STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable Brooks P. Goldsmith, Circuit Court Judge

KEVIN SHANE EPTING,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000696

BRIEF OF PETITIONER

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when the prosecutor in opening statement and closing argument referred to the story of Little Red Riding Hood referring to the witness as the grandmother and Petitioner as the big bad wolf?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when the prosecutor made an improper closing argument referring to Petitioner as the big bad wolf and telling the jurors, "But, at the end of Little Red Riding Hood and the big bad wolf, it turns out good. Because the woodman comes along and takes care of the wolf. Ladies and gentlemen, you are the woodman. You are the woodman to take care of this matter. Do we want any other grandma's subjected to the big bad wolf?"

STATEMENT

In February of 2009, the Laurens County Grand Jury indicted Petitioner, Kevin Shane Epting, for burglary first degree and assault and battery of a high and aggravated nature [ABHAN], indictments #2009-GS-30-0190, 0191. On November 10, 2009, Petitioner proceeded to jury trial before the Honorable D. Garrison Hill. Claude H. Howe, III, and D. Katherine Anderson represented Petitioner at trial. Ronald N. Fleming prosecuted the case. The jury returned verdicts of guilty. Judge Hill sentenced Petitioner to twenty (20) years for burglary and ten (10) years concurrent for ABHAN. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Epting, Op. No. 2012-UP-152 (Ct.App. filed March 7, 2012). A petition for rehearing was filed and then denied on May 12, 2012. A petition for writ of certiorari was filed with the South Carolina Supreme Court and the petition was granted on April 16, 2014. On October 22, 2014, the South Carolina Supreme Court dismissed the petition as improvidently granted.

On February 23, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on August 19, 2015. Petitioner filed an amended PCR application on February 17, 2016. On June 8, 2016, an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. Carson M. Henderson represented Petitioner at the PCR hearing. Justin J. Hunter represented the State. In a written order signed July 7, 2016, Judge Goldsmith denied relief and dismissed the application. Petitioner filed a timely motion to reconsider on July 25, 2016. The State filed a return on October 28, 2016. On March 10, 2017, Judge Goldsmith denied the motion to reconsider. A timely notice of intent to appeal was served on March 20, 2017, and a petition for writ of certiorari was filed on October 30, 2017. The State filed a return

on March 19, 2018. On September 21, 2018, this Court granted the petition for writ of certiorari as to issues one and two and denied the petition as to issues three and four. This brief of Petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENTS

1. **The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the prosecutor in opening statement and closing argument referred to the story of Little Red Riding Hood referring to the witness as the grandmother and Petitioner as the big bad wolf.**

During opening statement the prosecutor told the jurors, "Now, you've all heard the story of Little Red Riding Hood and the big bad wolf, I'm sure you have. I'd like to call this case the case of grandma and the big bad wolf. Grandma being Ms. Marilyn Hopkins sitting back there. She sort of reminds you of a grandma. She does to me. And sitting over here at the Defense table is Kevin Epting, the big bad wolf." (App. p. 72, lines 4-10) The prosecutor referred to Petitioner as the big bad wolf four additional times in opening statement. (App. p. 73, lines 4-5; p. 75, lines 9-10; p. 78, lines 3-4; 23). He referred to Ms. Hopkins as grandma two additional times in opening statement. (App. p. 74, lines 1-2; p. 78, lines 21-25).

The prosecutor told the jury, "And, as she went into the kitchen of her mobile home, she will tell you that, at that time, she saw the big bad wolf, Kevin Epting, in her house." (App. p. 73, lines 3-5). He referred to Ms. Hopkins as grandma. (App. p. 74, lines 1-2). He told the jury, "Now, ladies and gentlemen, Mr. Epting, the big bad wolf, has been charged with burglary in the first degree and assault and battery of a high and aggravated nature." (App. p. 75, lines 9-11). He also told the jury, "Well, don't get caught up in this trial and let your attention get diverted, ladies and gentlemen. Because that's what the big bad wolf and his attorneys will try to do. Beware of that. They will try to confuse you and divert your attention away from the facts." (App. p. 78, lines 1-5). Finally, in opening statement he told the jury, "If you do that, the State is confident that you will see that we have presented evidence sufficient enough for you to find that

the big bad wolf is guilty of burglary first degree and assault and battery of a high and aggravated nature against grandma." (App. p. 78, lines 21-25).

The prosecutor additionally referred to the Petitioner as the big bad wolf and Ms. Hopkins as grandma in closing argument. (App. p. 309, lines 12-13; p. 317, lines 6-21). He told the jury, "Now, I told you in the beginning that I call this case the case of grandma and the big bad wolf." (App. p. 309, lines 12-13). He told the jury, "You've got Ms. Hopkins, the grandma suffering from cancer." (App. p. 317, lines 6-7). He finally told the jury in closing argument, "But, at the end of Little Red Riding Hood and the big bad wolf, it turns out good. Because the woodman comes along and takes care of the wolf. Ladies and gentlemen, you are the woodman. You are the woodman to take care of this matter. Do we want any other grandmas subjected to the big bad wolf?"[1] (App. p. 317, lines 16-21). Trial counsel did not object to any of the references to Petitioner as the big bad wolf or to any of the references to Ms. Hopkins as grandma.

During the PCR hearing trial counsel admitted that he should have objected to the references to Petitioner as the big bad wolf and references to witness Hopkins as grandma. (App. p. 425, line 25 – p. 426, lines 1-25). In the order of dismissal the PCR judge wrote:

> This Court finds that Counsel was not ineffective for failing to object because, when read in context, the solicitor's comments involves his attempt to make a comparison between Applicant's case and *The Little Red Riding Hood* fairy tale, as both involve the home invasion of an elderly woman.[2] This Court finds that the solicitor was not trying to inflame the passions or prejudices of the jury by calling Applicant a wolf because it was in the context of an analogy. This Court further finds that even if such comments were objectionable, the few times they were used during the State's opening statement and closing argument did not so infect the trial that the jury's verdict is deemed unreliable as the trial judge properly informed the jury of the presumption of innocence and the burden of

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[1] Trial counsel's failure to object to this specific part of the closing argument is addressed in issue two.

[2] At the time of trial the witness was 57 years old. (App. p. 85, lines 23-24).

> proof. As such, this Court finds that applicant has failed to show that he was prejudiced by Counsel's actions in this regard.

(App. p. 448). The PCR judge erred. The solicitor's comments constituted more than an analogy to *The Little Red Riding Hood* fairy tale. Instead, the comments directly calling Petitioner the big bad wolf while referring to Ms. Hopkins as grandma were calculated to inflame the passions and prejudices of the jury and went outside of the record or any reasonable reference. Trial counsel was deficient in failing to object when the prosecutor called Petitioner the big bad wolf five times in opening and again in closing while referring to Ms. Hopkins as grandma. Petitioner was prejudiced by the deficient performance.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

In Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998), this Court granted a new trial based on the fact that trial counsel failed to object when the prosecutor misstated the law in closing argument. In Simmons this Court discussed when improper comments made by a solicitor required a new trial writing:

> A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Improper comments do not automatically require reversal if they are not prejudicial to the defendant. Johnson v. State, supra; 3 *Wharton's Criminal Procedure* § 353 (13th ed. 1991) (question is whether comment was sufficiently prejudicial or harmless). On appeal, the appellate court will view the alleged impropriety of the 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. Johnson v. State, supra (a solicitor's improper comments may be cured by the judge's instructions to the jury); State v. Copeland, supra; United States v. Wilson, 135 F.3d 291 (4th Cir.1998). The Petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument. Johnson v. State, supra; State v. Copeland, supra. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, *cert. denied,* 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997).

331 S.C. at 338, 503 S.E.2d at 166–67.

In Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), this Court granted a new sentencing hearing based on the fact that trial counsel failed to object when the prosecutor characterized Vasquez, a Muslim, as a domestic terrorist and correlated his acts with the terrorist attacks of September 11th. This Court wrote:

> A solicitor has a right to state his version of the testimony and 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). However, "[s]olicitors are bound to rules of fairness in their closing arguments," as we have explained:
>
> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

388 S.C. at 458, 698 S.E.2d at 566.

While the prosecutor in the present case did not misstate the law and did not reference domestic terrorism and the attacks of September 11th, the Little Red Riding Hood analogy directly referring to Petitioner as the big bad wolf while referring to Ms. Hopkins as the grandmother was also improper because it was calculated to arouse to the jurors' passions and prejudices and was outside of the record.

In Randall, a case cited in Vasquez, the prosecutor analogized drug dealers to cockroaches. This Court wrote:

> During his closing argument, the solicitor was describing Randall and his co-defendant (Yawn), accusing them of driving up from Florida to South Carolina to traffic drugs. He explained to the jury that a multitude of 10 and 20 dollar bills were found in their motel room, and 211 grams, or nearly one-half pound, of cocaine was found in a brown paper bag in the room. He told the jury they were not nice people and they were dirty because they were in the business of selling death and had come up to South Carolina to get rich, and they didn't care who they hurt when they sold their drugs. The solicitor then went on:
>
> That's why when I think of dope dealers ladies and gentlemen, the only way I can think of them is like cockroaches. And if that sounds foul to you, it should. Cause drug dealers are filthy just like cockroaches. Everywhere they go, everything they touch, they contaminate. And one thing about cockroaches and certainly is true is they hate the light. Particularly the blue kind like the ones that stopped these two fellows cause they were scurrying back to their nest egg. 40 to 80 thousand dollars total. But the thing that makes them worse than cockroaches is the fact they're human beings

Randall v. State, 356 S.C. 639, 642–43, 591 S.E.2d 608, 610 (2004). The Court found that the prosecutor's comments did not so infect the trial with unfairness as to make the conviction a denial of due process. The Court in Randall noted the overwhelming evidence of guilt and the cockroach analogy consisted of only ten lines of the transcript. The present case can be distinguished from Randall in four separate ways.

First, in the present case the prosecutor directly referred to Petitioner as the big bad wolf. In Randall, while the prosecutor implied that Randall was a cockroach because he was a drug

dealer, the prosecutor did not directly refer to Randall as a dirty cockroach. Second, in contrast to Randall, the improper reference in the present case was not limited to ten lines of the transcript. In the eight page opening statement the prosecutor called Petitioner the big bad wolf five separate times in addition to the reference in closing argument. Third, the present case was not a drug case but a case where a woman was burglarized and assaulted. In this assault and burglary case the references to Petitioner as the big bad wolf and Ms. Hopkins as the grandmother is far more prejudicial than the reference to drug dealers as cockroaches in Randall, a drug case. Fourth, unlike Randall, Petitioner's guilt was not overwhelming. The State presented no forensic evidence linking Petitioner to the crime. Petitioner presented an alibi defense. The State's case was based wholly on the identification by Ms. Hopkins. Curiously, Ms. Hopkins did not immediately report the incident. (App. p. 93, lines 2-8). The incident took place on November 11th at approximately 1:30 AM. (App. p. 149, lines 15-16). The police were not called until 3:00 PM on November 12th approximately 38 hours later. (App. p. 147, lines 22-25; p. 164, lines 5-8). Also, in her statement to police Ms. Hopkins said she saw someone at her china cabinet where she kept her wallet and then stated that her son Billy was "off limits to her wallet." (App. p. 109, line 11 – p. 110, lines 1-20). Ms. Hopkins admitted that her son knew where she kept her money and she had suspected him of taking money in the past. (App. p. 110, line 21 – p. 111, lines 1-14). The improper references in the present case deprived Petitioner of a fair trial.

In State v. Webb, 389 S.C. 174, 697 S.E.2d 662, (Ct. App. 2010), in opening and closing argument the prosecutor told the jury that **the case** reminded him of hyenas and then in closing asked the jury to do their job and "cage this wild animal." Defense counsel in Webb did not object to the closing argument. The South Carolina Court of Appeals wrote:

In his opening argument, the solicitor stated:

> Folks, I wonder if anybody here has ever seen a hyena, a dog-like creature, wild, feral, a scavenger, a predator. Not terribly bright, not king of the jungle but its vicious, malevolent, and it hops on weak, easy prey, a mean little thing. And I asked you that question because that's what this case reminds me of.
>
> The solicitor then argued: "So, [Mr. Price] goes to open the door. That's when those wild animals strike. They want what they want. They have to have it right then, and they rush in the room." Later, the solicitor remarked: "Merely forty-five minutes to an hour after these wild animals robbed...." After this third statement, defense counsel objected to the characterization of Webb as a wild animal arguing it inflamed the passions of the jury. The trial court overruled the objection and determined the solicitor "wasn't referring to this individual.... He was referring to an act of someone." Defense counsel argued the term "wild animals" clearly referred to Webb, and the trial court responded: "I have permitted this. He's not talking to him. He's talking generally as to folks who might do this. He has not indicated him." The solicitor then agreed to say "armed robbers." Later, during his closing argument, the solicitor stated:
>
> Well, I started off talking to y'all about hyenas. Once again, they are vicious animals, predatory scavengers always looking for the easy prey. They want—they don't want too hard for them (sic). Not terribly bright, and I think after listening to the facts of the case you understand why this case reminds me of hyenas.
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> The solicitor further remarked: "Like I said, hyenas aren't bright animals. They go to Wal–Mart with all the nice bright lights, big cameras, and that's where they're caught." The solicitor concluded by stating: "Folks, you've been left firmly convinced. All I ask is that you do your job and you cage this wild animal. Put him away for what he did." Defense counsel did not object to the solicitor's closing argument.

State v. Webb, 389 S.C. 174, 179–80, 697 S.E.2d 662, 664–65 (Ct. App. 2010).

The prosecutor in Webb did not call the defendant a hyena or a wild animal. Instead, the prosecutor stated that the case reminded him of hyenas. In the present case the prosecutor did not limit his comments by stating that the **case** reminded him of Little Red Riding Hood. Instead, the prosecutor referred to Petitioner directly as the big bad wolf and while referring to Ms. Hopkins as the grandmother.

In Webb the Court of Appeals found that the prosecutor's comments did not deprive Webb of a fair trial, noting that, like Randall, there was strong evidence of Webb's guilt and the

wild animal comment was not repeated throughout the trial. In the present case, as discussed above, there was not strong evidence of guilt and the prosecutor repeatedly referred to Petitioner as the big bad wolf. Petitioner demonstrated that he did not receive a fair trial as a result of the prosecutor's improper comments. The PCR judge erred in refusing to find counsel ineffective for failing to object to the comments. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different.

2. **The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the prosecutor made an improper closing argument referring to Petitioner as the big bad wolf and telling the jurors, "But, at the end of Little Red Riding Hood and the big bad wolf, it turns out good. Because the woodman comes along and takes care of the wolf. Ladies and gentlemen, you are the woodman. You are the woodman to take care of this matter. Do we want any other grandmas subjected to the big bad wolf?"**

As discussed in issue one above, the prosecutor's continued direct references to Petitioner as the big bad wolf while referring to Ms. Hopkins as grandma were improper as the comments were calculated to arouse the jurors' passions and prejudices. The prosecutor took it one step farther in closing argument telling the jury, "But, at the end of Little Red Riding Hood and the big bad wolf, it turns out good. Because the woodman comes along and takes care of the wolf. Ladies and gentlemen, you are the woodman. You are the woodman to take care of this matter. Do we want any other grandmas subjected to the big bad wolf?" (App. p. 317, lines 16-21). Trial counsel did not object. This was the very last thing the jury heard before the judge instructed them with the law. Telling the jury that they were the woodman to take care of this matter and then asking if we want any other grandmas subjected to the big bad wolf in combination with the earlier direct references to Petitioner as the big bad wolf while referring to Ms. Hopkins as grandma was improper because it was clearly calculated to arouse the jurors' passions and prejudices and went far outside of the record or any reasonable inference. This final comment was additionally improper as it urged the jurors to convict in order to deter future law breaking. Trial counsel admitted that he should have objected to this comment. (App. p. 421, line 7 – p. 422, lines 1-17).

In the order of dismissal the PCR judge wrote, "This Court finds that Applicant has failed to meet his burden of proving that counsel was ineffective in this regard. This Court finds that, when read in context, the solicitor was concluding the his *Little Red Riding Hood* analogy and

not appealing to the passions or prejudices of the jurors or asking them to place themselves in the victim's shoes." (App. pp. 449-450). The PCR judge additionally found that Petitioner failed to prove prejudice. The PCR judge erred. Telling the jurors that they are the woodman and asking if they wanted any other grandmas subjected to the big bad wolf went far beyond concluding the analogy to *The Little Red Riding Hood* fairy tale. The comments were improper. Trial counsel was ineffective for failing to object. Petitioner was prejudiced by the deficient performance.

In Brown v. State, 383 S.C. 506, 515–16, 680 S.E.2d 909, 914–15 (2009), this Court wrote:

> "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609–10, 602 S.E.2d at 744.
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> " 'While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.' " State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). " 'The solicitor's closing argument must, of course, be based on this principle.' " Id. "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006).
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> "On appeal, the appellate court will view the alleged impropriety of the 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." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the Petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.").

In Brown the Court found that counsel was ineffective in failing to object to the prosecutor's "Golden Rule" argument asking the jury to speak up for the child victim. See State v. Reese, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct.App.2004) (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence), *aff'd in part and rev'd in part,* 370 S.C. 31, 633 S.E.2d 898 (2006) (affirming the Court of Appeals' finding that the defendant was entitled to a new trial based on the solicitor's "Golden Rule" closing argument in which he repeatedly asked jurors to "speak" for the murdered victim). The Court in Brown, however, found that Brown failed to prove prejudice, noting that the prosecutor's comments were limited and there was overwhelming evidence of guilt. As discussed above in issue one, the prosecutor's comments in the present case were not limited and there was not overwhelming evidence of guilt.

While not a traditional "Golden Rule" violation, asking the jurors if they wanted any other grandmothers subjected to the big bad wolf is more inflammatory than asking the jury to speak for a victim. As counsel for Petitioner argued at the PCR hearing, all of us have grandmothers. (App. p. 422, lines 9-17). Nobody wants to see a grandmother harmed.

In Tappeiner v. State, 416 S.C. 239, 252, 785 S.E.2d 471, 478 (2016), this Court wrote:

> Further, the solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors' emotions, rather than the evidence in the record. *Cf.* Brown, 383 S.C. at 512, 517, 680 S.E.2d at 912, 915 (finding the solicitor improperly appealed to the jurors' emotions during closing argument when telling them to "speak up" for the child victim and "make sure that the perpetrator is punished"). Thus, we further find there is evidence in the record to support the PCR court's finding that trial counsel was deficient in failing to object to the solicitor's emotional appeal at the conclusion of its closing arguments.

As in Tappeiner, the prosecutor's question to the jury appealed to the jurors' emotions rather than the evidence in the case. Counsel in the present case was ineffective in failing to object to the prosecutor's question to the jury in closing argument. Petitioner was prejudiced by the deficient performance.

In State v. Liberte, 336 S.C. 648, 654, 521 S.E.2d 744, 747 (Ct. App. 1999), the South Carolina Court of Appeals wrote:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.
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> United States v. Monaghan, 741 F.2d 1434, 1441 (D.C.Cir.1984), cert. denied, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985); see also United States v. Hawkins, 595 F.2d 751, 754 (D.C.Cir.1978) (Prosecutors are not "at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem."), cert. denied, 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 380 (1979); United States v. Barker, 553 F.2d 1013, 1025 (6th Cir.1977) ("[I]t is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted it will be impossible to maintain 'law and order' in the jurors' community."); *cf.* State v. Smart, 278 S.C. 515, 526, 299 S.E.2d 686, 692-93 (1982) (finding solicitor's closing argument urging that "law officers who risked their lives in [the defendant's] recapture would be aggrieved by a sentence less than death" and implying that "other citizens of Lexington County including himself would strongly disapprove of a life sentence," to be improper, noting that "*[j]urors are simply not to consider the opinions of neighbors, officials or even other juries*") (emphasis added), *cert. denied,* 460 U.S. 1088, 103 S.Ct. 1784, 76 L.Ed.2d 353 (1983), *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); United States v. Radka, 904 F.2d 357, 361 (6th Cir.1990) ("Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.' ").

The prosecutor's comment to the jury in closing that they are the woodman to take of the matter followed by the question, "Do we want any other grandmas subjected to the big bad

wolf?" improperly appealed to the jurors' emotions, asking them to protect all grandmothers rather than judge the evidence presented. Additionally, the comment improperly asked the jury to convict the defendant in order to deter future lawbreaking. As the South Carolina Court of Appeals held in Liberte, such a comment is irrelevant to the determination of guilt or innocence and improper.

In State v. Smith, No. 2015-001905, 2018 WL 3863250, at *7 (S.C. Ct. App. Aug. 15, 2018), the South Carolina Court of Appeals found that the prosecutor's comment to the jury during closing argument that, ". . . [I]f you don't think that we've done it, if you don't think that Michael Painter was right about the man in the tan outfit firing the gun, then find him not guilty. *We will give him back all of his stuff and put him back out on the street.*" while tossing the defendant's gun on top of the clothes he wore on the night of the shooting was improper. The Court of Appeals wrote:

> She [the prosecutor] improperly alluded to Petitioner's future dangerousness, which is irrelevant to his guilt of the charged offenses, in an attempt to appeal to the jurors' sense of fear. See State v. White, 246 S.C. 502, 504, 507, 144 S.E.2d 481–83 (1965) (holding that the State's argument, "Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do?" injected matters outside the record into the case and "calculated to take from the trial the necessary element of impartiality"); Martin v. Estelle, 546 F.2d 177, 179 (5th Cir. 1977) (observing that the continual references to "highly inflammatory evidence," combined with the prosecution's argument "that [the] Petitioner would be 'back on the streets' if found incompetent to stand trial" supported the Petitioner's "position that he was denied a full, fair, and meaningful competency trial"); Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972) (holding that the prejudicial nature of evidence of a habeas petitioner's prior alleged robberies for which he was tried and acquitted was "quickened by" the prosecution's improper argument, "I am asking you not to allow this man to go back on the street and to redo those things that he has done"). In fact, the State conceded during oral arguments before this court that the assistant solicitor's comments were inappropriate.
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> State v. Smith, No. 2015-001905, 2018 WL 3863250, at *9 (S.C. Ct. App. Aug. 15, 2018).

In the present case, the prosecutor's direct references to Petitioner as the big bad wolf while referring to Ms. Hopkins as the grandmother in addition to the comment to the jury that they are the woodman to take of the matter followed by the question, "Do we want any other grandmas subjected to the big bad wolf?" improperly alluded to Petitioner's future dangerousness in the same way the comment in Smith alluded to future dangerousness. In Smith, however, the Court of Appeals found that the prosecutor's improper comment was cured by the trial judge's instruction to the jury to disregard the statement made by the prosecutor. There was no curative instruction in the present case as there was no objection. Trial counsel was ineffective in failing to object. The comments were prejudicially improper. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. The PCR judge erred in refusing to find both that trial counsel was deficient in failing to object to the improper closing argument and that Petitioner was not prejudiced by the deficient performance.

In the order of dismissal the PCR judge cited State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). The PCR judge's reliance on the Durden case is misplaced. The Court in Durden did not have the full argument made by the prosecutor. The opinion only contains defense counsel's objection as follows, "His argument to the effect that this jury is obligated to serve notice on others and what they do in this case will serve as a deterrent to others. And his argument that if they turn every man loose simply because you are afraid of convicting an innocent man, you're not doing your job. Those statements, first of all, are contrary to the principle of law in this case; and secondly, to say what effect the outcome of this case will have in other areas is highly prejudicial, and I move for a mistrial." Durden, 264 S.C. at 91, 212 S.E.2d at 590. The Court then noted, "It is difficult for this Court to delicately evaluate the

impact of the argument complained of, because we do not have before us the full argument or the evidence, and do not know in what overall context the argument was made. On the other hand, the trial judge heard all of the evidence and heard the entire argument, and he was in a much better position to weigh the effect and possible prejudice. A new trial should not be granted unless the Petitioner shows that there has been an abuse of discretion." Durden, 264 S.C. at 91–92, 212 S.E.2d at 590. Unlike the Court in Durden, this Court has the benefit of the entire trial transcript, the exact comments used by the prosecutor and the context of those comments. In the present case Petitioner demonstrated that the solicitor's comments so infected the trial with unfairness that the resulting conviction constitutes a violation of due process.

Additionally, the C.J.S. section relied upon by the Court in Durden, 23A C.J.S. Criminal Laws 1107, is not current. A current C.J.S. section is more consistent with current case law in regard to what constitutes an improper closing argument by the State and provides:

> The prosecutor may argue for the necessity of law enforcement or fearless or strenuous administration of the law, and impress upon the jury its responsibility in that regard, and denounce crime in strong terms. However, any statement which suggests to the jury that its mission is to solve the crime problem or do anything other than to determine the innocence or guilt of the accused is disapproved. A call for justice by the prosecutor during closing argument may be acceptable when it is directed to the jurors' duty to do justice in a general sense, but an appeal to the jurors to do justice on behalf of the victim or the local community is generally viewed as unprofessional and improper. Accordingly, the prosecutor may not urge the jury to convict the accused in order to protect community values, preserve civil order, or deter future lawbreaking. It is generally improper for the prosecutor to urge the jury to protect society with its verdict, and a prosecutor's summation should not employ language designed to stoke a jury's fear for the future of its community or make an inflammatory argument akin to a "call to arms."

23A C.J.S. Criminal Procedure and Rights of Accused § 1770 (footnotes omitted). This section is consistent with the holding in Liberte that a prosecutor may not urge the jury to convict in order to deter future law breaking. In telling the jury that that they are the woodman to take of the matter followed by the question, "Do we want any other grandmas subjected to the big bad

wolf?" the prosecutor in the present case improperly urged that the jury to convict in order to deter future law breaking.

Importantly, in the concurring opinion in Durden, Justice Bussey wrote:

> I concur in the opinion of Mr. Justice Littlejohn, but deem further comment appropriate as to question number three. There is abundant persuasive authority from other jurisdictions indicating that the latitude allowed a prosecutor in arguing before a jury is not nearly so broad as indicated by the text in 23A C.J.S. Criminal Law s 1107, quoted in the opinion of Mr. Justice Littlejohn, and there are numerous decisions holding arguments similar to that allegedly made by the prosecutor in this case to be improper. See for instance, Emerson v. State, 90 Ga.App. 323, 82 S.E.2d 882 and State v. Phifer, 197 N.C. 729, 150 S.E. 353.
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> Whether or not an argument is prejudicially erroneous depends in large measure upon the precise language used by the prosecutor and the context it which the utterances are made. We have the benefit of neither in the present case, nor of the trial transcript, and I am not convinced of any prejudicial error. On the other hand, I do not think this Court should go on record as approving the propriety of the argument allegedly made, such to my mind being prima facie improper.
> It is not amiss, I think, to call attention to the pertinent provisions of the American Bar Association Project on Standards for Criminal Justice relating to the argument of the prosecutor to the jury. Such appear to be supported by the better reasoned decisions from other jurisdictions. I quote the following from page 126 of the 'Approved Draft, 1971.'
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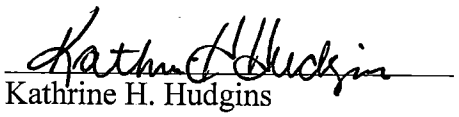
> **'5.8 Argument to the jury.**
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.'

State v. Durden, 264 S.C. 86, 93–94, 212 S.E.2d 587, 591 (1975). The holding in Durden is narrow and limited by the fact that the Court did not have the benefit of the trial transcript showing the comments made by prosecutor said and the context in which the comments were made. Additionally, the alleged improper comment in Durden is analogous to an improper comment urging the jury to convict in order to deter future law-breaking.

In light of current case law and the current C.J.S. section cited above, the prosecutor's comments in closing argument were improper because the comments were clearly calculated to arouse the jurors' passions and prejudices and urged the jurors to convict in order to deter future law breaking. Trial counsel was ineffective in failing to object to the improper comments. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. As discussed above, Petitioner's guilt was not overwhelming. The State presented no forensic evidence linking Petitioner to the crime. Petitioner presented an alibi defense. The State's case was based wholly on the identification by witness Hopkins. Curiously, Hopkins did not immediately report the incident. (App. p. 93, lines 2-8). The incident took place on November 11th at approximately 1:30 AM. (App. p. 149, lines 15-16). The police were not called until 3:00 PM on November 12th approximately 38 hours later. (App. p. 147, lines 22-25; p. 164, lines 5-8). Also, in her statement to police she said she saw someone at her china cabinet where she kept her wallet and then stated that her son Billy was "off limits to her wallet." (App. p. 109, line 11 – p. 110, lines 1-20). Hopkins admitted that her son knew where she kept her money and she had suspected him of taking money in the past. (App. p. 110, line 21 – p. 111, lines 1-14). The improper closing argument in the present case deprived Petitioner of a fair trial.

CONCLUSION

Based on the above arguments, this Court should grant post-conviction relief, reversing the finding of the PCR court, and remand the case for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

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S.C. SUPREME COURT

Certiorari to Laurens County

Honorable Brooks P. Goldsmith, Circuit Court Judge

KEVIN SHANE EPTING,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Kevin Shane Epting, #245196, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 21st day of November, 2018.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of November, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.