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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Case No. 2018-CP-36-0414

Carrol Tremayne Washington, #367333 ..... Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Applicant, Carrol Tremayne Washington, appeals the order of the Honorable J. Mark Hayes, II, filed July 1, 2021.

July 12th, 2021

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STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY	)	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
Carrol Tremayne Washington, #367333 Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-36-0414 **ORDER OF DISMISSAL**

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CLERK OF COURT

This matter comes before this Court by way of a post-conviction relief application, filed by Carrol T. Washington (Applicant) on September 10, 2018. Respondent made its Return on December 14, 2018, requesting an evidentiary hearing be convened. The evidentiary hearing was held on January 29, 2021, via the WebEx Virtual Courtroom platform. Applicant was present at the hearing and represented by Ashley McMahan, Esquire. Assistant Attorney General Brianna L. Schill of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Mr. Charles Verner, Esquire, also testified. After a thorough review of all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof in establishing he is entitled to post-conviction relief and hereby denies and dismisses this application with prejudice. Specific findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During the May 2017 term, the Newberry County Grand Jury indicted Applicant for first degree criminal sexual conduct with a minor (2015-GS-36-0546). Charles Verner, Esquire ("Counsel") represented

Applicant. Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel of the Eighth Circuit Solicitor's Office prosecuted the case. On February 29, 2016, Applicant proceed to a jury trial before the Honorable Donald B Hocker. On March 2, 2016, the jury convicted Applicant as indicted. Judge Hocker sentenced Applicant to the mandatory minimum sentence of twenty-five years of imprisonment.

Applicant filed a timely notice of appeal. Lara M. Caudy, Esquire, of the South Carolina Commission on Indigent Defense - Office of Appellate Defense, submitted a brief and motion to be relieved pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal on June 13, 2018. The remittitur was returned to the circuit court on July 2, 2018.

Summary of Relevant Facts

On March 25, 2015, Nicole Simms (Simms) took her ten-year old daughter (Victim) to the Sheriff's department to report Victim had been raped. (Trial Tr. 26.) Simms met with Officer Brad Epps regarding Victim's allegations and identified "Man" as the offender. (Trial Tr. 26.) Officer Epps set up a forensic interview for Victim. (Trial Tr. 26-27.) Officer Epps was able to identify "Man" after Simms provided additional information about Applicant. (Trial Tr.26-27, 36.) Officer Epps put a photo-lineup together that included Applicant's DMV picture (Trial Tr. 36.) He showed the photo-lineup to Victim on June 3, 2015, and Victim identified Applicant as the offender. (Trial Tr. 37.)

On June 4, 2015, Applicant was interviewed by Officer Epps and stated "he didn't know why [Victim] would say this about him and all the kids gravitate towards him". (Trial Tr. 29, 141.) Furthermore, Applicant went on to say that "she was a fast little girl" in reference to questions about Victim. (Trial Tr. 29.) On June 10, 2015, Applicant was interviewed again and confirmed

his nickname was "Man." (Trial Tr. 31, 143.) Applicant was arrested that day and, he told officers "he was ready to plea and get it over with." (Trial Tr. 34.)

Ethyl Simms (Grandmother), the victim's grandmother, testified she knew Applicant as her cousin's boyfriend and he and her cousin live in her same complex. (Trial Tr. 45.) Grandmother also said that at some point, Victim did not want to go visit her and would rather cry than come visit. (Trial Tr. 46.) Furthermore, she said that it was common for Victim to go over to her cousin's apartment because Victim plays with her cousin's son. (Trial Tr. 46.) Grandmother testified she had seen Victim and Applicant together a lot. (Trial Tr. 46, 50.)

Simms testified Victim started having behavioral problems at school in 2014 and she did not want to go see her grandmother anymore. (Trial Tr. 115-117.) She testified Victim was usually happy and loved everyone. (Trial Tr. 115-117.) Trina Elfering, Director of Forensic Services at the Dickerson Children's Advocacy Center, testified at trial. (Trial Tr. 179-196.) Elfering conducted the forensic interview of the victim that was videotaped. This video was played at trial.

Victim testified she often saw "Man" whenever she visited her Aunt Tonya. (Trial Tr. 58-59.) She also testified she and Applicant played hide and seek together. (Trial Tr. 58-59.) When asked about how many times scary things happened between her and "Man", she stated around four times. (Trial Tr. 61.) She was then asked to identify "Man" in the courtroom and she pointed to Applicant. (Trial Tr. 62.) She further testified officers showed her pictures of different men at the sheriff's department and, "I had to see which one was the one that was abusing me." (Trial Tr. 63.) The solicitor then asked her if she recognized anyone in the photos and she stated yes, it was "Man". (Trial Tr. 64.) She also recalled putting a checkmark by his picture on the lineup card. (Trial Tr. 65, 224.) When asked about what happened in the bathroom with "Man", the victim stated that he touched her inappropriately. (Trial Tr. 204.) She further testified Applicant touched

her "heinie" under her pants and that she felt pressure and "it felt hard." (Trial Tr. 205-206.) When asked how many times it occurred, she said twice. (Trial Tr. 207.) The victim then testified that on another occasion, Applicant forced her to pull her pants down. (Trial Tr. 213.) She explained that he asked her again to pull her pants down but she was not as afraid to say no that time. (Trial Tr. 218.) She also recalled telling her mother and sister that "Man" had been inappropriately touching her. (Trial Tr. 222-224.)

Current Action Before this Court

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

Ineffective Assistance of Counsel

1. "Trial counsel was ineffective for failing to object to amendment of indictment which changed offenses from CSC adult to CSC with minor 1st and thereby raised maximum punishment. The amendment deprived the court of jurisdiction. Hopkins v State, 451 S.E.2d 389 (SC 1994)."
2. "Counsel's failure to adequately investigate law enforcements improper conduct on several issues, and develop critical facts, deprived Applicant's trial strategy relevant, admissible, information regarding an accurate assessment of impermissible tactics to present impeachable evidence which would create a reasonable doubt necessary to determine officer's credibility and bias"
3. "for failure to object to leading questions by the prosecutor. Applicant argues that trial counsel's failure to object to such repeated questionable conduct by the solicitor shows a clear failure by trial counsel to effectively assist applicant in his defense"
4. "for failure to object to impermissible victim impact testimony. With at least 15 individual instances of improper comments by the solicitor in closing argument alone. No objections to this issue from defense counsel"
5. "for failure to object when the solicitor impermissibly informed the jury of highly inflammatory remarks which infer applicant and dense witness lied under oath"
6. "for failure to object to impermissible vouching of state's witness' credibility."
7. "Trial counsel's failure to act as an adversarial defense attorney allowing the prosecution to use improper and highly inflammatory statements that were prejudicial and irrelevant throughout the entire trial is the exact scenario to base the cumulative effect of counsel's deficiencies are sufficient to demonstrate a reasonable probability that but for the

accumulation of counsel's unprofessional errors the results of the proceeding would have been different"

8. "Counsel failed to investigate, develop and present all available, relevant and admissible mitigating evidence. See Wiggins v State, 539 U.S. 510 (2003)."
9. "Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution"
10. "Counsel failed to object to the courts erroneous charge. See State v. Stokes, 416 SC 493, 787 S.E.2d 480 (2016)."
11. "See Coyler v. Sullivan, 466 U.S. 335 (1980) Counsel's ethical obligation to promptly advise the court of a potential conflict of interest. Applicant's right to effective assistance violated from counsel's failure to advise and his Sixth Amendment rights violated".

Concerning relief, Applicant requested that his conviction be "vacated" and "remand[ed] to general sessions for a fair trial."

On January 18, 2021, Applicant filed an amended application, asserting the following claims:

1. Conflict of interest and failure to move for a mistrial.
2. Failure to object to multiple golden rule and witness credibility type arguments during the solicitor's closing statement.
3. Trial counsel allowed a juror to be seated that had worked with the Applicant and Applicant has asked repeatedly not to have on the jury.

At the PCR hearing, Applicant went forward on the allegations listed in his amended application, and Applicant's initial PCR allegations number 5-7, 9, and 11 listed above, to the extent they coincide with the amended application. All other allegations raised in his initial application are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of Testimony Presented

Applicant's Testimony

Applicant testified he filed the initial PCR application and PCR Counsel filed the amended application on his behalf. Applicant testified he was represented by Counsel at trial. Applicant testified he visited with Counsel once after six months and then saw him approximately two times during his general sessions court dates. Applicant testified he and Counsel started discussing trial after he did not receive bond. Applicant testified he tried to relieve Counsel as counsel. Applicant testified he tried to obtain a private attorney. Applicant testified he went before the court but his motion to relieve was not granted.

Applicant testified he was concerned with Counsel representing him because Counsel asked Applicant about where he worked, and at some point was talking about the wrong case with Applicant. Applicant testified on a few occasions he would contact Counsel and Counsel would not reply. Applicant testified he and Counsel discussed courtroom procedure such as where to sit in the courtroom and that he should speak clearly. Applicant testified he and Counsel did not discuss the testifying witnesses prior to trial and that the witnesses were called "at the spur of the moment." Applicant testified he and Counsel discussed the reasonable doubt standard. Applicant testified they did not discuss the criminal sexual conduct charges before trial.

Applicant testified he did not know Victim was going to testify at trial until she proffered testimony to the court. Applicant testified he and Counsel did not review the forensic interview. Applicant testified he did not know Counsel was Simms's divorce attorney prior to trial.

Applicant testified he learned about a plea offer for the second time prior to trial. Applicant testified his first plea offer was zero-to-fifteen years non-violent, but he rejected it because he did

not commit the offense and did not want to plead to something he did not do. His second plea offer was zero-to eight years of imprisonment, but he rejected it for the same reason.

Applicant testified he told Counsel he knew one of the jurors, but Counsel decided to pick the juror even after they had this conversation. Applicant testified he knew the witness from work because Applicant worked at the cafeteria at a Caterpillar plant. Applicant testified this juror, although he was not sure what the juror's name was, came through his line at the Caterpillar plant on occasion.

Applicant testified the solicitor was playing on his phone during trial. Applicant testified he did not like the solicitor's closing arguments because they put fear into the community and refer to Applicant's previous job as an ice cream truck driver.

Applicant testified he and Counsel did not discuss the elements the State had to prove his guilt. Applicant testified he and Counsel did discuss the possible sentence he was facing. Applicant testified he and Counsel did not discuss defenses of trial strategy. Applicant testified he and Counsel did not discuss his constitutional rights.

Applicant testified he knew Victim through Simms because he was in a relationship with Simms. Applicant testified this relationship started in August of 2011 or 2012. Applicant testified he met Victim while he was employed as an ice cream truck driver because Grandma would buy ice cream for the victim. Applicant testified this occurred before his relationship with Simms started.

Applicant again testified he knew one of the jurors from his job at Caterpillar, although he could not recall which juror. Applicant testified Verner told him it could help him, but Applicant did not want him on his juror because he was superstitious. Applicant testified this juror was a Caucasian male. Applicant testified he and this juror had spoken on an occasion in the parking lot

at the Caterpillar plant. Applicant also testified they both attended a company party, which was attended by many employees of the Caterpillar plant.

Counsel's Testimony

Counsel testified he represented Applicant. Counsel testified he met with Applicant at least once per month between the commencement of his representation and trial. Counsel testified he met with Applicant first in July of 2015, and his trial was in May of 2016. Counsel testified he and Applicant discussed defenses and possible sentences. Counsel testified he likely asked Applicant about his employment in order to determine his eligibility for a public defender.

Counsel testified Simms was the mother of Victim, and that she came in to his office in 2006 for representation. Counsel testified he represented her for a simple uncontested divorce. Counsel said custody of Simm's children was not an issue in the divorce case. Counsel testified that in 2006, her last name was Thompson, not Simms. Counsel testified he did not remember who Simms/Thompson was until trial.

Counsel testified as a matter of course, he always consults with his clients regarding their opinions of jurors. Counsel testified that he instructs his clients to advise him if they have a strong opinion regarding a potential juror. Counsel testified that none of the jurors in Applicant's case gave any indication they could not be impartial. Counsel testified he and Applicant had a discussion regarding one of the jurors. Counsel testified if Applicant indicated he did not want this juror on the jury, he would not have selected this juror for the jury.

Regarding the closing argument statements, Counsel testified he did not feel any of the comments listed in Applicant's amended application rose to the level of being improper such that they "crossed the line" per se. Counsel testified that the particular solicitor in this case was known for "pushing the limits," and Counsel did feel he was "pushing the limits" during the opening and

closing in this case. Counsel testified he had some notes indicating he was monitoring the solicitor's statements at the time they were made. Counsel testified, however, he did not believe they were improper such that he would have objected to them.

On cross-examination, Counsel testified he has been practicing law for almost 26 years as of the date of his hearing. Counsel testified he has been a public defender for 20 years. Counsel testified he and Applicant discussed the elements of the offenses, defenses, trial strategy, and the discovery with Applicant.

Counsel testified there was not a lot of hard evidence in this case, as this was essentially a "he said, she said" case. Counsel testified the victim testified more "forcefully" than the defense had anticipated. Counsel testified he and Applicant discussed the witnesses before trial.

Counsel reiterated that custody of Simms's children, including Victim, were not at issue during his representation of Simms for her divorce. Counsel testified Applicant was not involved in Simms's divorce, as he did not know Simms at the time. Counsel testified that prior to Applicant's trial, he had not spoken with Simms since early 2007.

With respect to trial strategy, Counsel testified they presented an alternative theory as it relates to the Victim's father. Counsel testified the only defense in this case was that the incident did not occur and that either the victim either misremembered what occurred or that the victim was coached into making the allegation.

Counsel testified he does not necessarily object to every possible objectionable statement, but has no problem objecting if he feels that the statement crossed the line. Counsel testified he evaluates the statement at the time it is given and will object when he believes it is appropriate. Counsel testified he did not feel the solicitor was improperly vouching for the credibility of the witness. Counsel testified that in this case, he did not believe he should object, but rather address

the comments by way of his own closing argument on behalf of Applicant. Counsel also did not believe the other comments inflamed the passions of the jury such that it put the jury in the position of the victims.

On redirect, Counsel testified he and Applicant had a conversation about the fact that the victim's mother continued to let the victim visit Applicant's house even after the allegations against Applicant had been made. Counsel testified that this fact was a part of their defense because it showed the allegations against Applicant were not credible. Counsel testified he was not aware of any conflict-related rules of professional conflict that go away after a certain period of time.

Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, records submitted by the parties, and applicable law. Before this Court are Applicant's Newberry County Clerk of Court records, Applicant's South Carolina Department of Correction records, the trial transcript, Applicant's direct appeal records, and the PCR action records. Pursuant to South Carolina Code Annotated, Sections 17-27-70 and -80, this Court dismisses the application based upon the following findings:

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Conflict of Interest

Applicant first alleges a conflict of interest existed because Counsel previously represented Simms in a divorce proceeding. This Court finds this allegation is without merit and denies and dismisses this allegation with prejudice.

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980); *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984)); *Padgett v. State*, 324 S.C. 22, 484 S.E.2d 101 (1997).

Furthermore, the Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, do not have any bearing on assessing a claim of ineffective assistance of counsel as "[n]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty." *Langford v. State*, 310 S.C. 357, 426 S.E.2d 793 (1993) (citing Rule 407, SCACR).

An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692

(2007); *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *also see Burger v. Kemp*, 483 U.S. 776, 783 (1987))."The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." *State v. Gregory*, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005).

Counsel testified Simms was the mother of the victim, and that she came in to his office in 2006 for representation. Counsel testified he represented her in a simple uncontested divorce. Counsel testified the custody of Simms's children was not an issue in the divorce case as the custody issued had previously been resolved. Counsel testified her last name in 2006 was Thompson, not Simms.

Counsel testified he did not remember who Simms/Thompson was until trial. Counsel testified Applicant was not involved in Simms's divorce because Applicant did not even know Simms at the time of her divorce. Counsel testified that prior to Applicant's trial, he had not spoken with Simms since early 2007. Applicant testified his relationship with Simms started in August of 2011 or 2012.

This Court finds Applicant's allegation is without merit. This Court finds Counsel's testimony on this issue credible, while also finding Applicant's testimony on this issue credible only to the extent he testified his relationship with Simms began in 2011 or 2012. This Court finds no actual conflict existed, as Applicant and Simms did not have adverse inverse interests. *See Thomas v. State*, 346 S.C. 140 (2001), citing *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984) (interests of other client and defendant are sufficiently adverse if it is shown the attorney owes a

duty to the defendant to take some action that could be detrimental to his other client.). Counsel represented Simms in a simple uncontested divorce approximately nine years before Applicant's trial, and at least four years prior to Applicant even knowing Simms. Prior to Applicant's trial, Counsel had not spoken with Simms since 2007 as his representation of her concluded by 2007. Counsel owed no duty to Simms that could have negatively affected Applicant, and vice versa. Moreover, this Court finds Counsel's previous representation of Simms did not negatively affect attorney's representation of Applicant. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998). Accordingly, this Court finds Applicant has failed to meet the burden imposed upon him, and denies and dismisses this allegation with prejudice.

Failure to Object to Solicitor's Closing Statement

In his application, Applicant alleges Counsel was ineffective for failing to object to certain statements containing alleged Golden Rule violations and alleged witness-credibility vouching arguments. This Court disagrees and denies and dismisses this allegation with prejudice.

It appears Applicant takes issue with the following alleged improper statements:

(1) "[a]and you're going to speak to the consciousness of the county. That's what you are. You're going to speak to the ideals of Newberry County." Transcript page 355, lines 18-20. "....[y]ou speak for this county and the values and morals of Newberry County. And you're going to speak for what Newberry County will decide is acceptable and not acceptable. ... give voice to the weak. Do what's right. Do what justice calls for." Transcript page 356, lines 2-7.

(2) "...voice like this cries out from the dark begging to be heard, asking to be believed. ... And this is the kind of case that demands justice." Transcript p. 344, lines 3-6.

(3) "...if we have a criminal justice system that can't speak up and protect the most vulnerable of us, the most helpless of us, then what good is it?" Transcript p. 344, lines 7-9.

(4) "...Will you believe the soft voice of the meek whose message rings the loudest, or are you going to believe the voice of the taker?" Transcript p. 344, lines 11-13.

(5) "... do any of you people truly believe an eight, nine, ten year old is capable of concocting

something like this? ... sitting alone in a room with a perfect stranger and disclosing all of these things in great detail like she did..." Transcript p. 346, l. 22- p. 347, l. 1.

(6) Is a nine, ten year old capable of doing that? You know, if you're lying you got to be good at it." Transcript p. 349, lines 8-9.

(7) "I submit to you [victim] was wholly credible. That she's only capable of telling the truth." Transcript p. 354, line 14-15.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. *Brown v. State*, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (citing *State v. Reese*, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct.App.2004) *aff'd in part and rev'd in part*, 370 S.C. 31, 633 S.E.2d 898 (2006) (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of the victim is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence)). "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." *Id.*, 383 S.C. at 515-16, 680 S.E.2d at 914 (citing *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)).

"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*, 295 U.S. at 88.

"Generally, the assessment of witness credibility is within the exclusive province of the jury." *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Solicitors may not make explicit personal assurances or indicate there is information not presented which supports the testimony, i.e. vouch, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. *Id.*, 416 S.C. at 250, 785 S.E.2d at 477 (*citing Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004))

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). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Reese*, 383 S.C. at 516, 680 S.E.2d at 915. "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.*

This Court finds none of these statements rise to the level of a Golden Rule violation.

These statements do not invoke the passions and prejudices of the jury such that they are improper Golden Rule violations. None of these statements ask the jury to put themselves in the victim's shoes or misinterpret the evidence.

Moreover, this Court finds none of the above statements improperly vouched for the victim's credibility. Throughout his closing argument, the solicitor used the evidence and record to attempt to counter the defense's theory that the victim either misremembered the incident or was coached into making the allegation. Although the solicitor states at one point, "I submit to you [victim] was wholly credible," the solicitor made no personal assurances as to the witness's credibility, nor did he directly or indirectly refer to any information outside of the record. The solicitor discussed testimony throughout his closing argument and then properly and fairly argued that the *evidence* would, according to the State's theory, show the victim's testimony supported a conviction. The solicitor did not improperly vouch for the victim's credibility. Because this Court finds these statements were not improper, this Court also finds Counsel cannot be deemed deficient for failing to object to these statements.

In any event, this Court finds that Applicant has failed to prove that he was prejudiced by Counsel's actions as Applicant has failed to show that the comment infected the trial with unfairness as to make his conviction a denial of due process. *See e.g. State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (holding that the solicitor's closing argument did not prejudice the defendant, where the Court held that "the State may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law"). Accordingly, Applicant has failed to meet the burden imposed upon him, and therefore, this allegation is denied and dismissed with prejudice.

Juror Allegation

In his application, Applicant alleges Counsel was ineffective for failing to strike a juror, or alternatively use a peremptory challenge on a juror who allegedly knew Applicant. This Court disagrees and denies and dismisses this allegation with prejudice.

Jury selection is a process that inherently falls within the expertise of counsel, and trial counsel is not ineffective for failing to exercise peremptory strike as instructed by applicant. *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). *Also see Magazine v. State*, 361 S.C. 610, 606 S.E.2d 761 (2004), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018), citing *Wilcher v. State*, 863 So.2d 719, 754-55 (Miss. 2003) (holding that counsel was not ineffective for failing to use all of the available peremptory challenges). Moreover, the Supreme Court of South Carolina has held that a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury. *State v. Patterson,* 324 S.C. 5, 482 S.E.2d 760 (1997).

In terms of *voir dire* questioning and a juror's concealment of information, an applicant would have to show: (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenge. *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013).

Counsel testified as a matter of course, he always consults with his clients regarding their opinions of jurors during *voir dire*. Counsel testified that he instructs his clients to advise him if they have a strong opinion regarding a potential juror. Counsel testified that none of the potential jurors in Applicant's case gave any indication they could not be impartial. Counsel testified he and Applicant had a discussion in which Applicant indicated he knew one of the jurors. Counsel testified that if Applicant indicated he did not want this juror on the jury, he would not have

selected this juror for the jury.

Applicant testified he knew one of the jurors from his job at Caterpillar, although he could not recall which juror. Applicant testified Counsel told him it could help him, but Applicant did not want him on his juror because he was superstitious. Applicant testified this juror was a Caucasian male. Applicant testified he and this juror had spoken on an occasion in the parking lot at the Caterpillar plant.

This Court finds Counsel's testimony on this issue very credible, while also finding Applicant's testimony on this issue not credible. As an initial matter, the record indicates that all of the selected jurors indicated they could be fair and impartial. Two prospective jurors were excused for cause by the judge, one due to the fact that he previously worked for the sheriff's office and another was excused due to a previous personal incident with sexual molestation. (Tr. 10-11). Accordingly, this Court accepts the jurors' *voir dire* responses as true as Applicant provided no evidence to support his claim that a juror actually did know Applicant and intentionally concealed this information during *voir dire*. In fact, Applicant could not identify which juror he allegedly worked with. In any event, even if Applicant had actually worked with this juror at the Caterpillar branch, it is entirely likely this juror did not recognize Applicant from their brief encounters while allegedly working at the same Caterpillar branch, and therefore, thus juror had no knowledge of this association. This Court cannot depart from the jurors' indications at *voir dire* indicating they could be fair and impartial, as Applicant has provided no evidence to support such a departure. Moreover, the credible testimony shows that Counsel consulted with Applicant regarding this issue, and Applicant did not request that this juror be stricken. Counsel testified that per his usual business practice, if Applicant had requested the juror be removed, he would have had the juror removed. As discussed above, jury selection is a process that inherently

falls within the expertise of counsel. Accordingly, this Court finds Counsel was not deficient.

Applicant has also failed to meet his burden as to prejudice, which requires him to show the result of the proceeding would have been different had Counsel moved to strike or use a peremptory challenge on this juror. *See Cherry*, 300 S.C. at 117-18. As discussed above, there is no indication or evidence to suggest that any of the jurors had a conflict that would prevent them from being fair and impartial. Accordingly, this Court finds Applicant has failed to meet the burden imposed upon him and denies and dismisses this allegation with prejudice.

Conclusion

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notifies Applicant must file and serve a notice of appeal within thirty days from 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 post-conviction relief. 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 his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the PCR application must be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of South Carolina Department of Corrections.

AND IT IS SO ORDERED this 21st day of June, 2021.

J. MARK HAYES, II
Presiding Judge
Eighth Judicial Circuit

Newberry, South Carolina.