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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO COLLETON COUNTY

Court of Common Pleas
Hon. Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-000182
Opinion No. 5997

MACK WASHINGTON,

Petitioner,

v.

THE STATE,

Respondent.

PETITION FOR REHEARING

On July 5, 2023, this Court issued an opinion reversing the denial of post-conviction relief pertaining to Petitioner's convictions for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. Washington v. State, Op. No. 5997 (S.C.Ct.App. filed July 5, 2023) (Davis Adv.Sh. No. 26 at 27). Pursuant to Rule 221(a) of the South Carolina Appellate Court rules, Respondent respectfully petitions this Court for rehearing.

- I. This Court misapprehended the law of ineffective assistance of counsel because it did not show deference to trial counsel's strategic decision to seek a mistrial rather than contemporaneously object in the presence of the jury and request a curative instruction.

Trial counsel's decision not to immediately object to the solicitor's comment in the presence of the jury was reasonable trial strategy, even if this meant trial counsel waived his opportunity for the trial court to sustain the objection in the presence of the jury, strike the comment, and give a curative instruction. By objecting in the presence of the jury, trial counsel would have necessarily called attention to the comment, with the only potential benefit being a curative instruction. Trial counsel testified that, in his experience, curative instructions were not effective and only served to call attention to the comment. Trial counsel did not believe this to be a wise course of action. Instead, he chose to forego a contemporaneous objection that he believed would not be to his client's benefit and raise the issue in a motion for mistrial instead. By waiting to raise his objection as a mistrial motion, he avoided bringing the comment to the attention of the jury but retained the potential for the granting of a mistrial. The trial court entertained and ruled on his mistrial motion. Even though the motion was unsuccessful, trial counsel avoided the more serious harm—in his professional opinion—that would have resulted from bringing the comment to the jury's attention, potentially alerting them to the possibility that Washington did in fact have a prior criminal record. Trial counsel's testimony at the PCR hearing shows that this was a calculated decision, not a mistake. The PCR court showed proper deference to trial counsel's strategic decision. See Strickland v. Washington, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential.").

This Court's opinion in this case sets a problematic precedent that could work to the disadvantage of future criminal defendants. Based on this decision, defense attorneys may feel compelled to act against their better judgment and object to all arguably improper comments in the presence of the jury, calling attention to those comments. Many of these objections will be unsuccessful, or will produce only marginal benefits for defendants. Many will in fact harm a

defendant's case by doing exactly what trial counsel sought to avoid in this case: drawing attention to the comment. As the United States Supreme Court has explained, defense attorneys must be able to exercise their professional judgment in ways that they believe will benefit their clients, even though there may be legitimate differences of opinion on which strategy is best in a given scenario. Decisions restricting reasonable strategic decisions could impair the "independence of defense counsel" such that his "performance . . . could be adversely affected." Strickland, 466 U.S. at 690.

It is true that trial counsel had an alternative course of action: to object in the presence of the jury, move to strike the comment, and request a curative instruction. Defense lawyers are constantly forced to choose between alternative strategies in a criminal trial. See United States v. Washington, 198 F.3d 721, 724 (8th Cir. 1999) (recognizing "the decision to move for a mistrial often must be made in a split-second and it involves numerous *alternative strategies* such as remaining silent, interposing an objection, requesting a curative instruction, or requesting an end to the proceeding") (emphasis added). Because trial counsel believed he had an arguable case for mistrial—a motion that was entertained and ruled on by the trial court—he reasonably chose not to immediately object and move to strike in the presence of the jury. He further decided not to seek a curative instruction because he did not want to bring the comment to the jury's attention. This was within trial counsel's discretion in exercise of his reasonable professional judgment. See Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000); see also United States v. Harris, 14 F. App'x 144, 146 (4th Cir. 2001) (explaining "it would have been a reasonable trial strategy to forego an instruction that would remind the jurors of the firearms" that were subject of alleged improper argument); Smalls v. State, 422 S.C. 174, 186, 810 S.E.2d 836, 842 (2018) (in context of improper opening statement, explaining "it may be reasonable for

trial counsel to simply ignore the misstatement . . . perhaps the circumstances of the trial—as perceived by trial counsel—unfold in such a way that pointing out the misstatement would no longer be beneficial"). The fact that the mistrial motion was denied does not negate the validity of trial counsel's strategic choice. This Court's holding in this case does not apply the "extreme deference" applicable to review of counsel's valid strategic choices.

II. This Court did not show proper deference to the PCR court's factual finding that Washington was not prejudiced.

The State respectfully submits this Court did not show proper deference to the PCR court's finding that Washington was not prejudiced. The likely effect of the solicitor's comments—i.e. the impact the comments had on the jury—is a factual question. See Smalls v. State, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018) (explaining "individual claims of deficient performance must be analyzed separately to determine whether either of them gives rise to a reasonable probability the result of the trial would have been different without counsel's error. . . . Ordinarily, the PCR court should make findings of fact on this issue, not us."). This Court recognized this as a factual question when, in its opinion, it cited cases establishing the "any evidence" standard of review and concluded that "probative evidence does not support the PCR court's finding that the solicitor's comments on a pattern only referred to the incidents presented to the jury." Washington, Davis Adv.Sh. No. 26 at 44.

The PCR court found the comments were reasonably interpretable as referring to Washington's pattern of conduct in this case, explaining the comments "did not reference [Washington's] prior criminal history or imply that he had one." App.698. This finding is supported by the record, where the solicitor referred to Washington's conduct related to the

incident itself, including his attempts to cover up his crime by destroying evidence and by intimidating his teenage codefendant. The solicitor used the word "pattern" earlier in closing argument when discussing Washington's attempts to manipulate witnesses, a topic to which the solicitor devoted significant time during her closing argument. App. 493, line 9.

The PCR court's interpretation is consistent with the language this Court quoted from S.C. Code Ann. §16-3-1700 (D), defining a pattern as "two or more acts occurring over a period of time, *however short*, evidencing *a continuity of purpose*." Washington, Davis Adv.Sh. No. 26 at 43 (emphasis added). There was no evidence presented at trial about Washington's criminal history, and the jury would have had no reason to think the solicitor was referring to prior crimes, regardless of the solicitor's intent. The PCR court found "the solicitor's use of the word 'pattern' did not indicate a past criminal history." App.698. Accordingly, the record supports the PCR court's finding that Washington was not prejudiced by the comments.

By contrast, this Court found that "the solicitor's comments referred to prior criminal convictions not in the record" and held "a curative instruction directing the jury to disregard the pattern comments may have cured any prejudice Petitioner may have suffered from the comments." Washington, Davis Adv.Sh. No. 26 at 44–45. The State respectfully submits that this holding does not show appropriate deference to the PCR court's finding that Washington failed to prove prejudice. Under the "abuse of discretion" standard of review, the appellate court should not reverse merely because it would have reached a different conclusion than the lower court. The PCR court found that these comments did not reasonably affect the result of trial in light of the strong case against Washington. The record supports the PCR court's finding.

In its opinion, this Court expressed concern that trial counsel failed to preserve the mistrial motion for appeal because he "waited until after the solicitor finished her closing

argument and the trial court dismissed the jury for a brief recess." Washington, Davis Adv.Sh. No. 26 at 44. The State respectfully submits that the issue would have been addressed on direct appeal. The comment came at the tail end of the solicitor's argument; the argument concludes on the same page of the trial transcript. App.496. Unlike in Black, trial counsel did not wait until after the jury charge to state the basis for his motion. While counsel waived any motion to strike the comment by not immediately objecting, the appellate court would likely have found his objection sufficiently contemporaneous to address the motion for mistrial. See State v. Eubanks, 437 S.C. 458, 486, 878 S.E.2d 335, 350 (Ct. App. 2022) (explaining that even though preservation rules were not strictly complied with, "we address the merits of this argument as the circuit court later addressed the juror issue in its order denying Eubanks's motion for a new trial"). The court's denial of the mistrial motion would have been subject to a deferential standard of review on direct appeal. See State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) ("The appropriateness of a solicitor's closing argument is left largely to the trial court's sound discretion, including the decision of whether to grant a defendant's motion for mistrial. Ordinarily, a trial court's rulings on closing arguments will not be disturbed.") (internal citation omitted).

Even if the issue was unpreserved, Washington was not prejudiced under the Strickland prejudice standard: whether, but for counsel's error, Washington would not have been convicted. A curative instruction would not have changed the result due to the strong case against Washington, as discussed in the State's brief, which the State incorporates into this petition. The State respectfully requests rehearing on this issue.

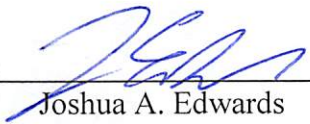
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for rehearing should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Petition for Rehearing on Jessica M. Saxon, Esquire, Petitioner's counsel of record, by sending one copy by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 20th day of July 2023.



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Date: Thursday, July 20, 2023 4:01:00 PM
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[Washington Mack - 2018-000182 - Petition For Rehearing \(03338441xD2C78\).PDF](#)

Good afternoon, Ms. Saxon.

Attached to this email is the State's Petition For Rehearing in the above matter. We will be filing the Petition electronically using the Court's AIS One Drive system to file the petition.

Sincerely,

Anne Mueller, Legal Assistant to Assistant Attorney General Joshua A. Edwards

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