STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Dillon County

Honorable Larry B. Hyman, Circuit Court Judge

SAMMY LEE SCARBOROUGH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001898

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel failed to object to the solicitor vouching for the testimony of minor children, where the comment was made during closing argument that children "don't make this stuff up" when no physical evidence was recovered in this case?

STATEMENT

In 2013 a Dillon County grand jury indicted Petitioner on three counts of criminal sexual conduct with a minor in the first degree, three counts of disseminating harmful material to minors, and one count of engaging a child under eighteen for sexual performance. App. 577 – 590. He proceeded to trial before the Honorable Paul M. Burch and a jury on November 4, 2013. Shipp Daniel served as the assistant solicitor, Kelly Hall was the assistant attorney general, and Kyle Hobbs represented Petitioner. App. 1.

After the state rested, it withdrew two of the indictments: engaging a child under eighteen for sexual performance and one of the criminal sexual conduct with a minor in the first degree charges regarding Minor 2. App. 388 ll. 8 – 16. Following a three day-trial, the jury found Petitioner guilty of the remaining indictments. App. 463 l. 6 – App. 464 l. 1. Judge Burch sentenced Petitioner to life imprisonment on the two criminal sexual conduct charges and five years on each of the dissemination of obscene materials charges, concurrent. App. 476 ll. 3 – 23. Petitioner's convictions were affirmed. State v. Scarborough, Op. No. 2016-UP-074 (S.C. Ct. App. filed Feb. 24, 2016).

Petitioner filed a timely application for post-conviction relief on November 2, 2017. App. 479 - 486. It contained allegations of ineffective assistance of counsel, including claims that counsel failed to object to questions asked and evidence offered by the state. App. 482. A first amendment to the PCR application was filed on May 24, 2018. App. 487 – 488. A second amendment was filed on July 1, 2018. App. 489 – 490. The state filed its Return and Partial Motion to Dismiss on February 2, 2018. App. 491 – 499.

An evidentiary hearing was held before the Honorable Larry B. Hyman, Jr. on July 23, 2018. App. 500. Lance Boozer represented Petitioner, and Johnny James, Jr. appeared on behalf

of the state. Petitioner and trial counsel testified at the hearing. At the conclusion of the hearing, Judge Hyman requested proposed orders from both sides. In October 2018, the PCR court issued its Order of Dismissal. App. 553 – 576. The court found that counsel rendered effective assistance and that Petitioner failed to meet his burden.

A Notice of Appeal was filed on October 24, 2018. A petition for writ of certiorari was filed on May 31, 2019. The state filed its Return on November 15, 2019. This Court granted certiorari as to Question 2 on November 22, 2021.

This Brief of Petitioner follows.

STANDARD OF REVIEW

Appellate courts defer to a PCR court's findings of fact and will uphold them if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, if there is no evidence to support the PCR court's ruling, this Court will reverse. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) (citation omitted). Questions of law are reviewed de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

ARGUMENT

The PCR court erred in denying relief, where trial counsel failed to object to the solicitor vouching for the testimony of minor children, where the comment was made during closing argument that children "don't make this stuff up" when no physical evidence was recovered in this case.

Relevant facts

The PCR court erred in finding that counsel rendered effective assistance where he failed to object to the solicitor's comments which vouched for the credibility of the state's minor witnesses. In addition to the repeated use of the word predator in the state's closing argument, the solicitor also vouched for the credibility of the minor witnesses:

> Ladies and gentlemen, use your common sense. Strip away all the outside stuff. Don't fall for Defense Lawyer 101. Let's be real. Five, six, seven and eight year olds don't make this stuff up. They just don't.

App. 419 l. 25 – App. 420 l. 4.

The state bolstered the testimony of the minors in this case by qualifying it with the seal of approval from adults. This was reinforced in the state's closing as well: "What you are saying about Mr. Sammy is very serious, and we are not going to ruin a man's life. So **you better be telling us the truth before we go further** with this." App. 409 ll. 2 – 5 (emphasis added). The understanding, therefore, is that the adults—both the fact witnesses and the solicitor—believed the children. As a result, they qualified that testimony with their own acceptance that what the children was saying was true. This was impermissible, and trial counsel should have objected.

Trial counsel was hired to represent Petitioner. App. 504 ll. 18 – 24. As trial preparations occurred, counsel never spoke with Petitioner about any particular trial strategy.

App. 512 ll. 1 – 15. Regarding the solicitor's comments during closing argument which are the subject of this appeal, trial counsel testified at the post-conviction relief evidentiary hearing that he did not believe the comments were vouching:

> I could see where your position is that it would [seem like the remarks from the solicitor were vouching]. Again, there is, from my research and preparation for the case, one of the big considerations that you have with minor children is source information. So where does a child come up with the idea of making an accusation about a sexual battery or a sexual assault[?] It is probably the consensus of anyone who listens to a five, six, seven or eight year old that there would need to be some sort of source for this information.
>
> Around that they wouldn't just come up with it out of thin air. So I did not view that as vouching. Again, I think that it was something that's inherent to the nature and the age of the children for there to be some source for their accusations.

App. 535 l. 13 – 536 l. 11. Trial counsel was not asked to provide either his definition or an example of vouching. He did, however, note that there was no physical evidence recovered. App. 539 ll. 19 – 22.

The section of the Order of Dismissal containing findings of fact and conclusions of law regarding this issue included only three paragraphs. The PCR court noted how "solicitors may not make explicit personal assurances or indicate there is information not presented which supports the testimony, i.e. vouch, as doing so improperly invades the province of the jury and places the government's prestige behind the witness." App. 572 (citations omitted). The unambiguous law notwithstanding, the PCR court still found no error:

> The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel is correct in his determination that the argument did not constitute vouching. Prohibitions against vouching in closing argument do not foreclose any arguments for or against the credibility of witnesses. The remarks offered no explicit personal assurance, or information beyond the record, but reasonably argued from the age of the victims that the victims should be afforded credibility. As such, there was no basis for objection. Even if the remark was objectionable, the single line at the end of closing argument does not give this Court cause to believe there is a reasonable probability that if the remark were excluded the outcome of trial would have been different. Accordingly, Applicant has failed to

meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is denied.

App. 572.

Discussion

Petitioner's trial began on November 4, 2013. Based on the jurisprudence in existence at that time, trial counsel should have known to object.

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)); State v. Pitts, 256 S.C. 420, 430, 182 S.E.2d 738, 743 (1971). It is improper for a judge or a prosecutor to bolster a witness's credibility by stating ot the jury his or her view that the witness is likely being truthful. Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016).

The state's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Furthermore, a prosecutor cannot vouch for a witness' credibility. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). In Shuler, our state Supreme Court explained that a solicitor "cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." Id. "Because 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." State v. Kelly, 343 S.C 350, 369, 540 S.E.2d 851, 861 (2001), rev'd on other grounds, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002).

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 Matthews v. State, the South Carolina Supreme Court held that Matthews' counsel rendered ineffective assistance by failing to object to the solicitor's comments vouching for the credibility of the state's witnesses. 350 S.C. 272, 565 S.E.2d 766 (2002). Matthews argued that his counsel should have objected to the solicitor's comments regarding corroboration of witness testimony. Id. at 275, 565 S.E.2d at 767. The Court held that "[c]ounsel's failure to object prejudiced his client by allowing the solicitor to vouch for the credibility of a key State's witness." Id. at 277, 565 S.E.2d at 769. Similarly, trial counsel in Petitioner's case failed to object to the vouching of minor witnesses which in turn prejudiced Petitioner and deprived him of a fair trial.

The reversal in Matthews is noteworthy in that it conflicts with the PCR court's order in this case. The Order of Dismissal in Petitioner's case suggests a "single line at the end of closing argument does not give this Court cause to believe there is a reasonable probability that if the remark were excluded the outcome of the trial would have been different." App. 572. The Matthews Court seemed to think the comment was prejudicial enough to reverse the PCR court in that case:

> The solicitor's summation led the jury to believe the government corroborated with witness' testimony before trial and found it credible. The solicitor did not support this vouching with anything within the record, such as corroboration by other witnesses or physical evidence. The solicitor improperly vouched for the witness.

Matthews v. State, 350 S.C. 272, 277, 565 S.E.2d 766, 768.

The solicitor's remarks in Matthews were admittedly more egregious, but the proposition that a solicitor's remark in closing argument is prejudicial enough to reverse the PCR court stands. The Court noted how the evidence presented against Matthews' co-defendant "was far from overwhelming." Id. As a result, "Counsel's failure to object prejudiced his client by allowing the solicitor to vouch for the credibility of a key State's witness. His silence compounded the duty of a jury faced with a confusing, mass trial characterized by improperly admitted evidence." Id. at 277, 565 S.E.2d at 769.

More recently is the case of Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016). Tappeiner was arrested and indicted for CSC with a minor, second degree. Id. at 244, 785 S.E.2d at 473. During closing, the solicitor stated to the jurors that the minor "looked [them] in the eye" and reminded them that the rape crisis counselor interviewed the minor "face to face, eye to eye" such that the counsel believed the minor's version of events. Id. at 246, 785 S.E.2d at 473. While the Court's opinion in Tappeiner largely addressed the vouching of the counselor's testimony along with the testimony of law enforcement, the solicitor's actions in Petitioner's case were likewise improper and should have prompted an objection because they impermissibly vouched for the minor's credibility.

The suggestion from the solicitor in closing is that the minor children are telling the truth. Not only is it inaccurate to submit that minor children do not make up accusations, but it is also tantamount to bolstering and vouching for their credibility. Trial counsel did not object to these

prejudicial and improper remarks. Without physical evidence, this case hinged on the testimony of the minor children. Letting this remark go unchallenged during closing arguments prejudiced Petitioner's right to a fair trial and constituted ineffective assistance of counsel.

As reflected by the beginning of the state's closing argument, the solicitor's intent was always to add credence to the minors' testimony: "Ultimately, this case comes down to do you believe the children[?] Do you believe what they are telling you or do you not?" App. 403 ll. 10 – 12. Seconds later, comments nearly identical to the closing remarks were made: "Common sense is what tells you that a five year old, a seven year old, a seven year old, and an eight year old don't make this kind of stuff up. Common sense tells you that." App. 403 ll. 20 – 23. Later on, the solicitor pointed out how the minors' credibility had been vetted: "So you better be telling us the truth before we go further with this." App. 409 ll. 4 – 6. The solicitor also stated "[c]hildren don't make this kind of stuff up. They just don't." App. 413 ll. 3 – 4. Notably, this assertion was not linked to a witness, expert or otherwise, who testified at trial.

Ultimately, the objectionable remark that was discussed at the PCR evidentiary hearing occurred near the conclusion of the state's closing argument. The solicitor stated: "[Let us] be real. Five, six, seven and eight year olds don't make this stuff up. They just don't." App. 420 ll. 2 – 4. The unattributed assertion that young children do not lie is inescapably intertwined with the solicitor's assignment of credibility.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced

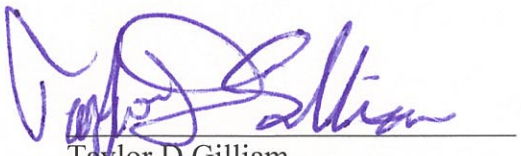
the defendant. Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

The solicitor's comments prejudiced Petitioner, and trial counsel was ineffective for failing to object. In Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002), the Court found prejudice where defense counsel failed to object when the solicitor vouched for the credibility of a state's witness, Etheridge, in opening statements. We "find that prejudice clearly flowed from counsel's error. In the instant case, Ethridge was the State's **key witness**, and therefore his credibility was crucial to the government's case." Id. at 227-28, 565 S.E.2d at 285 (emphasis added). Accord Matthews v. State, 350 S.C. at 277, 565 S.E.2d at 769 ("counsel's failure to object prejudiced his client by allowing the solicitor to vouch for the credibility of a key State's witness").

Here, Petitioner was prejudiced when the solicitor vouched for the credibility of the state's key witnesses. The case turned largely on the credibility of the minors. The solicitor's repeated bolstering of the minors' credibility was equal parts impermissible and prejudicial. Counsel should have objected.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court reverse the denial of post-conviction relief.



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This 22nd day of December, 2021.