STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2018-000371

RICHARD TODD CULBERSON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the post-conviction relief court properly found Petitioner failed to establish trial counsel was ineffective for failing to object to the Solicitor's closing argument on grounds it was made in violation of the Golden Rule where the portion of the argument at issue is not an improper Golden Rule argument, and where even if the argument was improper, Petitioner was not prejudiced when the comment did not so unfairly infect the trial so as to make Petitioner's conviction a denial of due process.

2. Whether the post-conviction relief court properly found Petitioner failed to establish trial counsel was ineffective for failing to object to the solicitor's comment during closing argument: "don't let him get away with this" where it was not an improper appeal to the juror's emotions and was instead a comment consistent with the Solicitor's duty to see justice done. Furthermore, even if the argument was improper, whether the court properly found Petitioner was not prejudiced where the comment did not so unfairly infect the trial so as to make Petitioner's conviction a denial of due process.

3. Whether the post-conviction relief court properly found Petitioner failed to establish trial counsel was ineffective for failing to object to the Solicitor cross-examining Petitioner's expert witness on the common-knowledge job duties and characteristics of a nurse, and for failing to object to the Solicitor's reference to those characteristics in his closing argument. Furthermore, even if the cross-examination and/or closing was improper, whether the court properly found Petitioner was not prejudiced where the questions and argument did not so unfairly infect the trial so as to make Petitioner's conviction a denial of due process.

4. Whether the post-conviction relief court properly found Petitioner failed to establish trial counsel was ineffective for failing to object to the Solicitor's purported comment during closing argument misstating the burden of proof. Furthermore, even if the misstatement was made, whether the court properly found Petitioner was not prejudiced where the trial court thoroughly charged the jury on the law, including the proper burden of proof.

5. Whether the post-conviction relief court properly rejected Petitioner's argument that the cumulative effect of Counsel's errors resulted in sufficient prejudice to his defense that he should have been granted relief.

STATEMENT OF THE CASE

Petitioner was indicted at the March 2013 term of the grand jury for Spartanburg County for first-degree assault with intent to commit criminal sexual conduct (2013-GS-42-1814), first-degree assault and battery (2013-GS-42-1811), kidnapping (2013-GS-42-1812), and attempted armed robbery (2013-GS-42-1813). He was represented by Matthew Shealy, Esquire (Counsel). Respondent (the State) was represented by Solicitor Barry Barnette of the Seventh Circuit Solicitor's Office. On June 16-18, 2014, Petitioner proceeded to trial before the Honorable Roger L. Couch and a jury pursuant to which he was found guilty as indicted. Judge Couch sentenced Petitioner to twenty (20) years' imprisonment for first-degree assault with intent to commit criminal sexual conduct, twenty (20) years' concurrent imprisonment for kidnapping, twenty (20) years' concurrent imprisonment for attempted armed robbery, and ten (10) years' concurrent imprisonment for first-degree assault and battery, for an aggregate sentence of twenty (20) years' imprisonment. (App.p.1; p.430-p.441; p.692-p.703).

Petitioner filed a timely notice of intent to appeal and an appeal was perfected by Assistant Appellate Defender Tiffany Butler of the South Carolina Office of Appellate Defense, who raised the following issue on appeal:

> Whether the trial judge erred by failing to direct a verdict of acquittal on the charge of attempted armed robbery, where there was no direct or substantial circumstantial evidence introduced at trial that Appellant had the intent to steal the victim's purse and permanently deprive her of the purse, where the purse was found next to the victim and nothing was missing from it?

(App.p.442-p.454). The State filed a brief in response (App.p.455-p.470) and the case was submitted without oral arguments. By way of an unpublished opinion filed December 2, 1015,

the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence pursuant to Rule 220(b), SCACR. *State v. Culberson*, Op. No. 2015-UP-546 (S.C. Ct. App. filed December 2, 2015). (App.p.471-p.472). The Remittitur was returned on December 21, 2015. (App.p.473).

On January 29, 2016, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel, in that:
    a. "Trial Counsel was ineffective for failing to object to improper comments and pre-trial remarks made by prosecution during closing arguments
        i. "the prosecution advised the jury that the state didn't have to prove this case beyond a reasonable doubt (See Tr. P. 105, Lines 16-21). This is erroneously lead the jury to believe the State didn't have to meet the burden of proof. The law states the defendant must be found guilty beyond a reasonable doubt as instructed by the judge in his charge to the jury (p. 112, lines 1-5)(p. 113, lines 3-11)(Tr. P. 114, lines 11-13).
        ii. "Trial counsel failure to object to improper closing remarks amounted to performance below the objective standard of reasonableness."
    b. "Trial counsel was ineffective for failing to pursue issue of mistaken identity when victim started to Mr. Faron Cox that the perpetrator was black man in a grey hoodie (Tr. Of the third day of trial, Tr. P. 147, line 21-25)(Tr. p. 48, lines 1-5). The defendant at trial was and is a white male.
    c. "Trial counsel was ineffective when he failed to pursue misidentification defense where Petitioner didn't have scar on his hand, the right or the back of his hand, nor a scar between his ring finger (Tr. p. 124, lines 11-25)(Tr. p. 125, lines 1-25).

(App.p.474-p.485). On October 13, 2016, the State filed a return asking that an evidentiary hearing be held. (App.p.486-p.491). On or about June 21, 2017, Petitioner, through counsel, filed a supplemental application alleging:

1. Ineffective Assistance of Counsel for:

a. "failure to object to improper rebuttal testimony,"
b. "failure to effectively impeach rebuttal witnesses,"
c. "failing to argue for delay to present alibi witness,"
d. "releasing alibi witness from subpoena,"
e. "failure to effectively object to State bolstering his witness with untrue facts contrary to prior testimony (See trial transcript p. vol II, 35, l.3, & pp. 142, l.14 & 143, l. 3), and"
f. "failure to object to improper argument the State's closing argument. (See trial transcript p. 97, l.21, p. 101, l. 17, p. 105, l. 17, & p. 108.)"

2. Ineffective assistance of appellate counsel for failing to brief issues of:
   a. "error in Judge's overruling objection to Solicitor bolstering his witness with facts contrary to evidence, (See trial transcript vol II, 35-3 & pp. 142-14 & 143-3)"
   b. "denial of due process when Judge allows trial attorney to release alibi witness from subpoena, (See trial transcript vol II p. 79) and
   c. "judge error of allowing the reply testimony of Stephanie Eubanks and Kelly Rudicill." (App.p.492-p.494).

An evidentiary hearing into the matter was convened on September 19, 2017, at the Spartanburg County Courthouse before the Honorable Grace Gilchrist Knie. Petitioner was present and represented by Susannah C. Ross, Esquire. The State was represented by Assistant Attorney General Valerie Giovanoli, Esquire, of the Office of the Attorney General. (App.p.495).

At the hearing, Petitioner testified on his own behalf. (App.p.501-p.542). The State called Solicitor Barnette and Counsel in response. The State also elicited telephone testimony from appellate counsel Butler. (App.p.542-p.637). The PCR Court had before it a copy of Petitioner's records from the Spartanburg County Clerk of Court, Petitioner's records from the South Carolina Department of Corrections, the trial transcript, Petitioner's direct appeal records, the PCR application and amendments, and the State's return. At the conclusion of the

evidentiary hearing, the parties made closing arguments and the PCR court took the matter under advisement. (App.p.637-p.647). On October 31, 2017, Judge Knie issued a written order denying relief and finding counsel provided effective assistance in this case. (App.p.649-p.676). Petitioner filed a motion to alter or amend, the State filed a return, and by Order dated February 16, 2018, the motion was denied. (App.p.677-p.691).

On February 28, 2018, Petitioner filed a Notice of Appeal, appealing the PCR court's denial of his application for PCR. Petitioner then filed his Petition for Writ of Certiorari and the Appendix on October 1, 2018. This Return on behalf of the State now follows.

STATEMENT OF FACTS

Trial

At trial, the State presented testimony and other evidence laying out the facts which led to the Petitioner's criminal charges. Victim, an employee of Carolina Ob-Gyn for approximately thirty years, arrived early to work on the morning of January 24, 2013. (App.p.142, lines 9-16). She was meeting a maintenance man before the office opened at 8:00 a.m. and arrived around 7:05 a.m. (App.p.144, lines 12-18). Victim was wearing scrubs, a corduroy coat, and gloves. (App.p.144, lines 22-24). Her purse was on her right arm. (App.p.148, lines 5-7). Victim walked to the entrance of the building. (App.p.146, line 12). She felt a tug on her coat, and as she turned, Petitioner stabbed her in the right shoulder with a screwdriver. (App.p.146, lines 15-17). Appellant grabbed Victim's breast and pushed her against the glass door. Victim testified at this point she didn't know where her purse was. (App.p.146, lines 19-23). She struck her head and back on the glass, and slid down to the floor. (App.p.146, lines 24-25). As Victim was lying on the ground, Petitioner started pulling at the waistband of her pants. (App.p.147, lines 3-

4). When Victim realized what Petitioner was doing, she began kicking him. (App.p.147, line 7). Petitioner stabbed Victim again on her right side under her rib, and "that's about the last thing I knew." (App.p.147, lines 8-9). Victim testified she was in shock, and didn't know how long she was lying on the ground. (App.p.161, lines 13-18). She was found later by an elderly couple who called 911. (App.p.147, lines 12-13). Her purse was found on the opposite corner of the room, diagonally across from where Victim was attacked. (App.p.151, lines 11-19).

Victim was able to describe her attacker to law enforcement. (App.p.168, lines 10-11). A BOLO went out that morning with Petitioner's description. (App.p.258, lines 10-12). At one point, city officers stopped Petitioner four miles away for questioning about another matter, but let him go. (App.p.195, lines 11-16). Officers found Petitioner again later that day and recognized him from the BOLO. (App.p.159, lines 7-12). The officer obtained his identification but did not yet detain him, and Petitioner walked across the street to another business. (App.p.261, lines 1-10). When officers followed Petitioner across the street, they were told by the employees of the business that Petitioner had exited the rear of the building. (App.p.262, lines 1-12). When officers later went to his address, which was his parent's house, they found Petitioner's mother cutting his hair. (App.p.214 lines 15-21). Investigators also found the hoodie and jacket that matched the Victim's description. (App.p.217, lines 18-19). Petitioner was taken into custody and arrested later that day. (App.p.218, lines 5-6). Victim was able to identify Petitioner from a photo lineup. (App.p.197, lines 1-25).

PCR Hearing

At the September 21, 2017 evidentiary hearing, Petitioner testified on his own behalf. He admitted he has been a petty criminal his whole life but claimed he has always pled guilty to the

crimes he committed. He said he had never been to a jury trial until this case because he had never been "not guilty" before. Petitioner insisted he was innocent in this case, that he had been one hundred percent cooperative with police during the investigation, and only ran from them due to a probation violation. (App.p.501-p.512). After Petitioner rested, the State called Solicitor Barnette, Counsel, and appellate counsel Butler in response. Barnette testified he had been practicing law since 1990 and was the Seventh Judicial Circuit Solicitor at the time of Petitioner's trial. Solicitor Barnette first gave a brief overview of the facts and the State's theory of the case. He then proceeded to answer questions about the specific issues raised in Petitioner's application. (App.p.542-p.546). Counsel testified he had been practicing law for eight years, all of it in criminal defense. He then gave a brief overview of Petitioner's case, including his investigation, his meetings with Petitioner, and their theory of defense, which primarily consisted of "trying to kick mud on the identification" because "it was solely an ID case." Counsel also answered questions about the specific issues raised in Petitioner's PCR application. (App.p.566-p.580).

A. Cross-Examination of Expert and Closing Argument on Facts not in the Record

In regard to the four substantive allegations relevant to this appeal, Petitioner only offered testimony on one—the Solicitor's cross-examination of his identification expert witness. He acknowledged Counsel objected to that cross-examination on the basis of relevance when the Solicitor asked if his expert considered Victim's job duties as a nurse for the last thirty years in her assessment of the case, including whether those duties would include evaluating patients and checking their temperature, eyes, and other features which might increase the accuracy of her identification; however, that objection was overruled. (App.p.327-p.328). Petitioner complained

the expert did not actually know Victim and that the questions the Solicitor asked either went beyond, or were contrary to, the facts that were presented in the direct testimony elicited from Victim. He also claimed appellate counsel was ineffective for not briefing the overruled relevance objection Counsel did raise at trial. (App.p.520-p.524).

On cross-examination, Petitioner acknowledged the accuracy of the information in the Solicitor's cross-examination questions where, both during a pretrial suppression hearing and at trial, the victim had testified she was the "head nurse" and had been working at Carolina OB-GYN off and on for about thirty years. (App.p.55). Petitioner claimed he did not really know the duties of a head nurse but seemed to agree with the underlying premise posited by the Solicitor at trial—that a head nurse would be particularly observant and attentive to details—when he stated: "So, she knows a few days facial hair from a goatee." (App.p.534-p.538).

Later, when responding to a question about the alleged Golden Rule violation in his closing argument, Solicitor Barnette emphasized this was a facial ID case where the victim was attacked face-to-face. He testified that as a result, he tried to argue she would be an observant person because she had been a nurse for thirty years. The Solicitor said he believed this was common sense knowledge in regard to nurses who examine patients. He acknowledged the particular testimony was about Victim's occupation and not a detailed description of her duties; however, he believed his closing argument in this regard was still appropriate. (App.p.555-p.557). The Solicitor then recognized the specific portion of his closing argument in question and confirmed there was no objection from Counsel. (App.p.394, lines 14-23; p.559, lines 10-25). On re-direct, Solicitor Barnette referenced Victim's trial testimony that she was a "nurse manager" at Carolina OB-GYN and had worked there "off and on, close to 30 years." He

testified he believed his closing argument simply drew from matters of general knowledge in the community about nurses, explaining their observational skills are common sense because everyone has been examined by doctors and nurses and are familiar with general examinations. (App.p.142, lines 9-16; p.563-p.565).

Counsel agreed with this belief, testifying he did not object to the Solicitor making inferences to a nurse's general duties either during trial or closing, because he believes those duties are common knowledge, particularly for a nurse who had been practicing for almost 30 years. He specifically noted he did not object on grounds that the inferences were based on "facts not in evidence" because, in his opinion, they were logical, reasonable inferences to be drawn from the testimony given by Victim. Counsel testified it would have been ludicrous for him to object on this ground, or to try to raise a nurses' duties as a fact in controversy because, having gone to a doctor himself, those duties are what the nurse did every day, every time he went. He testified it would not have been helpful to Petitioner to object to the Solicitor's description of Victim's duties. Counsel testified he did not find anything objectionable about the Solicitor's comments in closing about a nurse's duties. Counsel also saw no basis for objecting to the questions the Solicitor asked of the expert witness on cross-examination because the witness was given a packet of information about the victim before trial, including the fact that she was a nurse. He noted experts are able to consider facts not necessarily put in evidence before a jury, and testified he believed the Solicitor's cross-examination was fair because it simply challenged the expert on what exactly she relied upon in rendering her opinion. (App.p.583-p.587; p.605-p.607; p.613-p.614; p.618-p.619). Appellate counsel testified that when it comes to cross-examination, attorneys are given more leeway than on direct. She opined

Counsel's objection on grounds of relevance was not meritorious for purposes of appeal. (App.p.627).

B. Burden of Proof

In regard to the State's burden of proof, Solicitor Barnette testified he typically comments on reasonable doubt in his closing argument but often says slightly different things depending on the trial judge and what that judge usually says in the jury charge. He acknowledged the transcript indicated he said he did not have to prove Petitioner's case "beyond any reasonable doubt;" however, he testified he did not recall saying those exact words and would never willfully mislead a jury as to the reasonable doubt standard. Barnette said he could not imagine, under any circumstances, making the comment reflected, and noted he often says the State has to prove a case not "beyond a doubt," but only "beyond a reasonable doubt." (App.p.398; p.542-p.549). On cross-examination Barnette suggested the purported comment could have been a mistake in the transcript. (App.p.557-p.558). On re-direct he noted he was familiar with other transcripts transcribed by Pamela Faucette and is aware she had made errors. (App.p.564).

Counsel testified he did not hear Barnette say the State did not have to prove the case "beyond any reasonable doubt" as indicated in the transcript and that if he had, he would have objected immediately. Counsel testified he can't imagine he would have missed a comment like the one reflected, but upon prompting admitted, "all things are possible." (App.p.589-p.591).

C. Golden Rule

Next, Solicitor Barnette acknowledged the part of his closing argument where he asked the jurors to imagine someone right in front of their face, attacking them, and whether they would remember it. He testified he was familiar with the prohibition against making a "Golden

Rule" argument, but did not believe he made such an argument during his closing. Barnette explained that in a case primarily about a facial identification, where the defense was arguing the victim made an incorrect identification, the closing argument he made was appropriate. (App.p.390; p.554-p.556; p.562-p.563). Counsel testified he did not find this part of Barnette's closing argument objectionable. He testified he did not believe it was a "Golden Rule" argument and therefore was an appropriate argument to make in response to Petitioner's identity defense. (App.p.585-p.586).

D. "Don't let him get away with this"

Finally, Solicitor Barnette recognized the end of his closing argument where he responded to the defense claims that there was not enough evidence in the case to convict by saying:

> You've got what [the Victim] told you and you got what he did afterwards. Don't let him get away with this, don't, because women like [Victim] needs to be able to go to work and not face what she faced that day, not the face of horror. There is no question what happened to her. And what I'm going to ask you, ladies and gentlemen; The evidence is in. And I ask you, on behalf of [Victim] and on behalf of the State, to return guilty verdicts on all counts.

(App.p.401, lines 11-21). He acknowledged there was no objection to these comments. (App.p.559, lines 1-9). Counsel testified he did not see anything objectionable about this portion of the argument at the time of trial, noting he otherwise would have objected. When considered in hindsight, Counsel testified he maybe could have objected because the argument walks a line between proper argument and an objectionable attempt to play upon the jurors' fears; however, he explained both sides often make closing arguments that walk a line. Ultimately, Counsel

testified he did not think the argument was over the line and therefore, the only reason he might have objected would have been to break up the flow of the Solicitor's argument. He opined it would not have substantially benefitted Petitioner to raise an objection to these comments. (App.p.587-p.588).

E. Cumulative Error

At the end of the evidentiary hearing, Petitioner argued that because Counsel was allegedly ineffective in a number of regards, the cumulative effect of those errors was so prejudicial that Petitioner should be given a new trial. (App.p.644-p.645).

F. PCR Court's Findings

After hearing arguments from both parties on the claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel, the PCR court took the case under advisement. (App.p.637-p.647). In an Order of Dismissal dated October 31, 2017, and filed November 1, 2017, Judge Knie denied and dismissed Petitioner's PCR Application with prejudice. The PCR Court found it had the opportunity to review the record in its entirety and had heard the testimony at the post-conviction relief hearing. It found it had the opportunity to observe the witnesses presented at the hearing, and had weighed their testimony and credibility accordingly. The PCR Court noted a PCR matter is not intended to serve as a venue for questioning each and every decision of trial counsel. Rather, it found, the Petitioner must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. The PCR Court found Petitioner has failed to do so. The PCR court concluded: "[Peitioner] has not established any violations that would require this Court to grant his application. This Court finds [Petitioner] has failed to prove any

deficiencies on the part of Counsel and further, [Petitioner] has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him." (App.p.676).

STANDARD OF REVIEW

The standard of review in post-conviction relief cases depends on the specific issue before the reviewing court. It will defer to a post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law *de novo*, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018). In criminal cases, the appellate court sits to review errors of law only. *State v. Broadnax*, 414 S.C. 468, 473, 779 S.E.2d 789, 791 (2015). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012); *State v. Howard*, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2011). To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); *Howard* at 178, 720 S.E.2d at 514.

In a PCR action, "[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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, 104 S.Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The Petitioner must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the Petitioner must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Id.* (citing *Strickland*). 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. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Edwards v. State*, 392 S.C. at 456-57, 710 S.E.2d at 64 (quoting *Lounds v. State,* 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland,* 466 U.S. at 689; *Edwards*, 392 S.C. at 456-57, 710 S.E.2d at 64.

ARGUMENT

I.

The post-conviction relief court properly found Petitioner failed to establish trial counsel was ineffective for failing to object to the Solicitor's closing argument on grounds it was made in violation of the Golden Rule because the portion of the argument at issue is not an improper Golden Rule argument, and because even if the argument was improper, Petitioner was not prejudiced where the comment did not so unfairly infect the trial so as to make Petitioner's conviction a denial of due process.

Petitioner asserts the PCR court erred in finding Counsel was not ineffective for failing to object to the Solicitor's closing argument "asking the jurors to place themselves in the shoes of the alleged victim[1] when analyzing the evidence presented, in violation of the Golden Rule." He argues that by asking the jurors to judge the credibility of the victim's identification of Petitioner by imagining someone attacking them, and considering whether they would remember the face of the attacker, the Solicitor violated the Golden Rule. The State disagrees and submits Petitioner's argument is without merit.

First, Petitioner mischaracterizes the Solicitor's comments. He never asked the jurors "to place themselves in the shoes of the victim." Rather, he merely asked them to assess the accuracy of her identification by considering their own personal experiences with remembering faces. More importantly, Petitioner mischaracterizes the sentiment behind the comment, which was entirely appropriate in the context of the case and did not violate the Golden Rule by attempting to arouse passion or prejudice from the jury. Finally, even if the comment arguably crossed a line into a Golden Rule argument, the comment was not so prejudicial so as to

[1] Although it is consistent with the common practice of the defense bar when describing the facts of a crime, Petitioner's reference to the victim in this matter as the "alleged victim" is troublesome where there is no dispute she was attacked and stabbed twice with a screwdriver by her assailant.

constitute a denial of due process. For all of these reasons, Counsel was not ineffective for failing to object and the PCR court properly denied relief.

South Carolina's courts prohibit the use of a "Golden Rule" argument, in which jurors are urged to place themselves in the position of a party, a victim, or a victim's family member and decide the case from that perspective. *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). "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." *Brown v. State*, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009) (citing *Reese*, 370 S.C. at 38, 633 S.E.2d at 901). "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) (emphasis added). "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 (emphasis added). However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] 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.*

Here, the Solicitor did not appeal to the personal biases of the jurors by asking them to put themselves in the shoes of the victim so they would imagine the outrage and sense of violation that comes from being the victim of a violent crime. The Solicitor also was not asking

the jurors to consider the victim's perspective in an effort to garner pity for the victim and have the jury render a guilty verdict on that improper basis. Rather, the solicitor essentially asked the jurors to bring their own experiences and common sense to the table when evaluating whether the victim was credible. This was entirely appropriate in a case focusing on eyewitness identification. Indeed, the argument was similar to what the trial judge properly charged the jury on the law of credibility:

> . . . it's going to be necessary for you to determine the credibility or the believability of the testimony that you've heard. . . . I'll call on you, again, to *use your own good common sense and make a determination as to the credibility and believability of the testimony* that you heard and the weight that you choose to assign to the testimony that you heard.

(App.p.411-p.412) (emphasis added). As recognized by both Solicitor Barnette and Counsel, the comment at issue was not an objectionable Golden Rule argument; therefore, Counsel was not deficient in failing to object.

Furthermore, Petitioner did not prove there is a reasonable probability that had Counsel objected, it would have affected the outcome of the trial. The comment was not so prejudicial as to amount to a denial of due process, particularly in the context of the closing as a whole. *See State v. Rudd*, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record). Petitioner objects to three lines in a closing argument which spans approximately eleven pages of the trial record. These three sentences occur at the beginning of the Solicitor's argument and were immediately followed by a discussion of the evidence and later by a jury charge which thoroughly described the burden of proof, the presumption of innocence, direct and

circumstantial evidence, and the jury's duty to determine credibility of the witnesses. Petitioner's case is therefore comparable to *Smith v. State*, 375 S.C. 507, 524, 654 S.E.2d 523, 532 (2007), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (concluding any impropriety in the solicitor's closing argument was not sufficient to grant defendant post-conviction relief where solicitor's improper use of the pronoun "I" was limited, did not recur throughout his argument, there was overwhelming evidence of the defendant's guilt, and the trial judge instructed the jury not to consider counsels' statements as evidence); *compare State v. McDaniel*, 320 S.C. 33, 37-38, 462 S.E.2d 882, 884 (Ct. App. 1995) (finding solicitor's use of "you" forty-five times during closing argument asking the jurors to put themselves in the place of the victim constituted reversible error and warranted a new trial).

In *Smith*, this Court found the solicitor's comments came at the very end of his closing argument and were limited in duration, and therefore, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Id.; See also Von Dohlen*, 360 S.C. at 613-14, 602 S.E.2d at 746 (holding trial counsel, during the penalty phase of a capital case, was deficient in failing to object to solicitor's comment for the jurors to put themselves in the victim's shoes, but finding such deficient performance was not prejudicial). Here, the comment was similarly limited in scope. Also, the trial judge instructed the jury that opening statements and closing arguments are not evidence and could not be used in determining guilt or innocence. (App.p.82). Accordingly, Petitioner failed to prove either deficiency or prejudice, the PCR court's finding denying post-conviction relief was proper, and certiorari should be denied.

II.

The post-conviction relief court properly found Petitioner failed to establish trial counsel was ineffective for failing to object to the solicitor's comment during closing argument: "don't let him get away with this" because it was not an improper appeal to the juror's emotions and was instead a comment consistent with the Solicitor's duty to see justice done. Furthermore, even if the argument was improper, Petitioner was not prejudiced where the comment did not so unfairly infect the trial so as to make Petitioner's conviction a denial of due process.

Petitioner asserts the PCR court erred in finding Counsel was not ineffective for "failing to object to the solicitor's closing argument regarding 'not get away with crime'" because the comment violated Petitioner's rights pursuant to the Sixth and Fourteenth Amendments. Relying in part on *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Barrosso*, 320 S.C. 1, 462 S.E.2d 862 (Ct. App. 1995); and *State v. Merriman*, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985), he argues the comments were akin to cases in which this Court has held a new trial was warranted because the Solicitor evoked fear in the jurors by urging them to convict because Petitioner would be a future danger. The State disagrees and submits Petitioner's argument is without merit. The PCR court properly found nothing objectionable about the Solicitor's call upon the jury to punish Petitioner for his criminal conduct. The Solicitor's argument was fair. The jury's verdict was obviously not a result of emotion, but rather a result of the evidence put forth before them. Petitioner failed to prove his burden that he was prejudiced by the alleged deficiency on this issue.

Here, the Solicitor did not attempt to inflame the jury or stoke its fears by arguing Petitioner would be a future danger. Rather, the Solicitor's asking the jury not to let Petitioner "get away with the crime" was effectively a suggestion that the jurors could be instruments of

justice for the victim by finding the defendant guilty, which is a permissible argument. In *State v. Rice*, the prosecutor, during closing argument, "asked the jury to give the victim's wife peace and the victim justice." 375 S.C. 302, 333, 652 S.E.2d 409, 424 (Ct. App. 2007), *overruled on other grounds by State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011). Defense counsel objected on the ground that the comment "improperly injected passion or sympathy into the trial of the case" and asked the trial court to give a curative instruction, which the trial court declined to do. *Id.* at 335, 652 S.E.2d at 426. On appeal, the Court of Appeals agreed with the trial judge, explaining, "Arguably, the prosecutor's comment was consistent with his duty, not to convict a defendant, but to see justice done. Viewed from that perspective, the prosecutor merely asked the jury to do the duty that was already required of them." *Id.* at 336, 652 S.E.2d at 426. Similarly, in Petitioner's case, as explained by Counsel, the comment at issue was not objectionable as intended to appeal the jurors' emotions or improperly influence the verdict. By comparison, in *Northcutt* the solicitor argued a jury's failure to impose the death penalty would be like declaring "open season on babies in Lexington County." That argument turned the focus outward, on fear about future danger to the community. Here, the Solicitor appropriately turned the focus inward on Petitioner and the concept of not letting him evade justice. Also, unlike *Barrosso* and *Merriman*, the Solicitor in this case made no reference to threats or danger to prosecution witnesses or anyone else, other than threats and danger associated with the crime itself. The PCR court properly found Counsel was not deficient in failing to object to a proper closing argument.

Finally, even if somehow improper, the comment was not so prejudicial so as to constitute a denial of due process. Petitioner did not prove there is a reasonable probability that

had Counsel objected, it would have affected the outcome of the trial. Indeed, an objection would either have been overruled or resulted in a simple curative instruction from the trial court. Thus, Counsel was not ineffective for failing to object, Petitioner suffered no prejudice, and the PCR court properly denied relief.

III.

The post-conviction relief court properly found Petitioner failed to establish trial counsel was ineffective for failing to object to the Solicitor cross-examining Petitioner's expert witness on the common-knowledge job duties and characteristics of a nurse, and for failing to object to the Solicitor's reference to those characteristics in his closing argument. Furthermore, even if the cross-examination and/or closing was improper, Petitioner was not prejudiced where the questions and argument did not so unfairly infect the trial so as to make Petitioner's conviction a denial of due process.

Petitioner asserts the PCR court erred in finding Counsel was not ineffective for: (1) failing to object to the Solicitor cross-examining Petitioner's expert witness "about facts that were not in the record" and (2) failing to object to the Solicitor "capitalizing on those facts during his closing argument." Specifically, Petitioner complains Counsel did not object to the Solicitor asking his identification expert about common-knowledge general duties of a nurse and how those duties might affect identification, and then mentioning those duties during his closing argument in an effort to imply the victim was observant and therefore paid close attention to the face of her attacker. He argues that where the State only elicited testimony that Victim had worked at the doctor's office for thirty years, was the head nurse, and performed managerial duties, the general duties of nurses were not applicable to her and therefore the Solicitor was improperly bolstering Victim's identification based on facts not in evidence. The State disagrees and submits the PCR court properly concluded Counsel was not ineffective in these respects

because the cross-examination and the closing remarks were appropriate and unobjectionable. Furthermore, any objection from Counsel on this ground was not reasonably likely to affect the outcome of the trial.

The trial court has wide discretion in ruling on the appropriateness of a closing argument. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). In considering this issue, the solicitor's remarks must be evaluated in the context in which they were made. *See State v. Weaver*, 361 S.C. 73, 89, 602 S.E.2d 786, 794 ("In making this determination, we must examine the alleged impropriety in the context of the entire record."). "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." *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Here, the PCR court found a nurse's duties are general common knowledge. This finding is supported by evidence in the record, including the testimony of both the Solicitor and Counsel recognizing general nurses' duties are common knowledge. Here, the Solicitor drew reasonable inferences from Victim's own testimony that she was the head nurse and had worked for the doctor's office for approximately thirty years. Questions and arguments about common knowledge duties of a nurse were a logical and reasonable extension of the testimony. Indeed, as found by the PCR court, the duties of a nurse were not a fact in dispute or controversy and therefore were not objectionable under the theory that the State was assuming facts not in evidence. *Phillips v. State*, 728 So.2d 681, 684 (Al. Ct. Crim. App. 1998) ("Although the

appellant correctly asserts that a question that assumes facts not in evidence is objectionable, the question is improper only if it 'assumes a fact *in controversy*.'"). Thus, the PCR court properly found counsel was not ineffective for failing to object.

Petitioner also failed to prove there is a reasonable probability an objection to this testimony would have had any effect on the outcome of his trial. Therefore, this allegation was properly rejected by the PCR court and certiorari should be denied.

IV.

The post-conviction relief court properly found Petitioner failed to establish trial counsel was ineffective for failing to object to the Solicitor's purported comment during closing argument misstating the burden of proof. Furthermore, even if the misstatement was made, Petitioner was not prejudiced where the trial court thoroughly charged the jury on the law, including the proper burden of proof.

Petitioner asserts the PCR court erred in finding Counsel was not ineffective for failing to object to the Solicitor's closing argument "lowering the burden of proof" in violation of the Sixth and Fourteenth Amendments. He argues the comment that the State did not have to prove its case "beyond any reasonable doubt" was accurate as reflected in the transcript and was such an egregious misstatement of the law he should have been granted a new trial because Counsel failed to object. The State disagrees and submits the PCR court properly concluded Petitioner failed to prove the apparent misstatement was actually made, or that Counsel was ineffective in this regard. Furthermore, even if the transcript is accurate, the comment had no impact where the trial court cured the improper comment in its jury charge.

Both Counsel and the Solicitor testified the comment reflected in the transcript is not what was actually said during the Solicitor's closing argument. The PCR court found Counsel's

and the Solicitor's testimony on the issue credible and therefore, made factual findings that the transcript contained an error. That finding of fact must be given great deference on appeal. *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011). Consequently, Counsel could not have been ineffective for failing to object.[2]

Regardless, Petitioner has failed to prove any prejudice from the alleged failure to object. The trial judge repeatedly charged the correct burden of proof and mentioned reasonable doubt twenty-six times during his jury instructions. The trial court also charged the jury that a closing argument may not be considered for determining guilt or innocence. (App.p.82). Therefore, there is no reasonable possibility that had Counsel objected to any alleged misstatement by the Solicitor, it would have affected the outcome at trial.

V.

The post-conviction relief court properly rejected Petitioner's argument that the cumulative effect of Counsel's errors resulted in sufficient prejudice to his defense that he should have been granted relief.

Petitioner argues that even if the individual errors by trial counsel did not result in constitutionally deficient representation when analyzed separately, the "cumulative effect of those errors" would nevertheless entitle him to post-conviction relief. The State disagrees and submits the PCR court properly ignored this argument, as it already concluded Applicant failed to meet his requisite burden of deficiency for each ground raised.

"When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." *Simpson v. Moore*,

[2] Petitioner suggests the State is somehow at fault for failing to challenge the accuracy of the transcript during the direct appeal. This is preposterous, as the closing argument was not an issue in the direct appeal. There would have been no reason to know there was an inaccuracy until the particular language became an issue at PCR.

367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). However, "whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002); *see also Lorenzen v. State*, 376 S.C. 521, 535 n. 3, 657 S.E.2d , 771, 779 n.3 (2008). Moreover, 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, therefore, does not recognize a cumulative error analysis. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998).

This Court recently stressed the importance of the PCR court's role in making specific findings on prejudice that are tied to the particular deficiencies alleged. *Smalls*, 422 S.C. at 194, 810 S.E.2d at 846 ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. *Id.* (internal citations omitted).

Here, the PCR court addressed specific findings of prejudice, or the lack thereof, tied to each of the particular deficiencies alleged. Consequently, it appears the PCR court found a cumulative error analysis would be inappropriate, particularly because Petitioner had not met his burden of establishing deficiency as to any of the enumerated grounds. That implicit finding is supported by ample evidence in the record and should result in a denial of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues addressed herein.

Respectfully submitted,

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February 5, 2019.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2018-000371

RICHARD TODD CULBERSON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, J. Benjamin Aplin, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Office of Appellate Defense,
Post Office Box 11433
Columbia, South Carolina 29211-1433

I further certify that all parties required by Rule to be served have been served. This 5th day of February, 2019.

J. BENJAMIN APLIN
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 05 2019
S.C. SUPREME COURT

February 5, 2019

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

Re: **Richard Todd Culberson, #355804 v. State of South Carolina**
Appellate Case No.: 2018-000371
Lower Court Case: 2016-CP-42-0417

Dear Mr. Shearouse:

Enclosed for filing please find an original and six copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
SC Bar #8729

JBA/ck
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Director - Victim Advocacy Division