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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari from Spartanburg County
Honorable J. Mark Hayes, II, Post-Conviction Relief Judge
Honorable R. Keith Kelly, Trial Judge

Appellate Case No. 2022-000434

DANIEL SPADE,

Respondent-Petitioner,

vs.

THE STATE,

Petitioner-Respondent.

PETITIONER-RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON PETITION FOR CERTIORARI

Did the post-conviction relief court err by reversing its prior ruling correctly denying relief and erroneously finding Spade established trial counsel was constitutionally ineffective for failing to object to a portion of the prosecutor's closing argument, where the post-conviction relief court improperly determined that the portion of the closing argument was unconstitutional, incorrectly determined trial counsel must have objected based on reasonable professional standards, and mistakenly determined Spade met his high burden of establishing prejudice when there is no reasonable probability that the result of his trial would have been different but for counsel's failure to object?

STATEMENT OF THE CASE

Procedural History

During its February 2014 term, the Spartanburg County Grand Jury indicted Respondent-Petitioner Daniel W. Spade for first-degree criminal sexual conduct with a minor following an investigation into allegations he sexually assaulted his four-year-old biological daughter during an overnight visit at a hotel in Spartanburg County (2011-GS-42-4171). Spade retained the services of Kenneth Shabel, Esquire (who had been representing him in an on-going custody dispute involving the same minor child) and Shabel's law partner Shawn Campbell, Esquire, to represent him in this criminal matter. Seventh Circuit Solicitor Barry J. Barnette, Assistant Solicitors Jennifer Jordan and Kimberly Leskanic, and Special Prosecutor N. Douglas Brannon prosecuted the case. On February 24, 2014, Spade proceeded to a jury trial before the Honorable R. Keith Kelly, circuit court judge. The jury convicted Spade as indicted. Judge Kelly sentenced Spade to imprisonment for thirty-five years.

Spade filed a timely notice of appeal and was represented by C. Rauch Wise, Esquire.[1] who raised five grounds. The South Carolina Court of Appeals affirmed Spade's conviction by

[1] Trial counsel Kenneth Shabel originally assisted in the appeal but withdrew as counsel for Spade when he changed law firms and began practicing law with Special Prosecutor Brannon. Counsel Shabel filed a motion to be relieved as counsel with the Court of Appeals on March 21, 2016, and his motion was granted on May 6, 2016.

unpublished opinion on July 6, 2016. State v. Spade, Op. No. 2016-UP-352 (S.C. Ct. App. filed July 6, 2016). Spade subsequently filed a petition for rehearing, and, following the denial of rehearing, filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. On June 16, 2017, the Supreme Court denied the petition for certiorari. The Remittitur was returned to the circuit court on June 22, 2017.

On July 13, 2017, Spade filed a *pro se* application for post-conviction relief. Spade then retained E. Charles Grose, Jr., to represent him in this action, and, through counsel, filed three subsequent amendments to his application on October 2, 2017, December 24, 2018, and May 14, 2019, numerous allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct. Respondent filed a return to the application and requested an evidentiary hearing.

An evidentiary hearing on this action was convened May 15, 2019[2], before the Honorable J. Mark Hayes, II, circuit court judge. Spade was present and was represented by counsel Grose. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson and Assistant Attorney General Johnny Ellis James, Jr. At the start of the hearing, Spade also filed and submitted a "Memorandum in Support of Application for Post-Conviction Relief." At the hearing, Spade proceeded forward on the following claims from his third amended application, absent allegation number 15, which Spade expressly withdrew. During the lengthy evidentiary hearing, thirteen witnesses were presented, and numerous exhibits were introduced, including the videotaped forensic interviews of the victim.

Following the hearing and on Spade's motion, the court issued an order requiring the South Carolina Department of Social Services (DSS) to provide the court with a complete copy of any

[2] The Court convened for a motion hearing related to this matter on May 14, 2019.

file or records regarding the underlying custody action involving Spade, the minor victim, and her parents (mother and adoptive father) within ten days of receipt of the order. On June 11, 2019, the DSS file was hand-delivered to the court by a DSS attorney. Following in-camera reviews and a status conference with both parties and counsel for DSS, the file was first released to the parties and then ultimately made a part of the record under seal.

On October 31, 2019, following the issuance of this order and the delivery of the DSS file to the parties, the court requested the parties submit any additional memorandums on the DSS file and the issues raised at the PCR hearing on or before December 17, 2019. On that date, the State submitted its "Post-Hearing Memorandum in Support of the Denial of Post-Conviction Relief", and Spade submitted a "Supplemental Memorandum of Law regarding the DSS Records."

On May 7, 2020, the court issued a ten-page Form 4 denying post-conviction relief on all grounds and instructing the State to prepare a proposed order in accordance with the Form 4 within thirty days. On June 8, 2020, the State submitted a proposed order pursuant to the court's instructions. On the same date, Spade's counsel requested time to review the proposed order with Spade and submit written objections to the proposed order and the court granted this request. On July 7, 2020, Spade submitted "Objections to Attorney General's Proposed Order and Proffer of Attorney General's Proposed Order."

On October 8, 2020, the court issued an order of dismissal, denying and dismissing the post-conviction relief action in full.

On October 19, 2020, Spade served a timely Rule 59(e), SCRCP motion. The State made its return to the motion on January 13, 2021. On March 29, 2021, the court convened a hearing on Spade's motion. Spade was present and represented by counsel Grose. The State was represented by Senior Assistant Deputy Attorney General Jameson. Following the hearing, the court took this

motion under advisement.

On November 12, 2021, the court issued an amended order, reversing its previous denial of post-conviction relief and granting Spade a new trial in the court of general sessions. This order made new substantive findings of fact and conclusions of law pursuant to Section 17-27-80 and determineD Spade received constitutionally deficient representation during trial based on trial counsel's failure to object to a portion of the State's closing argument and that this failure to object likely changed the outcome of the trial, i.e., that Spade would have been acquitted of the sexual assault of his four-year-old daughter but for trial counsel's decision not to object to a story told by the prosecutor in his closing argument.

Because this was an amended order with new substantive findings and a complete change in the ultimate outcome of this case, the State moved to reconsider, alter, or amend this new order pursuant to Rule 59(e), SCRCP, by motion served on November 29, 2021. Spade served his return in opposition to this motion on January 24, 2022. The court summarily dismissed the State's motion to reconsider without a hearing by order filed on March 11, 2022.

The State now challenges this erroneous grant of post-conviction relief.

Summary of Facts Presented at Spade's Jury Trial

The victim's mother and Spade met at work and ultimately had a child together, the victim, who was born in September of 2006. (App. 149-51). Spade, who lived in Virginia at the time of conception and birth, first saw the victim in January or February of 2007. (App. 151). Sometime in the year 2007, Spade filed an action in South Carolina family court seeking visitation with the victim. (App. 151-52). Meanwhile, the victim's mother married her husband David in December 2007. (App. 151). The victim referred to David as "daddy." (App. 151). In 2008, the victim's mother and her husband filed an action in family court seeking to terminate Spade's parental rights.

(App. 152-53). The action was not successful, Spade was awarded visitation with the victim, and a visitation schedule was thereafter established. (App. 153). In the summer of 2010, the victim, then almost four years old, went to Virginia for an extended visit with Spade, who lived with his fiancée and their children. (App. 154). The next two visitations took place in South Carolina in September 2010 and October 2010. (App. 155-59).

The September 2010 visit took place at a Holiday Inn Express in Spartanburg County. (App. 126-27; 157). During this visit, Spade took the victim to the hotel's pool. (App. 138-40). At one point, he took the victim into the private bathroom near the pool area and "stuck his private part in [her] mouth." (App. 138). Spade told the victim that if she "didn't do it," he would not take her home to her mother. (App. 140).

Following the September visit, the victim's mother noticed regressive behavioral changes in the victim. (App. 157). The victim wet herself in her car seat, which was unusual for her as she was potty-trained at that time. (App. 157-58). After having a bath, the victim started crying uncontrollably. (App. 158). She pulled away from her mother, hid herself in the corner, and wet herself again. (App. 158). The victim was unable to control herself and was almost making herself sick. (App. 158). When the victim's mother asked what was wrong, the victim said, "I don't know." (App. 158). Thereafter, the victim developed problems sleeping and was suddenly terrified of the dark. (App. 160). One night the victim's mother found her barricaded under a small play table in her room, asleep. (App. 161). The victim also began to complain of stomach aches and headaches and would sometimes revert to speaking like a two-year-old. (App. 160). Sometimes she would "break down completely" and there was no consoling her. (App. 160). Sometimes she would hide behind a door and not come out for anywhere from five to thirty minutes. (App. 160). When she finally did come out, she wanted her mother to hold her. (App.

160). After the October 2010 visit with Spade, the victim's mother decided to seek counseling for the victim. (App. 163).

That same month, the victim began counseling with Kimberly Roseborough. (App. 163-64). At the time counseling began, the victim's mother had no idea that sexual assault was a possible issue. (App. 164). Instead, the goal of the counseling was to figure out the cause of the victim's anxiety and to try to ease any anxiety she may have had regarding her visits with Spade. (App. 165). Following the commencement of counseling, the victim had no further in-person visits with Spade. (App. 166, lines 14-18). Also following commencement of counseling, the victim's mother noticed an improvement in the victim's anxiety symptoms. (App. 166).

The victim disclosed the sexual abuse to her grandmother in late March of 2011. (App. 238-39). The grandmother was in shock regarding the disclosure and waited a day or two to tell her husband about it. (App. 239-40). Her husband, the victim's grandfather, reported the disclosure immediately to the victim's family court guardian ad litem Alexandria Wolfe. (App. 242, lines 24-25). He also called Kimberly Roseborough, the victim's counselor at that time, and reported the disclosure. (App. 203-204). In response, Ms. Roseborough referred the victim for a forensic interview at the Child Advocacy Center. (App. 204). The victim's mother found out about the allegation from her parents around this time. (App. 166-67).

Tabitha Webber, then a forensic interviewer at the Child Advocacy Center, conducted forensic interviews with the victim on five different dates in April and May of 2011. (App. 247-48). During the course of these interviews, the victim made a disclosure of sexual abuse that occurred "at a hotel with a pool" in South Carolina.[3] (App. 248-49). Following the interviews,

[3] The victim also made several other disclosures of sexual abuse during these interviews, but only this one limited instance of sexual abuse was presented to the jury during Spade's trial. (App. 137-40; PCR Ex. #8: Forensic Interviews).

Webber made a report to law enforcement. (App. 249). The victim thereafter began counseling with Meredith Thompson-Loftis in May of 2011. (App. 259). The victim disclosed sexual abuse during the counseling sessions and provided a specific time period and location. (App. 270). Although the victim started out having a variety of symptoms of anxiety, she exhibited a great deal of improvement over the course of the counseling sessions. (App. 268-70).

Spade's parental rights were terminated in family court in November of 2012, and the victim's last name was subsequently changed to that of her adoptive father. (App. 177).

STANDARD OF REVIEW

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the post-conviction relief judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the post-conviction relief judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court erred by reversing its prior ruling correctly denying relief and erroneously finding Spade established trial counsel was constitutionally ineffective for failing to object to a portion of the prosecutor's closing argument because the post-conviction relief court improperly determined that the portion of the closing argument was unconstitutional, incorrectly determined trial counsel must have objected based on reasonable professional standards, and mistakenly determined Spade met his high burden of establishing prejudice when there is no reasonable probability that the result of his trial would have been different but for counsel's failure to object.

In its amended order, the post-conviction relief court granted Spade post-conviction relief as to a single[4] issue—that trial counsel was constitutionally ineffective for failing to object to what the court's concluded was an improper closing argument by Special Prosecutor Brannon that "unconstitutionally negates the presumption of innocence." (App. 3282). The lower court found that this argument regarding the role of the jury in protecting good people from bad people somehow unconstitutionally shifted the burden of proof away from the State and told the jury not to view the evidence objectively and fairly, but, rather, "beseeches the jury to become an advocate for the victim, thus asking them to depart from their constitutional duty to consider the facts of the case impartially." (App. 3282 FN 22) The court determined that because this argument was impermissible, trial counsel should have objected. The lower court then concluded Spade was prejudiced by trial counsel's failure to object for several reasons. First, the court found that because trial counsel did not object, the trial court did not give an instruction to the jury that the verdict

[4] In a rather convoluted portion of this amended order, the court found Spade established prejudice, but not deficiency, as to the allegation that trial counsel was ineffective for failing to object to bolstering from State's witnesses in a footnote. Respondent asked the court to either remove the footnote in its entirety or clarify its position regarding this issue in the amended order, as the footnote in question finding prejudice does not comport with the body of the amended order unequivocally finding Spade failed to find trial counsel deficient as to this allegation. In its order summarily denying the State's motion, the court reiterated its prejudice finding but nevertheless refused to alter or amend its prior language and did not make a finding of deficiency of counsel. Accordingly, relief was ***not*** granted as to this issue.

must not be based on passions or emotions. Second, the court found that there is a reasonable probability that Spade would have been acquitted but for counsel's failure to object to this portion of the State's closing argument because the primary evidence introduced against Spade was the minor victim's testimony. The court elaborates that "[t]here were not multi-witnesses as to the events"[5] nor was there DNA or other physical evidence, thereby making the credibility of the minor victim crucial and "[c]ompounding and intensifying the prejudicial harm caused by trial counsel's failure to object to the Special [P]rosecutors argument[.]" (App. 3289). These findings and conclusions are not supported by the record or case law, and, accordingly, the State urges this Court to grant certiorari and ultimately reverse the erroneous grant of relief.

Standard of Review for Assessing Sixth Amendment Infective Assistance of Counsel Claims

Initially, the State notes the lower court's determination that Spade met his burden of establishing trial counsel was constitutionally ineffective does not comport with the recognized standard of review for granting relief in post-conviction relief matters, which required Spade to meet a heavy burden of establishing both that his counsel performed in a manner that no competent attorney would have performed and that there is a reasonable probability that he would not have been convicted but for counsel's error or omission.

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[5] It is crucial to note that the overwhelming majority of child sex abuse cases, the abuser performs his or her heinous acts not in front of an audience, but, rather, in secrecy while the child is isolated from those who can protect him or her, and, therefore, there generally are not "multi-witnesses" to the atrocious sex acts committed on children. The lack of additional eyewitnesses to the abuse does not make this case unique, but sadly, rather commonplace. See State v. Smith, 406 S.C. 215, 220, n. 7, 750 S.E.2d 612, 614 (2013) ("Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one's home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help." (quoting State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 484-485 (2008) (Toal, C.J. dissenting))).

In every criminal case, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient

to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 137 S. Ct. at 1912 (explaining "the rules governing ineffective-assistance claims must be applied with *scrupulous care*" (emphasis added and citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the *objective* reasonableness of counsel's performance, not counsel's subjective state of mind" (emphasis

added)). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded " 'strong presumption' of reasonableness that the defendant must overcome"); Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105; see State v. Woullard, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) ("Defense counsel's strategy must have been outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff' before a conviction will be reversed on the basis of ineffective assistance." (citations omitted)). "In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." Dunn, 141 S. Ct. at 2410 (citation and internal quotation and brackets in original omitted).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[6] Strickland, 466 U.S. at 691. In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112 (emphasis added); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In recent cases such as Smalls v. State, this Court has reaffirmed the necessity of the post-conviction relief court to make specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 864 (2018) ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the

[6] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective assistance of counsel claim on the grounds of lack of sufficient prejudice "[i]f it is easier" to do so. Id.

PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." Id. at 188, 810 S.C. at 844 (internal citations omitted).[7]

With this standard in mind, the State will now address why Spade was unable to meet this high burden placed upon him and why the lower court erred in its grant of relief.

Trial Counsel was Not Deficient for Failing to Object to this Portion of the Closing Argument

The post-conviction relief court's finding that trial counsel was constitutionally deficient for failing to object to the portion of the State's closing argument is not supported by prevailing professional standards required of competent attorneys.

In this case, Special Prosecutor Brannon gave the State's closing argument at trial. He began by discussing the elements of first-degree criminal sexual conduct, the State's burden of proof, and reviewing the evidence presented to meet the State's burden of proof as to the elements of the crime. (App. 298-301). Special Prosecutor Brannon then discussed the defense theory of the case—that Spade was merely a man trying to be a dad despite enormous opposition from the victim's mother—and tied it to his own experiences as a father while making comparisons to properly-admitted evidence presented to the jury. (App. 301-305). Then, more than two-thirds into his closing argument, Special Prosecutor Brannon tells a story of when his daughter came to him

[7] In its order summarily denying the State's motion to reconsider its amended order, the lower court asserts that the State somehow changed its position on the proper prejudice analysis to be conducted merely because the State did not explicitly cite Smalls in its motion. However, the State has consistently asserted that prejudice is established by comparing the deficiency or error of counsel to the strength of the State's case—which includes a review of the record as a whole. The State has cited numerous cases (both from this Court, the United States Supreme Court, and other courts) that support this proposition. The lower court's reliance of the lack of a cite to a single case—Smalls—to support its erroneous decision to reverse course and grant relief is indicative of the troubling legal and factual errors in the amended order.

and asked him, "daddy, who takes care of the good people?", to which Special Prosecutor Brannon ultimately responds that the jury takes care of the good people. (App. 305-307). Special Prosecutor Brannon then summarizes the evidence presented one more time before concluding his argument:

> Ladies and gentlemen, I submit to you that we have proved each and every element of this crime beyond a reasonable doubt. [Victim] put it best when she was asked "who is Danny D?" She said "he's a bad guy."
>
> Ladies and gentleman, you are good people. You take care of the good people. [Victim] is in your hands. He's guilty. Thank you.

(App. 308).

As an initial matter, the State notes this portion of the closing argument that Spade takes issue with was confined to evidence in the record and argument based on that evidence, and, accordingly, is not inherently improper or unconstitutional as a matter of law.

Closing arguments are a basic and important element of the adversarial fact-finding process in a criminal trial, and such arguments serve "to sharpen and clarify the issues for resolution by the trier of fact in a criminal case" while also providing both the solicitor and defense counsel with an opportunity to advocate for their respective positions, argue for certain inferences to be drawn from the evidence presented, and identify the weaknesses in the other side's positions. Herring v. New York, 422 U.S. 853, 862 (1975). When presenting a closing argument, a solicitor generally possesses "wide latitude" as to the substance of his remarks to the jury and is fully permitted to prosecute with earnestness and vigor. Bates v. Lee, 308 F.3d 411, 422 (4th Cir. 2002); Berger v. United States, 295 U.S. 78, 88 (1935) ("[A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so."); see also United States v. Isaacs, 493 F.2d 1124, 1164 (7th Cir. 1974) ("The closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture . . . because to shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice." (citations and quotations omitted)).

Pursuant to the wide latitude afforded in regard to the substance of a closing argument, the solicitor—amongst other things—is allowed to state and discuss the State's version of the testimony, to comment on the weight to be given to such testimony, and to point out the matters the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) ("[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider." (citation and internal quotations omitted)).

However, prosecutors must confine their arguments to the record and the reasonable inferences that may be drawn therefrom. Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). When a court is reviewing a post-conviction relief claim that a prosecutor's argument violated an applicant's due process rights, the court "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." Id. (quoting Darden v. Wainwright, 477 U.S. 168, 181, (1986) (internal quotations and citations omitted). This Court has stated:

> 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) (emphasis added and citations omitted); see also Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("The relevant question is whether the solicitor's comments [in closing argument] so infected the trial

with unfairness as to make the resulting conviction a denial of due process.").

While "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony[,]" prosecutors are "bound to rules of fairness in their closing arguments[.]" Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (quoting Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (quoting Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Von Dohlen, 360 at 609–10, 602 S.E.2d at 744

Here, the argument made by Special Prosecutor Brannon did not rely on inadmissible evidence, but, rather, was based on properly admitted evidence and reasonable inferences to be drawn from this evidence. He merely commented on properly admitted evidence, which including the minor victim calling Spade a "bad guy" when she was asked who Spade was on the witness stand. (Tr. 137). Special Prosecutor Brannon's tale of a conversation with his daughter and tying it to the evidence presented and the proper role of the jury—to evaluate the evidence properly admitted and determine whether that the State met its burden of establishing Spade's guilt beyond a reasonable doubt—is not *per se* impermissible and counsel is not *per se* deficient for failing to object to this portion of the State's argument.

In reaching its determination that this argument was impermissible, the lower court placed significant emphasis on the testimony of Special Prosecutor Brannon during the evidentiary hearing, which the court characterized as an acknowledgement that this portion of the argument was knowingly improper and specifically intended to arouse the passions of the jury. However,

this is a mischaracterization of the testimony provided at the evidentiary hearing, and, again, shows a troubling pattern of the lower court stretching to find a way to ultimately grant relief following a lengthy and hard-fought collateral review process.

During his testimony, Special Prosecutor Brannon was asked by the State about his closing argument, which he stated he "plagiarized" from former Seventh Circuit Solicitor Harold W. "Trey" Gowdy, III. (App. 1984). Later, Spade's counsel and Special Prosecutor Brannon had the following exchange:

> Q. And she asked you about the closing argument.
>
> A. Yes, sir.
>
> Q And, and I understand you would testify that you got that story from former Solicitor Gowdy?
>
> A. That's correct.
>
> Q. Okay. Are you familiar with case law about closing arguments that prohibit making an emotional appeal to jurors to decide the case on fact or on something other than the elements of the crime?
>
> A. I'm -- I -- yes, sir, I, I –I'm aware of that. But I also know that I tried cases for years, and saw Mr. Gowdy stand in front of the 12 people in the box with tears running down their face and telling that story. So, yes, I'm aware of that, that case law. But I'm always aware of what happens in the courtroom on a daily basis.
>
> Q. And, and did you ever object when or did you have a trial with Solicitor Gowdy when he made that argument?
>
> A. Dozens of them, yes.
>
> Q Did you ever object---
>
> A. I did not.
>
> Q ---to it?
>
> Do you think it's an objectionable argument?
>
> A. Well, it might of been. But that's not for me to – it might of been. But I knew that either I had just gone and had been just as passionate as him or I was about to go and was gonna try to be more passionate than him. So, I mean those are, those are calls for trial strategy, and Tr[e]y's a passionate lawyer, and I try to be one myself.

Q. All right. And, and I believe you started to say it's not for you to decide whether that's a proper argument or not?

A. I believe that would be correct.

(App. 1986-1987).

From the record, it is clear Special Prosecutor Brannon intended to give a ***passionate*** closing argument. However, there are no prohibitions against a prosecutor arguing with vigor, and no case law requiring the State's closing argument to sterile, antiseptic, and free from emotion.[8] Special Prosecutor Brannon's commentary that he intended to be just as passionate, if not more, passionate, than trial counsel during his closing argument is not impermissible—in contrast, it is being an effective advocate.[9]

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[8] In State v. Durden, 264 S.C. 86, 212 S.E.2d 587, 590 (1975), this Court set forth examples of permissible closing arguments by prosecutors:

> 'So long as he stays within the record and its reasonable inferences, *the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and it may employ any legitimate means for impressing on them their true responsibility in this respect*, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and for enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; *and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.'*

(emphasis added and citations omitted).

[9] In its amended order, the lower court again erroneously places emphasis on small snippets of an overall argument by the State, asserting that because undersigned counsel agreed with the court at the hearing on Spade's motion to reconsider (something the Court generously granted Spade but denied to the State) that Brannon's motive was to appeal to the jury's emotion, the State was somehow now precluded from arguing this portion of the closing argument was not improper. See App. 3323-28, 3239-41. Again, this is indicative of the lower court's strained attempts to justify its grant of relief following its profound departure from its earlier ruling denying relief, as the State has consistently argued that a prosecutor is allowed to argue with vigor and emotion but must

Importantly, Special Prosecutor Brannon did not testify that he made a knowingly improper argument. In contrast, he testified that as a defense attorney, he has prosecutors make this argument in cases where he is on the opposing side representing a defendant and he unequivocally stated he has ***not*** objected to this argument. Clearly, Special Prosecutor Brannon intended to invoke emotion, but that in and of itself does not render a closing argument unconstitutional as the lower court erroneously found.

While Spade invited the post-conviction relief court view the Special Prosecutor's remarks in the most damaging manner possible and the court accepted this invitation, the United States Supreme Court gave the admonition in Donnelly v. DeChristoforo that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly v. DeChristoforo, 416 U.S. 637, 647(1974). Respectfully, this Court's findings that Special Prosecutor Brannon knowingly made an argument intending to impermissibly inflame the passions of the jury is not supported by the record.

Because this portion of the prosecutor's closing argument was not impermissible, the post-conviction relief court's findings that trial counsel was constitutionally deficient for failing to object to this portion of the closing argument must fail. As described above, Spade carries the burden of overcoming the rebuttable presumption that counsel's performance was reasonable and to do so, he must establish that trial counsel's performance, whether it be through an act or omission, is so inherently unreasonable that "no competent attorney would have chosen." Dunn, 594 U.S. at ___, 141 S. Ct. at 2410 (quoting Burt v. Titlow, 571 U.S. at 22–23). As this portion of

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confine its argument to the record and reasonable inferences. The State's position has been consistent—something lacking in the post-conviction relief court's orders denying and then granting relief.

the closing argument was not *per se* impermissible, Spade cannot meet his high burden of establishing trial counsel was constitutionally deficient for failing to object.

Spade Failed to Meet His High Burden of Establishing Prejudice

Finally, the post-conviction relief court erred in finding that Spade established there is a reasonable probability that he would not have been convicted but for trial counsel's failure to object to the questioned portion of the State's closing argument. Notwithstanding the State's prior arguments that Spade cannot establish that the closing argument in question was impermissible or that counsel was deficient for failing to object to this argument, the State also asserts the lower court erred in determining Spade established the requisite prejudice for a grant of relief.

A convicted person seeking collateral review is not entitled to relief based upon the closing argument of a prosecutor unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly, 416 U.S. at 643. See also Humphries, 351 S.C. at 373, 570 S.E.2d at 166 ("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"). "'[I]t is not enough that the remarks were undesirable or even universally condemned.'" Darden, 477 U.S. at 181.

The United States Supreme Court has consistently held this is a very high standard for a petitioner seeking collateral review to meet. In Darden, the United States Supreme Court held that a closing argument considerably more inflammatory than the one at issue here did not warrant habeas relief, despite the prosecutor referring to the defendant as an "animal" and expressing a desire to see the defendant "with no face, blown away by a shotgun," amongst other comments to which Darden argued were objectionable. Darden, 477 U.S. 168.

Applying this high standard to the present case, Spade failed to show prejudice under Strickland resulting from trial counsel's failure to object to the Special Prosecutor's closing argument, as the innocuous comments that Spade was a "bad guy" did not so infect the trial with unfairness to warrant relief.

Moreover, the record is replete with admonitions to the jury from the trial court that the jury's verdict must be fair and impartial and the State firmly held the burden of proof, thereby eliminating any possible prejudice from the portion of the closing argument which the lower court found impermissibly shifted the burden of proof away from the State. (App. 115, 316, 317, 319, 328). Specifically, the trial court explicitly instructed the jury at the outset of trial that arguments from counsels were not evidence. (App. 115). The jury was repeatedly told its verdict must be based solely on the evidence presented from the witness stand and exhibits and was properly instructed on how to evaluate the credibility of witnesses. (App. 115, 316, 317, 319, 323, 328). The jury was instructed by the trial court that Spade was presumed innocent, which was then described to the jury as akin to Spade being cloaked in a "robe of innocence place about his shoulders . . . which remains with him from the moment of his arrest and continues until it has been stripped from him, from his shoulders, by evidence satisfying you of his guilty beyond a reasonable doubt." (App. 318-319). The jury was repeatedly instructed as to the State's burden of proof. (App. 316-330). The lower court's finding that Spade established prejudice from trial counsel's failure to object because the jury did not receive a special instruction that its verdict must be free from passion is not supported by the record in light of the repeated instructions the jury received explaining the verdict must be based solely on the evidence presented from the witness stand and the other proper jury instructions given by the trial court.

Moreover, there is no conceivable way the result of Spade's trial would have been different but for counsel's failure to object to this closing argument. As discussed above, the Special Prosecutor's argument was not *per se* impermissible, was not calculated to arouse the passions of the jury, and did not rise to the level of denying Spade a fair trial.

The post-conviction relief was correct the first time—Spade failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984), and its progeny. Based on the foregoing, the post-conviction relief court erred in granting Spade relief and remanding his case to the court of general sessions for a new trial. Therefore, the State asks this Court to grant certiorari and ultimately reverse the lower court's grant of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for writ of certiorari and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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