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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHEROKEE COUNTY
The Court of Common Pleas

R. Keith Kelly, Trial Judge
J. Mark Hayes, II, Post-Conviction Judge

Post-Conviction Relief Case No. 2017-CP-11-801
Appellate Case No. 2024-000128

Thomas Anthony Styla, ... Respondent/Petitioner,

v.

State of South Carolina, ... Petitioner/Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI OF PETITIONER/RESPONDENT

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QUESTIONS PRESENTED

1. Whether the PCR court properly concluded Counsel was not ineffective for failing to move for a mistrial based on improper comments by the solicitor during closing arguments where Counsel sought and secured a curative instruction from the trial court addressing the most troublesome comment and where the remainder of the jury charge removed any possible prejudice?

2. Whether the PCR court properly concluded Styla failed to prove prejudice from Counsel's ineffective assistance for failing to place on the record the objections, arguments, and rulings made in bench conferences during trial where he failed to establish any articulable appellate issues that would have led to reversal on appeal?

3. Whether the PCR court properly concluded Counsel was not ineffective for failing to object to evidence of Styla's other bad acts where: (1) Counsel chose, as part of a reasonable trial strategy, not to object and instead attempted to exploit inconsistencies in Victim's disclosure of those other acts to impeach her trial testimony about the indicted offense; and (2) even if Counsel had objected, such evidence would have been admitted under Rule 404(b) as evidence of Styla's motive, intent, and the absence of mistake or accident, because the acts were probative as to a pattern of grooming, or under Rule 405(b) as evidence of specific instances of Styla's conduct in regard to his character defense?

STATEMENT OF THE CASE

Respondent/Petitioner, Thomas Anthony Styla (Styla), was indicted at the April, 2015 term of the grand jury for Cherokee County for one count of first-degree criminal sexual conduct (CSC) with a minor (App.p.489-490; 2015-GS-11-00239). On August 30-September 1, 2016, a jury trial was held at the Cherokee County Courthouse before the Honorable R. Keith Kelly. Styla was present and was represented by Andrew J. Johnston, Esquire. Petitioner/Respondent (the State) was represented by Assistant Solicitor G. Matthew Kendall of the Seventh Circuit Solicitor's Office. (App.p.1). At the conclusion of trial, the jury found Styla guilty as indicted. (App.p.479). Judge Kelly sentenced Styla to twenty-five (25) years' imprisonment. (App.p.484-p.485; p.487-p.491). A timely Notice of Appeal was filed on Styla's behalf; however, by and through appellate counsel Jack B. Swerling, Styla moved to dismiss his direct appeal. The motion was granted by the Court of Appeals by order filed June 12, 2017. The Remittitur was issued on June 28, 2017. (App.p.492-p.498).

On October 23, 2017, Styla, who was still represented by Mr. Swerling, filed an application for post-conviction relief (PCR) raising twenty-three allegations of ineffective assistance of trial counsel (App.p.503-p.511), including the claims articulated in Arguments I and II of Styla's Petition for Certiorari now before this Court. (PCR allegations 10, 14, 15, 16, 17, 20, 22, & 23). (App.p.510). On January 12, 2018, the State submitted a Return requesting an evidentiary hearing to resolve Styla's numerous claims. (App.p.512-p.518). On November 1, 2018, Styla submitted an amendment to his application for PCR alleging four additional grounds (App.p.519-p.523), including the claim he raises in Argument III of his Petition, and expanding upon the claims he makes in Arguments I and II. (PCR allegations 25, 27 & 28). (App.p.521).

On November 6, 2018, an evidentiary hearing was held at the Spartanburg County Courthouse before the Honorable J. Mark Hayes, II. Styla was present and was represented by Mr. Swerling and Alissa L. Wilson, Esquires. The State was represented by Assistant Attorney General Jordan A. Cox of the South Carolina Attorney General's Office. (App.p.525). During the hearing, Styla called Mr. Johnston (Counsel), to the stand and, over the State's objection, Katherine Goode, Esquire, to offer her opinion that there were no viable issues available for direct appeal. Styla also testified on his own behalf. The PCR court was provided a copy of the PCR application, the State's return, Styla's amendment, the records of the Cherokee County Clerk of Court concerning the subject conviction, the trial transcript, the direct appeal records, and Styla's records from the South Carolina Department of Corrections. Due to time constraints, the hearing was not completed that day and was continued on a future date. (App.p.525-p.717).

On September 27, 2019, the PCR court reconvened the evidentiary hearing at the Spartanburg County Courthouse. Styla was again present and represented by attorneys Swerling and Wilson. The State was represented by Assistant Attorney General Johnny Ellis James, Jr., of the South Carolina Attorney General's Office. (App.p.718). At the hearing, Styla called five additional witnesses: his partner Dottie Crowder, his friends Lee Howell, Wendy Reveles, and Chad Wright, and Wright's daughter Olivia Wright. The State then recalled Counsel to offer additional testimony. At the end of the hearing, the PCR court took the matter under advisement and requested briefs from the parties to address the matters in dispute. (App.p.718-p.809). The State submitted a brief in opposition dated December 11, 2019, and Styla submitted a brief in support dated December 18, 2019. (App.p.810-p.904). The PCR court also had before it copies of the pleadings and exhibits submitted by the parties during the evidentiary hearings.

The PCR court issued an informal decision which denied relief and asked the State to prepare a formal proposed order consistent with the decision. (App.p.905-p.910). In an eighty-seven page Order of Dismissal dated February 19, 2021, and filed February 25, 2021, the PCR court initially denied Styla's application for PCR in toto, including denying relief on the three grounds he raises in the Petition for Certiorari now before this Court. (App.p.987-p.998).

On March 11, 2021, Styla filed a "Motion for Reconsideration and/or Relief from Judgment or Order to Amend, Alter or Modify pursuant to S.C.R.C.P. 59(e)" and on June 11, 2021, the State filed a return. (App.p.1001-p.1014). On November 10, 2022, the PCR court heard oral arguments on Styla's motion via Webex, asking the parties to place particular focus on the allegation related to Counsel's failure to interview witness Robin Christian Smith prior to calling her as a witness at trial. The PCR court was subsequently provided a transcript of the oral arguments. (App.p.1015-p.1075). In an Order dated May 31, 2023, and filed June 5, 2023, the PCR court granted Styla's motion to reconsider, granted PCR on the single allegation related to Smith, and thereby granted Styla a new trial. (App.p.1076-p.1088). In that same order, the PCR court specifically reconsidered its rulings regarding: (1) counsel's failure to move for a mistrial, and (2) counsel's failure to put bench conferences on the record. It further explained its reasoning and conclusions but maintained its prior ruling denying PCR on these two issues. (App.p.1086-p.1087). In regard to the allegation regarding counsel's failure to object to evidence of Styla's other bad acts, the PCR court declined to "further alter or amend" its prior order denying PCR. (App.p.1088).

On June 22, 2023, the State filed a "Motion to Alter or Amend" and on September 11, 2023, Styla filed a response. (App.p.1089-p.1102). In an Order dated December 20, 2023, and filed December 27, 2023, the PCR court denied the State's motion and reaffirmed its May 31,

2023 order "in all respects." (App.p.1103-p.1107). On January 31, 2024, the State filed a notice of appeal with this Court and on February 5, 2024, Styla filed a notice of cross-appeal. On June 22, 2024, Styla filed a "Petition for Writ of Certiorari of Respondent-Petitioner" asking this Court to reverse the findings of the lower court on the three issues for which PCR was denied. This return to petition for a writ of certiorari on behalf of the State now follows.[1]

STATEMENT OF FACTS

During pretrial motions, the solicitor noted that in addition to evidence regarding the CSC that was being tried, the State intended to elicit testimony about other incidents or bad acts involving Styla and the Victim that did not rise to the level of CSC. The solicitor said he understood the defense was not objecting to the evidence and Counsel advised: "Not at this time. If I were to change my position, I would let the Court know." (App.p.40, lines 3-12).

Trial

After the jury was sworn, the trial court gave preliminary jury instructions on the burden of proof and the respective roles of the judge and the jury. It explained the jury was the sole judge of the facts including whether evidence is believable and the weight to be given to that evidence. It further explained the jury must decide the case based solely on the evidence presented in the courtroom, not on any comment from the court, and not on what the attorneys might say in opening statements. (App.p.58-p.66). Next, the solicitor made a brief opening statement outlining the State's theory of the case. He said the case centered around the allegation that, in late December of 2009, around Christmas, Styla committed an act of criminal sexual misconduct in the first degree when he inserted his finger into the vagina of the nine-year-

[1] On July 5, 2024, the State filed a "Petition for Writ of Certiorai of Petitioner-Respondent" asking this Court to reverse the findings of the lower court on one issue for which PCR was granted.

old Victim. The solicitor said the molestation happened at Victim's grandmother's home when Styla entered a bedroom where Victim was lying on her cousin's bed, while her cousin was on the floor playing a video game. He said Styla began giving Victim a massage of her back and legs, and then when he reached the bottom of her legs Styla reached under her clothes, inserted his finger into her vagina, and asked: "does this feel good?" The solicitor said Victim was scared, told Styla to stop, and left the room. The solicitor explained this was the single incident of actual molestation, but said there were other instances of inappropriate behavior including: (1) Styla commenting on Victim's butt sometime after she turned nine; (2) Styla reaching his hand up the legs of Victim's shorts as they were riding a four-wheeler together when she was ten; and (3) Styla inviting Victim to come lie in bed with him sometime later the same summer of the four-wheeler incident. Counsel did not object to the solicitor's references to these other acts. (App.p.66-p.70).

With the first instance occurring during the State's open, there were eleven instances throughout the trial where a bench conference was held but where neither the trial judge nor Counsel put information on the record as to what specific objections were made, what arguments were made, and what rulings were rendered. (App.p.69; p.201-p.202; p.250; p.325; p.335; p.343; p.348; p.380; p.385; p.394; & p.418).

Counsel then made an opening statement. He first noted: (1) the lack of any objective evidence in the case such as a forensic interview, medical examination, or DNA; (2) the fact Victim had never been in therapy despite her allegation; and (3) the four-year delay before she disclosed. Counsel then focused on two key angles to Styla's defense: (1) that the *sole* evidence would be the testimony of a fourteen-year-old girl with credibility issues and (2) that Styla was

presumed innocent with the very high burden of proof resting solely on the State. (App.p.70-p.74).

Victim testified first. (App.p.75). She said that she had an okay relationship with Styla before the molestation, but that she thought of him as a "creepy old guy" because from the time she was seven until the time of the incident he would sometimes talk about or compliment her butt. (App.p.78-p.79). Counsel did not object. Victim proceeded to describe the indicted sexual assault in detail. (App.p.78-p.82). Next, Victim testified about two other interactions she had with Styla that made her feel uncomfortable and convinced her to disclose the pervious assault. She said that on one occasion when she was ten years old, Styla offered to let her ride a four-wheeler but told her she was not old enough to drive it by herself, so he rode on the back while she drove. While riding through the woods, Styla put his hands on Victim's shorts, then under her shorts. Victim told Styla she was done riding and when she turned to return home, he stopped. (App.p.82-p.83). Victim next testified that later that summer, Styla asked her if she wanted to get in bed with him and she responded: "No." (App.p.83-p.84). Victim concluded her testimony by explaining she ultimately disclosed the abuse and incidents with Styla to her eighth-grade guidance counselor [Smith] after these two encounters. (App.p.85). Counsel did not object to this testimony.

On cross-examination, Counsel questioned Victim about the alleged molestation incident and the other alleged interactions she had with Styla, attempting to show incongruities in her behavior and story. (App.p.86-p.92). Counsel also questioned her extensively about her delayed disclosure to Smith, identifying specific aspects of Victim's testimony that contradicted prior statements she gave to Smith (according to the notes Smith prepared for the police at the time of Victim's disclosure). (App.p.92-p.111).

After the State rested, Counsel called Styla's partner, Dottie Crowder, to the stand, and then had Styla testify in his own defense. (App.p.267-p.341). Next, Counsel called Smith as a witness for the defense. He presented Smith with the notes she prepared and provided to law enforcement, which detailed the disclosure Victim made to Smith, and began exploring the details of Victim's disclosure and how her trial testimony contradicted Smith's notes in some respects. (App.p.342-p.347). Counsel proceeded to pick apart Smith's notes, attacking her efforts to explain inconsistencies as typographical errors and getting her to admit some of her conclusions were things "she was led to believe" but not actually told. (App.p.345-p.354). Later, on redirect, Counsel got Smith to admit how coincidental it was that the points in her notes Victim claimed she did *not* say, were the same points Smith was now claiming were wrong, implying neither she nor the Victim's disclosures should be believed. (App.p.366-p.368).

In closing arguments, Counsel drew the jury's attention to Smith's prevarication as to her own notes about Victim's disclosure and the inconsistencies between her notes and Victim's testimony. (App.p.410-p.412). Counsel hammered Smith for disclaiming the portions of her notes which Victim disclaimed at trial. (App.p.412, lines 21-24). Counsel used Smith's waffling to attack Victim's credibility. He opined that Victim "walked back" the scope of the allegations from what she told Smith because "they didn't sound good." (App.p.412-p.414). During the State's closing argument, the solicitor referred to Victim's testimony describing the incident on the four-wheeler, Styla's invitation to join him in bed, and Styla's comments on her butt. Counsel did not object. The solicitor further discussed Victim's disclosures to Smith, attempting to counter what he described as the defense telling the jury "that she made the whole thing up, that this is all just a fabrication, and that she's a liar." (App.p.432-p.434; p.434, lines 6-9; p.444).

Also during the State's closing argument, the solicitor made various remarks regarding either the credibility of witnesses (App.p.444, lines 13-17; App.p.450-p.451; App.p.457, lines 7-19) or in support of Styla's guilt. (App.p.460-p.461). Counsel did not object to the first three comments; however, in regard to the fourth comment, Counsel interjected: "Your Honor, I have a matter of law." (App.p.461, line 6). After a bench conference off the record, the trial court instructed the jury to "disregard the last comments made by the Solicitor. Disabuse your mind of those comments." (App.p.461, lines 8-10). Shortly thereafter, the State concluded its closing. (App.p.461). The solicitor explained he had not been attempting to offer a personal opinion regarding Applicant's guilt, but rather that he was trying to express why he had no hesitation in putting the case before the jury. (App.p.462, lines 13-20). Counsel disagreed with the characterization, but kindly suggested the solicitor had not intentionally offered an inappropriate argument. He informed the trial court that he was satisfied with the curative instruction and would say nothing further on the subject. (App.p.462-p.463).

The trial court then charged the jury, beginning with a description of the role of the jury, emphasizing it was their exclusive duty to determine the facts and what effect, value, and weight is to be given to the testimony or evidence. (App.p.463-p.464). The court also charged the jury on the indictments, the presumption of innocence, the State's burden of proof, reasonable doubt, direct evidence, circumstantial evidence, the credibility of witnesses, character evidence, expert witnesses, the elements of the indicted crime, and the verdict forms. (App.p.463-p.475). In regard to credibility, the trial court explained that the jury is the finder of fact and necessarily must determine the credibility of witnesses who have testified. The court instructed it was their duty, as jurors, to analyze and evaluate the evidence and determine which evidence convinces them of its truth. (App.p.468-p.469).

PCR Hearing

In regard to the State's closing argument, Counsel acknowledged there were four comments for which an objection *could* have been made, agreeing that the first three "could be taken" as expressions of the solicitor's personal belief about the credibility of witnesses, though the third comment "was less so than the others." He confirmed he did not object or move for a mistrial on that basis. As to the fourth comment, Counsel testified it was "probably the most egregious statement" of the group. He testified that based on that comment, he asked to approach the bench, participated in a bench conference, secured a curative instruction from the trial judge, and said he was not going to pursue the issue any further. Counsel testified he was satisfied with the curative instruction and did not move for a mistrial even though it would have been a proper thing to do. He never said whether, in retrospect, he believed a motion for a mistrial would have been proper in regard to the first three comments even if he had objected. Counsel testified that notwithstanding his familiarity with both case law and ethical obligations prohibiting an attorney from stating personal opinions about the credibility of a witness or the guilt or innocence of an accused during trial, he chose to limit his response to the request for a curative instruction. (App.p.567-p.573). On cross-examination, Counsel confirmed that at the time it occurred he was satisfied with the trial court's curative instruction and did not find it necessary to move for a mistrial based on the solicitor's comments. (App.p.631-p.632). On redirect examination, Counsel testified that in retrospect he believed he should have moved for a mistrial. (App.p.633).

In regard to the failure to place on-the-record objections, arguments, and rulings made in bench conferences, Counsel acknowledged each of the eleven instances set forth in the PCR application. He testified he agreed that without a contemporaneous objection, to include placing

the grounds for the objection and the ruling on the record, there is no chance for anybody to review the propriety of those rulings on appeal. (App.p.556-p.566; p.633). On cross-examination Counsel explained he handles objections in different ways during a trial depending on the context and the judge's preference, but he knows this does not excuse him from the requirement to place them on the record. Counsel testified his decision to put a bench conference on the record sometimes depends on the significance of the objection and noted there often is no reason to put it on the record if he obtains a positive ruling. (App.p.609-p.611).

In regard to the State introducing testimony about Styla's alleged bad acts, Counsel acknowledged the pretrial exchange where he told the trial court the defense was not objecting to the State's plan but would advise the court if that position changed. Counsel testified he did not change his position during trial and did not make any objections to evidence of other bad acts that were not charged in the indictments. Counsel then acknowledged each instance of trial testimony or argument from the State which referenced the acts and agreed that he consistently chose *not* to object to those instances throughout the trial. (App.p.544, line 11-p.556, line 2).

During the second portion of the PCR hearing, Counsel described his defense strategy in detail, which included: (1) contending Styla did not do it; (2) discrediting the allegations of the Victim; (3) presenting a character defense; (4) pointing out the lack of corroboration; and (5) emphasizing that the burden of proof was on the State. He testified he believed this strategy was implicit in his many discussions with Styla when they reviewed the evidence and talked about possible witnesses to help their defense.

In regard to evidence of bad acts, Counsel testified he and Styla specifically talked about the bad act evidence and he had no recollection of Style suggesting the kinds of challenges that were brought up during the PCR hearing. (App.p.773-p.779). Counsel explained the lengthy

discussions he had with Styla about whether to testify, the plan to present a character defense, and how such a defense is fraught with danger because the prosecution could bring up instances of bad character the jury would otherwise never hear. (App.p.779-p.782). Finally, Counsel explained his defense strategy of trying to use the other bad act allegations to Styla's advantage. He noted that when one can successfully attack, refute, or call into question collateral allegations as part of a defense, it can be effective in refuting the main allegation, particularly as it relates to the defense of questioning veracity. (App.p.802, lines 5-23). Counsel emphasized his analysis of Styla's case had not changed since trial—it came down to credibility. (App.p.797, lines 2-21).

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). On appellate review, courts defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. *Id.* (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) and *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* at 180-81, 810 S.E.2d at 839-40; *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

In a post-conviction relief action, an Applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When an Applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." *Strickland v. Washington*,

466 U.S. 668, 687 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 689-90. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe,* 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The Applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

"In order to receive relief for ineffective assistance of counsel, a defendant must make two showings. First, he must show that his trial counsel's performance was deficient, meaning that 'counsel' made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Strickland*, 466 U.S. at 687); *See also Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The standards 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*, 466 U.S. at 696.

ARGUMENT

I.

The PCR court properly concluded Counsel was not ineffective for failing to move for a mistrial based on improper comments by the solicitor during closing arguments because Counsel sought and secured a curative instruction from the trial court addressing the most troublesome comment and because the remainder of the jury charge removed any possible prejudice.

Styla argues the PCR court erred in denying relief based on counsel's failure to object and request a mistrial due to the prosecution's improper closing argument. Specifically, he

focuses on four comments from the solicitor, three that allegedly stated his personal opinion about the credibility of witnesses, and the fourth stating his personal opinion as to the merits of the case or guilt of the defendant. (Pet.p.6-p.13). The State disagrees and submits the PCR court's conclusion that counsel was not deficient in this regard is supported by evidence in the record. In addition, Styla failed to carry his burden of proving that, had Counsel raised additional objections or moved for a mistrial, it would have produced a different result, particularly where the trial court's instructions adequately cured any improper arguments. Certiorari should be denied on this issue.

Discussion

In its February 19, 2021 Order of Dismissal, the PCR court found Styla: "failed to show ineffectiveness on the part of Counsel in responding to the solicitor's closing argument." It analyzed each of the four allegedly improper remarks individually before concluding: "For all the foregoing reasons, [Styla] has failed to demonstrate both prongs of Strickland were satisfied in the context of any of the four remarks, and [Styla's] request for relief is DENIED." (App.p.987-p.996). In its May 31, 2023 Order the PCR court further found counsel was not deficient in requesting a curative instruction rather than a mistrial after the fourth comment. The PCR court noted:

> While the Solicitor's comments were clearly not proper, and should not have been made, [Counsel's] decision at the time of trial was to seek a curative instruction and he was satisfied with the instruction given to the jury. He chose not to move for a mistrial, even though such a motion would have been the appropriate remedy. The fact that his objection was made in an off-the-record bench conference did not deny [Styla] an issue of appellate review as [Counsel] acknowledged his decision was to only request a curative instruction.

(App.p.1087).

Generally, the assessment of witness credibility is within the exclusive province of the jury. *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016). Thus, a prosecutor may neither vouch for nor bolster the testimony of a government witness in arguments to the jury. *United States v. Sanchez*, 118 F.3d 192, 198 (4th Cir. 1997); *Tappeiner*, 416 S.C. at 250, 785 S.E.2d at 477. "Vouching occurs when the prosecutor indicates a personal belief in the credibility or honesty of a witness." *Sanchez* at 198; *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). However, a solicitor does have "a right to state his version of the testimony and to comment on the weight to be given such testimony." *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "Improper 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). A court reviewing alleged impropriety of a solicitor's argument must do so 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." *Id.* "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*, 331 S.C. at 338, 503 S.E.2d at 166-67 (citing *Donelly v. DeChristoforo*, 416 U.S. 637 (1974)).

"To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion." *Early v. State*, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016). "The decision to grant or deny a mistrial is within the sound discretion of the trial judge." *State v. Stanley*, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes stated into the record by the trial judge."

Id., 365 S.C. at 34, 615 S.E.2d at 460 (quoting *State v. Simmons*, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002)). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." *Id.* "Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial." *Early*, 418 S.C. at 267, 792 S.E.2d at 233. "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." *Stanley*, 365 S.C. at 33, 615 S.E.2d at 460.

Here, there is ample evidence in the record to support the PCR court's conclusions that there was no ineffective assistance of counsel and no prejudice. Counsel chose not to object to the first three comments, likely because they were more akin to proper comments on the weight to be given to the testimony rather than actual vouching. Indeed, the solicitor did not indicate a personal belief in the credibility of the witnesses, only that he believed in the State's efforts to put up an honest, truthful, and consistent case for the jury to consider. Even in hindsight, Counsel agreed the comments "could be taken" as expressions of personal belief in credibility; however, he never said he thinks he should have objected on the basis of vouching. (App.p.567-p.573). Counsel then made a conscious, strategic decision to rely on the trial court's grant of a curative instruction rather than moving for a mistrial in regard to the fourth comment. This was a reasonable strategic decision, which is entitled to great deference and cannot be deemed ineffective assistance of counsel. *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244-45 (2018). Furthermore, because the trial court agreed to give a curative instruction as a remedy to the improper comment, it is unlikely it would have then taken the "extreme measure" of granting a mistrial which was not "absolutely necessary" under the circumstances, even if Counsel had requested it. Whatever the case, Styla failed to carry his burden of showing a mistrial would

have been granted. Finally, the trial court's preliminary instructions and jury charge so clearly instructed the jury that it was the sole judge of credibility, Styla suffered no prejudice. (App.p.58-p.66; p.468-p.469). For all of these reasons, certiorari should be denied on this issue.

II.

The PCR court properly concluded Styla failed to prove prejudice from Counsel's ineffective assistance for failing to place on the record the objections, arguments, and rulings made in bench conferences during trial because he failed to establish any articulable appellate issues that would have led to reversal on appeal.

Styla argues the PCR court erred in denying relief based on counsel's failure to place on the record the objections, arguments, and rulings made in bench conferences not transcribed by the court reporter. (Pet.p.13-p.15). The State disagrees and submits the PCR court's conclusion that Styla failed to show prejudice is supported by evidence in the record. Certiorari should be denied on this issue.

Discussion

In its February 19, 2021 Order of Dismissal, the PCR court examined each of the eleven instances where counsel failed to put the substance of a bench conference on the record before concluding in each instance that: "Applicant cannot show prejudice under *Strickland*, and his request for relief is **DENIED**." (App.p.962-p.978). In its May 31, 2023 Order the PCR court: "acknowledged the analytical hardship in addressing trial counsel's failure to assure a proper record was developed for appellate review," but concluded that for post-conviction purposes, Styla "failed to establish the element of prejudice" and "additionally failed to establish what issue an appellate court would have reversed." (App.p.1086-p.1087).

"An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." *State v. Hamilton*, 344 S.C. 344, 361, 543

S.E.2d 586, 595 (Ct. App. 2001), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). "When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record." *Smalls v. State*, 422 S.C. 174, 182 n.3, 810 S.E.2d 836, 840 n.3 (2018) (citing *Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999)). However, merely observing that trial counsel failed to place a bench conference on the record is inadequate to prove counsel was constitutionally ineffective; an applicant must still show prejudice under *Strickland*. *See Foye*, 335 S.C. at 590, 518 S.E.2d at 267 (concluding that while trial counsel was deficient for failing to place an objection on the record, the applicant failed to meet his burden of showing prejudice where the only evidence was the applicant's less-than-credible claim that a juror saw his chains).

Here, there is insufficient evidence to show what objections were lost to Counsel's failure to put the bench conferences on the record. Styla failed to present evidence to show he was deprived of any specific meritorious issue which could have been raised on appeal but for Counsel's failures. Without such a showing, there was no basis for finding prejudice. Styla argues the unique circumstances presented here—Counsel's "large scale failure to fulfill his duty to create a record"—amounts to a denial of his Sixth Amendment rights and should result in presumed prejudice per *United States v. Chronic*, 466 U.S. 648 (1984). The State disagrees. Counsel had ample time to review discovery, prepare for trial, develop a reasonable trial strategy, meet with Styla, and implement that trial strategy through vigorous cross-examination of State's witnesses, presentation of witnesses for the defense, and a closing argument impugning Victim's credibility. Even where, as here, Counsel failed to fully develop and preserve certain parts of the record for appeal, these circumstances as a whole are not so likely to have prejudiced Styla to make the adversarial process presumptively unreliable. *See Nance v.*

Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006) (holding that absent the three narrow circumstances of presumed prejudice under *Chronic*, defendants must show actual prejudice under *Strickland*). The PCR court properly denied relief on this ground and certiorari should likewise be denied on this issue.

III.

The PCR court properly concluded Counsel was not ineffective for failing to object to evidence of Styla's other bad acts because: (1) Counsel chose, as part of a reasonable trial strategy, not to object and instead attempted to exploit inconsistencies in Victim's disclosure of those other acts to impeach her trial testimony about the indicted offense; and (2) even if Counsel had objected, such evidence would have been admitted under Rule 404(b) as evidence of Styla's motive, intent, and the absence of mistake or accident, because the acts were probative as to a pattern of grooming, or under Rule 405(b) as evidence of specific instances of Styla's conduct in regard to his character defense.

Styla argues the PCR court erred in denying relief based on Counsel's failure to object to evidence of his other bad acts. He contends the evidence was inadmissible under Rules 401, 403, and 404 of the South Carolina Rules of Evidence and therefore, had Counsel objected, it would have been excluded. (Pet.p.15-p.21). The State disagrees and submits not only was the evidence admissible, but Counsel established a reasonable trial strategy for not objecting and therefore was not ineffective. The PCR court's ruling is supported by evidence in the record and certiorari should be denied on this issue.

Discussion

In its February 19, 2021 Order of Dismissal, the PCR court found the alleged but unindicted acts at issue—primarily the ride on the four-wheeler and the invitation to bed, and by implication the comments about Victim's butt, all of which ultimately led to the disclosure of abuse—served to establish Styla's motive and intent regarding his own sexual gratification, that the indicted offense was not a mistake, and that he was grooming Victim for further abuse. The

PCR court further found Styla's character was intentionally made an issue in the trial by Styla and Counsel. For these reasons, the PCR court concluded the testimony regarding the unindicted acts was not objectionable and Counsel was not deficient in failing to raise an objection. The PCR court further found the unindicted acts provided Counsel avenues through which he could impeach Victim using her prior disclosures and inconsistencies. It concluded Counsel tactically used the information to impeach Victim and subject her to crucial scrutiny. Ultimately, the PCR court held: For all of these reasons, [Styla] has failed to meet his burden under either prong of Strickland, and this claim for relief is DENIED." (App.p.997-p.998). In its May 31, 2023 Order, the PCR court declined to further alter or amend its prior order and held it "remains the Order of this Court." (App.p.1088).

First and foremost, Counsel explained his defense strategy of trying to use the other bad act allegations to Styla's advantage. He hoped to successfully attack, refute, or call into question the collateral allegations, which he believed would be very effective in refuting the main allegation, particularly as it related to the Victim's credibility. (App.p.802, lines 5-23). This was a reasonable strategic decision, which is entitled to great deference and cannot be deemed ineffective assistance of counsel. *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244-45 (2018). Indeed, the effectiveness of the strategy is evident where, rather than simply accepting Victim's testimony as credible before reaching a guilty verdict, the jury asked that her testimony be replayed for consideration during deliberations. (App.p.476-p.478). Despite the ultimate conviction, Styla simply failed to carry his burden of proving that Counsel's strategic decision was unreasonable or otherwise ineffective under the *Strickland* standard.

Second, Styla failed to prove that had Counsel objected to testimony about the other bad acts, it would have produced a different result or otherwise been a better option than Counsel's

reasonable trial strategy of using that evidence to attack Victim's credibility at trial. Rule 404(b), SCRE, provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." "Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." *State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). When evidence of other crimes is admitted based solely on the similarity of a previous crime, the evidence serves only the purpose prohibited by Rule 404(b), and allows the jury to convict the defendant on the improper inference of propensity that because he did it before, he must have done it again. *Id.* at 41, 842 S.E.2d at 663. Consequently, prior to admission: "The State must demonstrate to the trial court that there is in fact a scheme or plan common to both crimes, and that evidence of the other crime serves some purpose other than using the defendant's character to show his propensity to commit the crime charged." *Id.* at 44, 842 S.E.2d at 665. "The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'" *Id.* (quoting *State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923)).

The testimony at issue here is meaningfully different from the erroneously admitted testimony in *Perry* because it involved inappropriate conduct *towards Victim*; not evidence (as in *Perry*) of inappropriate conduct towards a different victim. This testimony was probative as to a pattern of grooming and was evidence of Styla's motive and intent. Rule 404(b), SCRE; *Perry*, 430 S.C. at 72, 842 S.E.2d at 679-80 (Kittredge, J., dissenting)[2]; *see also State v. Dinkins*, 435

[2] ("[T]he hallmark of the common scheme or plan exception is that the charged and uncharged crimes are connected in the mind of the actor by some common purpose or motive.... Thus, as with the *modus operandi* exception where

S.C. 541, 555, 868 S.E.2d 181, 188 (Ct. App. 2021) (holding the defendant's repeated inappropriate conduct towards the victim was probative as to a pattern of grooming and was evidence of intent and motive, countering his argument that his actions toward the victim were innocent and properly familial). The charged and uncharged acts here are logically connected within the pattern of grooming, which included a continuation of the conduct towards Victim that ultimately led to her disclosure, *before* Styla could successfully complete another assault. Styla argues two of the other acts could *not* constitute grooming because they happened *after* the charged incident and were of a "lesser degree of severity." But when the facts show Styla achieved the digital penetration for which he was charged without immediately getting into trouble, the subsequent, pre-arrest bad acts prove a continuing pattern of grooming with repeated attempts to either reoffend or escalate as Victim continued to mature. Furthermore, the comments about Victim's butt happened prior to the indicted offense. Though the bad acts testimony admittedly does not show a lengthy pattern of various escalated grooming, the PCR court did not abuse its discretion in viewing the testimony as grooming behavior and finding it would have been admissible at trial on that basis.

In addition, the State was required to prove intent as an element of first-degree CSC with a minor. *See* S.C. Code Ann. § 16-3-655(A) (2010) ("A person is guilty of criminal sexual conduct with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age."); *State v. Adams*, 430 S.C. 420, 430, 845 S.E.2d 217, 222 (Ct. App. 2020) (finding that an "intrusion" as set forth in the statutory definition of "sexual battery" in Section 16-3-651(h), is an act committed with wrongful intent and is not a mere volition). Here, Styla's pattern of inappropriate conduct with Victim was probative of his intent

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identity is interwoven with common scheme or plan, motive can also be inextricably intertwined with a common scheme or plan.").

toward and grooming of Victim. Styla argues they are not probative of motive or intent because the instances "were devoid of any claim or inference that the conduct . . . was in pursuit of sexual gratification." Yet, inviting Victim into bed and reaching under her shorts during a ride on a four-wheeler clearly *do* infer a pursuit of sexual gratification, particularly given the manner in which Styla accomplished the indicted offense, by reaching under Victim's clothes, while they were lying in bed, and digitally penetrating her vagina. Again, the trial court would have been well within its discretion to admit this testimony under Rule 404(b), SCRE, even if Counsel had objected; therefore, Styla has failed to carry his burden of proof under *Strickland*. Styla further argues the evidence would have been excluded under Rule 403, SCRE, because the danger of undue prejudice outweighs its probative value. But this argument is belied by multiple prior decisions from our appellate courts. *See, e.g., State v. Clasby*, 385 S.C. 148, 157, 682 S.E.2d 892, 897 (2009); *Dinkins, supra*.

Finally, our Rules of Evidence permit admission of evidence of a pertinent trail of character offered by an accused, or by the prosecution to rebut the same, Rule 404(a)(1), SCRE. Proof of that character trait (or lack thereof) may be made by specific instances of the person's conduct. Rule 405(b), SCRE. At trial, Counsel introduced evidence of Styla's character through several witnesses. They testified as to his reputation for honesty and telling the truth, his reputation for having good moral character, his reputation for being upstanding, and his reputation for being good when dealing with kids. (App.p.374; p.379-p.381; p.383-p.384; p.389; p.393). At the PCR hearing, Counsel noted this character defense was a key part of his strategy, that it was discussed with Styla, and that their discussions included talking about the danger the prosecution would bring up instances of conduct showing his bad character in rebuttal. (App.p.56-p.63; p.773-p.781). Styla argues Counsel's actions could not possibly constitute valid

strategy because the evidence was admitted in the State's case-in-chief, *before* the defense had even called character witnesses. However, the character defense was planned prior to trial and was an integral part of Counsel's strategy. Where Counsel knew the bad acts would be admissible in rebuttal to Styla's character defense, Counsel likely minimized their impact by having the jury hear about them during the case-in-chief rather than immediately before deliberations. Thus, even if Counsel objected, the trial court would have been within its discretion to later admit the testimony under Rule 405(b) to rebut Styla's character defense.

For all of these reasons, the PCR court properly concluded Styla failed to establish either deficiency or prejudice under *Strickland.* Certiorari should be denied on this issue.

CONCLUSION

For the reasons stated above, the State submits this Court should deny Petitioner/Respondent's Petition for a Writ of Certiorari and affirm the post-conviction relief court's ruling denying relief on the three issues raised. Should this Court grant Certiorari, the State requests permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

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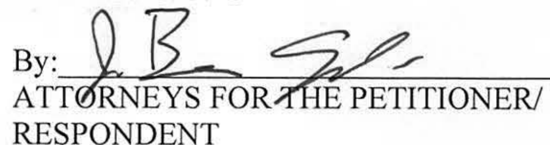

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