STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Grace Gilchrist Knie, Circuit Court Judge

RICHARD TODD CULBERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000371

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUES PRESENTED

I. By failing to object to the solicitor's closing argument asking the jurors to place themselves in the shoes of the alleged victim when analyzing the evidence presented, in violation of the Golden Rule, did trial counsel violate Petitioner's right to the effective assistance of counsel?

II. By failing to object to the solicitor's closing argument regarding "not get away with crime," did trial counsel render ineffective assistance in violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

III. Did trial counsel render ineffective assistance by (1) failing to object to the solicitor cross-examining the expert witness about facts that were not in the record in order to bolster the alleged victim's eyewitness identification and (2) failing to object to the solicitor capitalizing on those facts during his closing argument?

IV. By failing to object to the solicitor's closing argument lowering the burden of proof, did trial counsel render ineffective assistance in violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

V. Even if the egregious errors by trial counsel did not result in constitutionally deficient representation when analyzed separately, did the cumulative effect of those errors was prejudicial to Petitioner's defense?

STATEMENT

On January 24, 2013, Donna Pruitt worked at Carolina OB/GYN as a nurse manager. App. 141, ll. 23-25; App. 142, ll. 13-14. She had worked there "[o]ff and on, close to 30 years." App. 142, ll. 15-16. As the nurse manager, she made sure "that the patients flow[ed] well," "[took] calls for the patients" and "help[ed] to order things and equipment." App. 143, ll. 1-6.

Pruitt arrived to work early on January 24, 2013, at 7:05 a.m. to meet a maintenance man to repair one of the machines in the office. App. 144, ll. 12-17; App. 146, ll. 6-8; App. 165, ll. 11-21. Faron Cox was a clinical engineer and was scheduled to repair the sterilizer at Carolina OB/GYN. App. 338, ll. 5-16. He arrived around 7:20 a.m. App. 338, ll. 17-18.

When Pruitt opened the door to the building, she felt a tug on her coat. App. 146, ll. 9-13. As she turned, someone stabbed her on the right shoulder with a screwdriver. App. 146, ll. 15-16. She claimed the man touched her breast and pushed her against a glass partition. Ap. 146, ll. 19-22. She hit the back of her head and slid down the glass. App. 146, ll. 24-25. Pruitt claimed the man tried to pull her pants down by tugging at the hem at the top of her pants. App. 147, ll. 3-6. When she started kicking, the man stabbed her on her right side under her rib. App. 147, ll. 7-9. An elderly couple arrived soon thereafter and called for help. App. 147, ll. 12-13.

Cox heard Pruitt yell for help around 7:15 a.m., and he went to her aid. App. 339, ll. 20-25. Cox saw the elderly gentleman standing near Pruitt. App. 340, ll. 2-5. According to Cox, Pruitt told him that a black man attacked her and ran away. App. 340, ll. 22-25. Cox looked for the man, but he was unable to find him. App. 341, ll. 1-5.

Later, Pruitt described the attacker as a white male who was approximately six feet tall with bad teeth, longish hair, and scruffy facial hair. App. 152, ll. 2-8. The police began looking for the suspect in the nearby area based upon Pruitt's description. App. 194, ll. 7-24.

Eventually, the police developed Petitioner as a suspect because he generally fit the description. Petitioner was at a bus station with a white female, Heather Marie Holmstrom, when the police stopped him. App. 195, ll. 1-15; App. 258, ll. 6-16; App. 265, ll. 12-17. Petitioner told the police that he was waiting for the city bus to go to his father's house to pick up a check. App. 270, ll. 4-7. Later that day, the police arrested Petitioner at his parents' home. App. 213, ll. 4-14; App. 275, ll. 19-22.

The police also recovered a screwdriver from the doctor's office. App. 225, ll. 4-5. Subsequent DNA testing of the screwdriver revealed neither Pruitt's nor Petitioner's DNA was on the handle of the screwdriver. App. 247, ll. 2-14. Instead, the police found the DNA of an unidentified female on the screwdriver's handle. App. 247, ll. 15-19.

When the police showed Pruitt a line-up later that day, she selected Petitioner's photograph from the line-up. App. 156, ll. 1-22; App. 196, l. 16 – App. 198, l. 17.[1]

On March 29, 2013, a Spartanburg County grand jury indicted Petitioner for assault and battery in the first degree (2013-GS-42-1811), kidnapping (2013-GS-42-1812), attempted armed robbery (2013-GS-42-1813), and assault with intent to commit criminal sexual conduct in the first degree (2013-GS-42-1814). App. 692-693; App. 695-696; App. 698-699; App. 701-702. On June 16-17, 2014, the state, represented by Barry Barnette, called the case to trial before the Honorable Roger L. Couch and a jury. App. 1. Matthew Shealy represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 431, ll. 6-19. Judge Couch sentenced Petitioner to ten years imprisonment for assault and battery in the first degree and to twenty years imprisonment for the remaining offenses. He ordered all sentences to be served concurrently. App. 439, ll. 14-23; App. 694; App. 697; App. 700; App. 703.

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[1] At the trial, Pruitt identified Petitioner as the person who attacked her. App. 158, ll. 14-18.

Petitioner filed a notice of appeal, which was perfected by Tiffany L. Butler. App. 442-454. On appeal, Petitioner challenged the trial judge's failure to direct a verdict of acquittal on the attempted armed robbery charge based upon the state's failure to present any direct or substantial circumstantial evidence that Petitioner intended to steal anything. App. App. 442-454. On December 2, 2015, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Culberson, 2015-UP-546 (S.C. Ct. App. filed Dec. 2, 2015); App. 471-472. Remittitur was issued on December 21, 2015. App. 473.

On January 29, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 474-485. On June 21, 2015, Petitioner, through counsel, Susannah Ross, filed a supplemental application. App. 492-494. On September 19, 2017, the matter proceeded to an evidentiary hearing before the Honorable Grace Gilchrest Knie. App. 495. Ross represented Petitioner. App. 495. Valerie Giovanoli represented the state. App. 495. By an order filed November 1, 2017, Judge Knie denied Petitioner relief from his convictions and sentences. App. 649-676. Subsequently, Petitioner filed a motion to alter or amend the judgment. App. 677-679. By an order filed February 16, 2018, Judge Knie denied the motion. App. 691.

On February 28, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

I. By failing to object to the solicitor's closing argument asking the jurors to place themselves in the shoes of the alleged victim when analyzing the evidence presented, in violation of the Golden Rule, trial counsel violated Petitioner's right to the effective assistance of counsel.

Relevant facts

At the beginning of his closing argument, the solicitor asked the jurors to step into the shoes of the alleged victim. App. 390, ll. 20-22. Specifically, he asked the jurors to "just imagine somebody right in front of *your* face." App. 390, ll. 20-21 (emphasis added). He continued: "If somebody's attacking *you*; would *you* remember that? Would *you* remember seeing that face for maybe the last time?" App. 390, ll. 21-22 (emphasis added). Trial counsel posed no objection to the solicitor's improper argument.

When questioned about this portion of his closing argument at the PCR hearing, the solicitor explained that he remembered the argument and it is one he uses "quite often in [identification] cases." App. 554, l. 18 – App. 555, l. 7. The solicitor was well aware of the Golden Rule's prohibition on asking jurors to view the evidence from the position of the alleged victim. App. 555, ll. 8-11. However, the solicitor steadfastly maintained that he had not violated the Golden Rule here. App. 555, ll. 12-24. Specifically, the solicitor claimed:

> [W]hat it is from that standpoint, it's a situation where a person's looking at the facial ID standpoint. Here's the person that attacked her around the face. Of course, she's a nurse. She's been 30 years, and going to the ID question, I heard some of the testimony from [Petitioner] from that standpoint.
>
> That was one of the purposes that - - on the ID from that standpoint. Here's a lady that's pretty observant from that standpoint. Someone that she's looking at being attacked by the person face to face and obviously she testified to that ---

App. 555, ll. 14-24.

During the PCR hearing, trial counsel testified that he did not find the solicitor's argument asking the jurors to place themselves into the shoes of the alleged victim to be "objectionable." App. 586, l. 5. In his estimation, it was not "a Golden Rule argument," but was "a common sense understanding of eye witness testimony." App. 586, ll. 5-7. He thought the solicitor was permitted to make this type of argument in response to his mistaken identity defense. App. 586, ll. 11-16.

Judge Knie concluded that the solicitor's argument was not "a Golden Rule Argument." App. 665. According to the judge, "[t]he solicitor was not asking the [jurors] to put themselves in the shoes of the victim in an effort to garner pity for the victim and have the jury render a guilty verdict on that basis." App. 665. Judge Knie found "the argument fair game in the case of mistaken identity." App. 665. Additionally, the judge did not find prejudice resulting from trial counsel's failure to object to the solicitor's argument. App. 666.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695. "When a convicted defendant complains

of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688.

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland; 466 U.S. at 694. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the fact finding would have had a reasonable doubt respecting guilt." Id. (emphasis added).

Although a solicitor should prosecute vigorously, he is a minister of justice. Thus, his job is not to convict a defendant, but to see justice done. A prosecutor's argument must be based upon that basic principle of the criminal justice system. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Where a prosecutor makes an improper argument, the question is whether "the remark ... so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This Court explained an appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In Donnelly, 416 U.S. at 643-644, the United States Supreme Court held the prosecutor's improper comments were not so egregious such that they infected the trial with unfairness making the resulting conviction a denial of due process in light of the trial judge's "special pains" to cure the error and the ambiguous nature of the argument. Although the Donnelly Court afforded no relief to the defendant, the Court reaffirmed the long-standing legal principle that the "'Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.'" Id. at 646 (citing Miller v. Pate, 386 U.S. 1, 7 (1967)); see also Darden v. Wainwright, 477 U.S. 168, 179-182 (1986).

"A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 902 (2006), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). During the closing argument, the solicitor asked the jurors who spoke for the deceased. Id. at 37, 633 S.E.2d at 901. After asking the question several times, the solicitor informed the jurors that they spoke for her and would do so with their verdict. Id. This Court held "[t]he solicitor's argument indisputably asked the jurors to abandon their impartiality and view the evidence from [the deceased]'s viewpoint." Id. at 38, 633 S.E.2d at 902. Thus, the "argument was improper." Id. After remarking that the evidence of Reese's guilt was not overwhelming because his intent was disputed, this Court held the solicitor's improper Golden Rule argument deprived Reese of a fair trial. Id. at 39, 633 S.E.2d at 902.

Addressing this type of argument in the PCR context, this Court held the defense counsel rendered constitutionally deficient performance by failing to object to the solicitor's improper Golden Rule argument in Von Dohlen v. State, 360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004). The solicitor urged the jurors to place themselves in the shoes of the deceased. Id. at 608, 602 S.E.2d at

743. This Court held "[t]he solicitor's statements constitute a prohibited form of argument sometimes described as 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." Id. at 609, 602 S.E.2d at 744.

The solicitor asked the jurors to review the evidence – the only evidence – from the viewpoint of Pruitt. The solicitor's closing asked the jurors to imagine they were Pruitt and being attacked, and then asked if the jurors would be able to identify the attacker. The only evidence against Petitioner was Pruitt's testimony identifying him as her attacker. Thus, the sole question for the jurors was whether Pruitt's identification of Petitioner was accurate. By asking the jurors to view the evidence from Pruitt's standpoint, the solicitor violated the Golden Rule. Trial counsel's failure to object was deficient performance, and his testimony at the PCR hearing demonstrated a lack of understanding of the law regarding improper closing arguments by prosecutors. In light of the centrality of the evidence to which the solicitor's improper comments were directed, there can be little doubt the argument was prejudicial.

II. By failing to object to the solicitor's closing argument regarding "not get away with crime," trial counsel rendered ineffective assistance in violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

Relevant facts

At the very end of his closing argument, the solicitor pleading with the jury to find Petitioner guilty by appealing to the jurors' emotions: "Don't let him get away with this, don't, because women like Donna Pruitt needs (sic) to be able to go to work and not face what she faced that day, not face the horror." App. 401, ll. 16-18. At the PCR hearing, trial counsel acknowledged his failure to object to this portion of solicitor's closing argument. App. 587, ll.

12-23. Trial counsel explained that he did not find anything objectionable about the solicitor's argument "at the time." App. 587, l. 18-20. At the time of the PCR hearing, trial counsel "maybe" would have objected to the argument. App. 587, l. 21. He thought the argument "walk[ed] a line," but went on to explain that "we always - - we do walk lines on closing - - in closing." App. 587, ll. 22-23.

When asked if lawyers were not supposed to play on the emotions of the jury, trial counsel stated:

> Right. But I mean - - and, to some extent, we do it. You can't overly do it. You know, I will admit that I make arguments to the - - for instance, I'll tell a story that, you know, ask a jury not to be that member of the jury that comes up to me in six months and says Mr. Shealy, I wish I had voted not guilty cause you can't change it. Don't be the person that comes up to me at a Food Lion, and, yeah, that's playing on, I suppose, the emotions of the jury too. I didn't think that that was impermissible. I didn't think that it was over the line.
>
> Maybe I should [have] simply objected to break up the flow of his cross or his closing. I don't think I would [have] won that objection. I don't think Judge Couch would [have] sustained that objection.

App. 587, l. 25 – App. 588, l. 16.

Denying Petitioner relief on this claim, Judge Knie recounted that Petitioner alleged trial counsel was ineffective for failing to object to the solicitor asking the jury to return a guilty verdict "because women need to be able to go to work and not face the horror the victim did." App. 666. Judge Knie found "nothing objectionable about the solicitor's call upon the jury to punish Petitioner for his criminal conduct." App. 666. According to the judge, the "solicitor's argument was fair." App. 666. Judge Knie continued to explain her finding:

> The state and the defense are both allowed to play on both the reason and the emotion of a jury. After all, a jury is made up of humans, none of whom are immune to emotion. However, an appeal to the emotion of a jury becomes improper when it is an extreme or outweighs the appeal to reason. That was simply not the case here. The evidence presented damning facts against

> [Petitioner]. The jury's verdict was obviously not a result of emotion, but rather a result of the evidence put forth before them.

App. 666. Additionally, the judge found Petitioner failed to prove prejudice resulting from trial counsel's failure to object to the solicitor's closing argument.

Discussion

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984). Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

In a recent capital case, this Court found a solicitor's closing argument to require reversal where the solicitor informed the jury that if the death penalty were not returned, then it would be the equivalent of "declaring an "'open season on babies in Lexington County.'" The only purpose of such a statement was to inflame the jury. Additionally, the prosecutor told the jury repeatedly that he "expected" the jury to return a death verdict, which was in direct contradiction of case law. Finally, the prosecutor ended his argument by producing a large black shroud and draping it over the baby's crib, which he wheeled into the courtroom in a staged funeral procession. State v. Northcutt, 372 S.C. 207, 222-223, 641 S.E.2d 873, 881-882 (2007).

In State v. Barroso, 320 S.C. 1, 20-21, 462 S.E.2d 862, 874-875 (Ct. App. 1995), rev'd on other grounds, State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997), the Court of Appeals dealt with the prosecution offering testimony from a witness in a statewide grand jury drug conspiracy case where the wife of a state's witness found a note under her windshield which stated: "I know where you live." His wife also received a telephone call wherein she was told "testify and you

die," and the caller then hung up. Id. at 21, 462 S.E.2d at 875. The trial court sustained defense counsel's objections to this witness intimidation evidence and instructed the jury to disregard it through a curative instruction. Id. at 21-22, 462 S.E.2d at 875. While holding it was not an abuse of discretion to deny the mistrial motion in that instance, the Court noted the extreme prejudice and unfairness to the defendant when there was nothing to connect the alleged threat or intimidation to the particular defendant. Id. at 22, 462 S.E.2d at 876. The Court described the prosecutor's actions as "'trial by ambush'" because the prosecutor knew several days in advance what the witness would say. Id. at 22, 462 S.E.2d at 876.

In State v. Merriman, 287 S.C. 74, 83, 337 S.E.2d 218, 224 (Ct. App. 1985), the Court of Appeals held it was "a rather egregious example of prosecutorial misconduct" where the prosecutor elicited testimony that the witness had been in protective custody over the last week or ten days. The Court explained that "[t]he general rules is that references to threats or dangers to prosecuting witnesses are improper unless testimony is offered connecting the defendants with the threats of danger." Id. However, the Court found no error in failing to grant the mistrial motion because the judge gave a "full and complete" curative instruction to disregard the answer. Id.

The solicitor's comments were akin to those in cases in which this Court has held a new trial was warranted. The solicitor evoked fear in the jurors by urging them to convict Petitioner because the solicitor argued he was a future danger and that women should be able to go to work without fear. Instead of asking the jurors to decide the case on the evidence presented, the solicitor seized on the jurors' fears and asked that a verdict be returned to address that fear. Trial counsel rendered deficient performance by failing to object. His testimony at the PCR hearing demonstrated his fundamental misunderstanding of the confines of closing argument when he stated that playing on

the jurors' emotions was not simply permitted, but was expected. Trial counsel's deficient performance was prejudicial to Petitioner in light of the slight evidence presented by the state against Petitioner.

III. Trial counsel rendered ineffective assistance by (1) failing to object to the solicitor cross-examining the expert witness about facts that were not in the record in order to bolster the alleged victim's eyewitness identification and (2) failing to object to the solicitor capitalizing on those facts during his closing argument.

Relevant facts

Pruitt told the jury that she was the "nurse manager" at Carolina OB/GYN at the time she was assaulted. App. 141, l. 23 – App. 142, l. 14. She had worked there "[o]ff and on, close to 30 years." App 142, ll. 15-16. Her duties at the office included "making sure that the patients flow well, taking calls for the patients if [she] had to, helping to order things and equipment," and "making sure that they were maintained." App. 143, ll. 1-6. Pruitt provided no additional information about her job duties and she was not asked to do so.

The defense presented Dr. Dawn McQuiston as an expert witness in the field of eyewitness identification and memory as it relates to eyewitness identification. App. 316, ll. 12-17. On cross-examination, the solicitor asked Dr. McQuiston if she knew Pruitt "was a nurse for 30 years." App. 328, ll. 1-2. Dr. McQuiston responded that she was aware that Pruitt was a nurse. App. 328, ll. 1-2. Thereafter, the solicitor asked Dr. McQuiston a series of questions in an attempt to improperly bolster the identification testimony from Pruitt with facts not in evidence.

> Q. A nurse that would, when people come in, they have to evaluate; look, check the person for their temperature, eyes, and things like that? In her job that she does that?

A. (No Response).

Q. Wouldn't that be correct, a nurse - - I know you've been examined by a nurse. A nurse has to check you out and assess you and so forth?

A. Right.

Q. And that's something that she did for 30 years; did you know that?

A. I didn't know 30 years, no.

App. 328, ll. 3-11.

Shortly after the solicitor violated the Golden Rule by asking the jury to step into the shoes of Pruitt to evaluate the evidence, the solicitor used the improperly elicited evidence from his cross-examination of Dr. McQuiston to argue for a guilty verdict.

> Here's a nurse. They don't know her - - they bring this expert in and the expert says, "No, I don't know Donna Pruitt." Each person is individually different just like all of you are individuals.
>
> Each person remembers things differently. But here's a lady that was a nurse for 30 years that's trained - - and you all have been treated by nurses. They come in and they evaluate you. They come in.
>
> They're different from other folks from that standpoint because they're trying to help folks trying to go through there and go through everything they do; checking, looking in the eyes, checking your temperature. That's their thing.
>
> And they write this information down. And you all seen her put it down the pad. So she's one of those people that does that from that standpoint.

App. 394, ll. 11-23.

At the PCR hearing, the solicitor was confronted with the stark discrepancies between Pruitt's testimony regarding her job duties, his cross-examination of Dr. McQuiston regarding facts not in evidence, and how he capitalized on that cross-examination to bolster Pruitt's identification of Petitioner as her attacker. The solicitor deflected, stating that it was "common sense." App. 556, ll. 2-5. He was forced to admit that Pruitt never testified she looked into

patients' faces or examined them closely. App. 557, ll. 7-10. He was also forced to admit that Pruitt never testified about how nurses were different than other people regarding their observational abilities, which was what the solicitor argued to the jury. App. 559, ll. 10-25.

Without any evidence in the trial transcript to support him, the solicitor told the PCR judge that Pruitt had been a nurse for thirty years. App. 563, ll. 7-11. Instead, Pruitt testified that she had worked "off and on" for Carolina OB/GYN for "close to 30 years." App. 142, ll. 15-16. Pruitt's position there at the time of the trial was "nurse manager." App. 142, ll. 13-4. Again, without any evidence in the transcript, the solicitor described the career path of a "head nurse," based upon his wife's experiences. App. 563, l. 12 – App. 564, l. 8. The solicitor explained:

> [M]y wife's a nurse. She's been a nurse for over 30 years herself, and she's held every position from that standpoint. She's even been head nurse and things like that in the hospital, and I'm very familiar with their, with their duties, what they do and so forth, and know what they went through.
>
> So, you know, it's a situation you don't go to be the top nurse or whatever just right off the bat. You've got to develop obviously, experience, and work through the system from that standpoint.

App. 563, l. 23 – App. 564, l. 8.

Then, in direct contravention of his testimony that his knowledge of nursing and nursing duties at various levels was the result of his "insider knowledge" from his wife's experiences over the past thirty years, the solicitor claimed this was a "matter of general knowledge in the community." App. 564, ll. 9-11. In his view, everyone has been "examined by doctors and by nurses, and they know - - they're very familiar. Every time you go to the doctor's office, a nurse is going to examine you prior to the doctor examining you." App. 565, ll. 1-11.

Trial counsel did not find anything objectionable regarding the solicitor's argument about "a nurse's general duties." App. 584, ll. 8-13. According to trial counsel, "a 30 year nurse's

duties [were] generally, generally, common knowledge." App. 584, ll. 11-12. He thought the solicitor's argument consisted of "logical, reasonable inferences drawn from the testimony." App. 584, ll. 14-17. When asked about whether he should have objected that the solicitor was questioning Dr. McQuiston concerning facts not in evidence and presenting a closing argument based upon those facts, which was used to improperly bolster the only witness against Petitioner, trial counsel "guess[ed]" that in order to pose such an objection that facts would need to be in controversy. App. 584, l. 18 – App. 585, l. 1. He then indicated that he did not put a nurse's duties in controversy. App. 585, ll. 2-4. He "suppose[d] maybe [he] should [have]." App. 585, ll. 4-5. He did not consider putting the duties into dispute because "it would [have] been ludicrous for [him] to argue that that's not what nurses do because ... having gone to the doctor, that's what a nurse does to [him] every day every time [he] go[es] to the doctor." App. 585, ll. 7-12. He did not think such an objection would have been sustained. App. 13-17.

Concerning the solicitor's questioning of McQuiston about Pruitt having heightened abilities to observe people based upon her thirty-year career as a nurse, trial counsel admitted Pruitt had "a different version of what she was doing at the time that this happened." App. 606, ll. 22-23. Strangely, trial counsel believed Pruitt "had been a nurse for 30 years, and that was a job that she had been moved into." App. 606, l. 25 – App. 607, l. 1.

In the order denying relief, the PCR judge noted that the solicitor elicited testimony regarding a judge's general duties from Petitioner's expert witness and used that testimony to bolster Pruitt's identification of Petitioner. App. 667. Pruitt was the nurse manager and performed managerial duties. App. 667. She had worked at the doctor's office for thirty years at the time of the trial. App. 667. With no supporting evidence in the record, Judge Knie found it "worth noting" Pruitt "did not become the head nurse supervisor over the course of thirty years

of employment with that office without first having served as a nurse." App. 667. Additionally, the judge relied upon an out of state case to determine the testimony was "not objectionable under the theory that the state was assuming facts not in evidence" because the duties of a nurse were not a fact in dispute or controversy. App. 667. The judge "believe[d] a nurse's duties [were] general common knowledge." App. 667.

The PCR judge acknowledged Petitioner's claim that trial counsel rendered ineffective assistance by failing to object to the solicitor "mentioning the general duties of a nurse to imply the victim was observant and therefore paid attention to the face of her attacker." App. 666. The judge went on to find the "closing remarks appropriate and unobjectionable." App. 666. According to the judge, the solicitor "was drawing reasonable inferences from the victim's own testimony that she was the head nurse and had worked for the doctor's office for thirty years." App. 666. Finally, the judge determined "any objection from counsel on this point was not reasonably likely to affect the outcome of the trial." App. 666.

Discussion

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984). Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

Closing arguments "must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence." State v. Vaughn, 362 S.C. 163, 607 S.E.2d 72 (2004) (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Although a

solicitor should prosecute vigorously, he is a minister of justice. Thus, his job is not to convict a defendant, but to see justice done. A prosecutor's argument must be based upon that basic principle of the criminal justice system. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Where a prosecutor makes an improper argument, the question is whether "the remark ... so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This Court explained an appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In State v. Vaughn, 362 S.C. 163, 171, 607 S.E.2d 76 (2004), this Court held a defendant was entitled to a new trial based upon the solicitor's improper closing argument. The defendant's attorney asked the jury to remember that only one officer testified on behalf of the prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id., at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors' time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant's attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those witnesses to testify. She also stated she did not call the other witnesses because they would have said "the very same thing" that the officer presented said. Id., at 168, 607 S.E.2d at 74.

This Court recognized that improper argument includes vouching for witnesses and initiating argument about the testimony of absent witnesses. Id., at 169, 607 S.E.2d at 75.

Additionally, this Court recognized that the defendant "'opened the door' to some response from the solicitor" based on is closing argument concerning the absence of witnesses. Id., at 170, 607 S.E.2d at 75. This Court held that the solicitor's response was unfair and prejudicial in light of the lack of evidence of the defendant's guilt. Id., at 170, 607 S.E.2d at 75-76.

The solicitor questioned the defense's expert witness about the general duties of a nurse. The solicitor then capitalized upon this information in his closing argument to bolster the identification testimony from Pruitt. He tried to argue that due to the nature of a nurse's duties, a nurse would be better able to make an identification. The testimony from the expert regarding the duties of a nurse directly contradicted the testimony from Pruitt regarding her actual job duties. Pruitt was in an administrative position at the time of the offense. There was no evidence that she had ever been a nurse. While it may be intuitive that a nurse manager was a nurse at one time, there was no evidence regarding when she may have been a nurse or for how long. Her testimony was very general – she had worked at the doctor's office on and off for thirty years. She did not reveal her capacities over that time frame. The solicitor argued to the jury facts that were not in evidence and capitalized on the limited evidence he obtained from the defense witness to argue that Pruitt was better able to make an identification because of her role as a nurse. Trial counsel's failure to object was prejudicial deficient performance.

IV. By failing to object to the solicitor's closing argument lowering the burden of proof, trial counsel rendered ineffective assistance in violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

Relevant facts

During his closing argument, the solicitor informed the jurors that "the one thing" the judge would instruct the regarding would be "to leave you firmly convinced." App. 398, ll. 17-

18. According to the solicitor this meant the state did not "have to prove this case beyond any reasonable doubt." App. 398, ll. 18-19. Rather, the state need only "show it to you so that you're firmly convinced of this man's guilt." App. 398, ll. 20-21. Nevertheless, trial counsel posed no objection to the solicitor's statements.

At the PCR hearing, the solicitor had no memory of saying he did not have to prove the case beyond any reasonable doubt. App. 547, ll. 18-21. The solicitor stated that he would never "willfully mislead a jury as to the reasonable doubt standard." App. 548, ll. 9-11. Thereafter, the solicitor initially claimed that he would not ever say he did not have to prove the case beyond "any doubt," but later, he stated that he would tell a jury that he does not have to prove guilt beyond any doubt. App. 548, ll. 12-25. Later, he stated that he "sometimes" tells jurors that he does not have to "prove beyond a doubt." App. 549, ll. 3-5.

The solicitor claimed the court reporter *could* have made a mistake when she prepared the transcript. App. 558, l. 25. Later, he appeared more adamant that the court reporter had made a mistake. App. 560, ll. 3-6. In fact, the solicitor asserted that he had experience with the court reporter and that she "had errors before." App. 564, ll. 15-20. He insinuated that the court reporter was no longer employed by South Carolina Court Administration as a result of those errors. App. 564, ll. 21-23.

Trial counsel told the PCR judge that he did not hear the solicitor say that he did not have to prove the case beyond any reasonable doubt. App. 589, ll. 6-11. He claimed that if he had heard that, he would have objected. Ap. 590, ll. 1-5. According to trial counsel, it would be "absurd" for the solicitor to argue that he did not have to prove the case beyond any reasonable doubt and he would have objected immediately to that. App. 591, ll. 3-6. Trial counsel was forced to admit, however, that he did not remember every word the solicitor said in closing.

App. 599, ll. 6-9. Nevertheless, he persisted that he could not imagine that he would have missed the solicitor saying he did not have to prove the case beyond any reasonable doubt because that was "Black Letter Law objectionable." App. 599, ll. 9-14.

In her PCR order, Judge Knie recounted that trial counsel and the solicitor testified that the solicitor did not say he did not have to prove the case beyond any reasonable doubt. App. 665. Judge Knie found trial counsel and the solicitor credible on this issue. App. 665. According to Judge Knie, the solicitor "ha[d] been prosecuting criminal cases for many years and obviously fully understands the state's burden of proof." App. 665. As a result, the judge found it "very likely that this was a transcription error and that the solicitor most likely said the state was not required to prove the case by *any doubt*." App. 665 (emphasis in original). Thereafter, Judge Knie issued an alternative ruling. Judge Knie found "it very difficult to believe the mistake was not inadvertent" "if the solicitor "did actually say what appears in the transcript." App. 665.

Additionally, the judge held Petitioner failed to prove any prejudice from trial counsel's failure to object. App. 665. Judge Knie claimed the "record [was] littered with the correct burden of proof, including the trial judge who mentions reasonable doubt twenty-six times during his jury instructions." App. 665. She concluded there was "no reasonable possibility that had counsel objected to any alleged misstatement by the solicitor, it would have affected the outcome." App. 665.

Discussion

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984). Thus, in a PCR action, the applicant must

prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

The burden of proof in criminal cases is beyond a reasonable doubt "owing to the great tenderness of the law for the liberty and life of the accused." Brown v. Atlanta & C. Air Line Ry. Co., 19 S.C. 39, 44 (1883); see also Franklin v. Catoe, 346 S.C. 563, 573-574, 552 S.E.2d 718, 724 (2001)(explaining "the fundamental goal of the criminal justice system [is] that no citizen forfeit his life or liberty unless found guilty beyond a reasonable doubt").

This Court granted a defendant a new trial where a prosecutor's closing argument, which "misstated the law by improperly injecting parole considerations into the jury's sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence of an acquittal." Simmons, 331 S.C. at 338-339, 503 S.E.2d at 167. Although the trial judge informed the jury that the responsibility of sentencing the defendant was for the judge alone, the judge did not explain the sentencing consequences of the verdicts available to the jury. Id., at 339, 503 S.E.2d at 167. Therefore, the instructions did not cure the improper argument. Additionally, the Court was not persuaded by the overwhelming evidence of the defendant's guilt because the prosecutor's argument prevented the jury from fairly considering a verdict of guilty with a recommendation of mercy. Id., at 340, 503 S.E.2d at 167.

In his closing argument, the solicitor misstated the burden of proof. The text of the transcript was clear that he said he did not have to prove the case beyond any reasonable doubt. Although the state, defense counsel, and even the PCR judge believed the transcript contained an error in this regard, the state never sought to challenge the transcript. Certainly, the state could have challenged the correctness of the transcript during the direct appeal stage, but the state made no

attempt to do so. Instead, the state waited until the eleventh hour to posit its tenuous argument that the court reporter, about whom the solicitor personally attacked with no evidentiary support, made an error. The solicitor improperly argued to the jury that his burden of proof was lower than "beyond a reasonable doubt" when he argued he did not have to prove the case "beyond any reasonable doubt." Trial counsel erred in failing to object to the solicitor's improper closing argument. Despite the trial judge's correct statement of the law during the jury instructions, the damage had been done.

V. Even if the egregious errors by trial counsel did not result in constitutionally deficient representation when analyzed separately, then the cumulative effect of those errors was prejudicial to Petitioner's defense.

Relevant facts

Petitioner incorporates all relevant facts discussed in Issues I-IV, supra. At the conclusion of the PCR hearing, PCR counsel argued the cumulative effect of trial counsel's errors were prejudicial to Petitioner's defense. App. 644, l. 24 – App. 645, l. 1. Despite this argument, the PCR judge failed to make any findings of fact or conclusions of law on the matter. App. 649-676. Thus, PCR counsel filed a motion to alter or amend the judge noting that Petitioner argued "that while each allegation may not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." App. 677 (internal citation omitted). Subsequently, the judge denied the motion without any additional findings of fact or conclusions of law. App. 691.

Discussion

Petitioner incorporates all legal discussions related to Issues I-IV, supra. "The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). A litigant "must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." Id.; see State v. Daise, 421 S.C. 442, 466, 807 S.E.2d 710, 722 (Ct. App. 2017). The South Carolina Supreme Court explained that in the context of a post-conviction relief action, an applicant "must ordinarily show actual prejudice," but "he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized inquiry unnecessary." Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (citing Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988)).

In State v. Freeman, 319 S.C. 110, 123, 459 S.E.2d 867, 874 (Ct. App. 1995), the Court of Appeals held that Freeman was entitled to a new trial where "each point of error raised alone [was] insufficient to warrant a new trial," but "the cumulative effect [was] enough to require that relief." In Freeman's case, the trial judge repeatedly "interrupted, made unsolicited comments, interjected his opinion, [and] arbitrarily limited cross-examination of the state's investigating officers." Id. The court held "the combined effect of the numerous unsolicited comments and the limitation of cross examination unduly prejudiced" the appellant. Id. The court explained "the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal. In their totality, the cumulative effect of the lack of

latitude allowed the defense in cross-examining the state's investigating officers along with the court's comments, unfairly prejudiced the defense and necessitate[d] the convictions be set aside." Id. at 123-124, 459 S.E.2d at 874.

The cumulative effect of the errors described supra require reversal of Petitioner's convictions. The solicitor violated the Golden Rule in his closing argument, but went unchecked. The solicitor preyed upon the emotions and fears of the jurors when he implored them to not let Petitioner "get away with it," but his erroneous argument received no objection. Additionally, he elicited some facts from a witness without personal knowledge regarding the duties of a nurse and then used those and others not adduced at trial to argue the state's only witness against Petitioner was better qualified than an average person to make a reliable identification because of her alleged employment. Finally, he blatantly misstated the burden of proof in his closing and made *ad hominem* attacks when confronted. The cumulative effect of these errors, which were unobjected to, demonstrate prejudice to Petitioner's defense.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court, find trial counsel rendered ineffective assistance, and order a new trial on the charges.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Grace Gilchrist Knie, Circuit Court Judge

RICHARD TODD CULBERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jordan Cox, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Richard Todd Culberson, #355804, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of October, 2018.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of October, 2018.

Maria Reynolds (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023