

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal From Newberry County  
Hon. David B. Hocker, Circuit Court Judge  
Appellate Case Tracking No. 2021-000076  
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Feb 16 2021

S.C. SUPREME COURT

The State,

Respondent,

v.

Craig C. Busse,

Petitioner.

\_\_\_\_\_  
Opinion No. 2020-UP-307 (S.C. Ct. App. filed November 12, 2020)  
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**RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

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## STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals properly affirmed the trial court's decision to overrule Petitioner's objection to the State's closing argument because the comments were entirely cumulative to unobjected to comments; the solicitor's comments were not impermissible vouching; and even if error, the comments could not have reasonably affected the result of trial. (Petitioner's Questions I and II).

## STATEMENT OF THE CASE

### **Procedural History**

Petitioner was indicted at the September 2017 term of the grand jury for Newberry County for second-degree criminal sexual conduct with a minor (2017-GS-36-00414). On February 5-7, 2018, Petitioner proceeded to trial before the Honorable Donald B. Hocker and a jury. The jury found him guilty and the court sentenced him to fifteen (15) years' imprisonment. (App.398-400). Petitioner timely filed a notice of intent to appeal.

After briefing and without oral argument, the Court of Appeals affirmed Petitioner's conviction and sentence. State v. Busse, 2020-UP-307 (S.C. Ct. App. filed November 12, 2020). Petitioner served and filed a Petition for Rehearing, which was denied by the Court of Appeals on December 21, 2020. (App.1-6).

### **Factual Background**

Victim's classmate described the Victim's disclosure of sexual abuse which was made to her on the afternoon of March 8, 2017. She described Victim as upset and crying when she described the abuse happening in her bedroom and that it had been going on for a while. Victim's classmate told her mom the same afternoon and her mom called the school the following morning. (App.90-95).

Victim's mother described two instances prior to the disclosure when she discovered text messages on Victim's phone telling her boyfriend that Petitioner had tried to rape her, and how in each of those instances when she asked Victim about those messages Victim denied anything happened. She also described how Victim was seeing a therapist at the time she sent the text messages but had never disclosed any abuse to that therapist. Victim's mother testified she was

very surprised to hear the allegations of abuse against Petitioner when they were disclosed in March of 2017 and said D.S.S. would not let Victim come home with her that day because there had been allegations she knew the abuse was taking place. She testified Victim's behavior never changed during the time of the alleged abuse and she showed no indicators.

Victim's mother said the first time she saw Victim after she was taken into emergency custody was on March 24, 2017, the day of the forensic interview, and that she did not get custody back until November 29, 2017, eight months later. She testified she only moved away from Petitioner so she could get her daughter back.

Victim's mother testified Petitioner suffers from erectile dysfunction (ED) and that as a result their sex life was "very few and far between." She said they never had conversations about the ED with Victim but could not say whether she might have overheard them talking about it. (App.125-146).

Victim said Petitioner began touching her sexually when she was in eighth grade by grabbing her breasts and her vagina on top of her clothes. She said this occurred in his bedroom in the afternoons when she would come home from school. Petitioner eventually began reaching under her clothes to touch her breasts and vagina, progressing to inserting his fingers into her vagina and getting her to perform oral sex on him. Victim said she tried to make up excuses to leave or avoid the contact but it would not always work. She testified Petitioner once made her perform oral sex and he ejaculated inside her mouth. Petitioner performed oral sex on her three or four times. Victim said Petitioner attempted to have intercourse with her but was unsuccessful because his stomach got in the way. She testified his penis touched her vagina but there was no penetration. Victim said Petitioner would only let her hang out with friends if she agreed to pay him back by doing sexual things with him. She explained she did not disclose the abuse for a

long time because she was afraid it would get worse or her privileges would be taken away.

(App.230-272; 288-290).

## STANDARD OF REVIEW

The trial court has wide discretion in ruling on the appropriateness of a closing argument. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). In considering this issue, the solicitor's remarks must be evaluated in the context in which they were made. See State v. Weaver, 361 S.C. 73, 89, 602 S.E.2d 786, 794 ("In making this determination, we must examine the alleged impropriety in the context of the entire record."). "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." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

## ARGUMENT

- I. **The Court of Appeals properly affirmed the trial court's decision to overrule Petitioner's objection to the State's closing argument because the comments were entirely cumulative to unobjected to comments; the solicitor's comments were not impermissible vouching; and even if error, the comments could not have reasonably affected the result of trial or infected the trial with unfairness as to deny due process. (Petitioner's Questions I and II).**

The Court of Appeals correctly found the trial court did not err in overruling Petitioner's objection to the solicitor's comments during closing argument. Further, the Court of Appeals properly found any error did not so prejudice Petitioner as to deny him a fair trial.

### Relevant Facts

In his closing argument, the solicitor discussed the definition of reasonable doubt and the State's burden to ensure the jury was "firmly convinced" Petitioner committed the crime. (App.340-345). He said: "I want to go over some things that **I think are compelling** and I think lead you, as a jury, to be firmly convinced of his guilt. And that's all you must find for him to be guilty. Firmly convinced. I'm fixing to tell you about the credibility of a witness." (App.346) (emphasis added). Petitioner did not object to this comment. The solicitor then proceeded to talk about the duty of the jurors to determine the credibility of witnesses. In response to the defense theory that Victim was lying, he asked the jury to consider what interest Victim could possibly have to fabricate the sexual abuse. (App.346-352). He argued:

If she is this masterful liar, why didn't she go for it all and say he had intercourse with me. Because that didn't happen. Because she's telling, well, you can figure out that there is credible testimony. Why just say he had sex with her. If you're going to lie, go all out. 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 is compelling to me, how does she know that.

(App.352). Petitioner objected to the comment, arguing that anything the solicitor believed is compelling to him was improper. The trial court responded: “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.” The solicitor continued: “I’m going to repeat what was compelling to me and should be to you, was how did she know that. Is that something parents talk about with their child, step-dad has an erectile disfunction [sic], no.” (App.352-353) (emphasis added).

### **Preservation**

First, the issue is not properly preserved for review on appeal because Petitioner failed to make a contemporaneous objection the first time the solicitor argued he was going to review portions of evidence: “I think are compelling.” As the Supreme Court has stated: “We have routinely held that a party must object at the first opportunity to preserve an issue for review.” State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (citing State v. Sullivan, 310 S.C. 311, 426 S.E.2d 766 (1993); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991)). “A contemporaneous objection is required to properly preserve an error for appellate review.” State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (citing State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)). Because Petitioner failed to contemporaneously object the first time the solicitor explained he found evidence compelling, it is not properly preserved for review on appeal.

### **Merits**

On the merits, the comments by the solicitor were not inappropriate. “A solicitor’s closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences to it.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). However,

the courts of this state have acknowledged that a solicitor is an advocate. As this Court recently stated: “Even so, a solicitor is entitled to act as an advocate and, just like the defense, make the case for how he or she believes the jury should interpret the evidence.” State v. Gibbs, 431 S.C. 313, 322, 847 S.E.2d 495, 499 (Ct. App. 2020); see also, State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) (“However, a solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.”); State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) (“The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such.”).

All the solicitor did in this case was comment on the evidence and the fact he believed the jury should find it compelling—i.e. assign significant weight to that evidence compared to other evidence in the record. The solicitor’s comments directing the jury’s attention to evidence and circumstances which would render Victim’s testimony more credible were simply comments on the evidence presented during trial in response to Petitioner’s argument in opening that Victim’s story did not add up.

Further, “[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, 818 (2001). The Supreme Court explained: “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.” Additionally, the Court found: “Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration.” Id. The solicitor in this case did not offer personal assurance of the witness’ veracity. He merely argued inartfully that the testimony was

compelling and should be given great weight by the jury. Additionally, nothing in his comments implies he has additional facts beyond those presented to the jury. Quite the opposite, he specifically told the jury to consider the evidence presented as compelling. As a result, the solicitor did not improperly vouch for the witness; instead, he merely acted as an advocate and asked the jury to consider and weigh the evidence.

### **Harmless Error**

Additionally, even if improper, the comments by the solicitor were entirely harmless because they did not so infect the trial as to prevent Petitioner from receiving a fair trial and did not affect the jury's verdict. First, as discussed above, the comments objected to were merely cumulative to a similar unobjected to comment previously made by the solicitor. As a result, the error was cumulative and harmless. See e.g., State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 443 (1978) (stating that admission of improper evidence is harmless when it is cumulative to other, unobjected-to testimony).

Also, Petitioner did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. Although the solicitor inartfully used the first person "I" when making the objectionable comment, the overall context of the argument clearly focused on asking the jurors themselves to make a credibility determination based on the evidence in the record. Combined with the trial court's jury charges that: (1) the closing arguments were merely an opportunity for the attorneys to advocate for their respective sides (App.339), (2) the jurors must accept and apply the law exactly as charged (App.77; 377), (3) the jury is the sole and exclusive judge of the facts in a case (App.77; 377), and (4) the jury has the duty to determine the credibility of witnesses (App.379); the comments were so insignificant in the context of the case

that they could not have reasonably affected the outcome. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). For all of these reasons, the Petition for Writ of Certiorari should be denied.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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