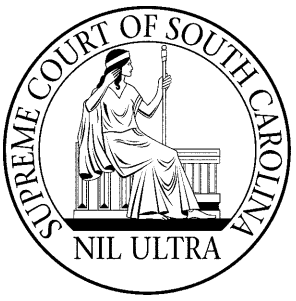

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 38
October 4, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27726 - Farid A. Mangal V. The State	Denied 10/4/2017
27725 - James Jowers v. SCDHEC	Granted 9/28/2017
27728 - Jane Doe v. The State	Pending
27730 - Angela Patton v. Dr. Gregory Miller	Denied 9/27/2017
27731 - Protestant Episcopal v. Episcopal Church	Pending
27734 - In the Matter of William Ashley Jordan	Pending
2017-MO-015 - Jackie Harris v. Lancaster County Election Commission	Denied 9/28/2017

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5514-State v. Robert Jared Prather	Pending
5516-Charleston County v. University Ventures	Pending
2017-UP-315-State v. Taquan L. Brown	Pending
2017-UP-336-Clarence Winfrey v. Archway Services, Inc. (1)	Denied 09/28/17
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Denied 09/28/17
2017-UP-342-State v. Bryant Christopher Gurley	Pending
2017-UP-344-Brent E. Bentrim v. Wells Fargo	Pending
2017-UP-354-Adrian Duclos v. Karen Duclos	Pending
2017-UP-355-George Hood v. Jasper County	Pending
2017-UP-356-State v. Damyon Cotton	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5253-Sierra Club v. Chem-Nuclear	Pending
5382-State v. Marc A. Palmer	Pending
5387-Richard Wilson v. Laura B. Willis	Pending
5388-Vivian Atkins v. James R. Wilson, Jr.	Pending
5391-Paggy D. Conits v. Spiro E. Conits	Pending
5416-Allen Patterson v. Herb Witter	Pending
5417-Meredith Huffman v. Sunshine Recycling	Pending
5419-Arkay, LLC v. City of Charleston	Pending
5430-Wilfred Allen Woods v. Etta Catherine Woods	Pending
5431-Lori Stoney v. Richard Stoney	Pending
5432-Daniel Dorn v. Paul Cohen	Pending

5433-The Winthrop University Trustees v. Pickens Roofing	Pending
5438-The Gates at Williams-Brice v. DDC Construction Inc.	Pending
5441-State v. David A. Land	Pending
5442-Otha Delaney v. First Financial	Pending
5443-State v. Steven Hoss Walters, Jr.	Pending
5444-Rose Electric v. Cooler Erectors of Atlanta	Pending
5447-Rent-A-Center v. SCDOR	Pending
5448-Shanna Kranchick v. State	Pending
5449-A. Marion Stone III v. Susan B. Thompson	Pending
5450-Tzvetelina Miteva v. Nicholas Robinson	Pending
5451-Pee Dee Health v. Estate of Hugh Thompson, III (3)	Pending
5452-Frank Gordon, Jr. v. Donald W. Lancaster	Pending
5453-Karen Forman v. SCDLLLR (3)	Pending
5454-Todd Olds v. City of Goose Creek	Pending
5455-William Montgomery v. Spartanburg County	Pending
5456-State v. Devin Johnson	Pending
5458-William Turner v. SAIIA Construction	Pending
5460-Frank Mead, III, v. Beaufort Cty. Assessor	Pending
5462-In the matter of the Estate of Eris Singletary Smith	Pending
5464-Anna D. Wilson v. SCDMV	Pending
5467-Belle Hall Plantation v. John Murray (David Keys)	Pending

5469-First Citizens Bank v. Park at Durbin Creek	Pending
5471-Joshua Fay v. Total Quality Logistics	Pending
5473-State v. Alexander Carmichael Huckabee, III	Pending
5475-Sara Y. Wilson v. Charleston Co. School District	Pending
5476-State v. Clyde B. Davis	Pending
5477-Otis Nero v. SCDOT	Pending
5479-Mark M. Sweeny v. Irene M. Sweeney	Pending
5483-State v. Shannon Scott	Pending
5486-SC Public Interest v. John Courson	Pending
5487-State v. Toaby Alexander Trapp	Pending
5488-Linda Gibson v. Ameris Bank	Pending
5489-State v. Eric T. Spears	Pending
5490-Anderson County v. Joey Preston	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-466-State v. Harold Cartwright, III	Pending
2016-UP-052-Randall Green v. Wayne Bauerle	Pending
2016-UP-109-Brook Waddle v. SCDHHS	Pending
2016-UP-138-McGuinn Construction v. Saul Espino	Pending
2016-UP-141-Plantation Federal v. J. Charles Gray	Pending
2016-UP-320-State v. Emmanual M. Rodriguez	Pending
2016-UP-325-National Bank of SC v. Thaddeus F. Segars	Denied 09/28/17
2016-UP-330-State v. William T. Calvert	Pending

2016-UP-382-Darrell L. Goss v. State	Pending
2016-UP-392-Joshua Cramer v. SCDC (2)	Pending
2016-UP-395-Darrell Efird v. The State	Pending
2016-UP-402-Coves Darden v. Francisco Ibanez	Pending
2016-UP-404-George Glassmeyer v. City of Columbia (2)	Pending
2016-UP-408-Rebecca Jackson v. OSI Restaurant Partners	Pending
2016-UP-424-State v. Daniel Martinez Herrera	Pending
2016-UP-430-State v. Thomas James	Pending
2016-UP-431-Benjamin Henderson v. Patricia Greer	Pending
2016-UP-436-State v. Keith D. Tate	Pending
2016-UP-447-State v. Donte S. Brown	Pending
2016-UP-454-Gene Gibbs v. Jill R. Gibbs	Pending
2016-UP-461-Melvin T. Roberts v. Mark Keel	Pending
2016-UP-473-State v. James K. Bethel, Jr.	Pending
2016-UP-475-Melissa Spalt v. SCDMV	Pending
2016-UP-479-State v. Abdul Furquan	Pending
2016-UP-485-Johnson Koola v. Cambridge Two (2)	Pending
2016-UP-486-State v. Kathy Revan	Pending
2016-UP-489-State v. Johnny J. Boyd	Pending
2016-UP-515-Tommy S. Adams v. The State	Pending
2016-UP-519-Live Oak Village HOA v. Thomas Morris	Pending

2016-UP-527-Grange S. Lucas v. Karen A. Sickinger	Pending
2016-UP-528-Betty Fisher v. Bessie Huckabee and Lisa Fisher v. Betty Huckabee	Pending
2016-UP-529-Kimberly Walker v. Sunbelt	Pending
2017-UP-002-Woodruff Road v. SC Greenville Hwy. 146	Pending
2017-UP-009-In the matter of Daryl Snow	Pending
2017-UP-013-Amisub of South Carolina, Inc. v. SCDHEC	Pending
2017-UP-015-State v. Jalann Williams	Pending
2017-UP-017-State v. Quartis Hemingway	Pending
2017-UP-021-State v. Wayne Polite	Pending
2017-UP-022-Kenneth W. Signor v. Mark Keel	Pending
2017-UP-025-State v. David Glover	Pending
2017-UP-026-State v. Michael E. Williams	Pending
2017-UP-028-State v. Demetrice R. James	Pending
2017-UP-029-State v. Robert D. Hughes	Pending
2017-UP-031-FV-I, Inc. v. Bryon J. Dolan	Pending
2017-UP-037-State v. Curtis Brent Gorny	Pending
2017-UP-040-Jeffrey Kennedy v. Richland Sch. Dist. Two	Pending
2017-UP-043-Ex parte: Mickey Ray Carter, Jr. and Nila Collean Carter	Pending
2017-UP-046-Wells Fargo v. Delores Prescott	Pending
2017-UP-054-Bernard McFadden v. SCDC	Pending
2017-UP-059-Gernaris Hamilton v. Henry Scott	Pending

2017-UP-065-State v. Stephon Robinson	Pending
2017-UP-067-William McFarland v. Mansour Rashtchian	Pending
2017-UP-068-Rick Still v. SCDHEC	Pending
2017-UP-070-State v. Calvert Myers	Pending
2017-UP-071-State v. Ralph Martin	Pending
2017-UP-082-Kenneth Green v. SCDPPPS	Pending
2017-UP-096-Robert Wilkes v. Town of Pawleys Island	Pending
2017-UP-103-State v. Jujuan A. Habersham	Pending
2017-UP-108-State v. Michael Gentile	Pending
2017-UP-109-State v. Kevin Choice	Dismissed 09/27/17
2017-UP-118-Skydive Myrtle Beach, Inc. v. Horry County	Pending
2017-UP-124-Rudy Almazan v. Henson & Associates	Pending
2017-UP-137-In the matter of Calvin J. Miller	Pending
2017-UP-139-State v. Jeffrey Lynn Chronister	Pending
2017-UP-145-Cory McMillan v. UCI Medical Affiliates	Pending
2017-UP-158-State v. Rion M. Rutledge	Pending
2017-UP-169-State v. David Lee Walker	Pending
2017-UP-192-David Johnson v. Mark Keel	Pending
2017-UP-193-John Gregory v. Mark Keel	Pending
2017-UP-194-Mansy McNeil v. Mark Keel	Pending
2017-UP-195-Edward Green v. Mark Keel	Pending

2017-UP-209-Jose Maldonado v. SCDC (2)	Pending
2017-UP-217-Clarence B. Jenkins v. SCDEW	Pending
2017-UP-228-Arrowpoint Capital v. SC Second Injury Fund	Pending
2017-UP-229-Arrowpoint Capital v. SC Second Injury Fund	Pending
2017-UP-234-SunTrust v. Mark Ostendorff	Pending
2017-UP-236-State v. Dennis E. Hoover	Pending
2017-UP-245-State v. Dameon L. Thompson	Pending
2017-UP-249-Charles Taylor v. Stop 'N' Save	Pending
2017-UP-258-State v. Dennis Cervantes-Pavon	Pending
2017-UP-264-Jerry Hogan v. Corder and Sons, Inc.	Pending
2017-UP-265-Genesie Fulton v. L. William Goldstein	Pending
2017-UP-272-State v. Wayland Purnell	Pending
2017-UP-279-Jose Jimenez v. Kohler Company	Pending
2017-UP-300-TD Bank v. David H. Jacobs	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Farid A. Mangal, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2016-000610

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes II, Trial Judge
J. Derham Cole, Post-Conviction Relief Judge

Opinion No. 27726
Heard December 14, 2016 – Filed July 19, 2017
Withdrawn, Substituted, and Refiled October 4, 2017

REVERSED

Attorney General Alan Wilson and Assistant Attorney General Alicia A. Olive, both of Columbia, for Petitioner.

John R. Ferguson, of Cox Ferguson & Wham, LLC, of Laurens, and C. Rauch Wise, of Greenwood, for Respondent.

Solicitor J. Strom Thurmond, Solicitor Barry J. Barnette and Amie Clifford, all of Columbia, for Amicus Curiae Solicitors' Association of South Carolina, Inc.

Suzanne B. Cole, of Spartanburg and Candice A. Lively, of Chester, for Amicus Curiae South Carolina Network of Children's Advocacy Centers and University of South Carolina Children's Law Center.

JUSTICE FEW: Farid A. Mangal was convicted of criminal sexual conduct with a minor, lewd act upon a child, and incest. After his convictions were affirmed, Mangal filed this action for post-conviction relief (PCR). He argues trial counsel was ineffective for not objecting to improper bolstering testimony. The PCR court refused to rule on the improper bolstering issue because the court found Mangal did not raise it in his PCR application or at the PCR hearing. The court of appeals reversed, finding the improper bolstering issue was raised to the PCR court. The court of appeals then proceeded to grant PCR on the merits of the issue before it was considered by the PCR court. We reverse the court of appeals and reinstate the PCR court's order.

I. Facts and Procedural History

The facts surrounding Mangal's sex crimes are set forth in detail in the court of appeals' opinion. *Mangal v. State*, 415 S.C. 310, 781 S.E.2d 732 (Ct. App. 2015). Focusing on those facts relevant to the specific issues in this appeal, the victim—Mangal's nineteen-year-old daughter—testified Mangal had been sexually assaulting her since she was ten years old. She described where, when, and how it happened. On cross-examination, trial counsel questioned the victim about inconsistencies in her testimony and suggested she had a motive to lie about the sexual abuse—to gain freedom from Mangal's strict parenting. Mangal testified in his defense and claimed the victim and her mother fabricated the allegations.

Mangal's improper bolstering claim is based on the testimony of the State's witness Nancy Henderson, M.D., a pediatrician the trial court qualified as an expert "in the examination, diagnosis, and treatment of child sex abuse." Dr. Henderson testified she conducted a physical examination of the victim and discovered her "hymen

tissue looked very, very normal" except for a "marked narrowing" at one spot.[1] Dr. Henderson concluded this was "a sign of some type of penetration." She then testified the victim had been "sexually abused," and that her opinion was "based on the history [the victim] shared with me and based on my examination." Trial counsel cross-examined Dr. Henderson in part by emphasizing her reliance on the victim's history—as opposed to the physical examination—in forming her opinion that the hymen injury resulted from sexual abuse.

The jury convicted Mangal of criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the second degree (two counts), lewd act upon a child,[2] and incest. The trial court sentenced Mangal to thirty years in prison, and the court of appeals affirmed his convictions. *State v. Mangal*, Op. No. 2009-UP-113 (S.C. Ct. App. filed March 4, 2009).

Mangal filed his PCR application without the assistance of counsel.[3] As required by section 17-27-50 of the South Carolina Code (2014) and Rule 71.1(b) of the South Carolina Rules of Civil Procedure, he made the application on the form prescribed by this Court. *See* Form 5, SCRCP Appendix of Forms. In the blank requiring the applicant to "State concisely the grounds on which you base your allegation that you are being held in custody unlawfully," Mangal handwrote, (a) "ineffective assistance of counsel trial," (b) "prejudiceness," (c) "ineffective assistance of appellate counsel." In the blank requiring the applicant to "State concisely and in the same order the facts which support each of the grounds set out [above]," Mangal handwrote (a) "failure to preserve direct appeal issue," (b) "failed

---

[1] Dr. Henderson explained the hymen "is a type of flexible tissue in the adolescent population that partially covers the vaginal opening."

[2] This offense is now classified as criminal sexual conduct with a minor in the third degree under subsection 16-3-655(C) of the South Carolina Code (2015).

[3] There is no provision of law for the appointment of counsel in a PCR proceeding unless the application raises questions of law or fact which the court determines require a hearing. *See* Rule 71.1(d), SCRCP ("If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent."); *see also Whitehead v. State*, 310 S.C. 532, 535, 426 S.E.2d 315, 316 (1992) ("Rule 71.1(d) mandates the appointment of counsel for indigent PCR applicants whenever a PCR hearing is held to determine questions of law or fact.").

to investigate documentary evidence and witnesses," and (c) "fail to make an additional object[ion] to the sufficiency of the curative charge or moved for a mistrial." He also wrote "will amend pursuant to SCRCP, Rule 71.1" to include "new grounds upon appt. of PCR counsel," in apparent recognition that Rule 71.1(d) requires, "Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary."

Mangal was subsequently appointed counsel, and later retained a different attorney who represented him at the PCR trial, but no written amendment to Mangal's original application was filed. Mangal's counsel began the PCR hearing by calling witnesses, giving no indication to the PCR court he intended to raise any issues not set forth in the original application. During his presentation of evidence, PCR counsel asked trial counsel why he did not object to "improper bolstering" testimony given by Dr. Henderson, and the State briefly cross-examined him on the same subject. However, PCR counsel did not mention any intent to make an ineffective assistance claim based on a failure to object to improper bolstering testimony until the end of the hearing. At that point, he argued trial counsel was ineffective in several respects not mentioned in the original application, including for not objecting to the alleged improper bolstering testimony of Dr. Henderson.

The PCR court denied relief in a written order without addressing the improper bolstering issue. Mangal made a motion under Rule 59(e) of the South Carolina Rules of Civil Procedure to alter or amend the judgment, arguing the PCR court should have addressed the improper bolstering issue. The PCR court denied the motion and held the improper bolstering issue was "not presented to the court in the application or in an amendment, and no testimonial evidence from the applicant was presented in support of these allegations."

Mangal filed a petition for a writ of certiorari seeking review of the denial of PCR, which we transferred to the court of appeals pursuant to Rule 243(l) of the South Carolina Appellate Court Rules. Mangal argued trial counsel was ineffective for not objecting to Dr. Henderson's testimony and the PCR court erred by not ruling on the issue. The court of appeals agreed the PCR court erred in not ruling on the improper bolstering issue. *Mangal*, 415 S.C. at 317-18, 781 S.E.2d at 735-36. The court of appeals then addressed the merits of the issue, finding Dr. Henderson's testimony was improper bolstering and counsel was ineffective for not objecting to it. 415 S.C. at 319-20, 781 S.E.2d at 736-37. The court of appeals remanded to the court of general sessions for a new trial. 415 S.C. at 319-20, 781 S.E.2d at 737. The State filed a petition for a writ of certiorari for review of the court of appeals' decision, which we granted.

II. Standard of Review

Our standard of review in PCR cases depends on the specific issue before us. 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. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We do not defer to a PCR court's rulings on questions of law.[4] "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." *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 (citing *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard. *See Winkler v. State*, 418 S.C. 643, 663, 795 S.E.2d 686, 697 (2016) (applying an abuse of discretion standard to the trial court's decision on a motion for a continuance); *Sweet v. State*, 255 S.C. 293, 296, 178 S.E.2d 657, 658 (1971) (same).

III. Presentation of the Improper Bolstering Issue

We first address the court of appeals' ruling that the improper bolstering issue was presented to the PCR court, and thus the PCR court erred in not ruling on it. We find the PCR court acted within its discretion in refusing to address the issue. First, the written application makes no mention of a claim based on improper bolstering, and no amendment to the written application was ever made. Second, PCR counsel began the hearing without mentioning there would be any additional claims for ineffective counsel beyond those listed in the original application. Third, even when PCR counsel questioned trial counsel on why he did not object to Dr. Henderson's testimony, he did not inform the PCR court he would make a claim for ineffectiveness based on the failure to make an objection.

Fourth, when PCR counsel did finally mention an ineffectiveness claim based on the testimony of Dr. Henderson, he did not make the claim with specificity. In

---

[4] The court of appeals incorrectly stated "an appellate court 'gives great deference to the PCR court's . . . conclusions of law,'" quoting our own incorrect statement in *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). *Mangal*, 415 S.C. at 316, 781 S.E.2d at 734. We clarify that appellate courts review questions of law de novo, with no deference to trial courts.

what was essentially a closing argument, PCR counsel argued for relief on several unrelated grounds, and then stated,

> We also brought up the issue of Dr. Henderson. I believe in this case we have no case law specifically on allowing an expert to say in her opinion abuse occurred. She wasn't asked that question. She gave that answer. It did not receive an objection which we believe it should have. It was improper vouching.

There was no further discussion of any claim for ineffectiveness based on trial counsel not objecting to Dr. Henderson's testimony.

To the extent PCR counsel's brief statement constitutes a claim for ineffective assistance of counsel, we find a PCR judge would have difficulty recognizing it. The entire evidentiary presentation at the PCR hearing regarding trial counsel's decision not to object to Dr. Henderson's testimony consisted of three points. First, the PCR court was informed that the State asked Dr. Henderson, "Do you have an opinion within a reasonable degree of medical certainty based on your education, training, and experience, and based on your findings on examination of the victim, whether those findings are consistent with a penetrating injury?" Second, PCR counsel immediately commented, "Which was an appropriate question under our law, I would think." Third, the PCR court was informed Dr. Henderson stated she "believed [the victim] had been abused."[5] Thus, the only evidentiary basis PCR counsel presented to support the premise that Dr. Henderson's testimony was improper bolstering was the fact Dr. Henderson gave her opinion—based in part on physical findings from an objective medical examination—that the victim suffered a penetrating injury resulting from sexual abuse.

In its opinion concluding Dr. Henderson's testimony was improper bolstering, the court of appeals relied on several additional portions of Dr. Henderson's testimony that were not revealed to the PCR court at any point during the PCR hearing. First, the court of appeals relied on the fact Dr. Henderson testified she considered "the

[5] Mangal's PCR counsel inaccurately quoted Dr. Henderson's testimony. She never used the word "believed." Instead, she stated, "Based on the history that she shared with me and based on my examination I felt that it was consistent with a, that she had been abused." She was then asked, "Also opinion as to whether she was sexually abused, that opinion is," and she replied, "That she had been, yes, sir."

history that [Victim] gave [her]" in reaching her opinion the victim had been abused. 415 S.C. at 319, 781 S.E.2d at 736. However, the PCR hearing transcript contains no mention of this testimony. Second, most of the testimony the court of appeals relied on to support its conclusion Dr. Henderson's testimony was improper bolstering was actually elicited by trial counsel on cross-examination. There was no reference to any of that testimony during the PCR hearing.

Finally with regard to the PCR court's exercise of discretion in refusing to address the improper bolstering issue, Mangal filed a Rule 59(e) motion asking the PCR court to consider the claim. The PCR court denied the motion, finding "no testimonial evidence . . . was presented in support of these allegations." We agree with the PCR court. The most generous interpretation of the improper bolstering claim—as counsel described it to the PCR court in closing argument and in the Rule 59(e) motion[6]—limits the claim to the failure to object to Dr. Henderson's direct examination opinion testimony. That testimony provides no support for the claim other than Dr. Henderson considered the victim's history—in addition to her objective findings—in reaching her opinion that the penetrating injury resulted from sexual abuse. Notably, however, Dr. Henderson did not repeat to the jury the victim's history.

From a procedural standpoint, the court of appeals relied on *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006), which it found "similar" to this case, to support its conclusion the PCR court erred by not ruling on the improper bolstering issue. *Mangal*, 415 S.C. at 317, 781 S.E.2d at 735. *Simpson* is similar to this case in that the PCR court refused to rule on a PCR claim "because Simpson did not specifically raise it in his PCR application." 367 S.C. at 599, 627 S.E.2d at 707. Also similar to this case, Simpson filed a Rule 59(e) motion challenging the PCR court's refusal to rule on the issue. 367 S.C. at 600 n.3, 627 S.E.2d at 708 n.3. We held "Simpson should have been permitted to amend his PCR application to conform to the evidence presented." 367 S.C. at 599, 627 S.E.2d at 708.

However, there are significant dissimilarities between *Simpson* and this case. First, *Simpson* was an appeal from a three and one-half day PCR hearing, and PCR counsel's intention to pursue the disputed issue was made clear *during* the PCR hearing. The issue concerned an alleged *Brady*[7] violation involving a bag of

---

[6] Mangal's current PCR appellate counsel did not represent him at the PCR hearing or in filing the Rule 59(e) motion.

[7] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

money, which trial counsel testified he learned of "two hours before testifying" at the PCR trial,[8] and the State knew about it in time to present a witness "whom the State called for the specific purpose of addressing the . . . issue." 367 S.C. at 599, 627 S.E.2d at 707. The PCR court also left the record open in *Simpson* for the State to submit additional evidence. 367 S.C. at 608, 627 S.E.2d at 712. Here, on the other hand, the State had no notice Mangal intended to pursue the claim until the end of the hearing, after all the evidence had been presented. Though the State did conduct a brief cross-examination of trial counsel on his decision not to object to Dr. Henderson's testimony, the State had little reason to suspect her testimony would form part of the basis of a PCR claim yet to be made.

Second, the PCR court in *Simpson* made a specific finding as to the merits of the *Brady* claim, stating "the contents of the bag could have been exculpatory," and "this evidence should have been preserved and, thus, been subject to discovery." 367 S.C. at 599, 627 S.E.2d at 707. We observed, "Despite this finding, the [PCR] court ruled that the issue about the bag of money was not preserved for review because Simpson did not specifically raise it in his PCR application." *Id.* Here, the PCR court made no such finding on the merits of the improper bolstering issue.

Finally, we specifically relied in *Simpson* on Rule 15(b) of the South Carolina Rules of Civil Procedure, under which—we stated—"pleadings may be amended, even after judgment, to conform to issues tried by express or implied consent but not raised in the original pleadings." 367 S.C. at 599, 627 S.E.2d at 708 (citing Rule 15(b), SCRCP). The focus of a Rule 15(b) analysis is prejudice to the opposing party. *See Harvey v. Strickland*, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002) (holding Rule 15(b) "[a]mendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result."). We analyzed prejudice in *Simpson*, holding "the State would not be prejudiced by such an amendment given that the State cross-examined Simpson's defense counsel on the issue and was permitted to present its own witness . . . to contest the issue's

---

[8] In *Simpson*, we stated, "Simpson's defense counsel . . . testified that he learned about the bag of money *only* two hours before testifying." 367 S.C. at 599, 627 S.E.2d at 707. We used the word "only" to emphasize the merit of the *Brady* claim—that trial counsel was never informed of exculpatory information. We did not mention it in relation to the late indication of an intent to pursue the PCR claim. The important fact here is that the applicant's intent to pursue the claim was clear *during* the PCR hearing.

relevance." *Simpson*, 367 S.C. at 599, 627 S.E.2d at 708. The court of appeals did not mention any prejudice analysis in this case before relying on *Simpson* to find error in the PCR court's refusal to allow an amendment.

IV. Excusing Procedural Default in PCR Proceedings

There have been rare cases in which we have excused PCR applicants from procedural failures such as occurred in this case. In *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016), for example, the PCR applicant properly amended his application to assert "a claim that the State violated his due process rights by presenting false evidence to the jury" with its presentation of DNA evidence. 416 S.C. at 589, 788 S.E.2d at 223. The PCR court granted relief on another issue, as a result of which the applicant's death sentence was vacated. 416 S.C. at 586, 788 S.E.2d at 222. The PCR court "summarily denied the remaining claims, including Simmons's challenge to the DNA evidence, 'as without merit.'" 416 S.C. at 591, 788 S.E.2d at 224. As to the summary denial of those claims, "Simmons failed to file a Rule 59, SCRCP motion, as our issue-preservation rules require." *Id.*; *see Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (holding that when a PCR court fails to make specific findings as to an issue, a Rule 59(e) motion is necessary to preserve the issue for appeal). We held that although the State was "technically correct" to argue Simmons' DNA claim was procedurally barred, "dismissing the writ of certiorari would be fundamentally contrary to the interests of justice." *Simmons*, 416 S.C. at 591, 788 S.E.2d at 224. We remanded the case to the PCR court for a new trial on the DNA claim. 416 S.C. at 593-94, 788 S.E.2d at 225.

Our ruling in *Simmons* was based on the State's presentation—though innocent—of false evidence underlying the State's analysis of DNA. 416 S.C. at 591, 788 S.E.2d at 224. We relied on precedent from the Supreme Court of the United States and this Court to support the need for the "extraordinary action" we took under that circumstance to excuse the procedural bar. 416 S.C. at 591-92, 788 S.E.2d at 224 (citing *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217, 1221 (1959) and *Riddle v. Ozmint*, 369 S.C. 39, 47-48, 631 S.E.2d 70, 75 (2006)).

In most PCR cases, however, we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases. In *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), for example, we refused to relax procedural requirements simply "on the ground that his first . . . PCR application was insufficient due to ineffective PCR counsel." 305 S.C. at 448, 409 S.E.2d at 393.

In *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992), the applicant attempted to raise on appeal for the first time a burden-shifting claim based on trial counsel's failure to object to the trial court's malice charge. 309 S.C. at 409, 424 S.E.2d at 478. As to the merits of the claim, we found "the malice charge . . . is so diseased with burden-shifting presumptions that it violates *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)." *Plyler*, 309 S.C. at 410-11, 424 S.E.2d at 478. Nevertheless, we affirmed the denial of PCR, stating, "Since this issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred." 309 S.C. at 409, 424 S.E.2d at 478. In *Marlar*, we reversed the court of appeals for addressing an issue not specifically addressed in a PCR order when the applicant did not make a motion to alter or amend pursuant to Rule 59(e). 375 S.C. at 410, 653 S.E.2d at 267. We stated, "Because respondent did not make a Rule 59(e) motion . . . , the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues . . . ." *Id.*; *see also Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (stating the failure to file a Rule 59(e) motion as to an issue not addressed by the PCR court leaves the issue unpreserved).

We have often considered the tension between the rights at stake in PCR proceedings and the application of traditional procedural requirements for the presentation and preservation of issues. *See, e.g.*, *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999). The Supreme Court of the United States recently addressed this tension in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). The issue in *Martinez* was "whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." 566 U.S. at 5, 132 S. Ct. at 1313, 182 L. Ed. 2d at 280. After Martinez was convicted in the state court of Arizona of two counts of criminal sexual conduct with a minor, the state appointed new counsel for the direct appeal. 566 U.S. at 5-6, 132 S. Ct. at 1313-14, 182 L. Ed. 2d at 280. While the direct appeal was pending, Martinez's newly-appointed counsel initiated a state PCR proceeding. 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 280. However, counsel made no claim of ineffective assistance of trial counsel, and later filed a statement asserting there were "no colorable claims at all." 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 280-81. The state court dismissed the PCR action. 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 281.

Later, Martinez filed a second PCR action in state court with new counsel, this time asserting trial counsel provided ineffective assistance. 566 U.S. at 6-7, 132 S.

Ct. at 1314, 182 L. Ed. 2d at 281. The state court dismissed this PCR action, finding Martinez was procedurally barred from pursuing ineffective assistance claims that should have been asserted in his first PCR action. 566 U.S. at 7, 132 S. Ct. at 1314, 182 L. Ed. 2d at 281. Martinez subsequently filed a writ of habeas corpus in federal court, again raising the ineffective assistance of counsel claims. *Id.* The district court refused to address the claims on the ground they were barred by procedural default in state court, and "Martinez had not shown cause to excuse the procedural default." 566 U.S. at 7-8, 132 S. Ct. at 1315, 182 L. Ed. 2d at 281. After the Ninth Circuit affirmed, the Supreme Court granted certiorari. 566 U.S. at 8, 132 S. Ct. at 1315, 182 L. Ed. 2d at 282.

The Supreme Court held "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17, 132 S. Ct. at 1320, 182 L. Ed. 2d at 288. In doing so, the Court recognized the right to the effective assistance of trial counsel is a "bedrock principle in our justice system," and acknowledged applicants "confined to prison" and "unlearned in the law" often have difficulty complying with procedural rules in a PCR case. 566 U.S. at 12, 132 S. Ct. at 1317, 182 L. Ed. 2d at 284. The Court then stated,

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.

566 U.S. at 14, 132 S. Ct. at 1318, 182 L. Ed. 2d at 285-86.

We first considered *Martinez* in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013). We held *Martinez* "is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." 404 S.C. at 365, 745 S.E.2d at 377. We considered *Martinez* again in *Robertson*. Reaffirming *Kelly*, we held "*Martinez* does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel." 418 S.C. at 516, 795 S.E.2d at 34. In *Robertson*, however, we permitted the PCR applicant to pursue a

successive application the PCR court found was procedurally barred. 418 S.C. at 516, 795 S.E.2d at 34.

The Supreme Court's decision in *Martinez* reminds us that the Sixth Amendment guarantee of effective assistance of counsel is a "bedrock principle in our justice system." *Simmons* and *Martinez* counsel us that there are situations where the interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure.[9] These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

As we stated in *Odom* and repeated in *Robertson*,

> "All applicants are entitled to a full and fair opportunity to present claims in one PCR application."

Robertson, 418 S.C. at 513, 795 S.E.2d at 33; *Odom*, 337 S.C. at 261, 523 S.E.2d at 755.

V. The Procedural Default in This Case

This is not an appropriate case in which to excuse Mangal from his procedural default. As we explained, the PCR court acted within its discretion to refuse to

---

[9] *See* 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice and Procedure* § 1029 (4th ed. 2015) ("The federal rules are designed to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies."); *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) ("In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules."); 3 *Cyclopedia of Federal Procedure* § 8.2 (3d ed., rev. 2017) ("The spirit of the Rules is to settle controversies upon their merits rather than to dismiss actions on technical grounds, to permit amendments liberally, and to avoid, if possible, depriving a litigant of a chance to bring a case to trial.").

address any claim based on Dr. Henderson's direct examination testimony. In addition to that testimony, however, the court of appeals relied on Dr. Henderson's cross-examination testimony to support its conclusion of improper bolstering. This testimony does not convince us to excuse the procedural default.

First, none of it was presented to the PCR court at the hearing. In addition, the State makes a convincing argument that trial counsel elicited this testimony intentionally pursuant to a valid trial strategy. *See Watson v. State*, 370 S.C. 68, 72-73, 634 S.E.2d 642, 644 (2006) (finding counsel's performance was not deficient in making the decision not to object to "inadmissible" testimony because his strategy—that doing so "might lead to the more damaging introduction" of other evidence—was valid).

Trial counsel testified this was "not the first time I've been with Dr. Henderson." When asked if he expected Dr. Henderson to give an opinion on whether the victim had been sexually abused, trial counsel answered, "Not only did I expect it, but if she had answered any other way I would have been shocked, because Dr. Henderson's testimony is canned testimony. And she'll testify the same way in every trial." The State argues trial counsel, knowing Dr. Henderson would give an opinion the victim had been sexually abused, attempted to undermine her opinion by demonstrating to the jury that Dr. Henderson's opinion was not based on the objective results of her physical examination, but rather on the victim's fabricated statements. The State argues trial counsel then intentionally invited Dr. Henderson to admit she based her opinion on the truth of what the victim told her. According to the State, this allowed trial counsel to impeach Dr. Henderson's opinion with the weaknesses he had previously shown in the victim's credibility. Otherwise, the State argues, trial counsel was left with an expert opinion based only on objective physical findings—a far more difficult opinion to impeach. We need not decide whether this was a valid trial strategy.[10] We simply find this evidence does not support the extraordinary action of excusing Mangal's procedural default.

---

[10] If we were to excuse the procedural default for failing to present this claim to the PCR court, it would be necessary to remand to the PCR court for a hearing because the PCR court was not given the opportunity to make factual findings as to the reasonableness of this strategy, and if found not to be a reasonable strategy, whether the applicant suffered prejudice. *See Simmons*, 416 S.C. at 593, 788 S.E.2d at 225 ("We sit today in an appellate capacity and making findings of fact de novo would be contrary to this appellate setting.").

VI. Conclusion

We **REVERSE** the court of appeals' finding that the PCR court erred in refusing to address the improper bolstering issue, and **REINSTATE** the PCR court's order denying PCR.

KITTREDGE, J., concurs. BEATTY, C.J., HEARN, J., and Acting Justice Costa M. Pleicones concur in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Lisabeth Kirk Rogers, Respondent.

Appellate Case No. 2017-001159

Opinion No. 27740
Submitted September 14, 2017 – Filed October 4, 2017

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Lisabeth Kirk Rogers, of Seneca, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and Respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a public reprimand or a suspension not to exceed one year. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts and Law

Respondent was employed by Oconee Medical Center (OMC) as General Counsel. A patient at OMC had no family or friends to care for her, so Respondent volunteered to act as her guardian and conservator. Respondent did not discuss the

possible conflicts of interest that could arise out of her appointment with the patient and did not get the patient to waive these conflicts.

Respondent billed the patient for her time as conservator; the patient's bills totaled $8,687. The patient's home needed repairs, and Respondent hired her son to do cleaning and repair work on the home for $10 per hour. Respondent paid her son a total of $700. Respondent's son had a history of drug abuse, but Respondent believed him to be sober at that time. Respondent gave her son permission to stay in the home while he was working as he did most of the work at night after his day job. At some point, Respondent's son moved into the patient's home. Respondent was not aware of her son's move into the home, but she acknowledges she would have known if she had inspected the utility bills she was paying on the patient's behalf.

Respondent admits she did not properly monitor the work her son was performing at the patient's house. She states she had meningitis and was required to be hospitalized both in and out of state over a three month period during the time her son was working on the house. When Respondent returned to work, she discovered the patient's home had been vandalized by her son and/or his friends. She also discovered her son had forged the patient's name to the patient's car title and sold the patient's car. Additionally, her son had sold some of the patient's possessions. Respondent promptly reported the matter to the police.

Respondent was arrested and charged with Failing to Report Exploitation of a Vulnerable Adult by the Seneca Police Department. She was accepted into pretrial intervention program (PTI), and her charge was expunged. Respondent made full restitution, including all fees she collected, and apologized to the patient. She also performed 48 hours of community service and attended a class required of all PTI participants.[1]

---

[1] By order dated March 22, 2016, Respondent was placed on interim suspension based on this criminal charge. With the filing of this opinion, this interim suspension has been dissolved. *See* Rule 2(n), RLDE (defining an interim suspension as a "temporary suspension from the practice of law pending a final determination in any proceeding under these rules.").

Respondent admits her conduct violated Rule 1.7 (lawyer shall not represent client if representation involves concurrent conflict of interest; concurrent conflict of interest exists if there is significant risk that representation of client will be materially limited by lawyer's personal interest) and Rule 8.4 (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct or do so through the acts of another; it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules of Professional Conduct contained in Rule 407, SCACR. Respondent admits these violations constitute grounds for discipline under Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or bring legal profession into disrepute or conduct demonstrating unfitness to practice law), RLDE, Rule 413, SCACR.

Conclusion

We find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand Respondent for her misconduct.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Darryl D. Smalls, Respondent.

Appellate Case No. 2017-001219

Opinion No. 27741
Submitted September 14, 2017 - Filed October 4, 2017

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Darryl D. Smalls, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and Respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension for no less than nine (9) months and no more than three (3) years. Respondent requests that any suspension be made retroactive to October 10, 2016, the date of his interim suspension. We accept the Agreement and impose a definite suspension of eighteen (18) months from the practice of law. We grant Respondent's request to make his suspension retroactive to the date of his interim suspension.

Facts and Law

Pattern of Failure to Pay Court Reporters

On May 5, 2009, Respondent received a transcript for a deposition and an invoice for $107.75 from Southern Reporting (Southern). Southern sent several notices to Respondent that payment was due and called Respondent in an attempt to collect, but could not reach him. On December 2, 2009, Southern filed a complaint with ODC. After notice of the complaint, Respondent paid the invoice on January 19, 2010.

Graber Reporting Service (Graber) issued invoices for transcripts to Respondent in October 2009 for $130.35, in July 2010 for $483.65, and in August 2010 for $321.59. After repeated attempts to collect these invoices, Graber filed a complaint with ODC in February 2012. After notice of the complaint, Respondent paid the invoices on March 12, 2012.

On January 25, 2012, Respondent received a transcript of a deposition and an invoice for $183.25 from Ray Swartz & Associates (Swartz). Swartz sent Respondent several letters asking for payment of the invoice. On October 24, 2012, Swartz filed a complaint with ODC. After notice of the complaint, Respondent paid the invoice on November 27, 2012. Respondent's failure to pay Swartz followed his receipt of a letter of caution in April 2012 for the same misconduct.

Graber issued invoices for transcripts to the Respondent in May 2013 for $526.05 and in July 2013 for $319.75. After repeated attempts to collect these invoices, Graber filed a second complaint with ODC on April 17, 2014. After notice of the complaint, Respondent paid the invoices on July 7, 2014. Respondent's failure to pay Graber followed his receipt of a letter of caution in April 2012 for the same misconduct.

On December 10, 2014, Respondent received a transcript of a deposition and an invoice for $78.50 from Creel Court Reporting (Creel). After repeated phone messages and several collection letters, Creel could not collect payment and filed a complaint with ODC on January 7, 2016. Respondent has yet to pay these

invoices. Respondent's failure to pay Creel followed his receipt of a letter of caution in April 2012 and a confidential admonition in October 2014 for the same misconduct.

Respondent admits his pattern and practice of failing to timely pay for court reporting services violates Rule 4.4 (in representing a client, lawyer must have respect for rights of third persons) and Rule 8.4(e) (it is professional misconduct to engage in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct (RPC) found in Rule 407, SCACR.

Pattern of Failure to Respond to Disciplinary Inquiries

On December 14, 2009, Respondent was notified of the complaint from Southern and given fifteen (15) days to submit a written response. On January 7, 2010, ODC sent a certified letter to Respondent reminding him of his obligation to respond. On February 2, 2010, Respondent submitted his written response, thirty-five (35) days late. ODC dismissed the complaint after Respondent paid the invoice.[1]

On February 23, 2012, Respondent was notified of the first Graber complaint and given fifteen (15) days to submit a response. On March 19, 2012, ODC received the Respondent's timely written response. On April 17, 2012, ODC concluded the first Graber complaint with a letter of caution citing Rule 4.4 and Rule 8.4(e), RPC, Rule 407, SCACR, after Respondent paid the invoices.

On November 8, 2012, Respondent was notified of the Swartz complaint and given fifteen (15) days to submit a written response. On November 27, 2012, ODC received Respondent's timely written response. On April 12, 2013, ODC issued a

[1] Rule 20, RLDE, Rule 413, SCACR, prohibits the use of the allegations in a dismissed complaint for any purpose unless it is re-opened by the Commission on Lawyer Conduct. Rule 20 allows a dismissed complaint to be re-opened by an Investigative Panel upon a finding that an additional complaint has been filed against the same lawyer involving allegations which are related or similar to the dismissed complaint. On March 4, 2016, Disciplinary counsel moved to re-open Southern's dismissed complaint. Respondent did not file a return or otherwise oppose the motion. The Investigative Panel granted the motion, and Southern's complaint was re-opened.

notice to appear to Respondent pursuant to Rule 19, RLDE, Rule 413, SCACR, requiring his appearance on April 30, 2013. Respondent did not appear. On May 30, 2013, ODC issued a notice to appear which rescheduled Respondent's appearance to July 9, 2013. Respondent appeared and responded to questions. On October 29, 2014, the Commission on Lawyer Conduct (Commission) accepted an Agreement for Discipline by Consent and concluded the Swartz complaint (along with the second Graber complaint and two client complaints) with a confidential admonition, with conditions, citing Rule 4.4, Rule 8.1(a) (a lawyer shall not fail to respond to a lawful demand for information in connection with a disciplinary matter), and Rule 8.4(e), RPC, Rule 407, SCACR.

On April 22, 2014, Respondent was notified of the second Graber complaint and given fifteen (15) days to submit a written response. On May 15, 2014, ODC sent a certified letter to Respondent reminding him of his obligation to respond. On May 23, 2014, ODC issued a notice to appear to Respondent requiring his appearance on July 2, 2014. Respondent did not appear. On July 10, 2014, ODC notified Respondent of its intention to file a petition for his interim suspension for failing to respond. On July 11, 2014, Respondent submitted his written response, sixty-five (65) days late. On October 29, 2014, the Commission accepted an Agreement for Discipline by Consent and concluded the second Graber complaint (along with the Swartz complaint and two client complaints) with a confidential admonition, with conditions, citing Rule 4.4, Rule 8.1(a), and Rule 8.4(e), RPC, Rule 407, SCACR.

On January 20, 2016, ODC sent Respondent a copy of the Creel complaint and a notice of investigation, giving him fifteen (15) days to submit a written response. Respondent did not submit a response. On January 20, 2016, ODC issued a notice to appear and subpoena to Respondent, requiring his appearance on March 4, 2016. Respondent did not appear.

Respondent admits his failure to timely respond and otherwise cooperate in disciplinary investigations violates Rule 8.1(a), RPC, Rule 407, SCACR.

Failure to Comply with Finally
Accepted Agreement for Discipline by Consent

In the Agreement for Discipline by Consent that concluded the Swartz complaint, the second Graber complaint, and two client complaints, Respondent agreed to

certain conditions. Those conditions included paying the investigation costs by November 29, 2014, completing the Legal Ethics and Practice Program (LEAPP) Ethics School and Law Office Management School by October 29, 2015, and maintaining $1,000 in his operating account to cover costs incurred on behalf of clients, including court reporting invoices.

The Commission sent letters reminding Respondent of his obligations on November 17, 2014, January 7, 2015, April 29, 2015, April 30, 2015, August 26, 2015, and January 8, 2016. Respondent did not complete the required LEAPP sessions, which were available to him in February 2015, September 2015, and February 2016. Furthermore, Respondent did not pay the investigation costs.

Respondent admits his misconduct violated the following Rules for Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct), Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to demand from disciplinary counsel), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or bring legal profession into disrepute or conduct demonstrating unfitness to practice law), and Rule 7(a)(9) (it shall be ground for discipline for lawyer to willfully fail to comply with terms of finally accepted agreement for discipline by consent).

Conclusion

We accept the Agreement for Discipline by Consent and impose on Respondent a retroactive definite suspension from the practice of law for eighteen (18) months, retroactive to the date of his interim suspension.

Prior to filing any petition for reinstatement, Respondent shall complete the LEAPP Program in its entirety, including Ethics School, Trust Account School, Advertising School, and Law Office Management School.

Within one hundred and twenty (120) days of the date of this order, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Edgefield and McCormick Counties. Effective October 10, 2017, all filings in all common pleas cases commenced or pending in Edgefield and McCormick Counties must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Cherokee	Clarendon
Colleton	Georgetown	Greenville	Hampton
Horry	Jasper	Lee	Oconee
Pickens	Spartanburg	Sumter	Williamsburg
Lexington	Saluda		

Edgefield and McCormick—Effective October 10, 2017

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
September 27, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Derek Vander Collier, Appellant.

Appellate Case No. 2015-000184

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 5518
Heard April 12, 2017 – Filed October 4, 2017

AFFIRMED

John Lafitte Warren, III, of Simmons Law Firm, LLC, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, all for Respondent.

LOCKEMY, C.J.: Derek Vander Collier appeals his conviction for second-degree burglary, arguing the trial court improperly limited his closing argument, erred in allowing the State to play recordings of two police interviews, and should not have allowed a witness to identify him in front of the jury. We affirm.

FACTS AND PROCEDURAL HISTORY

On November 20 and 21, 2013, the Jamaican Motor Inn in Myrtle Beach, South Carolina, was closed to visitors because the room doors were being repainted. Justin Kirkman, one of the subcontractors hired for this task, stayed in the penthouse on the fifth floor of the motel during the night to check the doors at thirty-minute intervals and close them when the paint dried.

During the early morning hours on November 21, while Kirkman was in the penthouse between rounds, he heard a suspicious sound coming from another floor. Kirkman took the motel elevator to the third floor, where he noticed the light in one of the rooms was on even though he had turned off all the room lights. Kirkman went to that room and saw a man attempting to remove a television from the wall of the room.

According to Kirkman, when he confronted the stranger, the man drew what appeared to be a semiautomatic handgun and fled the room to the first floor of the motel. Despite the brevity of the encounter, Kirkman observed the man face-to-face at a close distance for ten to fifteen seconds. Furthermore, the light in the motel room was on during the confrontation, and although the man wore a hooded sweatshirt, the hood was down during their encounter.

Kirkman followed the man to the parking lot and saw him drive away in a four-door sedan from the late 1990s or early 2000s. Kirkman saw no other occupants inside the car but noticed a television in the back seat. Kirkman chased the car in an unsuccessful attempt to get the license tag number. After returning to the third floor and noticing one of the rooms was missing a television, Kirkman called the police.

About a week after the incident, Kirkman went to the police station to meet with an artist, who prepared a computer sketch of the suspect based on his description. Later, Kirkman viewed a photo lineup. After viewing the lineup, Kirkman narrowed his selection to two photos. Although he was "leaning towards" one of the two, he could not make a positive identification because of the poor quality of the images and his reluctance to implicate the wrong person. However, Kirkman also told the police he was certain he would recognize the suspect in person.

On January 29, 2014, Brian Truex, who was then a violent crimes detective with the Myrtle Beach Police Department, recognized Collier on the street. Truex

attempted to contact Collier because he recognized Collier was facing numerous burglary charges. Initially, Collier attempted to evade arrest by giving Truex a false name, but the police confirmed his identity, arrested him, and transported him to the Myrtle Beach Police Department for an interview.

Truex conducted Collier's first police interview, which began five to ten minutes after his arrest. Before receiving *Miranda*[1] warnings, Collier informed Truex he had smoked crack cocaine a short time earlier[2]; however, he did not appear to be under the influence of any drugs and was eager to proceed with the interview. Collier had only a tenth-grade education, but he was articulate and able to answer Truex's questions in an appropriate manner, providing specific and incriminating details about the burglaries for which he was being investigated. During the interview, Collier admitted to burglarizing various area hotels but claimed he did this to help his mother, who he claimed was having financial problems. Collier also revealed his method for removing televisions from hotel rooms and acknowledged he had been at the Jamaican multiple times, an admission supported by specific information that Collier provided about the hotel and surrounding landmarks.

Carol Ann Allen, a property crimes detective with the Myrtle Beach Police Department, conducted the second and third interviews of Collier on January 30 and 31, 2014. Collier discussed the November 21 incident at the Jamaican during the third interview, which took place at his request. Although Collier denied pulling a gun on Kirkman, he indicated he was the individual whom Kirkman encountered.

On April 24, 2014, Collier was indicted on one count of second-degree burglary and one count of possession of a weapon during the commission of a violent crime. The State called the case to trial on December 8, 2014.

After a jury was selected, the trial court held *Jackson v. Denno*[3] hearings to determine the admissibility of recordings of the first and third interviews. Over

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] According to Collier, he "had smoked like four to five minutes before they arrested [him]"; however, Truex testified Collier "stated he had smoked crack approximately forty-five minutes prior to the interview."

[3] *See Jackson v. Denno*, 378 U.S. 368, 376-77 (1964) (stating a defendant in a criminal proceeding has the "constitutional right . . . to object to the use of [a]

Collier's objections, the trial court ruled the recordings of both interviews admissible with appropriate redactions.

Based on assurances from the State that it would not ask Kirkman to identify Collier in front of the jury, the trial court did not hold a *Neil v. Biggers*[4] hearing. However, during the State's case-in-chief, Kirkman, the first witness to testify, was asked if the person he saw attempting to dismount a television from a hotel room wall was "in the courtroom." Because a *Neil v. Biggers* hearing had not taken place, the trial court declared a mistrial.

A different jury was selected, and the State called the case to trial the next day. The court held an in camera *Neil v. Biggers* hearing and ruled, over Collier's objection, Kirkman could make an in-court identification of Collier in front of the jury.

Among the concerns expressed by the defense to Kirkman's in-court identification of Collier was Kirkman's presence in the courtroom during the *Jackson v. Denno* hearing the previous day, during which audio recordings of Collier's interviews were played.[5] The defense, however, did not question Kirkman or any other witness about what Kirkman saw or heard during the *Jackson v. Denno* hearing or whether his presence in the courtroom during the hearing affected his ability to make an impartial in-court identification.[6]

---

confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession").

[4] *See Neil v. Biggers*, 409 U.S. 188, 198-99 (1972) (requiring the trial court to determine whether an out-of-court eyewitness identification of a criminal defendant is admissible based on (1) whether the identification resulted from unnecessary and unduly suggestive procedures and (2) if so, "whether under the 'totality of circumstances' the identification was reliable" notwithstanding the suggestive identification procedures).

[5] The defense made no contemporaneous objection to Kirkman's presence in the courtroom during the *Jackson v. Denno* hearing because that hearing took place during the first trial, when the State mistakenly informed the trial court it would not ask Kirkman to make an in-court identification.

[6] The State noted Kirkman was in the courtroom for only a few minutes and the limited part of the recording that he heard did not include any admissions by

During the State's case-in-chief, Kirkman revealed on direct examination he was currently on probation for burglary and non-aggravated charges from Colorado. On cross-examination, defense counsel pointed out possible inconsistencies between what Kirkman claimed he told the police about the car that he saw leaving the Jamaican and the description of the vehicle in the police report. The State then requested to play a tape of Kirkman's statement to the police as a prior consistent statement. The defense objected, asserting "[i]t would just be bolstering testimony by the State" but indicated it would agree to playing the recording of "those specific questions."

The trial court noted Kirkman was asked specific questions about what he told the police and informed counsel it would grant the State's request if the defense intended to argue to the jury that Kirkman had an improper motive to fabricate his testimony and was "lying to save himself from going back to jail." Defense counsel conferred with Collier and advised the court Collier would not make this argument. Based on this assurance, the trial court denied the State's request.

Recognizing a "continuing objection by the Defense," the trial court allowed Kirkman to identify the artist's sketch made according to his description. Kirkman also identified Collier in front of the jury. The trial court also allowed the State to publish recordings of the first and third interviews to the jury.

The defense rested without presenting a case-in-chief, and the trial proceeded to closing arguments. When presenting its closing argument, the State pointed out Kirkman was still on probation and argued, "If [Kirkman] were to be convicted of lying to the police or lying to the [c]ourt, he could go to jail, he could go to prison. He has a lot of incentive to tell the truth. . . . [Kirkman] has no motivation to lie. [Kirkman] is a reliable witness." The defense did not object to these remarks. However, during closing argument by the defense, counsel asserted, "You tell me who has got motivation. Justin Kirkman has motivation, already convicted felon[,] already on probation." The State objected, and the jury exited the courtroom.

The State moved to reopen the case and play the recording of Kirkman's statements to the police, arguing it was entitled to this relief because defense counsel's closing remarks about Kirkman's motivation violated the defense's prior representation that

---

Collier. The State also reminded the trial court that (1) there was no sequestration order in effect when the *Jackson v. Denno* hearing took place and (2) Kirkman was promptly removed from the courtroom when a sequestration order was issued.

it would neither argue recent fabrication on Kirkman's part nor suggest Kirkman gave false testimony to avoid incarceration. In response, defense counsel noted (1) he advised the trial court he would be attacking Kirkman's general credibility as a witness and (2) the State's closing argument included discussion of Kirkman's believability and reliability.

The trial court denied the State's motion to reopen the case. However, observing the defense did not make a timely objection to the remarks at issue in the State's closing argument, the trial court refused to allow the defense to argue Kirkman was "lying on the stand to save himself from going to jail because he's a convicted felon." The trial court emphasized its ruling was limited to allegations that Kirkman had an improper motive to testify untruthfully and specifically ruled the defense could attack Kirkman's credibility in other ways, including references to Kirkman's status as a convicted felon. Although the trial court prohibited the defense from suggesting Kirkman had an improper motive to give false testimony, it did not instruct the jury to ignore the remarks defense counsel had already made that Kirkman, as a convicted felon, had motivation to lie.

When defense counsel resumed his closing argument, he included several points that called Kirkman's credibility into question, including (1) Kirkman's prior record, (2) Kirkman's inability to make a positive identification of Collier until his in-court identification at trial, and (3) the possibility that Kirkman misidentified the person whom he saw attempting to remove a television from the Jamaican.

The jury found Collier guilty on the charge of second-degree burglary but acquitted him on the weapons charge. The trial court sentenced Collier to thirteen years' imprisonment with credit for time served. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court improperly limit Collier's closing argument by prohibiting him from responding to the State's alleged bolstering of its key witness?

II. Did the trial court err in allowing the jury to hear recordings of Collier's first and third police interviews?

III. Did the trial court err in allowing Kirkman's in-court identification of Collier?

STANDARD OF REVIEW

"The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.* This broad discretion applies to rulings regarding closing arguments. *See State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) ("[A] trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. . . . The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial.").

"In determining whether a confession was given 'voluntarily,' [the appellate court] must consider the totality of the circumstances surrounding the defendant's giving the confession." *State v. Pittman*, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007). However, "[t]he trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

"[A trial] court's decision to allow the in-court identification of an accused will not be reversed absent an abuse of discretion or prejudicial legal error." *State v. Simmons*, 384 S.C. 145, 166, 682 S.E.2d 19, 30 (Ct. App. 2009).

LAW/ANALYSIS

I. Limitations on Collier's Closing Argument

Collier first argues the trial court improperly limited his closing argument when it prohibited him from responding to remarks in the State's closing argument that allegedly bolstered Kirkman's credibility. Collier maintains the trial court allowed the State to argue during its closing that Kirkman "ha[d] no motivation to lie" but unfairly deprived him of the right to dispute this assertion during his own closing argument. However, Collier's objection on appeal is not directed at the bolstering itself; rather, he contends the State's alleged bolstering of Kirkman's credibility and reference to his motivation not to lie opened the door and invited a response from the defense. We find no reversible error.

Under the "invited response" doctrine, also referred to as the "invited reply" doctrine, "[o]nce the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant." *Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006); *see also Vaughn v. State*, 362 S.C. 163, 169-70, 607 S.E.2d 72, 75 (2004) ("Once a defendant opens the door, the relevant question in determining if a defendant's rights were violated is whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974))). "[T]he idea of an invited response is not to excuse improper comments, but to determine their effect on the trial as a whole." *Id.* at 169, 607 S.E.2d at 75.

The doctrine has generally been applied upon a finding "that although a solicitor's closing argument was inappropriate, it was responsive to statements or arguments made by the defense, and thus did not deny the defendant due process." *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016). Nevertheless, we have found no binding authority prohibiting the use of the doctrine to justify an allegedly improper closing remark by a criminal defendant.

In the present case, however, the remarks in the State's closing argument that prompted the defense to assert Kirkman had an improper motive to fabricate his testimony did not constitute bolstering. To the contrary, the State's closing remarks were confined to the record and did not evidence any personal vouching of Kirkman's credibility. *See State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony.").

We further hold Collier had the burden to make a contemporaneous objection to any improper remarks in the State's closing argument instead of reneging on his earlier promise not to argue Kirkman fabricated his story to avoid a probation violation. *See U.S. v. Young*, 470 U.S. 1, 13 (1985) (advocating restraint in invoking the invited response doctrine and stating "the prosecutor at the close of defense summation should have objected to the defense counsel's improper statements with a request that the court give a timely warning and curative instruction to the jury").

Furthermore, to the extent the remarks at issue invited a response from the defense, we hold the trial court gave the defense adequate leeway to attack Kirkman's credibility in its closing argument. The court did not prohibit the defense from questioning Kirkman's observation of the suspect or from pointing out inconsistencies between Kirkman's testimony and police accounts of the incident in its summation. Moreover, although the defense was not permitted to assert that Kirkman testified falsely to avoid criminal penalties, the trial court expressly allowed the defense to address Kirkman's status as a convicted felon and the implication of his criminal record on his general credibility as a witness. In view of these considerations, we hold the restrictions imposed by the trial court on Collier's closing argument were not an abuse of discretion.

Finally, we note that before the trial court ruled on the State's motion to reopen, defense counsel had already argued to the jury that Kirkman, as a convicted felon on probation, had motivation to lie about what had happened. The trial court did not instruct the jury to disregard this remark or order it stricken from the record. Furthermore, after the trial court prohibited the defense from discussing improper motive in its closing argument, the defense never proffered additional remarks that it would have made but for this ruling. Given these circumstances, we hold Collier has not provided sufficient evidence to prove he was prejudiced by the trial court's ruling. *See State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 268 (1996) ("The burden of proof is on Appellant to show prejudice."); *State v. Reeves*, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) ("Error is harmless when it could not reasonably have affected the results of the trial."); *State v. White*, 371 S.C. 439, 447, 639 S.E.2d 160, 164 (Ct. App. 2006) ("[O]ur appellate courts have consistently held that trial court should only be reversed when an error is prejudicial and not harmless.").

II. Admission of Collier's First and Third Interviews

Collier argues the jury should not have heard the recording of his first police interview because the interview took place shortly after he smoked crack cocaine. Collier points out that Truex, who conducted this interview, acknowledged during his testimony that crack cocaine can impair a user's decisions. Collier contends the highly addictive and intoxicating effects of the drug were likely to have induced him to do almost anything to avoid incarceration even if the primary effects of the drug had worn off. In opposing the admission of his third police interview, Collier argues (1) he requested this interview because of concerns about admissions he made during the first interview and (2) law enforcement made promises of

leniency during this interview that overbore his will. The trial court rejected Collier's arguments that his statements during these interviews were not made voluntarily. We find no abuse of discretion.

Truex testified Collier did not appear to be under the influence of any drugs and refused his offer to postpone the first interview. In the audio recording of this interview submitted as an exhibit in this appeal, Collier appears relaxed and forthcoming with details, and we detected no signs of overreaching on the part of law enforcement in eliciting information from Collier. Therefore, we affirm the trial court's decision to allow the jury to hear the recording of the first interview.

Collier also asserts the tape of his third interview should have been suppressed because "had Appellant not [made] his first statement under the influence of drugs, he would not have given a subsequent statement."[7] In essence, Collier argues because his first statement was involuntary due to his intoxication, his third statement must also be involuntary. Because we find his first interview was voluntary, we find the trial court did not abuse its discretion in finding the statements in the third interview were also voluntary.

We also reject Collier's argument that his cooperation with law enforcement and admissions during the third interview were a desperate attempt to appease the police in order to avoid incarceration; to the contrary, the detectives who interviewed him only assured him that telling the truth would not hurt his situation. *See State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246-47 (1990) ("A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise.").

III. In-Court Identification

Finally, Collier argues the trial court should not have allowed Kirkman to identify him before the jury because the pretrial identification procedure was unduly suggestive. Collier points out (1) he was the only person in the photo lineup who, like the suspect, wore a hooded sweatshirt; (2) Kirkman had only limited time to view the suspect; (3) Kirkman was able to eliminate only four of the six individuals depicted in the lineup, made no firm identification, and admitted he could not be one hundred percent sure the photograph he selected was indeed the

[7] Collier does not assert any other basis for finding the third interview was involuntary.

person he encountered at the Jamaican; and (4) Kirkman himself expressed concern that he may have been unduly influenced by the fact that Collier was the only subject in the photo lineup who was wearing a hooded sweatshirt. Collier further contends (1) there were no indicators that Kirkman's out-of-court identification was so reliable that there could be no substantial likelihood of misidentification and (2) the problems resulting from the pretrial identification procedure were exacerbated by Kirkman's presence in the courtroom during the *Jackson v. Denno* hearing. We affim the admission of the in-court identification.

"A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *Id.* However, "[a]n identification may be reliable under the totality of circumstances even when a suggestive procedure has been used." *State v. Simmons*, 384 S.C. 145, 166, 682 S.E.2d 19, 30 (Ct. App. 2009). In determining whether an identification is reliable, the court must consider the following factors: (1) the witness's opportunity to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of any prior descriptions by the witness of the suspect, (4) the witness's level of certainty at the confrontation, and (5) the amount of time between the crime and confrontation. *Id.* at 166-67, 682 S.E.2d at 30.

To support his position that the photo lineup was unduly suggestive, Collier argues he was the only person depicted in the lineup who, like the person Kirkman confronted, wore a hooded sweatshirt. Collier points out Kirkman himself was reluctant to make a positive identification and even admitted he worried he "was associating . . . since the gentleman in the photo had a hoodie on, that [he] was just associating those two together . . . ." Although Kirkman's hesitation was probative of the reliability of his out-of-court identification, it does not necessarily follow that the lineup was tainted by suggestive police tactics. *Cf. State v. Turner*, 373 S.C. 121, 127-28, 644 S.E.2d 693, 697 (2007) (finding a photo lineup "not unduly suggestive . . . [d]espite the variation in the background colors" because the defendant "d[id] not stand out in comparison with the other individuals in the line-up"); *State v. Stewart*, 275 S.C. 447, 449-51, 272 S.E.2d 628, 629-30 (1980) (rejecting all challenges by the appellant to the pretrial identification procedures

used by the police even though, among other complaints, the appellant was the only person placed in a physical lineup who had a beard).

Furthermore, regardless of any alleged flaws in the photo lineup, the trial court gave adequate consideration to the requisite factors in deciding to admit Kirkman's in-court identification of Collier. Although more than one year passed between the incident and Collier's trial, Kirkman testified he viewed the suspect face-to-face and in good lighting for ten to fifteen seconds. There was no evidence of any distractions that would have compromised Kirkman's degree of attention. Shortly after the incident, Kirkman assisted law enforcement in preparing a sketch that was provided to this court and resembles the picture from the photo lineup that he tentatively selected. Finally, Kirkman maintained since the time he met with the police that he "would a hundred percent recognize him in[]person." Moreover, during the *Neil v. Biggers* hearing, Kirkman testified he was sure Collier was the person he confronted at the Jamaican "[t]he second [he] saw [Collier's] face when [Kirkman] was in the courtroom" and his recognition of Collier was based on this prior encounter. This evidence is sufficient to support a finding that Kirkman's in-court identification was reliable even if the pretrial identification procedure was suggestive.

We further affirm the trial court's decision to admit Kirkman's in-court identification of Collier even though Kirkman was in the courtroom during the *Jackson v. Denno* hearing.

"Where identification is concerned, the general rule is that a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation." *State v. Ramsey*, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2002). The purpose of the hearing is "to determine whether, under the circumstances of [the] case, [the witness's] identification of [the defendant is] so tainted as to require its suppression at trial." *State v. Simmons*, 308 S.C. 80, 83, 417 S.E.2d 92, 93-94 (1992). "In such [a] hearing, the testimony should be taken and all factual questions determined including those involving the [defendant's] constitutional rights pertinent to the admissibility of the proffered evidence." *State v. Cash*, 257 S.C. 249, 253, 185 S.E.2d 525, 527 (1971).

Here, an in camera *Neil v. Biggers* hearing took place, during which the defense expressed concern about Kirkman's presence in the courtroom during the *Jackson*

v. Denno hearing. However, defense counsel conceded he "d[idn't] know how much that played into [Kirkman's] identification all of a sudden a year later when it never happened before." Moreover, there was no evidence to support a finding that Kirkman's in-court identification of Collier resulted from anything Kirkman saw or heard during the *Jackson v. Denno* hearing. To the contrary, Kirkman testified at the *Neil v. Biggers* hearing "[t]he second" he saw Collier's face in the courtroom he was "one hundred percent" sure Collier was the person he observed attempting to remove a television from the Jamaican and his immediate recognition of Collier was based on his observation of Collier that night. Considering this testimony and the absence of any other indicia of undue influence, we hold Kirkman's in-court identification of Collier was not "so tainted as to require its suppression at trial." *Simmons*, 308 S.C. at 83, 417 S.E.2d at 94.

AFFIRMED.

HUFF and THOMAS, JJ., concur.