court of Appeals for the Third Circuit discussed generally the concept of vouching: 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 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. State v. Kelly, 343 S.C. 350, 368-69, 540 S.E.2d 851 (S.C. 2001). The Kelly court then concluded that:

> Although perhaps not technically vouching, the manner of questioning by the State raises the second concern outlined by the Walker court: the jury could have perceived that the assistant solicitor held the opinion that McCormack was, in fact, telling the truth. Thus, McCormack's testimony carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about McCormack. 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. Accordingly, the trial court erred in overruling Kelly's objection.

State v. Kelly, 343 S.C. 350, 369, 540 S.E.2d 851 (S.C. 2001).

The same prong of the Walker opinion which the Kelly court relied on is implicated here; the prosecution's assertion during closing (twice) that a fact testified to by the victim witness was "compelling" only served to assure the jury that the state deemed this witness to be credible. As such, this deprived the jury of their key role in exclusively assessing the credibility of all witnesses who testified during the trial.

While the Kelly court ultimately determined that the trial judge's failure to sustain the defense objection was harmless error, that is not the case here. State v. Kelly, 343 S.C. 350, 369-70, 540 S.E.2d 851 (S.C. 2001). The Kelly court based its harmless error decision largely on the defense attorney's ability to effectively cross-examine the witness to impeach their credibility following the improper bolstering. *Id.* at 343 S.C. 350, 370, 540 S.E.2d 851 (S.C. 2001). Additionally, the Kelly court was considering this error during the sentencing phase of the trial, whereas this appeal is concerned with the trial court's error in overruling defense objection during closing arguments made at the trial itself. *Id.* at 343 S.C. 350, 370, 540 S.E.2d 851 (S.C. 2001). Furthermore, the Kelly court did note that vouching typically occurs during opening or closing arguments, as was the case here. *Id.* at 343 S.C. 350, 369, 540 S.E.2d 851 (S.C. 2001) (citing United States v. Walker, 155 F.3d 180, 185-87 (3d Cir. 1998). The prosecutor's remarks during closing arguments amounted to clear improper bolstering of the only state witness against the Appellant in this case. This went far beyond harmless error, as there was no other evidence in the record to corroborate the victim's testimony.

With respect to appellate decisions on the issue, from the context of post-conviction relief (PCR) actions, there is additional authority supporting Appellant's position that vouching for the credibility of a state's witness is improper. These authorities have held that defense counsel has been ineffective when failing to object during opening or closing arguments, where the prosecution has vouched for the credibility of a state witness. In Tappeiner v. State, 416 S.C. 239, 254, 785 S.E.2d 471, 479 (S.C. 2016), the Supreme Court agreed with the PCR court that trial counsel's failure to object to the prosecutor's closing argument amounted to ineffective assistance of counsel but further held, contrary to the PCR court's finding, that this deficiency did in fact prejudice the defendant in that case. The court held:

> Accordingly, we find there is no evidence in the record to support the PCR court's conclusion that Tappeiner was not prejudiced by trial counsel's failures to object during the State's closing arguments. To the contrary, the solicitor's repeated vouching for Victim's credibility and her emotional plea to the jurors was incredibly prejudicial to Tappeiner because there was no other evidence beyond Victim's testimony of the events that allegedly occurred that August evening. We therefore reverse the PCR court's finding that trial counsel's failure to object during closing arguments was not prejudicial, and grant Tappeiner a new trial due to ineffective assistance of counsel.

Id.

In keeping their closing arguments within the record, solicitors additionally must tailor their remarks "so as not to appeal to the personal biases of the jury" or "arouse the jurors' passions or prejudices." *Id.* at 416 S.C. 250, 785 S.E.2d 477 (2016) (citing Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Accordingly, solicitors

should avoid comments that ask jurors to place themselves in the victim's—or another party's—shoes, because those types of comments tend to "completely destroy all sense of impartiality of the jurors. *Id.* at 416 S.C. 250-51, 785 S.E.2d 477 (2016) (citing Brown v. State, 383 S.C. 506, 515–16, 680 S.E.2d 909, 914 (2009). In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine "whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 416 S.C. 251, 785 S.E.2d 477 (2016) (citing Vaughn v. State, 362 S.C. 163, 169-70, 607 S.E.2d 72, 75 (2004).

Based on the foregoing, Appellant believes the trial court erred and should have sustained defense counsel's objection during the closing argument. These comments effectively vouched for the credibility of the primary witness against the Appellant, and therefore, Appellant was prejudiced before the jury could even deliberate and give their own weight to the credibility of the victim. Appellant submits that this error at this stage of the trial prejudiced him beyond harmless error, and asks for a new trial.

IV. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE RAPE SHIELD STATUTE WHEN THE COURT REFUSED TO ALLOW APPELLANT TO USE EVIDENCE FOUND ON THE VICTIM'S CELL PHONE TO SHOW MOTIVE.

The prosecution made a pretrial motion *in limine* regarding the DSS merits hearing that had occurred. During that merits hearing there was some discussion on the record regarding victim's prior sexual history that the State sought to avoid in the criminal trial, arguing it fell under the Rape Shield statute and therefore could not be introduced during the trial. R. p. 31, lines 10-20. During the pretrial motion, defense counsel agreed not to go into the victim's sexual history unless a pregnancy scare was brought up during the victim's testimony, at which point defense counsel believed that would open the door. R. p. 31, lines 22-25, p. 32, lines 1-2.

However, the defense believed it was appropriate to go into the contents of the victim's cell phone to show motive. The defense argued that State v. Finney applied in this case and that the defense should have been allowed to enter all relevant evidence which tends to establish motive, bias, and prejudice on the part of the complaining witness. R. p. 32, lines 5-10. The defendant Craig Busse denied that any of the allegations had occurred. R. p. 32, lines 10-11. Thus, this is not a case involving a confession but rather one where the defendant has maintained his innocence.

The timing of the allegations in this case actually began following an argument between the victim and Mr. Busse over the victim's cell phone, where she was sending photos of sexual things she had done to a boy that she had been sneaking into the house. R. p. 33, lines 12-15. Defense counsel argued pretrial that they should be able to bring up the contents of the cell phone communications that resulted in the dispute between victim and the defendant, so as to show motive why these allegations would have been made against the defendant. R. p. 33, lines 16-19. Defense counsel wished to introduce the evidence of the contents of those communications between the victim and another boy, including any photographs, to establish motive for making the allegations against the defendant. R. p. 33, lines 19-22. The defense argued that State v. Finley does not bar evidence of a victim's sexual conduct if it is offered for a purpose other than to attack the victim's morality. R. p. 33, lines 8-13. The prosecution argued that the South Carolina Rape Shield statute, S.C. Code Ann. § 16-3-659.1, prevented that evidence from being introduced at the trial. R. p. 32, lines 23-25, p. 33, lines 1-5. The Rape Shield statute in question provides:

> **SECTION 16-3-659.1. Criminal sexual conduct; admissibility of evidence concerning victim's sexual conduct.**
> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative

value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.

(2) If the defendant proposes to offer evidence described in subsection (1), the defendant, prior to presenting his defense shall file a written motion and offer of proof. The court shall order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, the judge may order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1).

In State v. Finney, 300 S.C. 200, 387 S.E.2d 90 (1989) the defendant argued that the Rape Shield statute should not have applied to bar the introduction of the victim's sexual conduct on the night preceding the alleged assault by the defendant, which the victim claimed occurred the next morning. Following a proffer of testimony, the trial judge ruled that the appellant could not testify about the complainant's sexual activity in his presence or appellant's belief as to her *motive* for allegedly fabricating the charges against him. (Emphasis added). *Id.* The court held,

"We hold that exclusion of the proffered evidence constitutes prejudicial error. Appellant's defense was that he did not commit the assault, that the charges were fabricated to silence him about the complainant's sexual conduct with her neighbor, and to extort money from him. The unique facts of this controversy, coupled with the appellant's right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness. Since the proffered evidence is essential to a full and fair determination of appellant's guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity with a third party, we conclude that such evidence does not come within the purview of the Rape Shield Statute. See State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). In Schmidt, this Court held that

evidence concerning hard feelings between the families of a victim and a defendant was relevant where the accused's defense was that he did not commit the alleged act of criminal sexual conduct and that the child's story was a result of her parent's vendetta against him. Though the Rape Shield Statute was not an issue in Schmidt, the circumstances are analogous and we find the reasoning persuasive. In Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d[300 S.C. 201] 347 (1974), the United States Supreme Court held that a state's policy of protecting juvenile offenders must yield to a defendant's right to confront witnesses. Similarly, the state's interest in protecting criminal sexual conduct victims from disclosure of sexual acts with third parties must yield to the defendant's right under the circumstances of this case to present evidence that he is being falsely accused because of his knowledge of the complainant's sexual conduct with a third party.

Id.

Similarly, the Appellant here sought to introduce the contents of sexually explicit communications between the victim and a third party. These communications were relevant for purposes to establish the victim's motive for fabricating the allegations of sexual abuse by the Appellant. Therefore, this purpose to show motive to fabricate (an essential defense to a sexual assault allegation) excluded the applicability of the Rape Shield statute. The trial judge's refusal to allow this evidence was error. Additionally, this error was prejudicial to the Appellant. The evidence would have corroborated Appellant's defense that the discovery of these communications on the victim's cell phone directly led to a dispute between her and Appellant, which then resulted in the fabrication of these

accusations against Appellant. Without this evidence, Appellant was deprived of the opportunity to establish motive to fabricate, and therefore, was deprived of the opportunity to fully defend himself against these accusations.

CONCLUSION

Based on the arguments presented herein, the Appellant asks this Court to overturn his conviction and to order a new trial, and for all other relief which is just and proper.

Respectfully submitted,

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April 29, 2019
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RULE 211 CERTIFICATION

The undersigned hereby certifies that the ***Final Brief of Appellant*** complies with Rule 211, SCACR.

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