STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari
to Newberry County
Donald B. Hocker, Trial Judge
R. Scott Sprouse, PCR Judge

Appellate Case No. 2023-000635

ANTHONY MAURICE WISE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION
FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's Question

Whether the PCR court erred in finding trial counsel was not ineffective where counsel failed to object to the multiple golden rule argument and improper victim impact argument violations made by the Solicitor during closing argument?

Respondent's Counterstatement of Question

Did the PCR court properly find Petitioner did not prove counsel was ineffective for not objecting to the State's closing argument when the comments did not so infect the trial with unfairness as to violate due process, the State presented overwhelming evidence of guilt, and Petitioner did not meet his burden of proving deficiency?

STATEMENT OF THE CASE

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections serving a twenty-two-year-sentence. In December 2016, the Newberry County Grand Jury indicted Applicant for kidnapping (2016-GS-36-706) and first-degree burglary (2016-GS-36-709). In May 2017, the Newberry County Grand Jury indicated Applicant for first-degree assault and battery (2017-GS-36-201). These charges arose from a home invasion and kidnapping of Beneza Wicker (Victim), which occurred on September 21, 2016.

On May 15-18, 2017, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker. Charles Verner represented Applicant, and Dale Scott and Tayler Daniel represented the State. The jury convicted Applicant of kidnapping, first-degree burglary, and first-degree assault and battery but acquitted him of armed robbery. Judge Hocker sentenced Applicant to concurrent terms of twenty-two years each for kidnapping and burglary, and ten years for assault and battery.

Applicant filed a direct appeal, which was perfected by Susan Barber Hackett. The Court of Appeals dismissed his appeal pursuant to Anders. The remittitur was sent May 3, 2019.

On July 22, 2019, Petitioner filed an application for post-conviction relief (PCR). On November 28, 2022, an evidentiary hearing convened before the Honorable R. Scott Sprouse. Applicant was present and represented by Ashely McMahan, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. On April 6, 2023, Judge Sprouse issued an order denying Petitioner's PCR application.

Summary of evidence presented at trial

At trial, Victim testified she returned home and was unloading her Cadillac when someone "lunge[d] up out of . . . the seat of the car," hit her in the chest, and kicked her. (Tr. 159). The

assailant drug her inside her house, tied her hands and feet with a telephone cord, and demanded money. (Tr. 159-70). He then put a pillowcase over her head, drug her to the backseat of her truck, and drove to the ATM, where he demanded her pin-number. (Tr. 170-71, 174-77). After returning Victim home, the assailant put duct tape around her hands and feet and left with her televisions and her Cadillac. (Tr. 177-84). Although Victim could not see the assailant's face because he was wearing a mask, she noticed he had dreadlocks and believed he was someone she had seen in her neighborhood. (Tr. 191-94). She testified the assailant knew details about her such as the fact her husband was deceased and she cared for her elderly mother. (Tr. 191-92). After the assailant left, Victim ran to her neighbor's home and they called 911. (Tr. 186, 259-61).

Law enforcement entered Victim's description of the assailant into Law Track, and Applicant's name "popped up" as living in the same neighborhood and matching the description provided by Victim. (Tr. 299-300). Police later arrested Applicant and recovered his girlfriend's phone from his pocket; the GPS data on the phone showed it was in the general vicinity of Victim's home at the time of the home invasion, Victim's ATM machine at the time her ATM card was used, and the lumber yard where her Cadillac was subsequently recovered. (Tr. 301-02, 322, 325-28, 333-35, 341, 384, 412-13, 434-35). Victim later listened to a recording of Applicant's voice and identified him as the assailant based on his voice. (Tr. 345-46).

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STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR 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).

ARGUMENT

The PCR court properly found Petitioner did not prove counsel was ineffective for not objecting to the State's closing argument when the comments did not so infect the trial with unfairness as to violate due process, the State presented overwhelming evidence of guilt, and Petitioner did not meet his burden of proving deficiency.

Petitioner asserts trial counsel was ineffective for not objecting to golden rule and victim impact arguments during the State's closing argument. He contends counsel did not articulate a valid reason for not objecting and was thus deficient. Petitioner further contends he was prejudiced by counsel's failure to object because the State did not present overwhelming evidence of his guilt. Contrary to Petitioner's argument, however, the State presented overwhelming evidence of guilt, and the comments did not so infect the trial with unfairness as to violate due process. Further, Applicant did not meet his burden of proving deficiency. Thus, the PCR court properly denied relief.

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel 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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625.

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." Id. When assessing allegedly improper comments by the solicitor, appellate courts "view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Id. The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Id. **"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."** Id. (emphasis added).

A. The solicitor's arguments at 672-73 and 681 were not raised to the PCR court and are not properly before this Court.

In a PCR hearing, it is the applicant's burden to prove his allegations. Here, Applicant's amended allegation related to counsel's failure to object the State's closing argument referenced pages 652, 662, and 655 of the trial transcript. (App. 749). At the PCR hearing, Applicant's only question related to the closing argument was whether trial counsel had a strategic reason for not objecting to "victim impact" and "golden rule stuff." (App. 777-78). Applicant himself did not offer any testimony on what portion of the argument was objectionable. (App. 756-69). During closing, counsel merely argued, "And then the last one, the closing arguments, I do believe Mr.

Scott, while he's tapped dance very close to the line, I think he tapped right over it and those were golden rule arguments that should have been objected to and preserved for appeal." (App. 796).

As Petitioner concedes,[1] the solicitor's argument at pages 672-73 and 681 of the trial transcript were not raised by Applicant in his application or at the PCR hearing. As a result, the PCR court was never asked to consider whether counsel was ineffective for not objecting to this portion of the argument. Thus, any contention that counsel was ineffective for not objecting to this portion of the argument is not preserved for review and is not properly before this Court.

B. The argument Applicant relied on at the PCR hearing did not so infect the trial with unfairness as to violate due process.

In Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009), the Supreme Court of South Carolina found the solicitor's comments that the jury should protect and "speak up" for the three-year-old victim were improper, impermissible "Golden Rule" comments, and counsel was deficient for not objecting. However, the Court reversed the PCR court's grant of relief, finding the petitioner did not prove resulting prejudice. In reversing, the Court reasoned the "comments came at the very end of his closing argument and were limited in duration"; thus, they "did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 517, 680 S.E.2d at 915. The Court further found the State presented overwhelming evidence of the petitioner's guilt. Id. at 518, 680 S.E.2d at 916.

Likewise, in Van Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004), a capital case, the Supreme Court of South Carolina determined the solicitor's improper comment—"Put yourself in [the victim's] shoes, size six"—"did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 613, 602 S.E.2d at 746.

[1] "[T]he failure to counsel to object to these and other portions of the argument is not before this Court . . . ." (Pet. 13).

Here, the PCR court properly found the closing argument relied on by Applicant in his amended application did not so infect the trial with unfairness as to violate due process, and Applicant thus did not prove prejudice. The State's closing argument spanned thirty pages of the transcript; however, Applicant only cited three pages in the first third of the closing argument as improper argument. Like the comments in Brown, these comments were limited in duration. Ultimately, these passing statements did not so infect Applicant's trial with unfairness as to make the resulting conviction a denial of due process. See Darden v. Wainwright, 477 U.S. 168 (1986) (finding prosecutor's improper comments—which included statements such as "He shouldn't be out of his cell unless he has a leash on him" and "I wish that I could see him sitting here with no face, blown away by a shotgun"—did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process").

Further, the PCR court properly found the State submitted compelling evidence of Petitioner's guilt, which included (1) Victim's identification of Applicant based on his voice and (2) GPS data from Applicant's girlfriend's phone showing it was in the area of Victim's home near the time of the home invasion, the area of Victim's ATM machine near the time it was used, and the area where Victim's Cadillac was subsequently recovered. The foregoing evidence constituted overwhelming evidence of guilt such that it is not reasonably likely any alleged improper comment impacted the jury verdict. Overall, Applicant did not prove any resulting prejudice from counsel's failure to object to the States' closing argument; thus, the PCR court properly denied relief.

C. Applicant did not meet his burden of proving deficiency.

The PCR court properly found counsel articulated a valid reason for not objecting in that he believed the closing argument was a fair inference of the facts and not inflammatory or objectionable. Cf. State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (finding, in

a capital case, the solicitor's "(1) crying numerous times throughout the argument; (2) telling the jury 'we will kick the baby some more' if they returned a life sentence; (3) dehumanizing Appellant ('I don't even call him a person'); and (4) threatening the jury ('it will be on your heads if he kills someone else [during his life sentence in prison]'" to be permissible arguments but reversing based on other improper argument).

Further, Applicant did not meet his burden of proving deficiency. Although Applicant referenced three pages in the thirty pages of the State's closing argument, he did not indicate with specificity in his amended application or at the PCR hearing which statements he believed were inflammatory or objectionable. Thus, Applicant did not meet his burden of proving deficiency.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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This 21 day of March, 2024