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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Spartanburg County
Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2023-000551

ANTHONY BRIGGS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF ISSUE ON CERTIORARI.....1

COUNTER-STATEMENT OF ISSUE ON CERTIORARI1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW5

ARGUMENT6

 The PCR judge correctly declined to find defense counsel was constitutionally ineffective for failing to object to the solicitor’s closing argument remarks because—just as both defense counsel and the PCR judge correctly recognized—the solicitor’s remarks were not objectionable in any way.6

Relevant Facts.6

Applicable Law Regarding Ineffective Assistance of Trial Counsel Claims.11

Applicable Law Regarding the Propriety of a Solicitor’s Closing Argument.13

Application of the Applicable Law to Briggs’s Case.16

CONCLUSION.....21

STATEMENT OF ISSUE ON CERTIORARI

“Did the PCR court err in finding defense counsel was not ineffective for failing to object to statements made by the solicitor, during closing argument, that were inflammatory and improperly played to the jury’s emotions where the solicitor invited the jury to imagine they were the alleged victim and imagine how she felt?”

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge somehow err by declining to find defense counsel was constitutionally ineffective for failing to object to the solicitor’s closing argument remarks when—just as both defense counsel and the PCR judge correctly recognized—the solicitor’s remarks were not objectionable in any way?

STATEMENT OF THE CASE

In February of 2009, Petitioner Anthony Briggs was arrested following an investigation into allegations he sexually abused his girlfriend's daughter when she was four to five years old. In May of 2009, the Spartanburg County Grand Jury indicted Briggs for first-degree criminal sexual conduct with a minor. In August of 2010, the Spartanburg County Grand Jury additionally indicted Briggs for committing a lewd act upon a child. Later that month, a jury trial was commenced in the Spartanburg County Court of General Sessions with the Honorable J. Derham Cole, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Briggs as indicted. Following the verdict, the trial judge sentenced Briggs to concurrent terms of imprisonment of life without parole for first-degree criminal sexual conduct with a minor and fifteen years for committing a lewd act upon a child. Briggs then timely initiated an appeal.

On appeal, the Court of Appeals—following briefing—issued an unpublished decision unanimously affirming Briggs's convictions. State v. Briggs, Op. No. 2012-UP-323 (S.C. Ct. App. filed May 20, 2012). Thereafter, on June 19, 2012, remittitur was issued.

Subsequent to the issuance of the remittitur, Briggs timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing. Briggs—through counsel—then filed an amended application for post-conviction relief raising additional grounds. On November 12, 2013, an evidentiary hearing was conducted in the Spartanburg County Court of Common Pleas with the Honorable Robin B. Stilwell, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement. Thereafter, through an order filed on February 4, 2014, the PCR judge granted Briggs's PCR application on two grounds. The State then timely filed a motion to alter or amend

pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and the PCR judge summarily denied the State's motion through an order filed on March 3, 2014. Following that, the State timely initiated an appeal of the PCR judge's decision, and Briggs initiated a cross-appeal.¹

On appeal, both the State and Briggs filed petitions for a writ of certiorari in the Supreme Court. On July 18, 2016, the Supreme Court granted the State's petition in part and denied Briggs's petition. Thereafter, following briefing, the Supreme Court affirmed the PCR judge's grant of relief through a published opinion issued on October 25, 2017. Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017). On November 13, 2017, remittitur was issued.

Subsequently, on March 25, 2019, a second jury trial was commenced on Briggs's indicted charges in the Spartanburg County Court of General Sessions with the Honorable R. Keith Kelly, circuit court judge, presiding. At the conclusion of the three-day trial, the jury once again convicted Briggs as indicted. Following the verdict, the trial judge—consistent with the first trial judge—sentenced Briggs to concurrent terms of imprisonment of life without parole for first-degree criminal sexual conduct with a minor and fifteen years for committing a lewd act upon a child. Briggs then timely initiated an appeal.²

On appeal, Briggs's appellate counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), along with a petition to be relieved as counsel, and Briggs personally

¹ The records from the State's appeal and Briggs's cross-appeal are presently available through the South Carolina Appellate Public Index. Appellate Records from Anthony Neil Briggs v. State, South Carolina Appellate Court Public Index, <https://ctrack.sccourts.org/public/caseView.do?csIID=56357>.

² The appellate records from Briggs's second direct appeal are presently available through the South Carolina Appellate Public Index. Appellate Records for State v. Anthony Briggs, South Carolina Appellate Court Public Index, <https://ctrack.sccourts.org/public/caseView.do?csIID=69678>.

submitted several pro se documents. After reviewing the matter, the Court of Appeals issued an unpublished decision dismissing the appeal and granting appellate counsel's petition to be relieved. State v. Briggs, Op. No. 2021-UP-380 (S.C. Ct. App. filed Nov. 3, 2021). Thereafter, on November 24, 2012, remittitur was issued.

Subsequent to the issuance of the remittitur, Briggs timely filed another PCR application, and, in response, the State filed a return requesting an evidentiary hearing along with a more definite statement. On October 18, 2022, an evidentiary hearing was conducted in the Spartanburg County Court of Common Pleas with the Honorable Brian M. Gibbons, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement. Thereafter, through an order filed on March 29, 2023, the PCR judge denied and dismissed Brigg's latest PCR application with prejudice. Briggs then timely filed a notice of appeal.

STANDARD OF REVIEW

In PCR 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 PCR 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 PCR judge’s rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR 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 PCR judge correctly declined to find defense counsel was constitutionally ineffective for failing to object to the solicitor’s closing argument remarks because—just as both defense counsel and the PCR judge correctly recognized—the solicitor’s remarks were not objectionable in any way.

Relevant Facts

During Briggs’s second trial on charges of first-degree criminal sexual conduct with a minor and committing a lewd act upon a child, Briggs’s victim (“Victim”), who was by then fifteen years old, testified about sexual abuse she suffered at the hands of Briggs—her mother’s live-in boyfriend—on mornings when she was left home alone with him at the ages of four to five. (App’x pp. 7-8; pp. 56-60; p. 71). Specifically, Victim recounted Briggs—on multiple occasions—touched her “private” with his hand underneath her clothing, touched her “private” with his “private,” and licked her “private” on a pull-out couch in the home’s living room while her mother was at work and her other siblings were already at school. (App’x pp. 59-62; p. 71). Additionally, Victim further acknowledged she had previously stated during forensic interviews conducted shortly after she disclosed the abuse that Briggs had also subjected her to anal sex and digital penetration. (App’x p. 69). However, Victim indicated she no longer had any memories of that specific abuse by that point in time and had tried her best over the years to forget what had happened to her. (App’x pp. 67-69).

In addition to Victim’s testimony, the recordings from the forensic interview were admitted into evidence and played for the jury. (App’x pp. 82-83). Likewise, several witnesses, including a pediatrician who conducted a sexual assault examination of Victim in the aftermath of her disclosure, confirmed Victim repeated her disclosure of the sexual abuse to them. (App’x p. 78; pp. 96-97; pp. 107-110; pp. 179-180).

Beyond that, the detectives who interviewed and ultimately arrested Briggs after the allegations came to light discussed a number of troubling remarks he made to them during their investigation, which they perceived to be “non-verbal” and incriminating admissions. (App’x pp. 115-130; pp. 138-169). Furthermore, several jail call recordings containing incriminating statements Briggs made to Victim’s mother after his arrest were admitted into evidence and played for the jury. (App’x p. 135). On those recordings, Briggs opined oral sex could not be proved or disproved, discussed how his case involved his word against Victim’s, encouraged Victim’s mother not to bring Victim to court, and—while promising to marry her and take care of her financially if she did as directed—instructed Victim’s mother to move out of state with the children while taking steps to avoid being tracked.³ (App’x pp. 167-169).

After that testimony and evidence was introduced, Briggs elected to testify in his own defense and acknowledged he had been left alone with Victim some mornings just as Victim had described. (App’x pp. 287-288). However, he denied sexually abusing her and claimed he loved her “[w]ith all [his] heart.”⁴ (App’x p. 289; p. 294). He further appeared to contend Victim’s biological father was responsible for the purportedly false accusations and—relying on hearsay supposedly relayed to him—suggested Victim’s minor brother was potentially the true perpetrator of the sexual abuse.^{5 6} (App’x p. 313; pp. 317-318). Significantly though, Briggs

³ Victim’s mother remained in her relationship with Briggs even after Victim disclosed the sexual abuse. (App’x pp. 65-66).

⁴ To bolster his claim of loving Victim, Briggs also offered testimony from his mother and stepfather, who both stated Briggs *appeared* to have a loving relationship with Victim based on their own personal observations of the two. (App’x p. 248; pp. 251-252; p. 259; p. 263).

⁵ Victim testified in reply and denied her brother ever sexually abused her. (App’x pp. 337-339).

⁶ Although Briggs claimed he was told about the supposed sexual abuse involving Victim’s minor brother while he was in jail, the contents of the jail call recordings did not support his

also acknowledged he had encouraged Victim's mother to "disappear" with Victim and her siblings after he was arrested in connection to the allegations, admitted he urged her not to take the children back to the child advocacy center, and conceded he stated "no face, no case" to her as support for his requests. (App'x pp. 295-296; pp. 323-326).

At the conclusion of the evidentiary phase of trial, the solicitor presented her closing argument to the jury and, as part of her remarks, stated—without objection—the following:

So the judge told you that he is the arbitrator of the law and you guys are the fact finders. And you get to decide. You've heard the witnesses. You get to decide the credibility of the witnesses. Whether you believe every single thing they said, a little bit of what they said, or nothing of what they said. And you use your common sense and your life experiences.

You guys have been living longer than 18 years. Some of us for much longer than that. And we all have life experiences and we all know kind of how to read people and we all know about people's motives and the bias. And that's something else that you consider when you're determining the credibility of the jury. Who has a motive to lie?

So let's talk about lying for just a minute. Now, there are people who are pathological liars and they lie about everything. We're gonna set them aside, we're not considering them. Typically w[e']ll lie for two reasons, to get out of trouble or to get some kind of a benefit.

So [Victim] was four and five when this -- the timeframe when we know this was possibly going on. Of course, she doesn't know the exact dates because she was four and five, but she wasn't in any kind of trouble. And the kind of lie you would tell to get out of trouble is to blame somebody else for something. Like, oh, I broke this, but my brother did.

claim. (App'x pp. 317-318; p. 341). However, one of Briggs's friends, Amber Wofford, testified for the defense and claimed Victim told her a few months after Briggs was arrested that she had been abused by her brother as opposed to Briggs. (App'x p. 243). By her own admission, Wofford never alerted law enforcement of that critical revelation, though. (App'x p. 231).

Or you might lie to get a benefit. So what kind of benefit did get from this? She got to talk to multiple people about a sexual experience and she's a little kid. And she tells about this and then she finds out that her mom is still talking to her abuser. So she got no parental support. She got to have a gynecological exam, which none of you men have experienced, but they are not fun at all. So she had to go through that.

And you -- put you -- it's difficult for people to talk in public. That's one of the number one fears. When y'all came in and you sat down and you found out that you were gonna have to stand up and you're gonna have to talk about your name and who your spouse is and where you work and where your spouse works, most of you got a knot in the pit of your stomach.

And then when you realized it was going in alphabetical order and it was getting closer to your name, that knot probably got a little bit worse and your heart starts pounding and your throat starts to constrict because you're gonna have to stand up and talk about you briefly in front of a bunch of strangers and it was scary for most of you.

Imagine if what the clerk of court had said to you is stand up and tell me about your worst sexual experience. Think of what that would have been like.

(App'x pp. 348-350).

Contrastingly, during defense counsel's closing argument, defense counsel repeatedly attempted to attack Victim's credibility and, in doing so, noted she had not been able to remember various things during her trial testimony. (App'x pp. 365-380). And, to drive his point home, defense counsel stated: "[Y]'all known it to be true. Traumatic things you remember." (App'x p. 368). As his efforts to discredit Victim continued, defense counsel further suggested her behavior during the forensic interview was not consistent with the behavior of someone who had truly been abused while stating: "You don't expect somebody to just open up to a stranger and just chat all about what happened to you, okay?" (App'x pp. 369-371; pp. 374-375).

Following the closing arguments, the trial judge—who had earlier ensured the jurors understood the parties’ opening statements and closing arguments were not evidence—instructed the jury on the applicable law. (App’x p. 43; pp. 382-397). In doing so, the trial judge explained to the jurors it was their exclusive duty to determine the facts in the case and advised them they should carry out that duty by conducting a common-sense evaluation of the evidence and testimony presented. (App’x p. 383). Furthermore, the trial judge instructed the jurors of their responsibility in determining the credibility and believability of the witnesses while emphasizing they could employ their common sense and good judgment in doing so. (App’x pp. 391-392).

Thereafter, the case was submitted to the jury. (App’x p. 398). And, after just over two hours of deliberations, the jury convicted Briggs as indicted. (App’x pp. 398-400).

Subsequently, following an unsuccessful appeal, Briggs sought relief through the PCR process. (App’x pp. 408-414). As part of the claims raised, Briggs alleged defense counsel was constitutionally ineffective for failing to object to the solicitor’s closing arguments remarks about what it would be like to have to testify in front of others about your worst sexual experience. (App’x p. 459). However, when questioned about his failure to object in that regard, defense counsel explained he did not believe the solicitor’s remarks were actually objectionable because the solicitor was not asking the jurors to place themselves in the shoes of the victim at the time of the sexual abuse but, instead, was permissibly asking them to put themselves in the position of a witness for purposes of evaluating the witness’s demeanor and credibility on the witness stand. (App’x p. 476; p. 485).

Ultimately, after considering the matter, the PCR judge declined to grant relief. (App’x p. 499; pp. 516-517). In so ruling, the PCR judge concluded defense counsel was not deficient for failing to object to the now-challenged portion of the solicitor’s closing argument because the

solicitor's remarks did not constitute an improper "Golden Rule" argument and were not, in fact, objectionable. (App'x p. 515). The PCR judge further concluded Briggs likewise failed to meet his burden of establishing he was prejudiced by those remarks because they were "not so crucial as to undermine the results of the proceedings." (App'x p. 515).

Applicable Law Regarding Ineffective Assistance of Trial Counsel Claims

In every criminal case tried in South Carolina, 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, effective assistance of counsel does *not* mean perfect representation. See 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 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.

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* 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).

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* Harrington v. Richter, 562 U.S. 86, 110 (2011) (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* 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). 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.” Strickland, 466 U.S. 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 Dunn v. Reeves, 594 U.S. 731, 739 (2021) (“[E]ven 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.” (citation, internal quotations, 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.” 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 Strickland, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”). Importantly, “[t]he likelihood of a different result must be substantial, not just conceivable.” Richter, 562 U.S. at 112.

Applicable Law Regarding the Propriety of a Solicitor’s Closing Argument

Closing arguments are a basic and important element of the adversarial fact-finding process in a criminal trial. Herring v. New York, 422 U.S. 853, 862 (1975). 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. Id.

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 internal quotations omitted)). However, in presenting arguments to the jury, a solicitor must avoid appeals to the personal biases of the jurors and must not attempt to arouse the passions or prejudices of the jurors. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Significantly, “[i]t is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger, 295 U.S. at 88.

Importantly though, the solicitor is generally permitted to use his opportunities to speak directly to the jurors to appeal to them to do their full duty in enforcing the law, urge them to return the verdict desired by the prosecution, employ any legitimate means of impressing upon them their responsibilities, and “dwell on the evil results of crime[.]” State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (citation and internal quotations omitted). Likewise, the solicitor is unquestionably permitted in arguments to the jury 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 Durden, 264 S.C. at 92, 212 S.E.2d at 590 (“[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)). Furthermore, the solicitor is permitted to use the available opportunities for jury argument to call into question the credibility of the defenses that have been identified or raised by the opposing side. State v. Liberte, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999).

When evaluating the propriety of a solicitor’s remarks to the jury, “[i]t is sometimes difficult to draw the line between proper and improper argument[.]” State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961). “However, some latitude must necessarily be allowed[.]” Id. Resultantly, the solicitor’s remarks should and must be evaluated in the context in which they were made, and the most damaging meaning or interpretation should not be “lightly drawn” from those remarks. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974); see United States v. Robinson, 485 U.S. 25, 33 (1988) (instructing “prosecutorial comment must be examined in context”); State v. Weaver, 361 S.C. 73, 89, 602 S.E.2d 786, 794 (Ct. App. 2004) (“In making this determination, we must examine the alleged impropriety in the context of the entire record.”).

Ultimately, when a challenge is raised to the propriety of a closing argument, the burden rests upon the party raising the challenge to establish that the allegedly improper argument rendered the trial fundamentally unfair. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). Such a determination hinges on whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant’s due process rights.

State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003); see State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) (“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.”). And, for that high bar to be met, “it is not enough that the [challenged] remarks were undesirable or even universally condemned.” Darden v. Wainwright, 477 U.S. 168, 181 (1999) (citation and internal quotations omitted). As a result, criminal convictions typically will not be “lightly overturned on the basis of a prosecutor’s comments standing alone[.]” United States v. Young, 470 U.S. 1, 11 (1985).

Application of the Applicable Law to Briggs’s Case

Through his petition for a writ of certiorari, Briggs contends defense counsel was deficient for failing to object to the solicitor’s closing arguments remarks calling the jurors’ attention to the anxiety most people experience when having to speak in public in front of others and asking the jurors to imagine what it would be like having to speak in the courtroom about one’s worst sexual experience. As support for that contention, Briggs maintains defense counsel should have objected to the solicitor’s remarks because they purportedly constituted an improper “Golden Rule” argument that was an “obvious appeal” to the emotions of the jurors. Beyond that, Briggs appears to suggest he was somehow prejudiced by the now-challenged remarks to such an extent his due process rights were violated. For those reasons, Briggs asserts the PCR judge erred by declining to grant relief in his case.

Generally speaking, a “Golden Rule” argument is one that asks the jurors to put themselves in the shoes of one of the parties. State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 538 (Ct. App. 2009); see Braddy v. State, 111 So. 3d 810, 842 (Fla. 2012) (“Golden rule arguments are arguments that invite the jurors to place themselves in the victims position *during*

the crime and imagine the victim’s suffering.” (emphasis added and citation and internal quotations omitted)). In the context of a criminal prosecution, an argument asking the jurors to place themselves in the victim’s shoes is ordinarily improper because it tends to completely destroy all sense of impartiality of the jurors and serves to arouse passion and prejudice. Brown v. State, 383 S.C. 506, 515-516, 680 S.E.2d 909, 914 (2009).

Importantly though, “an argument which asks the jurors to draw inferences *from the evidence* based on how a reasonable person would act if placed in the position of the victim is not an improper golden rule argument.” Buszkiewicz v. State, 424 P.3d 1272, 1277 (Wyo. 2018) (emphasis added). Similarly, “rhetorical questions which ask the jurors to use their common sense and life experiences to weigh the trial evidence do not violate the rules even though the prosecutor may ask the jury what they would do in similar circumstances.” Id.

With those principles in mind, the solicitor in Briggs’s case did *not* use her closing argument to improperly appeal to the passions or prejudices of the jurors, attempt to get them to place themselves in Victim’s shoes at the time she was being abused, or seek for them to consider how Victim must have been feeling when she was enduring the sexual abuse at Briggs’s hands. Instead, the solicitor made remarks designed to encourage the jurors to rely on the own common sense and knowledge of human nature when evaluating the credibility of *trial evidence* by considering factors that might have impacted Victim’s testimony and demeanor when she was on the witness stand publicly speaking in front of a group of strangers about intimate topics during Briggs’s trial. Cf. United States v. Kirvan, 997 F.2d 963, 964 (1st Cir. 1993) (“Kirvan’s brief relies primarily on cases that forbid so-called ‘golden rule’ arguments in which plaintiffs or prosecutors ask the jury to put itself in the place of the victim. But ‘golden rule’ cases do not apply where, as here, the jury is asked to put itself in the place of an *eyewitness*. In this situation,

the invitation is not an improper appeal to the jury to base its decision on sympathy for the victim but rather a means of asking the jury to reconstruct the situation in order to decide whether a witness' testimony is plausible.” (citation omitted)); State v. Bell, 931 A.2d 198, 214-215 (Conn. 2007) (“In the present case, . . . the prosecutor was not appealing to the jurors’ emotions or to their sympathies for the victim. Rather, he was asking the jurors to draw inferences from the evidence that had been presented at trial regarding the actions of the defendant and [a witness], based on the jurors’ judgment of how a reasonable person would act under the specified circumstances.”); Buszkiewicz, 424 P.3d at 1277-1278 (“In this case, the prosecutor was not making an appeal for the jury to decide the case based upon sympathy or bias rather than the evidence. Instead, she requested that the jury consider the evidence using their life experiences and common sense. When she asked the jurors whether they would remember the number of times they had been slapped, she was requesting that they look at the evidence through the lens of their ordinary affairs. In other words, the prosecutor was simply making the point that it is human nature not to remember all of the details of a violent encounter, such as the number of slaps.”).

Therefore, just as both defense counsel and the PCR judge correctly recognized, the solicitor’s closing argument remarks—when viewed in context as required—did not constitute an improper “Golden Rule” argument and, instead, were entirely proper remarks that were fully consistent with the very purpose of a closing argument. See Humphries, 351 S.C. at 373, 570 S.E.2d at 166 (“A solicitor has a right . . . to comment on the weight to be given [to a witness’s] testimony.”); cf. Williams v. State, 689 So. 2d 393, 399 (Fla. Dist. Ct. App. 1997) (“We disagree with Williams’ contention that the argument here constitutes a ‘golden rule’ argument. The proper exercise of closing argument is to review the evidence and to explicate those inferences

which may reasonably be drawn from the evidence. Here, the state properly asked the jury to understand the circumstances of the child witness's viewing of the crime as a plausible explanation of [the child witness]'s confusion as to the car's color. The argument was not a plea for the jury to abandon its obligation to determine the case based solely on the evidence and to place itself in the victim's position." (citation and internal quotations omitted)). As a result, defense counsel was not and could not have been deficient for failing to raise a meritless objection. See State v. Schwaderer, 898 N.W.2d 318, 332 (Neb. 2017) ("As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument."); Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) ("One of the key circumstances a court must consider in its examination of counsel's decision not to make a particular objection is whether there was any law to support the objection."). Moreover, given the nature of the remarks and the context in which they were made, they likewise were not something that could have rendered Briggs's trial unfair to him in any way or otherwise improperly impacted the outcome of the proceedings. See Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019) ("To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we 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."); cf. Darden, 477 U.S. at 180-181 (concluding Darden's murder trial was not rendered fundamentally unfair by the prosecutor's closing argument remarks, which attempted to place some of blame on the Florida Department of Corrections for releasing Darden on weekend furlough prior to the incident, implied the death penalty was the only way to ensure Darden would not commit a future similar crime, employed the term "animal" to describe Darden, and expressed a personal desire for Darden to have been killed or be killed); State v. Copeland, 321 S.C. 318, 326, 468 S.E.2d 620, 625 (1996) (finding

the trial judge did not abuse his discretion in regard to the solicitor's closing argument "[b]ecause Copeland has not established that she was deprived of a fair determination of her guilt or innocence" as a result of the argument); State v. Lunsford, 318 S.C. 241, 247, 456 S.E.2d 918, 922 (Ct. App. 1995) ("Further, Lunsford failed to demonstrate as he was required to do, that the result of the solicitor's comment was to materially prejudice his right 'to obtain a fair and impartial trial.' " (citations omitted)).

Accordingly, since defense counsel's failure to object to the solicitor's unobjectionable closing argument remarks neither constituted deficient performance nor prejudiced the fairness of Briggs's trial in any conceivable way, the PCR judge correctly concluded Briggs failed to meet his burden of establishing defense counsel was constitutionally ineffective, and there are no valid grounds upon which that correct ruling could now be disturbed on appeal. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); cf. Finch v. Commonwealth, 681 S.W.3d 84, 98 (Ky. 2023) ("None of the foregoing statements asked the jurors to imagine themselves or someone they care about in the position of the crime victim. They are therefore not 'golden rule' arguments, and no error occurred."). Briggs's petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

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