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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Horry County
Honorable H. Steven DeBerry, IV, Circuit Court Judge
Appellate Case No. 2023-000525

ALQI DHIMO,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

“Trial counsel erred in failing to enter a specific Doyle objection and move for a mistrial after the solicitor’s initial comment on petitioner’s post-arrest silence in the case.” (footnote omitted).

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge somehow err by determining Dhimo failed to meet his burden of establishing defense counsel was constitutionally ineffective for failing to raise a Doyle-based objection to testimony elicited by the solicitor from a detective concerning who chose to end her interview with Dhimo when Dhimo neither demonstrated defense counsel’s performance was objectively unreasonable under the circumstances involved nor showed there was a reasonable likelihood the result of the trial would have been different but for trial counsel’s failure to raise a Doyle-based objection to the specified testimony?

STATEMENT OF THE CASE

In June of 2015, Petitioner Alqi Dhimo was arrested shortly after he was discovered on a beach with his penis exposed while in close proximity to an unconscious woman lying in the sand. In September of 2015, the Horry County Grand Jury indicted Dhimo for attempted third-degree criminal sexual conduct, indecent exposure, and kidnapping. On January 8, 2018, a jury trial was commenced on the attempted third-degree criminal sexual conduct and indecent exposure charges in the Horry County Court of General Sessions with the Honorable Steven H. John, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Dhimo of attempted third-degree criminal sexual conduct and acquitted him of indecent exposure. Following the verdict, the trial judge sentenced Dhimo to an eight-year term of imprisonment. Dhimo then timely filed and perfected an appeal.

On appeal, the Court of Appeals—following briefing—issued an unpublished decision unanimously affirming Dhimo’s conviction.¹ State v. Dhimo, Op. No. 2020-UP-031 (S.C. Ct. App. filed Feb. 5, 2020). Thereafter, Dhimo timely filed a petition for rehearing, and that petition was denied. However, the Court of Appeals withdrew its earlier opinion and issued a revised unpublished opinion again affirming Dhimo’s conviction. State v. Dhimo, Op. No. 2020-UP-031 (S.C. Ct. App. refiled Apr. 29, 2020). Following that, Dhimo filed a petition for a writ of certiorari in the Supreme Court, and that petition was denied.² On December 24, 2020, remittitur was issued.

¹ The records from the appellate proceedings in the Court of Appeals are presently available through the South Carolina Appellate Public Index. Appellate Records for State v. Alqi Dhimo, South Carolina Appellate Court Public Index, <https://ctrack.sccourts.org/public/caseView.do?csIID=66640>.

² The records from the appellate proceedings in the Supreme Court are presently available through the South Carolina Appellate Public Index. Appellate Records for State v. Alqi Dhimo,

Subsequent to the issuance of the remittitur, Dhimo timely filed an application for post-conviction relief (“PCR”), and, in response, the State filed a return requesting a more definite statement along with an evidentiary hearing. On November 30, 2022, Dhimo—through counsel—filed an amended PCR application raising additional grounds for relief.³ On the very same date, an evidentiary hearing was commenced in the Horry County Court of Common Pleas with the Honorable H. Steven DeBerry, IV, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement. Thereafter, through an order filed on March 9, 2023, the PCR judge denied and dismissed Dhimo’s PCR application. Dhimo then timely filed a notice of appeal.

South Carolina Appellate Court Public Index,
<https://ctrack.sccourts.org/public/caseView.do?csIID=72244>.

³ The amended PCR application is presently available through the Horry County Public Index. Records for Alqi Dhimo, Horry County Fifteenth Judicial Circuit Public Index, <https://publicindex.sccourts.org/horry/publicindex>.

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge’s factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (“Under the proper standard of review, the appellate court’s ‘view’ must be limited to whether there is probative evidence to support the PCR court’s factual findings.”). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge’s rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge’s decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR judge correctly determined Dhimo failed to meet his burden of establishing defense counsel was constitutionally ineffective for failing to raise a Doyle-based objection to testimony elicited by the solicitor from a detective concerning who chose to end her interview with Dhimo because Dhimo neither demonstrated defense counsel's performance was objectively unreasonable under the circumstances involved nor showed there was a reasonable likelihood the result of the trial would have been different but for trial counsel's failure to raise a Doyle-based objection to the specified testimony.

Relevant Facts

In the early morning hours of June 22, 2015, several security guards working at a hotel in Myrtle Beach, South Carolina, spotted Dhimo, a taxicab driver, lying in the sand at the beach in a very dark area. (Supp. App'x p. 75; pp. 109-113; p. 117; pp. 123-125). When they approached him to find out what was going on, Dhimo sprang up from the ground, and they realized his pants were pulled down in a manner that left his penis fully exposed. (Supp. App'x p. 117; p. 121; pp. 125-126). One of the security guards then asked Dhimo if he was okay, and Dhimo responded by irately urging them to back away and come no closer to him. (Supp. App'x pp. 112-114; p. 130).

Due to the unusual circumstances involved, the Myrtle Beach Police Department was contacted, and several officers quickly responded to the scene. (Supp. App'x p. 66; pp. 89-91; p. 115; p. 125; p. 131). Once there, they found Dhimo's taxicab illegally parked near the entrance to a beach access point, and its engine was still on. (Supp. App'x p. 66; p. 69; p. 111; p. 130; pp. 146-148). Additionally, the officers located a heavily-intoxicated woman passed out in the sand near where Dhimo—who had suspicious scratches and bite marks on his arm—had been lying on the beach before he was discovered by the security officers, and the woman's swimsuit bottom

was pulled to the side in a way that left her vagina exposed.⁴ (Supp. App'x pp. 67-68; p. 92; p. 126; p. 130; pp. 257-258; pp. 260-263). Upon making that troubling discovery, the officers attempted to awaken the woman, but they were unable to do so until they obtained some smelling salts. (Supp. App'x p. 68; p. 93).

Through the ensuing investigation into the matter, the woman was identified as Jessica Kessler (“Victim”), and the officers discovered she had sought a ride home in Dhimo’s taxicab at roughly 1:09 a.m. on the date of the incident. (Supp. App'x p. 55; p. 290; pp. 311-312). However, instead of taking her home, Dhimo—without ever starting his fare meter—drove her to a bar, purchased a number of liquor shots for her, and then took her on a circuitous drive that went past her house and ended up at the beach.⁵ (Supp. App'x pp. 133-137; p. 139; pp. 312-313; pp. 315-316). Once she was capable of communicating, Victim advised officers Dhimo attacked her at that final location, and the evidence—including her askew swimsuit bottom, his exposed penis, and his injuries—suggested he had attempted to sexually assault her.^{6 7} (App'x p. 59). Ultimately, based on what was uncovered, Dhimo was arrested and indicted for a number of offenses, including attempted third-degree criminal sexual conduct and indecent exposure. (App'x pp. 187-190; Supp. App'x pp. 10-11).

⁴ Based on a recording captured by Dhimo’s taxicab’s dashboard camera, Dhimo did not appear to have any injuries to his arm when he arrived at the beach. (Supp. App'x p. 319).

⁵ Dhimo even let Victim drive his taxicab at some point in the ride, and he had to help her out of it when they arrived at the beach because she passed out inside. (App'x pp. 176-177).

⁶ At the time she was found passed out on the beach, Victim’s blood alcohol concentration was estimated to be approximately 0.332%, which was a dangerously high level. (Supp. App'x pp. 213-214; pp. 216-218).

⁷ By the time of Dhimo’s trial, Victim was deceased, and, resultantly, her statements could not be admitted into evidence. (Supp. App'x p. 59).

Before Dhimo’s trial on those two charges got underway, the trial judge conducted a pre-trial hearing to address several outstanding matters. (App’x p. 3; p. 11). During the course of that hearing, the solicitor confirmed she had—in response to a motion made by defense counsel—redacted portions of a recording of Dhimo’s post-arrest interview with Detective Carol Allen from the Myrtle Beach Police Department. (App’x pp. 33-34). Amongst the redactions made, the solicitor noted the recording had been redacted to omit Dhimo’s invocation of his right to counsel. (App’x p. 11; p. 37). In response, defense counsel specifically confirmed he had no issues with the identified redactions. (App’x p. 12).

Later on during Dhimo’s trial, Detective Allen testified about her involvement in the investigation of Dhimo’s case. (Supp. App’x pp. 270-272). As part of her testimony, Detective Allen discussed her post-arrest interview of Dhimo, and the redacted version of the recording of that interview was admitted into evidence. (Supp. App’x pp. 272-280). After Detective Allen described what occurred during the interview, the solicitor elicited testimony from the detective indicating she “decided to end [her] part of the interview” after Dhimo advised her the source of his bite marks was “[n]ot from [Victim].” (Supp. App’x p. 280).

At that point, defense counsel swiftly objected, and an in camera hearing was conducted on the matter. (Supp. App’x p. 281). During that hearing, defense counsel asserted Detective Allen’s response constituted a factual misstatement that would mislead the jury because Dhimo—as opposed to the detective—had actually been the one to end the interview by invoking his right to counsel. (Supp. App’x p. 281). In rebuttal, the solicitor noted the State was not permitted to elicit testimony about a defendant invoking his right to counsel, and she further argued no factual misstatement occurred since the detective did, in fact, choose to end the interview after the invocation occurred. (Supp. App’x p. 281). At that point, the trial judge

instructed the solicitor to “clear . . . up” the matter of how the interview ended since it was not clear from the testimony presented the interview ended as a result of Dhimo invoking his right to counsel, and defense counsel confirmed he did not have any objection to such testimony being elicited since “that’s what happened.” (Supp. App’x pp. 282-283). However, defense counsel nonetheless moved—unsuccessfully—for a mistrial because the detective had purportedly “knowingly” made a misstatement of facts to the jury. (Supp. App’x p. 284). Following that, the trial proceeded forward, and the solicitor—with the approval of both the trial judge and defense counsel—elicited testimony from Detective Allen clarifying to the jury she ended the interview as a result of Dhimo’s request to do so. (Supp. App’x p. 285).

Thereafter, as Detective Allen’s testimony continued, defense counsel elicited testimony from her on cross-examination suggesting Dhimo had been “fully cooperative” with her. (Supp. App’x p. 298). Based on that, the solicitor asked Detective Allen on redirect examination whether terminating an interview was “fully cooperative.” (Supp. App’x p. 301). Immediately in response, defense counsel objected, and the trial judge swiftly sustained the objection and instructed the jury it was an improper one. (Supp. App’x p. 301). Then, following an in camera hearing in which defense counsel unsuccessfully moved for a mistrial, the trial judge directly instructed the jurors the question asked by the solicitor was improper, advised them it had been struck from the record, explained Dhimo had a constitutional right to stop an interview at any point in time, noted the solicitor was not permitted to comment in any manner on a constitutional right being exercised, and informed them they could not consider Dhimo’s invocation in “any shape, manner or form” when deciding the case. (Supp. App’x pp. 302-303).

Ultimately, at the conclusion of trial, the jury—after a little over an hour and a half of deliberations—convicted Dhimo of attempted third-degree criminal sexual conduct and acquitted

him of indecent exposure. (Supp. App'x p. 403). Notably, prior to that point, no additional references were ever made to Dhimo's invocation of his right to counsel, and, as part of her closing argument remarks, the solicitor expressly reiterated to the jury a defendant had every right to stop a statement at any time. (Supp. App'x pp. 354-372).

Subsequent to that and following an unsuccessful appeal, Dhimo sought relief through the filing of a PCR application and raised a number of allegations. (App'x pp. 99-105). Amongst the allegations raised, Dhimo—following a last-minute amendment submitted by PCR counsel—alleged defense counsel was constitutionally ineffective for failing to object to a particular reference to Dhimo's invocation of the right to remain silent that occurred during trial. (App'x pp. 99-105; pp. 121-122).

During the ensuing evidentiary hearing conducted on the matter, Dhimo's defense counsel noted he specifically objected to testimony elicited from Detective Allen by the solicitor about the manner in which her interview with Dhimo ended, and he further explained he did so because he was concerned that testimony misrepresented to the jury who actually ended the interview. (App'x pp. 142-143; p. 155). In addition to that testimony, the solicitor who prosecuted Dhimo's case explained she elicited the initial testimony from Detective Allen about how the interview ended because: (1) she was attempting to avoid revealing the interview ended after Dhimo invoked his right to counsel; and (2) she believed the detective did, in fact, choose to end the interview since she did so volitionally—and correctly—after the invocation was made. (App'x pp. 161-162). After that, the solicitor recounted she was ordered by the trial judge to reveal Dhimo was the one who truly ended the interview, and she noted she did not necessarily personally agree with that particular directive from the trial judge. (App'x p. 164).

At the conclusion of the hearing, PCR counsel—as part of his arguments—contended defense counsel was constitutionally ineffective for insisting the solicitor comment on Dhimo’s invocation of his right to silence, which PCR counsel maintained was improper and should not have occurred, after defense counsel became concerned the solicitor had elicited “untrue” testimony regarding the nature of how the law enforcement interview ended. (App’x pp. 167-168). Conversely, counsel for the State argued Dhimo’s application should be denied. (App’x pp. 169-170).

Upon considering the arguments of counsel, the PCR judge issued an order denying relief. (App’x pp. 174-186). In doing so, the PCR judge concluded defense counsel’s actions concerning the testimony regarding Dhimo’s invocation of his right to silence were reasonable under the specific—and “difficult”—circumstances involved. (App’x pp. 183-184). Furthermore, the PCR judge found there was no reasonable likelihood of a different outcome had defense counsel acted differently, including based on the fact the trial judge addressed a subsequent Doyle-based objection and presented a curative instruction to the jury in response. (App’x p. 184).

Law Applicable to Ineffective Assistance of Trial Counsel Claims

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). Pursuant to that right, the defendant is entitled to effective assistance of trial counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). However, that does not mean entitlement to perfect or mistake-free representation. Burt v. Titlow, 571 U.S. 12, 24 (2013). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Meanwhile, trial counsel’s assistance is considered constitutionally

ineffective only when it “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686.

When faced with a claim of ineffective assistance of trial counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant must establish: (1) trial counsel’s representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for trial counsel’s deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether trial counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Harrington v. Richter, 562 U.S. 86, 110 (2011) (instructing the proper analysis “calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind”). To establish deficiency, the applicant must demonstrate trial counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. Thus, trial counsel’s performance will be considered deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply “deviated from best practices or most common custom.” Richter, 562 U.S. at 105.

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as “[a]n error by counsel,

even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691. For that burden to be met, trial counsel’s deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the trial would have been different but for trial counsel’s unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). Moreover, “[t]he likelihood of a different result must be substantial, not just conceivable.” Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

Law Applicable to Comments Upon a Defendant’s Exercise of a Constitutional Right

Under both the state and federal constitutions, a criminal defendant has a constitutional right not to be compelled to incriminate himself or herself. See U.S. Const. amend. V (prohibiting a criminal defendant from being “compelled in any criminal case to be a witness against himself[.]”); S.C. Const. art. I, § 12 (“[N]or shall any person be compelled in any criminal case to be a witness against himself.”). As a result, both comments by the prosecution on a defendant’s silence and instructions by the trial judge indicating a defendant’s silence constitutes evidence of guilt are prohibited. Griffin v. California, 380 U.S. 609, 615 (1965); see Doyle v. Ohio, 426 U.S. 610, 618 (1976) (“[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.”).

“In particular, the State may neither comment upon nor present evidence at trial of a defendant’s decision to exercise his right to remain silent[.]” Edmond v. State, 341 S.C. 340,

346, 534 S.E.2d 682, 685 (2000); see McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.”); State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004) (“As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant’s failure to testify at trial is constitutionally impermissible.”). “The obvious purpose [of that prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions.” Edmond, 341 S.C. at 346, 534 S.E.2d at 685; see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) (“The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.”).

Importantly though, the mere mention of a defendant’s decision to exercise his right to remain silent during trial does not automatically constitute reversible error. See State v. Truesdale, 285 S.C. 13, 17, 328 S.E.2d 53, 56 (1984) (“When such a violation occurs, the question remains, however, whether it is cause for reversal or is harmless error beyond a reasonable doubt.”), rev’d on other grounds by Truesdale v. Aiken, 480 U.S. 527 (1989). Instead, such an occurrence only requires reversal when it actually results in prejudice to the defendant. Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001); see State v. Johnson, 306 S.C. 119, 129, 410 S.E.2d 547, 553 (1991) (declining to reverse Johnson’s conviction as a result of the introduction of testimony establishing Johnson invoked his right to counsel after determining the admission of that testimony was not prejudicial to Johnson’s case). Significantly, the burden rests upon the defendant to establish such an occurrence deprived him

of a fair trial. Gill, 346 S.C. at 221, 552 S.E.2d at 33; see also Weaver, 361 S.C. at 89, 602 S.E.2d at 794 (“[A]lthough it is improper for the solicitor to indirectly comment on a defendant’s failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.”).

Application of the Relevant Law to Dhimo’s Case

Through his petition for a writ of certiorari, Dhimo contends the PCR judge erred by refusing to grant relief based on defense counsel’s failure to raise a specific Doyle-based objection to certain testimony elicited by the solicitor. More specifically, Dhimo points to the portion of the testimony in which the solicitor elicited a response from Detective Allen indicating she decided to end her interview of Dhimo after he answered her queries about the source of his bite marks, and he contends that particular testimony constituted an impermissible comment on his post-arrest silence “by stating that the pre-trial interview of [him] ended[.]” Based on that, Dhimo asserts defense counsel should have raised an objection based on Doyle to that testimony instead of objecting to it as a misstatement of facts and should have further moved for a mistrial. Moreover, Dhimo maintains there was a reasonable probability the result of his trial or appeal “might” have been different but for defense counsel’s deficient performance even though the trial judge a short time later expressly provided a powerful curative instruction to the jurors indicating: (1) Dhimo had a constitutional right to stop his interview with law enforcement at any point in time; (2) it was improper for the solicitor to ask a question related to Dhimo’s exercise of his constitutional rights; and (3) they were not permitted to consider Dhimo’s exercise of his rights “in any shape, manner or form” when deciding Dhimo’s case.

Initially, contrary to Dhimo’s current contention on appeal, the solicitor *in no way* committed a Doyle violation by asking Detective Allen whether *she* decided to end her interview

of Dhimo. Simply put, evidence establishing *an officer* personally decided to stop a custodial interview of a suspect does not—without something more—constitute a direct or indirect comment on the suspect’s exercise of a constitutional right in any manner, and it likewise does not violate the mandates of Doyle for a jury to learn a pre-trial interview of a defendant ended at some point since every interview necessarily has to come to an end. See Greer v. Miller, 483 U.S. 756, 764-765 (1987) (explaining no Doyle violation occurs when a defendant’s post-arrest silence is not submitted to the jury as evidence from which it is allowed to draw any adverse inference); Lindgren v. Lane, 925 F.2d 198 (7th Cir. 1991) (“Doyle does not impose a prima facie bar against any mention whatsoever of a defendant’s right to request counsel, but instead guards against the exploitation of that constitutional right by the prosecutor.”). Therefore, defense counsel could not have been constitutionally ineffective for failing to raise a Doyle-based objection to the testimony Dhimo now contends on appeal should have been objected to on Doyle-based grounds since that testimony did not implicate Doyle, and the PCR judge could not have erred by failing to grant relief on such a basis. See Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) (“One of the key circumstances a court must consider in its examination of counsel’s decision not to make a particular objection is whether there was any law to support the objection.”); cf. Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (holding a post-conviction relief judge’s grant of relief based on defense counsel’s failure to raise an objection to be without factual support where “there was no sustainable objection” defense counsel could have made).

However, even assuming Dhimo’s current appellate contention could be construed as being related to the testimony elicited *after* Detective Allen’s testimony suggesting she decided to end the interview, the PCR judge nevertheless correctly declined to grant relief on Dhimo’s

claim related to that particular testimony. That is true because Dhimo failed to meet his burden of establishing both defense counsel's performance concerning that matter was deficient and there was a reasonable likelihood the result of the proceedings would have been different but for defense counsel's alleged deficiency.

Turning to the deficiency prong of the analysis, defense counsel's decisions to object to Detective Allen's testimony indicating she personally decided to end the interview and to agree to further testimony being elicited that clarified it was actually Dhimo's decision to do so was not an unreasonable strategic decision because—by pursuing that course of action under the “difficult” circumstances involved—defense counsel was able to potentially undermine the credibility of both the solicitor and Detective Allen by forcing the correction that occurred, which objectively constituted a sound trial strategy for the defense to pursue out of the available options. And, that sound strategic decision had limited risk due to the fact the agreed-upon manner in which the clarifying evidence of Dhimo's termination of the interview was presented to the jury was not one suggesting an adverse inference should be drawn from it. See Cullen v. Pinholster, 563 U.S. 170, 195-196 (2011) (explaining trial counsel is entitled to constitutionally-protected independence and wide latitude in making tactical decisions and instructing there will rarely be just one technique or approach that would be considered constitutionally reasonable for trial counsel to undertake in representing a defendant); Strickland, 466 U.S. at 688-689 (recognizing there typically exists a “range of legitimate decisions regarding how best to represent a criminal defendant” and instructing defense counsel must have “wide latitude” in making tactical decisions); see also Lindgren, 925 F.2d at 201 (explaining “a mere transcript witness' reference to [a] defendant's silence” does not constitute a Doyle violation unless submitted to the jury as evidence from which an adverse inference could be drawn). Moreover,

when a basis for a Doyle-based objection later arose, defense counsel did, in fact, both *immediately* raise one and move for mistrial, which directly led to the presentation of a critical curative instruction to the jury that prevented any prejudice to Dhimo from resulting. See Richter, 562 U.S. at 111 (“[I]t is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy.”).

Similarly, turning to prejudice prong, there was no reasonable likelihood of a different outcome in Dhimo’s case because—even if defense counsel’s performance concerning the matter was somehow deficient—the trial judge presented a powerful curative instruction to the jurors that unambiguously explained they were not permitted to consider in any manner Dhimo’s decision to exercise his constitutional rights when deciding the case. Critically, by giving that firm curative instruction, the trial judge took sufficient steps under the circumstances involved to ensure the jurors—who were presumed to follow that instruction—would not draw any adverse inferences against Dhimo based on his termination of the interview, which prevented the brief testimony elicited referencing Dhimo’s invocation of his rights from having any conceivable impact on the outcome of the case. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (“[J]urors are presumed to follow the law as instructed to them.”); cf. State v. Shuler, 353 S.C. 176, 187-188, 577 S.E.2d 438, 444 (2003) (“While the State may not comment on the defendant’s right to remain silent, an improper reference is subject to harmless error analysis. The trial court’s instruction to the jury that it could not consider appellant’s failure to testify in any way and could not use it against him *cured any potential error.*” (emphasis added)).

Accordingly, since Dhimo failed to meet his burden of establishing both deficiency and prejudice, Dhimo’s PCR application was properly rejected, and the PCR judge’s decision to do so was neither unsupported by the record nor legally erroneous. See Strickland, 466 U.S. at 700

(“Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.”); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (instructing a PCR judge’s factual finding will be upheld if supported by any evidence and a post-conviction relief’s judge’s decisions will only be reversed where controlled by an error of law). Dhimo’s petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 13, 2023