

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Newberry County

Honorable David B. Hocker, Circuit Court Judge

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Opinion No. 2020-UP-307 (S.C. Ct. App. filed May 2, 2019)

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The State of South Carolina,

Respondent,

v.

Craig C. Busse,

Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

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**S.C. SUPREME COURT**

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## CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on December 21, 2020.

### QUESTIONS PRESENTED

- I. Did the Court of Appeals err in holding that the trial court did not abuse its discretion in overruling Petitioner's objection during solicitor's closing argument, wherein the solicitor improperly vouched for and bolstered the credibility of the victim?
- II. Did the Court of Appeals erroneously determine that Petitioner failed to establish prejudice such that Petitioner's right to a fair trial was violated?

### STATEMENT OF THE CASE

Craig C. Busse, Petitioner, appealed his conviction for Criminal Sexual Conduct with a Minor, Second Degree. Petitioner's trial was held during February 5<sup>th</sup> through 7<sup>th</sup>, 2018. During the trial, Petitioner was represented by Anna Browder, and the State was represented by Dale Scott and Taylor Daniel. Petitioner's trial counsel timely filed a Notice of Appeal. Petitioner was represented by Vicki Koutsogiannis with the Law Office of James R. Snell, Jr., LLC during the appeal. Following the Court of Appeals' unpublished opinion affirming the conviction, Petitioner's appellate counsel filed a Petition for Rehearing. App. p. 11, p. 3. The Court of Appeals denied the request for rehearing on December 21, 2020. App. p. 1. Petitioner hereby submits this Petition for a Writ of Certiorari.

The criminal trial of this case consisted of testimony by the victim-witness who was the Petitioner's stepdaughter. The State's case comprised solely of the victim's own testimony and credibility; apart from a few other witnesses whom were merely made aware of the allegations

(absent any other knowledge), the State did not present any other physical or corroborative evidence during the trial. The victim alleged during the trial that beginning when she was fourteen years old, the Petitioner began inappropriate contact with her sexually, which ultimately led to her performing oral sex on the Petitioner one time, and Petitioner performing oral sex on her several times. App. p.249, lines 9-25; p. 250, lines 1-19. The victim further alleged that Petitioner attempted, without success, to have sexual intercourse with her, during times when other family members would have been physically present in the home. App. p. 252, lines 8-25; p. 253, lines 4-15. The victim testified that the occurrences began during Fall 2015 and continued until March 2017. App. p. 257, lines 8-14. The victim did not come forward to her mother but rather to one of her peers, and that is how her mother found out about the incident. App. p. 248, lines 12-25. The victim admitted during the trial that when first questioned by her mother, that she [victim] disclosed that it did not happen, and retracted her story. App. p. 249, lines 1-8.

During closing arguments, the state argued to the jury that: “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.) App. p. 352, lines 9-16. Defense counsel timely objected, renewed her motions following the conviction, and further moved for a new trial. App. p. 352, lines 17-19; p. 389, lines 23-25; p. 390, lines 1-6.

### ARGUMENT

- I. THE COURT OF APPEALS SHOULD HAVE DETERMINED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING PETITIONER’S OBJECTION DURING SOLICITOR’S CLOSING ARGUMENTS WHEN THE SOLICITOR IMPROPERLY VOUCHERED FOR AND BOLSTERED THE VICTIM’S CREDIBILITY

During closing arguments, the solicitor, Mr. Scott, gave commentary to the jury which improperly bolstered the victim's testimony. The solicitor argued that that the victim's testimony as to a consequential fact in the case was "compelling" to him; that, but for that fact, how would the victim have known this [fact]. App. p. 352, lines 9-16. The state was arguing this fact to the jury regarding the Petitioner's supposed impotence or inability to sustain an erection, and connecting that fact to the victim's testimony on the subject. During this line of questioning on direct examination, the victim was asked by the solicitor directly, whether the Petitioner had issues achieving an erection (App. p. 254, lines 4-7); whether "this was the only way you could have known about Craig's issues with achieving an erection" *Id.* at lines 24-25; p. 255, line 1. This fact regarding erectile dysfunction was first offered into evidence by the solicitor himself, to which all the victim-witness had to do was respond affirmatively.

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". App. p. 352, 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."* *Id.* at lines 23-24.

The prosecutor exceeded the bounds of appropriate commentary during closing arguments and therefore, the trial court should have sustained the objection. 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. Shuler, 344 S.C. at 630 (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. Schuler, 344 S.C. at 630; Missouri v. Wolfe, 13 S.W.3d 248 (Mo.2000).

It is immediately apparent that in this case, during closing arguments, the solicitor engaged in improper bolstering that is precisely what our precedents have prohibited. Here, the prosecution argued about a consequential fact in the case- the defendant's inability to sustain an erection- and directly connected this fact with his personal assurance regarding the victim's truthful testimony. The solicitor effectively 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 the particular weight that should be placed on this singular fact. His assertion that this fact was *compelling to him*- the fact being victim's supposed 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 solicitor's improper bolstering during closing arguments.

The solicitor did two things simultaneously which together should be regarded as improper witness bolstering. First, he personally assured the credibility of the testimony by declaring, "What

I want you to ask yourselves and what was compelling to me....” Second, he concluded with, “how does she know that.” This statement exceeded merely arguing the facts presented during trial; it assured the jury that the solicitor 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 solicitor’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 solicitor 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 369. The defense in Kelly argued this point even during direct examination- that the solicitor’s method of questioning its witness amounted to improper bolstering because it placed the prestige of the government behind the testifying witness.

*Id.* at 368. The defense also argued that this questioning effectively made the solicitor 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 369. The Kelly court relied on United States v. Walker, 155 F.3d 180 (3d Cir. 1998) in concluding that the state had engaged in improper witness bolstering.

Citing 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.

*Id.* at 369.

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 weighing 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. *Id.* at 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 370. 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.* Furthermore, the Kelly court did note that vouching typically occurs during opening or closing arguments, as was the case here. *Id.* at 369 (citing United States v. Walker). The prosecutor's remarks during closing arguments amounted to clear improper bolstering of the sole witness against the Petitioner in this case. This went far beyond harmless error, as there was no other evidence in the record to corroborate the victim's testimony of which the state's case was entirely dependent.

With respect to appellate decisions on the issue, from the context of post-conviction relief (PCR) actions, there is additional authority supporting Petitioner'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 underlying charge which was for criminal sexual conduct with a minor (in the second degree), 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; however, the Court 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 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 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 251, 785 S.E.2d 477 (2016) (citing Vaughn v. State, 362 S.C. 163, 169-70, 607 S.E.2d 72, 75 (2004)).

Petitioner submits that the solicitor's closing arguments made during the trial amounted to improper bolstering and vouching for the credibility of the victim's testimony; that precedent has already established that such commentary by the state during closing arguments is improper; and that the Court of Appeals erroneously determined, without proper justification in its Opinion, that the Petitioner received the relief requested from the trial court.

II. THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT PETITIONER DID NOT SUFFER PREJUDICE THAT VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL

In cases such as this, where a victim's uncorroborated allegation alone is sufficient to convict, it is imperative that the state be precluded from improper bolstering of any witness, especially of the victim's own testimony, so as to ensure the Defendant is afforded a fair and impartial trial by jury. Here, the prosecutor's closing remarks not only constituted improper bolstering, but they further infected the minds of the jurors such that Petitioner suffered prejudice and a denial of due process.

In sexual abuse cases, there are various rules which restrict the testimony of state's witnesses, for instance, forensic interviewers, who are prohibited from, among other things,

“indirectly vouchi[ng] for the child’s believability, such as stating the interviewer has made a ‘compelling finding’ of abuse’...” State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013). The distinction in this case, where it was the solicitor rather than a state’s witness arguing to the jury that specific facts testified to by the victim were “compelling,” does not ameliorate the prejudice suffered by Petitioner during a most critical stage of the trial. The closing argument constitutes the summation of the evidence; it is the last impression fixed upon the jurors prior to engaging in deliberations.

While there is no factor-based test available by which to determine whether a solicitor’s closing arguments are categorically “prejudicial,” the remarks in this case speak for themselves. “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.’” Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (citing Vaughn, 362 S.C. 163, 169–70, 607 S.E.2d 72, 75). As a result of this inquiry, courts may occasionally apply the “invited reply” doctrine, and find that although a solicitor’s closing argument was inappropriate, it was responsive to statements or arguments made by the defense, and thus did not deny the defendant due process. *Id.* (citing Vaughn, 362 S.C. at 169, 607 S.E.2d at 75). There is no indication in this case that the solicitor’s comments to the jury were in any way responsive to direct arguments or assertions raised by the defense.

As both the defense and the state freely admitted during trial, this case hinged upon the credibility of the victim’s testimony. More notably, that the state’s entire case rested upon uncorroborated allegations by the accuser, the sole witness against the defendant, whose credibility had repeatedly been called into question by the defense during the trial and whose testimony was bolstered by the state during the conclusion of the case.

Similarly, in Tappeiner, the Court noted, “Given the dearth of evidence beyond Victim's assertions, we cannot say evidence of Tappeiner's guilt was overwhelming. Therefore, we find that but-for the improper vouching for Victim's credibility, there is a reasonable likelihood the outcome of the trial would have been different, and Tappeiner was thus prejudiced by trial counsel's failure to object.” Tappeiner at 235, 785 S.E.2d at 478 (2016). Here, the Petitioner’s case does not involve *any* other witnesses with direct knowledge, apart from the victim’s own allegations, nor does it involve *any* other corroborative evidence; this includes no evidence to corroborate the victim’s testimony that she was “out of school” on a specific date in question, when she alleged that abuse had occurred. App. p. 362, lines 13-17. No evidence was even presented to substantiate this allegation when, as the defense noted, it would have only required elementary inquiry by way of verifying through the school whether the victim was absent on that day. *Id.* Also like in Tappenier, the allegations in this case claimed that the abuse occurred even during the presence of others in the home. This case offered but a mere dearth of evidence against Petitioner, who manifestly suffered prejudice as a result of the solicitor’s improper vouching for the victim’s credibility.

In Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), the Supreme Court ruled that the state improperly vouched for the credibility of a witness when, during opening statements, the solicitor declared that, “*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 227. The Supreme Court determined that this remark constituted to improper bolstering because it amounted to a personal assurance of the witness’s veracity, since the solicitor “emphatically” stated that the witness was “now clean,” or worthy of belief. *Id.* The same analysis is applicable here.

As argued in the Petition for Rehearing (App. p. 3), the solicitor's comments in this case effectively removed the function of the jury to be the sole arbiter of the credibility of the witnesses in the case, and exceeded the bounds of proper commentary during opening or closing arguments. Even more prejudicial to the Petitioner is the fact that the solicitor's remarks during closing directly connected a fact of consequence in the trial – the defendant's inability to sustain an erection – with the solicitor's own testimony regarding the significance of this fact. As noted herein, this fact was itself proposed by the solicitor during direct examination; it was not offered voluntarily by the victim during her testimony. This only compounds the violation of due process in this case.

The solicitor's declaration to the jury that the victim's testimony was "*compelling to [him]*" demanded the very weight to be placed on this single fact during their deliberations. As such, the due process violation here is not merely concerned with the prosecutor's own personal viewpoint of the weight of the evidence, but rather exceeds the evidence presented at trial – by assuring the jury that this fact testified to 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.

As set forth in the Petition for Rehearing, the trial judge did not provide any curative instruction to alleviate the prejudicial effect of these remarks to the jury following defense counsel's objection. In a case such as this, where the sole evidence against the defendant rests upon the credibility of the victim-witness's testimony, the prosecutor's improper vouching of this testimony is unduly prejudicial and cannot be cured absent a new trial for the defendant.

CONCLUSION

Based on the foregoing, Petitioner believes that certiorari should be granted in this case; Petitioner's sentence and conviction reversed; Petitioner's request for a new trial granted, and for all other relief which is just and proper.

Respectfully submitted,



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