

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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)

The State of South Carolina,

Respondent,

v.

Craig C. Busse,

Petitioner.

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**PETITIONER'S REPLY TO RESPONDENT'S RETURN TO
PETITION FOR A WRIT OF CERTIORARI**

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INDEX

Issue Preservation..... 1

Harmless Error..... 3

Conclusion 4

Issue Preservation

Respondent erroneously characterizes the solicitor's bolstering statements as being "cumulative" to prior unobjected remarks during the closing argument.

The solicitor's prior remarks, "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," were merely introductory statements informing the jury of the summary of the evidence. (App. p. 346, lines 1-3) The solicitor then continued, "I'm fixing to tell you about the credibility of a witness..." and proceeded to argue reasons why the victim's testimony should be deemed credible. (*Id.* at lines 4-5) In doing so, the solicitor was restating the victim's testimony. (App. p. 352, lines 4-16) The impermissible vouching of the victim's credibility occurred when, after having restated the testimony and evidence, the solicitor took it upon himself to personally bolster that very evidence and the weight which the jury should attach to that evidence. (*Id.* at lines 15-16, lines 23-24) This was error, and a denial of due process as set forth in detail in the Petition.

In The State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (S.C. 2011), the Supreme Court reversed the Court of Appeals on the issue regarding defense counsel's objection following testimony by the state's witness. The Court ruled that not only was defense counsel's motion to strike timely made, but that the trial court's failure to sustain the objection constituted reversible error that was prejudicial to the Defendant. That case comprised of a co-defendant's testimony as to whether the defendant was a passenger in the vehicle that was responsible for an armed robbery. Absent any other corroborative evidence, the Court held that the witness's hearsay testimony (referencing the police incident report as the sole basis for *believing* defendant was an occupant in the vehicle) was unduly prejudicial and constituted reversible error. *Id.*, 392 S.C. at 447, 710 S.E. 2d at 59 (emphasis

added). The Court determined that defense counsel's objection was both timely and specific, even though counsel objected sometime after the testimony was made. Id.

The following is the exchange of the relevant testimony from Byers when defense counsel cross-examined the witness:

Counsel: But you're testifying today after pleading guilty yesterday that that person was Najjar Byers?

Crisco: That's what they said in the motions that it was Najjar Byers.

Counsel: When you say that's what they said in the motions, what do you mean?

Crisco: In the motion of discovery. They had his name in it.

Counsel: Who had his name in it?

Crisco: The police and Woodrow Thompson. So I know [Woodrow] wasn't high on no drugs, so I know he know who he is.

Counsel: So what you're saying is the reason you think that was Najjar Byers is because that's what the police put in their report?

Crisco: Yes, sir; yes, sir.

Counsel: Your Honor, I would move to strike any of his testimony about Najjar Byers. He's been relying on the police report.

Court: Counsel, denied. That's not a proper motion. His testimony stands for itself.

Counsel: Okay. But you have no other independent recollection of Najjar Byers being in the car?

Crisco: No, sir.

Id., 392 S.C. at 4441-42, 710 S.E.2d at 56-57.

Harmless Error

“Improper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.” The State v. Jennings, 394 S.C. 473, 478-79. 716 S.E.2d 91, 94 (S.C. 2011) (citing Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (S.C. 1994).

Petitioner reemphasizes the significance in this case that the victim's testimony was not corroborated, and was itself contradictory (in light of what the victim had previously denied to her mother when questioned about the abuse). The solicitor's improper closing remarks, instructing the jury that the evidence which the solicitor had restated for the jury *was compelling to [him]* far exceed the doctrine of harmless error and unduly prejudiced the Petitioner, who should have been granted a new trial.

“[W]hether an error is harmless depends on the particular facts of each case, including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, *the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points*, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case.” State v. McEachern, 399 S.C. 125, 141, 731 S.E.2d 604, 612 (Ct. App. 2012) (citing State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (emphasis added).

Conclusion

Based on the foregoing, and incorporating Petitioner's arguments set forth in the Petition for Writ of Certiorari, Petitioner believes that his trial counsel timely objected following the solicitor's summation of the evidence and prejudicial remarks therefrom; that the remarks were not cumulative to prior un-objected testimony; that the trial court erred in overruling trial counsel's objection; and that, based on the absence of corroborative evidence produced at trial, the solicitor's comments unduly prejudiced the Petitioner far beyond the scope of harmless error.

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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