

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 22 2013

CERTIORARI TO LAURENS COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2012-212074

Donald Wetherall,..... Petitioner,

v.

State of South Carolina,..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW.....5

ARGUMENTS

 I. The PCR court properly found Counsel was not ineffective for not objecting to the solicitor’s closing argument as the argument was not improper *per se* or so improper as to mandate an objection or infer prejudice.....6

 II. The issue of whether Counsel was ineffective for not objecting to the Solicitor’s comments during closing arguments as violating Petitioner’s right to remain silent and failure to present a defense is not preserved for appeal. Nevertheless, the issue is without merit.....12

CONCLUSION.....16

QUESTIONS PRESENTED

- I. Did the PCR court properly find Counsel was not ineffective for not objecting to the solicitor's closing argument as the argument was not improper *per se* or so improper as to mandate an objection or infer prejudice?

- II. Is the issue of whether Counsel was ineffective for not objecting to the Solicitor's comments during closing arguments as violating Petitioner's right to remain silent and failure to present a defense preserved for appeal? If so, is it a meritorious argument?

STATEMENT OF THE CASE

Donald Wetherall ("Petitioner") was indicted at the January 2005 term of the Laurens County Grand Jury for Criminal Sexual Conduct ("CSC") with a Minor (2005-GS-30-0166, Count I), and Committing or Attempting Lewd Act Upon a Child under Sixteen Years of Age (2005-GS-30-0166, Count II). He was represented by Claude H. Howe, III, Esquire. From September 12-14, 2006, he proceeded to a jury trial and was found guilty of the lesser-included offense of Assault with Intent to Commit CSC with a Minor, First Degree, and guilty as indicted of the lewd act charge. The Honorable Cordell Maddox sentenced him to thirty (30) years suspended after twenty (20) years with five (5) years' probation for Assault with Intent to Commit CSC with a minor, and fifteen (15) years, concurrent, for Committing or Attempting Lewd Act Upon a Child under Sixteen Years of Age.

A Notice of Appeal was filed on Petitioner's behalf, and an appeal was perfected by Kathrine H. Hudgins, Esquire. The S. C. Court of Appeals affirmed. State v. Wetherall, 2009-UP-340 (Ct. App. filed June 15, 2009). Petitioner's Petition for Rehearing was denied by written Order dated August 25, 2009. The S. C. Supreme Court denied Petitioner's Petition for Writ of Certiorari by written Order dated January 20, 2011. The Remittitur was sent on February 7, 2011.

Petitioner subsequently filed an application for post-conviction relief (PCR) on February 4, 2010 and amended on October 24, 2011. Respondent made its Return on August 19, 2011. On March 12, 2012, an evidentiary hearing was held before the Honorable Frank R. Addy, Jr. Petitioner was present and represented by Rodney Richey, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On April 16, 2012, the Honorable Frank R. Addy, Jr. denied and dismissed Petitioner's application with prejudice by

written Order. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENTS

I. The PCR court properly found Counsel was not ineffective for not objecting to the solicitor's closing argument as the argument was not improper *per se* or so improper as to mandate an objection or infer prejudice.

Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for not objecting to the Solicitor's comments in his closing argument. During his closing argument, the Solicitor made the following argument:

You think about this, Ladies and Gentlemen. You thin[k] about the courage it took for that seven-year-old little girl to come in here and tell you those vivid details of what happened to her. How embarrassing it was for her. Had to be. Had to be. Now, I'd like you to do something for me. I'd like you all to close your eyes for a second. I want you to imagine a five-year-old little girl, she's in her nightgown. Nothing on but her pair of panties and she's laying on the couch in a place that she is comfortable in her home. Can you see her? She's watching cartoons. It might be a Saturday morning. It might be Wednesday morning. I don't know. But she's in a comfortable place watching cartoons and someone you know and trust comes into that room and sits down on the couch beside her and he makes her take her panties off. And that person gets on top of her with his sweating stinking body and he tries to put his penis into her five-year-old vagina. Can you see the fear in that child's eyes? Can you see the tear rolling down her cheek as it hurts? Can you see it Ladies and Gentlemen? Can you see her laying there in fear not knowing what to do? Do you think that's not going to have an [e]ffect on her for the rest of her life? Do you think she's not going to see his face in her nightmares every night for the rest of her life? I put it to you that she will. You can open up your eyes. But you can see that little girl laying there on that couch, not knowing what to do, and that man taking advantage of her.

(App. 192 line 5- App. 193 line 3). The PCR court correctly held Counsel was not ineffective for not objecting to the solicitor's closing argument because these comments were not improper *per se*, and Petitioner failed to meet his burden of proving any resulting prejudice.

In a PCR action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Petitioner must prove counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

At the PCR hearing, Counsel testified:

I was still wrestling with what I could do and not do to address the Court's ruling that—that—that he was actually being tried on assault with intent to commit CSC, as opposed to CSC, because the child did not testify to penetration. The child did testify to other matters, but would not testify to penetration. In Ron Fleming's closing argument, I will—would admit: At some point in time, I got distracted, still wrestling with that issue...And I admit, I was asleep at the wheel when that took place. And I should've objected

to that at that point in time. There's no question in my mind; I should've done that.

(App. p. 352 line 8- p. 353 line 1).

Counsel later agreed that solicitors have wide latitude in closing arguments, although he thought he should have made an objection in this case. (App. p. 353 lines 5-7).

The PCR Court held, "the Solicitor made essentially "A Time to Kill" argument which may have been arguably objectionable. However, I find this argument was not improper *per se*, nor was it so improper as to mandate an objection or infer prejudice." (App. p. 373).

"A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999). "If a solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999).

At the trial, the Solicitor asked Victim if Petitioner did something he was not supposed to do to her, to which she replied, "He stuck his wee wee up on me." (App. p. 41 line 25). The Solicitor and Victim then engaged in the following colloquy:

Q: And where were you at when this happened?

A: I was living with my mama.

Q: Okay. And you were living with your mama, but where were at in the house when that happened?

A: I was on the couch.

Q: What were you doing?

A: I was...

Q: What had you been doing?

A: I was watching TV.

Q: Watching TV? Were you watching cartoons?

A: (Nods head)

Q: Huh? You were watching cartoons?

A: (Nods head)

Q: Okay. And when you were watching cartoons on the couch there, what were you wearing?

A: My nightgown.

Q: Your nightgown? Did you have on anything else?

A: I had my panties on.

Q: Now, did he make you take the panties off?

A: Yes.

Q: And then he stuck his wee wee on you?

A: Yes.

Q: Was he on top of you?

A: (looking down)

Q: It's oaky sweetie. Look up here at me. Was [Petitioner] on top of you?

A: Yes.

(App. p. 42 line 6- p. 43 line 7).

Based on Victim's testimony, the Solicitor clearly confined his argument to the evidence presented at trial to the jury. He was also allowed to comment on the weight that should be given to Victim's testimony. As such, Counsel was not ineffective for not objecting to the

Solicitor's closing argument as there was ample evidence from Victim's testimony to warrant each of the details in his closing argument.

Petitioner argues, however, that the Solicitor's argument violates the "Golden Rule." A "Golden Rule" argument is one which suggests jurors to put themselves in the shoes of the victim and decide the case based on personal interests and bias rather than evidence. See Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009) (holding the solicitor's remarks encouraging the jury to "speak for" the victim is improper; however, no prejudice was shown because solicitor's comments came at the end of his closing argument and were limited in duration and there was overwhelming evidence of guilt); see also State v. Reese, 359 S.C. 260, 597 S.E.2d 169 (Ct. App. 2004), *aff'd in part and rev'd in part*, 370 S.C. 31, 633 S.E.2d 898 (2006) (recognizing Solicitor's improper argument when asking the jury to speak for the victim); but see State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998) (holding the prosecutor may properly ask the jury to imagine the fear and emotions of a victim during closing argument if based on the evidence). This argument is without merit.

The Solicitor, in his argument, highlighted details from Victim's testimony which proved Petitioner committed Assault with Intent to Commit CSC with a Minor. He argued the fact that Petitioner assaulted Victim while she was in her nightgown and panties on the couch at her mother's house while Victim was watching cartoons. However, the Solicitor never requested the jury to speak up for Victim or put themselves in the shoes of the Victim. At most, the Solicitor used his artistic license to paint a picture for the jury to prove Petitioner violated Victim. Pursuant to Cooper, 334 S.C. 540, 514 S.E.2d 584(1999), the Solicitor was allowed to argue his version of the facts and to comment on the weight to be given to Victim's testimony. Additionally, pursuant to Warren, 348 N.C. 80, 499 S.E.2d 431 (1998), the Solicitor properly

asked the jury to imagine the fear Victim felt when assaulted by Petitioner. Thus, the Solicitor's argument was proper and did not violate the "Golden Rule." As such, the PCR Court correctly held the Solicitor's argument was not *per se* improper or so improper as to warrant an objection from Counsel. Therefore, regardless of what Counsel testified to at the PCR hearing, he was not obligated to object and was not ineffective in his representation.

Moreover, even assuming *arguendo* the comments were improper, no prejudice can be shown as there was overwhelming evidence of Petitioner's guilt through his own confession, his own letter to Victim's mother and Victim's testimony.

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); see also Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "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." Id.

Even if these comments were improper, Petitioner admitted to admitting his role in this crime in an oral statement during an interview with an investigator at the Laurens County Sheriff's Office. In this statement, which was found to be voluntarily made by the trial court, Petitioner stated Victim stated he was licking Victim "down there" and that he handled the situation in the wrong manner. (App. p. 94 lines 3-4). Petitioner also admitted to touching

Victim's private parts to a pastor and Victim's mother. (App. p. 94 lines 15-19). Additionally, Petitioner stated that after an incident between Victim and Victim's biological father, Victim started asking Petitioner to touch her, including the incident in the present case. (App. p. 96 lines 3-5). Further, a letter, written by Petitioner, which was sent to Victim's mother, was admitted into evidence at the trial. In this letter, Petitioner wrote: "[Victim's mother] What happened? How did they hear about this shit? Are you the one who told them? I thought we were going to work through this. I am going to jail for the rest of my life- Am I going to jail for the rest of my life?" (App. p. 98 lines 1-4).

Taking the Solicitor's comments in the context of the entire record, including Victim's testimony and Petitioner's statement and letter, no prejudice can be shown where there is overwhelming evidence of Petitioner's involvement in this crime. As such, the Solicitor's comments did not infect the trial with unfairness as to make the resulting conviction a denial of due process. Humphries, 351 S.C. 362, 570 S.E.2d 160 (2002).

Accordingly, there is clear "evidence of probative value" to support the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

II. The issue of whether Counsel was ineffective for not objecting to the Solicitor's comments during closing arguments as violating Petitioner's right to remain silent and failure to present a defense is not preserved for appeal. Nevertheless, the issue is without merit.

Petitioner asserts Counsel was ineffective for not objecting to the Solicitor's comments during closing argument as the Solicitor's argument violated Petitioner's right to remain silent and failure to present a defense. However, this argument is not preserved for appeal.

"To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State

v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996); see also State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (“The issue which is not properly preserved cannot be raised for the first time on appeal). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). “A Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review.” Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

In this case, while Petitioner raised this issue at the PCR hearing (App. p. 331 lines 1-16), the PCR Court did not address it in the Order of Dismissal. Further, Petitioner filed no motion to alter or amend the judgment pursuant to Rule 59(e) SCRPC. Therefore, pursuant to Gee and Marlar, this issue is not preserved.

Even assuming *arguendo* this issue was preserved for appeal, this issue is without merit.

During his closing argument, the Solicitor made the following comments:

[Detective White] finally found out that [Petitioner]—where he was at, [Petitioner], and she went and interviewed him. Now, I’ve got to tell you, [Petitioner] didn’t admit to the police officers in that statement that he gave that he did it. What he did to [sic] was admit it. He admitted it to his wife or his girlfriend and his mother. If you’re innocent ladies and gentlemen, why would you admit it to anybody? Why? You also heard Detective White state that he never did deny it. Either. He never denied that he committed some kind of cruel sexual conduct on this minor child. Never denied it. Had a chance to. Had a chance to write the statement. He sound[ed] like he tried to make it sounds like in there [the written statement] that it was all the little girl’s fault...

(App. p. 189 line 22- p. 190 line 11).

“It is impermissible for the prosecution to comment, directly or indirectly, upon the defendant's failure to testify. However, improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant.” Johnson v. State,

325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997). If a solicitor makes an improper comment on the defendant's decision not to testify, a curative instruction emphasizing to the jury that it cannot consider his decision not to testify will cure any potential error. Id at 188, 480 S.E.2d at 735.

First, the State contends the Solicitor's comments were not an impermissible reference, directly or indirectly, upon Petitioner's right to remain silent or failure to testify. See Edmond v. State, 341 S.C 340, 534 S.E.2d 682 (2000) (holding Counsel ineffective for not objecting to Solicitor comments on petitioner invocation of counsel). Petitioner waved his right to counsel and gave a voluntary statement to Detective White admitting that he had admitted the crime to Victim's mother. This can hardly be viewed as a comment on his right to remain silent. Nevertheless, if it was an impermissible comment upon Petitioner's right to remain silent or not to present a defense, the trial court cured any potential error in its jury instructions. First, the trial court stated:

The person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. I charge you that it is an important rule of law that the defendant in a criminal trial, no matter the seriousness of the charge may be, will always be presumed to be innocent of the crime in which the indictment was issued unless guilty has been proven by evidence satisfying you of that guilty beyond a reasonable doubt. The presumption of innocence does not end when you begin your deliberations, but it accompanies the defendant throughout the deliberations and only ends when you reach a verdict based on the evidence satisfying you of guilty beyond a reasonable doubt.

(App. p.197 lines 9-20).

Additionally, the trial court instructed:

Now, I instruct you and emphasize to you that the fact [Petitioner] did not testify in this trial cannot be considered by you in any way whatsoever or be considered as a factor when you determine guilt or innocence. It cannot be considered at all. A defendant has a

Constitutional right to remain silent and the assertion of that right must not be considered by you in your deliberations. Under your oath, you are to draw no conclusions whatsoever from the fact that the defendant in this case did not testify. The fact that [Petitioner] did not testify should not even be discussed in the jury room. The burden of proof, as I stated to you, is on the State. [Petitioner] is not required to prove his innocence. The burden of proof remains on the State to prove [guilt] beyond a reasonable doubt.

(App. p. 201 line 20- p. 202 line 7).

Clearly, the trial court thoroughly instructed the jury not to even consider Petitioner's right to remain silent or failure to present a defense in their deliberations. Further, the trial court emphasized the burden of proving Petitioner's guilt beyond a reasonable doubt remains always on the State. As juries are presumed to follow the law as instructed by the trial court under State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975), Petitioner's jury is presumed to have disregarded any mention by the Solicitor of Petitioner's 'silence.' Therefore, any potential error was cured by the trial court's instructions to the jury. Thus, the Solicitor did not infringe on Petitioner's Constitutional right to remain silent.

Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

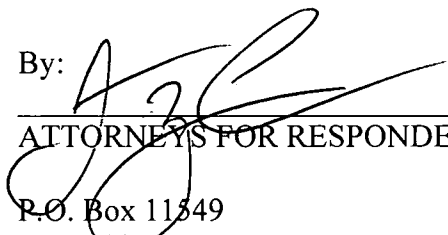
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar #78871

By:



ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

May 22, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable Frank R. Addy, Jr., Circuit Court Judge

DONALD WETHERALL, 317576

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

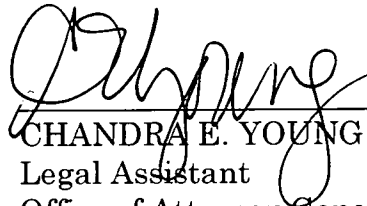
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Dayne C. Phillips, Esquire
1330 Lady Street; Suite 401
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 22nd day of May 2013.



CHANDRA E. YOUNG
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAY 22 2013

May 22, 2013

S.C. Supreme Court

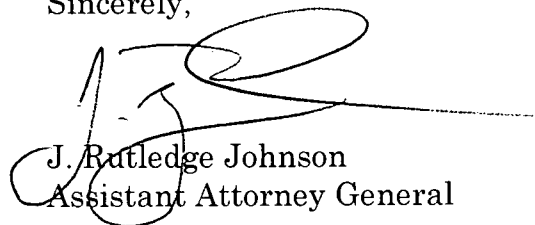
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Donald Wetherall, 317576 v. State of South Carolina
2012-212074**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,



J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Dayne C. Phillips, Esquire
Trisha Allen, Victim Services