

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

CERTIORARI TO LAURENS COUNTY
The Honorable Books P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-000696

KEVIN SHANE EPTING,

Petitioner,

v.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS6

STANDARD OF REVIEW7

ARGUMENT9

 I. The PCR court correctly found Counsel was not ineffective for failing to object to the State’s opening statement and closing argument where the assistant solicitor analogized Petitioner’s factual situation to the story of *Little Red Riding Hood*, referring to the victim as the “grandmother” and Petitioner as the “big bad wolf.”9

 II. The PCR court correctly found Counsel was not ineffective for failing to object to the State’s closing argument because no Golden Rule violation occurred where the State analogized Petitioner’s factual situation to the story of *Little Red Riding Hood*, stating “You are the woodman to take care of this matter. Do we want any other grandma’s subjected to the big bad wolf?”16

CONCLUSION.....21

TABLE OF AUTHORITIES

Cases

<u>Bowman v. State</u> , 422 S.C. 19, 809 S.E.2d 232 (2018).....	16
<u>State v. Adcock</u> , 194 S.C. 234, 9 S.E.2d 730 (1940).....	13
<u>State v. Allen</u> , 266 S.C. 468, 224 S.E.2d 881 (1976)	16
<u>State v. Baccus</u> , 367 S.C. 41, 625 S.E.2d 216 (2006).....	13
<u>State v. Beam</u> , 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999)	14
<u>State v. Doby</u> , 273 S.C. 704, 258 S.E.2d 896 (1979)	15
<u>State v. Douglas</u> , 369 S.C. 424, 632 S.E.2d 845 (2006).....	2, 3, 12
<u>State v. Dunlap</u> , 353 S.C. 539, 579 S.E.2d 318 (2003).....	14
<u>State v. Gibert</u> , 196 S.C. 306, 13 S.E.2d 451 (1941)	16
<u>State v. Hawes</u> , 423 S.C. 118, 813 S.E.2d 513 (Ct. App. 2018).....	13
<u>State v. Jackson</u> , 364 S.C. 329, 613 S.E.2d 374 (2005).....	13
<u>State v. Jennings</u> , 394 S.C. 473, 716 S.E.2d 91 (2011)	13
<u>State v. Kennedy</u> , 143 S.C. 318, 141 S.E. 559 (1928).....	18
<u>State v. Major</u> , 301 S.C. 181, 391 S.E.2d 235 (1990).....	15
<u>State v. Page</u> , 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008).....	3, 12, 13, 14
<u>State v. Robinson</u> , 305 S.C. 469, 409 S.E.2d 404 (1991).....	3, 15
<u>State v. Shands</u> , 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018).....	14
<u>State v. Stroman</u> , 281 S.C. 508, 316 S.E.2d 395 (1984).....	15
<u>State v. Taylor</u> , 333 S.C. 159, 508 S.E.2d 870 (1998).....	15
<u>State v. Torrence</u> , 305 S.C. 45, 406 S.E.2d 315 (1991).....	16
<u>State v. White</u> , 361 S.C. 407, 605 S.E.2d 540 (2004).....	13
<u>State v. Young</u> , 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2005).....	3, 20
<u>State v. Young</u> , 378 S.C. 101, 661 S.E.2d 387 (2008)	13, 14, 17, 19, 20, 21

Statutes

S.C. Code Ann. § 16-11-450.....	5, 6, 16
---------------------------------	----------

Rules

Rule 404, SCRE	i, 1, 2, 3, 8, 9, 12, 13, 14, 16, 18, 20, 21
Rule 609, SCRE	8, 20

STATEMENT OF ISSUE

- I. Did the PCR court properly determine Counsel was not ineffective for failing to object to the State's opening statement and closing argument where the assistant solicitor analogized Petitioner's factual situation to the story of *Little Red Riding Hood*, referring to the victim as the "grandmother" and Petitioner as the "big bad wolf"?

- II. Did the PCR court properly determine Counsel was not ineffective for failing to object to the State's closing argument because no Golden Rule violation occurred where the State analogized Petitioner's factual situation to the story of *Little Red Riding Hood*, stating, "You are the woodman to take care of this matter. Do we want any other grandma's subjected to the big bad wolf" during their closing argument?

STATEMENT OF THE CASE

Petitioner was indicted by the February 2009 term of the Laurens County Grand Jury for first-degree burglary (2009-GS-30-190) and assault and battery of a high and aggravated nature (ABHAN) (2009-GS-30-191). Claude H. Howe, III, Esquire, (Counsel) represented him. On November 10, 2009, Petitioner proceeded to a jury trial before the Honorable D. Garrison Hill. On November 11, 2009, Petitioner was found guilty as indicted. Judge Hill sentenced Petitioner to imprisonment for twenty years for burglary and ten years for ABHAN. All sentences were set to run concurrently.

A timely notice of intent to appeal was filed and the direct appeal perfected. Petitioner argued whether the trial court erred in refusing to allow evidence of third party guilt and refusing to allow defense counsel to cross-examine Ms. Hopkins on a 911 call she made regarding her son. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Epting, Op. No. 2012-UP-152 (Ct.App. filed March 7, 2012).

On March 21, 2012, Petitioner filed and served a Petition for Rehearing, and at the request of the Court, Respondent filed its Return on April 3, 2012. The Court of Appeals denied the Petition for Rehearing by Order filed May 25, 2012.

On July 25, 2012, Petitioner filed and served his Petition for Writ of Certiorari with the South Carolina Supreme Court. Respondent filed its return on September 24, 2012. This Court granted the petition on April 16, 2014. On October 22, 2014, this Court issued Memorandum Opinion 2014-MO-040, dismissing the petition as improvidently granted. The Remittitur was sent October 22, 2014.

On February 23, 2015, Petitioner filed an application for post-conviction relief (2010-CP-30-128) alleging ineffective assistance of counsel. On February 19, 2016, Petitioner filed an

amendment. His grounds are consolidated as follows:

1. "Denied the Effective Assistance Counsel at Trial"
 - a. "Counsel failed to competently argue pre-trial motions"
 - b. "Counsel failed to investigate thoroughly"
2. "Denied the Effective Assistance of Counsel at Sentencing"
3. "Denied the Effective Assistance of Counsel of Appeal"
4. "Failed to object during the State's closing argument when the solicitor said the victim 'has no motive to lie.' See Trial Transcript, page 313, lines 12-17. This constituted improper burden shifting by the solicitor and improper vouching for the victim's credibility by the solicitor, especially in a he said/she said case with no forensic evidence indicating the Applicant committed the crime. Furthermore, the trial judge had prevented the Applicant from introducing third-party guilt evidence that the victim's son had assaulted the victim, when there was evidence demonstrating prior difficulties between the victim and her son and evidence that the victim believed her son may have previously stolen money from her wallet/billfold. The victim's desire to protect her son was the victim's 'motive to lie,' but the Applicant was prohibited from presenting evidence about third-party guilt and therefore could not respond to the victim having 'no motive to lie'"
5. "Failed to object during the State's opening statement when the solicitor, referring to the fairy tale 'Little Red Riding Hood,' called the Applicant 'the big bad wolf' and called the victim 'grandma.' See Trial Transcript, page 71, line 23 - page 79, line 2. This was improper use of a nickname;"
6. "Failed to object during the State's closing argument when the solicitor again called the Applicant 'the big bad wolf' and called the victim 'grandma.' See Trial Transcript, page 309, line 5 - page 317, line 22. This was improper use of a nickname;"
7. "Failed to object during the State's closing argument when the solicitor said, 'Do we want any other grandma's [sic] subjected to the big bad wolf?' See Trial Transcript, page 317, lines 20-21. This was a 'Golden Rule' argument which impermissibly appealed to the passion of the jurors by asking them to "speak up" for other elderly grandmothers who may potentially become victims of the Applicant or other people, because every juror has a grandmother;"
8. "Failed to ask the Court to prohibit the witnesses from mentioning the Applicant's prior record (other than the two (2) burglary convictions relied upon by the State to prove burglary 1st degree); and failed to object when the solicitor asked the Applicant about his driving offenses during cross examination (see Trial Transcript, page 216, lines 6-22) and when the solicitor asked defense witness Sharon Corley about the Applicant's driving offenses during cross-examination (see Trial Transcript, page 263, lines 21-25). It was bad enough that the jury heard about the Applicant's burglary convictions, but this testimonial evidence made the Applicant out to be a drunk."

Respondent served its Return on August 19, 2015. An evidentiary hearing into the matter was convened on June 8, 2016, at the Greenwood County Courthouse before the Honorable Brooks P. Goldsmith. Petitioner was present at the hearing and represented by Carson Henderson, Esquire. Assistant Attorney General Justin Hunter of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel also testified.

By Order of Dismissal filed July 14, 2016, the PCR court denied and dismissed Petitioner's application with prejudice. The PCR court found Counsel was not ineffective for failing to object to the State's closing argument where the solicitor stated the victim "has no motive to lie" because such a statement did not constitute improper vouching. (App. 446-447.) The PCR court found Counsel was not ineffective for failing to object to the State's *Little Red Riding Hood* analogy in its opening statement and closing argument as such statements, when read in the context of an analogy, did not arouse the jurors' passions or prejudices to rise to the level of improper comments that would require reversal of the conviction. (App. 447-448.) The PCR court also found Counsel was not ineffective for failing to object to the State's closing argument asking, "Do we want any other grandma's subjected to the big bad wolf" as this comment was not a Golden Rule violation because it did not ask the jurors to place themselves in the victims shoes nor did it rise to the level of improper comments that would require reversal of the conviction. (App. 449-450.)

On July 25, 2016, Petitioner filed a Motion to Reconsider. Respondent made its Return on or about October 28, 2016. The PCR court issued an Order Denying Motion to Reconsider on March 10, 2017.

Petitioner filed a timely notice of appeal and filed his Petition for Writ of Certiorari on October 30, 2017. The Return to the Petition for Writ of Certiorari was filed on March 22, 2018.

On September 21, 2018, this Court granted certiorari. This brief follows.

STATEMENT OF FACTS

On November 11, 2008, Marilyn Hopkins awoke to the sound of someone in her home. She went to the kitchen and found Petitioner at the china hutch going through her pocketbook. (App. 90-91; 94.) Ms. Hopkins recognized the burglar as Petitioner because he had been to her home before with her son and she recognized the tattoos on his arms and legs. (App. 91-92.) Ms. Hopkins confronted Petitioner and told him, "My son is off limits to my wallet and you will not go in my billfold." (App. 94.) Petitioner started walking toward Ms. Hopkins and began hitting and kicking her. (App. 91.) Petitioner left without taking the pocketbook or any money. (App. 93.) Ms. Hopkins suffered two black eyes, a knot on her head, bruises on her side, broken glasses, and was in a state of shock. (App. 137.) Ms. Hopkins admitted not calling the police right away because she was frightened. She later called her sister, who subsequently called the police the morning of November 11, 2008. (App. 93; 123; 129; 137-138.)

Deputy Galarza responded to the sister's call. (App. 147-149.) He took Ms. Hopkins' statement, whom he described as upset, nervous, and scared. (App. 150-151.) Ms. Hopkins described the situation, identifying Petitioner as the burglar and the one who assaulted her based on knowing him as a neighbor, describing what he looked like, and accurately describing his tattoos. (App. 149-159.) Ms. Hopkins further identified Petitioner from a photo shown by Deputy Galarza. (App. 157.)

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, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief 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 post-conviction relief 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).

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; 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 post-conviction relief 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.

ARGUMENT

I. The PCR court properly determined Counsel was not ineffective for failing to object to the State's opening statement and closing argument where the assistant solicitor analogized Petitioner's factual situation to the story of *Little Red Riding Hood*, referring to the victim as the "grandmother" and Petitioner as the "big bad wolf."

Petitioner asserts the PCR court erred in failing to find Counsel was constitutionally ineffective for failing to object to several statements in the State's opening statement and closing argument that analogized Petitioner's case to the story of *Little Red Riding Hood*. However, as the post-conviction court properly found, the State's comments did not rise to the level of impropriety as to warrant a new trial, and additionally, the court found that an objection to the State's comments would not have changed the outcome of the trial. Petitioner has failed to meet his burden, as he cannot show how Counsel was ineffective during the trial, or how objecting to the statements at issue would have changed the outcome of the trial. Therefore, the decision of the PCR court should not be disturbed.

An appellate court will review the alleged impropriety of a solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. State v. Rudd, 355 S.C. 5432, 586 S.E.2d 153 (2003). A solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Webb, 389 S.C. 174, 178-179, 697 S.E.2d 153, 156 (Ct. App. 2003). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Smith v. State, 375 S.C. 507, 522,

654 S.E.2d 523, 531 (2007). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”

Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Petitioner has failed to prove Counsel’s performance was constitutionally ineffective, as the State’s comments analogizing Petitioner’s case to the *Little Red Riding Hood* and Petitioner to the big bad wolf were not improper and did not result in a denial of due process. Petitioner argues the following portions of the State’s opening statement were improper:

Now, you’ve all heard the story of Little Red Riding Hood and the big bad wolf, I’m sure you have. I’d like to call this case the case of grandma and the big bad wolf. Grandma being Ms. Marilyn Hopkins sitting back here. She sort of reminds me of a grandma. She does to me. And sitting over here at the Defense table is Kevin Epting, the big bad wolf. (App. 72.)

And she went into the kitchen of her mobile home, she will tell you that, at that time, she saw the big bad wolf, Kevin Epting, in her house. (App. 73.)

Now, ladies and gentlemen, Mr. Epting, the big bad wolf, has been charged with burglary in the first degree and assault and battery of a high and aggravated nature. (App. 75.)

If you do that, the State is confident that you will see that we have presented evidence sufficient enough for you to find the big bad wolf is guilty of burglary first degree and assault and battery of a high and aggravated nature against grandma. (App. 78.)

Petitioner also argues several statements in the State’s closing argument were also improper. Those statements are as follows:

Now, I told you in the beginning that I call this case the case of grandma and the big bad wolf. (App. 309.)

You’ve got Ms. Hopkins, the grandma, suffering from cancer. (App. 317.)

But, at the end of Little Red Riding Hood and the big bad wolf, it turns out good. Because the woodman comes along and takes care

of the wolf. Ladies and gentlemen, you are the woodman. You are the woodman to take care of this matter. Do we want any other grandmas subjected to the big bad wolf? (App. 317.)

Petitioner asserts Counsel was constitutionally ineffective because he failed to object to the State's remarks referring to Petitioner as "the big bad wolf", which Petitioner characterizes as prejudicial, improper, and objectionable. However, Petitioner did not meet his burden to show how Counsel was deficient or how Petitioner was prejudiced by the State's comments. Further, the comments did not prevent Petitioner from receiving a fair trial.

Deficiency

The PCR court correctly denied Petitioner's claim that Counsel was deficient for failing to object to the State's comments in its opening statement and closing argument because the comments did not rise to the level of impropriety as to warrant a new trial. A solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Webb, 389 S.C. 174, 178-79, 697 S.E.2d 662, 664 (Ct. App. 2010) (citing State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct.App.2003)).

Petitioner attempts to distinguish his case from that of the petitioner in Randall, however, the two cases are quite similar. The solicitor equated Corey Randall and his co-defendant to "cockroaches" during his closing argument. Randall and his co-defendant were on trial for, and ultimately convicted of, trafficking in crack cocaine and possession with intent to distribute crack cocaine within the proximity of a school. In closing the solicitor stated, "That's what I think of dope dealers ladies and gentlemen, the only way I can think of them is like cockroaches. And if that sounds foul to you, it should. Cause drug dealers are filthy just like cockroaches...And one thing about cockroaches [that is certainly true] is they hate the light. Particularly the blue kind like

the ones that stopped these two fellows...But the thing that makes them worse than cockroaches is the fact they're human beings." Randall, 356 S.C. 639, 591 S.E.2d 608. Here, the State, instead of comparing Petitioner to a cockroach, compared him to the big bad wolf. Although the terms are distinguishable, the end result of comparing a defendant to an unlikeable creature is the same.

Additionally, Petitioner attempts to distinguish Randall from his case because the underlying crimes being tried are not the same. Petitioner's belief that the underlying crime has any bearing on this analysis is meritless. The underlying crime being tried does not have any affect on whether the State's comments were objectionable. If a solicitor makes improper remarks in the opening or closing statements, they are objectionable, regardless of the crime being tried. Petitioner also attempts to distinguish Randall from his case by stating the evidence against Petitioner was not overwhelming, unlike the defendant in Randall. However, Petitioner was known to the victim as a neighbor and friend of her son. She was familiar with him and was able to identify him as her attacker based on her recognition of him and the tattoos on his arms and legs. Deputy Galarza testified he showed the victim a picture of Petitioner and she was able to identify him as the person who burglarized her home and assaulted her. (App. 157.) This eye witness account was no doubt very strong evidence against Petitioner.

Petitioner attempts to distinguish the present case from Webb, 389 S.C. 174, 697 S.E.2d 662, as well. In Webb, the State referred to the defendant in its opening and closing statement as a wild animal and a hyena looking for easy prey. This Court found "[g]iven the facts of this case...the solicitor's comments did not infect the trial with unfairness so as to deprive Webb of a fair trial." Webb, 389 S.C. at 180. This Court found the comments were not repeated through the trial and did not result in a denial of due process. This Court also noted there was strong evidence of Webb's guilt. Id.

Petitioner also cites Vazquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), to illustrate how this Court has granted new trials based on counsel's failure to object to inappropriate comments in opening and closing statements. In Vazquez, the State referred to the petitioner as a Sunni Muslim, a domestic terrorist, and provided extensive references to the September 11th attacks on the United States. This Court stated:

Although this Court on several occasions has found no reversible error in a solicitor's singular inflammatory characterization of a defendant, we find the solicitor's comments in the instant case clearly exceed the bounds this Court has established with respect to this type of comment. ...We find the solicitor's statements improperly evoked religious prejudice and, thus, served only to inflame the passions and prejudice of the jury.

Id. at 460 (internal citations omitted). Vazquez, who was not charged with terrorism, was compared to a real life terrorist by the solicitor. The solicitor used Vazquez's religion to draw on the jurors' real life fear and trauma from the September 11th attacks to implore the jury to find Vazquez guilty and sentence him to death. Here, the State insinuated Petitioner was like a fictitious character from a child's bedtime fable, which clearly does not hold the same connotations as the comments made about Vazquez by the solicitor. The solicitor's comments made in Vazquez were clearly objectionable and prejudicial and wholly distinguishable from Petitioner's case.

In State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), the appellant argued the solicitor's closing argument, "so infected the jury's sentencing determination with passion and prejudice that it required reversal of Appellant's death sentence." The objectionable conduct listed by Appellant was as follows:

[T]he solicitor violated this well-established rule¹ by (1) crying numerous times throughout the argument; (2) telling the jury "we

¹ S.C. Code Ann. §16-3-25(C) (1) (2003).

will kick the baby some more” if they returned a life sentence; (3) dehumanizing Appellant (“I don’t even call him a person”); (4) threatening the jury (“it will be on your heads if he kills someone else [during his life sentence in prison]”); (5) declaring an “open season on babies”; (6) telling the jury he “expects” the death penalty; and (7) enacting a funeral procession complete with a black shroud covering the baby’s crib.

This Court found only three of the listed comments by the solicitor supported reversal of Appellant’s sentence. First, the solicitor’s comment declaring an “open season on babies”; second, the solicitor’s comment that he “expects” the death penalty; and third, the solicitor’s production of a baby carriage covered in a large black shroud during a staged funeral procession in the courtroom. *Id.* at 223. This Court found, “Any one of these three miscues requires reversal of Appellant’s sentence.” *Id.* at 224.

In the case at bar, the State did not exhibit any of the conduct that was found to be inflammatory or prejudicial in *Northcutt*. The State referring to *Little Red Riding Hood* and the big bad wolf in the opening and closing argument does not rise to the same egregious conduct as what was displayed in *Northcutt*.

The PCR court properly found the State’s comments did not so infect the trial with unfairness as to deprive the defendant due process. The State’s limited comments in opening and closing statements provided the jury with an analogy of Petitioner’s case to a well-known child’s fable. The State did not conduct any of the objectionable behavior outlined by this Court in *Northcutt* or *Vazquez*. It is clear when reading the State’s remarks in context of the facts in Petitioner’s case that the State was not improperly inflaming the passions of the jury by calling Petitioner “a wolf,” but was simply making an analogy to a fable with a similar fact pattern. Such brief comments are not objectionable and Counsel was not deficient for failing to object.

Prejudice

Furthermore, there is clear evidence Petitioner was not prejudiced by Counsel's failure to object to these comments. "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Webb, 389 S.C. at 178-179 (citing Randall, 356 S.C. at 642). The word "wolf" was used three times in the State's opening statement and twice in the State's closing argument. These brief mentions did not so infect the trial that the jury's verdict would be deemed unreliable. Furthermore, the trial judge properly informed the jury of the presumption of innocence and the burden of proof and there is nothing to suggest the jury reached its verdict improperly. Petitioner failed to prove the outcome of his trial would have been different had Counsel objected to these comments. Therefore, this Court should not disturb the decision of the PCR court.

II. The PCR court properly determined Counsel was not ineffective for failing to object to the State's closing argument because no Golden Rule violation occurred where the State analogized Petitioner's factual situation to the story of *Little Red Riding Hood*, stating, "You are the woodman to take care of this matter. Do we want any other grandma's subjected to the big bad wolf" during their closing argument.

Petitioner argues Counsel was constitutionally ineffective for failing to object to the State's closing argument as he believes the State made an improper Golden Rule argument. In its opening statement, the State's likened the facts of Petitioner's case to *Little Red Riding Hood*. During closing arguments, the State continued with the *Little Red Riding Hood* theme by stating:

But, at the end of Little Red Riding Hood and the big bad wolf, it turns out good. Because the woodman comes along and takes care of the wolf. Ladies and gentlemen, you are that woodman. You are the woodman to take care of this matter. Do we want any other grandma's subjected to the big bad wolf?

(App. 317.) Petitioner concedes this is not a typical Golden Rule violation, but argues the comment was inflammatory. (BOP. 15.) This Court has typically found Golden Rule violations where the State has implored the jury to speak for the victim or place themselves in the victim's shoes. Here, the State has not committed such a violation. The State created a theme to their case by using an analogy between the facts of the case and *Little Red Riding Hood* to convey their theory of the case. The statements Petitioner has pointed to, if read in context of the entire closing statement, shows the State was simply concluding their *Little Red Riding Hood* analogy. The State's comments was in no way asking the jury to speak for the victim or put themselves in her shoes. During the PCR hearing, Counsel even testified the State's comments were not asking the jurors to put themselves in the victim's shoes. (App. 421-422.) The PCR court properly found Counsel was not ineffective, as no Golden Rule violation was committed. Therefore, this Court should not disturb the ruling of the PCR court.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (citing State v.

Reese, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct.App.2004) *aff'd in part and rev'd in part*, 370 S.C. 31, 633 S.E.2d 898 (2006) (recognizing that a “Golden Rule” argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence)). 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. “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.” Id., 383 S.C. at 515-16, 680 S.E.2d at 914 (citing State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)). 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., 383 S.C. at 516, 680 S.E.2d at 915.

Deficiency

Petitioner cites Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016), as an example of this Court finding deficiency with trial counsel for failing to object to a solicitor’s emotional appeal in closing arguments. However, Tappeiner is readily distinguishable from Petitioner’s case. In Tappeiner, the solicitor made statements during her closing argument that vouched for witnesses and misrepresented the evidence. Further, “As her final statement to the jury, the solicitor asserted that in making their decision, the jurors should consider ‘would you let [Tappeiner] babysit your kids? Your grand kids? Nieces and nephews? I think the answer to that is why you should find her guilty.’” Id. at 247. This Court stated, “[S]olicitors should avoid comments that ask jurors to place themselves in the victim’s – or any other party’s – shoes, because those types of comments tend to ‘completely destroy all sense of impartiality of the jurors.’” Id. at 250-251. Here, the State’s

closing argument did not ask jurors to put themselves in the victim's shoes, did not misrepresent the evidence, or vouch for the victim or other witnesses. The statement made by the State at the end of the closing argument was only intended to conclude the analogy of *Little Red Riding Hood*, which the State used as their theme in explaining the facts to the jury.

In State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965), the State was prosecuting the petitioner for rape and made highly inflammatory remarks and blatantly threatened the jury during the closing arguments. The State said in part, "Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them what would you do?" The State also made numerous comments during their closing asking the jury to imagine their mothers, daughters or wives as the victim in the brutal rape case. The State further said, "[W]hen you go back there and consider giving him mercy like they are going to ask you for, think about your wife, think about your daughters, think about your sister or your mother, being in the same position as this young lady, with a knife at her throat and a brute on top of her." Id. at 505. Here, the State's comment merely analogized the jurors to the woodmen from *Little Red Riding Hood*; at no time did the State did not ask the jury to imagine the victim was a member of their family, or ask the jurors' to put themselves in the victim's shoes.

Petitioner's case is clearly distinguishable from cases where Golden Rule violations have occurred. In Brown, the Court found counsel was ineffective for failing to object to the State's closing argument where the State asked the jurors to "speak up" for a three-year old sexual assault victim with its verdict. Brown, 383 S.C. at 515. In Reese, the Court found a Golden Rule violation occurred when the State asked the jury to "speak up" for the victim and telling them "you speak for her with your verdict." Reese, 370 S.C. at 37, overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). See also Von Dohlen v. State, 360 S.C. 598, 613, 602 S.E.2d

738, 746 (2004) (holding a Golden Rule violation occurred when the State told the jury to “put yourself in Margaret’s shoes, size six”). The solicitors in both in White and Tappeiner requested the jury to think about their own children, mothers, daughters, wives, or sisters while considering the guilt of the respective petitioners. In the case at bar, the State did not request this of the jury. The State did not misrepresent the evidence, did not vouch for the victim or other witnesses, or request jurors to think about the Petitioner being in their home with their grandmother as they deliberated on Petitioner’s guilt; the State merely concluded their closing argument using their theme – *Little Red Riding Hood* – to submit their theory of the case to the jury.

The PCR court correctly found Petitioner’s case was akin to State v. Durden, 264 S.C. 86, 212 S.E.2d 587, 590 (1975) (holding that the solicitor’s closing argument did not prejudice the defendant, where the Court held that “the State may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law”). The solicitor in this case did not commit a Golden Rule violation, but appealed to the jury to do their duty to enforce the law and reminded them that people look to them for protection against crime by stating, “You are the woodman to take care of this matter.” (App. 317.) The PCR court properly ruled the comment was not a Golden Rule violation, did not infect the trial with unfairness, and was proper according to this Court’s ruling in Durden.

Prejudice

Petitioner has failed to show how the State’s comment “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Brown, 383 S.C. at 516, 680 S.E.2d at 915. At one point the jurors sent a note to the court requesting a copy of the police report and witness statement; the jury also informed the court, even though instructed not to, they were

currently at seven guilty, five not guilty. (App. 338.) It is evident from this note the jurors were not overly swayed by the State's closing comment. As the trial court told Petitioner after conviction, this case came down to credibility, and, based on the jurors' note, the deliberations were focused was on the evaluation of witness statements. (App. 342.) Petitioner has failed to show how an objection from Counsel when the State made the alleged improper statement during his closing argument would have affected the outcome of this case. Especially since, even after the State made their closing argument, five jurors were still considering Petitioner not guilty.

Additionally, "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Webb, 389 S.C. at 178-179 (citing Randall, 356 S.C. at 642). This Court in Brown found Brown was not prejudiced by his counsel's failure to object to the State's Golden Rule violation because "the solicitor's comments came at the very end of his closing argument and were limited in duration." Brown, 383 S.C. at 517. See also Von Dohlen, 360 S.C. at 613 (holding "the solicitor's single comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process"). Regardless of the fact no Golden Rule violation occurred, the State's single comment in this case occurred at the very end of its closing and did not infect the trial with unfairness as to require reversal of Petitioner's conviction. Furthermore, the trial judge properly informed the jury of the presumption of innocence and the burden of proof and Petitioner is unable to provide any information to suggest the jury reached its verdict improperly. Petitioner failed to prove the outcome of his trial would have been different had Counsel objected to these comments and certiorari should be denied on this ground.

Petitioner has failed to overcome the presumption afforded to Counsel in Strickland, 466 U.S. 668, or the show this Court there is reasonable probability the outcome would have been different had Counsel objected to the State's final statement in their closing argument. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Additionally, as noted in the early section, the trial judge properly informed the jury of the presumption of innocence and the burden of proof and there is nothing to suggest the jury reached its verdict improperly. The PCR court properly denied Petitioner relief on this allegation and this Court should not disturb that ruling.

CONCLUSION

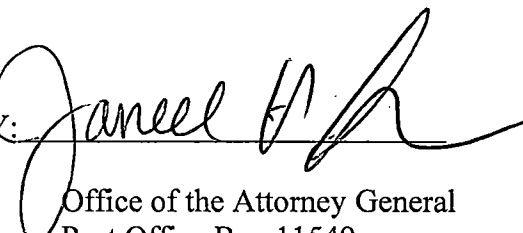
For all the foregoing reasons, it is respectfully submitted that the judgment of the PCR court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

2/15, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LAURENS COUNTY
The Honorable Books P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-000696

KEVIN SHANE EPTING,

v.

THE STATE,

Respondent.

PROOF OF SERVICE

I, Janell H. Gregory, certify that I have served the within Brief of Respondent on Petitioner by depositing two copies of the same in interagency mail, addressed to:

Appellate Defender Kathrine H. Hudgins
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 15th day of February, 2019.



Janell H. Gregory
Assistant Attorney General

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RECEIVED
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S.C. SUPREME COURT
Petitioner,



ALAN WILSON
ATTORNEY GENERAL

February 15, 2019

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S.C. SUPREME COURT

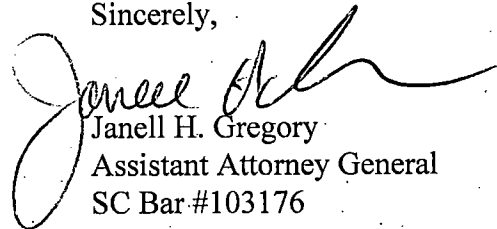
The Honorable Daniel L. Shearhouse,
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kevin Shane Epting v. State of South Carolina
Appellate Case No. 2017-000696
Lower Court Case No. 2015-CP-30-0128

Dear Mr. Shearhouse:

Attached are the original and fifteen (15) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,


Janell H. Gregory
Assistant Attorney General
SC Bar #103176

JHG/clw

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division (without enclosure)