STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

DWAYNE LEE RUDD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000091

Certiorari to Aiken County

Honorable J. Mark Hayes II, Circuit Court Judge

Opinion No. 2021-UP-366

PETITION FOR REHEARING

On October 27, 2021 in this Court's Opinion No. 2021-UP-366, this Court dismissed certiorari as improvidently granted for this case. Petitioner respectfully requests rehearing of the decision to dismiss the grant of certiorari pursuant to Rule 221(a), SCACR.

In light of this Court's decision to dismiss certiorari, it is difficult for Petitioner to point to any specific matters that were misapprehended or overlooked. Nonetheless, Petitioner implores this Court to reexamine the decision to dismiss certiorari as improvidently granted because the merits of Petitioner's claim of ineffective assistance of trial counsel warrant review.

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)). As explained by our Supreme 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." Vaughn, at 169, 607 S.E.2d at 75. 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." Id. (emphasis added)

Here, during the state's closing the solicitor took the opportunity to address the crucial testimony from the minor witnesses when she stated, "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. The only reasonable interpretation of the solicitor's statements was that they were veiled "personal assurances" from the solicitor to the jury that the minor witnesses were telling the truth, which put the imprimatur of the government behind their testimony. See State v. Shuler, at 630, 545 S.E.2d at 815 ("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."); see also State v. Kelly, 343 S.C. 350, 368 – 69, 540 S.E.2d 851, 860 (2001), *rev'd on other grounds*, Kelly v. State, 534 U.S. 246 (2002).

Trial counsel failed to object to the obvious improper bolstering and/or vouching by the solicitor. At Petitioner's post-conviction relief (PCR) hearing, trial counsel admitted that she should have objected to the solicitor's comments during the state's closing. App. 621, ll. 8 – 20. Moreover,

trial counsel recognized that the failure to object was particularly harmful because Petitioner's case was a "swearing contest." Id. Trial counsel even opined that she should have moved for a mistrial. App. 622, ll. 2 – 9. Moreover, she stated that if her motion for a mistrial was denied, she would have moved to have the improper vouching comments be stricken from the record and for "a subsequent jury instruction regarding the stricken testimony." Id. PCR counsel followed up by asking, "then in your opinion, this [violation] rises to such - - sort of egregious level you'd ask for a mistrial?" App. 622, ll. 10 – 12. To which trial counsel replied, "Absolutely." App. 622, l. 13.

To the extent this Court was persuaded to dismiss certiorari by the state's argument that the solicitor did not improperly bolster the minor witnesses because she did not use the first-person pronoun of "I," Petitioner respectfully requests rehearing because there has never been any precedent holding that solicitors *only* commit improper bolstering if they use the word "I" in their assurances to the jury of a witness' credibility. Brief of Respondent, p. 7. Such a strict rule would frustrate the interests of justice because solicitors would be able to circumvent our Supreme Court's prohibition on the improper bolstering of witnesses by cleverly crafting their personal assurances of a witness' credibility to the jury without using "I."

Furthermore, to the extent the state argued the solicitor not using the word "I" showed that her statements to the jury did not include her own subjective belief that the minor witnesses were telling the truth, that argument was wrong. The solicitor used the first-person pronoun of "us" in her improper comments regarding the minor witnesses. The solicitor specifically stated, "*let's* give them an Academy Award." App. 443, ll. 8 – 10. (emphasis added) The solicitor's use of the phrase "let [us]" specifically included herself in the group of people that were so convinced by the minor witnesses' testimony that the minor witnesses would have had to be among the best actresses in the world if they were not being truthful.

The statements made by the solicitor cannot be said to be directed at the weight the jury should give the minor's testimony because her comments did not direct the jury to examine particular parts of the minors' testimony, or other pieces of evidence, that showed the minors' testimony was especially credible. The solicitor's comments also did not go to the weight of the evidence presented. See State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990). To be considered a comment on the weight of the evidence the solicitor would have to limit her statements to stressing the evidentiary importance of the minors' testimony and to telling the jury *if* they believed the minors then they should convict Petitioner. Instead, in this case the solicitor simply assured the jury that she believed, and all reasonable people should believe, the minor witnesses, which used the imprimatur of the government to induce the jury to trust the solicitor's judgment and convict Petitioner. App. 443, ll. 8 – 10; See Vaughn v. State, supra.

Determining whether a solicitor improperly bolstered a witness' testimony during closing is not a hair-splitting exercise hinging on the exact language the solicitor used in her improperly bolstering comments. The crux of the matter in this case was that the solicitor's intent was to impute upon the jury the notion that she believed the minor witnesses and that they should too. The comments by the solicitor presented a false dichotomy of two potential options. The first option was that the minor witnesses were telling the truth. The second option was minor witnesses were lying, but, according to the solicitor, that was incredibly unlikely because their performance was so believable.

In the mind of a juror choosing between those two options, it was clear which one the solicitor believed. Thus, the solicitor knew what she was doing when she made those comments, she was telling the jury that in her opinion she believed the minor witnesses and *that it would be outlandish a reasonable person to disbelieve them.* That was improper bolstering and nothing else.

To the extent that this Court dismissed certiorari because the trial court's instruction to the jury cured the prejudice from the solicitor's improper vouching and/or bolstering of the minor witnesses, the trial judge's instruction did not cure the prejudice because it failed to inform the jury that the arguments of counsel were not evidence and that they were required to disregard the solicitor's personal beliefs when judging the credibility of the witnesses. In State v. Reyes, 432 S.C. 394, 853 S.E.2d 334 (2020) our Supreme Court held that the trial court cured a solicitor's improper bolstering *questions* with instructions to the jury that they are the sole arbiter of witness credibility. Reyes, at 408 – 09; 853 S.E.2d at 342. In Reyes, the solicitor asked the minor witness "Do you know that while you're here, *we* only talk about things that are the truth?" and "Okay. So you understand that when *we're* in here, *we're* going to talk about the truth. Do you understand that?" Id. at 400; 853 S.E. at 337. (emphasis in original) Those questions were improper bolstering but since the trial court in its jury instruction told the jury that they are the sole arbiters of credibility, the Court held the prejudice to Reyes was cured. Id. at 408 – 09; 853 S.E.2d at 342.

Similar to the trial court in Reyes, the trial court in this case instructed the jurors that they are the "sole judges of credibility." App. 451, ll. 17 – 25. However, the difference in the types of bolstering between this case and Reyes necessitate additional curative instructions such that the trial court's instruction here was insufficient to cure the prejudice against Petitioner from the solicitor's improper bolstering.

Here, the solicitor's improper bolstering was in the form of personal assurances that she believed the minor witnesses whereas in Reyes the improper bolstering was in the form of questions about truthfulness to the minor complainant. App. 443, ll. 8 – 10; Reyes, at 400; 853 S.E. at 337. The instruction given here that the jury was the "sole judge of credibility" did not cure the prejudice arising out of the personal assurances from the solicitor because the trial court failed to instruct the jury that

the solicitor's arguments were not evidence and the jury was not take into account the personal assurances the solicitor made when coming to their own conclusions as to the credibility of witnesses. In other words, the jurors were unaware they were not supposed to use the solicitor's assertions that she believed the minor witnesses when they made their credibility determinations. Accordingly, there was a reasonable likelihood the solicitor's improper bolstering of the minor witnesses influenced the jury's credibility determinations such that the trial court's jury instruction did not cure the prejudice against Petitioner.

In this case the improper assurances made to the jury by the solicitor were particularly prejudicial because they bolstered the credibility of the crucial testimony from the state's key witnesses. As in State v. Tappeiner, 416 S.C. 239, 785 S.E.2d 471 (2016), trial counsel's failure in this case to object to the improper bolstering in the state's closing argument prejudiced Petitioner because "the dearth of direct or circumstantial evidence, outside of the minor's allegation, meant that the evidence [of guilt]... was not overwhelming." See Tappeneir, at 250, 785 S.E.2d. at 476. In this case, the state presented no physical evidence, no video evidence, and no third-party witness testimony of the alleged crimes such that there was not overwhelming evidence of guilt. App. 423, ll. See Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018).

The scarcity of evidence made this case a credibility battle and the solicitor's improper invasion into the province of the jury by commenting that she believed the minor witnesses' testimony during her closing argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Vaughn, at 170, 607 S.E.2d at 75. Accordingly, trial counsel's failure to object to those comments constituted ineffective assistance of counsel that prejudiced Petitioner and this Court should reinstate its prior grant of certiorari.

Respectfully Submitted,

s/ Victor R. Seeger
VICTOR R SEEGER
Appellate Defender

This 12th day of November, 2021.

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Honorable J. Mark Hayes, Circuit Court Judge

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR the undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Dwayne Lee Rudd, #358140, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 12th day of November, 2021.

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT