

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Aiken County

Honorable J. Mark Hayes, Circuit Court Judge

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SC Court of Appeals

DWAYNE LEE RUDD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000091

BRIEF OF PETITIONER

VICTOR R SEEGER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance when she failed to object to the solicitor's improper vouching of the trustworthiness of the state's key witnesses during closing arguments, where Petitioner's case hinged on the credibility battle between him and the state's key witnesses?

STATEMENT

During the October 2013 term, the Aiken County Grand Jury indicted Petitioner for five counts of criminal sexual conduct with a minor in the third degree and five counts of criminal sexual conduct in the second degree. App. 688 – 707.

Petitioner's trial was held on December 9 – 12, 2013, in front of the Honorable James R. Barber, and a jury. App. 1. Aimee J. Zmroczek and Robert L. Bank represented Petitioner. Id. Ashley A. Hammack and Kevin N. Molony represented the state. Id.

Petitioner was found guilty of three counts of criminal sexual conduct with a minor in the third degree and five counts of criminal sexual conduct in the second degree. App. 462, l. 4 – 463, l. 16.

Judge Barber sentenced Petitioner to fifteen years' imprisonment on each count of criminal sexual conduct with a minor in the second degree and five years' imprisonment for each criminal sexual conduct with a minor in the third degree. App. 471, l. 12 - 472, l. 14. All of Petitioner's sentences were run concurrent except one criminal sexual conduct with a minor in the third-degree charge. App. 472, ll. 15 – 17. On the sole criminal sexual conduct with a minor in the third-degree charge that ran consecutive, the five-year sentence was suspended with probation for three years. App. 472, ll. 9 – 14.

Petitioner filed an application for post-conviction relief on June 10, 2016. App. 476 – 505. The state filed its return on December 16, 2016. App. 507 – 514.

Petitioner's post-conviction relief hearing was held on September 18, 2017 in front of the Honorable J. Mark Hayes. App. 516. Lance S. Boozer represented Petitioner. Id. Julie A. Coleman represented the state. Id.

On January 2, 2018, Judge Hayes filed an order of dismissal denying Petitioner’s post-conviction relief application. App. 662 – 687. Judge Hayes found that the failure to impeach, Esther Timmerman’s testimony with her prior inconsistent statement and the failure to object to the solicitor’s improper comments at closing “may have” constituted deficient performance; however, Petitioner failed to prove how he was prejudiced by those deficiencies. App. 675 – 676; App. 683.

A petition for certiorari was filed on September 21, 2018. The state’s Return was filed January 3, 2019. This Court granted certiorari on September 22, 2020. This Brief of Petitioner follows.

STANDARD OF REVIEW

Generally, “[t]he assessment of witness credibility is within the exclusive province of the jury.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Thus, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)) (stating that a solicitor improperly vouches for a witness's credibility “by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony”); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Thus, solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

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.’ ” Vaughn, 362 S.C. at 169–70, 607 S.E.2d at 75 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); Von Dohlen, 360 S.C. at 609, 602 S.E.2d at 744; cf. Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (stating that testimony that improperly corroborates a child sex victim's testimony has a devastating impact because of the cumulative effect of repeating the victim's testimony, and thereby improperly bolstering the victim's credibility).

ARGUMENT

Trial counsel provided ineffective assistance when she failed to object to the solicitor's improper vouching of the trustworthiness of the state's key witnesses during closing arguments, where Petitioner's case hinged on the credibility battle between him and the state's key witnesses.

Relevant Facts

The state alleged the facts as follows. Petitioner, from 2011 to 2013, groped and digitally penetrated his two daughters, the complaining witnesses, Minor 1 and Minor 2. App. 99, l. 19 – 100, l. 9.

On May 23, 2013, police officers were called to Petitioner's home regarding the aforementioned allegations. App. 30, ll. 2 – 14. Petitioner was arrested seventeen days later. App. 40, ll. 8 – 10.

Petitioner's trial was held on December 9 – 12, 2013, in front of the Honorable James R. Barber, and a jury. App. 1. His case boiled down to a credibility battle between Petitioner and the complaining witnesses. App. 607, ll. 21 – 24; App. 607, l. 25 – 608, l. 4; App. 531, ll. 18 – 22.

At trial Minor 1 and Minor 2 testified against Petitioner. App. 119, l. 1; 156, l. 1. Other than the complaining witnesses, there were no other witnesses to the alleged misconduct and there was no physical evidence of abuse. App. 384, ll. 29 – 24.

During closing, the solicitor improperly vouched for the credibility of the two complaining witnesses. She told the jury that, "If those girls weren't telling you the truth then, ladies and gentlemen, let's give them an academy award." App. 443, ll. 8 – 10. Trial counsel failed to object to the solicitor's improper vouching of *the state's key witnesses* and Petitioner was found guilty on all charges. App. 462, l. 4 – 463, l. 13.

At Petitioner's post-conviction relief (PCR) hearing, Aimee Zmroczek, Petitioner's first chair counsel, testified that she should have objected to the solicitor's improper vouching. App. 621, ll. 2 – 6. Zmroczek testified that she should have objected because the solicitor's comment was, "absolutely vouching," for the complaining witnesses' credibility. App. 621, ll. 8 – 12.

Trial counsel admitted she could have objected and did not know why she failed to object. App. 621, ll. 15 – 17. Zmroczek agreed with that the comment was especially hurtful in the present context because Petitioner's case was a, "swearing contest." Id. App. 621, ll. 18 – 20.

PCR counsel asked trial counsel how she would have handled the improper comment now that she realized her mistake. App. 622, ll. 2 – 3. Trial counsel responded, "the first thing I would have done is ask for a mistrial," and if that was denied she, "would have asked that [the comment] be stricken from the record and... then [for] a subsequent jury instruction regarding stricken testimony." App. 622, ll. 4 – 9.

PCR counsel followed by asking, "then in your opinion, this rises to such - - sort of egregious level you'd ask for a mistrial?" App. 622, ll. 10 – 12. To which Zmroczek responded, "Absolutely." App. 622, l. 13.

In Judge Hayes' Order of Dismissal, he found that although trial counsel "may have" provided deficient performance for failing to object to the solicitor's improper vouching, "this Court finds there is no resulting prejudice given the totality of the evidence against [Petitioner]." App. 683.

That was an error and that error prejudiced Petitioner.

Discussion

Petitioner's case was a credibility battle between the two complaining witnesses and Petitioner. App. 607, ll. 21 – 24. Accordingly, trial counsel's failure to object to the solicitor's

improper vouching of the minor witnesses' testimony constituted deficient performance that prejudiced Petitioner because the solicitor's comments improperly bolstered the key witnesses' testimony where there was no physical evidence of abuse nor third-party witness testimony of guilty such that the evidence of guilt against Petitioner was not overwhelming.

To establish ineffective assistance of counsel, Petitioner must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the outcome at trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984).

Generally, "[t]he assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). The closing argument of a solicitor, "must be carefully tailored so as not to appeal to the personal biases of the jury." Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007)(citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). The argument "must be confined to evidence in the record and the reasonable inference that may be drawn from the evidence." Id. at 522-523, 654 S.E.2d at 531. Although a solicitor may argue the credibility of a witness based on the record and its reasonable inferences, a solicitor may not vouch for the credibility of a prosecution witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

As explained by this Court, "[i]t is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record." Id. Generally, "[a] prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or

indicating that information not presented to the jury supports the testimony.” Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The question for a reviewing court is whether the prosecutor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). A reviewing court examines the impropriety of the prosecutor’s closing argument in the context of the entire record. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2003), our Supreme Court held that trial counsel provided ineffective assistance of counsel for failure to object to the solicitor’s opening statement where he informed the jury that the state’s key witness had a clean soul. The Court held that the solicitor’s statement was a personal assurance of the witness’ veracity, and trial counsel should have objected. Id. Further, the Court held trial counsel’s error prejudiced Gilchrist because the witness the solicitor vouched for was the *prosecution’s key witness*. Id. at 228, 565 S.E.2d at 285. (emphasis added)

This Court defined when a solicitor vouches for the credibility of a witness in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), *rev’d on other grounds*, Kelly v. State, 534 U.S. 246 (2002):

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 is 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.

Id. at 368-69, 540 S.E.2d at 860 (quotation omitted). See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977 (2001) (“[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity[.]”) (citations omitted). Accordingly, “[b]ecause 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.” Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (quoting Kelly, 343 S.C. at 369, 540 S.E.2d at 861).

The state argued in its Return to the petition for certiorari that under State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990), the solicitor in this case did not improperly vouch for the minor’s credibility because the solicitor’s comment regarded “the credibility and common sense biases of the witnesses that were apparent from the evidence.” Caldwell, at 505 – 06, 388 S.E.2d at 822 – 23; Return to Cert. p. 6 – 7. The state also argued that the solicitor’s comments were directed at the weight the jury should give to the minors’ testimony. Return to Cert. p. 7. Those were not accurate characterizations of the solicitor’s comments in the present case.

The solicitor’s improper comments did not tell the jury to examine particular pieces of evidence which would show the minors’ testimony was especially credible. App. 443, ll. 2 – 10. Accordingly, her comments were not derived from the evidence presented.

Moreover, the solicitor’s comments did not go to the weight of the evidence presented. State v. Caldwell, at 505, 388 S.E.2d at 822. To be considered a comment on the weight of the evidence the solicitor would have to limit her statement to stressing the evidentiary importance of the minors’ testimony and to telling the jury **if** they believed the minors, they should convict

Petitioner. Instead the solicitor simply assured the jury that she believed the minor witnesses, which used the imprimatur of the government to induce the jury to trust the government's judgment and convict Petitioner. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (a solicitor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony).

The state also argued that because the solicitor did not use the word "I" while she told the jury she believed the minor witnesses; her comments did not constitute improper vouching. State v. Smith, 375 S.C. 507, 654 S.E.2d 523 (2007). While in Smith the Court did discourage solicitors from making personal appeals to any or all members of the jury, the Court did not state that improper vouching *only* occurred when the solicitor used the word "I" in their closing argument. Smith, at 523, 654 S.E.2d at 632. This Court should not adopt such a narrow interpretation of the rule prohibiting a solicitor's from improperly vouching for a witness's credibility because that inflexible approach would be easily circumvented such that the rule would be rendered ineffectual.

During Petitioner's post-conviction relief hearing, trial counsel admitted she should have objected. App. 621, ll. 15 – 17. Trial counsel agreed that the solicitor's comment was especially hurtful because Petitioner's case was a, "swearing contest." Id.

Trial counsel opined that to provide effective assistance she should have asked for a mistrial, and if that was denied, she should have asked for the comment to be struck from the record and a curative instruction given. App. 622, ll. 4 – 9. Moreover, in the Order of Dismissal the PCR court did not find that trial counsel provided effective assistance. Therefore, since trial

counsel failed to object to the solicitor's improper vouching of *the state's key witnesses*, she provided ineffective assistance of counsel. Gilchrist, at 285, 565 S.E.2d at 285.

As to prejudice, trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 692. When the solicitor told the jury that the complaining witnesses deserved, "an academy award," if they were lying, she improperly expressed her personal opinion regarding the complaining witnesses' truthfulness¹. Gilchrist, at 227, 565 S.E. 2d at 285 (2002). The solicitor's opinion carried with it, "the imprimatur of the Government" and induced the jury to trust her judgment rather than its own view of the evidence. Kelly, at 368, 540 S.E.2d at 860. The vouching in this case is particularly harmful because the solicitor knew the case would turn on whether or not the jury believed the complaining witnesses' testimony and she improperly told the jury during closing that *the state's key witnesses* were telling the truth.

The trial court was unable to cure the prejudice created by the solicitor's improper vouching because trial counsel failed to object and request the trial court issue a curative instruction, as she now knows she should have done. *Cf. Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997) (finding a solicitor's improper comments may be cured by the judge's instructions to the jury). As a result, the solicitor's improper comment during the state's closing argument, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Vaughn, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

¹ The prejudice from solicitor's vouching of the complaining witnesses' testimony was exacerbated by another comment she made at closing where she gave her opinion on how the jury should interpret a recording of a phone call between Petitioner and a family member. The solicitor stated, "He's not talking about lying or stealing or doing something years ago. You know exactly what he's talking about. He's talking about what he did to these girls." App, 444, ll. 5 – 8.

In State v. Tappeiner, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016), our Supreme Court held that trial counsel was ineffective for failing to object during the solicitor's closing where she improperly vouched for the credibility of the minor witness because her comments amounted to her telling the jury that she believed the minor's version of events. The Court determined that Tappeiner was prejudiced by trial counsel's ineffective assistance because the dearth of direct or circumstantial evidence, outside of the minor's allegation, meant that the evidence of Tappeiner's guilt was not overwhelming. Id. at 253, 785 S.E.2d at 478. Accordingly, there was a reasonable probability that but for the solicitor's improper vouching the outcome of Tappeiner's trial would have been different. Id. at 250, 785 S.E.2d at 476.

Here, the solicitor invaded the province of the jury and usurped its fact-finding function when she asserted that the state's key witnesses were trustworthy. That invasion into the jury's province was improper because "the jury is charged with assessing the credibility of witnesses." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

As in Tappeiner, the evidence of Petitioner's guilt in the present case was not overwhelming. Petitioner testified at his PCR hearing that, "the only evidence... that they had to convict me was the testimony of [the complaining witnesses]. And based on those testimonies, the whole case hinged on credibility; that they believe [the complaining witnesses] or they believe me." App. 531, ll. 18 – 22. Since there was no physical evidence of guilt nor third party witness testimony, the case came down to a credibility battle between the complaining witnesses and Petitioner. App. 607, ll. 21 – 24; App. 607, l. 25 – 608, l. 4; App. 531, ll. 18 – 22. Concordantly, trial counsel's ineffective assistance in failing to object to the solicitor's improper vouching of the state's key witnesses prejudiced Petitioner.

Therefore, the PCR court erred when it found that trial counsel's failure to object to the solicitor's improper vouching of the state's key witnesses did not prejudice Petitioner because, "there [was] a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

By reason of the forgoing arguments, Petitioner respectfully requests this Court reverse his convictions and remand his case back to the Aiken County Court of General sessions.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of December, 2020.