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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

Honorable R. Scott Sprouse, Circuit Court Judge

ANTHONY M. WISE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000635

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel was not ineffective where counsel failed to object to the multiple golden rule argument and improper victim impact argument violations made by the Solicitor during closing argument?

STATEMENT OF THE CASE

Petitioner was indicted during the December 2016 term of the Newberry County grand jury for one count of kidnapping, one count of armed robbery, one count of assault and battery first degree, and one count of burglary first degree. App. 815-820. The State, represented by Dale Scott and Taylor Daniel, called the case to trial on May 15-18, 2017, before the Honorable Donald B. Hocker and a jury. Petitioner was represented by Charles Verner. App. 1.

At trial the State alleged that on September 21, 2016, Benzena Wicker was attacked by an unknown man at her home in the Green Meadow Drive area of Newberry, South Carolina. The man had lain in wait in the backseat of her pickup truck. When she went to place some items into the truck, he lunged from his hiding place and kicked her in the chest[1] which knocked her into the ramp attached to her home. The pair struggled outside of the home until the man was able to subdue Wicker, obtain her keys, and gain entry to her home. Once inside, the pair continued to struggle, with the man eventually gaining control of Wicker after threatening her with a hammer that he had taken from her. Wicker was bound with telephone cords at her wrist and ankles, and a pillowcase was placed over her head. The man took some of her jewelry and her ATM card. He then proceeded to place Wicker in the floorboard of the pickup truck and drove around Newberry, eventually going to an ATM where he withdrew $500 from her bank account. He returned to Wicker's home and took her back inside. The man proceeded to take all the televisions from the home and placed them in Wicker's Cadillac. After further securing Wicker with duct-tape, he advised her she was not alone and left the residence in her Cadillac. App. 150, ll. 2-8; App. 153, ll. 14-16; App. 159, l. 19-App. 160, l. 7; App. 161, ll. 12-25; App. 162, l. 12-App. 177, l. 25; App. 182, l. 1-App.184, l. 22.

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1 Wicker suffered a broken collarbone as a result of the incident. App. 187, ll. 20-22

Approximately thirty minutes after her attacker left, Wicker managed to free herself. She ran to the neighbor's house and the neighbor called 911. App. 185, l. 4-App. 186, l. 5. Wicker described her assailant as a black male in his twenties, approximately five feet to five feet and two inches tall, with dreadlocks to his shoulders. She informed police that her attacker seemed to have some familiarity with her as he knew her husband was deceased and that her elderly mother lived with her. Based on that familiarity, she theorized that her attacker could have been someone from the neighborhood. She stated that during the attack the man was wearing a hard white plastic mask, gloves, a red shirt, and a black hoodie that was covering most of his dreadlocks. App. 162, ll. 12-24; App. 204, ll. 13-15; App. 191, l. 14-App. 192, l. 15; App. 260, l. 3-App. 261 l. 14.

That same evening, investigators with the Newberry County Sherriff's Department entered the basic description given by Wicker, along with her home address to narrow the search radius, into a database called Law Track. The database produced three names, one of which was Petitioner. App. 299, l. 17-App. 300, l. 5; App. 322, l. 9-App. 323, l. 3. Investigators were also able to locate Wicker's Cadillac through the vehicle's OnStar system that night. The Cadillac was recovered from an old, abandoned lumberyard with the stolen televisions still in the back seat. App. 301, l. 5-App. 302, l. 16; App. 325, ll. 1-24.

The following day investigators interviewed Petitioner and obtained various cellphone numbers that he was associated with, including a 404 number that belonged to his girlfriend Laswan Anderson. The cellphone numbers were sent to SLED where warrants were obtained to get the carrier information, location data, and call data for the phones. Using the location data SLED Agent Chris Johnson was able to plot the 404 number within the areas of Wicker's neighborhood, the ATM used during the incident, and the lumberyard where the Cadillac was discovered within the incident timeframe. App. 382, l. 25-App. 385, l. 9. Officers obtained arrest

warrants for Petitioner based on the cellphone data and the description given by Wicker. During an interview with investigators Petitioner denied any knowledge of or involvement in the attack on Wicker. App. 335, ll. 13-17. A clip of Petitioner talking during the interview was played for Wicker and she stated that the voice in the recording was the same as her attacker. App. 344, l. 23-App. 345, l. 25. No forensic evidence, such as DNA or fingerprints, was recovered from Wicker's home or vehicles. App. 361, l. 1-App. 366, l. 14. Petitioner took the stand in his defense and maintained that he did not attack Wicker on the evening in question. App. 549, ll. 19-25; App. 585, ll. 12-19.

During closing argument, Solicitor Scott made the following remarks:

> Ladies and gentlemen, the fear, panic, terror, confusing [sic], all these things and more racing through the mind of Benzena Wicker. The pain there, we heard her collarbone had been broken. The ride was uncomfortable. Her wrists tied together. Her ankles binded [sic] laying in the floorboard or backseat of an F150. **But, maybe worse of all, the anxiety, the uncertainty of what the next few minutes, the next few hours would bring had to have been unbearable. Would her mother come home to find her missing or worse, find her dead on the floor? What about her two daughters, her son, would she ever speak with them again. Ever get a chance to see those grandchildren, that great-grandchild celebrate another birthday. Thankfully, Ms. Benzena, she's not an ordinary victim or not at least in my opinion. I have a lot of victims that I represent in this Court. Not a typical victim, I would say. Don't let her sweet demeanor fool you. This God-fearing woman is tough, and you got to be tough to survive something like this. Widow, Charles, thirty-three Army Veteran, a military man, tough as nails. Did three stints in Vietnam. You don't think some of that rubbed off on her. What we're here for is to figure out how did this sweet, mild mannered God-fearing, seventy-three-year-old woman, daughter, sister, mother, grandmother, great-grandmother, how did she come to be in such an undignified situation, such a terrible position, such a horrifying predication?** App. 652, ll. 2-App. 653, l. 3 (emphasis added).
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> . . .
>
> It's chaotic. Give me your keys. Give me your keys. Gets her keys. Takes her up to this backdoor here. Open the door. Open the door. **Can you imagine the panic? Can you imagine the panic going through Ms. Wicker's mind at that moment? Can you imagine her heart racing? Can you imagine trying to fumble with your own keys, something that's as easy as can be any day of the**

week, suddenly becomes an exercise, the most complicated thing you can do, because when panic sets in, the most easy thing becomes difficult. App. 655, ll. 13-23(emphasis added).

. . .

A victim of something like that, you never go to your house again, you never step out of your car without thinking something really terrible is going to happen. You never take a key and put it in a hole without the thought going through your mind there's somebody in here waiting for me and that's the curse, and sadly, there's nothing you can do about it. App. 662, ll. 14-24 (emphasis added).

At no point during Solicitor Scott's closing argument did defense counsel make an objection. Petitioner was ultimately convicted of burglary first degree, kidnapping, and assault and battery first degree. He was acquitted of the armed robbery charge. App. 722, ll. 4-19. Petitioner was sentenced to ten years imprisonment on the assault and battery charge, and twenty-two years imprisonment on both the burglary first degree and kidnapping charge, all sentences to run concurrently. App. 731, l.24-App.732, l. 3; App. 821-823.

Petitioner timely filed a notice of direct appeal. The appeal was dismissed in an unpublished opinion pursuant to Anders v. California.[2] State v. Wise, Op. No. 2019-UP-141 (S.C. Ct. App. filed April 7, 2019). Petitioner filed a *pro se* application for post-conviction relief on July 22, 2019. App. 734-739. The State filed a return, motion for more definite statement, and partial motion to dismiss dated December 17, 2019. App. 740-747. PCR Counsel Ashley A. McMahan filed an amended PCR application dated November 26, 2022, alleging in part that Counsel Verner was ineffective for failing to object to improper victim impact and golden rule arguments during Solicitor Scott's closing argument. App. 748-749. A hearing was convened on

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2 386 U.S. 738 (1967)

November 28, 2022, before the Honorable R. Scott Sprouse. The State was represented by Danielle Dixon. Petitioner was represented by Counsel McMahan. App. 750.

At the PCR hearing Counsel Verner testified during direct examination that he did not object to everything that "technically violates the rules of evidence if I think it does more damage or the damage is minimal, maybe they didn't hear it, or it was just a word said in passing." App. 773, ll. 22-25. He further testified that in his opinion "when you sometimes object, it does more damage than what the actual, what you feel like the infraction is." App. 775, ll. 15-17. In addressing the impropriety of the State's closing argument Counsel Verner stated the passages notated in the PCR application[3] "weren't inflammatory." He felt the comments were "fluffing" and were "fair inferences of the facts." He admitted some of the arguments made were "rhetorical" but that he believed those were "also fairly within inferences of facts in the case" and in his opinion were not objectionable. He stated that he does object during opening and closing arguments when he thought the prosecution was "crossing the line." App. 778, ll. 5-23.

At the end of the hearing the State argued the passages from the closing argument that Petitioner found objectionable did not rise to the level of violating any kind of golden rule argument. App. 793, ll. 16-22. Counsel McMahan argued that Solicitor Scott tap danced "right over the line" and that the golden rule arguments should have been objected to and preserved for appeal. App. 796, ll. 4-8. The PCR court took the matter under advisement.

An order of dismissal was filed on April 6, 2023. App. 798-814. The court found that Petitioner had failed to prove counsel was ineffective because counsel articulated a valid reason for not objecting, specifically that he believed the closing argument was a fair inference of the

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[3] The three passages specifically highlighted in the PCR application are reproduced on pages four and five of this petition.

facts and not inflammatory or objectionable. The court found that Petitioner had also failed to prove prejudice because the State's argument did not so infect Petitioner's trial with unfairness as to make the resulting conviction a denial of due process and that the outcome of the trial would not have been different had counsel objected to the statements during closing argument considering the evidence of Petitioner's guilt "was compelling." App. 812-813.

ARGUMENT

The PCR court erred in finding that trial counsel was not ineffective where counsel failed to object to the multiple golden rule arguments and improper victim impact arguments made by the Solicitor during closing argument.

Solicitor Scott made a textbook golden rule argument during his closing that was improper, inflammatory, and objectional. He repeatedly asked the jurors to imagine what it was like to be Ms. Wicker, to imagine what was going through her mind, to imagine themselves in that situation. This argument was wholly improper as it urged the jury to set aside its calm, rationed impartiality and decide the case from the emotional perspective of Ms. Wicker. The improper victim impact argument only worsened the impact of the golden rule argument. Counsel Verner's failure to object to a clear golden rule argument violation, along with improper victim impact argument, was deficient performance that was not excused by a valid trial strategy or sound reason. The deficient performance prejudiced Petitioner as there was not overwhelming evidence of guilt.

"A solicitor's...argument must be carefully tailored so as not to appeal to the personal biases of the jury." 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." Id. at 609–10, 602 S.E.2d at 744. "'While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.'" State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). "'The solicitor's... argument must, of course, be based on this principle.'" Id.

"Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)[4] (internal citations removed). "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." Id. "Specifically, the solicitor asking the jurors to put themselves in the place of the victim is improper and constitutes reversible error." State v. Reese, 359 S.C. 206, 271, 597 S.E.2d 169, 174 (Ct.App.2004)[5] *citing* State v. McDaniel, 320 S.C. 33, 38, 462 S.E.2d 882, 884 (Ct.App.1995). "The 'Golden Rule' argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Id. *citing* 75A Am.Jur.2d Trial § 650 (1991). **Regardless of the nomenclature used, any argument that importunes the jurors to places themselves in the victim's shoes is disallowed Golden Rule Argument**. Id. *citing* Johnson v. State, 263 Ga.App. 443, 587 S.E.2d 775, 781 (2003) (emphasis added). Golden Rule arguments are per se objectionable as they have no legal relevance to any of the real issues in a case. Arnold v. E. Air Lines, Inc., 681 F.2d 186, 199 (4th Cir. 1982), on reh'g, 712 F.2d 899 (4th Cir. 1983).

"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). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the

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4 Overruled in part on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)

5 Affirmed in part, reversed in part by State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006)

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.; *see also* State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.").

Solicitor Scott began his closing statement with an emotionally charged victim impact argument. App. 652, l. 2-App. 563, l. 3. The argument was wholly irrelevant to the guilt of Petitioner and was a purely emotional appeal to the jury. The argument was designed to inflame the passions of the jurors, arouse their sympathies, and encourage them to weigh the case subjectively, through the perspective of the victim, instead of objectively, as their oath requires.

Solicitor Scott then made a classic golden rule argument when he asked the jury to imagine Ms. Wicker's panic and what she was thinking and feeling during the attack. His improper argument continued as he asked the jury to imagine themselves in the same situation "fumbling with your own keys." App. 655, ll. 13-23. The Solicitor unquestionably asked the jurors to place themselves in the position of Ms. Wicker during the incident. This improper argument was further exacerbated when Solicitor Scott, talking about the impact of crime on a victim, placed the jurors in the shoes of a victim, telling them that after experiencing something akin to what Ms. Wicker went through that "you" would never come home and go into "your home" without worrying if an attacker lay in wait inside. App. 662, ll. 14-24.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether

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.'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, an applicant must show that counsel's performance was deficient and that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688). Counsel can be found deficient for failing to object, failing to place an argument on the record, failing to obtain a final ruling, or failing to proffer testimony. See Thompson v. State, 423 S.C 235, 814 S.E.2d 487 (2018); Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Failure to object to impermissible golden rule comments was addressed in Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009). In Brown, the State asked the jury to speak up for the minor child in a criminal sexual conduct case. Id. at 511-2, 680 S.E.2d 909, 912. This Court concluded that the PCR judge "correctly concluded the solicitor's remarks were improper in that they amounted to an impermissible 'Golden Rule' type argument." Id. at 516, 680 S.E.2d at 915 (internal citations omitted). In light of this improper closing argument, the Brown Court indicated that trial counsel should have objected to the closing remarks and held that counsel's "trial strategy" of not objecting as to avoid "exacerbat[ing] a bad set of facts" could not be construed as a valid strategy given the evident impropriety of the solicitor's remarks. Id. at 517, 680 S.E.2d 915. This Court in Brown held trial counsel deficient for failing to object to object to the State's Golden Rule argument which impermissibly appealed to the passion of the jurors. Id.

The case *sub judice* is on all fours with the deficiency analysis in Brown, Id. The failure to object to these highly improper arguments was deficient performance by Counsel Verner. Further, Counsel Verner's supposed "valid reason" for not objection was not reasonable under prevailing professional norms. The failure to object when the Solicitor explicitly asks the jury to place themselves in the position of the victim cannot be excused. Federal and state courts, including this Court, have repeatedly held that golden rule arguments are prohibited in both criminal and civil cases. See Von Dohlen v. State, 360 S.C. 598 at 611, 602 S.E.2d 738 at 745 (2004). That Counsel Verner did not believe the golden rule arguments were inflammatory or objectional was not a valid reason or strategy, but a complete misapprehension of the impropriety of the argument. While our appellate courts give deference to strategic decisions, the decision to employ a certain strategy must be sound. A strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). Given the obvious impropriety of the solicitor's remarks, and the fact that all parties are forbidden from making Golden Rule arguments, failing to object because it might cause damage or draw attention to the objectional matter cannot be construed as valid or reasonable under the Sixth Amendment. See Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009).

Petitioner's case can be distinguished from Brown in that Petitioner was prejudiced by Counsel Verner's deficient performance. In analyzing prejudice this Court must consider the entirety of the Solicitor's closing argument and the evidence adduced at trial. In reviewing the entire closing argument there were other improper arguments made which were not objected to. For instance, Solicitor Scott impugned the character of Counsel Verner by stating his argument would "muddy" things up and contain "cockamamie" excuses, implying that Counsel Verner would be misleading the jury when he made his closing argument. App. 672, l. 24-App. 673, l. 2;

See Fortune v. State, 428 S.C. 454, 837 S.E.2d 37 (2019); State v. Parker, 391 S.C. 606, 614 n.3, 707 S.E.2d 799, 803 n.3 (2011) ("it is generally improper for the prosecutor to accuse defense counsel of fabricating a defense or otherwise denigrate defense counsel"); United States v. Ollivierre, 378 F.3d 412, 420 (4th Cir. 2004) *opinion vacated on other grounds by* 543 U.S. 1112 (2004) ("emphasiz[ing] the importance of ensuring that prosecutors refrain from impugning, directly or through implication, the integrity or institutional role of their brothers and sisters at the bar who serve as defense lawyers"); United States v. Friedman 909 F.2d 705, 709 (2d Cir. 1990) (improper for prosecutor to argue that defense counsel would "make any argument he can to get that guy off").

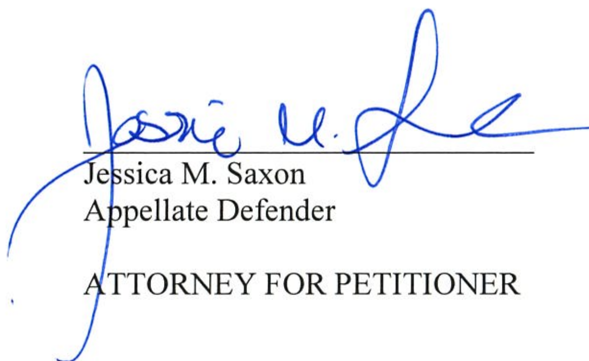
Additionally, Solicitor Scott improperly vouched for the Ms. Wicker when he stated "If you look at her and said, I think she's a liar. I don't believe it. Well, first of all. I would find that very difficult to believe. I submit to you the opposite." App. 681, ll. 12-15. See State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Improper vouching occurs when the prosecution ... mak[es] explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony," or "when a prosecutor implies he has facts that are not before the jury"); Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("[S]olicitors 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"). There were also times where Solicitor Scott argued facts that were not in evidence, such as Ms. Wicker's husband's military record and his being "hard as nails" which rubbed off on his wife. While the failure of counsel to object to these and other portions of the argument is not before this Court, the repeated use of improper argument informs the prejudice analysis.

Taken as a whole, within the context of the record, Solicitor Scott's closing argument was improper. There was not merely a single incident of improper argument or a passing sentence that might be overlooked by the jury. Instead, there were multiple, flagrant calls by Solicitor Scott for the jury to abandon impartiality, place themselves in the shoes of the victim, and decide the case on emotion. Additionally, there was not overwhelming evidence of guilt such that the golden rule arguments did not violate Petitioner's right to a fair trial. The PCR court described the evidence against Petitioner as "compelling," not overwhelming. There were no forensics, Petitioner did not confess to the incident, the GPS data relied on by the State came from Petitioner's girlfriend's phone, and Ms. Wicker never saw her attacker's face.

Petitioner was prejudiced by Counsel Verner's failure to object to the improper golden rule and victim impact arguments made throughout the State's closing. Solicitor Scott improperly used the "you" pronoun throughout his closing argument and made improper victim impact argument that made his golden rule argument that much more prejudicial. As there was not overwhelming evidence of Petitioner's guilt it is reasonable to conclude that the comments so infect the trial with unfairness that the resulting conviction was a denial of due process, especially considering the jury acquitted Petitioner of the armed robbery charge. Petitioner has shown both deficient performance and prejudice. This Court should find the PCR court erred in ruling that Petitioner had not met his burden and should reverse Petitioner's convictions and sentences.

CONCLUSION

Based on the forgoing argument, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to allow for full briefing of this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of December, 2023.