

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY 13 2015

Certiorari to Calhoun County
Court of Common Pleas
The Honorable Diane S. Goodstein, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2014 – 001537
Lower Court Case No. 2010-CP-09-0088

MICHAEL A. SMITH, #311064,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

- I. Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to the solicitor's misleading, prejudicial demonstration during closing arguments, which mischaracterized Petitioner's testimony, since the demonstration bore no resemblance to the reality of the actual shooting?
- II. Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to the solicitor's closing arguments during which he impermissibly appealed to the passions of the jurors by arguing, *inter alia*, that if they found Petitioner not guilty, he would find his hidden gun and would kill again; thus so infecting the trial with unfairness as to make the resulting conviction a denial of due process?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Calhoun County. Petitioner was indicted at the April and June 2004 term of the Calhoun County Grand Jury for murder (2004-GS-09-0145) and possession of a weapon during the commission of a violent crime (2004-GS-09-0202). (App. p. 481-86). Petitioner was represented by Charlie Jay Johnson, Jr., Esquire. Petitioner proceeded to trial before the Honorable Deadra L. Jefferson. Petitioner was convicted by the jury on September 1, 2005. Judge Jefferson sentenced Petitioner to concurrent terms of forty-five (45) years' imprisonment for murder and five (5) years' imprisonment for possession of a weapon during the commission of a violent crime. Id.

A notice of appeal was filed. Then Deputy Chief Attorney for Capital Appeals, Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense represented Petitioner. Appellate counsel filed a Final Anders Brief of Appellant and petitioned to be relieved as counsel with the South Carolina Court of Appeals. The court dismissed Petitioner's appeal and granted counsel's motion to be relieved. State v. Smith, Op. No. 2009-UP-415 (S.C. Ct. App. filed September 3, 2009). The Remittitur was sent down on September 21, 2009.

Petitioner filed his first application for post-conviction relief (PCR) on April 19, 2010. (2010-CP-09-0088). (App. p. 413-19). A hearing was held on June 6, 2011. Petitioner was represented by Nicole Singletary, Esquire. The State was represented by Mary Williams, Esquire. This action was denied by order filed September 26, 2011. (App. p. 458-64).

Petitioner filed a second PCR application on September 14, 2012 (2012-CP-09-00174). (App. p. 465-71). An evidentiary hearing was convened on May 29, 2014, before the Honorable

Maité Murphy at the Dorchester County Courthouse. Tara D. Shurling, Esquire, represented Petitioner, and the State was represented by Megan E. Harrigan, Esquire. The PCR court entered a Consent Order Granting an Appeal Pursuant to Austin v. State¹ filed on June 27, 2014. (App. p. 478-79). The Order ruled that Petitioner did not voluntarily waive his right to appeal the PCR Court's denial and dismissal of his 2010 application. Id.

Petitioner filed a notice of appeal and a Petition for Writ of Certiorari. This Return follows.

¹ 305 S.C. 453, 409 S.E.2d 395 (1991).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **Certiorari is not warranted where Petitioner did not raise the issue to the PCR Court of whether trial counsel was ineffective for not objecting to the Solicitor's demonstration of Petitioner's version of events. Certiorari is also not warranted where Petitioner failed to present any valid basis for an objection to the demonstration.**

In his petition, Petitioner, for the first time, asserts trial counsel was ineffective in failing to object to the Solicitor's demonstration of Petitioner's version of events during closing arguments. Respondent submits this issue is not preserved for this Court's review as it was not raised at the PCR hearing and was not ruled upon in the Order of Dismissal. Respondent submits that even if this Court finds this issue preserved, it is without merit. Finally, Respondent cannot show he was prejudiced because he cannot show an objection would have been successful, and cannot show that the outcome of the trial would have been different.

- A. The issue of whether trial counsel was ineffective in failing to object to the Solicitor's demonstration is not preserved.**

This argument is not preserved for this Court's review. It is well settled that an issue that has not been presented to or passed upon by the trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); State v. Sheppard, 391 S.C. 415 --, 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); I'On, L.L.C. v.

Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting issues and arguments on appeal). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C 461, 719 S.E.2d 640 (2011).

In the present case, the PCR Court addressed the following allegations in its order of dismissal:

Counsel was ineffective because Counsel didn't adequately prepare a defense strategy, didn't object to statements by the Solicitor that improperly called Petitioner's character into question, didn't object to testimony of an EMS worker who Petitioner believed the State improperly communicated with prior to the start of the trial and Counsel improperly advised applicant to take the witness stand.

(App. p. 460-61). The issues raised in this petition were not discussed in the Order of Dismissal.²

The demonstration at issue here took place during the Solicitor's closing arguments. (App. p. 343, lines 3-19). Counsel did not object, and the issue was not raised on direct appeal. The allegation was not referenced in *either* of Petitioner's applications for post-conviction relief, nor was it mentioned during the entirety of his PCR evidentiary hearing.³ In the PCR Court's order dismissing Petitioner's application with prejudice, there is no mention of or ruling on the demonstration. (App. p. 458-64). Finally, Petitioner did not file a Rule 59(e) motion raising the issue to the courts attention.

² Issue preservation problems relating to Petitioner's remaining claims are addressed in the sections below. In addition, in all fairness to Petitioner, one of the arguments deeply embedded within the second issue could possibly be construed to fall under the allegation presented at the PCR hearing that the Solicitor improperly called Petitioner's character into question. *See infra Inflammatory Language*. Respondent maintains that it is Petitioner's responsibility to conform his arguments to the existing record, not that of the State *or this Court*. Regardless, whether the issue is preserved or not, it is without merit.

³ Petitioner fails to point to any part of the record in which a ruling is made concerning the Solicitor's closing argument demonstration. Petitioner does acknowledge that the PCR Court ruled that Counsel made a reasonable strategic decision in not objecting to the Solicitor's statements and actions in his closing argument. (PWC, p. 2). The record is devoid of any such ruling relating to the demonstration.

Because this issue is being raised for the first time on this appeal, Respondent submits the issue is not preserved for this Court's review.

B. Counsel was not ineffective in failing to object to the Solicitor's demonstration.

Even if this Court finds the argument preserved, it is without merit. In making closing arguments, "[a] solicitor has a right to state his version of the testimony to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). That being said, closing arguments must stay within the record and reasonable inferences drawn therefrom. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). Closing argument can include demonstrative acts. State v. Finklea, 388 S.C. 379, 385, 697 S.E.2d 543, 547 (2010). Such demonstrations are subject to the same analysis as any other potentially improper conduct during closing argument, and the demonstration must be viewed in the context of the entire record. Id.

The demonstration that occurred in this case was clearly permissible because it constituted nothing more than the Solicitor commenting on evidence presented in the record – Petitioner's testimony. (App. p. 289, line 21 – p. 290, line 10). The demonstration was never entered into evidence, was never presented as a crime scene reconstruction, and did not involve anyone claiming to be an expert. Any discrepancy between the actual events and the demonstration were patently obvious to the jury, and were even commented upon by the Solicitor beforehand. Petitioner argues that the demonstration "merely showed that, by his own account, a diminutive solicitor was, [sic] unable to reach around a Sheriff with a larger build than Petitioner." This appears to be a mischaracterization of the facts. During the actual demonstration, the Sheriff was acting as Mr. Brown (who Petitioner alleged to be the shooter) and the Solicitor was acting as Petitioner. (App. p. 343, lines 3-9). The Sheriff, who was larger

than Mr. Brown, was reaching around the Solicitor, who was smaller than Petitioner. (App. p. 373, lines 3-19). The Solicitor attempted to demonstrate that Petitioner's version of events was "[a]bsolutely impossible." (App. p. 343, line 20). If anything, the relative sizes of the demonstrators are skewed *in favor of* Petitioner's version of events.

C. Petitioner is unable to show any resulting prejudice from the demonstration.

Moreover, Petitioner's argument concerning prejudice is unsupported by the record. The burden is clearly on Petitioner to present some evidence that would support his contention that the Solicitor's demonstration was improper. Any argument to the contrary is based on pure speculation. Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (finding of prejudice cannot be based on "pure conjecture"). The PCR Court specifically found no prejudice resulting from any of Petitioner's actual claims at the hearing. (App. p. 463). First, the trial court would have not sustained an objection to the demonstration because it was obvious that the Solicitor was not asserting this demonstration to be to scale or based on any scientific proportions. Second, Petitioner submitted no evidence to support his assertions that Petitioner would have been found not guilty but for the demonstration. As Petitioner argues (PWC, p. 15), this case was about credibility, and the Solicitor properly argued Petitioner's version of events were not consistent with reality.

II. Certiorari is not warranted where the issue relating to the Solicitor's closing argument were not presented to the PCR Court.

In the second issue, Petitioner argues Counsel was ineffective for failing to object to improper burden shifting, inflammatory language, and improper vouching. Petitioner does not allege that any of these claims, alone, caused sufficient prejudice to warrant relief – arguing instead, that a cumulative error analysis should be employed.

A. The issue of whether trial counsel was ineffective in failing to object to the Solicitor's closing argument is not preserved.

These issues are similarly not preserved for this Court's review. None of the issues raised by Petitioner were specifically ruled upon by the PCR Court, nor were they presented in their present form to the PCR Court. In response to a question regarding whether Counsel properly prepared a defense, Petitioner testified at the PCR hearing: "It's certain things that he let the prosecutor say, far as discrediting my character during closing arguments, that I felt he should have objected to, that he never objected to." (App. p. 435, lines 7-10). The specific issues of burden shifting, inflammatory language, and vouching were never raised. Petitioner asks this Court to construe Petitioner's testimony very broadly and interpret them to encompass any possible challenge to the Solicitor's closing argument. As a result, these issues are not properly preserved for review by this court. The State addresses each of these allegations in turn.

B. Burden Shifting

Petitioner argues the Solicitor "impermissibly shifted the burden of proof" and invited jurors to draw a negative inference from Petitioner's failure to explain what happened to the weapon. This argument is without merit. First, the statements Petitioner cites do not shift the burden; second, the statements are supported by reasonable inferences drawn from the evidence in the record.

Petitioner takes issue with part of the State's closing-argument at trial, in which the Solicitor tells the jury that "[Petitioner] knows where his gun is. [Counsel] keeps talking about his gun. Find [Petitioner] not guilty. Let him go back to it." (PWC, p. 18, *citing* App. p. 340, lines 9-11). Petitioner's stated position is that he was entitled to a contemporaneous curative instruction from the trial judge clarifying that the defense does not have to put forth evidence. (PWC, p. 18).

A solicitor may make arguments concerning the evidence in the record and the reasonable inferences that may be drawn from the evidence. See Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). The Solicitor's arguments here were supported by testimony presented by several witnesses at trial, which indicated that Petitioner had a nine millimeter handgun. (App. p. 125, lines 2-25; p. 228, lines 17-18; p. 301, lines 1-23). Moreover, there was direct and "substantial circumstantial evidence" presented at trial indicating Petitioner's guilt. (App. p. 248, l. 5-22).⁴ Taken together, the Solicitor's statement indicating a not-guilty verdict would allow Petitioner to "go back to [his gun]" was supported by the evidence in the record, or reasonable inferences therefrom. (App. p. 338, lines 23-24).

Petitioner has also failed to show any resulting prejudice from Counsel's alleged deficiency as required by the second prong of the Strickland test. 466 U.S. at 691, 104 S.Ct. 2052; see also State v. White, 371 S.C. 439, 446, 639 S.E.2d 160, 164 (2006) ("[E]ven without a curative instruction, an error not shown to be prejudicial to the appellate does not constitute grounds for reversal."). Appellate courts view any alleged improprieties in a solicitor's argument in the context of the *entire record, including whether the trial judge's instructions adequately cured the improper argument* and whether there is overwhelming evidence of the defendant's guilt. Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007) (emphasis added).⁵ The trial judge in Petitioner's trial charged the jury⁶ that the State had the burden "to prove the Defendant guilty, because a person charged with committing a criminal offense in South Carolina is *never required to prove himself innocent*." (App. p. 356, lines 6-10 (emphasis added)).

⁴ The trial judge made this finding in ruling on a motion for directed verdict by the defense. (App. p. 248, l. 3-22).

⁵ Before the trial judge charged the jury on the proper burdens, any alleged improper shift was first cured *by the solicitor*, who told the jury that the State had "the sole burden of proof," and that "[t]he defense didn't even have to ask a question, throw up an assertion, or even put up a case." (App. p. 339, l. 6-9).

⁶ Petitioner argues that he would have been entitled to a contemporaneous curative instruction from the trial judge clarifying that the defense does not have to put forth evidence. Respondent maintains that in light of Smith the trial judge's subsequent correct jury instruction was a sufficient remedy. 375 S.C. at 523, 654 S.E.2d at 532.

The trial judge also informed the jury that the burden was on the State to prove every element of the crime charged. App. p. 362, l. 16-17. Because the trial judge cured any alleged improper burden shift made by the Solicitor, Petitioner has failed to show prejudice.

C. Inflammatory Language

Petitioner next argues that the Solicitor used inflammatory language in calling Petitioner a “cold-blooded murderer” during closing arguments, in an improper appeal to the jury’s prejudice. This argument is also without merit.

It should first be noted that similar language has been found appropriate and not prejudicial. *Compare Vasquez v. State*, 388 S.C. 447, 459, 698 S.E.2d 561, 567 (2010) (per opinion of Beatty, J., with one judge concurring and one judge concurring in result only) (trial counsel deficient in failing to object to solicitor’s depiction of defendant as a domestic terrorist *because such a depiction was without legal support*). In fact, there have been several occasions in which the South Carolina Supreme Court “has found no reversible error in a solicitor's singular inflammatory characterization of a defendant.” *Id.* (citing, e.g. *State v. Bennett*, 369 S.C. 219, 231-32, 632 S.E.2d 281, 288-89 (2006) (description of defendant as “King Kong” was “descriptive of Appellant's size and strength as they related to his past crimes” and were not made to inflame the passions or prejudices of the jury; concluding term “Caveman” was not inflammatory given it was “merely descriptive of two of Appellant’s past violent incidents”); *Randall v. State*, 356 S.C. 639, 591 S.E.2d 608 (2004) (holding that prosecutor's likening of defendant as “cockroach” during closing argument did not so infect trial as to deny defendant due process); *State v. Lee*, 269 S.C. 421, 237 S.E.2d 768 (1977) (concluding prosecutor's reference to defendant as a “menace to society” could not be considered prejudicial since that concept forms the very basis for crimes involving moral turpitude). In light of previous rulings

on this issue, Respondent maintains that the Solicitor's comments were not inappropriate.

Further, Petitioner has failed to show, or even allege, prejudice from any alleged deficiency. Respondent simply asserts that the language, even if improper, did not so infect the trial with unfairness as to result in a denial of due process.

D. Vouching

Petitioner next argues Counsel was deficient in failing to object to improper vouching by the Solicitor.

A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 531-32 (2007). A solicitor may also argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. Matthews v. State, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). However, "[a] solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." Smith at 523, 654 S.E.2d at 531-32 (*quoting Matthews* at 276, 565 S.E.2d at 768 (2002)). Vouching for a witness based on outside materials conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction. Matthews at 276, 565 S.E.2d at 768. It is inappropriate for the State to assure the jury of a witness's credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record. *Id.* A solicitor improperly vouches for a witness's credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

Petitioner points to two statements in particular in support of his claim for improper

vouching. First, Petitioner argues improper vouching occurred when the solicitor said “because if it wasn’t for [Frank Brown’s] statement he [(Frank Brown)] wouldn’t have even been charged. And if [Petitioner is] not guilty, then Frank Roger Brown is not guilty. That’s the only way he’s prejudiced. You don’t get any more credible than that.” PWC, 19 (*citing* App. p. 132, line 19 – p. 134, line 23). Petitioner also argues the Solicitor personally guaranteed the credibility of Darren Brown by telling the jury that implicating his own brother in the murder was courageous. PWC, 19 (*citing* App. p. 347, l. 4-8).

Neither of these statements amount to improper vouching as a matter of law. First, the Solicitor is not alluding to or referencing any outside facts or information not available to the jury. Nor is the Solicitor giving the jury the impression that he has personal knowledge outside the record supporting either witness’s credibility. Finally, the Solicitor did not place the government’s prestige behind any of the witnesses by giving making any explicit personal assurances about their credibility. Instead, the Solicitor merely argued to the jury that the two witnesses were credible based on the circumstances – which were in the record and available to the jury – surrounding their testimony.

Moreover, Petitioner has failed to meet the prejudice prong of Strickland.⁷ As stated above, the appropriate standard for determining whether improper comments made by a solicitor were prejudicial is quite high. See Smith at 524, 654 S.E.2d at 532. Petitioner must show that he did not receive a fair trial because of the alleged improper argument – that the trial was *so infected* with unfairness as to make the resulting conviction a denial of due process. Id (internal citations omitted).

The PCR judge found that the result at trial would not have been different had trial

⁷ Petitioner has failed to even allege that the prejudice suffered from this supposed vouching is sufficient to call into doubt the validity of his verdict. Instead, he rests upon what appears to be a cumulative error approach. As a result, prejudice is dealt with more fully below.

counsel done what Petitioner alleges he should or should not have done. (App. p. 463).

E. Cumulative Error

Finally, Petitioner argues that the improper comments described above, “taken together, had a significant impact on the trial that improperly strengthened the state’s circumstantial case,” and that the “sheer number of objectionable comments made by the Solicitor which were either; [sic] unsupported by the evidence, improperly bolstered State’s witnesses, shifted the burden of proof to Petitioner, or appealed to the prejudices of jurors, call into question whether the trustworthiness [sic] of the verdict.” PWC, p. 20. Beyond not being raised below, this claim is without merit. The Fourth Circuit has held that “ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively” and does not recognize a cumulative error analysis. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998). The PCR Court did not err in failing to conduct a cumulative error analysis when it found no instances of ineffectiveness. Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006).

Therefore, Petitioner’s argument is not preserved but also lacks merit under a comprehensive analysis. The PCR Court’s ruling should be upheld.

CONCLUSION

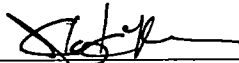
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court’s ruling as there is ample evidence of probative value to support the PCR Court’s denial of Petitioner’s application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

(signatures on following page)

Respectfully submitted,

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BY: 

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May 13, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Calhoun County
Court of Common Pleas

The Honorable Diane S. Goodstein, Circuit Court Judge
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MICHAEL A. SMITH, #311064,

PETITIONER,

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THE STATE OF SOUTH CAROLINA,

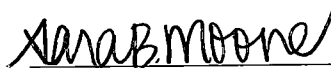
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

John H. Strom, Esquire
SC Commission of Indigent Defense
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Post Office Box 11589
Columbia, SC 29211

This 13th day of May, 2015



SARA B. MOORE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAY 13 2015

May 13, 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Michael A. Smith, #311064 v. The State of South Carolina
Appellate Case No. 2014-001537

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
S.C. Bar No. 101443

JCM/sbm
Enclosures

cc: John H. Strom, Appellate Defense