

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Dec 17 2021**

**S.C. SUPREME COURT**

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Certiorari to the Court of Appeals  
Appeal from Newberry County  
Honorable David B. Hocker, Circuit Court Judge

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The State of South Carolina,

Respondent,

v.

Craig C. Busse,

Petitioner.

Appellate Case No.: 2021-000076

Opinion No. 2020-UP-307 (S.C. Ct. App. filed November 12, 2020)

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**PETITIONER'S REPLY TO BRIEF OF RESPONDENT**

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## ARGUMENTS

### I. THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING PETITIONER'S OBJECTION DURING SOLICITOR'S CLOSING ARGUMENT WHEN THE SOLICITOR IMPROPERLY VOUCHERED FOR AND BOLSTERED THE VICTIM'S CREDIBILITY.

During the closing arguments, the Solicitor made remarks to the jury that improperly bolstered the Victim's testimony. As previously stated in the Brief of Petitioner, in the Solicitor's line of questioning regarding the Petitioner's supposed inability to sustain an erection, the Solicitor asked the Victim directly regarding whether the Petitioner did have issues achieving an erection, when he stated, "this was the only way you could have known about Craig's issues with achieving an erection." App. p. 254, lines 24-25, p. 255, line 1. The Solicitor himself brought this into evidence and it was then timely objected to by Defense Counsel, which was then overruled by the Court without allowing Defense the opportunity to argue the merits of the objection. The Solicitor then continued with, "I'm going to repeat what was compelling to me and should be to you, was how did she know that" when addressing the jury during closing arguments and Defense counsel objected but was overruled by the trial judge. App. p. 352, line 23-24. However, counsel cannot express opinion, only the facts in evidence. In addition, counsel cannot improperly vouch for or bolster testimony. Therefore, the court abused its discretion in allowing the bolstering and inappropriate vouching of the sole witness' testimony by the Solicitor. The Court should have sustained the objection to prevent reversible error.

Again, our Supreme Court, has already addressed improper witness bolstering by prosecutors in State v. Shuler, where it states that a prosecutor cannot vouch for the credibility

of a witness, and then further supported it in State v. Kelly. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). This is even further supported in Missouri v. Wolfe, in which it was ruled that a Solicitor cannot indicate information not presented to the Jury to support their testimony and when the Solicitor does, the Solicitor is improperly vouching. Missouri v. Wolfe, 13 S.W.3d 248 (2000). The Solicitor's statement to the Jury was then followed with "[H]ow does she know that." App. p. 352, lines 23-24. This statement exceeds arguing the facts presented to the Jury and was instead assuring the Jury that he believed the Victim and so she therefore must be credible. This statement alone shows the improper bolstering by the Solicitor. Improper bolstering occurs when the Solicitor places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity. Shuler, 344 S.C. at 630 (See State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001); 75A AM.JUR Trial § 700 (1991)). The Respondent in their brief to the Court states, that through United States v. Eltayib, that although just the simple use of "I" or, "even though phrases such as 'I think it is clear,' or 'Does it make sense-I think it does,'" are not 'acceptable,' they do no merit reversal unless 'the summation viewed as whole...reflect[s] improper vouching.'" Respondent's Brief p. 11; United States v. Eltayib, 88 F.3d 157, 173 (2d Cir.1996). However, in this case it does merit a reversal due to the closing statement made by the Solicitor constituting improper vouching and bolstering, not simply by the use of "I", but by taking away the duty of the Jury to decide the credibility of the sole witness in regards to the Victim's testimony. *Id.*

Solicitors should avoid comments that ask jurors to place themselves in the victim's, or another party's shoes, because those types of comments tend to "completely destroy all sense of impartiality of the jurors." Tappeiner v. State, 416 S.C. 239, 250-51, 785 S.E.2d 471, 477

(2016) (citing Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009)). The Solicitor's assertion that the fact was "compelling to him," the fact being the Victim's supposed first-hand knowledge of the Defendant's impotence, told the Jury what weight to put on this in their deliberations, which is counter to the Jury instructions given by any trial judge at the end of every case.

In United States v. Walker, the Court of Appeals for the Third Circuit discussed how the Prosecutor's vouching for the credibility of a government witness raises two concerns:

(1) such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant 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 judgement rather than its own view of the evidence.

United States v. Walker, 155 F.3d 180 (3d Cir. 1998).

While in Kelly, the court ultimately determined the trial judge's failure to sustain the defense objection was harmless error, that is not the case here. Kelly, 343 S.C. at 369-70. Under Kelly, the sole witness was being questioned when the bolstering happened, allowing for the defense to impeach the witness on cross examination. *Id.* at 370. Additionally, this occurred only during the sentencing phase of the trial. *Id.* In our case, the bolstering occurred during closing arguments, where there was not an opportunity for impeachment during cross-examination of the Victim, and the closing argument was during the guilty phase of the trial. These differences change the harmless error in Kelly into reversible error in the Petitioner's case. The Solicitor's closing remarks clearly amount to the improper bolstering of the sole

witness against the Petitioner and therefore the Appellate Court erred here because this is a reversible error.

The impropriety of bolstering is further supported in Tappeiner v. State. Tappeiner, 416 S.C. at 254, 785 S.E.2d at 479. Tappeiner was likewise charged with criminal sexual conduct with a minor in the second degree and the Court held, “the solicitor’s repeated vouching for the Victim’s credibility and her emotional plea to the jurors was incredibly prejudicial to Tappeiner because there was no other evidence beyond Victim’s testimony of the events that allegedly occurred that August evening.” *Id.* Like in Tappeiner, no other evidence was presented in Petitioner’s case other than the Victim’s testimony, further making the improper vouching and bolstering of the Victim’s credibility prejudicial to the Petitioner, and thus reversible error. *Id.*

Petitioner submits that the Solicitor’s closing arguments in this case improperly bolstered and vouched for the credibility of the Victim’s testimony and the trial court erred in overruling the Defense Counsel’s objection to those statements. The Appellate Court then erred in stating the Petitioner suffered harmless error, when in fact the petitioner had suffered reversible error and the precedent has already been established that such commentary by the State during closing arguments is improper.

II. THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT PETITIONER DID NOT SUFFER PREJUDICE THAT VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL.

The Solicitor's closing remarks were not only improper bolstering, but they infected the minds of the jurors in such a way that the Petitioner suffered prejudice, and thus a denial of his right to due process. *Id.* at 251 (citing Vaughn v. State, 362 S.C. 163, 169-70, 607 S.E.2d 72, 75 (2004)). Due to the trial court allowing the Solicitor to continue on with his personal opinions and facts not in evidence in the closing statements, he was not restricted from the improper bolstering of the Victim's testimony. This led to the Defendant being unable to have a fair and impartial trial by jury, violating Petitioner's right to due process.

The prejudicial comments made by the Solicitor speak for themselves in this case. In Tappeiner, "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.'" *Id.* With this being the Appellate Courts power to do so, the Appellate Court erred in stating the Petitioner received a fair trial, when in fact the Solicitor had infected the trial with the improper bolstering of the Victim's testimony, therefore taking the decision bestowed to the Jury alone out of the Jury's hands.

Both the Defense and State during trial stated that this case hinged upon the credibility of the Victim's testimony. The Victim's testimony was uncorroborated by any other evidence. The Victim's testimony was improperly bolstered by the State during the conclusion of this case. Therefore, the trial erred in overruling the Defense's objection to the closing argument and then the Appellate Court erred as well because the Appellate Court should have sided

with the Petitioner solely due to the bolstering and vouching by the Solicitor being supported in case law through Tappeiner. *Id.*

In Tappeiner, the Court noted, “Given the dearth of evidence beyond Victim’s assertions, we cannot say evidence of Tappeiner’s guilt was overwhelming. Therefore, we find that but-for the improper vouching for Victim’s credibility, there is reasonable likelihood the outcome of the trial would have been different, and Tappeiner was thus prejudiced by trial counsel’s failure to object.” *Id.* The ruling in this case should have been in favor of the Petitioner, following the precedent set out in Tappeiner. *Id.* The Petitioner’s case involves a single victim with no corroborated evidence. Also, like in Tappeiner, the allegations in this case claimed that the abuse occurred even during the presence of others in the home. *Id.* With the facts of Tappeiner being so closely similar to the case at hand, we find no reason for this court not to follow the same precedent. *Id.*

In the Petition for Rehearing, the Solicitor’s closing remarks effectively removed the function from the jury to be the sole arbiter of the credibility of the witnesses. The Solicitor starts the statements with, “During closing arguments, the state argued to the jury that: “But you know, he didn’t have to have intercourse with her. You know why. He can’t have intercourse with her. He’s impotent, cannot sustain an erection.” App. p. 352. This statement by the Solicitor further indicates that this is not a statement made by the Victim and that it was added by the State through the Solicitor’s own testimony regarding the significance of this fact, which introduces facts not in evidence and violates due process. In the Respondent’s brief, the Respondent goes as far as to quote most of the closing and adds additional context as to the violation by the Solicitor in that he further dictates to the Jury when he says, “If she is this masterful liar, why didn’t she go for it all and say he had intercourse with me. Because it didn’t

happen. Because she's telling, well, you can figure out that there is credible testimony," App. 346-352.

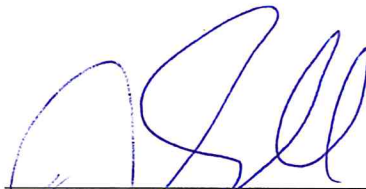
Furthermore, the Solicitor's declaration to the Jury that the Victim's testimony was "compelling to [him]" demanded that the very weight to be placed on that single fact without any supporting evidence and therefore ultimately making the decision as to the victim's credibility for the jury. App. p. 352, lines 23-24. Due process was furthered violated with his following comment of "How does she know that?" in that this comment exceeds the scope of facts in evidence by stating to the Jury that this single fact seals the Victim's credibility. *Id.* The Respondent further states in the brief how the United States Supreme Court and this Court already ruled on this in United States v. Young and Fortune v. State in that the "prosecutor's closing argument cannot inject his personal assurance or belief in the guilt of the accused," which further validates that the Solicitor was improperly bolstering and vouching for the Victim's credibility with what was "compelling to [him]" and "How does she know that?" Respondent's Brief p. 8 (citing 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)).

As stated with the Petition for Rehearing and the Brief of the Petitioner, the trial judge did not provide any curative instruction to alleviate the prejudicial effect of the remarks by the Solicitor. Also, with cases as these, where the evidence is solely the Victim's testimony and their credibility, bolstering and vouching by the Solicitor towards the credibility of the Victim is unduly prejudicial and cannot be cured absent a new trial for the Petitioner.

**CONCLUSION**

Based on the foregoing and the resulting prejudice against him, the Petitioner asks that the conviction be overturned, his sentenced and mandatory sex offender registration be vacated, a new trial granted, and for all other relief that is just and proper.

Respectfully submitted,



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