Judicial Merit Selection Commission

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M E D I A R E L E A S E

July 3, 2023

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below that were newly created as per Act 232 of 2022:

A vacancy will exist in the newly created seat for the Circuit Court, Second Judicial Circuit, Seat 2. The term will be from July 1, 2024, to June 30, 2030.

A vacancy will exist in the newly created seat for the Circuit Court, Ninth Judicial Circuit, Seat 4. The term will be from July 1, 2024, to June 30, 2030.

A vacancy will exist in the newly created seat for the Circuit Court, Fourteenth Judicial Circuit, Seat 3. The term will be from July 1, 2024, to June 30, 2030.

A vacancy will exist in the newly created seat for the Circuit Court, Fifteenth Judicial Circuit, Seat 3. The term will be from July 1, 2024, to June 30, 2030.

A vacancy will exist in the newly created seat for the Family Court, First Judicial Circuit, Seat 4. The term will be from July 1, 2024, to June 30, 2030.

A vacancy will exist in the newly created seat for the Family Court, Seventh Judicial Circuit, Seat 4. The term will be from July 1, 2024, to June 30, 2030.

A vacancy will exist in the newly created seat for the Family Court, Sixteenth Judicial Circuit, Seat 3. The term will be from July 1, 2024, to June 30, 2030.

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below:

A vacancy will exist in the office currently held by the Honorable Jeffrey M. Tzerman, Master-in-Equity, Kershaw County, upon his retirement on December 31, 2023. The successor will serve the remainder of the unexpired term of that office, which expires June 30, 2025.

There is a vacancy in the office currently held by the Honorable Joseph M. Strickland, Master-in-Equity, Richland County. The successor will serve the remainder of the unexpired term of that office, which expires April 30, 2027.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Note that an email will suffice for written notification.

Please note: The Commission will not accept applications for the seats above after 12:00 pm (noon) on Friday, August 4, 2023.

Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

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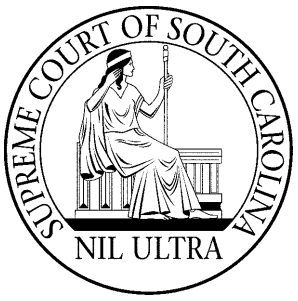
ErinCrawford@scsenate.gov or (803) 212-6689

or

Lindi Putnam, JMSC Administrative Assistant
LindiPutnam@scsenate.gov or (803) 212-6623

As a reminder: The Commission will not accept applications for the seats referenced in the June 12 media release after 12:00 pm (noon) on Friday, July 14, 2023.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
July 5, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tammy Caison Moorer, Appellant.

Appellate Case No. 2018-001938

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5987
Heard December 9, 2021 – Filed June 7, 2023
Withdrawn, Substituted and Refiled July 5, 2023

AFFIRMED

Chief Appellate Defender Robert Michael Dudek and Appellate Defender Lara Mary Caudy, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General David A. Spencer, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, all for Respondent.

HILL, A.J.: Tammy C. Moorer (Tammy) appeals her convictions for kidnapping and conspiracy to kidnap. She argues the trial court erred in (1) failing to grant her motion for a directed verdict; (2) admitting text messages that were sexually explicit

and referenced drug use; (3) allowing an expert in forensic video analysis to testify the Moorers' truck was the vehicle videotaped going to and from the area where Victim was last known to be; (4) excluding her alibi witnesses because she failed to comply with Rule 5(e)(1), SCRCrimP; and (5) excluding several defense witnesses because they violated the sequestration order. We affirm.

I. FACTS

Heather Elvis (Victim), a twenty-year-old woman from Myrtle Beach, disappeared on December 18, 2013. The last known phone call Victim made was to Tammy's husband, Sidney Moorer, a thirty-eight-year-old man with whom she had a months' long affair that had ended on November 2, 2013. The phone call was made at 3:41 a.m. from the area of the Peachtree Boat Landing on the Waccamaw River. Victim's unoccupied car was discovered at the Landing at 4:00 a.m. by an officer on routine patrol. The next day, when her car remained abandoned at the Landing, the police contacted Victim's father, and a search for Victim began. Victim has never been found.

Based on Victim's phone records, a search of her apartment, and statements from her coworkers and roommate, it became apparent Victim may have been pregnant with Sidney's child, and Sidney became the prime suspect in Victim's disappearance. On December 20, 2013, the police visited Sidney's home, roughly a five-minute drive from the Landing. Sidney lived there with Tammy and their three children. Tammy's mother, father, and sister lived next door. The police discovered the Moorers had a home surveillance system that Tammy advised did not work and a black Ford F-150 truck that Tammy told police could not be unlocked at the time. Police observed a bag of cement, a spent shotgun shell, and a bottle of cleaning fluid piled by the Moorers' parked camper. The day after this police visit, Sidney purchased a new home surveillance system.

Investigators began to believe Tammy was also involved in Victim's disappearance. Phone records and location data from the Moorers' two iPhones revealed a grim picture of a wife irate with her husband for having an affair with a much younger woman; who threatened Victim upon discovery of the affair; who desired to punish Sidney; who took control of Sidney's iPhone on November 2, 2013, when she discovered the affair; who sexted other men from Sidney's iPhone; who began accompanying Sidney on his shifts to complete maintenance work at restaurants around Myrtle Beach; and who began stalking Victim.

Cell phone data showed Tammy sent the following text message to Victim shortly after Tammy discovered the affair: "You want to call me right now and explain yourself? It would be wise thing to do. . . . Save yourself. I'm giving you one last chance to answer before we meet in person, only one. Hey, Sweetie, you ready to meet the Mrs., the kids want to meet you?" The State also presented several messages reflecting Tammy's anger at both Sidney and Victim for the affair, including a message to the Moorers' daughter that "[y]our dad is an evil, twisted freak and I am being punished for it" and a message from Tammy to her sister stating "that bitch is in hiding" in response to Tammy's sister's message that Victim was not at her place of work. Tammy's texts also stated that after the affair was uncovered, Sidney "had to stay chained to the bed until further notice while I live my life as a single woman." Another witness testified she saw Sidney restrained at home.

On the evening of December 17, 2013, six weeks after her affair with Sidney ended, Victim went on a date with a man her own age. During the date, Victim was happy and laughing. Her date dropped Victim off at her apartment after 1:00 a.m. on December 18, 2013. Meanwhile, Sidney and Tammy were, by their own admission, together. Location data from their iPhones indicated they were at Longbeard's Bar until 12:30 a.m. At around 1:15 a.m., Sidney purchased a pregnancy-test kit from Walmart. Sidney and Tammy then went to an area near a Kangaroo Express Gas Station. At 1:33 a.m., video from the Kangaroo Express showed Sidney leaving his truck and calling Victim for the first time since their affair ended—from a payphone at the Kangaroo Express. The call lasted four minutes and fifty seconds.

After receiving the payphone call, Victim called her roommate Brianna Warrelmann, who was out of town. Victim was upset and scared. Warrelmann calmed Victim down and told her not to call Sidney back or do anything rash. However, it appears Victim changed into her favorite outfit and—according to the location data from her cell phone—left her apartment at 2:31 a.m., arriving near Longbeard's Bar at 2:42 a.m. While in the vicinity of Longbeard's Bar, Victim called the Kangaroo Express payphone nine times. None of the calls were answered. Meanwhile, the cell phone evidence indicates Sidney and Tammy returned to their home.

After waiting at Longbeard's Bar for a while, Victim also returned home, where, at 3:16 and again at 3:17 a.m., she called Sidney's iPhone. The first call to Sidney's iPhone went to voicemail, but the second call lasted a little over four minutes. Location data from Victim's phone showed that after this call, Victim left her

apartment and traveled to the Landing, a place where—according to an analysis of her cellphone location data—she was not in the habit of going. While at the Landing, Victim called Sidney's iPhone four more times: at 3:38 a.m., 3:39 a.m., 3:40 a.m., and 3:41 a.m. All four calls went to voicemail. The 3:41 a.m. phone call was the last one made from Victim's phone, and to this date, there has been no further activity on Victim's phone. There was no activity on the Moorers' iPhones between 3:30 a.m. and 4:00 a.m. However, at 4:37 a.m., Tammy texted Sidney for the first time since November 2, 2013, and Sidney texted back.

Police officers discovered that two surveillance systems located along a road that goes to the Landing had captured images of a pickup truck driving between the Moorers' home and the Landing in the early morning hours of December 18, 2013. One was a home surveillance system located five minutes from the Landing, which showed a dark pickup truck heading towards the Landing at approximately 3:45 a.m. and then returning nine minutes later. The second was from a business' surveillance system located two or three minutes from the Landing, which showed a dark pickup truck going towards the Landing at 3:39 a.m. and returning from the Landing at 3:46 a.m. (The time stamps of the videos are not synchronized to each other, so there was a few minutes' variation between them). The State asked a forensic video analyst, Grant Fredericks, to assist them in identifying the truck from the videos. After conducting many tests, including a "headlight spread pattern analysis," Fredericks formed the opinion the truck in the video footage was the Moorers' Ford F-150.

A Horry County Grand Jury indicted Sidney and Tammy for kidnapping and conspiracy to kidnap Victim on or about December 18, 2013. They were tried separately.

Before his trial began, Sidney moved to exclude Fredericks' expert testimony, and Tammy joined in the motion. Tammy and Sidney presented their own expert, Bruce Koenig, to dispute the reliability of Fredericks' opinion that the truck in the footage belonged to the Moorers. The circuit court qualified Fredericks as an expert but stated that any objections to the scope of his opinion could be raised at trial.

At Tammy's trial, the State moved to exclude any alibi evidence from Tammy's children, sister, and mother because Tammy did not comply with the alibi defense notice procedures outlined in Rule 5(e)(1), SCRCrimP. The trial court granted the motion. The trial court also granted Tammy's motion to sequester the witnesses.

During the trial, the State presented evidence from police investigators; a cellphone location data analyst; Victim's coworkers; Victim's roommate; the man with whom Victim went on her December 17, 2013 date; testimony indicating the Moorers' surveillance system was likely functional on the night of December 18, 2013; and over Tammy's objection, Fredericks' expert forensic video testimony. Also over Tammy's objection, the State presented the content of Tammy's sexually explicit text messages to a younger man, as well as messages mentioning her use of marijuana.

The State sought to paint the picture that, in the weeks before Victim's disappearance, Tammy was infuriated with Sidney for having an affair with Victim; did not respect Victim; was obsessed with Victim and the affair; sought revenge on Sidney; and, upon hearing the rumors that Victim was pregnant with Sidney's child, sought to dispose of Victim and her unborn child. The State's theory of the case was on the night of Victim's disappearance, Tammy had control over Sidney's iPhone and actions, and she and Sidney lured Victim to the Landing by asking Victim to take the pregnancy test they had purchased at Walmart. Police discovered an empty pregnancy test kit box at Victim's apartment. Tammy and Sidney destroyed their own incriminating surveillance camera footage from the night of the disappearance; and Tammy and Sidney had a "kidnapping kit" of cement and cleaning solution at the end of their driveway. The State noted Tammy returned Sidney's iPhone to his control for the first time in six weeks immediately after Victim disappeared. As a final piece of incriminating evidence, the State called Tammy's cousin Donald Demarino, who testified that, after Victim's disappearance, Sidney showed him a picture of Victim on a burner cell phone. Demarino explained that from the picture, it did not look like Victim could move or talk; he believed the picture was for Tammy; and based on the picture, he did not expect anyone to hear from Victim ever again. Demarino stated he did not tell anyone about the picture until he was imprisoned for an unrelated drug offense, but he did not receive anything in exchange for telling the State about the picture. Demarino admitted, however, he told his mother over the phone that this story was not true. He explained he did this to stop his mother from worrying.

After the State rested, Tammy moved for a directed verdict, arguing the State had not presented substantial circumstantial evidence to support the charges of kidnapping or conspiracy to kidnap. The trial court denied the motion.

Before the defense's case began, the trial court ruled that Tammy's children and mother had violated the trial court's sequestration order and excluded them from

testifying.

During the defense's case, Tammy's sister testified Tammy texted her when Tammy and Sidney came home at 3:10 a.m. on December 18, 2013, and she then sent Tammy's children home when she saw the Moorers outside their door waiting for their children. Tammy testified she did not go to the Landing on December 18, 2013, and, to her knowledge, neither did the Moorers' Ford F-150. Tammy further testified she and Sidney were trying to conceive a child around the time of Victim's disappearance, and the pregnancy test purchased was for her. While in custody, Tammy received a positive pregnancy test at a local hospital on March 28, 2014, showing she was almost seven weeks pregnant (she later miscarried). Tammy testified she was not angry with Victim and had quickly forgiven her; she had an open relationship with Sidney; and she and Sidney purchased the new surveillance cameras because her family was the object of harassment after Victim's disappearance.

The jury found Tammy guilty of both kidnapping and conspiracy to kidnap. The trial court sentenced her to concurrent sentences of thirty years' imprisonment for each charge.

II. STANDARD OF REVIEW

In criminal cases, we review only for errors of law, and we are bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

III. DIRECTED VERDICT

Tammy argues the trial court erred in denying her motion for a directed verdict on her kidnapping and conspiracy to kidnap charges. Tammy asserts the State presented no direct or substantial circumstantial evidence Victim was kidnapped because there was no evidence of struggle at the Landing or in the Moorers' truck and the State's evidence raised only a mere suspicion she and Sidney were involved in Victim's disappearance. As to the conspiracy to kidnap charge, Tammy argues the State presented no evidence that she and Sidney conspired to kidnap Victim. We disagree.

The offense of kidnapping is defined by statute: "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony . . . ." S.C. Code Ann. § 16-3-910 (2015). The act of inveigling or decoying alone can satisfy the unlawful act requirement of the kidnapping statute. *State v. East*, 353 S.C. 634, 637, 578 S.E.2d 748, 750 (Ct. App. 2003) ("South Carolina's kidnapping statute requires proof of an unlawful act taking *one* of several alternative forms, including . . . inveiglement[or] decoy . . . ." (emphasis added)). "Inveigling has [] been defined as 'enticing, cajoling, or tempting the victim, usually through some deceitful means such as false promises.'" *State v. Stokes*, 345 S.C. 368, 373 n.6, 548 S.E.2d 202, 204 n.6 (2001) (quoting *United States v. Macklin*, 671 F.2d 60, 66 (2d Cir. 1982)). "The definition of 'decoy' is 'to lure successfully.'" *Id*. (citation omitted). Kidnapping "commences when one is wrongfully deprived of freedom and continues until freedom is restored." *State v. Tucker*, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999).

The offense of conspiracy to kidnap is also statutorily defined: "If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of Section 16-3-910 and any of such persons do any overt act towards carrying out such unlawful agreement, confederation, or conspiracy, each such person shall be guilty of a felony . . . ." S.C. Code Ann. § 16-3-920 (2015).

The trial court did not err in denying Tammy's motion for a directed verdict as the State presented substantial circumstantial evidence of her guilt. *See State v. Owens*, 291 S.C. 116, 118–19, 352 S.E.2d 474, 475–76 (1987) (corpus delicti may be proven by circumstantial evidence in kidnapping prosecution); *see also State v. Lewis*, 434 S.C. 158, 166, 863 S.E.2d 1, 5 (2021) ("[O]n appeal from the denial of a directed verdict, an appellate court views all facts in the light most favorable to the nonmoving party."); *id*. ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." (quoting *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006))); *State v. Larmand*, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) ("If there is either any direct evidence or any substantial circumstantial evidence reasonably tending to prove the defendant's guilt, appellate courts must find that the trial judge properly submitted the case to the jury."). The State presented evidence Victim disappeared against her will, including: (1) Victim was a reliable worker, who typically notified her employer if she was going to miss work; (2) Victim did not take any of her

belongings with her when she disappeared; (3) Victim has not used her phone—which her coworkers testified she kept with her at all times—since her disappearance; (4) Victim's car was left at the Landing; (5) shortly before her disappearance, Victim called Warrelmann, and Warrelmann testified Victim seemed "hysterical" after talking to Sidney and Warrelmann told Victim to not do anything rash or call Sidney back.

The State also presented substantial circumstantial evidence the Moorers kidnapped Victim, including proof that: (1) Tammy sent Victim and others angry texts about the affair during the six weeks preceding Victim's disappearance; (2) Sidney called Victim's manager, and Tammy took over the call, demanding that the manager fire Victim because Victim was "spreading rumors she was pregnant" by Sidney; (3) Sidney went to Walmart a few hours before Victim disappeared to purchase a pregnancy test when Victim was showing symptoms of pregnancy; (4) Tammy controlled both her and Sidney's iPhones from November 2, 2013, when she discovered the affair, until the early morning hours of December 18, 2013, when Victim disappeared; (5) based on their iPhone location data, the Moorers' life pattern changed drastically after Tammy discovered the affair, and this change showed the Moorers' iPhones were increasingly located in the same vicinity as Victim—suggesting the Moorers were stalking Victim; (6) Tammy admitted she and Sidney were together in the early morning hours of December 18, 2013, when Sidney spoke to Victim from a payphone and later from his own iPhone; (7) Victim repeatedly called Sidney on the night of her disappearance, including at 3:41 a.m. when Victim's phone stopped reporting any data; (8) the Landing, which Victim's cell phone data showed she did not frequent, was only a short distance from the Moorers' home; (9) video surveillance from the morning of Victim's disappearance showed a dark truck going to and from the area of the Landing around the time of Victim's disappearance; (10) Fredericks, an expert in forensic video analysis, opined the truck seen in the surveillance videos was the Moorers' black Ford F-150; (11) there was evidence the SD card in the Moorers' truck had been removed, so no GPS data of the truck's movements was recorded during the time Victim disappeared; (12) someone with access to the Moorers' electronic devices ran a software program on November 13, 2013, and attempted to delete text messages, including threatening texts Tammy had sent to Victim; and (13) Sidney showed Demarino a picture of Victim after her disappearance depicting her unable to talk or move.

The State presented sufficient evidence that Sidney and Tammy conspired to kidnap Victim. Tammy and Sidney's iPhones' locations demonstrated they tracked Victim's

whereabouts following Tammy's discovery of the affair. This and other evidence illustrated vividly that Sidney and Tammy were operating in tandem, focusing their joint attention on Victim before she vanished. Tammy controlled Sidney's iPhone from November 2, 2013, until the very hour of Victim's disappearance, when Sidney began using it again. Tammy admitted that she and Sidney were together in their Ford F-150 in the early morning hours of December 18, 2013, including at the payphone where Sidney called Victim on the night of Victim's disappearance. Demarino testified the picture of Victim Sidney showed him was "for Tammy."

Conspiracy often can only be proven by circumstantial means, as the crime often lurks in dark caverns, far from the light of day. We conclude there was evidence of a common design and mutual tacit agreement between Tammy and Sidney that went well beyond mere association or suspicion. *See State v. Fleming*, 243 S.C. 265, 274, 133 S.E.2d 800, 805 (1963). Given the timelines and conduct the evidence bore out, the Moorers' truck's path to the Landing was a fateful link in their long-laid plans, plans that required Sidney and Tammy's mutual cooperation. *See State v. Jeffcoat*, 279 S.C. 167, 170, 303 S.E.2d 855, 857 (1983).

Signs of struggle do not have to be present to prove the crime of kidnapping. In cases of inveigling or decoying, there may not be signs of struggle because the victim is tricked into going with his or her kidnapper willingly. *See Stokes*, 345 S.C. at 373, 548 S.E.2d at 204; McAninch et. al., *The Criminal Law of South Carolina* at 320 (6th ed. 2013) ("The act of kidnapping need not involve force. The victim could be inveigled or decoyed to her doom."). The State alleged the Moorers lured Victim to the Landing. Thus, the State did not have to prove the Moorers kidnapped Victim by force or prove there was a struggle. *See Ray v. State*, 330 S.C. 184, 188, 498 S.E.2d 640, 642 (1998) (kidnapping was proven when evidence showed the defendant inveigled victim into his truck under the pretense he was taking her to the hospital); *see also United States v. Hughes*, 716 F.2d 234, 239 (4th Cir. 1983) (providing the policy behind the kidnapping statute does not "justif[y] rewarding the kidnapper simply because he is ingenious enough to conceal his true motive from his victim until he is able to transport her" to another location). Accordingly, we affirm the trial court's denial of the directed verdict motion.

IV. ADMISSION OF TEXT MESSAGES AND OTHER PHONE DATA

The State presented messages from the Moorers' iPhones that referenced Tammy's use of marijuana. Tammy objected to these messages, arguing they amounted to

character evidence barred by Rule 404, SCRE, and were unduly prejudicial under Rule 403, SCRE. The trial court admitted the messages, accepting the State's argument the messages demonstrated Tammy was not attempting to become pregnant before Victim's disappearance, and therefore, the pregnancy test purchased by Sidney on the night of Victim's disappearance was not for Tammy.

The State also presented proof Tammy conducted internet searches for the term "Cougar Life" and sent a series of sexually explicit messages from Sidney's iPhone to a much younger man on December 16, 2013. Tammy objected, arguing this evidence violated Rule 403 and was improper character evidence. The State asserted the messages showed Tammy had control of Sidney's iPhone as late as the day before Victim's disappearance, and the trial court allowed the messages. However, when the State went into excessive detail about the messages including that the young man's mother had called to ask why Tammy was messaging her underage son, Tammy objected again. The trial court sustained this objection, noting the details dealt "more with character and ha[d] zero probative value."

The State claimed they introduced the messages to show Tammy had control of Sidney's phone, Tammy was punishing Sidney for the affair, and their marriage was not open and happy as Tammy claimed. Although the trial court chastised the State for the putting "salty materials that were pretty prejudicial that did get into the defendant's character" into evidence, it denied Tammy's motion for a mistrial.

Tammy argues the trial court abused its discretion in admitting the text messages that referenced marijuana use and were sexually explicit. *See State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006))); Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); *State v. Faulkner*, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980) ("While the State may not attack a criminal defendant's character unless he has placed it in issue, relevant evidence admissible for other purposes need not be excluded merely because it incidentally reflects upon the defendant's reputation." (citations omitted)).

Although the messages referencing drug use constituted prior bad act evidence, they were relevant and logically pertinent to the State's attempt to discount Tammy's testimony that she and Sidney were trying to get pregnant at the time of Victim's disappearance and that Sidney went to Walmart to purchase a pregnancy test for her, not Victim. *See Johnson v. State*, 433 S.C. 550, 860 S.E.2d 696, 699 (Ct. App. 2021) (stating in criminal cases, "the State must convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case: 'If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime'" (quoting *State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923))); *see also State v. Perry*, 430 S.C. 24, 34, 842 S.E.2d 654, 659 (2020). The State's evidence showed Victim was possibly pregnant with Sidney's child at the time of her disappearance, and its theory of the case was that Tammy and Sidney lured Victim to the Landing in order to take a pregnancy test. Moreover, the State alleged Victim's possible pregnancy was also part of Tammy's motive to kill Victim, i.e., Tammy was already angry with Victim and Sidney for the affair, but her anger increased when she learned Victim may have been pregnant. While the State's presentation of Tammy's drug use was prejudicial, we find the prejudicial effect of these text messages did not substantially outweigh their probative value as to the State's theory of Tammy's motive.

Second, we find Tammy's internet searches for "Cougar Life" and her sexual text messages to a younger male were character evidence and, because the recipient may have been underage, prior bad act evidence. However, this evidence was relevant and logically pertinent to show Tammy's motive for kidnapping Victim, her anger at Sidney for the affair, her desire for revenge against Sidney, and to prove she had control over Sidney's phone, which was used to lure Victim to the Landing. Both Tammy's motive and identity as one of the kidnappers were material issues of fact in this case, and thus, the probative value of this evidence was high.

Even if the trial court erred in admitting these messages, we find the error harmless given Tammy's statements–during police interviews and her testimony–that she and Sidney had an open relationship. Tammy's trial testimony also included gratuitous and vulgar descriptions of sexual acts.

V. EXPERT WITNESS

The State called Grant Fredericks, who was qualified as an expert in video forensic analysis. Fredericks testified he used a process known as reverse projection analysis to form his opinion that the truck seen on the surveillance cameras on the road to the Landing between 3:35 a.m. and 3:45 a.m. on December 18 was in fact the Moorers' truck.

On appeal, Tammy does not quibble with Fredericks' qualifications or his methodology, but she claims the trial court erred in allowing Fredericks to testify to his identification of the Moorers' truck because the opinion was unreliable. The State claimed Tammy did not preserve this issue, but she did. We do, however, disagree with her argument that Fredericks' opinion lacked sufficient reliability.

Before admitting expert testimony, trial courts, as the gatekeepers of evidence, must ensure the proffered evidence is beyond the ordinary knowledge of the jury; the witness has the skill, training, education, and experience required of an expert in his field; and the testimony is reliable. *Watson v. Ford Motor Co*., 389 S.C. 434, 445–46, 699 S.E.2d 169, 174–75 (2010); Rule 702, SCRE. In South Carolina, a trial court minding the Rule 702 gate must assess not only (1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the *substance* of the expert's testimony is reliable. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (trial court must determine whether underlying science is reliable); *Watson*, 389 S.C. at 446, 699 S.E.2d at 175 ("[T]he trial court must evaluate the substance of the testimony and determine whether it is reliable."). South Carolina has not adopted *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594–95 (1993), by name, nor has it revised Rule 702, SCRE, to incorporate the *Daubert* framework. Nevertheless, our approach is "extraordinarily similar" to the federal test. Young, *How Do You Know What You Know?*, 15 S.C. Law. 28, 31 (2003); *see also State v. Phillips*, 430 S.C. 319, 343–44, 844 S.E.2d 651, 664 (2020) (Beatty, C.J., concurring).

Our state supreme court has set out four factors to be considered in determining the admissibility of novel scientific evidence: (1) publications and peer review; (2) prior application of the method to the type of evidence in the case; (3) quality control procedures utilized; and (4) consistency of the method with recognized scientific law and procedures. *State v. Jones*, 273 S.C. 723, 730–32, 259 S.E.2d 120, 124–25 (1979); *see also State v. Mealor*, 425 S.C. 625, 647–48, 825 S.E.2d 53, 65–66 (Ct.

App. 2019). "The trial judge should apply the *Jones* factors to determine reliability." *Council*, 335 S.C. at 20, 515 S.E.2d at 518.

The substance of an expert's testimony is reliable if it adheres to the rigors of the method. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). As long as the trial court is satisfied the expert's testimony consists of a reliable method faithfully and reliably applied, the gate of admissibility should be opened. The correctness of the conclusion reached by an expert's faithful application of a reliable method (and the credibility of the expert who reached it) is for the jury, for the trial judge must remain at the gatepost and not tread on the advocate's or the jury's turf. *See State v. Jones*, 423 S.C. 631, 639–40, 817 S.E.2d 268, 272 (2018) ("There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it be may offered into evidence.").

Fredericks testified that reverse projection is a form of photogrammetry, which is a process to conduct measurements by using the reflection of light to determine the shape, size, and distance of objects. He explained that, as used in this case, reverse projection photogrammetry "is the examination of reflective patterns off the vehicle and off the headlight spread pattern, that is the headlight projection onto the roadway." He stated he had used these methods and techniques for over thirty years and had tested them with his peers. He distinguished his technique from mere "eyeballing" video images for comparison, explaining that the method involves the technical science of analyzing the compression involved in the production of the video images. Fredericks elaborated that comparing video images by "eyeballing" can lead to error because the viewer does not have the experience to test the comparison by taking compression into account. The scientific process of evaluating compression enables him to determine whether the video accurately reproduces the image. Fredericks further testified that he follows the methodology "universally accepted" in the field of forensic identification for decades, known as "ACEVR: analyze, compare, evaluate, verify, and report."

Fredericks' testimony illustrated the verification and testing inherent in the method he employed. He stated that, although he is often consulted to identify a specific vehicle for a case, he can only do so less than ten percent of the time, mainly due to the low-quality resolution of the video evidence. He also related an episode that highlighted the testability and reliability of his method: he once opined that, after

conducting the reverse projection analysis, the "questioned" vehicle was not the same model as the "known" vehicle, and it later transpired that he had not been furnished with the correct "questioned" vehicle. As to identifying a specific vehicle by headlight pattern spread analysis, Fredericks testified headlight spread pattern is one of the "very, very unique features of a vehicle," and has been the subject of numerous publications and testing. He noted he once tested sixty new vehicles of the same make and model and found all of their headlights reflected off the roadway in different ways.

In arriving at his opinion that the truck seen on the surveillance video riding to and from the Landing area between 3:35 and 3:46 a.m. on December 18, 2013, was the Moorers', Fredericks overlaid the images captured at that time on images captured by the cameras during a recreation using the Moorers' truck in February 2014, under similar light and other conditions. He concluded that the headlight pattern reflections off the roadway were identical in both videos. He then compared the reflective images from over a dozen other trucks, including some of the same make and model. None of them matched the headlight pattern seen on the December 18th video. Fredericks further reviewed images of some 3,910 trucks that the surveillance cameras had captured over several months and found none had the unique characteristics of the Moorers' truck.

Fredericks explained he had adhered to the "strict" methodology of ACEVR in reaching his opinion. He emphasized his opinion was not based exclusively on the headlight pattern analysis, but also on the analysis of the light reflections off various other parts of the truck and found the "reflections were identical and different from all of the other vehicles."

We conclude the trial court was well within its discretion in admitting Fredericks' identification testimony as a reliable expert opinion. Fredericks' expertise was based on his vast experience with forensic video analysis, as well as the facts that his report and conclusion in this case had been peer reviewed by another certified forensic video examiner and his headlight spread analysis was a peer reviewed technique. The reliability of the reverse projection methodology was demonstrated by Fredericks' own experience. The text of Rule 702 states expertise can be based on experience. *See also Kumho Tire Co.*, 526 U.S. at 156 (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience").

The reliability of expertise is often proven by its success. *See, e.g.*, *State v. White*, 382 S.C. 265, 271, 676 S.E.2d 684, 687 (2009) (dog handler deemed reliable in part because of his record of some 750 tracks with the same dog). A leading commentator has stressed that when an expert's opinion is based on inferences derived from historical facts (and that—along with the technical knowledge of how forensic video analysis and light reflections work–is essentially all reverse projection analysis is), a judge should measure reliability as follows:

> [T]he judge should insist on a foundation demonstrating that the expert's technique "works"; that is, the methodology enables the expert to accurately make the determination as to which she proposes to testify. The foundation must include a showing of the results when the technique was used on prior occasions. Do the outcomes demonstrate a connection between facts *A* and *B*?

1 *McCormick on Evid*ence § 13 (8th ed.) (2020). Fredericks' testimony about his successful results did precisely that. Our supreme court has emphasized the importance of empirical verification to reliability. *See, e.g.*, *State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015) ("[E]vidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies."). To sum up, we hold the trial court did not err in admitting Fredericks' opinion as it satisfied the *Jones* factors and met the reliability standard of Rule 702.

VI. EXCLUDING DEFENSE WITNESSES

Before the defense began its case, the State asserted Tammy's children and mother had violated the trial court's sequestration order by watching a live feed of the trial. After an evidentiary hearing, the trial court ruled Tammy's mother and children had willfully and knowingly violated the sequestration order and excluded their testimony. Tammy asked to proffer the witnesses, but the trial court refused. Tammy later objected to the exclusion of the witnesses on due-process grounds,

asserting the suppression of her witnesses and their alibi testimony[1] prevented her from presenting a full defense.

Tammy asserts the trial court abused its discretion in excluding the testimony of her defense witnesses because it was an extreme and disproportionate remedy for the violation of sequestration order, especially, when it appeared the defense witnesses heard, at most, the testimony of two State witnesses on one morning of the trial. We disagree.

Whether the testimony of a witness who has violated the sequestration rule should be excluded depends upon the circumstances of the case and lies within the sound discretion of the trial court. *State v. Huckabee*, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010). "The purpose of the exclusion rule is . . . to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial; and if a witness violates the order he may be disciplined by the court." *State v. Washington*, 424 S.C. 374, 409, 818 S.E.2d 459, 477 (Ct. App. 2018), *aff'd in part, vacated in part, rev'd in part on other grounds*, 431 S.C. 394, 848 S.E.2d 779 (2020).

A proffer allows us to evaluate to what extent the exclusion of the testimony was prejudicial. *State v. Cabbagestalk*, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984); *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 402–03 (1986). The trial court should have granted Tammy's proffer request, as that would have enhanced our review of the materiality of evidence, as well as the prejudicial effect of its exclusion. *State v. Jenkins*, 322 S.C. 360, 367, 474 S.E.2d 812, 816 (Ct. App. 1996) ("The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice."). We do not need to reach the question of what prejudice Tammy

[1] As for the trial court's exclusion of alibi testimony from Tammy's mother, children, and sister after finding Tammy did not give adequate notice of an alibi defense to the State pursuant to Rule 5(e)(1), SCRCrimP, we find this exclusion was not prejudicial because: (1) Tammy's sister testified that she saw Tammy arrive at her home at 3:10 a.m.; (2) Tammy's mother and children were excluded from testifying for violating the sequestration order; and (3) the State did not need to prove Tammy was at the Landing when Victim disappeared to prove Tammy lured Victim to the Landing or conspired with Sidney to lure Victim to the Landing. *See, e.g.*, *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (stating "a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all").

experienced as a result of the exclusion of her witnesses because we believe the trial court was within its discretion to exclude their testimony.

Here as in *Washington*, the trial court conducted an evidentiary hearing and made a specific finding that the State's witness, Deputy Pike, was credible. Deputy Pike detailed she observed Tammy's children and mother watching a live stream of the trial in the sequestration room. During the hearing, one of Tammy's children admitted he was watching YouTube on his cell phone, which meant he had access to the internet. This is important because several days before, the trial court had been confronted with someone in the sequestration room live-streaming the trial. At that juncture, the trial court exercised its discretion not to impose sanctions. Defense counsel affirmed that defense counsel had "made it clear that no one who is sequestered for the defense is allowed to have access to a device which could connect to the internet." In short, the sequestered witnesses were told what not to do and did it anyway, despite the first admonition. We find no error.

Consequently, we also reject Tammy's claim that the exclusion of her witnesses infringed her right to present a complete defense, thereby violating her right to due process. *See California v. Trombetta,* 467 U.S. 479, 485 (1984) (finding the Due Process Clause of the Fourteenth Amendment affords criminal defendants a meaningful opportunity to present a complete defense); *see also State v. Lyles*, 379 S.C. 328, 342, 665 S.E.2d 201, 209 (Ct. App. 2008) (finding the right to present a defense is not unlimited).

Tammy's convictions for kidnapping and conspiracy to kidnap are therefore

AFFIRMED.

KONDUROS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mack Washington, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-000182

ON WRIT OF CERTIORARI

Appeal From Colleton County
Perry M. Buckner, III, Trial Court Judge
Thomas A. Russo, Post-Conviction Relief Judge

Opinion No. 5997
Heard October 12, 2022 – Filed July 5, 2023

REVERSED

Appellate Defender Jessica M. Saxon and Taylor Davis Gilliam, both of Columbia, for Petitioner.

Senior Assistant Deputy Attorney General William M. Blitch, Jr. and Assistant Attorney General Joshua Abraham Edwards, both of Columbia, for Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, Mack Washington, Jr. (Petitioner) appeals the denial of his PCR application. He contends the PCR court erred in finding trial counsel was not ineffective for failing to preserve the issue of an improper closing argument for direct appeal when the solicitor referred to "a pattern" of conduct and asked the jury "[w]ho among us is safe[?]" We reverse.

FACTS/PROCEDURAL HISTORY

Frank Klem and Joan Klem[1] (collectively, the Klems) checked into the Rice Planters Inn in Walterboro on January 7, 2012, around 11:00 p.m. Two males followed them into their room and one of the men grabbed Joan around her waist and held a knife on her. The other perpetrator instructed Frank and Joan to give them their wallet, purse, and car keys or they would kill Joan. The Klems put their possessions on the bed, and the perpetrators took Frank's wallet, Joan's purse, and their car keys, and pulled the hotel phone out of the wall. The perpetrators fled in the Klems' white Chevrolet Impala, which contained luggage, golf clubs, and two rifles.

In connection with this incident, a Colleton County grand jury indicted Petitioner for possession of a weapon during the commission of a violent crime, two counts of kidnapping, and two counts of armed robbery.

Trial began March 17, 2014. At trial, Tyneshia Young testified Petitioner visited her apartment in Druid Hills "[a]lmost every other day" but he did not live there. Young testified she saw Petitioner on January 7, 2012, at her apartment. She later saw Petitioner with Tyheem Lewis[2] in the early morning hours of January 8. She provided she observed Lewis sitting on the couch in her living room at that time and noticed something large on the couch next to him. Young stated "[i]t almost looked like a guitar on the couch." Young testified Lewis indicated the item belonged to Petitioner.

Young testified Petitioner returned to her apartment in the evening on January 8, and later, they heard someone knock on the door. Young provided she went to the

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[1] Frank testified he was eighty-five years old at the time of trial, and Joan testified she was eighty years old.

[2] Lewis was sixteen at the time of this incident.

door and saw police. She stated Petitioner would not let her open the door; rather, he put her in her room and went to the bathroom. Young testified Petitioner then put her in the bathroom and she called her mother. She stated that when she returned to her room, she saw Petitioner take guns out of her closet and put them under her bed. Young testified she called her mother again and talked to a police officer. She stated she eventually opened the door once Petitioner allowed her to do so and she told police where they could locate the guns.

Young provided she initially told police someone else brought the guns to her house; however, she stated she lied because Petitioner told her to do so. Young testified she spoke to police again when she was arrested for receiving stolen goods and she lied to Lieutenant Jason Chapman of the Walterboro Police Department but eventually told him the truth. She stated police dismissed her charge but no one promised her anything for it to be dismissed. Additionally, Young testified a maintenance worker found credit cards and an older white woman's ID in her toilet and she believed Petitioner put the cards in her toilet.[3]

Lewis testified he pled guilty in exchange for a one- to six-year sentence and agreed to testify against Petitioner. He stated that on January 7, 2012, Petitioner asked if he wanted to make some money. Lewis testified he confirmed he wanted to make money and met with Petitioner later that night. He stated they went to the Rice Planters Inn and after waiting, saw a white male and white female pull into the parking lot and go inside their room. Lewis testified they ran in behind them and Petitioner grabbed the female and held a knife to her throat while Lewis grabbed a phone, wallet, purse, and car keys. He stated they then ran to the car and fled. Lewis testified they threw some items away near water and parked the car; however, they took the guns and went back to Druid Hills apartments. He stated Petitioner planned to pick up the car the following day and they were going to take it to a "chop shop."

Lewis testified he later spoke with police and confessed to the crime. Additionally, he confirmed he sent a letter to the solicitor, stating Petitioner was not with Lewis

[3] A maintenance employee at Young's apartment stated he found several credit cards belonging to Frank and Joan and a driver's license in Young's toilet on January 16, 2012.

when he committed the crime, and another letter, stating the first letter was true.[4] However, Young testified the letters were not true but he sent them because Petitioner asked him to send them and he felt pressured to do so. He also stated he was pressured by police to help them prosecute Petitioner and police promised him leniency if he would help in Petitioner's prosecution. Lewis testified he believed the solicitor could have prosecuted him for kidnapping if he did not testify against Petitioner, which was part of the reason Lewis testified against Petitioner. However, Lewis maintained his statement to police implicating himself and Petitioner was true.

Lieutenant Chapman testified that on January 8, 2012, he received a phone call informing him the two firearms stolen during the robbery were in a particular apartment at Druid Hills. Lieutenant Chapman stated he reviewed the initial robbery report and confirmed two rifles had been stolen from the Klems. Lieutenant Chapman provided he confirmed with the informant the two firearms located in the Druid Hills apartment were "long guns[] or rifles," which matched the description of the firearms stolen from the Klems. Lieutenant Chapman testified he and a group of officers went to the apartment, which registered as being occupied by Young. He indicated no one would answer the door but he heard movement inside. He testified Young's mother approached them and he spoke to Young on the phone through her. Lieutenant Chapman testified Young eventually opened the door and gave him permission to obtain the guns from under her bed. He stated the police determined the guns were the ones stolen from the Klems.

Lieutenant Chapman provided police recovered the Klems' luggage and personal effects near a boat landing on January 10, 2012.[5] He testified that later in the

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[4] Major Leslie Jamison, a jail administrator, testified Petitioner requested in October 2013 she "notarize a letter in reference to a witness or a victim saying he didn't do the crime," so he could send a copy to his attorney and the Solicitor's Office. However, Major Jamison provided she refused to notarize it. She testified she later spoke with Petitioner and he told her he needed her to notarize a letter written by witness or victim stating he did not commit the crime; she refused to notarize it. She testified Lewis never requested she notarize a letter.

[5] Sergeant Kirt Wallace with the Colleton County Sheriff's Office testified he went to a boat landing on January 8, 2012, and found luggage and a red binder, which contained a death certificate for Eric Klem, the Klems' son. Lieutenant Chapman

month, police recovered Frank's golf clubs in Charleston. The following day, police learned of a possible location for the missing Impala and located what remained of the vehicle a few days later.

Lieutenant Chapman testified he spoke to Young again shortly after recovering the guns from her apartment and he believed she was not being honest. He stated he later arrested Young for receiving stolen goods and Young told him Petitioner and Lewis brought the guns to her apartment. Lieutenant Chapman testified he interviewed Lewis, arrested him, and issued warrants for Petitioner. He stated he recommended Young's charge be dropped after he spoke with Lewis.

Quincy White, an acquaintance of Petitioner's, testified he saw Petitioner driving a gray Impala and later standing outside the Impala in January 2012. He stated that when he walked by Petitioner, he did not really hear Petitioner say anything regarding the car. However, upon further questioning, White testified he heard Petitioner say he stole the Impala. White stated he later saw the Impala behind his abandoned house and the car was stripped while there. White testified he was charged with possession of a stolen vehicle regarding this matter and he obtained a deal—the charges would be dropped—for his testimony. He stated the deal did not have anything to do with his testimony; rather, he testified because he wanted the warrant against him dropped.

After trial counsel's closing argument, the solicitor gave her closing argument and stated the following at the end of the argument:

> [Petitioner] has . . . a pattern of manipulating young people and luring them and intimidating them. He has a pattern of violence, throwing Tyneshia Young to the floor and intimidating and manipulating her into lying for him. *He has a pattern of robbing old folks, intimidating old folks, kidnapping old folks, holding them up.* And also, trying to manipulate Captain Jamison.
>
> I ask you, this day, who is safe from the force that is [Petitioner]? Who among us is safe, ladies and

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testified Sergeant Wallace brought the red binder to the Walterboro Police Department when he learned it related to the department's investigation.

> gentlemen? I told you I would ask you. I ask you now, I beseech you now, to find [Petitioner] guilty of armed robbery of Frank and Joan Klem, of kidnapping of Frank and Joan Klem, of possession of a weapon during the commission of a violent crime, because then and then only, ladies and gentlemen, then and then only will [Petitioner] cease from trouble. And the weary traveler can finally be at rest.

(emphasis added). The trial court took a brief recess.

Thereafter, trial counsel moved for a mistrial outside the presence of the jury. He argued the solicitor's comments in closing arguments about Petitioner having a pattern of robbing old people was improper because it implied he had a prior record for the same charges when his record had not been published to the jury. Trial counsel explained he believed the solicitor's comments implied Petitioner had a prior record of robbing old people because "[a] pattern is not just one time"; rather, it "is something that is repeated." He asserted the comments prejudiced Petitioner.

The solicitor argued her comments were not improper because Joan and Frank were older—eighty years old and eighty-five years old at the time of trial—and she did not believe her comments implied Petitioner had a prior record. She stated that the pattern was that Joan and Frank were together. Additionally, the solicitor contended a curative instruction would be the appropriate remedy if the trial court deemed the comments improper.

The trial court denied Petitioner's mistrial motion and stated the following:

> I do not believe that the Solicitor mentioned anything about [Petitioner] having a record in her argument to the jury. It is your contention that the use of the term "pattern" and of course, could be construed to [be] more than one victim in this case, and my verdict form has seven questions on it. That you could consider a pattern to be more than one incident. Here, we have an allegation of more than one armed robbery, more than one kidnapping, which has been vigorously defended. I

> do not believe that gives rise to a mistrial. On the other side of that fence, would you want the [c]ourt to prevent any confusion, which I don't think exists, but would you want a curative instruction from the [c]ourt where I instruct them to disregard the use of the term "pattern" from an argument by an attorney?

Trial counsel declined the offer, stating he "wouldn't really want to call attention to it." The jury convicted Petitioner as indicted, and the trial court imposed an aggregate sentence of thirty-five years' imprisonment.[6] The trial court also revoked Petitioner's probation in full. Petitioner filed a direct appeal, which this court dismissed pursuant to *Anders v. California*, 386 U.S. 738 (1967). *See State v. Washington*, Op. No. 2016-UP-101 (S.C. Ct. App. filed Mar. 2, 2016).

Petitioner filed a PCR application, alleging trial counsel was ineffective for refusing the curative instruction. At the PCR hearing, Petitioner testified he was concerned about the solicitor's closing argument, specifically when the solicitor told the jury he had a pattern of conduct and when the solicitor asked the jury: "Who among us is safe[?]" He believed the solicitor "put [his] character in play when she said [he] had a pattern." He explained he believed a pattern indicated past behavior, meaning he had a record of committing the actions the solicitor named. Petitioner maintained his criminal record had not been presented to the jury because he did not testify at trial. Petitioner testified there was no pattern in this case because although there were two victims, they were involved in the same incident.

Trial counsel testified he moved for a mistrial based on the solicitor's closing argument and believed he had a "slam dunk" mistrial motion based on her discussion of a pattern because Petitioner did not testify at trial. He stated he believed the solicitor's statement about a "pattern of robbing old people" was the "most prejudicial" statement. He acknowledged the solicitor alleged Petitioner used force to coerce people during four incidents in this case. Trial counsel believed the mistrial motion should have been granted and the denial of the motion "would have been a good ground[]" for appeal. When asked about error

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[6] The sentence was thirty years' imprisonment for each of the kidnapping and armed robbery charges to run concurrently, along with five years' imprisonment for the weapons charge to run consecutively.

preservation and whether an attorney needed to object contemporaneously before the end of closing argument, trial counsel stated he knew an attorney could object during closing argument but noted he was not an appellate attorney and had never handled an appeal. He testified he declined the trial court's offer to give a curative instruction because he did not want to call further attention to the comments. Trial counsel referred to his decision as "a trial strategy decision." Trial counsel stated he would have asked for a curative instruction had he objected during closing argument because he would have already drawn attention to the statement. He explained he moved for a mistrial because he did not believe the jury would actually disregard the improper comments based on a curative instruction. Additionally, trial counsel testified the solicitor "skirted the edge a little bit" when she asked the jury "[w]ho among us is safe[?]" He stated he considered this question and it was part of the basis for his mistrial motion even though he did not specifically mention it to the trial court. Trial counsel explained "sometimes you have to make a call about objecting while somebody is in closing argument" because if an attorney objects and is wrong, the trial court would "castigate[] and fuss[] at" them. Trial counsel believed he "had a pretty meritorious actual ground for a motion for a mistrial."

The prosecuting solicitor testified the pattern she referenced in the closing argument related to Petitioner's conduct in the present case, not his prior behavior. She explained she was referring to Petitioner manipulating Lewis into participating in the robbery, intimidating Lewis into writing an exculpatory letter on his behalf, refusing to allow Young to open the door for police, threatening and manipulating Young, and robbing and kidnapping the Klems. She stated the Klems were older and Petitioner committed two kidnappings and two robberies.

The PCR court concluded trial counsel was not ineffective. It found trial counsel's testimony to be credible while finding Petitioner's testimony was not credible. The PCR court found trial counsel failed to preserve the closing argument issue for direct appeal when he refused the curative instruction; however, it concluded trial counsel was not deficient in refusing the curative instruction because he articulated a valid strategy in doing so—he did not want to draw the jury's attention to the comments. It noted trial counsel "believed he had a valid argument for a mistrial, which could have been granted at the conclusion of the closing argument outside of the jury's presence." The PCR court further found Petitioner failed to show a direct appeal would have been successful if the issue were preserved because "the solicitor's use of the word 'pattern' appropriately described [his] consistent *modus*

operandi of intimidation and manipulation" and it did not imply or reference Petitioner's criminal history. The PCR court concluded Petitioner failed to show "prejudice[] because the jury had no reason to believe he had a prior criminal history from the solicitor's comments."

The petitioner filed a petition for a writ of certiorari, which this court granted.

STANDARD OF REVIEW

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "Our standard of review in PCR cases depends on the specific issue before us." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). "We defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Id.*; *see also Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (holding an appellate "[c]ourt gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them"). However, "[w]e do not defer to a PCR court's rulings on questions of law." *Mangal*, 421 S.C. at 91, 805 S.E.2d at 571. "Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." *Id.* (quoting *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527). "This court gives great deference to the PCR court's findings on matters of credibility." *Putnam v. State*, 417 S.C. 252, 260, 789 S.E.2d 594, 598 (Ct. App. 2016).

LAW/ANALYSIS

Petitioner argues the PCR court erred in finding trial counsel was not ineffective for failing to preserve the improper closing argument issue for direct appeal when he failed to (1) contemporaneously object when the solicitor told the jury Petitioner had a pattern of conduct, including a pattern of robbing old people, a pattern of manipulating young people, and a pattern of violence; (2) object to the entirety of the improper argument, including when the solicitor asked the jury "[w]ho among us is safe[?]"; and (3) accept a curative instruction. Petitioner contends the solicitor's statements during closing arguments "intimated and frightened the jury into a guilty verdict" and the solicitor "capitalized not only on the jury's fear of robbery, but also on the unknown prior history of a criminal defendant who had not

taken the stand." Petitioner argues he was prejudiced because the State's evidence did not amount to overwhelming evidence of guilt. We agree.

I. Ineffective Assistance of Counsel

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-89, 694 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

"[A]n issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." *McHam v. State*, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 n.2 (2018). In *McHam*, the direct appeal had been filed pursuant to *Anders*, and the court of appeals dismissed the appeal. *Id.* at 471, 746 S.E.2d at 45. On review from the denial of the petitioner's PCR application, the supreme court determined "the [c]ourt of [a]ppeals did not consider the merits of the . . . issue because it was not preserved by trial counsel." *Id.* at 469, 475, 746 S.E.2d at 43, 47. Accordingly, the supreme court found "an examination of the merits of the issue is appropriate in analyzing the prejudice prong in [the] PCR claim." *Id.* at 475, 746 S.E.2d at 47.

II. Closing Argument

A closing argument must stay contained to the evidence within the record or any reasonable inferences that can be drawn therefrom. *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). A solicitor is allowed to argue his or her version of the evidence and to comment on how much weight to give such evidence. *Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566. However, a solicitor's duty is to see justice done, not to convict

a defendant. *Id.* Therefore, a closing argument "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." *Id.* (quoting *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007)). "Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially." *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

When counsel makes an improper argument, opposing counsel should "*immediately* object and . . . have a record made of the statements or language complained of and . . . ask the court for a distinct ruling thereon." *State v. Black*, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995). "The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "Improper comments do not 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." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). Accordingly, the appellate court must determine whether the improper argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* To make this determination, the appellate court will review the improper argument in the context of the entire record. *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "The power of the trial court to declare a mistrial should be used with the greatest caution" and only "when absolutely necessary" and a defendant has to "show both error and resulting prejudice." *Id.* "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." *Id.*

In *State v. Wiley*, this court concluded the solicitor's opening statement, which mentioned the defendant had an unrelated warrant for his arrest, "was not sufficiently prejudicial to warrant a mistrial" because it was "a vague reference to his prior criminal record" and even if the jury inferred the defendant committed another crime, the State never attempted to prove the defendant was convicted of another crime. 387 S.C. 490, 495-96, 692 S.E.2d 560, 563 (Ct. App. 2010).

However, in *State v. Huggins*, at the defendant and her paramour's trial for the murder of the defendant's husband, the solicitor stated during closing arguments the defendant had a plan and offered to pay someone to kill the victim. 325 S.C. 103, 105-07, 481 S.E.2d 114, 115-16 (1997). The supreme court found because no evidence was presented the defendant had done so, the solicitor's statement was fundamentally unfair and highly prejudicial, especially when there was not overwhelming evidence of the defendant's guilt. *Id.* at 107-08, 481 S.E.2d at 116. Accordingly, the supreme court determined the trial court erred in denying the mistrial motion. *Id.* at 108, 481 S.E.2d at 116-17.

"[D]efendants are protected from overly prejudicial evidence by due process." *Humphries*, 351 S.C. at 375, 570 S.E.2d at 167. "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). In *Humphries*, a death penalty PCR in which the petitioner argued the solicitor had improperly compared his life to the victim, the supreme court "consider[ed] whether any of the solicitor's comments in his closing argument were so unduly prejudicial as to render his sentencing fundamentally unfair." *Id.* at 371-76, 570 S.E.2d at 165-67. The court noted "[i]nstead of arguing prejudice, however, Petitioner staked his argument on the impropriety of the solicitor's closing" argument that compared his life to the victim's, which the court found was not prohibited. *Id.* at 375-76, 570 S.E.2d at 167. The court determined because the "comments were not improper," they did "not warrant reversal unless they were so prejudicial that they rendered the sentencing fundamentally unfair." *Id.* at 376, 570 S.E.2d at 167. The court found "the solicitor's closing argument did not render sentencing fundamentally unfair as [it] did not prejudice Petitioner" because "[t]he solicitor's comments were based on evidence already in the record." *Id.*

III. Curative Instruction

"A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005). In *State v. Vasquez*, the supreme court found the trial court did not err in refusing to grant a mistrial based on the solicitor's closing argument, which mentioned the defendant might escape from prison and kill the State's witnesses, because the trial court's curative instruction cured any prejudice the defendant may have suffered and

afforded him a fair trial. 364 S.C. 293, 299-300, 613 S.E.2d 359, 362-63 (2005), *abrogated on other grounds by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). In *Copeland*, the supreme court concluded because the defendant's objections the solicitor's closing argument were properly overruled or corrected with a curative instruction, the trial court did not abuse its discretion in denying the defendant's mistrial motion; the comments did not infect the trial with unfairness. 321 S.C. at 325-26, 468 S.E.2d at 625.

In *State v. Wilson*, the defendant objected to certain testimony and moved for a mistrial; the trial court overruled the objection and admitted the testimony. 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). On appeal, the defendant argued the trial court erred in denying his motion for a mistrial. *Id.* at 582, 698 S.E.2d at 864. The State asserted this argument was not preserved because he did not move to strike the testimony, accept or request a curative instruction, or renew his mistrial motion. *Id.* The court recognized an issue is not preserved for review when "the trial court *sustains* a party's objection to improper testimony and the party does not subsequently move to strike the testimony or for a mistrial." *Id.* at 583, 698 S.E.2d at 864. However, the court stated that "when an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error." *Id.* at 584, 698 S.E.2d at 864. The court explained a party was not required to accept a curative instruction when a court overruled an objection because the admission of proper evidence did not require a curative charge. *Id.* Accordingly, the court found the defendant properly preserved the issue because the trial court overruled his objection and admitted the testimony; therefore, he was not required to accept a curative charge or make another motion for mistrial. *Id.* at 585, 698 S.E.2d at 865.

IV. Trial Strategy

"Whe[n] trial counsel articulates a valid reason for employing certain trial strategy, counsel will not be deemed ineffective." *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008). "Courts must be wary of second-guessing counsel's trial tactics . . . ." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). In *Caprood v. State*, the supreme court found trial counsel articulated a valid trial strategy when he stated "he did not request curative instructions because they tend to bring into focus precisely the item the objector has kept out." 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000), *abrogated on other grounds by Smalls*, 422 S.C. at 181 n.2, 810 S.E.2d at 839 n.2.

However, in *Brown v. State*, the supreme court found that "although [it did] not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to [certain] comments, [it] f[ou]nd this 'strategy' [could]not be construed as a valid one given the evident impropriety of the solicitor's remarks." 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009). The supreme court "h[e]ld trial counsel was deficient in failing to object to the challenged portion of the solicitor's closing argument because it constituted a 'Golden Rule' argument which impermissibly appealed to the passion of the jurors by asking them to 'speak up' for the child victim." *Id.* Nonetheless, the court ultimately determined the petitioner "did not satisfy his requisite burden of proving that there was a reasonable probability that but for counsel's deficient performance the result of his trial would have been different." *Id.* The court noted because "the solicitor's comments came at the very end of his closing argument and were limited in duration," the "comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

In *Stone v. State*, 419 S.C. 370, 386, 798 S.E.2d 561, 570 (2017), the supreme court explained the importance of an objection: "Without an objection, however, there can be no debate[,] and the trial court has no opportunity to exercise its discretion." The court recognized that if trial counsel "had objected [to certain testimony], the trial court may have sustained the objection. But in any event, counsel would have at least tested the trial court's discretion." *Id.* "The fact the trial court has such wide discretion does not justify the decision not to object. Rather, the debate that precedes the exercise of that discretion is part of the adversarial process" trial counsel is required to test. *Id.*; *see also Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) ("When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function . . . is to make the adversarial testing process work in the particular case.'" (quoting *Strickland*, 466 U.S. at 690)).

In *Stone*, the court noted "counsel testified he made the decision not to object for reasons other than the strength of his argument for exclusion. In fact, we read counsel's testimony to say he made the decision not to object *despite* his belief that he had good grounds for the objection." 419 S.C. at 386, 798 S.E.2d at 570. The court found "[t]rial counsel failed to articulate any valid strategic reason for not objecting to important . . . testimony the trial court had the discretion to exclude. Therefore, the decision not to object d[id] not meet an objective standard of

reasonableness, and [the PCR applicant] . . . satisfied the first prong of *Strickland*." *Id.* at 387, 798 S.E.2d at 570.

V. Probative Evidence

An appellate court will not uphold a PCR court's findings when no probative evidence supports them. *Holland v. State*, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996). In *Jackson v. State*, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998), the supreme court found no probative evidence supported the PCR's court's finding of prejudice. The supreme court determined "no probative evidence was presented at the PCR hearing to show the eyewitnesses and victims were not credible" as "[t]he only 'evidence' that either the victims or eyewitnesses had criminal records were statements and questions by . . . PCR counsel that one of the victims was incarcerated in another state at the time of . . . [the] trial and [the PCR applicant's] testimony that he knew this victim was in jail." *Id.*

In *Chappell v. State*, 429 S.C. 68, 75, 837 S.E.2d 496, 499 (Ct. App. 2019), the PCR court found certain testimony did not contain any vouching statements. On review, this court found the statement "not only had the effect of improperly bolstering the victim's credibility; it also improperly invaded the province of the jury to determine the only issue in th[e] case." *Id.* at 78, 837 S.E.2d at 501. This court found the "statement [could not] reasonably be interpreted to have served any purpose other than to improperly bolster the victim's credibility" and "the PCR court erred in finding [the] testimony contained no vouching statements." *Id.*

In *Lounds v. State*, 380 S.C. 454, 464-65, 670 S.E.2d 646, 651 (2008), the supreme court reversed the PCR court, stating "there [wa]s no probative evidence to support the PCR court's finding[]" trial counsel's "comments were not improper as he was 'simply presenting to the jury an alternate explanation of events that was implied from [the PCR applicant's] own testimony.'"

VI. Analysis

Here, the solicitor stated that Petitioner "has a *pattern* of robbing old folks, intimidating old folks, kidnapping old folks, holding them up." (emphasis added). The facts presented to the jury were that Petitioner robbed Frank and Joan together and no other conduct towards older people was presented to the jury. At the PCR hearing, the solicitor testified that her reference to a pattern only related to

Petitioner's conduct towards the Klems, suggesting that robbing two people at the same time was pattern. The definition of pattern from *Black's Law Dictionary* relevant here is a "series of acts that are recognizably consistent." *Pattern*, *Black's Law Dictionary* (11th ed. 2019). *Merriam-Webster Dictionary*'s definitions of pattern include "a reliable sample of . . . acts" and "frequent or widespread incidence," providing as an example "a *pattern* of violence." *Pattern*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/pattern. (last visited June 9, 2023).

Both our supreme court and this court have referenced in previous opinions the word pattern without defining it in discussing the existence of a common scheme or plan allowing the State to introduce evidence of prior bad acts in criminal sexual conduct cases.[7] *See State v. Tutton*, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003) ("[C]ommon scheme or plan evidence in criminal sexual conduct cases will be admitted on a generalized basis only where there is a *pattern* of continuous illicit conduct. Sex crimes may be unique in this respect because they commonly involve the same victims engaged in repeated incidents occurring under very similar circumstances. The reason for the general admissibility of such evidence under these circumstances is self evident—where there is a *pattern* of continuous conduct shown, that *pattern* clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion." (emphases added)); *see, e.g.*, *State v. McClellan*, 283 S.C. 389, 391, 323 S.E.2d 772, 773 (1984) ("[The defendant] was indicted on one count of criminal sexual conduct against his youngest daughter . . . . All three daughters testified concerning the *pattern* of this and prior attacks." (emphasis added)); *Tutton*, 354 S.C. at 329-30, 580 S.E.2d at 192 ("[W]e are compelled to find there is no *pattern* of continuous illicit conduct . . . . [T]he determination of

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[7] *See State v. Stokes*, 279 S.C. 191, 193, 304 S.E.2d 814, 814-15 (1983) ("[E]vidence of other 'bad acts' is not admissible to prove the crime charged unless it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged."); *id.* at 193, 304 S.E.2d at 815 ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted.").

the admissibility of the uncharged act rests solely on whether the requisite degree of similarity between the separate acts is present in this case." (emphasis added)); *State v. Weaverling*, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999) ("We find [the victim's] testimony regarding the *pattern* of sexual abuse he suffered by [the defendant] to be quintessential common scheme or plan evidence." (emphasis added)); *see also State v. Perry*, 430 S.C. 24, 67, 842 S.E.2d 654, 677 (2020) (Kittredge, J., dissenting) ("The majority is missing an inferential step—one that is satisfied through either a repeated *pattern* of highly similar *or* unique criminal activity—that being 'where there is a *pattern* of continuous conduct shown, that *pattern* clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion.'" (first, third, and fourth emphases added) (quoting *Tutton*, 354 S.C. at 328, 580 S.E.2d at 191)); *State v. Cope*, 405 S.C. 317, 356, 748 S.E.2d 194, 214 (2013) (Kittredge, J., concurring in part and dissenting in part) ("I find there is a striking similarity between the facts of this case and the proffered evidence of [the co-defendant's] other sexual assaults. . . . [T]he other four incidents present a compelling *pattern* in terms of time, geography and commonality of features—a *pattern* which is entirely consistent with the facts of this case and material to [the defendant's] theory that [the co-defendant] acted alone." (emphases added)).

In the present case, while the solicitor's comments about a pattern were not in relation to any statute, we find instructive our legislature's definition of pattern, contained in the chapter on offenses against the person, in the article regarding harassment and stalking: "'Pattern' means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose." S.C. Code Ann. § 16-3-1700(D) (2015).

The solicitor stated Petitioner "has a *pattern* of robbing old folks, intimidating old folks, kidnapping old folks, holding them up." (emphasis added). Contrary to the PCR court's finding, this statement can only be reasonably construed as discussing his prior record and therefore the statement was outside the record. *See Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566 (stating a closing argument must stay contained to the evidence within the record or any reasonable inferences drawn therefrom). However, the solicitor explained at trial and at the PCR hearing that the comment should be construed as referring to the two victims in the case for which Petitioner was on trial. The PCR court interpreted the references this way as well. This court defers to the PCR court's findings of fact and must uphold them if any evidence in the record supports them; however, the court reviews questions of law de novo.

Mangal v. State, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). Although we defer to the PCR court on credibility matters and accept the court's findings of fact if any evidence supports those findings, the solicitor's testimony at the PCR hearing that her reference to a pattern was not referring to previous crimes and was only referring to the present crimes is not in keeping with the meaning of pattern. While her testimony could support a finding that she intended only to refer to current rather than past crimes, this cannot change that the jury would reasonably assume otherwise from her statement. Accordingly, probative evidence does not support the PCR court's finding that the solicitor's comments on a pattern only referred to the incidents presented to the jury. *See Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 (holding an appellate "[c]ourt gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them"); *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) ("[A] PCR [court's] findings should not be upheld if there is no probative evidence to support them.").

Here, the solicitor's comments referred to prior criminal convictions not in the record. Although trial counsel moved for a mistrial and the trial court denied the motion, trial counsel did not contemporaneously object during the solicitor's argument. Rather, he waited until after the solicitor finished her closing argument and the trial court dismissed the jury for a brief recess. [8] *See Black*, 319 S.C. at 521-22, 462 S.E.2d at 315 (concluding the defendant's argument regarding a closing argument was not preserved for appellate review because although trial counsel objected and moved for a mistrial during the closing argument, he waited until after the court's charge and the jury retired to deliberate to state the basis for his objection and mistrial motion). Accordingly, trial counsel was deficient for failing to contemporaneously object.

Additionally, trial counsel was deficient for failing to accept a curative instruction. *Compare Wilson*, 389 S.C. at 585, 698 S.E.2d at 865 (concluding the defendant was not required to accept a curative instruction or make another mistrial motion because his objection had been overruled; therefore, the denial of his mistrial motion was preserved), *with State v. Banton*, 387 S.C. 412, 418, 692 S.E.2d 201, 204 (Ct. App. 2010) (noting that when the defendant objected to certain testimony

[8] PCR counsel stated Petitioner raised the denial of the mistrial motion issue on direct appeal in an *Anders* brief, and the brief contained a footnote indicating the issue was likely not preserved for direct appeal.

and moved for a mistrial, by rejecting the trial court's offer to give a curative instruction, he failed to preserve the issue of whether he was entitled to a mistrial). Trial counsel expressed a valid strategy for refusing the instruction—he did not want to draw attention to the solicitor's comments. Generally, trial counsel will not be deemed ineffective when he or she has expressed a valid reason for using a particular trial strategy. *McKnight*, 378 S.C. at 43, 661 S.E.2d at 359. In particular, the supreme court has held trial counsel articulated a valid trial strategy for not requesting a curative instruction after his objection to improper testimony was sustained when trial counsel testified he did not request curative instructions because they tended to place more focus on the problem. *Caprood*, 338 S.C. at 109-10, 525 S.E.2d at 516-17. However, in *Brown*, the supreme court found that even though trial counsel genuinely articulated a trial strategy for not objecting to certain comments, the strategy was not valid due to "the evident impropriety of the solicitor's remarks." 383 S.C. at 517, 680 S.E.2d at 915. Trial counsel here believed the solicitor's comments were egregious enough that a mistrial would be granted; therefore, this situation is closer to *Brown*, in that counsel should have known that refusing a curative instruction was not a valid trial strategy.

Here, a curative instruction directing the jury to disregard the pattern comments may have cured any prejudice Petitioner may have suffered from the comments. However, trial counsel refused such instruction, thereby not curing Petitioner's prejudice. Accordingly, we review the pattern comments made at trial to determine if the comments prejudiced Petitioner.

The solicitor's comments here about a pattern fall between *Wiley* and *Huggins*. These comments were more than "a vague reference to [Petitioner's] prior criminal record," contrary to *Wiley* in which the solicitor mentioned the defendant had an unrelated warrant for his arrest and on appeal, this court found even if the jury inferred the defendant committed another crime, the State never attempted to prove the defendant was convicted of another crime. 387 S.C. at 495-96, 692 S.E.2d at 563. We recognize the pattern comments here do not rise quite to the same level of *Huggins*, in which our supreme court found the solicitor's statement during closing arguments the defendant had a plan and offered to pay someone to kill the victim was fundamentally unfair, when no such evidence was presented and there was not overwhelming evidence of guilt. 325 S.C. at 107-08, 481 S.E.2d at 116-17. However, the solicitor's comments about the pattern rise to the level of being so egregious as to warrant a mistrial or "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See Randall*, 356 S.C. at

642, 591 S.E.2d at 610 (stating a petitioner has the burden of showing the improper argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process"); *Harris*, 382 S.C. at 117, 674 S.E.2d at 537 ("The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.").

Petitioner demonstrated prejudice from trial counsel's failure to contemporaneously object to the solicitor's comments. Further, the record does not contain overwhelming evidence of Petitioner's guilt. *See Smalls*, 422 S.C. at 191, 810 S.E.2d at 845 (stating in the context of an ineffective assistance claim, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the [second prong of] *Strickland* . . . cannot possibly be met"). Accordingly, we reverse the PCR's court's denial of Petitioner's application for PCR on the issue of ineffective assistance of counsel for trial counsel's failure to object to the solicitor's references to Petitioner's patterns of behavior during closing arguments and remand to the court of general sessions for a new trial.[9]

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[9] Based on our disposition, we do not reach the issue of the solicitor's comment asking the jury "[w]ho among us is safe[?]" during closing arguments. *See Reese*, 370 S.C. at 38, 633 S.E.2d at 901 ("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."). We also do not address Petitioner's alternative request that because the PCR court failed to make any determination on his "[w]ho among us is safe" argument in the order, this court should remand in accordance with *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019), for the PCR court to make specific findings of fact and to expressly state its conclusions of law as required by section 17-27-80 of the South Carolina Code (2014). The State contends Petitioner's argument that trial counsel was deficient for failing to object to the solicitor's question "[w]ho among us is safe[?]" is not preserved for appellate review because it was not ruled on by the PCR court. In *Fishburne*, the supreme court determined because PCR cases involve the Sixth Amendment's guarantee to a right to effective assistance of counsel, the court would no longer allow a "procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent th[e] [c]ourt from remanding claims

REVERSED.

HEWITT and VINSON, JJ., concur.

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of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80." *Id.* at 512, 516, 832 S.E.2d at 587, 589. Because we reverse the denial of Petitioner's PCR application based on the pattern comments, we need not reach these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review the remaining issues when its determination of a prior issue is dispositive of the appeal).