ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dillon County

Honorable Larry B. Hyman, Circuit Court Judge

RECEIVED

MAY 31 2019

S.C. SUPREME COURT

SAMMY LEE SCARBOROUGH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001898

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether the PCR court erred in denying relief, where trial counsel failed to object to the repeated use of the term predator during the state's opening statement and closing argument, where the solicitor remarked about devouring and destruction, and where the state suggested that Petitioner preyed on minor children?

II. Whether the PCR court erred in denying relief, where trial counsel failed to object to the solicitor vouching for the testimony of minor children, where the comment was made during closing argument that children "don't make this stuff up" when no physical evidence was recovered in this case?

III. Whether the PCR court erred in denying relief, where trial counsel failed to object to hearsay in a criminal sexual conduct case, where counsel conceded part of the testimony was hearsay, where allegations of misconduct against Petitioner which constituted hearsay were mentioned by minor and adult witnesses alike and were not objected to by counsel?

STATEMENT

In 2013 a Dillon County grand jury indicted Petitioner on three counts of criminal sexual conduct with a minor in the first degree, three counts of disseminating harmful material to minors, and one count of engaging a child under eighteen for sexual performance. App. 577 – 590. He proceeded to trial before the Honorable Paul M. Burch and a jury on November 4, 2013. Shipp Daniel served as the assistant solicitor, Kelly Hall was the assistant attorney general, and Kyle Hobbs represented Petitioner. App. 1.

After the state rested, it withdrew two of the indictments: engaging a child under eighteen for sexual performance and one of the criminal sexual conduct with a minor in the first degree charges regarding Minor 2. App. 388 ll. 8 – 16. Following a three day-trial, the jury found Petitioner guilty of the remaining indictments. App. 463 l. 6 – App. 464 l. 1. Judge Burch sentenced Petitioner to life imprisonment on the two criminal sexual conduct charges and five years on each of the dissemination of obscene materials charges, concurrent. App. 476 ll. 3 – 23. Petitioner's convictions were affirmed. State v. Scarborough, Op. No. 2016-UP-074 (S.C. Ct. App. filed Feb. 24, 2016).

Petitioner filed a timely application for post-conviction relief on November 2, 2017. App. 479 - 486. It contained allegations of ineffective assistance of counsel, including claims that counsel failed to object to questions asked and evidence offered by the state. App. 482. A first amendment to the PCR application was filed on May 24, 2018. App. 487 – 488. A second amendment was filed on July 1, 2018. App. 489 – 490. The state filed its Return and Partial Motion to Dismiss on February 2, 2018. App. 491 – 499.

An evidentiary hearing was held before the Honorable Larry B. Hyman, Jr. on July 23, 2018. App. 500. Lance Boozer represented Petitioner, and Johnny James, Jr. appeared on behalf

of the state. Petitioner and trial counsel testified at the hearing. At the conclusion of the hearing, Judge Hyman requested proposed orders from both sides. In October 2018, the PCR court issued its Order of Dismissal. App. 553 – 576. The court found that counsel rendered effective assistance and that Petitioner failed to meet his burden

This Petition follows.

ARGUMENT

I. The PCR court erred in denying relief, where trial counsel failed to object to the repeated use of the term predator during the state's opening statement and closing argument, where the solicitor remarked about devouring and destruction, and where the state suggested that Petitioner preyed on minor children.

The prosecution referred to Petitioner as a predator thirteen times throughout the trial. The solicitor conjured up animalistic imagery of destruction by repeatedly suggesting that Petitioner preyed on the minors. In doing so, the state appealed to the jury's emotions by comparing the minors to prey. App. 418 ll. 1 – 6; App. 420 ll. 5 – 7. Each instance passed without objection by counsel.

In its closing argument, the state wasted no time in referring to Petitioner as a predator and suggesting that he preyed on the minors:

> Thank you, Your Honor. May it please the Court, Mr. Hobbs, ladies and gentlemen, good morning. At the beginning of this trial Ms. Hall defined the word 'neighbor.' She talked about the good memories that a lot of us enjoyed having spent time with our neighbors. Well, I am going to define another word for you, and that word is predator.
>
> The word predator is defined as one who preys, destroys, or devours. For [minors], Scarborough wasn't just a neighbor. He was a predator. He preyed on these little children. He destroyed their chance at a normal life, and he devoured their innocence.
>
> The evidence, the true, tough, raw evidence that you heard from that witness stand screamed that Sammy Scarborough is a predator.

App. 402 l. 14 – App. 403 l. 3. The dehumanizing remarks did not end there. App. 418 ll. 3 – 6. Later during the state's closing, the solicitor continued with the predator reference: "When a neighbor turns into a predator and preys on little children, destroys their chance at a normal life

and devours their innocence that predator needs to be held accountable. Sammy Scarborough is a predator. Sammy Scarborough is guilty." App. 420 ll. 4 – 9.

At the evidentiary hearing, trial counsel indicated he was not aware of "any case law or any precedent regarding the word, 'predator'." App. 535 ll. 1 – 8. Counsel opined that the description of predator was accurate:

> The word, 'predator' in my mind describes the nature and the circumstances of the accused behavior in that he was someone who was in a position of authority or an elder above these children. And that there was a predatory nature to what he was doing; that it wasn't consensual and that these children were more vulnerable. So I think that the word, 'predator' describes the nature of their accusation about what they were saying what Mr. Scarborough did. But I don't think the word in and of itself is impermissible.

App. 535 l. 25 – App. 535 l. 12.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Much like in Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), the solicitor in Petitioner's case referred to him in a derogatory fashion before even informing the jury about Petitioner's charges. In Vasquez, this Court granted Vasquez a new sentencing hearing partly in part due to the inflammatory remarks offered by the solicitor, including a direct reference to terrorism. Id. This Court held that Vasquez's case was not one that constituted "terrorism" by the legal sense of the word. Id. at 459, 689 S.E.2d at 567. Likewise, Petitioner's trial was not one regarding the Sexually Violent Predator ("SVP") program. Therefore, given the solicitor's depiction of Petitioner as a predator was without legal support, trial counsel was deficient in failing to object on this ground.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, "[s]olicitors are bound to rules of fairness in their closing arguments," as this Court has explained:

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

"On appeal, the 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, 331 S.C. at 338, 503 S.E.2d at 166. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997)("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.").

Counsel failed to object, request a curative instruction, or move for a mistrial. Petitioner was unable to seek review of these improper comments on appeal due to the failure of trial counsel to object. It is indisputable that the term "predator," in the sense it was used at trial by the state, can only conjure negative connotations. Thus, the solicitor's use of the term was improper. The solicitor's comments in this matter exceeded the bounds established by this Court regarding these types of remarks. As such, trial counsel's failure to object was prejudicial to Petitioner.

The solicitor's characterization of Petitioner as a predatory was excessive, inflammatory, and repetitious. The continuous use of the term was extremely prejudicial because it was used to portray Petitioner as an animal who stalked its prey. These references permeated the state's opening statement and closing argument, infected the trial with unfairness, and deprived Petitioner of due process. Counsel should have objected; had he done so, this matter could have been remedied by the trial judge or an appellate court.

II. The PCR court erred in denying relief, where trial counsel failed to object to the solicitor vouching for the testimony of minor children, where the comment was made during closing argument that children "don't make this stuff up" when no physical evidence was recovered in this case.

Similar to the issue discussed above, the PCR court also erred in finding that counsel rendered effective assistance where he failed to object to the solicitor's comments vouching for the credibility of the state's minor witnesses.

In addition to the repeated use of the word predator in the state's closing argument, the solicitor also vouched for the credibility of the minor witnesses:

> Ladies and gentlemen, use your common sense. Strip away all the outside stuff. Don't fall for Defense Lawyer 101. Let's be real. Five, six, seven and eight year olds don't make this stuff up. They just don't.

App. 419 l. 25 – App. 420 l. 4.

In Matthews v. State, this Court held that Matthews' counsel rendered ineffective assistance by failing to object to the solicitor's comments vouching for the credibility of the state's witnesses. 350 S.C. 272, 565 S.E.2d 766 (2002). Matthews argued that his counsel should have objected to the solicitor's comments regarding corroboration of witness testimony. Id. at 275, 565 S.E.2d at 767. This Court held that "[c]ounsel's failure to object prejudiced his client by allowing the solicitor to vouch for the credibility of a key State's witness." Id. at 277, 565 S.E.2d at 769. Similarly, trial counsel in Petitioner's case failed to object to the vouching of minor witnesses which in turn prejudiced Petitioner and deprived him of a fair trial.

More recently is the case of Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016). Tappeiner was arrested and indicted for CSC with a minor, second degree. Id. at 244, 785 S.E.2d at 473. During closing, the solicitor stated to the jurors that the minor "looked [them] in

the eye" and reminded them that the rape crisis counselor interviewed the minor "face to face, eye to eye" such that the counsel believed the minor's version of events. Id. at 246, 785 S.E.2d at 473. While this Court's opinion in Tappeiner largely addressed the vouching of the counselor's testimony along with the testimony of law enforcement, the solicitor's actions in Petitioner's case were likewise improper and should have invited an objection because they impermissibly vouched for the minor's credibility.

Generally, "[t]he assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Thus, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)) (stating that a solicitor improperly vouches for a witness's credibility "by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony"); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Thus, solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

The suggestion from the solicitor in closing is that the minor children are telling the truth. Not only is it inaccurate to submit that minor children do not make up accusations, but it is also tantamount to bolstering and vouching for their credibility. Trial counsel did not object to these prejudicial and improper remarks. Without physical evidence, this case hinged on the testimony of the minor children. Letting this remark go unchallenged during closing arguments prejudiced Petitioner's right to a fair trial and constituted ineffective assistance of counsel.

III. The PCR court erred in denying relief, where trial counsel failed to object to hearsay in a criminal sexual conduct case, where counsel conceded part of the testimony was hearsay, where allegations of misconduct against Petitioner which constituted hearsay were mentioned by minor and adult witnesses alike and were not objected to by counsel.

Minor 2 testified during the state's case-in-chief that Minor 1 said that Petitioner made Minor 1 perform oral sex on him. App. 230 ll. 2 – 22. Notably, Minor 2 testified that "[Minor 1] came in and said that." Id. On direct examination, Minor 2 testified that he heard about it rather than witnessed it. Id. These hearsay statements passed without objection.

Petitioner retained trial counsel five or six weeks before his date certain trial. App. 504 l. 20 – App. 505 l. 17; App. 516 ll. 6 – 8. According to Petitioner, the duo never discussed trial strategy. App. 512 ll. 1 – 3. They never discussed how to attack the state's case or applicable defenses. App. 512 ll. 4 – 15. Trial counsel objected on hearsay grounds on at least two other occasions, with at least one objection being sustained. App. 175 ll. 22 – 23; App. 180 l. 19 – App. 181 l. 4.

At the evidentiary hearing, counsel admitted that he could have objected on hearsay grounds. App. 533 ll. 2 – 21. However, he indicated that he thought having one minor discuss allegations that another minor made against Petitioner was somehow beneficial. Id. When asked whether he could have asked for a curative instruction or moved for a mistrial, counsel reiterated that he could have objected based on hearsay grounds but he "thought that that was a beneficial statement on [Minor 1] backtracking on having actually [seen] it and that he had a different source for that belief." App. 533 ll. 16 – 21.

Counsel also failed to object during the testimony of Hope Owens, mother to one of the minor children. App. App. 241 l. 10 – App. 242 l. 4. Owens testified that her child disclosed

alleged sexual abuse regarding Petitioner but she did not immediately notify law enforcement. Id. She waited approximately half a year before advising the police about the allegation. Id. When asked by the solicitor what caused her to notify law enforcement, she answered "I found out what happened to Quinae's two kids…" Id.

Both of these instances represent objectionable hearsay statements. On both occasions, trial counsel failed to object. Because a valid trial strategy did not exist to justify counsel's failure to object, the PCR court erred in finding that counsel provided effective representation.

Following Thompson v. State, the PCR court and this Court should consider the strength of the state's case apart from the inadmissible evidence to which trial counsel deficiently failed to object. 423 S.C. 235, 814 S.E.2d 487 (2018). This was not done in areas of the Order of Dismissal pertaining to these allegations. App. 565 – 568.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is not admissible except as provided by the South Carolina Rules of Evidence, by other rules prescribed by this Court, or by statute. Rule 802, SCRE. Rule 801(d)(1)(D), SCRE, provides:

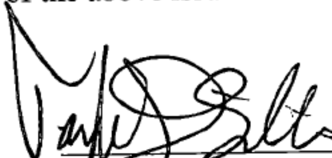
> A statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony in a criminal sexual conduct case ... where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

The foregoing testimony from Minor 2 and Owens constitutes inadmissible hearsay. Their accounts of conversations, direct or indirect, meet the definition of hearsay. Trial counsel was therefore deficient for not objecting to the inadmissible hearsay testimony. There is no probative evidence in the record to support the PCR court's findings that Petitioner was not

prejudiced by these deficiencies. As discussed above and as was noted by trial counsel, there was no physical evidence recovered in this case. In a trial which relied so heavily on the testimony of minor witnesses, counsel should have objected on hearsay grounds. The failure to do so constituted ineffective assistance, and Petitioner was prejudiced in a case without overwhelming evidence of guilt.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and order further briefing of the above issues.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dillon County

Honorable Larry B. Hyman, Circuit Court Judge

SAMMY LEE SCARBOROUGH,

PETITIONER

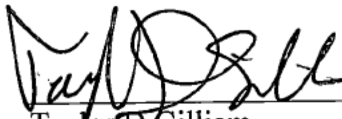
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

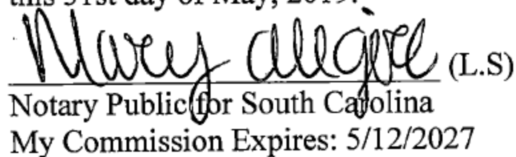
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Sammy Lee Scarborough, #141397, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 31st day of May, 2019.



Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of May, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: 5/12/2027