STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO AIKEN COUNTY

Court of Common Pleas
J. Mark Hayes, Circuit Court Judge

Appellate Case No. 2018-000091

DWAYNE LEE RUDD,

Petitioner,

v.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Petitioner was indicted in 2013 by an Aiken County grand jury for five counts of third degree criminal sexual conduct with a minor and five counts of second degree criminal sexual conduct with a minor. Petitioner was represented on these charges by Aimee Zmroczek, Esquire. Petitioner proceeded to a jury trial and was convicted of five counts of CSC second degree and two counts of CSC third degree. The Honorable James R. Barber, III sentenced Petitioner to fifteen years' imprisonment for each charge of CSC second degree, to run concurrently, and five years' imprisonment for both charges of CSC third degree, with one sentence to run concurrently and the other to run consecutively.

A timely notice of appeal was filed on Petitioner's behalf by Tommy A. Thomas, Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Rudd, Unpublished Opinion No. 2016-UP-088 (S.C. Ct. App. February 24, 2016). The Remittitur was issued March 17, 2016. Petitioner filed a post-conviction relief (PCR) application on June 10, 2016. Respondent submitted its return on December 16, 2016. An evidentiary hearing into the matter was convened on September 18, 2017, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from Robert Bank, Esquire, Kate Chappell, an expert in forensic pediatric medical exams, and Trial Counsel Aimee Zmroczek ("Trial Counsel"). Respondent presented

testimony from Assistant Solicitor Ashley Agnew Hammack, Esquire. The court denied relief in a written order dated January 2, 2018. This appeal follows.

Relevant Facts Adduced at Trial

Petitioner is the father of Victim 1 and Victim 2, girls who were fourteen and thirteen, respectively, at the time of trial. App. 112; 156. Both children testified. Both alleged Petitioner digitally penetrated them and groped their breasts and private areas. This occurred when Victim 1 was twelve to thirteen years old and Victim 2 was eleven to twelve years old. App. 123-33; 157-68. Victim 1 further alleged Petitioner touched her privates with his penis. App. 128-29. Victim 2 testified Petitioner made her straddle him while she was wearing only a shirt, and that he squeezed her buttocks. App. 164-65. Both girls testified Petitioner apologized for hurting them after instances of abuse. App. 130; 165. Both girls testified Petitioner would cover their heads with a blanket or pillow while he touched them. App. 127; 162. Victim 2 testified Petitioner told her he touched her because he had "thoughts in his head, and if he did it it would go away." Ap.165. She also testified he would "pray and cry" afterwards. App. 166; 188.

Petitioner testified and denied digitally penetrating either child or engaging in inappropriate behavior. App. 328. He admitted to touching Victim 1's vagina, but claimed he was checking to see if she was healing correctly after having surgery on her genitals. App. 329. He further claimed he applied medicine to her genitals following the surgery. App. 329. He testified he only looked at both girls' vaginas to "compare" them. App. 344-47; 359-60; 367-68. However, Victim 1 testified the abuse began before her surgery and continued in the same fashion afterwards. App. 136. She denied Petitioner ever applied medicine to her genitals. App. 136.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel'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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I.

The PCR court correctly denied relief because the prosecutor did not vouch for the credibility of the State's witnesses.

Petitioner claims the prosecutor vouched for the credibility of the State's witnesses in her closing argument when she argued: "If those girls weren't telling you the truth then, ladies and gentlemen, let's give them an academy award." App. 443. Contrary to Petitioner's claim, the prosecutor did not vouch for the witnesses because she did not offer a personal opinion that she believed them. Instead, she merely argued that they were telling the truth and should be believed. The prosecutor's argument was appropriate and trial counsel was not deficient for failing to object. Certiorari should be denied.

A prosecutor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (holding prosecutor vouched for witness when she told jury: "I don't trust any of these people until I corroborate their testimony."). "Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility." State v. Kelly, 343 S.C. 350, 369, 540 S.E.2d 851, 861 (2001), rev'd and remanded, 534 U.S. 246 (2002). "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

However, a prosecutor's argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error. State v. Caldwell, 300 S.C. 494,

505-06, 388 S.E.2d 816, 822-23 (1990) overruled on other grounds by State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013) (prosecutor did not vouch when he argued State's witnesses were credible because the "comments were permissible as to the credibility and common sense biases of the witnesses that were apparent from the evidence"); Shuler, 344 S.C. at 629, 545 S.E.2d at 818 (prosecutor's examination of witness regarding cooperation was not vouching because he "made no overt statement of his personal belief as to the truth of Jones' testimony, and made no insinuation he knew better than the jury what the truth was"). "A prosecutor has the right to state his version of the evidence and to comment on the weight to be given such testimony." Caldwell, 300 S.C. at 506, 388 S.E.2d at 823.

In this case, the prosecutor did not tell the jury she personally believed the witnesses. She merely argued their testimony was believable. She did not use the word "I" in her argument. Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (discouraging use of the pronoun "I" in closing argument). Nor did she refer to any facts outside the record, such as by stating that she had personally corroborated their testimony. Her argument was limited to the believability of the trial testimony of the witnesses. She argued:

> I want you to remember [Victim 1] sitting right here. Think about what she looked like and what she acted like when she told you what her daddy had been doing. Think about [Victim 2]. And what they had to say to you, things that grown-ups don't talk about in public. If those girls weren't telling the truth they deserve an Academy Award.

App. 443. The witnesses' trial testimony was admissible evidence and the prosecutor was allowed to comment on the weight to be given to that evidence. See Caldwell, 300 S.C. at 506, 388 S.E.2d at 823.

An argument is a "statement that attempts to persuade[.]" Black's Law Dictionary (10th ed. 2014), argument. That is the essence of lawyering, and that is what the prosecutor did in this

case. Because the prosecutor did not vouch for the credibility of the witnesses, defense counsel did not provide deficient representation by failing to object.

Finally, the PCR court found that even if counsel was deficient by failing to object, Petitioner "suffered no prejudice given the totality of the evidence against him." App. 671. This factual finding is within the province of the PCR court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018), reh'g denied (Mar. 29, 2018) (explaining the PCR court's factual findings should not be overturned if they are supported by evidence). The PCR court correctly denied Petitioner's application. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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BY:_____
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ATTORNEYS FOR RESPONDENT

January 3, 2019

STATE OF SOUTH CAROLINA
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DWAYNE LEE RUDD,

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v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Kaitlyn Slice, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served. This 3rd day of January, 2019.

Kaitlyn A. Slice
KAITLYN S. SLICE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JAN 03 2019
S.C. SUPREME COURT

January 3, 2019

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

Re: **Dwayne Lee Rudd v. State of South Carolina**
Appellate Case No. 2018-000091
Lower Court Case No. 2016-CP-02-1361

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
SC Bar No. 101188

JAE/ks
Enclosures

cc: Victor R. Seeger, Esquire (2 copies)