

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

RECEIVED

Dec 07 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)

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar Number 15608

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON CERTIORARI..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT 5

 I. The trial court did not err in admitting the solicitor’s closing argument because he did not improperly vouch for the witness and merely focused the jury’s attention on strong evidence supporting the State’s case. Additionally, any possible error did not warrant reversal because the solicitor’s comments did not infect the trial with unfairness so as to deny Petitioner a fair trial and make the conviction a violation of due process. (Petitioner’s Issues I and II). 5

CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	8
<u>Darden v. Wainwright</u> , 477 U.S. 168 (1986).....	6, 10, 11
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637 (1974).....	5
<u>Fortune v. State</u> , 428 S.C. 545, 837 S.E.2d 37 (2019).....	5, 8
<u>Humphries v. State</u> , 351 S.C. 362, 570 S.E.2d 160 (2002).....	8
<u>Lawn v. United States</u> , 355 U.S. 339 (1958)	10
<u>Simmons v. State</u> , 331 S.C. 333, 503 S.E.2d 164 (1998)	10
<u>State v. Busse</u> , 2020-UP-307 (S.C. Ct. App. filed November 12, 2020).....	2
<u>State v. Copeland</u> , 321 S.C. 318, 468 S.E.2d 620 (1996).....	5
<u>State v. Northcutt</u> , 372 S.C. 207, 641 S.E.2d 873 (2007).....	5
<u>Tappeiner v. State</u> , 416 S.C. 239, 785 S.E.2d 471 (2016)	5
<u>United States v. Eltayib</u> , 88 F.3d 157 (2d Cir. 1996).....	11
<u>United States v. Garza</u> , 608 F.2d 659 (5th Cir. 1979)	8
<u>United States v. Walker</u> , 155 F.3d 180 (3d Cir. 1998)	9
<u>United States v. Young</u> , 470 U.S. 1 (1985)	8
<u>Vaughn v. State</u> , 362 S.C. 163, 607 S.E.2d 72 (2004).....	5

STATEMENT OF ISSUES ON CERTIORARI

- I. The trial court did not err in admitting the solicitor's closing argument because he did not improperly vouch for the witness and merely focused the jury's attention on strong evidence supporting the State's case. Additionally, any possible error did not warrant reversal because the solicitor's comments did not infect the trial with unfairness so as to deny Petitioner a fair trial and make the conviction a violation of due process. (Petitioner's Issues 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).

This Court granted Petitioner's Petition for Writ of Certiorari and he has served and filed his Brief of Petitioner. This Brief of Respondent follows.

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). Victim specifically testified that Petitioner had issues achieving an erection and that he told her he had trouble getting an erection for health reasons. She also stated that she never heard her mom and Petitioner talking about his erectile dysfunction. (App.254).

ARGUMENT

- I. **The trial court did not err in admitting the solicitor's closing argument because he did not improperly vouch for the witness and merely focused the jury's attention on strong evidence supporting the State's case. Additionally, any possible error did not warrant reversal because the solicitor's comments did not infect the trial with unfairness so as to deny Petitioner a fair trial and make the conviction a violation of due process. (Petitioner's Issues I and II).**

The trial court correctly allowed the State's closing because it was not improper. The solicitor did not impermissibly vouch for any of the witnesses or the victim, nor did he impart any belief that he had knowledge outside that of the jury which should lead them to believe the same way as the prosecutor. Any error in what was said by the prosecutor did not so infect the trial with unfairness to cause the conviction to be in violation of due process.

Standard of Review

A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007); *see also*, State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (same). "To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial." Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). "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 v. State, 362 S.C. 163, 169-170, 607 S.E.2d 72, 75 (2004); Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974) (internal

quotations omitted)). “The relevant question is whether the prosecutors’ comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” Darden v. Wainwright, 477 U.S. 168, 181, (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

Relevant Facts

In his closing argument, the solicitor began by noting he was not as familiar with this case as he usually was prior to trial; instead, his co-counsel did most of the preparation. He indicated he knew the general facts, but noted: “I’ve sat here this week, I felt like I’ve kind of been like you guys, learning about this case, hearing from these witnesses. And really just kind of taking it all in.” (App.340). He then 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) 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). He then explained the relevance of the admitted testimony indicating: “She knew that because she experienced it first-hand. While he was laying on top of her he said his stomach was too big and couldn’t get an erection. How does she know that, ask yourselves that.” (App.353). He concluded again referring to the fact she knew things only because of experience: “I submit to you, that’s what I’m asking, give, give this victim a voice, hear her out. I submit to you she is credible. I submit to you she knew things that only somebody who experienced these things would have known.” (App.354).

Merits

The solicitor in this case did not cross the gray line which separates proper argument from impermissible bolstering or vouching. Nearly ninety years ago, the United States Supreme Court (USSC) discussed the role of a prosecuting attorney during closing argument:

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). In the years since, both the USSC and this Court have reiterated the requirement that a prosecutor's closing argument may not inject his personal assurance or belief in the guilt of the accused. See e.g., United States v. Young, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 1048, 84 L. Ed. 2d 1, 14-15 (1985); Fortune v. State, 428 S.C. 545, 553, 837 S.E.2d 37, 41 (2019). Additionally, "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).

As the USSC stated: "The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Young, 470 U.S. at 7. None of the statements by the solicitor in closing argument in this case crossed the line into improper comments. While he may have inartfully used the personal pronoun "I," the crux of his closing argument was to highlight facts presented during testimony that should drive the jury's determination of credibility and guilt. His statement did nothing more than to highlight Victim's testimony and explain that the jurors should assign significant weight to the fact that Victim knew Petitioner could not sustain an erection and that the only way for her to know that fact would be to have experienced it firsthand.

This is not a case similar to Fortune or others where the solicitor indicated he had knowledge outside the record or had made a pre-trial determination about bringing the case that the jury should follow. He did not invoke his personal status as a government attorney or attempt to use the prestige of the government to sanction his opinion. See, e.g., United States v. Garza, 608 F.2d 659 (5th Cir. 1979). Instead, the solicitor merely highlighted the testimony in the record heard by the jury and asked them to assign particular weight to one significant fact.

The closing argument in this case is similar to that found in United States v. Walker, 155 F.3d 180 (3d Cir. 1998). In that case, the prosecutor when discussing several witnesses indicated: “I submit to you that they have no motivation to lie to you. . . .” Id. at 184. The prosecutor continued:

Now, in addition, we went further, we then called Agent Turner . . . What motivation would he have to come into this courtroom and lie to you . . . I submit to you that Agent Turner would have no motivation to come into this courtroom and make these things up. I submit to you that Agent Turner corroborated the direct evidence of the two and the only two eyewitnesses.

Id. The Third Circuit Court of Appeals was asked to find these statements improperly vouched for the witnesses by indicating the prosecutor’s personal belief and assurances. The Court articulated:

Our case law indicates that to find vouching two criteria must be met: (1) the prosecutor must assure the jury that the testimony of a Government witness is credible; and (2) this assurance is based on either the prosecutor’s personal knowledge, or other information not contained in the record. Thus, it is not enough for a defendant on appeal to assert that the prosecutor assured the jury that a witness’ testimony was credible. The defendant must be able to identify as the basis for that comment an explicit or implicit reference to either the personal knowledge of the prosecuting attorney or information not contained in the record. **It follows that where a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the witness based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching.**

Walker, 155 F.3d at 187. This is exactly what took place in this case. The prosecutor argued in favor of the credibility of the Victim based on the testimony in the record and before the jury and

not based on any outside or special knowledge.¹ See, e.g., Lawn v. United States, 355 U.S. 339, 359, 78 S. Ct. 311, 323, 2 L. Ed. 2d 321 (1958) (“The Government’s attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury, and therefore it was not improper.”). The statements made in this case, while inartful and not recommended to be used in the future, did not convey to the jury any improper vouching or bolstering by the solicitor and merely sought to highlight a fact in the record from which the jury should find Victim credible.

This Court has noted:

Improper comments do not automatically require reversal if they are not prejudicial to the defendant. On appeal, the appellate court will view the alleged impropriety of the solicitor’s argument in the context of the entire record The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. 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.

Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (citations omitted). As the USSC has concluded: “it ‘is not enough that the prosecutors’ remarks were undesirable or even universally condemned.’ . . . The relevant question is whether the prosecutors’ comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’”

Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986).²

¹ The beginning of the State’s closing argument also highlights the fact his statements were not based on outside information or knowledge because he began by telling the jury that he learned the facts of the case as they did from the testimony and evidence presented at trial. (App.340).

² The comments in this case are not nearly as inflammatory or personal as those used in Darden. There, the closing argument included: 1) ““I will ask you to advise the Court to give him death. That’s the only way that I know that he is not going to get out on the public. It’s the only way I know. It’s the only way I can be sure of it;” 2) “As far as I am concerned, and as Mr. Maloney said as he identified this man this person, as an animal;” and 3) the prosecutor’s personal desire “I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown

While the State agrees it is generally best to avoid the personal pronoun “I” during closing arguments, it is not enough to warrant a finding that the statements of counsel so infected the trial with unfairness that the verdict of the jury should be questioned. As the Second Circuit Court of Appeals noted: “a prosecutor’s use of the pronoun ‘I’ does not automatically wreck the case.” United States v. Eltayib, 88 F.3d 157, 173 (2d Cir. 1996). The Court also indicated: “even though phrases such as ‘I think it is clear,’ or ‘Does it makes sense—I think it does,’ are not ‘acceptable,’ they do not merit reversal unless ‘the summation viewed as a whole . . . reflect[s] improper vouching.” Id. (citations omitted).

Although the solicitor unartfully 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. The solicitor made it abundantly clear to the jury that the evidence before them, and most significantly the testimony about Petitioner’s erectile dysfunction and Victim’s first had experience witnessing the issue, should drive their determination of credibility and their determination of guilt. 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 and certainly did not so infect the trial with unfairness as to render the verdict a violation of due process.

[Darden’s] face off. I wish that I could see him sitting here with no face, blown away by a shotgun;” Darden, 477 U.S. at 180.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Petitioner's conviction and sentence should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY:



William M. Blich, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 7, 2021