

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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NOV 30 2020

SC Court of Appeals

Appellate Case No. 2018-000201
Unpublished Opinion No. 2020-UP-307

The State of South Carolina,

Respondent,

v.

Craig Carl Busse,

Appellant.

APPELLANT'S PETITION FOR REHEARING

Appellant hereby submits this Petition for Rehearing asking that the Court reconsider having affirmed this conviction based on the following:

I. Prosecutor's Closing Statements

The Court's opinion affirming the decision of the lower court to overrule the objections by Appellant's trial counsel fails to consider the overwhelming prejudice suffered by the Appellant-Defendant during trial as a result of these improper statements. The Court cited Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016): "Solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom..." and that "The trial court's discretion will not be

overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant,” (citing Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). Appellant believes the trial judge abused their discretion in allowing these improper comments by the prosecutor during the closing arguments; that no curative instruction was provided to the jury to alleviate this prejudice; and that the basic tenants of due process and fundamental fairness were violated.

The Court concluded, based on the opinions cited in affirming the conviction, that insufficient prejudice existed based on the record. Yet the Court overlooks the overwhelming prejudice suffered by the defendant as a result of these comments: “*What I want you to ask yourselves and what is compelling to me, how does she know that?*” And once again, after the judge sustained, “*I’m going to repeat what was compelling to me and should be to you, was how did she know that.*”

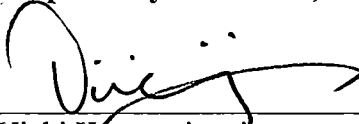
Appellant’s basis for prejudice is rooted in the very fact that the solicitor’s improper arguments were perceived by the jury as improper vouching, or bolstering, of the victim-witness who testified against defendant in the trial. South Carolina precedent precludes witness bolstering and vouching for the witness’s veracity by a prosecutor. State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). See also Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002). In Gilchrist, the Supreme Court agreed that the State improperly vouched for the credibility of the witness, during opening statements, where the prosecutor’s remarks included, “*And I’ll say this from the bottom of my heart, that there is one soul, who was at one time unclean and is now clean.*” *Id.* at 350 S.C. 227. As the Supreme Court determined, this statement was itself improper bolstering because it amounted to a personal assurance

of the witness's veracity since the prosecutor "emphatically" stated that the witness was "*now clean,*" or worthy of belief. *Id.* The same analysis applies here in this case.

The prosecutor's improper comments effectively removed the function of the jury to be the sole arbiter of the credibility of the witness in the case, and exceeded the bounds of proper commentary during opening or closing arguments. Even more prejudicial to the defendant is the fact that the prosecutor's remarks during closing directly connected a fact of consequence in the trial – the defendant's inability to sustain an erection – with the prosecutor's own testimony regarding the significance of this fact. The prosecutor implanted into the minds of the jury this new fact, and further, by adding his comments that this fact was "compelling," he demanded of the jury the very weight to be placed on this single fact during their deliberations. As such, the violation here is not merely the prosecutor's own personal viewpoint of the weight of the evidence, but also in exceeding the evidence presented at trial – by assuring the jury that this fact testified by the witness mandates her credibility – "*How does she know that*" – essentially instilling into the juror's minds that the witness's testimony must be true because there is no other alternative, but the truth of the matter asserted at trial.

The trial judge did not provide any curative instruction to alleviate the prejudicial effect of these remarks to the jury. In such a case as this, where the sole evidence against the defendant rests on the credibility of the victim-witness, the prosecutor's improper vouching and presentation of evidence in a new light to the jury which was not itself independent evidence presented during the trial, is unduly prejudicial and cannot be cured absent a new trial for the defendant.

Respectfully submitted,



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November 30, 2020

Lexington, South Carolina

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PROOF OF SERVICE

The undersigned, an attorney with the Law Office of James R. Snell, Jr., LLC, hereby certifies that she has served a copy of the *Appellant's Petition for Rehearing* on the Respondent in this case, by depositing a copy of the same in the United States Mail, postage prepaid, on November 30, 2020, addressed to the following:

Donald J. Zelenka, Esq.
John Benjamin Aplin, Esq.
Attorney for the Respondent
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

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Attorneys for the Appellant

November 30, 2020
Lexington, South Carolina



LAW OFFICE OF
JAMES R. SNELL, JR.

LLC

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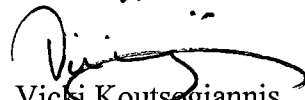
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: State of South Carolina, Respondent, vs. Craig C. Busse, Appellant
Appellate Case No.: 2018-000201
Opinion No.: 2020-UP-307

Dear Ms. Kitchings,

In accordance with Rule 221, SCACR, enclosed for filing please find an original and a copy of the Appellant's Petition for Rehearing in this case, as well as a Proof of Service. Thank you.

Sincerely,


Vicki Koutsogiannis
Attorney for Appellant

cc: South Carolina Attorney General's Office:
Mr. Alan McCrory Wilson, Esq.
Mr. John Benjamin Aplin, Esq.
Mr. William M. Blitch, Jr., Esq.
Mr. Donald J. Zelenka, Esq.

Eighth Circuit Solicitor's Office:
David Matthew Stumbo, Esq.

The Honorable Donald B. Hocker
Circuit Court Judge