

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUL 23 2012

S.C. Supreme Court

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

THURSTON M. BOLTON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding Counsel's performance was not deficient where Counsel failed to object to the prosecution's comment in closing argument that the Complaining Witness' clothes were ripped off, yet where there was no evidence that the clothes were ripped?

STATEMENT

Petitioner Thurston Bolton was indicted by the Charleston County grand jury for first degree criminal sexual conduct (CSC 1st), and kidnapping. App. 6, ll. 13-16; App. 411. His case proceeded to trial before the Honorable R. Markley Dennis and a jury from August 31 through September 1, 2009. Petitioner was represented by Ted Smith (Counsel) and Mary Ford, while the State was represented by Peter McCoy and Adam Young. App. 1. The jury acquitted Petitioner of CSC 1st, but convicted him of kidnapping. App. 320, ll. 1-12. The trial court imposed a sentence of 20 years incarceration without registration as a sex offender upon release. App. 326, ll. 1-9; App. 480.

Petitioner initially appealed his conviction and sentence to the South Carolina Court of Appeals. However, Petitioner dropped his direct appeal by affidavit on June 18, 2010. App. 328. His case was dismissed on June 24, 2010, and remittitur was sent on July 14, 2010. App. 329—App. 330.

Petitioner filed his application for post-conviction relief on August 9, 2010, asserting multiple grounds of ineffective assistance of counsel. App. 331; App. 338—App. 352. An evidentiary hearing was held before the Honorable Deadra L. Jefferson on September 14, 2011. Petitioner was represented by David Holton, while the State was represented by Matthew Friedman. App. 408.

Petitioner alleged, *inter alia*, that Counsel was ineffective for failing to object to a comment made by the State in its closing argument. Specifically, the State indicated that Petitioner “rips her bottoms off her, rips her underwear off, rips her top off, rips her bra off.” App. 268, ll. 20-22. However, the while the Complaining Witness’ testimony indicated her clothing was removed forcefully and aggressively, nothing in evidence indicated they were ripped. Thus, Petitioner

maintained that the comments by the State in closing argument were without evidentiary support. App. 424, ll. 12-24.

The PCR court issued its ruling from the bench at the end of the evidentiary hearing, as well as in a written order of dismissal that was filed on November 3, 2011. App. 453, ln. 19—App. 464, ln. 24; App. 467. Regarding Petitioner's claim the State's improper comment in closing argument, the PCR court held that the comment was supported by the Complaining Witness' testimony that her clothes were forcibly removed. App. 459, ll. 1-12; App. 476.

As a result, the PCR court dismissed Petitioner's claims, holding Petitioner failed to show either that Counsel's performance was deficient, or that he was prejudiced by Counsel's performance. App. 476—App. 477. This petition follows.

ARGUMENT

The PCR court erred in finding Counsel's performance was not deficient where Counsel failed to object to the prosecution's comment in closing argument that the Complaining Witness' clothes were ripped off, yet where there was no evidence that the clothes were ripped.

Counsel's performance was constitutionally deficient for failing to object to the State's comments during closing argument that Petitioner ripped various articles of clothing off of the Complaining Witness. No proof of ripped clothing was entered into evidence. Thus, if timely made, the trial court would likely have been sustained the objection. Further, the comments were likely to arouse the passions and prejudices of the jury. As a result, Petitioner was prejudiced by Counsel's failure to object, as it sufficiently undermines the confidence in the outcome of Petitioner's trial.

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). Indeed, "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 772 n.14, 90 S.Ct. 1441, 1449 n.14 (1970) (internal citations omitted).

"To prove ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced thereby." Mincey v. State, 314 S.C. 355, 358, 444 S.E.2d 510, 512 (1994) (reversing PCR court's denial of relief and remanding for new trial where counsel failed to object to Solicitor's improper comments in closing argument).¹ "It is most certainly proper, especially in criminal cases, that counsel, in addressing the jury, should keep themselves strictly within the record. This rule is essential, and must be strictly enforced." State v.

¹ See also Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Cannon, 229 S.C. 614, 618, 93 S.E.2d 889, 891 (1956) (reversing and remanding case where Solicitor's remarks to the jury were improper and prejudicial). Accordingly, "[t]he rule that it is the duty of the prosecuting attorney to always treat the defendant in an impartial manner applies to his argument to the jury, and he should at all times confine himself to the evidence adduced in trial." Id. Further, "[a] solicitor's closing argument must not appeal to the personal biases of the jurors," and the argument may not "be calculated to arouse the jurors' passions or prejudices." State v. Liberte, 336 S.C. 648, 652, 521 S.E.2d 744, 746 (Ct. App. 1999).

In the present case, the State made improper comments during its closing argument. Specifically, the State posited that during the alleged offense, Petitioner ripped the clothing off of the Complaining Witness: "He starts to take her clothes off. He rips her bottoms off her, rips her underwear off, rips her top off, rips her bra off." App. 268, ll. 19-22. Yet, the only evidence remotely close to allegations of ripped clothes was by the Complaining Witness, who indicated her clothes were forcibly and aggressively removed. In short, there was no evidence in the record that the clothes were ripped off of the Complaining Witness. Thus, the PCR court's ruling was in error, as State's comments were without evidentiary support. See, e.g., Cannon, 229 S.C. at 618, 93 S.E.2d at 891. Accordingly, Counsel's performance was constitutionally deficient, as it fell well below an objective standard of reasonableness. Strickland, 466 U.S. at 690, 104 S.Ct. 2066.

Further, Petitioner was prejudiced by Council's failure object. The standard is whether Counsel's performance prejudiced Petitioner to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). In the case at bar, the visceral comments employed

by the State indicated acts of violence on the part of Petitioner toward the Complaining Witness. They also indicate the Complaining Witness was helpless to leave as her clothes were being ripped off. Therefore, the improper comments were designed to leave the jury with the impression that the Complaining Witness was essentially held against her will and at the mercy of the Petitioner. As a result, Petitioner was prejudiced by the State's improper comments, as they were calculated to arouse the passions and prejudices of the jury regarding the charge of kidnapping.

CONCLUSION

Accordingly, Petitioner Thurston Bolton respectfully requests that this Court grant his Petition for Writ of Certiorari, reverse the PCR court's Order of Dismissal, and grant a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of July, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

THURSTON M. BOLTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

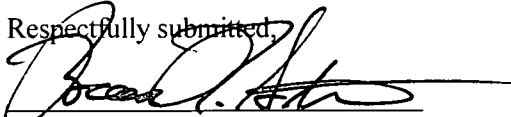
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thurston M. Bolton states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on September 14, 2011. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Thurston M. Bolton.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of July, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

THURSTON M. BOLTON,

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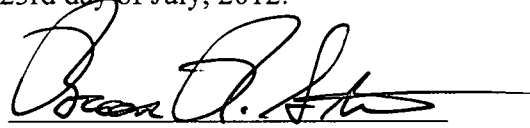
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

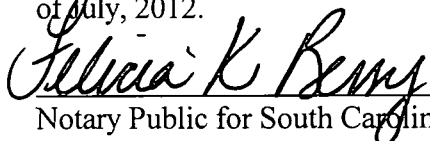
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire and Thurston M. Bolton, #115095, at McCormick Correctional Institution this 23rd day of July, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of July, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.