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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Greenville County
The Honorable D. Garrison Hill, Trial Judge
The Honorable Alex Kinlaw, Jr., PCR Judge

Appellate Case No. 2019-000907

JERALD D. GASKINS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

AMENDED BRIEF OF REPSONDENT

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STATEMENT OF THE CASE

During its April of 2013 term, the Greenville County Grand Jury indicted Jerald D. Gaskins, Jr. ("Petitioner"), for four counts of second-degree criminal sexual conduct with a minor and two counts of committing a lewd act upon a child. On February 4-5, 2015, Petitioner proceeded to a jury trial with the Honorable D. Garrison Hill ("trial court") presiding. Randall L. Chambers ("trial counsel") represented Petitioner at that trial. After the jury convicted Petitioner as indicted, the trial court sentenced him to imprisonment for twenty years for each count of second-degree criminal sexual conduct with a minor, fifteen years for one of the counts of committing a lewd act, and five years for the remaining count of committing a lewd act. The five-year sentence is to be served consecutively to the others, and to be served first; the other sentences are all to be served concurrently. On direct appeal, this Court unanimously affirmed Petitioner's convictions. App. 617-19. The remittitur was issued on May 5, 2017.

Petitioner then filed a timely application for post-conviction relief. An evidentiary hearing was convened before the Honorable Alex Kinlaw, Jr. ("the PCR court") on October 24, 2018. The PCR court denied Petitioner's application in an order issued on February 1, 2019. App. 754-80. The PCR court subsequently denied Petitioner's motion to alter or amend the judgment. App. 793-95. This Court's grant of a writ of certiorari to Petitioner followed.

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, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief court's factual findings, the appellate courts defer to and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, at 180-81, 810 S.E.2d at 839-40. However,

pure questions of law will be reviewed de novo without deference to a post-conviction relief court. *Smalls*, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of a post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court was correct to deny Petitioner's application because Petitioner has failed to prove that trial counsel was constitutionally ineffective with respect to the solicitor's cross-examination of Petitioner and because this Court should not adopt the theory of cumulative errors and use it to justify the grant of relief to Petitioner.

Petitioner argues that the PCR court erred in not granting relief to Petitioner on his claims that trial counsel was constitutionally ineffective with respect to the solicitor's cross-examination of Petitioner about text messages that the victim's father and sister received, social media messages allegedly sent to the prosecution's Rule 404(b) witness and to an unrelated minor, and a no-contact order in place between Petitioner and his ex-fiancée, and in not finding that Petitioner is entitled to the adoption and application of the theory of cumulative errors. For the reasons that follow, Petitioner has failed to prove that he is entitled to post-conviction relief.

A. Petitioner has failed to prove that the PCR court erred in finding that trial counsel was not ineffective for not preserving for appellate review the issue of the solicitor's questions about text messages allegedly sent to the victim's father because Petitioner has not proven that the solicitor lacked a good faith basis for asking the questions and because Petitioner has not proven that he suffered any prejudice from the questions.

Walt ("Walt") and Sandra Mucienko ("Sandra"), the victim's parents, met Petitioner and Rachel Gaskins ("Rachel"), who was Petitioner's wife at the time, at a backyard horseshoe tournament, and the two families grew close. App. 61-64, 134-36, 392. Petitioner testified that he had already known Walt before meeting the rest of the Mucienkos at the horseshoe tournament because he had met Walt, and shared a drink and sang a song with him, at the Veterans of Foreign Wars post ("the VFW"). App. 392-93. The families spent time together on an almost-daily basis.

App. 83. Petitioner would give money to the Mucienkos to help them with their bills, and covered their cars on his insurance policy. App. 71, 85. The Mucienkos let the victim spend time with Petitioner and Rachel. App. 65. Eventually Sandra ended her friendship with Petitioner because he had become too controlling of the victim, and cut off contact between Petitioner and the victim. App. 74-75, 227. When Sandra confronted the victim about her relationship with Petitioner after being alerted to the matter by Rachel,[1] the victim disclosed to Sandra that Petitioner had been sexually abusing her. App. 228-29. The victim testified at trial that she and Petitioner had sexual intercourse on more than ten, and maybe on more than twenty, but fewer than one hundred occasions. App. 197, 303. After Sandra reported the abuse to law enforcement, Sandra never spoke with Petitioner again. App. 88-89. Sandra testified that Walt continued to have contact with Petitioner after that point, which was a factor in Sandra's and Walt's divorce. App. 89-91. Walt's continued relationship with Petitioner caused the victim to cut off her connection to Walt. App. 289. The victim affirmed that she was aware that Petitioner was spending time with Walt because he wanted Walt the sexual abuse charges dropped. App. 305.

Petitioner testified that he began to hate all of the Mucienkos after they filed charges against him, and that he tried to stay away from them. App. 423-24. Despite that, he admitted, he had sang a song together with Walt at the VFW after the charges were filed. App. 423-24. During her cross-examination of Petitioner, the solicitor questioned Petitioner about alleged text messages ("the Walt texts") sent to Walt. App. 424-25. Petitioner admitted that the messages referenced Rachel and his and her divorce, but denied that the phone number from which the messages were sent was his. App. 424-25. Petitioner testified that there had been "problems with . . . random texts coming

[1] By the time of Rachel's call to Sandra, Rachel and Petitioner had been going through a contested divorce. App. 414.

through throughout this whole thing." App. 425. The trial court sustained trial counsel's objection to the lack of foundation for the solicitor's questions. App. 425-26. The solicitor asked Petitioner directly if he had sent a text message to Walt that read as follows: "Will you drop charges, or are we going to go to court? Either way, I'm still going to hang out with you. Just be honest with me?" App. 426. Petitioner denied that he sent that message. The trial court then sustained trial court's objection to the solicitor's reading the messages aloud. App. 426.

The trial court heard argument about trial counsel's objection outside the presence of the jury. App. 426-31. The solicitor wanted to give Petitioner a chance to admit or deny that he sent the messages so that she could call a rebuttal witness who would lay a foundation for their admission. App. 427. Trial counsel doubted that anyone but Walt could lay such a foundation. App. 427-28. The solicitor stated that Sandra was her rebuttal witness, and that Sandra had had possession of Walt's phone, had provided the messages to the solicitor, and could verify that the sending phone number was Petitioner's. App. 428. The trial court overruled trial counsel's objection to the solicitor's questions asking Petitioner to admit or deny that he sent the messages because the solicitor was allowed to ask Petitioner his alleged prior statements. App. 428-29. Once the jury returned, Petitioner denied sending multiple messages to Walt asking Walt to drop the charges against him. App. 431-33. Petitioner insisted that he cut off all ties with the Mucienkos after being arrested and did not send text messages to Walt at any time during or after 2013. App. 432-33. The photographs of the text messages were not admitted into evidence at trial. App. 5, 428. After the defense rested, the solicitor did not call any witnesses in reply. App. 463. On direct appeal, this Court found that trial counsel had not preserved the issue for appellate review. App. 618. The PCR court found that trial counsel's performance with respect to the text messages was reasonable because he objected to the solicitor's questions twice, but was overruled. App. 772.

The PCR court found that Petitioner had failed to prove that trial counsel could have done anything more to prevent the questions, and that Petitioner had done nothing more than offer conjecture that the outcome of trial would have been different had trial counsel raised some further objection. App. 772.

In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the applicant must prove that the performance of his lawyer was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler v. State*, 286 S.C. 441, 444-45, 334 S.E.2d 813, 815-16 (1985) (quoting *Strickland*). "The burden of rebutting this presumption rests squarely on the defendant, and it should go without saying that the absence of evidence cannot overcome it. In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (quotation omitted). Second, the deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for [the lawyer's] unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "[T]he defendant must show that [particular errors of counsel] actually had an adverse effect on the defense." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (quotation omitted).

Because this Court found that trial counsel failed to preserve the issue of the Walt texts for direct appellate review, the PCR court should have analyzed the prejudice prong of *Strickland* by considering the merits of Petitioner's argument about the impropriety of the solicitor's questions and whether Petitioner proved that the outcome of the appeal would have been different but for the lack of preservation. *See Milledge v. State*, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through the same lens that would be applied on appeal . . . "); *see also McHam v. State*, 404 S.C. 465, 474-82, 746 S.E.2d 41, 46-50 (2013) (holding the PCR court erred in finding counsel was not deficient in failing to preserve an issue for appellate review but agreeing with the PCR court that McHam failed to establish prejudiced because the Fourth Amendment claim failed on the merits), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 (2018).

Petitioner has failed to prove that he would have been successful on appeal had trial counsel preserved the issue of the solicitor's questions about the Walt texts because Petitioner has not proven that the solicitor lacked a good faith basis for asking the questions. A solicitor can question a defendant about his past conduct if he has a good faith basis for doing so. *See State v. McEachern*, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012) ("[O]ur courts have held that a cross-examiner must have a good faith factual basis before questioning a witness about his or her past conduct. Counsel should not be permitted to go on a fishing expedition, and merely asking a question that has no basis in fact may be prejudicial."). Sandra had given the texts to the solicitor, identified them as having been received on Walt's phone, and identified the sending number as Petitioner's. App. 428. Petitioner has not proven that Sandra did not do these things. While it is true that Walt denied at the PCR hearing that he had been exchanging texts with Petitioner during

the time in question, Walt's denial does not negate the good faith nature of the solicitor's questions. It can be true simultaneously that Sandra affirmed the truth of those details to the solicitor and that Walt denied them to the PCR court. The solicitor also had a reason to ask Petitioner about the texts. The questions about the Walt texts were responsive to Petitioner's testimony that he had cut off all contact with the Mucienkos, including Walt, after he had been arrested.

The questions led to no evidence prejudicial to the defense, despite, as the PCR court noted, Petitioner's conjecture that he suffered prejudice therefrom. The photographs that the solicitor was relying upon were not admitted into evidence. The solicitor did not call Sandra as a rebuttal witness to testify about the texts. The only evidence before the jury about the texts was Petitioner's testimony that he had not sent them and knew nothing of them. Petitioner is correct that the solicitor did not establish at trial that the texts were actually sent by Petitioner, but his point undermines his prejudice argument. *See id.* (finding that the issue of whether the solicitor improperly asked a witness if she had sold drugs to two other people without having a proper foundation for the question was unpreserved for appellate review, but noting anyway "that the mere asking of an improper question is not necessarily prejudicial, where no evidence is introduced as a result," and that the witness denied knowing either of the people to whom the solicitor's question referred); *State v. Benning*, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999) (while agreeing with the Benning that the solicitor's question of Benning was an attempt to pit him against the victim's mother, stating the principle that "[t]he mere asking of an improper question is not necessarily prejudicial, however, where no evidence is introduced as a result."); *Gainer v. Tyner*, 259 S.C. 629, 631-32, 193 S.E.2d 525, 526-27 (1972) (finding that, even if a questioned asked of a party on cross-examination was improper, the witness answered that she did not know the answer to the

questioned posed, and rejecting the plaintiff's argument that "there mere asking of the question resulted in prejudice").

Furthermore, the trial court's instructions to the jury ensured that the jury did not consider the solicitor's questions. During its preliminary remarks, the trial court said, "Evidence consists of two sources. The first is by way of sworn witness testimony. The second source of evidence is by way of exhibit. . . . Now, those are the only two things, typically, that you can use to determine what the facts are." App. 36. During its jury charge, the trial court instructed the jury that the lawyer's statements were not evidence, and that testimony and exhibits were. App. 498. The trial court's instructions insulated Petitioner from any harm from the questions. *See Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267, n.1 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice.").

In his closing, trial counsel argued that the victim, the victim's family members, the victim's friend, and Rachel had reasons to falsely accuse Petitioner. App. 472-79. Trial counsel argued that the jury should be able to discern from their testimony that they had been lying. App. 480-81. Trial counsel argued that the investigating officers had done a sloppy job in investigating the victim's allegations, and that a thorough investigation would have made it more difficult for the victim and those around her to create a false but coherent narrative. App. 479-83. Trial counsel argued that the prosecution had not met its burden of proof with respect to the "discussion about texts and phones," because the officers had not gotten phones or phone records. App. 483. In response, the solicitor mentioned in her closing that, among other things, Petitioner denied sending the messages to Walt, and argued that Petitioner was motivated to make false denials. App. 494-

95. In direct response to trial counsel's arguments, the solicitor argued that Petitioner was "the only person in this with something to gain or lose." App. 495. The solicitor confined her argument to evidence in the record because she accurately stated that Petitioner had denied sending the Walt texts, and she did not say that there was any other evidence supporting the contention that Petitioner had actually sent them.

B. Petitioner has failed to prove that trial counsel was constitutionally ineffective with regard to the solicitor's cross-examination of Petitioner about text messages he allegedly sent to the victim's sister because the evidence was properly authenticated and because the solicitor had a good faith basis for asking questions about the messages.

During the prosecution's case-in-chief, the solicitor offered Jamie Mucienko ("Jamie"), the victim's elder sister, as a witness. App. 94-129. Jamie had been friends with Rachel before Rachel and Petitioner were ever been married, and she met Petitioner when he and Rachel visited her home in Florida with the Mucienkos. App. 96-97. She testified that, when she moved back to her parents' home from Florida, she began to suspect that Petitioner was in an inappropriate relationship with the victim, so she tried to win Petitioner's trust in the hope that he would disclose the details of that relationship. App. 98-100. She testified that she exchanged text messages ("the Jamie texts") with Petitioner "on numerous occasions." App. 100-01. Trial counsel objected and asked to be heard outside the presence of the jury, at which point he argued that the contents of the messages were hearsay and that the solicitor had not laid a proper foundation that Petitioner was the author of the messages. App. 101-02. Trial counsel stated that he had received the messages from the solicitor on the previous afternoon and had given them to Petitioner to review that night. App. 102. The solicitor stated that she had turned the messages over to trial counsel as soon as she received them. App. 102. She argued that the admission of the statements would not violate the rule against hearsay and that Jamie could lay a foundation for the messages by testifying about them and that the photocopy of the messages did not need to be introduced. App. 102-03. The trial

court asked the solicitor to proffer evidence about the phone number that sent the messages. App. 103.

Outside the jury's presence, Jamie affirmed that she had had Petitioner's phone number saved in her phone in September and October of 2012, that she had labeled the contact information with Petitioner's name, that her text message conversations with Petitioner "would appear as" Petitioner on her phone, and that the messages she had shared with the solicitor came from Petitioner. App. 104. She testified that the phone she used at the time was no longer in service and that she had used her iPad to take the screenshots of the messages in order to preserve them. App. 104-05.[2] She affirmed that the photocopy was a "true and accurate picture[] of the texts between [her] and [Petitioner]." App. 105. The trial court overruled trial counsel's objection, and the jury returned to the courtroom. App. 105-06. Jamie then testified that: she and Petitioner had exchanged phone numbers when she moved back to her parents' home, she and Petitioner had sent text messages to each other, Petitioner referred to her in text messages as his sister, Petitioner sent a message to her that said that he loved the victim the most out of all of the Mucienkos, that she preserved her messages with Petitioner by taking a photograph of them using her iPad, and that she shared those messages with the solicitor only on the day before trial began. App. 106-11. Referring to the photographs to some extent in order to refresh her recollection, Jamie testified about the content of the messages: Petitioner referred to the victim as "[his] beautiful future wife"; during a time when the victim's parents prevented any contact between the victim and Petitioner, Petitioner said that he missed the victim the most out of all the Mucienkos; Petitioner told her that she could not go to a concert with him, the victim, and Petitioner's parents because he had only

[2] Jamie also testified later that she had no longer had or used the phone that she had been using at the time that she received the messages from Petitioner. App. 110.

four tickets; Petitioner shared his feelings toward the victim; Petitioner admitted that he was the reason that the victim's parents took her phone away from her; and Petitioner said the Mucienkos would regret their treatment of the victim "when she's gone." App. 112-16. Jamie also agreed with trial counsel's characterization of the messages as Petitioner's saying that he loved the victim the best and wanted to marry her. App. 123. Jamie testified that Petitioner made verbal statements to her that were of the same general nature as the aforementioned messages, and included statements from Petitioner that "[h]e can't ever be with [the victim]," that the Mucienkos were jealous of the victim, and that he was apologetic "for everything." App. 107-08, 116, 118. Trial counsel cross-examined Jamie about the messages, asking if she were really testifying that she could have gained Petitioner's confidence to such an extent that he would send messages that included admissions of guilt to her, and questioning her about the reason that she waited for so long to share the messages with anyone. App. 124-28. The photocopy of the messages to which Jamie referred was not admitted into evidence at trial.

The "requirement of authentication" is a condition precedent to the admissibility of a piece of evidence. Rule 901(a), SCRE. But the burden of authentication "is not high and requires only that the proponent offer a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." *Berry v. Spang*, 433 S.C. 1, 10-11, 855 S.E.2d 309, 314-15 (Ct. App. 2021) (quotation omitted). A party offering evidence does not have to "rule out any possibility that the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities." *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019), *aff'd as modified, State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020). Once a trial court makes a prima facie showing that the "true author" of some piece of evidence is who the proponent claims, it is for the jury to determine if it will accept "the evidence as genuine and, if so, what weight it carries."

Id. A text message bears no heavier a burden of authentication than does any other form of writing. *See id.* at 231, 830 S.E.2d at 714-15 (stating that the requirement of authentication does not apply differently based upon the form of the writing that is being offered).

Petitioner has not proven that the PCR court's finding that Petitioner did not satisfy the prejudice prong of *Strickland* because he has failed to prove that, even if trial counsel had preserved the issue of the Jamie texts for direct appellate review, the outcome of the appeal would have been different. The photocopy of the texts, though it was not admitted into evidence at trial, and the content thereof, was properly authenticated by Jamie's testimony. A writing can be authenticated "by testimony from a person who sent or received the writing." *Id.* at 231, 830 S.E.2d at 715. Jamie testified that she exchanged numbers with Petitioner and carried on conversations with him by text; she identified the texts in question as those which she had received from Petitioner, from whose phone the messages were sent. Petitioner himself identified the receiving phone, Jamie's phone, as a "contract phone" that Jamie and her brother shared. App. 437-38. Petitioner testified that he knew details about Jamie's phone. App. 438. Additionally, the distinctive characteristics of the texts authenticated them. This Court approves of the use of circumstantial evidence to authenticate writing. *See id.* at 232, 830 S.E.2d at 715 (pointing out that South Carolina law has "long endorsed authentication by circumstantial proof" and recognizing that "courts are growing more comfortable with using circumstantial evidence to authenticate social media content"). The author of the texts referred to Jamie and the victim using phrases or descriptions that Petitioner used to refer to them. The author referred to events or situations that corresponded with events occurring in Petitioner's and the Mucienkos' lives. The author sent the texts during the time frame in which the victim alleged that Petitioner was pursuing a sexual relationship with her. The author made statements about events and the Mucienkos that

corresponded with Jamie's testimony about similar statements that Petitioner had made to her verbally. Petitioner basically conceded that the content in the texts was distinctive and related to events in his life when he testified that anyone could have falsely sent or created the texts while pretending to be him because he testified that "everyone knew about [his] life" because people spread information about him to others. App. 438-39. The content in the texts was distinctive enough that a reasonable jury could have determined that Petitioner sent them to Jamie. The solicitor could have had the photocopy of the texts admitted if she had tried to do so.

Petitioner also attacks Jamie's credibility, arguing that it was clear that Petitioner did not actually send the texts. Supp. App. 15-36. Petitioner testified that he did not invite the victim to a concert, although he admitted that there had been "a discussion" about a concert. App. 420-21. He denied that he had been in a sexual relationship with the victim, and testified that he treated her as if she were his sister. App. 422. At one point, when the solicitor was asking Petitioner if he had sent a text to Jamie about his seeing her brother and that Petitioner loved him like a brother, Petitioner corrected the solicitor about her description of the text, testifying, "Past tense. Not in that text." App. 436-37. Although Petitioner immediately denied that he had been texting with Jamie at all, his testimony indicates that he was correcting the solicitor about what he actually texted to Jamie and, when he realized that he was implicitly admitting that he had been texting with her, switched back to the general denial that he had never texted with Jamie. Petitioner asserts that Jamie's testimony must have been false because there are alleged "abnormalities" on the photocopy. Brief of Petitioner at 7. Petitioner thinks that the difference between the time stamps on the text block of each of the texts and the time stamp at the top of the phone screen as shown at the top of each photocopy page is significant, but the typical phone user would recognize that the number in the text block shows the time at which the text was sent or received and the number at

the top of each page shows the time at which the photograph or screenshot was taken. Supp. App. 15-36. That time difference perfectly corroborates Jamie's explanation for the process that she used to preserve the texts. Petitioner's assertion about the significance of the difference aside, his arguments that the solicitor's turning the photocopy over to trial counsel on the day before trial constituted a violation of the solicitor's discovery obligations and prevented Petitioner from noticing the difference earlier should be rejected outright. The solicitor's statements to the trial court and Jamie's testimony prove that Jamie disclosed the existence of the photocopy of the texts to the solicitor right before trial and that the solicitor promptly delivered the same to trial counsel. That last-minute disclosure did no injustice to Petitioner because even the most casual of reviews of the photocopy reveals the difference between the times that Petitioner has identified. Petitioner's arguments concern the alleged lack of credibility in Jamie's testimony and the low weight that Petitioner believes the jury should have given her and the texts, but those are arguments for a jury to consider, not arguments that would go to the admissibility of the evidence.

The photocopy of the messages, and the content of the messages, was properly authenticated by Jamie's testimony and the distinctive content of the messages. The solicitor, therefore, had a good faith basis for her cross-examination of Petitioner. The trial court did not abuse its discretion by allowing the solicitor to ask those questions.

C. Petitioner incorrectly asserts that the solicitor cross-examined him about social media messages alleged sent to a minor who did not testify at trial; regardless, Petitioner has not proven that trial counsel should have objected to the solicitor's questions about a Facebook profile under the name "Jay Fowler" or that Petitioner suffered any resulting prejudice.

Petitioner argues that trial counsel should have objected to the solicitor's cross-examination of him about social media messages ("the Fowler messages") that he allegedly sent to a minor who did not testify at trial on the bases that the solicitor did not have a good faith basis for asking the questions, that the questions were irrelevant, and that the evidence constituted improper character

evidence.[3] When cross-examining Petitioner, the solicitor asked Petitioner if he knew Jennifer Anglin and Anglin's daughter. App. 444. Petitioner answered that he knew of Anglin, but denied that he had ever been to Anglin's home and testified that he did "[n]ot really" know of Anglin's daughter, whom the solicitor alleged was a twelve-year-old girl; when asked if he sent a friend request on Facebook to Anglin's daughter, Petitioner answered, "Not really." App. 444. Petitioner testified that he did not know Anglin's daughter, and did not know if "she's a Facebook friend or whatever. You can be anybody on Facebook. I don't know." App. 445. He testified that he did not send a friend request to Anglin's daughter "to [his] knowledge . . . ." App. 445. He denied that he had created a Facebook profile under the user name of "Jay Fowler" ("the Fowler profile") in order to send a friend request to the girl. App. 445. The solicitor never asked Petitioner about any messages sent from the Fowler profile to Anglin's daughter. The solicitor did not return to the topic during her questioning, nor did she seek to introduce any such messages into evidence.

At the PCR hearing, Applicant testified that he knew Anglin's daughter "[v]aguely" because his ex-fiancée was Anglin's sister-in-law. App. 669-70. Applicant denied that the Fowler profile was his. App. 670. Referring to Applicant's exhibit three, he testified that the solicitor had asked him about the messages ("the Fowler messages") at trial, which were sent from the Fowler profile to Anglin's daughter. App. 669; Supp. App. 37-66. He testified that Anglin's daughter was fourteen-years old, which presumably was a reference to her age at the time of the PCR hearing. App. 670. Trial counsel testified that he had not seen the Fowler messages before he testified at the PCR hearing, he denied that he had received the messages in discovery, and he denied that the solicitor had represented to him that she had a good faith basis for believing that Petitioner was

[3] The PCR court declined to address this issue after Petitioner brought the omission to its attention through the motion to alter or amend the judgment. App. 771-72, 783-84, 793-95.

the author of the messages. App. 724. He testified that it was his understanding from a previous ruling from the trial court that the solicitor could question Petitioner about the messages and would be stuck with whatever answer Petitioner gave. App. 724-25. Trial counsel agreed with Petitioner that the solicitor had cross-examined him about the messages in order to create a belief in the jurors' minds that Petitioner had been trying to talk to Anglin's daughter. App. 725-26.

As an initial matter, Petitioner's assertions that he was "cross-examined about" the messages is an inaccurate characterization of the record. Brief of Petitioner at 11. As already noted, the solicitor asked Petitioner if he knew Anglin's daughter, had created the Fowler profile, and had sent a friend request from that profile to the girl, but she never asked him about messages. Petitioner argues that the content of the messages imply that Petitioner was trying to solicitor sex from a minor while out on bond for the underlying crimes, but the jury never heard or saw the messages or was made aware that any such messages existed. Petitioner argues that the solicitor lacked a good faith basis "for asking about [the] messages from a 'Jay Fowler' and a good faith basis to believe that they were from" Petitioner, but the solicitor did not ask about the messages; Petitioner argues that the messages' implication that Petitioner was conversing inappropriately with a twelve-year-old girl is not relevant, but the jury did not hear of the messages' existence or content, and thus, could not have picked up on any such of implication; and Petitioner argues that "[t]his evidence," i.e., the messages, constituted improper character evidence, but the jury did not know of the messages. Brief of Petitioner at 12. Petitioner's entire argument concerns the existence and content of the messages and asserts, or at least assumes, that the jury knew of the same. No possible harm could have come to Petitioner's defense from evidence that was not admitted, introduced, or even mentioned during the trial.

Petitioner has failed to prove that trial counsel's performance was deficient due to trial counsel's not objecting to the solicitor's questions about the Fowler profile. The solicitor did not testify at the PCR hearing and, as a consequence, her basis for asking about the profile is not known, but the solicitor's questions surely indicate that she had some reason to think that Petitioner was behind the Fowler profile; regardless, details of the messages are clues for this Court that Petitioner was behind them. For example, the author wrote that he was home alone because "Angle" [sic] was elsewhere, that he and others had been planning to go to the Anglin's daughter's home until "angel" changed her mind, that he was not allowed to be around the girl and others alone on "Angels orders" due to the fact that "Angel" was "jealous," that he wanted to know if the girl was getting dressed up for a visit for the benefit for him or for "angel," and that he was coming to visit the girl while he was being accompanied by "Angel"; the girl asked the author why he would want to date her when he was "with angel." Supp. App. 37-40, 47, 61, 65-66. "Angel" could easily be a nickname for Angelina Campbell, to whom Petitioner was engaged at the time of trial. App. 445. Petitioner testified at the PCR hearing that Campbell had previously been his fiancée, and that she was the mother of his third child. App. 682, 694-95. The messages' author wrote that he was not allowed to be on his own around "females," which undoubtedly included the twelve-year-old girl, because "Angel" was jealous, which is similar to Jamie's testimony that Petitioner told her that the Mucienkos were jealous of the victim. App. 116; Supp. App. 39-40. The messages' author told the girl that he wanted to "spoil" her, which matched what the victim said that Petitioner told her that he wanted to do to her. App. 190-92. Supp. App. 41. The author said that he was going to buy a Halloween costume for the girl, which is similar to the evidence that Petitioner bought gifts for the victim and her friend, both of whom were minors at the time. App. 73, 99, 252-53, 288, 293, 422; Supp. App. 40-41. The author wrote that he liked the girl because, among other

reasons, she was not "about drama or telling on people," which, coupled with the timing of the messages and the events going on in Petitioner's life at the time, sounds like something Petitioner would say if he wanted to continue his sexual advances on children while his criminal case was pending without incurring further detection. Supp. App. 42. The author referenced his being older than the victim and inquired into whether the age difference bothered the girl; when she asked what he thought people would say about their being in a relationship despite the age difference, the author wrote, "Well I wouldnt let know one no right now." Supp. App. 44-48, 50. Considering the criminal trouble that Petitioner was facing at the time, he would likely have had the same concerns about it being known publicly that he was engaged in a romantic relationship with yet another minor female. The girl answered, "Oh yea I knew that," which would also fit Petitioner's situation because, as Petitioner testified, it was known generally that he was facing sexual abuse allegations from the victim at the time. Supp. App. 48. If the solicitor believed that the circumstances surrounding the Fowler messages resembled the details of Petitioner's behavior with respect to the victim and her friend, she did so justifiably, and would have therefore had a good faith basis for asking Petitioner if he was behind the Fowler profile.

Petitioner has failed to prove that, even if trial counsel had objected to the solicitor's questions about the Fowler profile, there is a reasonable likelihood that the outcome of trial would have been different. The Fowler messages were not admitted, so the jury's knowledge of the Fowler profile was limited to the facts that Petitioner denied that he was behind the profile and denied that he sent a Facebook friend request to Anglin's daughter. As trial counsel testified, the solicitor was "stuck with" Petitioner's denial. App. 724-25. The trial court told the jury preliminarily that there were only two sources of evidence: witness testimony and exhibits. App. 36. The trial court later charged the jury that nothing but testimony and exhibits, even the lawyers'

statements, were evidence. App. 498. Although this second charge specifically refers to the parties' closing arguments, it would apply implicitly to the lawyers' questions for the witnesses. The jury heard testimony directly from the victim about Petitioner's actions, and heard corroborating testimony from the victim's friend and family members and from Rachel. The solicitor's few questions about the Fowler profile and Petitioner's denials had negligible effect on the jury's verdict, if any.

D. Petitioner did not preserve for this Court's review his claim that trial counsel was constitutionally ineffective for not objecting to the solicitor's cross-examination of him about social media messages that the prosecution's Rule 404(b) witness had received from the "Jay Fowler" Facebook profile; notwithstanding the lack of preservation, Petitioner's claim fails on the merits.

H. Barton ("Barton"), the victim's friend, testified at trial about the criminal sexual acts that Petitioner committed against her while she was a minor, the details of which were shockingly similar to his sexual acts against the victim. App. 306-27. The solicitor offered Barton's testimony as a common scheme or plan exception. App. 236, 240. After trial counsel objected and asked for precedential case law to be overturned, the solicitor proffered Barton's testimony. App. 243-56. The trial court heard argument from the parties and overruled trial counsel's objection. App. 256-67. When the solicitor was cross-examining Petitioner, she asked him about his relationship with Barton, and Petitioner answered that he did not know her, that he had met her on about two occasions, and that he had never "hung out" with her. App. 454. The solicitor asked if Petitioner had sat in the car with Barton and talked about music, which was something that Barton had already testified about. App. 310, 454. The solicitor asked if Petitioner had sent a message to Barton on Facebook ("the Barton message") two weeks previously asking for her to call him, and Petitioner denied that he had done so. App. 454. The solicitor asked if Petitioner had sent the message using the Fowler profile, and Petitioner answered, "Maybe not. Prove that, ma'am." App. 454-55. The

solicitor did not seek to introduce the messages to Barton or call Barton as a reply witness to testify about the matter.

The PCR court's order of dismissal noted that Petitioner alleged that trial counsel had not objected to the solicitor's questions "regarding text messages or Facebook messages," but apparently did not specifically address the Barton messages. App. 771-72. Petitioner's motion to alter or amend the judgment did not ask the PCR court to make findings regarding Petitioner's arguments as to the Barton messages. App. 782-88. Petitioner argues now that his motion highlighted the PCR court's failure to address the claim. However, that argument is incorrect because Petitioner addressed in his motion, on the pages he cites in his Brief, only the solicitor's "cross examination . . . concerning the daughter of Jennifer Anglin," and even cited to pages of the trial transcript on which the solicitor asked questions about Anglin's daughter but not any questions about the Barton message. App. 783. Petitioner asked the PCR court to make findings to address other claims that were properly raised by not addressed in the order of dismissal, but he did not do so with regard to this claim about the Barton message. This Court should decline to address issue now.

Notwithstanding Petitioner's failure to preserve this issue for this Court's review, his claim fails on the merits. Petitioner's argument that trial counsel had a duty to object to the solicitor's questions on the ground of the lack of authentication of the Barton message is incorrect because the requirement of authentication applies to exhibits, not testimony. "The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a) (emphasis added); *see, e.g., State v. Hall,* Op. No. 5919 (S.C. Ct. App. filed June 22, 2022) (Howard Adv. Sh. No. 22 at 34) (finding that the trial court's error in not admitting Snapchat video messages was harmless). If the solicitor had tried to introduce

a photocopy of the Barton message while cross-examining Petitioner, the message would not have been admissible due to the lack of authentication, absent confirmation of authenticity from Petitioner, but because the solicitor did not try to do so, the requirement of authentication was not triggered by the questions.

Additionally, this Court has already determined that Barton's testimony was properly admitted under the common scheme or plan exception to the prohibition on evidence of prior bad acts. This Court found on direct appeal that the trial court did not abuse its discretion in admitting the testimony. App. 618. This Court's opinion indicates that the Court found that "the vast majority of [Barton's] specific allegations directly aligned" with the victim's testimony. App. 618 (quotation omitted). Petitioner denied at trial that he had engaged in sexual intercourse with Barton, disputing her testimony. App. 421. The solicitor's question about the Barton message was a follow-up to that earlier testimony, and as Petitioner denied communicating with Barton, the solicitor was entitled to question Petitioner about his alleged post-arrest communications with Barton. App. 419-21.

E. Petitioner has failed to prove that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel objected more thoroughly to the solicitor's cross-examination of Petitioner about a no-contact order.

While cross-examining Petitioner, the solicitor elicited testimony from him that he was engaged to Campbell and that Campbell was sitting in the courtroom. App. 445-46. The solicitor asked Petitioner if there was a no-contact order in place between him and Campbell due to an "active charge with her," and then essentially engaged in a back-and-forth dispute with Campbell over whether that order was still in effect. App. 446-47. Eventually, trial counsel objected to the solicitor's engaging in argument with Petitioner, and the trial court sustained the objection. The solicitor then asked again if Petitioner had an "active charge with [Campbell]," and Petitioner answered that he was apologetic if he did, but that he was not sure because he thought that the

charge was being dismissed due to Campbell's testimony or statement. App. 447. The solicitor did not question Petitioner about the matter further. The PCR court correctly found that trial counsel objected to questions about a criminal charge concerning Petitioner's fiancée, even if Petitioner wishes that trial counsel's objection had been for a different reason than the one given at trial. App. 772, 784.

Petitioner has not proven that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected more thoroughly or differently to the solicitor's questions.[4] While the exchange admittedly did communicate the solicitor's belief about the lack of credibility in Petitioner's testimony that there was not a no-contact order, Petitioner's credibility was already thoroughly rebutted through the other evidence presented at trial. Petitioner, by that point, was already at odds with the testimony given by Sandra, Jamie, Rachel, the victim, and Barton. Petitioner testified that all involved were lying and that he was the victim of false accusations, as he had been for his entire life. App. 439. Trial closing's closing argument was that "these people got together and they made this up . . ." App. 479. The jury's determination about the credibility of Petitioner's testimony did not depend on the brief exchange about a no-contact order between him and Campbell. *See Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) (finding that the post-conviction relief applicant was prejudiced by his lawyer's failure to object to the solicitor's vouching for a witness because the witness was the prosecution's key witness and the jury could have convicted the applicant only if it had believed that that witness was telling the truth, and the witness's credibility was questionable).

[4] The PCR court did not make any findings as to the prejudice prong of *Strickland* with respect to this claim.

F. This Court should deny Petitioner's request that South Carolina begin applying the theory of cumulative errors because Petitioner failed to preserve the argument for appellate review; notwithstanding the lack of preservation, the theory deviates from the correct prejudice analysis prescribed by *Strickland*; furthermore, even if the Court applies the theory, Petitioner has not proven that the theory entitles him to post-conviction relief.

This Court should not consider Petitioner's argument about the theory of cumulative errors. Petitioner did not specifically argue at the PCR hearing that our South Carolina courts should adopt the theory and apply it in his case. The PCR court's order of dismissal did not address the theory at all. App. 770-80. Petitioner did not ask the PCR court to make any findings regarding the theory in his motion to alter or amend the judgment. App. 782-88. Petitioner's argument is not properly before this Court now. Notwithstanding Petitioner's failure to preserve the issue, this Court should reject Petitioner's argument because this Court is required to consider the prejudice of the alleged errors individually and because, even if the theory of cumulative errors is applied, Petitioner has failed to prove that trial counsel committed multiple errors.

"Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. "Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. A court that is reviewing an ineffectiveness claim is required to determine" whether the specified errors resulted in the required prejudice. . . ." *Strickland*, 466 U.S. at 694. The reviewing court is to consider all of the evidence before the jury because each error on the defense lawyer's part likely had varying degrees of effect on the jury's decision. *Strickland*, 466 U.S. at 695-96.

Our Supreme Court has not decided whether a PCR court can analyze an applicant's arguments as to the prejudice prong of *Strickland* cumulatively. *See Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (rejecting the post-conviction relief applicant's argument

that the PCR court erred in not conducting a cumulative error analysis because there was only a single error for the PCR court to consider), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 ("Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina.")) Instead, as the Court put it recently, "[i]n determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's errors had on the outcome of trial." *Smalls*, at 188, 810 S.E.2d at 843 (citing *Strickland*). This Court should continue to do as our Supreme Court has done in analyzing prejudice this way, as such is required by *Strickland*, whose language suggests a prejudice analysis that takes in all of the evidence but is focused solely on the corresponding alleged deficiency in defense counsel's performance.

The only authority that Petitioner cites in support of his request for an adoption of the cumulative effect theory is *Blue v. State*, 19 So. 11 (Ala. 1944). Petitioner's reliance is misplaced, however, as that case was decided before the United States Supreme Court decided *Strickland*, and concerned not post-conviction relief, but whether multiple, improper statements made by the prosecutor during cross-examination and closing argument inject[ed] the poison of bias and prejudice into the minds of the jury" and "created an atmosphere of bias and prejudice which no remarks by the [trial] court could eradicate." *Blue*, at 16-17.

Petitioner argues that it is only logical that the theory should be recognized. It that were really the case, though, courts would be more in agreement about the theory than they are. For example, it is not a settled question among the federal Courts of Appeal whether the theory of cumulative errors can be applied when ineffective assistance of counsel claims are being considered. *Compare United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021) ("[W]e have long held that the prejudice inquiry under *Strickland* can be a cumulative one as to the effect of all of

counsel's slipups that satisfy the deficient-performance prong—meaning that a defendant need show it more likely than not that the several blunders, even if not prejudicial on their own, prejudiced him when take together."), *with Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998) (holding "that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively . . . .").

Even if this Court decides now for the first time to apply the cumulative effect theory in post-conviction relief cases, it should find that the theory affords no aid to Petitioner. The theory, as has been applied in other contexts in South Carolina, affords relief to a party when a combination of errors that are insignificant by themselves prevents him from receiving a fair trial and "the cumulative effect of the errors affects the outcome of the trial." *State v. Daise*, 421 S.C. 442, 466, 807 S.E.2d 710, 722 (Ct. App. 2017) (quotation omitted). In order to merit the reversal of his conviction based on the doctrine, an appellant must demonstrate "more than error." *McEachern*, at 149, 731 S.E.2d at 616 (citation omitted). The errors must adversely affect the appellant's right to a fair trial, not merely deprive him of a trial that is perfect. *Id.* First, as argued throughout this Brief, Petitioner has not proven that trial counsel's performance was deficient in any of the particulars identified by Petitioner. Second, Petitioner has not proven that he suffered any prejudice from those alleged deficiencies. Finally, Petitioner has not proven that the alleged instances of prejudice, which would be constitutionally insignificant in and of themselves for the purpose of a Sixth Amendment inquiry, cumulate to create a reasonable likelihood that the outcome of trial would have been different but for the accumulated deficiencies.

II. Petitioner has failed to prove that trial counsel was constitutionally ineffective for not making an improper opinion testimony objection to a law enforcement officer's testimony because the testimony did not constitute an improper opinion and because Petitioner has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had the trial court sustained such an objection.

Robert J. Perry, an investigator with the Greenville County Sheriff's Office, testified at Petitioner's trial. App. 345. Inv. Perry was a detective in the special victims' unit at the Sheriff's Office, and was the investigator assigned to Petitioner's case. App. 345-46. Inv. Perry testified about the details of his investigation into the allegations against Petitioner. App. 346-56. In response to a question from the solicitor, Inv. Perry testified that he and three others had been assigned to investigate sex crimes involving minors whenever the special victims' unit was formed in 2011, and that he had conducted an investigation in "several hundred, probably over 500" of such cases since that time. App. 356-57. At that point, the following exchange occurred:

> Q: And in your experience investigating those cases, is – what we call delayed disclosure or the child coming forward much after the events have, actually, occurred, is that common or uncommon?
>
> A: Oh, yeah. It's such a rarity for me to see a case that a child has immediately told that it's like, you know, maybe one out of a hundred, you know. So that is a very common thing, very common.

App. 357. The solicitor then asked if a victim's delayed disclosure hampers Inv. Perry's ability to investigate, and Inv. Perry testified that it does because a delay between an act of abuse and the reporting of it makes "the gathering of physical evidence [] much more difficult." App. 357. When asked if there would be any "DNA or serological type evidence" considering the amount of time between the instances of sexual assault and the victim's disclosure, Inv. Perry terrified that such evidence was "gone." App. 358. Inv. Perry testified that he had not found any physical or digital evidence to support the victim's allegations, meaning that he had been unable to corroborate the victim's statement beyond confirming that Petitioner and the victim lived at specific locations at specific times, as the victim alleged. App. 357-59.

Petitioner is correct that the topic of the behavioral characteristics of sex abuse victims is one that is properly in the domain of expert testimony. *See State v. Makins*, 433 S.C. 494, 860 S.E.2d 666 (2021) (finding that the trial court did not err in ruling that a dual expert in the treatment of child trauma and child sexual abuse dynamics and as the minor victim's treating therapist did not improperly bolster the victim's credibility, not deviating from an earlier recognition of the expertise of child abuse assessment experts, but declining to retreat from an earlier warning that the use of dual experts runs the risk that the expert will vouch for the victim's credibility); *State v. Weaverling*, 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor." (citations omitted)). Petitioner's argument as to the deficiency prong of *Strickland* fails, however, because Inv. Perry's testimony did not concern the behavioral characteristics of sex abuse victims; instead, Inv. Perry's testimony was about his personal observations in many sexual abuse investigations that it is common for victims to delay disclosing the abuse and that the delay hampers law enforcement officers' ability to acquire evidence to corroborate the allegations. "[L]aw enforcement and other government officials are not permitted to offer opinions other than those that could otherwise be offered by lay witnesses. However, in limited circumstances, law enforcement officers are allowed to draw on their experiences while testifying. The dividing line that many courts have drawn—and that our supreme court appears to have adopted—is that officers may provide lay opinions based on their observations, experience and training, but may not provide lay opinions on such matters if they

did not either observe the events in questions or actively participating in the investigation." *State v. Ostrowski*, 435 S.C. 364, 385, 867 S.E.2d 269, 279-80 (Ct. App. 2021) (citations omitted).

"A common distinction between expert witnesses and lay witnesses is that most lay witnesses do not state 'opinions.' Even so, the evidentiary rules allow a lay witness to offer an opinion if certain criteria are met." *State v. Pickrell*, 435 S.C. 417, 443-44, 867 S.E.2d 465, 479 (Ct. App. 2021) (quotation omitted). The following rule applies whenever a lay witness is giving opinion testimony:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony of the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE.

Even if this Court finds that trial counsel should have objected to Inv. Perry's testimony on the ground that it constituted improper opinion testimony, Petitioner has still failed to prove the prejudice prong of *Strickland*. The only testimony that Petitioner offered before the PCR court as to prejudice was when he affirmed that he thought that Inv. Perry's testimony was prejudicial to him. App. 686. Other than this testimony, Petitioner offered no evidence or argument as to prejudice before the PCR court. In Petitioner's motion to alter or amend, the only argument Petitioner offered as to prejudice was that Inv. Perry's "testimony [] was prejudicial against [Petitioner]." App. 787. Petitioner now argues only that, if trial counsel had objected to the testimony, "[a]nother piece of inadmissible evidence would have been excluded," and that the testimony "helped advance the case for the State and was therefore prejudicial to [Petitioner]." Brief of Petitioner at 18-19. Petitioner has not proven that there is a reasonable "probability that, but for [the alleged] unprofessional error[], the result of the proceeding would have been different." *Cherry*, at 117-18, 386 S.E.2d at 625. He has not proven that the alleged error "actually had an

adverse effect on the defense." *Hill*, 474 U.S. at 58. All that Petitioner has done is assert that he suffered prejudice and hope that this Court would presume prejudice where none had been shown. Petitioner's failure to make any argument as to the prejudice prong alone should be fatal to his claim.

Regardless, such argument would have failed even if petitioner had made it. The victim was seventeen years old at the time of Petitioner's trial. App. 183. She testified that Petitioner once asked her, while his wife was putting Petitioner's baby to sleep, if she was a virgin, and said that he would "make love to [her] and spoil [her] for the rest of [her] life" if he was to take her virginity. App. 189. The victim testified that, as she had been thirteen years old at the time, the idea of being spoiled had appealed to her, and she affirmed that Petitioner's statement made her feel special, and affirmed that that conversation represented the start of Petitioner's sexual advances towards her. App. 190. She testified that, after the first time that Petitioner had intercourse with her, she thought that Petitioner cared for her, that Petitioner gave her material gifts, that Petitioner gave her lots of attention, that Petitioner told her not to tell anyone and that he would give her anything she wanted in exchange, that she enjoyed getting things from Petitioner, that she feared getting in trouble if she told anyone, and that she came to like Petitioner. App. 195-96, 293-96. She testified that, by the time that she was in the ninth grade and had had sexual intercourse with Petitioner on more than ten occasions, she thought of Petitioner as her boyfriend. App. 192-204. She denied that Petitioner had ever made specific threats in order her sexual compliance, but she testified about seeing Petitioner's temper and affirmed that her knowledge of Petitioner's temper made her more likely to give in when he pushed her to have intercourse. App. 210-13. She testified that Petitioner told her to tell her parents that she lost her virginity by using a tampon if her parents ever had her examined. App. 216-17. She testified that, after Petitioner separated from his wife, he told her that

she would start a new life with her and his child, that they would get married, and that they would live together forever, and that he encouraged her to get emancipated and told her negative things about her parents. App. 222-23, 301. She testified that she kept returning to Petitioner's home despite the sexual abuse because she was a social person and she liked Petitioner's child. App. 279. She testified that Petitioner isolated her from others by telling her that she "was his" and that she could not go places with other people because they "were bad, or they weren't good influences, or they weren't real friends," and that Petitioner told her that others she knew were expressing sexual interest in him. App. 281, 300, 302. She testified that she did not cut off contact with Petitioner despite the sexual abuse because she was scared, and that she did not want to have to answer questions about cutting off contact. App. 291-92.

The jury also heard evidence that Petitioner had been giving financial support to the victim's parents before the victim disclosed the sexual abuse, that Petitioner was possessive of the victim and had even given her a secret phone, and that others had noticed that Petitioner was giving gifts to the victim. App. 71, 73, 78, 85, 99, 109, 115. One of the victim's friends testified about Petitioner's sexual abuse of her, which began when she was fourteen years old. App. 306-313. The friend testified that Petitioner made her feel "special like [she] was going a good favor," and the details that she provided about the three times that Petitioner sexually abused her were similar to the victim's testimony about Petitioner's abuse of her. App. 313-16. She also testified that Petitioner told her "that he was going to go after [the victim] next" when she told Petitioner that she would no longer have sexual intercourse with him. App. 316-17.

Had trial counsel objected to Inv. Perry's testimony on the basis that it was improper opinion testimony, and the trial counsel had sustained that objection, the testimony of multiple witnesses would still have supplied the jury with all the evidence that it needed to understand the

reason that the victim delayed her disclosure, declined to cut off contact with Petitioner, and continued to give into Petitioner's sexual advances. The evidence demonstrated that Petitioner had made the victim feel special and appreciated, made the victim feel apprehensive about denying Petitioner's sexual requests, and caused the victim to feel somewhat isolated from others around her, among other things. The victim, seventeen years old by the time of trial, had been able to express those reasons all on her own without the need for testimony from an expert. Inv. Perry testified that delayed disclosure was common, but that testimony was dwarfed in prejudicial effect by the evidence highlighted above. Even if the jury had not heard Inv. Perry's brief testimony that delayed disclosure was common in the cases that he had investigated, it had ample evidence to lead it to conclude that the victim's explanations for not disclosing the sexual abuse right away were credible.

This Court should find that Petitioner has failed to prove that trial counsel was constitutionally ineffective for not objecting to Inv. Perry's reference to delayed disclosure because Petitioner has failed to prove that the testimony was objectionable as improper opinion testimony and because Petitioner has failed to prove that, even if the trial court had sustained an objection on the basis, there is a reasonable likelihood that the outcome of trial would have been different. This Court should deny relief to Petitioner as to this claim.

III. Petitioner has failed to prove that trial counsel was constitutionally ineffective for not raising a vouching or bolstering objection to testimony from a law enforcement officer because he has not proven that the testimony was improper, trial counsel had a valid strategic reason for not objecting to the pediatrician's testimony, and Petitioner has failed to satisfy the prejudice prong of *Strickland*.

Petitioner argues that the PCR court erred in finding that Petitioner failed to prove that trial counsel was constitutionally ineffective for not objecting to testimony from two witnesses that

constituted improper bolstering for the victim's credibility.[5] Petitioner alleges that certain testimony from a law enforcement witness and from a pediatrician served no other purpose than to communicate to the jury that the two witnesses believed that the victim's allegations against Petitioner were credible.[6]

A. Petitioner has failed to prove that there was any deficiency in plea counsel's performance with respect to the pediatrician because the pediatrician's testimony did not constitute improper bolstering and because, even if it did, trial counsel had a valid and strategic reason for not objecting to it.

Mary Fran Ratchford Croswell, a pediatrician working in the Greenville Health System's division of forensic pediatrics, child abuse, and neglect, was qualified at Petitioner's trial without objection as an expert in pediatric medicine and child abuse pediatrics. App. 329-32. Immediately after it qualified Dr. Croswell, the trial court explained the difference between an expert and a lay witness, but then said, "But expert witnesses and all other witnesses have this in common, they're [sic] credibility is determined entirely by you." App. 332-33. Dr. Croswell testified that she had conducted a sexual assault examination of the fifteen-year-old victim after the victim had been referred to her by law enforcement officers for a sexual abuse evaluation. App. 333, 336. Dr. Croswell explained that she took "a detailed medical history and history of any incident" from both the victim and her parents, performed a physical examination of the victim, and then made

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[5] Improper bolstering is something that one witness does with respect to another witness's credibility, while improper vouching is something that a prosecutor does with respect to a witness's credibility. *See State v. Geter*, 434 S.C. 557, 864 S.E.2d 569 (Ct. App. 2021).

[6] Petitioner did not explicitly raise this claim in his pro se application or his amended application, although he did raise a different argument in his amended application with respect to the pediatrician's testimony. App. 621-27, 634-43. The PCR court heard testimony about the claim. App. 686-87, 710-12, 728-29, 736-40. The PCR court did not explicitly make findings of fact or conclusions of law with respect to the claim in its order of dismissal. App. 770-80. It did, however, make findings about trial counsel's performance with respect to the pediatrician's testimony that are applicable to this claim. App. 773. Petitioner noted in his motion to alter or amend the judgment that the order of dismissal did not address the claim that trial counsel did not object to improper bolstering from the officer and the pediatrician. App. 786.

recommendations. App. 334. Dr. Croswell related the particulars of the changes in the victim's behavior as told to her by the victim's parents. App. 334. Dr. Croswell testified that this information "would support other history that was provided" to her so that she could form her diagnosis. App. 334-35. She testified that the victim told her that her abuser had performed oral sex on her and penetrated her vagina with his penis, which assisted her in making appropriate recommendations for sexually transmitted disease ("STD") tests. App. 335-36. Dr. Croswell visually inspected the victim's body and used a colposcope to help her "visualize the anogenital area" and photographically document her findings. App. 336. Dr. Croswell classified the examination as "normal," and testified that the victim "had normal hymenal tissue." App. 337. She did not see physical indications of trauma to the victims' hymenal tissue or vaginal canal. App. 337-38. She agreed with the solicitor that her findings would be "consistent with the allegations of sexual abuse" because medical studies show that 85 to 90 percent of children who have been sexually abused show no physical signs of the abuse. App. 338. She did not determine that any further medical treatment was needed "for sexual abuse," although she did have the victim undergo additional STD testing six months later and referred the victim for "appropriate mental health counseling." App. 338-39.

When being cross-examined by trial counsel, Dr. Croswell testified that her findings were consistent with the patient history that the victim provided to her, but also admitted that she "did not have physical findings specific for sexual abuse." App. 339. Dr. Croswell admitted twice that everything she recounted during her testimony had been supplied to her by the victim or the victim's parents. App. 339-40. She testified that normal physical exams have "repeatedly" been shown that they "can be consistent with the allegations that she made." App. 340. She testified that she was "not hesitant in saying that" the normal exam could also be consistent with their having

been no sexual abuse; however, she said that such a conclusion was contradictory to what the victim and her parents had told her. App. 340-41. She agreed that it was possible that a patient could lie when providing his or her history, but said that she accepts what a patient says to her as true because she is a doctor. App. 341. She agreed that she had elicited the patient history from the victim by questioning her using a sixteen-page, detailed report. App. 341-42. She agreed that she had testified on the solicitor's behalf on "numerous occasions." App. 343.

During his closing, trial counsel argued that Dr. Croswell's testimony provided no value to the jury because she "did a physical exam and she found nothing." App. 483. Trial counsel argued that the solicitor had called Dr. Croswell as a witness because the solicitor wanted the doctor to repeat the victim's allegations. App. 483-84. Trial counsel pointed out that Dr. Croswell initially testified that her findings were consistent with the victim's allegations of abuse, and that she admitted on cross-examination that her findings were also consistent with the victim's not having been abused. App. 484. Trial counsel argued that "they" wanted the jury to find Petitioner guilty, and said that Dr. Croswell "knew before she did that physical exam that they weren't going to find anything. And she found nothing to indicate that there was anything going on." App. 484.

Petitioner testified at the hearing before the PCR court that trial counsel had not objected when the pediatrician testified that her normal examination of the victim did not exclude sexual abuse and that she had referred the victim for mental health counselling. App. 686. Petitioner opined that he did not think that the fact that the pediatrician referred the victim for counselling was relevant at trial. App. 687.

Petitioner's argument that trial counsel performed deficiently by not raising a vouching objection to Dr. Croswell's testimony fails because the witness's testimony did not constitute improper vouching or bolstering. "The assessment of witness credibility is within the exclusive

province of the jury. While experts can testify to their opinion, they are precluded from offering an opinion about the credibility of another witness. Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. A witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Makins*, at 501-02, 860 S.E.2d at 670-71. "[W]hen the expert witness gives no indication about the victim's veracity, it does not amount to bolstering." *State v. Perry*, 420 S.C. 643, 663, 803 S.E.2d 899, 910 (Ct. App. 2017), *overruled on other grounds by State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). Petitioner wants this Court to consider only a single sentence from Dr. Croswell's testimony. But that sentence should not be "considered in isolation." *Perry*, at 665, 803 S.E.2d at 911. Arguably, that sentence, when Dr. Croswell testified that "[her] patient provided [her] a history of sexual abuse, and her exam was consistent with the history provided," taken alone, could be interpreted to mean that Dr. Croswell believed that the victim could have been sexually abused despite the normal examination. App. 339.

However, Dr. Croswell's testimony, considered in its entirety, was not a comment on the victim's credibility. Trial counsel elicited testimony from Dr. Croswell that her understanding of the victim's patient history, and the sexual abuse allegations, were based entirely on what the victim and the victim's parents told her, that it was possible that the victim and her parents had been lying to her when relaying the victim's history, that she takes at face value the patient history that each of her patients provides to her, and—perhaps most importantly—that she found no physical indications that the victim had suffered sexual abuse, which she admitted could mean that there had been no such abuse. Dr. Croswell even testified when being questioned by the solicitor that she determined based on her examination that the victim did not require any medical treatment, and it would be a bridge too far for this Court to conclude that Dr. Croswell's counselling referral

for the victim meant that she believed that the victim's allegations were true. *See Makins*, at 503-04, 860 S.E.2d at 671-72 (disagreeing with this Court's conclusion that a treating expert's affirmation that she had provided treatment to a victim constituted improper bolstering because the affirmation, without more, did not convey to the jury that the expert believed the victim's allegations to be true). Petitioner's contention that Dr. Croswell based a finding of sexual abuse "solely on the interview of the minor child" is a misrepresentation of Dr. Croswell's testimony, which did not include a finding from Dr. Croswell that the victim had been sexually abused. Brief of Petitioner at 20. Dr. Croswell was not vouching for the victim's credibility because she admitted that she accepts as true every patient history that one of her patients provides and that there was no medical evidence that the victim had been sexually abused. The "most likely interpretation" of Dr. Croswell's testimony, and really the only one that is possible when her testimony is considered on the whole, is that Dr. Croswell found no physical evidence during her examination that would prove or disprove the truth of the victim's allegations.[7] *Perry*, at 665, 803 S.E.2d at 911.

Even if Dr. Croswell improperly vouched for the victim's credibility, trial counsel had a valid and strategic reason for not objecting to it. Trial counsel testified before the PCR court that he had heard similar testimony from Dr. Croswell in past trials, that he did not think that Dr. Croswell's testimony was objectionable, and he did not want the jury to think that he was trying to hide something from it in the event that the trial court overruled an objection from him, which he felt would be the likely ruling in that situation. App. 711-12. Trial counsel testified that he does

[7] Petitioner has not proven that Dr. Croswell's testimony that the normal exam can be consistent with sexual abuse is false. Dr. Croswell's testimony on that point was a blanket statement that she based upon research that she said applied generally. *See State v. Acker*, 435 S.C. 716, 733, 869 S.E.2d 873, 882 (Ct. App. 2022) ("Nor did [an expert's] testimony about false denials [from child sexual abuse victims] being more common than false allegations improperly bolster [the minor victim's] credibility.").

not always object to evidence that could be objectionable because, in some cases, if the evidence is not very harmful to the defense, he does not want the jury to think that he is trying to hide something. App. 710-11. The PCR court found that trial counsel's strategy was to not object to testimony from Dr. Croswell because trial counsel thought that he could "handle it" when he cross-examined her, and concluded that trial counsel's strategy was reasonable. App. 773. The PCR court's finding was correct; furthermore, trial counsel did "handle" the situation, and was able to elicit admissions from Dr. Croswell that essentially negated any support to the solicitor's case that the testimony may have had.

B. Petitioner has failed to prove that there was any deficiency in plea counsel's performance with respect to the law enforcement officer because the officer's testimony did not constitute improper bolstering and because Petitioner has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected.

"[T]he testimony of a witness is improper bolstering if: (1) the witness directly states an opinion about the other witness's credibility; (2) the sole purpose of the testimony is to convey the witness's opinion about the other witness's credibility; or (3) there is no way to interpret the testimony other than to mean the witness believes the other witness is telling the truth." *Geter*, at 569, 864 S.E.2d at 575 (quoting *Chappell v. State*, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019)).

Inv. Perry, while testifying about the course of his investigation into the victim's allegations, described his interview of the victim, which took place at her school. App. 348. Inv. Perry testified that, in that interview, the victim disclosed that she had been subjected to multiple sexual assaults and gave information about the times and locations of those assaults. App. 348-51. While the solicitor was questioning Inv. Perry about the approximately forty-five-minute interview, the following exchanged occurred:

> Q: And was it pretty easy for her to tell you what was – to give you the statement, or were you having to prompt her a lot, or how was that going?

> A: I felt like she was a little bit ashamed and kind of embarrassed, not necessarily talking to me as a male, but talking about what occurred to her. She presented herself as bright and intelligent. And she presented herself, to me, as being a pretty articulate young lady, and kind of embarrassed that she kind of got manipulated by [Petitioner].

App. 350-51. Inv. Perry then went on to testify about the steps he took after the conclusion of that interview to see if he could find evidence to corroborate the victim's allegations. App. 351.

In his opening statement, trial counsel said that the jury would hear evidence that Petitioner had been generous towards the victim and her family, that Petitioner came to feel that the victim's family was taking advantage of his generosity, that the victim's family became angry when Petitioner cut off his financial support of them, that the victim's family told Petitioner "that he would be sorry," that Petitioner and Rachel were going through a divorce, and that the victim's sexual abuse allegations followed, implying that the allegations were false and stemmed from ill will on the part of the victim, the victim's family, and Petitioner's soon-to-be ex-wife. App. 46-47. When Sandra testified, trial counsel cross-examined her about Petitioner's financial support of her family, although she denied that Petitioner ever cut off his support for her. App. 85-87. Sandra testified that Rachel called her while Rachel's custody dispute with Petitioner was ongoing to say that she should look into whether Petitioner had something "going on" with the victim. App. 88. The solicitor elicited a denial from Jamie that the victim's family cut off the victim's contact with Petitioner because they were angry that he was no longer giving them financial support. App. 109. Jamie had been friends in the past with Petitioner's wife and had gotten acquainted with her again before the victim disclosed the sexual abuse. App. 109-10. Rachel[8] testified that she told Sandra that she felt that Petitioner's relationship with the victim was not normal and that she had caught

[8] Rachel testified that she met Petitioner when she was seventeen years old and he was twenty-six. App. 131.

him sleeping on a couch with the victim with his legs on her. App. 157. On cross-examination, Rachel admitted that she had previously falsely told her grandmother and law enforcement officers that her father had cut and raped her, although she claimed that Petitioner had forced her to do so. App. 165-66. Trial counsel vigorously questioned Rachel on the fact that she did not leave Petitioner, despite alleging that he was abusive towards her, which obviously was meant to make the jury question her credibility. App. 161-65. Rachel affirmed that Petitioner had threatened to take away her child if she ever "[went] against him," and that he had strangled her twice and held a gun to her head while threatening to kill her if she ever told anyone about him and the victim. App. 177-78. While being questioned by trial counsel, she testified that she had never before told anyone about Petitioner's threatening her with a gun to her head because she "wasn't asked." App. 180. On cross-examination, the victim agreed that she had been friends with Petitioner's ex-wife. App. 272. Trial counsel questioned the victim about her continued visits to Petitioner's home if Petitioner was actually sexually abusing her. App. 279. The victim testified that she did not remember if Petitioner at some point refused to financially support her family. App. 288.

Trial counsel argued in closing that the solicitor's case was built on the victim's testimony, whose story did not add up. App. 466-67. He argued that the victim was falsely accusing Petitioner because of the feud between her family and him. App. 473. He argued that the victim was lying because she was trying to help Petitioner's ex-wife, who was friends with the victim's older sister, in her divorce from Petitioner. App. 473-76. He argued that the victim's friend was lying about Petitioner's sexual activities in order to help the victim. App. 476-77. He argued that Petitioner's ex-wife had a motive to lie and was not credible because she had falsely accused her own father of rape in the past. App. 477-78. He argued that the victim's mother was lying because Petitioner stopped financially supporting her and because she did not like that Petitioner was friends with her

ex-husband, the victim's father. App. 479. As trial counsel put it, "I don't want to beat around the bush. I'm flat out telling you that these people got together and they made this up, that it didn't happen." App. 479.

Petitioner's defense was that the victim, the victim's family members, and Petitioner's ex-wife were falsely accusing him. It was essential for the solicitor, as part of making the case against Petitioner generally and to rebut Petitioner's defense, to establish the victim's credibility. The question and answer about the victim's demeanor or behavior during her schoolhouse statement were appropriate because the victim's demeanor while giving her statement was helpful for the jury in its assessment of the victim's credibility. *See State v. Tillman,* 433 S.C. 58, 63, 856 S.E.2d 168, 171, n.3 (Ct. App. 2021) (when considering whether the trial court erred in denying the defense's motion for a directed verdict, reasoning that the admission of law enforcement officers' interviews of the defendant could have enabled the jury to properly form conclusions about the defendant's credibility because the interviews were admitted during the prosecution's case-in-chief); *State v. Barrett*, 416 S.C. 124, 132-33, 785 S.E.2d 387, 391 (Ct. App. 2016) (in finding that a forensic interviewer did not improperly bolster a minor victim's credibility, noting that the interviewer testified to, among other things, her personal observations about the victim's demeanor); *State v. Palmer*, 415 S.C. 502, 513, 783 S.E.2d 823, 828 (Ct. App. 2016) (quoting authorities for the proposition that a trial court, in determining whether a lawyer has committed purposeful discrimination in its juror selection, usually has to rely on its evaluation of the lawyer's demeanor and credibility); *State v. Johnson,* 413 S.C. 458, 468, 776 S.E.2d 367, 372 (2015) (finding that the trial court's finding that Johnson was not credible was supported by the record because, among other reasons, the trial court was able to assess her demeanor on the witness stand); *State v. Berry*, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015) (finding that testimony from an expert

witness, who was a psychotherapist and social worker, about things she noticed in the victim's demeanor, did not constitute improper bolstering).

Petitioner's only reference to the prejudice prong of *Strickland* comes from his assertions that the trial court would have been required to sustain an objection to bolstering, if trial counsel had made one, that Petitioner "was prejudiced by the failure to object," and that "there is a reasonable likelihood that the result in this trial would have been different." Brief of Petitioner at 21. This is not an argument, and is merely an unsupported conclusion. For that reason alone, Petitioner has not proven that the alleged error "actually had an adverse effect on the defense." *Hill*, 474 U.S. at 58. After the jury was sworn, the trial made the following remarks to it:

> [A]s the judge of the facts, you will have to, by necessity, determine the credibility of all the evidence. So that means for every witness who takes the stand and testifies . . . you'll have to determine its believability.
>
> In the case of a witness who testifies, I can give you some general guidelines that you may or may not find useful in gauging credibility. But you can consider, for instance, what opportunity the witness had to observe the things they're here to tell you about. You may consider if they have some interest in the outcome of this case, whether they have something to gain or lose by the decision in the case. That is, whether they're biased or prejudiced towards someone or some issue in the case.
>
> You may consider how their testimony stacks up to the other evidence in the case, whether it's consistent or inconsistent. You may consider their demeanor on the stand. And you may use whatever it is you use in your daily life to determine whether someone is being truthful. You can use your common sense. It didn't evaporate when you walked into the courthouse. So you will make this decision, however, about credibility, I know, using your good common sense and your sense of logic and reason and not arbitrarily.

App. 36-37. After the parties finished their closing arguments, the trial court instructed the jury as follows:

> I told you, also, that you were, also, the judges of the credibility of the evidence. And I'm not going to repeat that, because I know you heard me the first time.

> But I will tell you that in deciding credibility, you may believe everything a witness says, or you may believe nothing a witness says. You may believe parts of their testimony, and disbelieve other parts. You may believe one witness over several, or several over one.

App. 499.

CONCLUSION

Petitioner was convicted because the jury heard damning evidence of: Petitioner's gross and criminal behavior, as given by the minor victim; Petitioner's conduct with respect to Barton, who—a minor herself during the period of time at issue—was the victim's friend, conduct which was almost identical to the sexual acts Petitioner performed on the victim; and Petitioner's unusual public behaviors with respect to the minor victim from her and his family members, which corroborated details of the victim's testimony. For the foregoing reasons, the State respectfully requests that this Court affirm the PCR court's denial of Petitioner's application for post-conviction relief.

Respectfully submitted,

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