RECEIVED
Jan 31 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2023-000449

SCOTT ROWAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3747

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

P.O. Box 1688
Georgetown, SC 29442

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

Federal Cases:

Other State Cases:

STATEMENT OF ISSUE

The PCR court properly found that counsel was not ineffective for failing to object to solicitor's opening statement because counsel's conduct was not outside the zone of professional norms and Petitioner suffered no prejudice.

STATEMENT OF THE CASE

Petitioner Scott Rowan was indicted by a Horry County Grand Jury in 2016 for one count of second degree criminal sexual conduct with a minor and one count of third degree criminal sexual conduct with a minor. He proceeded to a jury trial on April 9-12, 2018, before the Honorable Larry B. Hyman, Jr., circuit court judge, presiding. Petitioner was convicted as charged and sentenced to fifteen years' incarceration for each count to run consecutively. Petitioner's appeal was dismissed pursuant to Anders. Petitioner filed an application for post-conviction relief on October 28, 2020, and amended his application on November 30, 2022. His PCR hearing was held on November 30, 2022, before the Honorable H. Steven DeBerry, IV, circuit court judge, presiding. Petitioner's application was dismissed with prejudice. This appeal follows.

STATEMENT OF FACTS

Anatasya Herron (Mother) married Scott Rowan (Petitioner) in October 2008. (App. 340). At this time, she had two children. (App. 340). The older sister, A.R. testified that, at a young age, Petitioner would give her alcohol and marijuana. (App. 401-2). She further testified that after a while Petitioner began to fondle her breasts in exchange for drugs and alcohol. (App. 402-3). She stated this went on for months. (App. 404). A.R. recalled that the last time Petitioner fondled her she ran up to her room and Petitioner followed her to apologize. (App. 405). She stated after she did not accept his apology Petitioner got angry with her and asked her not to tell Mother. (App. 405). She disclosed to Vega, her partner, that Petitioner was inappropriate with her. (App. 626).

The younger sister J.H. testified that, at around seven years old, Petitioner began treating her inappropriately by watching her and A.R. change clothes. (App. 235). She testified that this progressed to Petitioner groping her in exchange for drugs and alcohol. (App. 238; 241). She stated that when she did not let Petitioner grope her, she was punished in the form of being grounded, choked, slapped, and thrown against a wall. (App. 241). She stated it got even worse and that in exchange for liquor she was forced to perform sex acts on Petitioner, including oral sex. (App. 242). She recalled that after these acts Petitioner would clean himself with a towel. (App. 242). She testified that at this point she was around eleven or twelve years old. (App. 243). She further testified that Petitioner forcibly raped her at least twelve times. (App. 249). She stated Petitioner used a condom about two times. (App. 249). She told A.R. about her abuse and the two made a plan to run away. (App. 412-3). Ultimately, A.R. graduated early and moved out. (App. 416). J.H. ultimately ran away from home and left a note explaining that she had been raped by Petitioner. (App. 255).

Mother testified that she once witnessed J.H. and petitioner have an "intimate argument" that made her feel uncomfortable. (App. 347). She also stated she saw them once in the staircase right next to each other and it "looked like they were kissing." (App. 347-8). She stated that she spent most of her time locked up in a room she called her "office," which was located at the home. (App. 342). Mother stated that she and Petitioner did not use condoms, but that Petitioner once brought a box of condoms home. (App. 341). A.R. also stated she saw Petitioner with a box of condoms and that struck her as odd since she knew her mother could not have children. (App. 421-2). Mother stated that she once found a semen covered towel in the bathroom and asked Petitioner about it. (App. 354). She testified that Petitioner got "really mad and blew up on [her] about it." (App. 354). Mother testified that after J.H. left the home Petitioner confessed that he had oral and vaginal sex with J.H.. (App. 353). She also stated he confirmed the towel found in the bathroom was from an encounter with J.H.. (App. 354).

Petitioner became aware he was going to be charged with a crime and subsequently turned himself in to police. (App. 600). In the solicitor's opening statement, he said:

> But I want to ask something from y'all here today. While all of this is going on, your job is going to be watching what takes place here on this witness stand, nothing else. And imagine for a second when you're doing that how difficult and how embarrassing it would be to talk with a member of your family or your closest friends, people who have known you for a very, very long time, they know all of your dark secrets, and to talk with them about your personal, intimate details of your sex life.
>
> Now, take that a step further and imagine that you're here today in this setting, in this courtroom, in that chair, talking to 14 total strangers who you've never met before, who don't know the personal details of your life, and having to talk with them about intimate details of your sex life.
>
> Now, take it one step further where you're in here today in that seat talking to 14 total strangers about how your stepfather inappropriately touched you, kissed you, your first kiss, fondled you and raped you. Sure, there is going to be some nervous laughter, there is going to be some uncomfortable moments for all of us. But I want you to think about that.

(App. 223). Counsel responded in his opening statement by saying "And the solicitor, the prosecutor in the case has said, imagine, if you will, the difficulty that the prosecutrix, the witness, the person who's making these allegations, imagine if you will, how that is to come there and testify." (App. 222-3). Defense counsel made no objection to the State's opening statement. (App. 216-23). Counsel was unable to testify at the PCR hearing due to his passing. At the PCR hearing Petitioner's second chair counsel testified that the statement was objectionable. (App. 764-5). She also stated that it was her recollection Counsel did not object to this, because they would be granted additional leeway in their opening. (App. 764-5).

Solicitor Walter testified that she remembered the opening statement given in this case. (App. 788). She stated that she typically gives different openings and that it was not language she would use but would not go so far as to say it was improper. (App. 788). Solicitor Martin recalled giving the opening statement in the case. (App. 797). He stated that the argument may have been objectionable but did not go as far as to say the statement was improper because he "did not directly ask the jury to put themselves in the shoes of the victim." (App. 798; 800). The PCR court found Petitioner failed to meet his burden in establishing the failure to object to the State's argument was so crucial as to undermine the proceeding. (App. 823).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's finding of fact and will uphold them if there is any evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed de novo without deference to the lower court. Id.

ARGUMENT

The PCR court properly found that counsel was not ineffective for failing to object to solicitor's opening statement because counsel's conduct was not outside the zone of professional norms and Petitioner suffered no prejudice.

The PCR court properly denied relief because the solicitors comments dealt with credibility and did not encourage the jury to decide the case based upon an emotional response. Even if Counsel was deficient for failing to object to solicitor's opening statement, Petitioner suffered no prejudice because the State produced credible testimony from both victims and their mother to support their case. Accordingly, this Petition for Writ of Certiorari should be denied.

Pursuant to the first prong of the Strickland analysis, Petitioner must prove counsel's performance was deficient. Strickland v. Washington, 466 U.S. at 686 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence"). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant." Id. at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. Strickland, 466 U.S. at 688-89. The benchmark for judging any claim of

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the result cannot be relied upon as being just. Id. 466 U.S. at 686. Even if there is reason to think counsel's conduct was far from exemplary relief may still be denied so long as counsel did not take an approach that no competent lawyer would have taken. Dunn v. Reeves, 141 U.S. 2405, 2410 (2021).

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. Id. at 695. Realistically, this is found "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 111-12 (2011) (quoting Strickland, 466 U.S. at 697).

In Von Dohlen v. State, the South Carolina Supreme Court found the State improperly used a golden rule argument. Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). During closing arguments, the solicitor asked the jury to put themselves in the victim's shoes "size six." Id. S.C. at 608 S.E.2d at 743. Petitioner's sister testified that the solicitor even cried when doing so. Id. The golden rule argument was not allowed because it urged jurors to place themselves in the position of a victim and "decide the case from that perspective"; potentially causing jurors to decide the case based on passion and prejudice rather than impartial considerations. Id. 360 S.C. at 608 S.E.2d at 744. Yet, the Court concluded that while the comment was improper, it did not so infect the trial with unfairness as to deprive petitioner of due process. Id. 360 S.C. at 614, 602 S.E.2d at 746.

In State v. White, our Supreme Court invalidated another golden rule argument where the solicitor asked, "How would you like to see him coming in your bedroom or your daughter's bedroom with this butcher knife?" State v. White, 246 S.C. 502, 504 144 S.E. 2d 481, 482 (1965). The White Court found that this argument tended to nullify all sense of impartiality. Id. S.C. at 586 S.E. 2d at 482.

Our courts have found other golden rule arguments improper. State v. Gilstrap, 205 S.C. 412, 32 S.E.2d 163 (1994). ("[p]lace yourself in the position that this girl was your own daughter and go in and vote as though it were your own daughter who had been raped" was deemed improper.); State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (reversing conviction where solicitor used a form of "you" forty-five times asking the jury to put themselves in place of victim).

In State v. Stephen J.R., the Connecticut Supreme Court found that a prosecutor's statement asking jurors to view the level of detail in victim's testimony from the perspective of a child was not improper. State v. Stephen J.R., 72 A.3d 379 (Conn. 2013). The court found this because the statements did not improperly appeal to jurors' emotions or attempt to request sympathy. Id. at 394. This was because the statements were not a golden rule argument, but rather an argument that victim's recollection was consistent with how a reasonable child would react given the circumstances. Id.

In the case sub judice, counsel was not deficient because the solicitor's statements do not encourage jurors to decide the case from the Victims' perspective, but rather concern the credibility of the Victims. Solicitor asked the jury to imagine how difficult it would be to speak about the intimate details of the assault in open court. Counsel was not deficient for failing to

object because the remarks were relatively brief, were not particularly passionate or emotional, and did not ask jury to speak up for the victims.

Solicitor's statements request that the jury "imagine for a second when you're doing that how difficult and how embarrassing it would be to talk [about the offense]." The solicitor went on to add "sure there is going to be some nervous laughter." The comments do not encourage a verdict from the Victims' perspective, but rather highlight that a witness may react differently than expected when recalling a traumatic event. Even Petitioner's Counsel understood this to be the case when he responded in his opening statement "the solicitor, the prosecutor in the case has said, imagine, if you will, the difficulty that the prosecutrix, the witness, the person who's making these allegations, imagine if you will, how that is to come there and testify." Counsel's response shows the State did not improperly utilize a golden rule argument, but rather highlighted the difficulties associated with the victims testifying. Petitioner has failed to meet his burden in establishing counsel was deficient for failing to object.

Even if counsel deviated from the standards of professional norms, any deficiency did not result in prejudice. The standards of prejudice do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland v. Washington, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97. To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001).

Yet, a solicitor's "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); Darden v. Wainwright, 477 U.S. 168 (1986) (finding prosecutor's improper statement "I wish [Victim] had had a shotgun in his hand when he walked in the back door and blown [Defendant's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun" did not so infect the trial with unfairness as to require reversal); Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009) (solicitor telling jury to speak up for a child victim violated golden rule but was harmless error because it came at end of closing, was limited in duration, and there was overwhelming evidence of guilt); Grushoff v. Denny's Inc., 693 So. 2d 1068, 1069 (Fla. 4th Cir. 1997) ("Generally, isolated golden rule comments such as this do not harmfully infect a case").

Other courts have adopted factors to consider whether a golden rule argument is reversable. See City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir.1980) ("a court must examine, on a case-by-case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case, and the verdict itself."); Forrestal v. Magendantz, 848 F.2d 303, 309 (1st Cir. 1988)(quoting verbatim).

Here, an objection to the State's opening is not reasonably probable to produce a different outcome. The chief concern with golden rule arguments is that they will encourage the jury to decide the case based on passion and prejudice rather than the facts presented. Here, that concern is alleviated by the nature of these comments coupled with their low frequency. The statements

were made briefly at the beginning of the trial, not right before deliberations. The comments do not harmfully infect the case, nor do they rise to the level of nullifying all sense of impartiality.

Also, the State produced sufficient evidence to convict Petitioner, by introducing testimony from J.H., A.R., Mother, a note from J.H., and testimony from A.R.'s fiancé. J.H and A.R. both testified as to the abuse they received from Petitioner. Mother testified that Petitioner confessed to the abuse. (App. 352). Also, there is corroboration amongst the witnesses. Mother and A.R. corroborate J.H. by testifying that they saw Petitioner with condoms, even though he did not use them with Mother. (App. 249; 341; 421-2). Further, Mother corroborated J.H. with her testimony concerning the towel found in the bathroom. (App. 242; 354). Petitioner has not shown the jury would have rendered a different verdict had counsel objected to the State's opening statement. Accordingly, this Petition for Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Court deny the Petition for Writ of Certiorari.

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

P.O. Box 1688
Georgetown, SC 29442

BY: _____
ANDREW D. POWELL
Bar # 106415

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3747

ATTORNEYS FOR RESPONDENT

January 31, 2024