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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Pickens County

The Honorable John C. Hayes, III, Trial Judge
The Honorable Edward W. Miller, PCR Judge

Appellate Case No. 2021-000057

JONATHAN MATTHEW HOLDER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

PETITIONER'S ISSUE PRESENTED

Whether the PCR court erred where it found trial counsel provided effective representation where counsel moved for a mistrial because the solicitor asked Petitioner if he was gay and if he was "interested in young boys," since the Court of Appeals procedurally barred the mistrial issue because counsel did not object the trial court's curative instruction or renew his mistrial motion?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE

Did the PCR court correctly find that Petitioner failed to prove that trial counsel was constitutionally ineffective for not preserving the mistrial issue for direct appellate review when trial counsel reasonably concluded that the trial court's curative instruction was the best relief that Petitioner would receive and when, even if the issue had been preserved, the appellate courts would not have found error in the curative instruction in light of the deferential standard of appellate review?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. During its June of 2013 term, the Pickens County Grand Jury indicted Petitioner for second-degree criminal sexual conduct with a minor (2013-GS-39-00957) and third-degree criminal sexual conduct with a minor (2013-GS-39-000958). In May of 2015, both indictments were amended so as to refer to different time frames. Petitioner was represented by David D. Cantrell, Jr. ("trial counsel"). Assistant Solicitor Samuel Barton Tooker of the Thirteenth Circuit Solicitor's Office prosecuted the case. On May 20-21, 2015, Petitioner proceeded to a jury trial with the Honorable John C. Hayes, III ("trial court"), presiding. At the conclusion of the second day of trial, the jury found Petitioner guilty as indicted. The trial court sentenced Petitioner to imprisonment for ten years for each offenses, with both sentences to be served concurrently.

Trial counsel filed a timely notice of appeal. Appellate Defender David Alexander ("appellate counsel") of the South Carolina Commission on Indigent Defense represented Petitioner on appeal, and argued that the trial court erred in denying trial counsel's motion for a mistrial after the prosecution asked during its cross-examination of Petitioner if Petitioner was gay and sexually interested in "young boys." The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Holder, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017) (per curiam). The remittitur was issued on June 27, 2017.

An evidentiary hearing regarding Petitioner's application for post-conviction relief ("PCR") was held before the Honorable Edward W. Miller ("PCR court") at the Greenville County Courthouse on October 25, 2019. At the conclusion of that hearing, the PCR court took the matter under advisement and asked for proposed orders from both parties. On July 16, 2020, the PCR

court issued an order granting post-conviction relief to Petitioner based on two of the claims raised by Petitioner and denying as to the others.

Respondent filed a timely motion to alter or amend the judgment, pursuant to Rule 59(e), SCRCP. The parties appeared before the PCR court by WebEx on November 30, 2020, for a hearing on Respondent's motion. After the conclusion of the hearing, each party submitted a post-hearing brief to the Court, and Petitioner filed a return to Respondent's motion to alter or amend the judgment. On January 5, 2021, the PCR court issued an order granting Respondent's motion to alter or amend, vacating its previous grant of post-conviction relief to Petitioner, and making new findings of fact and conclusions of law with regard to the two claims at issue in the motion. Petitioner's appeal followed.

STATEMENT OF FACTS

On October 13, 2011, the victim, a fifteen-year-old ward of the State,[1] was admitted to Hampton Psychiatric Residential Facility ("Hampton"), an inpatient treatment center for minors with psychological, behavioral, and other mental health concerns, to address his on-going behavioral problems. App. 60-63, 73, 98, 100, 132, 135, 137, 141-42. Hampton was designed to care for up to fifty-two boys at a time; the facility was operated by more than eighty employees called direct care staff. App. 73-74, 100, 141. Direct care staff was responsible for resident care, including preventing the residents from harming themselves or others, assisting with residents' basic needs, and rewarding or punishing the residents. App. 101-02, 136. Petitioner was a direct care staff employee at Hampton while the victim resided there. App. 76, 135-37, 225-27. Hampton provided the residents with the bare essentials, but well-performing residents were able to do chores and other tasks to earn "Avalons," an in-house currency that residents could use to purchase special items. App. 74-75, 137-38. 141.

Hampton was equipped with an extensive camera system throughout the facility, but there were several locations without cameras, including the library, the laundry room, and portions of the nurse's station. App. 104-05, 108, 140. Members of the direct care staff were advised to remain on-camera at all times and to avoid being off-camera with residents. App. 108, 129, 231. Additionally, Hampton protocol required that all doors remain open. App. 128. This protocol was for the protection of both residents and direct care staff. App. 108-09.

[1] The victim had been in the custody of the South Carolina Department of Social Services ("DSS") since his parents' rights were terminated when he was twelve. App. 98.

In late spring of 2012, the victim was progressing well in Hampton's program and was able to do extra chores to earn Avalons. App. 74, 132, 137, 290. On one particular evening, the victim asked to do laundry to earn Avalons. App. 234-35. Pursuant to Hampton's policy, a direct care staff member was required to accompany the victim while he completed his chores, and Petitioner was tasked with assisting the victim in the laundry room, a small area that was not equipped with cameras. App. 77, 108, 122, 140, 235-37. While in the laundry room with the door shut, Petitioner made comments comparing the size of his genitalia to a box of laundry detergent. App. 77-78. Petitioner then showed his penis to the victim and asked the victim to reciprocate. App. 78. Petitioner and the victim touched each other's genitals for a few minutes. App. 78-79. The entire encounter lasted approximately thirty minutes. App. 79.

Later that same evening, Petitioner was monitoring the victim as the victim cleaned the nurse's station. App. 80-81. While the victim was cleaning a back room out of camera view, Petitioner touched the victim's genitals and asked the victim to put his mouth on Petitioner's penis. App. 80-81, 90-91. The victim declined and moved away from Petitioner. App. 80-81. The encounter lasted for approximately ten minutes and occurred when the on-duty nurse left the station. App. 81, 91.

Another evening shortly thereafter, the victim asked for permission to retrieve a book from the library, and Petitioner was asked to accompany the victim. App. 81, 244-45. Petitioner, who had brought a large pizza into work that evening against Hampton policy, gave the victim a few slices to eat while they were on the way to the library. App. 84-85, 246-47. It took a few minutes for Petitioner and the victim to the library, which was a small room without any windows and one door that opened to a common area. App. 81-82, 86-89, 245, 249-50. Once inside the library,

Petitioner left the door cracked and stood inside the library with the victim. App. 81-82. Petitioner instructed the victim to masturbate and the victim complied while Petitioner watched him do so. App. 82-83. Petitioner then shut the door completely and performed fellatio on the victim until the victim ejaculated. App. 83. Following the assault, the victim grabbed a book and went back to his room. App. 83.

After the abuse, the victim began acting out aggressively, and destroyed property around the facility. App. 83-84. A few days later, the victim disclosed the abuse to Kevin Sowell, the director of Hampton. App. 83, 135, 138. The victim attributed the decline in his behavior to anger over the abuse and frustration over his perception that no one believed that he had been abused by Petitioner. App. 83-84. The victim remained at Hampton for a few months following the abuse. App. 84, 137.

Following the victim's disclosure, Sowell began an internal investigation into the victim's abuse allegations, during which he watched camera footage from the locations at which the victim alleged the incidents of abuse had taken place. App. 138-40. The various cameras through Hampton showed that Petitioner and the victim had been alone and off-camera during the periods that the victim had identified. App. 63, 102-04, 108-12, 121-24, 138-40. The allegations were eventually reported to DSS, an employee of which informed the Pickens City Police Department. App. 59-60. The case was assigned to Detective Samuel Byers, who interviewed the victim on three occasions. App. 59-61. Detective Byers also watched video footage from Hampton and reviewed a statement made by Petitioner. App. 61-63. Following his investigation, Detective Byers sought and obtained warrants for Petitioner's arrest. App. 63.

During the State's case-in-chief at Petitioner's trial, the State presented testimony from Detective Byers, the victim, Sowell, the victim's DSS caseworker Johniece Wofford, and Hampton's Assistant Facility Director Meghann Harvey. The State also presented Shauna Galloway-Williams, who was admitted as an expert in the field of child abuse disclosure dynamics and who testified about delayed disclosure, risk factors for sexual abuse, and grooming of victims. App. 147-94. Additionally, the State presented and published to the jury the video footage from Hampton showing Petitioner and the victim alone, often with the door shut, in the laundry room, nurse's station, and library. App. 102-04, 108-12, 121-24, 138-40.

Petitioner testified in his defense and denied abusing the victim. App. 223-64, 268-96, 301-08. Petitioner, who was thirty-three years old at the time of trial, testified he began working at Hampton as direct care staff in March of 2011. App. 224-25. He testified he had worked in the victim's unit previously and was familiar with the victim. App. 227, 232-33. He testified he would occasionally accompany the victim while the victim did chores to earn Avalons, something Petitioner also did with other residents. App. 233-34. Petitioner testified that although Hampton policy was to remain on-camera at all times with residents, it was impossible to stay within the view of a camera at all times and staff was allowed to go off-camera if necessary to care for or supervise a resident. App. 231-32. Petitioner testified that he accompanied the victim one evening when the victim was doing laundry and that he was unable to leave the victim alone at any point due to risks associated with the chore, including electrical and chemical risks. App. 234-35. He testified that nothing inappropriate occurred while he assisted the victim with the laundry. App. 240.

Petitioner testified that he also took the victim to the library one evening to retrieve a book at the request of his supervisor. App. 244-45. He testified that he brought a pizza in to share with residents and fellow staff that evening, which he testified was a common practice despite formally being against Hampton policy, and he gave the victim pizza because the victim asked for some. App. 246-49. He testified that the library door was heavy and automatically shut if he did not hold it open. App. 249-50. He testified that he tried to hold the door open the entire time, but allowed it to shut briefly when he was helping the victim select a book or keeping him separated from other residents. App. 254-56. Petitioner insisted nothing inappropriate happened between himself and the victim in the library. App. 257. He similarly testified that nothing inappropriate happened when he assisted the victim in cleaning the nurse's station. App. 258-59.

During the cross-examination of Petitioner, the following exchange occurred between the assistant solicitor and Petitioner:

> Q. So are you gay?
> A. No.
> Q. Are you interested in young boys?
> A. No.

App. 296-97. Trial counsel objected and the trial court sustained his objection. App. 297. Trial counsel then asked to be heard outside the presence of the jury. App. 297. Once the jury cleared the courtroom, trial counsel moved for a mistrial, arguing the line of questioning was irrelevant, without foundation, and prejudicial. App. 297-98. The assistant solicitor responded that the line of questioning was in reply to trial counsel's questioning about Petitioner's marital status and number of children, which he theorized "revealed or developed that [Petitioner] is a heterosexual." App. 299-300. He elaborated that his theory of the case was that Petitioner was a repressed homosexual.

App. 299-300. After hearing from both parties, the trial court denied trial counsel's motion for a mistrial. App. 300-01. The trial court stated:

> Well, I think—I think it was an inappropriate question, quite candidly, because there is nothing without foundation to throw that in. It is—it is just inappropriate. I'm not going to go any further than that.
>
> However, I do not feel that it manifests a necessity to grant a mistrial. I'm going to ask the jury to disregard that. If we—if we have another episode like that, then we will bring this two and a half day—or two day trial to a screeching halt. And I think I have said enough on that, too. I tend to ramble. I think I have rambled enough. So I'm not going to grant it. I don't think it manifests the necessity to grant a mistrial.
>
> I will give, even though the defense has not requested it, I want the record to be clear that I'm doing this sua sponte, to give the correct—curative instructions and we'll proceed.

App. 300-01. When the jury returned to the courtroom, the trial court issued the following instruction:

> Members of the jury panel, shortly before you went out, the—[the assistant solicitor] asked [Petitioner] whether or not he was gay. That was not an appropriate question. There is no evidence in this record to support that question. The question is not relevant—the question nor the answer.
>
> So please disregard the fact that the question was asked. [Petitioner] answered it no, so you can disregard that, too. But just disregard—that's not an issue in this case to any degree whatsoever. So disregard the fact that that question was asked. You may proceed.

App. 301-02. The assistant solicitor finished his cross-examination without incident and defense counsel re-examined Petitioner before resting his case.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court correctly found that Petitioner failed to prove that trial counsel was constitutionally ineffective for not preserving the mistrial issue for direct appellate review because trial counsel reasonably concluded that the trial court's curative instruction was the best relief that Petitioner would receive and because, even if the issue had been preserved, the appellate courts would not have found error in the curative instruction in light of the deferential standard of appellate review.

Petitioner argues that the trial court's curative instruction to the jury was insufficient to cure the prejudice that Petitioner may have suffered when the assistant solicitor asked him in cross-examination if he was gay and interested in young boys and that the PCR court erred in finding that Petitioner failed to prove that trial counsel was constitutionally ineffective for not preserving the issue for appellate review by objecting to the insufficiency of the instruction. Petitioner's argument fails because the PCR court correctly found that trial counsel's decision not to object to the sufficiency of the instruction was reasonable under the circumstances and that Petitioner failed to prove that there is a reasonable likelihood that he would have been successful on appeal if trial counsel had so objected.

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in the post-conviction relief action, and when alleging that counsel was constitutionally ineffective, she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625

(1989) (quoting Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficiency

Petitioner argues now that the trial court's curative instruction addressed only one of the two questions asked of Petitioner by the assistant solicitor. Petition for Writ of Certiorari 11-13, 15. Petitioner did not make this argument at the evidentiary hearing before the PCR court, in his return to Respondent's motion to alter or amend the judgment, at the hearing on Respondent's motion to alter or amend the judgment, or in his post-hearing brief. Because Petitioner did not make this argument before the PCR court, he should not be allowed to make it now. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (instructing that a party cannot argue one ground before the trial court and then an alternate ground on appeal).[2]

[2] Notwithstanding Petitioner's preservation trouble, this Court should consider the assistant solicitor's two questions and Petitioner's two answers collectively. The most reasonable way to view the two questions and answers is as a single incident because that is what the parties did at trial, and that is what the parties and the PCR court did below. Trial counsel's objection came immediately after the assistant solicitor asked the second question—whether Petitioner was interested in young boys—and Petitioner answered in the negative. App. 296-97. Trial counsel argued that it was not relevant to ask "about gay, not gay, that sort of thing . . . ." App. 297 (emphasis added). It is true that the trial court's curative instruction literally only addressed the assistant solicitor's question of "whether or not [Petitioner] was gay." App. 301-02. But it was clear enough from the context that both questions and both answers were included in the objection and the curative instruction. When arguing before the PCR court and in the filings, the parties considered the two questions as a single event and considered the curative instruction as one addressing both questions. This indicates that the parties, the trial court, the jury, and the PCR court all understood the curative instruction to be addressing both questions. This Court should take the same view, despite the novel argument that Petitioner raises for the first time now.

Ultimately, the PCR court found that Petitioner failed to prove that trial counsel's performance with respect to his handling of the mistrial issue was deficient. App. 617. The PCR court's finding was correct because trial counsel was aware that Petitioner would likely receive no benefit from further objection from trial counsel. Under the deficiency prong of Strickland, the post-conviction relief court is to measure an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, at 117, 386 S.E.2d at 625 (quoting Strickland, at 690). In order for an applicant to successfully prove that his defense attorney's performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Id. (citations omitted). The "preeminent authority for all" courts when they are considering an applicant's claim of constitutional ineffectiveness requires that the courts be highly deferential to a defense lawyer's performance because:

> [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting Strickland). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

When the assistant solicitor asked Petitioner during cross-examination whether he was gay and liked young boys, trial counsel objected. App. 297. Outside the presence of the jury, trial

counsel moved for a mistrial and argued that the assistant solicitor's two questions were irrelevant, unduly prejudicial to Petitioner, and lacked foundation in the evidence admitted. App. 614-15. The trial court denied the motion but chastised the assistant solicitor and gave a curative instruction to the jury once it returned to the courtroom. App. 300-02. The Court of Appeals found that trial counsel accepted the trial court's ruling and did not challenge the sufficiency of the curative instruction. State v. Holder, Op. No. 2017-UP-239 at *2 (Ct. App. filed June 7, 2017) (per curiam). Trial counsel testified before the PCR court that he did not object to the sufficiency of the instruction because "curative instructions are frequently done or frequently appropriate." App. 506. Trial counsel thought that the trial court's curative instruction was the best relief that Petitioner would get. App. 509. Trial counsel was hesitant to object further because the single incident:

> [W]as the only comment in that respect that was made. Obviously it was cut off quickly. I don't know where [the assistant solicitor] would have gone with it if there'd been no objection or ruling. So as far as speaking it out loud . . . that was the only time I'm aware of, and I know of nothing else that was said or done during the trial that would go in that direction.

App. 509-10. Trial counsel felt that the incident was prejudicial to Petitioner, but could not gauge the extent of the prejudice, and he thought that at least one of the video recordings admitted at trial that showed Petitioner, in violation of Hampton's policy, entering an off-limits area alone with the minor victim was "a big deal . . . ." App. 510.

Trial counsel decided not to object to the sufficiency of the trial court's curative instruction. His testimony before the PCR court shows that he considered the fact that the incident, though he felt that it had been improper, was brief in duration and limited in scope. He weighed the likelihood that the issue would prove successful for Petitioner on appeal and concluded that the trial court's curative instruction had been the greatest relief that Petitioner would receive. He obviously

watched to make sure that the issue was not revived by the assistant solicitor during the remainder of the trial. And he agreed that curative instructions were typically given to cure prejudicial incidents like the one he felt he had just seen. The PCR court's eventual conclusion that the issue would not have caused Petitioner to prevail on appeal is further proof that trial counsel's decision not to object further was reasonable under the circumstances. Even if there was reason for this Court to think that trial counsel's decision in this regard was "far from exemplary, [it] still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) (quotation omitted).

Prejudice

The PCR court evaluated Petitioner's claim by considering whether Petitioner had proven that there is a reasonable likelihood that Petitioner would have prevailed on direct appeal had trial counsel preserved the issue after the trial court gave a curative instruction to the jury. App. 615-16. The PCR court was correct to evaluate Petitioner's claim this way. When an issue was unpreserved for direct appellate review, a PCR court is to examine whether the applicant suffered prejudice from the lack of preservation under the second prong of Strickland by analyzing the merits of the issue and considering whether the applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through the same lens that would be applied on appeal . . . ") (citation omitted); see also McHam v. State, 404 S.C. 465, 474-82, 746 S.E.2d 41, 46-50 (2013) (holding the PCR court erred in finding counsel was not deficient in failing to preserve an issue for appellate review

but agreeing with the PCR court that McHam failed to establish prejudiced because the Fourth Amendment claim failed on the merits), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

The PCR court correctly identified that an appellate court, if the issue had been preserved for appellate review, would have reviewed the trial court's decision not to declare a mistrial under the abuse of discretion standard. App. 616. "The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decisions will not be overturned on appeal absent an abuse of discretion resulting in prejudice to the defendant." State v. Makins, 433 S.C. 494, 860 S.E.2d, 670 (2021) (citing State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Makins, 433 S.C. 494, 860 S.E.2d at 670 (quoting State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007)). Our Court of Appeals "favors the exercise of wide discretion of the trial court in determining the merits of a mistrial motion in each individual case." State v. Ferguson, 376 S.C. 615, 618, 658 S.E.2d 101, 103 (Ct. App. 2008) (quoting State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)). "The less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) (citations omitted). Appellate courts should give some level of deference to a trial court's view of the circumstances of trial when reviewing that court's decision not to declare a mistrial. See State v. Taylor, 427 S.C. 208, 212, 829 S.E.2d 723, 726 (Ct. App. 2019) (reviewing the trial court's decision to, instead of declaring a mistrial, give the jury a charge

pursuant to Allen v. U.S., 164 U.S. 492 (1896), "with deference to the trial court's superior position to observe the courtroom atmosphere, the jury's demeanor, and the tenor and rhythm of the trial.").

The PCR court found that Petitioner failed to prove that there is a reasonable likelihood that he would have been victorious on appeal if trial counsel had preserved the issue for appellate review. App. 616. The PCR court's finding was correct. It took into consideration the caution our courts use when deciding whether to declare a mistrial, the sufficiency of the trial court's curative instruction to the jury, and the limited nature of the incident.

First, the trial court correctly identified the caution that a trial court has to use when considering whether to declare a mistrial. App. 616. "The power of the court to declare a mistrial ought to be used with the greatest caution . . . ." State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 487, 479 (1997), quoted in State v. Durant, 430 S.C. 98, 111, 844 S.E.2d 49, 55, n.6 (2020). "Granting a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way." Makins, 433 S.C. 494, 860 S.E.2d at 670 (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998)). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Green, 432 S.C. 572, 600, 854 S.E.2d 626, 641 (Ct. App. 2021) (quoting State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010)). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. Green, 432 S.C. 572, 598, 854 S.E.2d 626, 640 (Ct. App. 2021) (quoting State v. Bantan, 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010)). "A trial court should declare a mistrial as a last resort, when all other alternatives have been exhausted." State v. Taylor, 427 S.C. 208, 212, 829 S.E.2d 723, 726 (Ct. App. 2019).

Second, the PCR court correctly considered the effect of the trial court's curative instruction. The trial court's curative instructive was substantial and unequivocal. See State v. Tillman, 433 S.C. 58, 67, 856 S.E.2d 168, 173 (Ct. App. 2021) (finding that the trial court's curative instruction "was lengthy and unequivocal" and corrected any misunderstanding that the jury may have had about whether a law enforcement officer had been qualified as an expert witness in a legitimate scientific field). Even if the assistant solicitor's two questions were not proper, they were not impervious to effect of the trial court's curative instruction. See Earley v. State, 418 S.C. 255, 270-73, 792 S.E.2d 226, 234-36 (2016) (without deciding whether the solicitor's failure to disclose evidence to the defense constituted prosecutorial misconduct such that would justify a mistrial, finding that the PCR court erred in finding that a mistrial was the only remedy that could have cured any prejudice from the nondisclosure and erred in finding that the facts of the case would have compelled the trial court to declare a mistrial); State v. Smith, 425 S.C. 20, 38, 819 S.E.2d 187, 196-97 (Ct. App. 2018) (finding that the assistant solicitor's plea in closing argument that the jury not "put [the defendant] back out on the street" was misleading and an improper "attempt to appeal to the jurors' sense of fear", but finding that the improper remark was nevertheless cured, in part, by the trial court's instruction that the jury was to disregard it) (citation omitted), rev'd on other grounds, State v. Smith, 430 S.C. 226, 845 S.E.2d 495 (2020). Petitioner relies upon State v. Ferguson, 376 S.C. 615, 658 S.E.2d 101 (Ct. App. 2008), to no avail. In Ferguson, the defendant shot and killed a female victim after they had a dispute after the father of the defendant's girlfriend shut off the water to both the defendant's and the victim's homes while attempting to repair a water leak in the victim's home. Id. at 617, 658 S.E.2d at 102. The solicitor intentionally elicited testimony from the defendant's girlfriend that the defendant, when the police

were at his home to arrest him after the shooting, "looked at [her] and told [her] that [she] was next." Id. at 619, 658 S.E.2d at 103. The Court of Appeals approved of the trial court's decision to give a curative instruction to the jury instead of granting the defendant's motion for a mistrial. Id. at 620-21, 658 S.E.2d at 104. Curative instructions cured any prejudice in these aforementioned cases; likewise, the trial court's curative instruction cured any prejudice to Petitioner that may have arisen from the assistant solicitor's two questions.[3]

Third, the PCR court noted that the issue was not revisited with the jury for the remainder of Petitioner's trial. App. 617. Other than the assistant solicitor's two short questions and Petitioner's two, one-word denials, there was no testimony about Petitioner's sexual preferences, orientation, or interests at trial. After the trial court gave its curative instruction, there were no further references to the two questions and answers. The brevity of the situation, which consisted of a scanty total of twelve words from the assistant solicitor and Petitioner, did not justify a mistrial. See State v. Palmer, 415 S.C. 502, 518, 783 S.E.2d 823, 831 (Ct. App. 2016) (finding that the defendant failed to establish that he was entitled to a mistrial because, among other things, the single reference at trial to the fact that a witness took a polygraph test "was an isolated comment");

[3] Petitioner tries to support his argument for prejudice by noting that "[p]eople in the courtroom [during Petitioner's trial] noticeably reacted and gasped when the questions were asked." Petition for Writ of Certiorari 14. Petitioner's own testimony on this point does not help his case, though; it cuts against a finding of prejudice. Petitioner testified before the PCR court that trial counsel "was floored, the whole court, people were like, ah, you know, gasping that [the assistant solicitor] said something this outlandish." App. 454. Petitioner testified that, during a break at trial, trial counsel told him that he felt that the assistant solicitor made, by asking the two questions, "a fool of himself the way he did that, that that was our slam dunk . . . ." App. 454-55. Petitioner testified that some people in the courtroom "yelled out" and that "everybody" and "the few onlookers that were there . . . really couldn't believe it . . . ." App. 478-79. Petitioner felt that the people in the courtroom thought the questions were "[e]xtremely inappropriate." App. 479. Petitioner's testimony indicates that the assistant solicitor's two questions earned opprobrium from those in the courtroom *for the assistant solicitor*, not for Petitioner.

State v. Manning, 400 S.C. 257, 270, 734 S.E.2d 314, 320-21 (Ct. App. 2012) (finding that a single reference to the schedule-three drug charge included in the indictments read to the jury at the beginning of trial, when that specific drug charge was subsequently severed, did not cause prejudice sufficient to justify a mistrial) (citation omitted); State v. Thompson, 352 S.C. 552, 561-62, 575 S.E.2d 77, 82-83 (Ct. App. 2003) (finding that a law enforcement officer's single, vague reference to the defendant's prior criminal record was insufficient to justify a mistrial because, in part, the solicitor did not attempt to introduce evidence that the defendant had been convicted of other crimes) (citations omitted).

CONCLUSION

For all the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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October 1, 2021

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Pickens County

The Honorable John C. Hayes, III, Trial Judge
The Honorable Edward W. Miller, PCR Judge

Appellate Case No. 2021-000057

JONATHAN MATTHEW HOLDER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned is counsel of record for Respondent. The undersigned has served a copy of the Return to Petition for Writ of Certiorari in the above-captioned matter on opposing counsel by emailing a copy to the email address listed in the Attorney Information System:

Joanna Katherine Delany, Esquire
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This 1st Day of October, 2021.

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