

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO GEORGETOWN COUNTY S.C. SUPREME COURT
Court of Common Pleas
Honorable Kristi Curtis, Circuit Judge
Appellate Case No. 2022-001326

STANLEY MOULTRIE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE**

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RESPONDENT'S ISSUE PRESENTED

The post-conviction relief court properly denied post-conviction relief where trial counsel did not object to witness testimony or move for a mistrial.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

A Georgetown County grand jury indicted Petitioner for kidnapping and armed robbery. On August 22-24, 2016, Petitioner proceeded to jury trial before the Honorable D. Craig Brown. Petitioner was convicted of armed robbery and acquitted of kidnapping. (App 272). Based on his prior record, the trial court sentenced him to life without the possibility of parole (LWOP). (App 277). Petitioner filed a direct appeal, arguing the trial court erred in denying his motion for a mental health evaluation. (App. 307-321). The Court of Appeals affirmed in an unpublished opinion pursuant to Rule 220(b), SCACR. *State v. Moultrie*, 2019-UP-013 (S.C. Ct. App. filed Jan. 9, 2019).

Petitioner filed a *pro se* application for post-conviction relief (PCR) April 17, 2019, and after retaining counsel, he filed an amended application for PCR November 30, 2020 and a second amended application for PCR on March 10, 2021. (App. 351-397). Petitioner proceeded to an evidentiary hearing before the Honorable William H. Seals, Jr. on June 23, 2021, who ultimately denied and dismissed the application with prejudice by order dated July 31, 2021. (App. 467-490). Petitioner did not appeal, but after a hearing before the Honorable Kristi R. Curtis., was granted a belated appeal September 22, 2022, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. 505-510)

RELEVANT FACTS

On January 20, 2015, the victim, Joyce Messinger, was working as an assistant manager at Shoe Show in Georgetown, when Petitioner entered the store shortly after opening. (App. 124). Applicant was wearing a blue jumpsuit, blue cap, and round rimmed glasses. (App. 130). Applicant approached Messinger asking if she could check if the store had a size 13 shoe. (App. 124). There was no size 13 in the shoe requested, so Messinger grabbed the phone to call the nearby Conway store to see if they had the shoes in stock. (App. 124). When she turned around, Petitioner grabbed her neck and told her to open the safe, saying he used to work there and knew they had one. (App. 125). When she informed him there was no safe, Petitioner told her to empty the registers and hand him the money, while he continued to hold the knife against her neck (App. 125). Petitioner sat Messinger on a bench in front of the employee door. (App. 125). After checking that Petitioner had left the scene, Messinger walked slowly to the front of the store, locked the doors, and called 911. (App. 126). Messinger identified Petitioner in a photo lineup about 10 days later. (App. 132). Messinger testified at trial, she did not feel free to leave while Applicant had a knife and a grip on her. (App. 127-128). Petitioner was arrested and charged with armed robbery and kidnapping.

Ronald Walker, Asset Protection Associate at Walmart, was called to testify. (App. 140). A video from January 20, 2015, was admitted into evidence showing a vehicle entering the parking lot, stopping in a spot, parking for twenty to thirty minutes before someone exited and walked into Shoe Show and then exiting the store minutes later and driving away. (App. 143). Beyond seeing the individual in the video walked with a limp, the video quality was too poor to tell exactly who the individual was. (App. 143). Sergeant Jason Ward from Georgetown Police Department testified they were able to get a tag on the car from the surveillance video and photos and the vehicle was registered to Stanley Moultrie, Petitioner. (App. 161).

Officers obtained a search warrant for Petitioner's residence and found a car matching the tag and description in the video, size 13 shoes, glasses, and a blue jumpsuit.(App. 165-166). The State also offered cell phone records indicating that Petitioner was in the vicinity of the Shoe Show during the time of the robbery. (App. 216). The jury found Petitioner guilty of armed robbery, but acquitted him of the kidnapping charge.

ARGUMENT

I. The post-conviction relief court properly found that Counsel was not ineffective for failure to object to burden shifting by the Court.

Petitioner contends that the PCR court erred finding that trial counsel was not ineffective for failing to object to the trial court's repeated reference to the jury's duty as "searching for the truth" and rendering a "true and just verdict." The PCR Court found Applicant's allegation is without merit as Applicant failed to present any evidence to suggest that Counsel's performance was deficient, nor did Counsel present any evidence that Applicant was prejudiced by Counsel's failure to object to support the allegation.

When an applicant alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. The attorney's performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970). Our Supreme Court has cautioned trial courts against including language in jury instructions that may have the effect of lessening the State's burden of proof. The Court has discouraged instructions which urge the jury to "seek the truth," State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000), or "return a verdict that is 'just' or 'fair' to all parties." State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012). However, the Court has not reversed convictions in any of those cases.

In similar cases dealing with “seek for the truth” language, the Supreme Court has made clear that context matters. In Aleksey, the Court emphasized that the trial court's charge that the jury should “seek the truth” occurred during his instructions regarding witness credibility. It noted the charge was “prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof.” State v. Aleksey, 343 S.C. 20, 29, 538 S.E.2d 248, 253 (2000). It concluded there was “not a reasonable likelihood the jury applied the judge's instructions to convict appellant on less than proof beyond a reasonable doubt.” Id.

In State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), the Court considered a challenge to a trial judge's comments that a trial is "a search for the truth," that the jury took an oath to "reach a fair and just verdict," and to find the "true facts." The Court stated that the trial judge should "refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict." Beaty, 423 S.C. at 34, 813 S.E.2d at 506. However, the Court did not reverse and, instead, found: "our review

of the entirety of the judge's opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal." *Id.* Again, the Court emphasized that the comments "were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in Aleksey." *Id.* See also State v. Patterson, 425 S.C. 500, 511, 823 S.E.2d 217, 224 (Ct. App. 2019), *reh'g denied* (Feb. 21, 2019), *cert. denied* (June 28, 2019) (finding trial court's remarks that the jury should "search for the truth" did not warrant reversal); State v. Needs, 333 S.C. 134, 154, 508 S.E.2d 857, 867 (1998) (affirming conviction despite trial court's erroneous instruction for "jurors to seek a reasonable explanation other than the guilt of the accused" because other portions of the charge correctly emphasized the State's burden of proof beyond a reasonable doubt); State v. Pradubsri, 420 S.C. 629, 641, 803 S.E.2d 724, 730 (Ct. App. 2017) (affirming conviction despite use of phrase "search of the truth" during reasonable doubt instruction because "review of the record and the entire charge reveals no prejudice sufficient to warrant reversal").

Counsel was not ineffective on this ground because the court's remarks, when viewed in their totality, were not offered in a way that lessened the State's burden of proof and no prejudice to Petitioner was shown. Specifically, the court's opening remarks in using the "search for the truth" language were not offered as a charge on the law but, instead, seemingly as preparation of the jury for the slow process that is the practice of law and how it differs from what is depicted on television. (App. 110-111). Additionally, after using this language, the Court explained the burden of proof appropriately: "[t]he State therefore has the burden of proving each of the elements of the indictment beyond a reasonable doubt and it will be your duty . . . to decide whether the State has met that burden." (App. 111). Thus, much like in similar cases where the court determined the court statements, even if improper, did not warrant relief, the opening remarks here, when viewed

in their totality, were separated out for what was otherwise the correct statement concerning the burden of proof and did not prejudice Petitioner.

Further, similar language used in the jury charge was also non-prejudicial and did not deter from the otherwise correct statement of the burden of proof in the charge. Though the jury was instructed to “determine the truth” in the case, the Court again made the burden of proof clear: that they are to “giv[e] to the Defendant the benefit of every reasonable doubt on each and every issue.” (App. 262). The Court also made clear the burden of proof in the case was placed on the State to prove Applicant was the perpetrator beyond a reasonable doubt early in the charge and that Applicant was presumed innocent until proven guilty before again stating that his guilt must be determine beyond a reasonable doubt and then delved into the definition of reasonable doubt. (App. 252-254). The Court repeated this burden of proof again several other times throughout the charge. (App. 257-262). Thus, any mention of searching for the truth in the charge was not used in shifting the burden of proof and did not have an impact on the trial results because of the clarity with which the Court laid out the burden of proof during the charge, along with the overwhelming evidence of guilt implicating Petitioner. Therefore, this Court should deny Certiorari on this claim.

II. The post-conviction relief court properly found that counsel was not ineffective for failing to object to the prosecutor’s alleged vouching for the victim’s credibility.

Petitioner argues that the PCR court erred in finding the solicitor’s statements vouching for the state witness were improper. To find whether a prosecutor’s comments in closing argument violated a defendant’s due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019).

“It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence.” United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994); see also State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (“Undoubtedly, a Solicitor may argue the State’s version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.”). A prosecutor should “prosecute with earnestness and vigor” and “may strike hard blows, [but] is not at liberty to strike foul ones.” Berger v. United States, 295 U.S. 78, 88 (1935). “If a Solicitor’s closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs.” New, 338 S.C. at 319, 526 S.E.2d at 240. “On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury’s passions or prejudice.” Id. “[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.” Berger at 88.

“Improper comments do not automatically require reversal if they are not prejudicial to the defendant.” Id., 428 S.C. at 550, 837 S.E.2d at 40 (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). A PCR court must view the alleged impropriety of the prosecutor’s argument in the context of the entire record, and the applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Id.

Here, nothing the solicitor stated rose beyond the level of fair inferences drawn from her testimony. Though the solicitor stated that the victim’s emotions on the stand were genuine, he made clear it was the jury’s decision concerning the veracity of her statements and her credibility as a witness and to use the testimony, in conjunction with other evidence presented, when determining whether Petitioner was guilty. (App. 233-37). Though the solicitor stated he

personally found her credible, he acknowledged it was the jury's determination to make and did made it clear that it was none other than a personal opinion. The statements did not appeal to personal biases of the jury, inflame their passions, or make improper insinuations, suggestions, or make assertions of personal knowledge. Accordingly, the statements made were not improper and, therefore, Counsel was not ineffective for failure to object to the statements.

Further, even if the statements were improper, Petitioner was not prejudiced. Ordinarily, the existence of overwhelming evidence does not automatically preclude a finding of prejudice, as an element of ineffective assistance of counsel claim. Smalls v. State, 422 S.C. 174,189, 810 S.E.2d 836, 844 (2018). "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 Strickland standard of 'a reasonable probability... the factfinder would have had a reasonable doubt' can be met." Id. at 191, 810 S.E.2d 836 at 845. Here, Victim gave a statement to what Petitioner was wearing and those clothes were found at Petitioner's home, Petitioner was identified in a lineup, Petitioner's car was seen on surveillance video in the parking lot where the incident occurred as well as Petitioner's cell phone records placed him in the vicinity of the incident. As stated above, the evidence against Petitioner in the case was overwhelming and, thus, any improper statements made were not prejudicial to Petitioner. Consequently, Counsel was not ineffective because, even if this Court found Counsel deficient, Petitioner was not prejudiced by the deficiency. Therefore, Certiorari on this issue should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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