

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-001957

RICHARD E. TEDFORD,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Issue Presented

Whether the PCR court erred in finding counsel provided effective representation in petitioner's burglary trial where counsel failed to object to the solicitor's closing argument that petitioner wanted to rape the complainant, where this was not a reasonable inference as the argument was based solely on the fact that the complainant was nude but there was no showing the intruder knew she was nude, since this allowed impermissible fear and speculation to infect petitioner's trial?

Respondent's Issue Presented

Did the PCR court properly find that Petitioner failed to establish trial counsel was constitutionally ineffective for failing to object during Petitioner's trial for burglary to the State's closing argument referencing Petitioner's possible intention to sexually assault the victim where the State's argument was properly based on reasonable inferences from the record and counsel made a strategic decision not to object to avoid highlighting the reference to the jury?

- A. The PCR court correctly found that Counsel was not deficient because the evidence at trial reasonably supported the inference that Petitioner intended to sexually assault the victim.
- B. Petitioner failed to demonstrate prejudice where the State did not conclusively argue that Petitioner intended to sexually assault the victim.

STATEMENT OF THE CASE

During its October of 2014 term, the Greenville County Grand Jury indicted Petitioner for two counts of first-degree burglary and two counts of grand larceny stemming from two separate home invasions (of the Wilbanks house and the Walker house). App. 716, 791-802. Richard H. Warder, Esquire, represented Petitioner, and Assistant Solicitor L. Mark Moyer of the Thirteenth Circuit Solicitor's Office prosecuted the case. App. 716. On October 13-15, 2015, Petitioner proceeded to a jury trial with the Honorable Perry H. Gravely, presiding. During the course of the trial, Judge Gravely granted the State's motion to amend the indictments for grand larceny and first-degree burglary concerning the Walker house to petit larceny and second-degree burglary based upon the lack of evidence presented at trial to support the original indictments. App. 470, 474. At the conclusion of trial, the jury convicted Petitioner of first-degree burglary (2014-GS-23-10427), second-degree burglary (2014-GS-23-596), grand larceny (2014-GS-23-10427), and petit larceny (2014-GS-23-597). App. 627. Petitioner filed a timely notice of appeal, and Appellate Defender David Alexander perfected an appeal on Petitioner's behalf. App. 717. On appeal, Petitioner argued that the trial court erred in denying Petitioner's motion to consider that his two previous burglary convictions, which had been committed on a single day and were pleaded to on the same day, as a single conviction for the purpose of enhancing Petitioner's charge to first-degree burglary and second-degree burglary. App. 649. The South Carolina Court of Appeals affirmed the convictions. State v. Tedford, Op. No. 2017-UP-297 (S.C. Ct. App. filed July 19, 2017). The Remittitur was issued on August 8, 2017.

Petitioner then filed an application for post-conviction relief on October 10, 2017, alleging that he received the ineffective assistance of trial counsel and appellate counsel. App.

692-707. Respondent made its Return on January 17, 2018. App. 769. An evidentiary hearing was convened before the Honorable Letitia H. Verdin on June 20, 2018, at the Greenville County Courthouse. Rodney W. Richey, Esquire, was present on behalf of Petitioner, and Assistant Attorney General DeShawn H. Mitchell represented Respondent. At the hearing, Petitioner proceeded on the allegations that trial counsel had been constitutionally ineffective for failing to get Petitioner's two prior burglary convictions considered as a single conviction for purpose of the enhancement of his charges, failing to object to the solicitor's closing argument that Petitioner may have intended to sexually assault the victim, failing to ask additional jury voir dire questions, failing to investigate the status of Petitioner's mental health in an effort to obtain a plea bargain, failing to adequately cross-examine Investigator Gary Gilstrap at trial, and failing to object to the amendment of the first-degree burglary indictment relating to the Walker house. Judge Verdin denied Petitioner's application for post-conviction relief and dismissed the action with prejudice in an Order of Dismissal issued on October 19, 2018. App. 789-90. She found that Petitioner had failed to establish any constitutional violations requiring the grant of post-conviction relief and, with respect to the allegation that trial counsel was ineffective for failing to object to the State's closing argument, found that Petitioner's intent to sexually assault the victim could reasonably be inferred from the evidence presented at trial, that trial counsel did not object to the State's argument due a valid strategy of avoiding the highlighting of the relevant testimony to the jury, and that Petitioner could not demonstrate that the State's remarks deprived him of a fair trial. Petitioner's appeal follows.

STATEMENT OF FACTS

Melody Wilbanks (“the victim”) testified that she woke to the sound of shattering glass shortly after her husband left their home in Greer for work shortly around 6:00 a.m. on August 13, 2013. App. 138, 141. She testified that she ran to check on the source of the sound, and was in the nude at the time. App. 142. She saw an intruder coming into her living room through the broken window. App. 143. Since it was dark in her home, she was not able to get a good look at his face, but she was able to see enough to observe that the intruder was a white man wearing dark clothing. App. 143-44. The victim ran back into her bedroom and locked the door behind her, and then ran into her master bathroom, locking that door behind her as well. App. 144. The victim heard the intruder kick in her bedroom door and, among other things, dig through her drawers. App. 146. The intruder then tried to open the door to the bathroom by turning the doorknob. App. 147. The victim could hear the intruder talking, but did not know whether he was trying to speak to her. App. 147-48. The victim finally left when the victim fired her pistol in warning when he tried to turn the bathroom’s doorknob. App. 148-49. She later realized that the intruder had stolen her car upon fleeing her home. App. 149. During cross-examination, the victim admitted that she could not testify as to the identity of the intruder because she did not see his face. App. 170-71.

Gerald Lockhart testified at trial that he saw a man suspiciously parked in the driveway of his home in Greer at approximately 6:30 a.m. on August 13, 2013. App. 177, 182-83. He forced the man to leave at gunpoint and reported the Scion’s license tag number to police. App. 185, 191. Lockhart identified Petitioner as the man he had seen. App. 196. Terry Bishop also testified at trial that he had seen a man rummaging in a black Scion in front of his home in Greer

at approximately 7:20 a.m. on August 13, 2013. App. 204, 206-07. Bishop forced the man's leaving at gunpoint, and his wife reported the incident to police. App. 209. He identified Petitioner as the man he had seen in front of his home that morning. App. 211. Natalie Powell testified that a man rang the doorbell at her home in Greer at approximately 8:00 a.m. on August 13, 2013, and asked if her parents were home. App. 215, 221. Gun in hand, she instructed the man to leave, and noticed that he was driving a black Scion. App. 222-23. She identified Petitioner as the man who had been at her door. App. 229.

Brian Walker testified at trial that his new home in Greer, into which he was about to move, had been broken into at some point between August 12, 2013, and August 14, 2013. App. 260, 262. There were items missing from the home, including some matches. App. 269, 273. Police lifted fingerprints from, among other sources, a lightbulb in the home's bathroom. App. 275. Arlene Walker, who was Brian Walker's fiancée at the time, described the damage the intruder had done to the home and testified as to her showing the detectives that the intruder had stolen even some matches. App. 302, 308-09. A forensic investigator with the Greenville County Sheriff's Department successfully lifted fingerprints from the home. App. 371-74. A fingerprint examiner testified at trial that he was able to identify Petitioner as the source of some of the lifted prints. App. 399.

Denise Crockett testified at trial that she had seen a black SUV become stuck in the mud near her workplace in Greer. App. 323-24. A patrol officer testified at trial about certain pieces of evidence that were taken from the abandoned car, which included a box of matches and other property that had been taken from the Walker house. App. 257, 414. A forensic investigator with the Greenville County Sheriff's Department successfully lifted fingerprints from the abandoned

black Scion after Crockett reported seeing it. App. 356-58. A fingerprint examiner testified that he was able to identify Petitioner as the source of some of the prints lifted from the Scion. App. 389.

Petitioner testified at trial that he had never been inside the victim's home. App. 493. His explained the presence of his prints in the Walker house by testifying that he used the home, which he believed to have been unoccupied, to clean himself after walking along the highway all night due to his girlfriend's leaving him stranded. App. 479-87. A friend named Derek or Dirk supposedly picked him up from the Walker house in a black Scion, and supposedly did any stealing therefrom without Petitioner's knowing it. App. 489. He testified that this friend shuttled him to the Lockhart and Powell homes while Petitioner was asleep, and that the witnesses saw Petitioner but not Derek or Dirk for various reasons. App. 490-92. Petitioner testified that, if Bishop saw the Scion in the witness's front yard, then Petitioner must have slept throughout that incident. App. 528.

During his closing argument at trial, the solicitor made the following remarks:

Now, [the victims'] home, we know that he stole property. So we know there was an intent to commit a crime.

We also know that he was following [the victim] into her bedroom where she's hiding to get away from him. And did he also enter that home with the intention of rape? Did he intend to do that only when he saw [the victim] come into the room naked? Or did he not have an intention of rape. We know he certainly was going after her. We don't know for sure. We don't know and probably never will. But he came in that home and that is what he did.

App. 575.

During the sentencing phase of trial, the victim shared the effect of the burglary upon her, noting that she daily considers how the intruder tried to "get to [her]", and how he ignored expensive electronics in order to pursue her to the bathroom after kicking in her bedroom door.

App. 637-38. She concluded that the intruder must have had an intention worse than mere theft.
App. 638.

At the PCR hearing, Petitioner testified that “rape” was not mentioned during his trial until the solicitor’s closing argument, and that Counsel should have objected to the solicitor’s remarks because he felt that the jury was inflamed by the remarks. App. 735. He added that perhaps Counsel should have objected to the remarks or requested a curative instruction. App. 736. Counsel testified at the PCR hearing that he felt that the solicitor’s remark in closing was inflammatory and was likely objectionable. App. 757. He testified that he believed that the “jury could have wondered about [Petitioner’s] intent from Petitioner’s breaking into the victim’s home, then breaking into the victim’s bedroom, and then breaking into the victim’s bedroom. App. 757. He then went on to testify that he did not object because he did not want to risk highlighting to the jury the possibility that Petitioner intended to rape the victim by arguing about the remarks. App. 757-58.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found that Petitioner failed to establish trial counsel was constitutionally ineffective for failing to object during Petitioner's trial for burglary to the State's closing argument referencing Petitioner's possible intention to sexually assault the victim where the State's argument was properly based on reasonable inferences from the record and counsel made a strategic decision not to object to avoid highlighting the reference to the jury.

Petitioner argues Counsel was constitutionally ineffective for failing to object to the solicitor's closing argument that the evidence presented indicated Petitioner entered the home of one of the female victims with the intent to rape her because the argument was based solely upon the fact of the victim's nudity and the Petitioner's movement into the victim's bedroom, and that the only evidence that Petitioner had committed the burglary was that he was seen in the victim's car after the burglary.

The PCR court properly found that there was sufficient evidence from which the jury could have inferred that Petitioner intended to rape the victim and that Counsel made the strategic decision not to object because he wanted to avoid cementing the image of Petitioner attempting to rape the victim in the mind of the jurors. The solicitor's closing argument did not affect the outcome of trial because the solicitor did not conclusively argue that Petitioner entered the victim's home with the intent to rape her, only that he may have entered the home with that intention.

Petitioner has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the

adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that Counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel’s deficient performance must have prejudiced 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 does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the PCR applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697.

A. The PCR court correctly found that Counsel was not deficient because the evidence at trial reasonably supported the inference that Petitioner intended to sexually assault the victim.

Petitioner argues that the solicitor's argument in closing that Petitioner may have intended to sexually assault the victim was not supported by the evidence at trial. Petitioner contends that, unlike in Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998), there is no question that the solicitor in this case went outside the record in arguing that Petitioner might have intended to commit sexual assault. According to Petitioner, the solicitor speculated about Petitioner's intention based off of the fact that the victim was undressed when the intruder entered her home, a fact that Petitioner argues was not shown at trial to have been known to the intruder at the time of the break-in. Petitioner tries to distinguish the present case from Simmons in an effort to show that the solicitor's remarks in this case were improper. In Simmons, the solicitor argued in closing that:

[Simmons] might have had plans to case that house, get an idea everything that was there and was going to take it on the way out. He had something else in mind. He had something evil on his mind. He went in, it was obvious the people were upstairs. He knew exactly what he wanted. He saw [the victim] sleeping in her bed in the darkness, exactly what he wanted”

Id. at 336, 503 S.E.2d at 165.

This Court found that Simmons' claim that his trial counsel should have objected to the solicitor's argument in closing that Simmons intended to rape the victim while inside her home was not preserved for appellate review because the PCR court had not ruled upon the ground. Id. at 341, 503 S.E.2d at 168. Because the Court did not address the ground, it did not provide explanation as to its statement that it was “a close question” as to whether the solicitor went outside the record in implying that Simmons wanted to rape the victim. Id., footnote 3.

Here, the solicitor's remarks were grounded in the record. Although the victim did not testify as to whether she believes that the intruder saw her as he climbed through the window into her living room, in which she was standing at the time, she did testify that she was able to identify the race, sex, and clothing of the intruder while she stood in her living room. A reasonable inference from her testimony was that there was enough light in the room and that the victim and the intruder were both present in the living room for time enough for him to notice that the victim was a nude female. The victim testified that the burglar's entrance into her home began after her husband left the home for work around 6:00 a.m. She also testified about the intruder's forcible entrance into her bedroom and then his attempt to enter the bathroom in which she was closeted in fear. The movements of the intruder once he was inside the victim's home could reasonably be interpreted as actions of an attacker in pursuit of a target. All of this evidence at trial could have supported the conclusion that the intruder entered the victim's home with an intent to rape her.

The present case is distinguishable from Simmons; however, it is distinguishable because the solicitor's remarks in this case are not as definite as the solicitor's in Simmons. Whereas the solicitor argued that Simmons' intended to rape the victim in that case, and used language like "obvious" and "exactly", the solicitor in the present case merely raised the possibility that, in addition to intending to steal the victim's property, Petitioner also intended to rape the victim. The solicitor explicitly stated in closing that it was not certain whether Petitioner had an intent to rape the victim and that it *would probably never be certain*. App. 575. In contrast with Simmons, the State did not argue that the evidence clearly demonstrated that Petitioner entered the victim's home with an intent to rape her, which readily distinguishes the two cases.

As an explanation at the PCR hearing for his decision not to object to the solicitor's remarks, Counsel pointed to the victim's trial testimony, and testified that there could have been a factual inference of Petitioner's intent to rape the victim drawn therefrom. App. 757. Counsel also testified that he did not object to the remarks because, even if his objection had been sustained, argument about the word "rape" could cause it to take on more significance to the jury and could highlight the relevant testimony from the victim. App. 758. Petitioner argues that Counsel's strategy in not objecting to the remarks was not valid, relying upon Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009). In Brown, the solicitor argued in closing that the jury should find Brown guilty of criminal sexual conduct with a minor in the first degree and transmitting a sexual disease, calling on the jury to "speak up for [the victim]." Id. at 512, 680 S.E.2d at 912. This Court approved of the findings of the PCR court that the solicitor's comments amounted to a "Golden Rule" argument, noted that the case had emotional tension because the victim was a three-year-old child, and concluded that the solicitor's remarks implored the jury to shed its impartiality and consider the case from the point of view of the child. Id. at 516-17, 680 S.E.2d at 915. Brown's trial counsel testified that he did not object to the solicitor's comments because he did not want to highlight to the jury bad facts or give the jury an additional reason to dislike Brown. Id. at 512, 680 S.E.2d at 913. This Court held that the PCR court had correctly concluded that the supposed trial strategy was not valid in light of the "evident impropriety of the solicitor's remarks." Id. at 517, 680 S.E.2d at 915. Brown does not aid Petitioner in this case as the solicitor's remarks in this case concerned evidence in the record and reasonable inferences therefrom meant to go to the elements of the charged offense. The solicitor's remarks were not a Golden Rule argument meant to shift the jury from its impartiality

to bias. Rather than calling upon the jury to be an avenger of a victim or calling the jury to put itself in the shoes of a sympathetic victim, the solicitor in this case argued about the reasonable inferences that could be drawn from the evidence presented.

The evidence at trial supported a reasonable inference that Petitioner broke into the victim's house with the intent to rape the victim, and the solicitor's remarks in closing focused the jury on the evidence before it, not on the person of the victim or inappropriate feelings of vengeance. Counsel articulated that he did not object to the remarks because the inference of Petitioner's intent to rape could be inferred from the evidence and in order to avoid highlighting the issue to the jury. The PCR court properly found that there was no deficiency in Counsel's performance.

B. Petitioner failed to demonstrate prejudice where the State did not conclusively argue that Petitioner intended to sexually assault the victim.

Petitioner argues that he was prejudiced by Counsel's decision not to object to the remarks because the evidence that Petitioner was the burglar of the victim's home was not overwhelming and the jury's passion was inflamed by the remarks. He has, however, failed to establish that the outcome of his trial would have been different had Counsel objected to the solicitor's closing argument. Petitioner understates the evidence against him for these crimes. Three witnesses who lived at different locations in Greer testified that they saw Petitioner in or near the victim's black Scion on the day of the home invasion, shortly after the burglar fled the victim's house. Although Petitioner's explanation was that he was merely a tag-a-long for Dirk or Derek, the supposed true burglar, the witnesses never saw this person. In fact, despite the fact that Bishop testified that he confronted Petitioner with a firearm, Petitioner denied any memory

of the event, claiming that he must have been asleep at the time. App. 528. All of this could have indicated to the jury that Petitioner's testimony was not credible.

Petitioner argues that the solicitor's closing argument inflamed the jury's passion and prejudice by inviting the jury to render its verdict on an improper basis and not the evidence before it, and cites in support State v. Hawkins, 292 S.C. 418, 420, 357 S.E.2d 10, 12 (1987), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In Hawkins, the solicitor referred to the defendant by the nickname "Mad Dog Hawkins" more than forty times throughout the course of trial. By way of contrast, the solicitor's remarks in this case were composed of a few sentences given in closing argument and did not pervade Petitioner's entire trial. The remarks did not significantly undermine the confidence in the outcome of Petitioner's trial because they did not convey to the jury that Petitioner must have had the intent to rape the victim. The solicitor even admitted that the State could not demonstrate conclusively that Petitioner's intent was to rape the victim, whereas he argued that the evidence did conclusively demonstrate that the Petitioner intended to steal the victim's property. The solicitor's closing argument, besides being based upon a legitimate inference based upon the evidence presented at trial, was a far cry from the solicitor's consistent use in Hawkins of the defendant's unflattering nickname. Petitioner has failed to demonstrate that the outcome of his trial would have been different had Counsel objected to the remarks.

CONCLUSION

The evidence before the PCR court shows that Petitioner failed to demonstrate that Counsel should have objected to the solicitor's remarks in closing because the evidence at trial supports the reasonable inference that the intruder broke into the victim's home with the intent to rape her, the remarks did not conclusively identify rape as a motive of Petitioner, and Counsel wanted to avoid highlighting to the jury the evidence from which the intent to rape could have been inferred. The PCR court properly found that Counsel was not ineffective in not objecting to the remarks. This Court should deny the petition.

Respectfully submitted,

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November 15, 2019

STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
Honorable Letitia H. Verdin, Circuit Court Judge

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Richard E. Tedford, 365731,..... Respondent,

v.

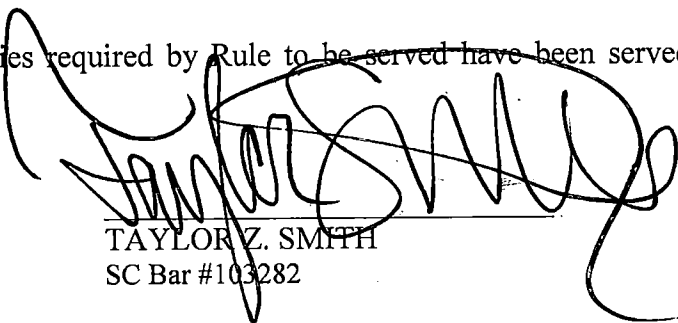
State of South Carolina,Petitioner.

CERTIFICATE OF SERVICE

I, Taylor Z. Smith, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Joanna K. Delany, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 15th day of November, 2019.



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