STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM MARION COUNTY
D. Craig Brown, Circuit Court Judge

2018-CP-33-00444

Lindell Davis, # 366106,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Lindell Davis, # 366106, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed October 26, 2020 and served on counsel for Appellant by letter dated November 17, 2020, issued by the Honorable D. Craig Brown, Presiding Judge, Twelfth Judicial Circuit.

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STATE OF SOUTH CAROLINA COUNTY OF MARION	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Lindell Davis, # 366106 Applicant, v. State of South Carolina, Respondent.	2018-CP-33-0444 **ORDER OF DISMISSAL**

The matter before the Court is Lindell Davis's (Applicant) action for post-conviction relief (PCR) commenced June 18, 2018, alleging ineffective assistance of trial counsel. The State submitted its return requesting an evidentiary hearing into the matter on October 1, 2018. Thereafter, Applicant amended his application, through PCR counsel, alleging ineffective assistance of trial counsel for (a) failing to properly investigate the facts and circumstances surrounding the allegations against Applicant; (b) failing to object to impermissible testimony by Investigator Jackson and Salley Williamson; and (c) failing to object to impermissible comments made by the State during closing arguments.

An evidentiary hearing into the matter convened before the undersigned at the Florence County Courthouse on December 19, 2019. Applicant was present and represented by Jonathan D. Waller. Assistant Attorney General Samuel L. Key represented the State. Applicant and Henry M. Anderson, Jr. (Counsel) testified at the hearing. Also before the Court were the Marion County Clerk of Court records for the underlying convictions; Applicant's records from the South Carolina Department of Corrections (SCDC); Applicant's entire appellate records including the trial transcript; and the records of this PCR action. After a full review of the record before the Court

and observation of the testimony presented, this Court finds Counsel was not constitutionally ineffective. Therefore, this action is denied and dismissed with prejudice.

I. PROCEDURAL HISTORY

Applicant is confined in SCDC pursuant to orders of commitment of the Marion County Clerk of Court. During its November 2014 term, the Marion County Grand Jury indicted Applicant for second-degree criminal sexual conduct (CSC) with a minor and criminal solicitation of a minor (2014-GS-33-00312). Henry M. Anderson, Jr., Esquire (Counsel) represented Applicant. Assistant Solcitors David Richardson and Lauren Hummel prosecuted the case.

On November 17, 2015, Applicant proceeded to a jury trial before Judge William H. Seals, Jr. The jury convicted Applicant as indicted. Judge Seals sentenced Applicant to concurrent terms of fifteen years imprisonment for second-degree CSC with a minor and eight years imprisonment for criminal solicitation of a minor. Applicant appealed.

Chief Appellate Defender Robert M. Dudek perfected Applicant's appeal by filing an *Anders*[1] brief. On December 6, 2017, the Court of Appeals dismissed the appeal. *State v. Davis*, Op. No. 2017-UP-450 (S.C. Ct. App. filed December 6, 2017). Thereafter, Applicant, *pro se*, petitioned our Supreme Court for a writ of certiorari to review the court of appeals' decision; however, the Supreme Court denied certiorari on June 5, 2018. *State v. Davis*, S.C. Sup. Ct. Order dated June 5, 2018. The case was remitted back to the circuit court on June 19, 2018.

Applicant timely commenced this PCR action on June 18, 2018.

[1] *Anders v. California*, 386 U.S. 738 (1967).

II. FACTS

On May 31, 2014, Christal Saldierna (Aunt) caught Applicant having sex with her fifteen-year-old neice (Minor). Minor consented to the sexual relationship. At trial, Counsel argued Applicant did not penetrate Minor.

Applicant, Aunt, and Aunt's boyfriend were friends. Aunt's boyfriend and his friends used to work on cars and exercise in a shed on her property.[2] The inside of the shed was well lit and housed tools, weightlifting equipment, and a punching bag. (Tr. 86, 89).

Aunt's boyfriend died in October 2012; however, Applicant and Aunt remained friends, and Applicant was allowed to use the weighlifting equipment in the shed. (Tr. 86–87). He came over almost every day. (Tr. 87). While he was allowed to use the shed, he did not have a key. Aunt, or another family member, would unlock the shed for Applicant, and when he was finished, someone would lock the shed behind him. (Tr. 58). Minor also came over to Aunt's house almost every day.[3] (Tr. 55).

On May 31, 2014, Minor was at Aunt's house, and Applicant was using the shed to lift weights. Applicant and Minor communicated that night through text messages. (Tr. 59–63). The State entered into evidence pictures of the shed, a picture of a weight bench, and three pictures of text messages.

The first text message was sent from Minor to Applicant at 9:30 pm. The second text message was Applicant's response at 10:00 p.m. The third text was from Applicant to Minor at

[2] The shed on Aunt's property is referred to throughout trial as a shed, barn, and garage. For ease of reference, it will be referred to as the shed in this order.

[3] At the time of trial, Minor was living with Aunt.

10:03 pm. The criminal solicitation of a minor charge stems from the 10:00 pm and 10:03 pm text messages that Applicant sent Minor. (Tr. 57–64).

It is unclear from the record what Applicant sent Minor in the 10:00 p.m. text message. However, Minor testified at trial and the record indicates that at 10:03 pm—Applicant texted Minor, "Come lock up." Minor stated that after she received this text from Applicant, she went outside to go lock the shed. Minor stated she entered the shed, and Applicant was inside. (Tr. 57–64).

Minor stated that when she entered the shed, Applicant pulled down her pants, and they had sex. (Tr. 64). Minor recalled what she and Applicant were wearing that night. (Tr. 64–65). She stated that after Applicant pulled down her pants, she layed down on her back on the weight bench. Minor recalled that Applicant was wearing athletic shorts that night, but he did not take his shorts off completely. Instead, he pulled down the front of his shorts and exposed his penis to her. She testified that after he exposed himself to her, "He penetrated me." (Tr. 65). She stated that while they were having sex, her legs were over his sholders. She said they were not having sex for long before Aunt walked in. (Tr. 66).

During cross examination, Counsel questioned Minor about the text messages, two statements she gave to the police, and her relationship with her mother and Aunt. (Tr. 69–85).

Aunt testified at trial. (Tr. 86–107). She stated she heard Minor exit the front door to go lock the shed. (Tr. 87–88). After a short period of time, Aunt went to check and see what was taking Minor so long. Aunt stated she walked out to the shed, and entered the shed. (Tr. 88). When asked what she saw when she entered the shed, Aunt stated, "I see [Minor] laying on a bench holding bars. [Applicant] was straddling the bench. And I couldn't see the back of his shorts down, but he was humping her." (Tr. 88). Aunt recalled Minor's pants were at her ankles and her legs

were over Applicant's sholders. Aunt reiterated that Applicant was humping Minor, but admitted she could not see the front of Applicant. (Tr. 89). When asked what happened next, Aunt said, "I told him to get the fuck off my neice." (Tr. 90). Counsel's cross-examination primarily focused on the fact that Aunt could not tell if Applicant penetrated Minor. (Tr. 95–101).

After Aunt testified, the State called the deputy who arrived at the scene, and then the lead investigator. After the lead investigator's testimony, the State indicated that it would call one more witness. However, the case concluded for the day before the State called its final witness, Sally Williamson. (Tr. 133).

The following day, Williamson testified she was a forensic interviewer and therepist with the Care House of the Pee Dee. Williamson interviewed Minor on June 16, 2014. She was not qualified as an expert. (Tr. 136–38). Williamson descriped the process and setting of a typical forensic interview. Minor's interview was a usual interview. (Tr. 138–40). At trial, the State questioned Williamson about Minor's demeanor and ability to speak with Williamson. Williamson answered:

> [Minor] appeared to understand me and comprehend the process as I was explaining it. She was very open and forth coming with answering questions and sometimes children are guarded in some way or unable or unwilling to provide information, but she was very very forthcoming with information and I found her to give consideration to my questions and provide as much information as possible.

(Tr. 140–41). Williamson then affirmed that Minor discolosed penetration or some type of sexual abuse, and Minor communicated the time and place the incident occurred. (Tr. 141). The State then asked Williamson specifically what Minor discolsed. Williams answered:

> [Minor] disclosed that it occurred at her aunt's house in -- her Aunt Christal['s] house I believe in a barn where there was some weights set up, a weightlifting bench. And the time --- I don't remember the

> exact time. I have to look through -- I remember that it was a number of days before the actual interview took place in mid June.

(Tr. 141).

The State rested its case after Williamson's testimony. The jury exited the courtroom, and Counsel moved for a directed verdict on both charges. The motion was denied, and the jury re-entered the courtroom. (Tr. 150). Counsel did not call any witnesses and rested. (Tr. 151). Counsel renewed all previous motions, and the motions were denied. The case then proceeded to closing arguments. (Tr. 151–73).

After closing arguments, the trial court charged the jury. (Tr. 173–82). There were no objections to the given charges. The jury found Applicant guilty on both charges. (Tr. 183). The trial court sentenced Applicant to concurrent sentences of fifteen years for second-degree CSC with a minor and eight years for criminal solicitation of a minor. (Tr. 185).

III. ALLEGATIONS

In his original PCR application, Applicant alleged he is being held in custody unlawfully due to ineffective assistance of Counsel. Applicant alleged Counsel was ineffective for:

a. "[F]ailing to inform the Court of [Applicant's] fundamental right to testify or not to testify is a personal right that can only be waived by the defendant;" and
b. "[F]ailing to object or file a motion that the Court failed to inform [Applicant] to allocate."

On December 13, 2019, Applicant, through PCR counsel, amended his application alleging ineffective assistance of Counsel for:

a. Failure to properly investigate the facts and circumstances of the case;
b. Failure to object to impermissible testimony from Investigator Jackson and Sally Williamson; and
c. Failure to object to impermissible comments made by the State during closing arguments.

At the outset of the PCR hearing, Applicant, through PCR counsel, informed the Court he was only going forward on the allegations contained in the amended application. Therefore, to the extent the allegations contained in the original application could be construed as separate grounds from the amended application, the Court finds Applicant has waived the allegations in his original application. Accordingly, the only issues properly before the Court are those presented in the amended application.

IV. PCR TESTIMONY

Applicant testified at the PCR hearing and recalled being arrested and charged with solicitation of a minor and second-degree CSC with a minor. Applicant stated he bonded out a couple weeks after being arrested, and Counsel was appointed to represent him. Applicant recalled first meeting Counsel at a roll call hearing, but at that time he did not have a chance to discuss anything regarding the case with Counsel. Applicant recalled first discussing the specifics of the case with Counsel during their second meeting in a room in the courthouse. Applicant recalled Counsel had a hard copy of the discovery at that time. However, Applicant testified they did not fully discuss the discovery at that time, and he never got a chance to review all of the discovery. Applicant stated he told Counsel Minor and Aunt had set him up during their second meeting.

Applicant testified Counsel never told him about the State's allegations against him, but he did remember Counsel talking about the warrants. However, Applicant could not recall whether Applicant discussed the facts in the warrants with him. Applicant told Counsel he did not commit the alleged acts, he was being set-up, and he had thirteen daughters he was very protective of. Applicant testified he and Counsel met once or twice to prepare for trial, and Counsel had the discovery during their second meeting.

Applicant explained he told Counsel he was set up by Minor and Aunt. Applicant testified Aunt had a shed with work-out equipment behind her house, he was friends with Aunt's deceased husband, and how he continued to use the shed and the work-out equipment. Additionally Applicant told Counsel Aunt called him that night asking him to come over because she hurt her foot. Also, Applicant claimed he let a man named Phil use his phone that night. Applicant stated Aunt called his phone from Minor's phone, Phil answered and relayed to Applicant that Aunt had called. Applicant stated Aunt called his phone again from Minor's phone and Applicant answered. Applicant stated he went over to the house, looked at Aunt's foot, and then went to the shed to work-out. Applicant testified he texted Aunt back on the same number she had called him on, Minor's, and told her he was done and to come lock-up.

Applicant stated Minor came out to the shed, and he was sitting on the weight bench. Applicant claimed Minor then got on the bench, took her clothes off, pulled her pants down, and was sitting there naked. Applicant stated he turned around and saw she was naked, got up, and said "you're not gonna get me in trouble." Then, Aunt walked in and asked him what they were doing. Applicant responded and said "nothing, I haven't even touched her." Applicant stated he told Counsel all of this and he even gave a written police report to the same affect. Additionally, Applicant stated he gave his phone to law enforcement, but law enforcement eventually gave his phone back to him. Applicant stated law enforcement tested the phone, but he and Counsel never discussed anything about the phone being tested.

Applicant could not recall what he and Counsel did to prepare for trial. Applicant did not give Counsel any witnesses to investigate, but asked Counsel to look at his case closely. Applicant testified he never saw Minor's forensic interview or a transcript of the interview, and Applicant did not know about the interview until trial. Applicant did not ask Counsel to investigate or look

into Phil, and knows Counsel did not look into Phil. However, Applicant could have provided Phil's location to Counsel, but did not. Applicant testified he gave a DNA sample to law enforcement but did not know if any DNA testing was done from Minor.

Counsel testified he works part time for the Public Defender's Office in Marion. Counsel stated his file shows a different Public Defender met with Applicant at the Public Defender's Office on August 15, 2014. Counsel recalled first meeting Applicant on August 19, 2014, and he represented Applicant for over a year before trial.

Counsel recalled the State's theory was Applicant was at the house working out, he sent a text-message to Minor, Minor came out to the shed, and they were having sex on the weight bench when Aunt walked in catching them in the act. Counsel recalled the defense strategy was maybe Aunt did not see what she thought she saw. Counsel stated he focused a lot of his cross-examination on actual penetration, and Aunt never testified she actually saw penetration.

Counsel recalled Applicant told him in their first meeting he did not have sex with Minor. Applicant told Counsel that Minor took her clothes off, but he did not do anything to her. Counsel stated he usually gets a complete copy of the discovery at the initial appearance, which was August 2014 in this case, or by the docket appearance, which was October 2014 in this case.

Counsel recalled there being forensic testing of the Minor—there was a rape kit done, and Minor was interviewed at the Care House. Counsel could not specifically recall going over the results of the rape kit and interview with Applicant; however, Counsel testified his general policy is to discuss any and all discovery with his client. Further, Counsel testified Applicant had a chance to view the interview, but Counsel did not know if Applicant ever saw it. Counsel recalled the State took text messages from Applicant's phone, but he did not think the State ever tested the

phone by performing a data dump. Counsel thought the State had a search warrant for Applicant's phone, but also stated Applicant may have given his phone to law enforcement voluntarily.

Counsel testified it was Applicant's decision to go to trial, but Counsel told Applicant he did not think going to trial was a good idea; however, Applicant insisted on going to trial, and Counsel was ready for trial. Counsel stated he reviewed all the discovery in preparation for trial, prepared cross-examination questions for all potential witnesses, prepared his opening and closing arguments, and went to trial. Counsel recalled there were two eyewitnesses, Minor and Aunt, and he knew both would testify at trial.

Counsel did not recall Applicant telling him he was being set-up; rather, Applicant continued asserting it did not happen—Minor took her clothes off but they did not have sex. Counsel recalled discussing the text-messages with Applicant and informing the text-messages did not look good for the case. Counsel stated Applicant may have told him someone else sent the text messages, but Applicant never told Counsel who that person was to investigate or call as a potential witness. Counsel felt the only way to effectively show someone else had Applicant's phone and sent the text-messages was to have that other person as a witness. Counsel stated Applicant may have told him that Phil had his phone that night but that never came out at trial.

V. DISCUSSION

This Court has reviewed the entire record and evidence introduced at the hearing, and the Court has also observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained

prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

Applicant alleged Counsel was constitutionally ineffective for: (a) failure to properly investigate the facts and circumstances surrounding the allegations against Applicant; (b) failure to object to impermissible testimony by Investigator Jackson and Salley Williamson; and (c) failure to object to impermissible comments made by the State during closing arguments. For the reasons discussed below, the Court disagrees and finds Counsel was not constitutionally ineffective and denies relief and dismisses the action with prejudice.

a. *Failure to Investigate*

Applicant alleges Counsel was constitutionally ineffective for failure to properly investigate and prepare for trial. Specifically, Applicant alleges Counsel should have investigated a potential witness, Phil, and elicited testimony that Phil actually had Applicant's phone on the night in question. For the reasons discussed below, the Court disagrees.

Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action

or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. *Id.*

The Court finds Counsel reasonably conducted his investigation surrounding the case. Applicant testified he told Counsel someone had borrowed his phone on the night in question; however, Applicant testified he did not give Counsel any witnesses to look into, and he did not tell Counsel that Phil had his phone or how to locate Phil to investigate. While Applicant did tell law enforcement that Phil had his phone in his statement, he still never told Counsel about Phil or how

to find Phil. Therefore, the Court finds Counsel was not deficient for failing to investigate Phil as a potential witness because Applicant never provided Counsel with any information on who Phil was or how to find him.

The Court also finds Applicant has failed to show prejudice from Counsel's alleged failure to investigate Phil as a potential witness. First, there has been no evidence, other than Applicant's own self-serving testimony, introduced to support Applicant's assertion that Phil had his phone the night in question. For Applicant to show Counsel's alleged failure to investigate Phil prejudiced him, either Phil needed to credibly testify at the PCR hearing or Applicant must have introduced something supporting his assertion that Phil had his phone. *See Glover*, 318 S.C. at 498–99, 458 S.E.2d at 540 (stating to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence). Here, no such supporting evidence was introduced at the PCR hearing; therefore, Applicant has failed to show prejudice.

Second, Applicant's own testimony regarding what happened the night of the incident does not support a showing of prejudice. While Applicant testified Phil had his phone the night in question, Applicant's testimony also shows that Applicant also had access and control over his phone. Applicant testified Aunt called his phone, from Minor's phone, and Phil answered. Phil relayed to Applicant that Aunt had called, and Applicant answered the phone when Aunt called back from the same number. Further, Applicant testified *he* texted the number (Minor's) when he was done lifting weights to "come lock up." This testimony shows that Applicant still maintained control over his phone that night. Therefore, Applicant has failed to show how Counsel's failure

to investigate Phil as a potential defense witness prejudiced him because Applicant still asserted he had his phone and sent a text message to Minor's number that night.

Based on the foregoing, Applicant has failed to show Counsel was deficient for failing to investigate Phil as a potential witness, Applicant merely told Counsel *someone* else had his phone the night of the incident and never provided Counsel with who that someone was or how to locate them. Further, Applicant has failed to show prejudice resulted because there was nothing introduced at the PCR hearing to support Applicant's assertion that Phil had his phone, and Applicant's own testimony shows that he had access and control over his phone. Accordingly, the Court denies relief on this allegation and dismisses it with prejudice.

Applicant also asserted Counsel was constitutionally ineffective for failing to properly prepare for trial. The Court disagrees, as Counsel credibly testified he reviewed all the discovery and thoroughly prepared for trial. Counsel articulated his trial strategy—Counsel focused his cross-examination and arguments on the fact that Aunt never saw penetration. Counsel also clearly attacked Minor's credibility at trial. (Tr. 68–85). Counsel questioned Minor about her prior inconsistent statements, and Minor cutting herself. (Tr. 79–85). Counsel used Williamson's testimony to support his argument that Minor was not credible in his closing argument. (Tr. 165-66). Counsel also elicited testimony from Sally Williamson that Minor told her she cut herself because she was angry at her mother. (Tr. 148–49). The trial transcript reflects that Counsel was clearly well prepared for trial, and the Court finds Counsel's articulated trial strategy reasonable based on the facts of this case. Therefore, this allegation is denied and dismissed with prejudice.

There was testimony regarding law enforcement obtaining Applicant's phone and looking through his text messages and pictures. Applicant testified he gave law enforcement his phone, which was returned to him. The Court finds Applicant's PCR testimony shows he voluntarily gave

law enforcement his phone to look through. Additionally, Applicant voluntarily consented to a search of his phone. (Tr. 117) (State's Exhibit 2).

Finally, Applicant admitted his phone received two calls from Minor's phone number the night in question, and admitted to texting Minor's number on the night in question. Therefore, Counsel cannot be deficient for failing to investigate anything regarding the phone records because Applicant admitted it was his phone, he spoke to Aunt on his phone when Aunt called him from Minor's number, and he texted Minor's number to "come lock up" after he was finished lifting weights. Additionally, the Court finds not credible Applicant's self-serving testimony that someone else sent the text messages to Minor. Therefore, Counsel was not deficient for failing to investigate Applicant's phone records. Further, Applicant cannot show prejudice because he admitted to the phone calls and at least one of the text messages. Accordingly, this allegation is without merit and is denied and dismissed with prejudice.

b. *Failure to object to impermissible testimony by Investigator Jackson and Sally Williamson*

Applicant alleges Counsel was constitutionally ineffective for failing to object to Investigator Jackson and Sally Williamson testifying that Minor disclosed sexual penetration to them. The Court disagrees.

Subsection 17-27-20(b) of the South Carolina Code (2014) provides that post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." "[E]rrors which can be reviewed on direct appeal may not be asserted for the first time, *or reasserted*, in post-conviction proceedings." *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) (emphasis added).

Applicant alleged Counsel was ineffective for failing to object to Investigator Jackson testifying Minor disclosed penetration. At trial the State asked Jackson, "And did she disclose ---

." Counsel immediately objected stating, "I think that's already been asked and answered. [Minor] testified. I think it's repetitive. I think it's cumulative." The State responded, "Time and place exception, Judge." Counsel's objection was overruled. The State then asked, "[D]id Minor disclose to you about the sexual penetration in the shed?" Jackson responded, "Yes, sir, she did." (Tr. 123). Counsel objected to Jackson testifying that Minor disclosed penetration, and this issue was raised on appeal. (Tr. 123) (*Anders* Brief). Specifically, Applicant argued on direct appeal:

> The [trial] [c]ourt erred by allowing Investigator Jackson to testify [Minor] told her that "sexual penetration" occurred in this case since this testimony went beyond the "time and place exception," and it was highly prejudicial hearsay testimony where [Minor] admitted she wanted to have sex with [Applicant], but where [Applicant] told the police penetration never occurred before [Aunt] walked into the room.

(*Anders* Brief 1; 3).

First, Counsel was not deficient for failing to object to Jackson testifying Minor disclosed penetration because Counsel properly objected at trial. Second, Applicant cannot reassert this issue in PCR because it has already been asserted and rejected by both the Court of Appeals and our Supreme Court on direct appeal. Therefore, Applicant's allegation Counsel was constitutionally ineffective for failing to object to Jackson's allegedly impermissible hearsay testimony regarding penetration is denied and dismissed with prejudice.

Applicant also alleged Counsel was ineffective for failing to object to Sally Williamson testifying Minor disclosed sexual penetration. At trial, the State asked Williamson, "And did [Minor] make a disclosure of penetration or some type of sexual abuse to you?" Williamson responded, "Yes, she did." The State then asked if Minor gave Williamson "a time and place for when that happened?" Williamson responded Minor disclosed it occurred in the shed at Aunt's

house, and the abuse occurred "a number of days before the actual interview took place in mid-June." (Tr. 141). Counsel did not object to Williamson stating Minor disclosed penetration.

However, on cross-examination, Counsel also asked Williamson about Minor's disclosure of the incident. Counsel asked, "And [Minor] told you I don't even say stuff like this dot dot. *We were just fucking that's it basically.* Is that what she told you?" Williamson agreed. (Tr. 147–48) (emphasis added). Counsel then asked, "At no point in time when she was describing what happened that night did she ever tell you that he had his - - had my leg on top of his shoulders, did she?" (Tr. 148).

At the PCR hearing, Counsel testified he did not think he had any reason to object to Williamson testifying Minor disclosed penetration to her. At first glance, the State's question and Williamson's answer could be viewed as impermissible hearsay testimony offered to improperly bolster Minor's testimony. However, when looking at Williamson's testimony as a whole, it is clear Counsel wanted to get into the details of Minor's disclosure to Williamson. As Counsel stated in his closing argument, "I'm glad Ms. Williamson testified because she let me know that Minor didn't describe it the way she described it to you all." (Tr. 171).

The Court finds Counsel was not deficient for failing to object to Williamson's testimony on direct that Minor disclosed penetration. This Court finds, as noted above, that Counsel articulated a valid and reasonable trial strategy for attacking Minor's allegation penetration occurred by attacking Minor's credibility in using her prior inconsistent statements. From the transcript, it is clear Counsel felt Minor's forensic interview was inconsistent with the testimony she gave at trial, and wanted to get in the details of the disclosure to show how Minor's trial testimony had changed from her forensic interview. The Court will not second guess Counsel's trial strategy of attacking Minor's credibility with the specifics of her disclosure to Williamson.

See Strickland, 466 U.S. at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). Therefore, Counsel was not deficient for failing to object to Williamson testifying Minor disclosed penetration.

Further, Applicant has failed to show prejudice resulted from Counsel's alleged deficiency. This Court recognizes that, like with any child-sex case, Minor's credibility was a key issue. However, the entire case did not hinge on Minor's credibility, and finds there was other admissible evidence introduced at trial substantially showing Applicant's guilty. *See Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) ("In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial.").

Specifically, the Court considers the facts that Aunt walked in on the act, Applicant and Minor exchanged text-messages that night, and Applicant's own excited utterance, "I already know I'm going to jail." (Tr. 66). Further, while Aunt could not affirmatively testify to Applicant penetrating Minor, she did testify, "I s[aw] Minor laying on a bench holding bars. [Applicant] was straddling the bench. And I couldn't see the back of his shorts down, *but he was humping her.*" (Tr. 88) (emphasis added). Aunt also described seeing Minor's legs over Applicant's shoulders and her pants around her ankles. (Tr. 89).

Based on the above referenced admissible evidence from trial, the Court is not convinced the outcome of trial would have been different if Counsel had objected to Williamson testifying Minor disclosed penetration to her. Even without this testimony, the jury certainly could find Applicant penetrated Minor from Aunt's testimony alone—she walked in, saw Minor lying on the bench with her pants around her ankles and legs on Applicant's shoulders, and Applicant was humping Minor.

Based on all the foregoing, Applicant has failed to show Counsel was constitutionally ineffective for failing to object to Investigator Jackson and Sally Williamson testifying Minor disclosed penetration to them. Accordingly, this allegation is denied and dismissed with prejudice.

c. *Failure to object to the State's impermissible comments during closing argument*

Finally, Applicant asserts Counsel was constitutionally ineffective for failing to object to the State's impermissible comments during closing arguments. Specifically, Applicant references the State's closing argument at pages 152 and 160 of the transcript. Applicant also asked Counsel if he took issue with the State using "we" when addressing the jury. This Court has reviewed the State's closing argument and finds it to be proper. Therefore, for the reasons discussed below, this allegation is denied and dismissed with prejudice.

To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Id.*, 428 S.C. at 550, 837 S.E.2d at 40 (quoting *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *Id.*

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994); *see also State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony

presented, and furthermore may comment on the weight to be accorded such testimony."). A prosecutor should "prosecutor with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." *New*, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." *Id.* "[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger*, at 88.

The Court has reviewed the State's closing argument on pages 152–53 of the transcript and finds the State was merely contrasting the specific facts of this case with the typical facts of child-sex cases. The State explained that in typical child-sex cases, there are no eye-witnesses because usually everything is done in secret behind closed doors. The State explained this case was completely different from typical cases because Aunt actually walked in on Applicant and Minor having sex. The Court does not believe the State was alluding to facts not in the record—Applicant was trying to keep everything a secret—but was just attempting to illustrate why this case was different from typical child-sex cases. Therefore, the Court finds the State's closing argument was not impermissible and Counsel was not deficient for failing to object to these comments.

On page 160 of the transcript, the State is instructing the jury on what it has to prove for Applicant to be guilty of second-degree CSC with a Minor. Applicant takes issue with the State stating, "The defendant is in a familiar or familia or custodial or has official authority over the child or big emphasis on or here the defendant is older than the victim," because there was no indication Applicant was in a position of power or authority over Minor. However, there was

evidence at trial that Applicant is a family friend and comes over to the house every day to work out. The Court finds the State's comment is a reasonable inference from the evidence presented at trial. Further, the State tells the jury it does not matter that Applicant was in a position of authority over Applicant because he is older than the victim, which is accurate as the law states, "or is older than the victim." (Tr. 160); S.C. Code Ann. § 16-3-655(B)(2). The Court finds the State stayed with the record and its reasonable inferences in making these comments to the jury; therefore, Counsel was not deficient for failing to object.

Finally, Applicant takes issue with the State using the term "we" when addressing the jury. The Court has reviewed the State's entire closing argument and finds the State's use of the word "we" was not improper given the entire argument. The Court views the State's closing argument as the State arguing the facts and reasonable inferences of the facts in the case. Here, the facts were somewhat difficult for the State because Minor consented to and wanted to have sex with Applicant. The State was merely explaining that even though Minor, a fifteen year old girl, wanted to have sex with Applicant does not mean Applicant should not be held accountable for his actions. The State stated, "It's the way this county works, we can't be letting 50-something-year-old men who are having sex with 15 year olds just walk away from it like it didn't happen." (Tr. 157). In the Court's view, this was the State explaining that Minor's consent was irrelevant because the law makes sex between a fifty-four year old and fifteen year old illegal no matter the circumstances. Therefore, the State's use of the term "we" in its closing argument was not impermissible and Counsel was not deficient for failing to object.

The Court also finds Applicant has wholly failed to show how the State's closing argument resulted in him not receiving a fair trial. Applicant has merely hinted that the State's argument may have been impermissible; however, he has failed to claim in any way how the State's argument

infected the trial to the extent that it was unjust. Therefore, the Court finds Applicant has failed to show prejudice resulted for Counsel's alleged failure to object to the State's allegedly impermissible comments during closing argument. Accordingly, this allegation is denied and dismissed with prejudice.

VI. CONCLUSION

Based on all the foregoing, the Court finds Counsel was not constitutionally ineffective. Counsel reasonably investigate the facts and circumstances of the case. It is clear from the record Counsel wanted the details of Minor's disclosure to Williamson to come into evidence because Counsel's valid trial strategy was to attack Victim's credibility through her prior inconsistent statements, chiefly, her forensic interview. Applicant has failed to show prejudice resulted from these alleged deficiencies. Finally, Counsel was not deficient for failing to object to portions of the State's closing argument because the State's comments were admissible, and the Court finds the State's comments did not infect the trial to the extent Applicant's was denied his right to a fair trial. Accordingly, Applicant's action for PCR is denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED.

D. CRAIG BROWN
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina

10-19, 2020.