STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
The Honorable Paul M. Burch, Trial Judge
The Honorable Larry B. Hyman, Post-Conviction Relief Judge

Appellate Case No. 2018-001898

SAMMY LEE SCARBOROUGH, Petitioner,

v.

THE STATE, Respondent

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

STATEMENT OF ISSUE ON APPEAL

Did the PCR judge properly deny relief for the allegation that trial counsel was ineffective for failing to object to the solicitor's comments in closing argument that children don't make up sexual allegations, when trial counsel's failure to object was a strategic decision which assisted his defense that a third party had sexually assaulted the Victims and not Petitioner, and where even if trial counsel was deficient in his failure to object, Petitioner was not prejudiced by trial counsel's failure because the solicitor's comments were not objectionable and had no effect on the outcome of Petitioner's trial?

STATEMENT OF THE CASE

In June 2013, a Dillon County Grand Jury indicted Petitioner for two counts of first degree criminal sexual conduct with a minor and three counts of disseminating obscene material to a minor. On November 4-6, 2013, a jury trial was held in the Dillon County Court of General Sessions with the Honorable Paul M. Burch presiding. Petitioner was represented by Kyle Hobbs, Esq. The State was represented by Assistant Solicitor Shipp Daniel of the Fourth Circuit Solicitor's Office and Kelly Hall of the South Carolina Attorney General's Office. At the conclusion of trial, Petitioner was convicted of all counts. The trial judge sentenced Petitioner to concurrent terms of life imprisonment for the first degree criminal sexual conduct with a minor counts and five year sentences for each count of disseminating obscene material to a minor.

Petitioner filed a timely notice of appeal. On February 24, 2016, this Court issued an unpublished opinion affirming Petitioner's convictions. State v. Scarborough, Op. No. 2016-UP-074 (S.C. Ct. App. filed February 24, 2016). Petitioner submitted a petition for writ of certiorari to the South Carolina Supreme Court which was denied on May 30, 2017. The remittitur was issued on June 2, 2017.

On November 2, 2017, Petitioner filed an application for post-conviction relief. Petitioner alleged five grounds for relief. Through counsel, Petitioner amended is application on May 24, 2018 to allege four grounds for relief. Of relevance to this appeal, Petitioner claimed trial counsel was ineffective because "Counsel failed to object to improper vouching for witnesses by the State during closing arguments and inflammatory language calling Applicant a 'predator.'" (App. 487). On July 11, 2018, Petitioner amended his application a second time to add an additional five grounds for relief. The State submitted a return on January 31, 2018 and an evidentiary hearing into the matter was convened on July 24, 2018 before the Honorable Larry

B. Hyman. Petitioner was represented by Lance Boozer, Esq. and the State was represented by Johnny James of the South Carolina Attorney General's Office. Judge Hyman dismissed Petitioner's application in a written order on October 1, 2018. Petitioner filed a notice of appeal on October 24, 2018 and a petition for writ of certiorari with the South Carolina Supreme Court on May 31, 2019. The Supreme Court transferred Petitioner's case to this Court on November 27, 2019. On November 22, 2021, this Court granted certiorari on the second question presented by Petitioner but denied certiorari on the remaining two questions.

STATEMENT OF FACTS

On May 25, 2012, the City of Dillon Police Department received a report that two young men, Victim 1 and Victim 2, had been sexually molested. (App. 121-22). Detective Jason Turner conducted an initial interview of the children, and then arranged for forensic interviews, which confirmed the initial report and further revealed a third, previously unreported minor victim: Victim 3. (App. 122-29).

Detective Turner interviewed each victim separately, and obtained enough information to start an investigation. (App. 123-26). Each victim disclosed that he was abused and where the abuse happened, and Turner was able to isolate the abuse to a range of dates based on when the family moved to a residence near Petitioner's home. (App. 123-25). Turner arranged forensic interviews for both victims for May 29, 2012, and drove the family to the Care House in Florence for the interviews. (App. 127). Turner made contact with Victim 3 shortly thereafter. Victim 3 disclosed where the abuse happened and the date he reported it to his mother. (App. 129). Turner testified he signed warrants for Petitioner on June 13, 2012, based on information received from the three victims. (App. 129). The first attempt to arrest Petitioner at his home was unsuccessful, but law enforcement was ultimately able to locate and arrest Petitioner in Virginia around February 2013. (App. 129-30, 135-36). On cross-examination, Turner admitted he did not search Petitioner's house for obscene materials. (App. 145-47).

Four different Victims testified against Petitioner at trial. Victim 1 testified that Petitioner "put his ding a ding in my throat and made me choke" in Petitioner's barn. (App. 202, lines 10-16, App. 213). Victim 1 also testified Petitioner showed him pictures of naked girls and boys in a magazine. (App. 204-05). Victim 1 denied that his cousin Stefan ever touched him, and denied Stefan ever tried to make Victim 1 touch him. (App. 208). On cross-examination, Victim 1

described the barn as red with a white edge across it and again testified Petitioner "made me suck his ding a ding." (App. 213).

Victim 2 testified he had seen Petitioner's private parts when Petitioner "made [Victim 1] suck his wee wee." (App. 230, lines 1-10). When the prosecution followed up for clarification, Victim 2 initially affirmed he saw Petitioner force Victim 1 to fellate Petitioner. (App. 230). The State asked Victim 2 to talk about it, and Victim 2 explained "[i]t was when we were living in the other house. Victim 1 came in and said that." (App. 230, lines 11-13). When asked to clarify, Victim 2 explained:

Q. Did you see it with your eyes? Yes. Where were you?

A. Home.

Q. You were at home. Where was [Victim 1] when that happened?

A. At his house.

Q. Whose house?

A. Sammy.

Q. So you didn't see it. Did you hear about it?

A. Um hum.

(App. 230, lines 14-22). Petitioner did not object and the State moved on. Victim 2 testified Petitioner showed him pictures of undressed "gay boys" humping. (App. 231-33). Victim 2 testified he saw his cousin, Stefan, touch Victim 1's penis and saw Petitioner touch Victim 1's penis. (App. 233-34). Victim 2 denied that Petitioner ever touched his penis or otherwise committed a sexual battery against him. (App. 234-35).

The mother of Victim 3 (Mother) explained how her child would spend time with Petitioner alongside Victim 1 and Victim 2, and that Petitioner would give them candy, balloons, and on one occasion a Nerf football. (App. 238-41). Mother testified Victim 3 disclosed sexual

abuse "[i]n the backyard at Mr. Sammy's" occurring "about November of 2011." (App. 241, lines 10-17). Mother did not report the disclosure to law enforcement until "May or June" of 2012 after she found out about the abuse suffered by Victim 1 and Victim 2. (App. 242).

Victim 3 testified Petitioner tried to hump him in Petitioner's backyard. (App. 253). Victim 3 reported Petitioner gave him a football and a balloon. (App. 254). Victim 3 testified he saw Petitioner's "turtle" when he was at the back of Petitioner's yard, and that Petitioner tried to put his "turtle" in Victim 3's butt and that it hurt. (App 256-57). Victim 3 also testified Petitioner showed him a nasty magazine with boys and girls humping with their clothes off. (App. 258). Victim 3 stated that when Petitioner was humping him, Petitioner touched Victim 3's "turtle" and squeezed it, which he testified hurt. (App. 259). He further testified Petitioner tried to make him suck Petitioner's "turtle," but Victim 3 did not do so. (App. 261). On cross-examination, Victim 3 admitted he told the forensic interviewer that Petitioner had not touched his butt and that he had never taken his clothes off around Petitioner. (App. 264). However, he agreed that he was now saying Petitioner did touch his butt. (App. 264). Victim 3 also testified Petitioner put his head close to Petitioner's "thing." (App. 264).

Victim 4[1] testified that he saw Petitioner's "private part" while they were in his truck. (App. 300). He stated that Petitioner had his pants unbuttoned with his "private part" sticking out of the pants, and that Petitioner made Victim 4 touch it with his lips. (App. 301). Victim 4 testified Petitioner's "private part" was in his mouth for a second and that it made him feel bad. (App. 301).

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[1] Petitioner was not charged for acts against Victim 4, but the child was permitted to testify under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), over Counsel's objections. (Tr. 17-41; Tr. 266-67); see also Rule 404(b), SCRE (Other wrongs admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.").

Sally Williamson, the forensic interviewer from Care House, interviewed Victims 1, 2, and 3. Neither Victim 1 nor Victim 2 disclosed sexual abuse to her. (App. 317, 332). Victim 3 did disclose sexual abuse to Williamson. (App. 323). Valerie Williams, an investigator with the South Carolina Attorney General's office, also met with each of the victims in preparation for trial. (App. 338-40). Victim 1 and Victim 3 disclosed sexual abuse to her, but Victim 2 did not. (App. 341-43).

Gaye Allen Cook, a clinical child and family therapist specializing in trauma and abuse, testified as a blind expert in child abuse assessment. (App. 363-66). Cook testified children do not always report sexual abuse and that disclosure is a process that develops and occurs over time, rather than a singular event. (App. 366-68). Cook further explained the prevalence of delayed disclosure by abused children and opined that 95-96% of children she had personally treated delayed in disclosing abuse. (App. 368-70).

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, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief 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).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

ARGUMENT

The PCR judge properly denied relief for the allegation that trial counsel was ineffective for failing to object to the solicitor's comments in closing argument that children don't make up sexual allegations, because trial counsel's failure to object was a strategic decision that assisted his defense that a third party had sexually assaulted the Victims and not Petitioner. Even if trial counsel was deficient in his failure to object, Petitioner was not prejudiced by trial counsel's failure because the solicitor's comments were not objectionable and had no effect on the outcome of Petitioner's trial.

Petitioner argues the post-conviction relief court erred by denying relief for the allegation that trial counsel was ineffective for failing to object to the solicitor's comment in closing argument that children "don't make this stuff up." Petitioner contends this remark prejudiced him, because the trial hinged on the credibility of the minor victims. Petitioner's argument fails for two reasons. First, Petitioner's argument ignores the well-articulated defense and trial strategy used by trial counsel. At the PCR hearing, trial counsel testified that he didn't view the solicitor's comments as objectionable because he agreed that children don't make up sexual allegations, but rather the sexual knowledge of a child has to be derived from another source. (App. 536, 546-47). Trial counsel argued in closing that the children had actually been assaulted by their cousin, Stefan, and the children were thus introduced to sexual knowledge that was inappropriate for their age. (App. 430-31). Second, even if trial counsel was deficient by not objecting to the solicitor's comment, Petitioner was not prejudiced by trial counsel's failure, because the Solicitor's comment was not objectionable and the comment did not effect the outcome of Petitioner's trial. The holding of the PCR court should be affirmed.

Trial Counsel's Failure to Object was Strategic

"To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been

different." Gilchrist v. State, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002). Counsel is not required to object at every opportunity if Counsel has a reasonable explanation for not doing so. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010); See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel).

"A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." Id. However, "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." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999).

Here, trial counsel articulated the following strategy when he was asked why he didn't consider the solicitor's comments in closing to be vouching for the credibility of the Victims:

> Mr. Hobbs: I could see where your position is that it would. Again, there is, from my research and preparation for the case, one of the big considerations that you have with minor children is source information. So where does a child come up with the idea of making an accusation about a sexual battery or a sexual assault. It is probably the consensus of anyone who listens to a five, six, seven or eight year old that there would need to be some sort of source for this information. Around

> that they wouldn't just come up with it out of thin air. So I did not view that as vouching. Again, I think that it was something that's inherent to the nature and the age of the children for there to be some source for their accusations.

(App. 535, line 23—App. 536, line 11). During cross examination at the PCR hearing, trial counsel further elaborated on his trial strategy regarding the potential sexual assault by a third party being the source of the Victim's sexual knowledge:

> Mr. Hobbs: That was probably one of the better parts of my investigation for [Petitioner] was in a stack of incident reports locating a cousin of the victims who was alleged to have sexually assaulted some other members of the family. And I think that one of the minor children actually states that he saw his cousin, I believe it was Stephen, sexually assault someone. And as I mentioned previously when you're dealing with minor children finding a source for the knowledge regarding the sexual battery or sexual assault became a very important issue that I wanted to bring up so the jury could understand that these children, perhaps, didn't just make this up out of thin air; that they had seen things in their life that lead them to make this up and also they were directed and coached by individuals to make this accusation.

(App. 546, line 11—App. 547, line 1). Trial counsel's testimony at the PCR hearing regarding his strategy was corroborated by his closing argument at trial. In closing, trial counsel argued:

> Mr. Hobbs: Now, you may say, Stefan Murphy, what does he have to do with anything? See, the basis of the State's case is that where else could these children have come up with this information? How else would a child know what to say or what accusations to make? How else would a child know what it was like to be sexually assaulted? What I present to you as in the case of [Victim 1] he had been sexually assaulted by the family member, Stefan Murphy. And that's why the villianizations of going into these details, the reason being because the victim's sexual knowledge and their exposure to these things is highly relevant in these case (sic) so we can understand how a young child comes up with these kinds of accusations. Why would a child manifest these accusations out of thin air? And as their expert said it comes from their life's experiences. It comes from the things that they have seen and they have experienced. That's where these accusations come from.

(App. 430, line 15—App. 431, line 7). Thus, trial counsel's failure to object to the solicitor's comments in closing argument was part of a well-articulated trial strategy and defense. Trial counsel did not consider the solicitor's comments to be vouching for the Victim's credibility.

Rather, trial counsel agreed with the solicitor's statement and thought it was important to explain to the jury how the Victims knew about the sexual acts they were accusing Petitioner of committing against them. In other words, instead of contesting the solicitor's assertion that children don't make accusations up, trial counsel agreed with the statement and sought an alternative explanation for the accusations that would create reasonable doubt about Petitioner's guilt. Trial counsel's decision to raise the possibility that Victim's cousin committed the sexual assaults rather than Petitioner was a reasonable and sound strategic decision. Because trial counsel articulated a valid trial strategy for refusing to object to the solicitor's statement in closing argument, the PCR court appropriately found trial counsel was not deficient in his representation of Petitioner.

Petitioner Was Not Prejudiced by Trial Counsel's Failure to Object

Even if trial counsel's failure to object the solicitor's statements in closing argument was deficient, Petitioner was not prejudiced by trial counsel's failure to object because the solicitor's comments did not vouch for the credibility of the Victims. In support of his argument that he was prejudiced by the solicitor's comments, Petitioner cites to our Supreme Court's holding in Matthews v State, 350 S.C. 272, 565 S.E.2d 766 (2002). However, Petitioner admits that the comments considered by the Supreme Court in Matthews were more egregious than the comments made by the solicitor here. (Brief of Petitioner 9). Indeed, the comments made in Matthews were egregious and considerably different than the comments made in Petitioner's case. In Matthews, the solicitor explicitly stated that he personally corroborated the testimony of the State's key witness and would not have put that witness on the stand unless the testimony was corroborated. Matthews 350 S.C. at 275, 565 S.E.2d at 767. Thus, the Supreme Court concluded that the solicitor vouched for the credibility of a key State's witness and that vouching

combined with the confusing nature of the trial and other improperly admitted evidence prejudiced Matthews. Matthews 350 S.C. at 277, 565 S.E.2d at 769. Here, the solicitor never said that he personally believed the Victims or otherwise gave the government's prestige or credibility to the witnesses' testimony. Rather, the solicitor merely asked the jury to evaluate the Victim's credibility and asked the jury rhetorically whether they believed the Victim's testimony. (App. 419-20). The solicitor's statement here is a far cry from the solicitor's personal assurances of corroboration in Matthews.

Petitioner also cites to the Supreme Court's holding in Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016) to support his argument. The facts of Tappeiner are also plainly distinguishable from the facts presented here. In Tappeiner, the solicitor implied that each of the State's witnesses believed the victims in that case because the State's witnesses met with the Victims "face to face, eye to eye." Tappeiner, 416 S.C. at 246, 785 S.E.2d at 474-475. In addition to noting the prejudicial nature of the "face to face, eye to eye" comments, in reaching its conclusion that trial counsel was ineffective, the Court noted the solicitor misrepresented evidence and claimed a rape crisis counselor is someone "'who can detect when someone is making something up or if there is nothing there.'" Tappeiner, 416 S.C. at 251-252 785 S.E.2d at 477. Here, the solicitor's anodyne statement that children don't make up accusations is a far cry from the plainly prejudicial comments and attempts to vouch for witness credibility that were considered by the Court in Tappeiner. Because the solicitor's comments in Petitioner's case were not objectionable, Petitioner suffered no prejudice from trial counsel's failure to object to them. Even if the solicitor's comments had been objectionable, Petitioner failed to show that the result of his trial would have been different had trial counsel objected. The holding of the PCR court should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

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