

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Honorable Brian M. Gibbons, Circuit Judge
Appellate Case No. 2023-000562

S.C. SUPREME COURT

ROBERT L. MOORE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

RESPONDENT’S ISSUE PRESENTED1

STANDARD OF REVIEW2

STATEMENT OF THE CASE3

RELEVANT FACTS...4

ARGUMENT6

 I. The post-conviction relief court properly found that counsel was
 not ineffective for failing to object to the solicitor’s comments in
 closing argument.6

CONCLUSION.....9

RESPONDENT'S ISSUE PRESENTED

The post-conviction relief court properly found that counsel was not ineffective for not objecting to the solicitor's comments during closing argument.

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 Spartanburg County Grand Jury indicted Petitioner for attempted murder. On July 21-23, 2014, Petitioner proceeded to jury trial before the Honorable R. Keith Kelly. Petitioner was convicted as charged and sentenced to thirty years' imprisonment. Petitioner's conviction was affirmed on direct appeal. On April 9, 2020, Petitioner filed an application for post-conviction relief. On April 4, 2021, the State filed a return and motion for a more definite statement. On February 9, 2023, Petitioner filed an amended application.

On February 15, 2023, a hearing was held on the matter before the Honorable Brian M. Gibbons. Susannah Ross represented Petitioner. Chelsey Marto represented the State. PCR counsel argued trial counsel provided ineffective representation for failing to object to comments made by the solicitor in his closing argument. On March 29, 2023, the PCR court issued an order of dismissal denying relief stating that Applicant had not proven prejudice. Petitioner filed a petition for writ of certiorari on November 22, 2023. This return follows.

RELEVANT FACTS

On February 25, 2013, several officers responded to a shooting at the Taco Bell in Spartanburg. (App. 110, 125). The victim was found, shot in the left side of the head, hanging out of the victim's vehicle, and hung up in the seatbelt. (App. 115). A bystander was frantically yelling how the victim had been shot. (App. 127). The victim was barely breathing, unresponsive, and had blood draining out of his mouth. (App. 116, 119). EMS arrived to render aid and transport the victim. (App. 116-117). The victim was in the ICU for over a month and spent in total about two or three months in the hospital, but ultimately survived the incident. (App. 104-105). The victim suffered permanent injuries that require around-the-clock care. (App. 105). Petitioner, Robert L. Moore, was charged and tried for attempted murder.

In its amended application for post-conviction relief, Petitioner alleged ineffective assistance of counsel for "failing to object to State's improper comment in closing asking to convict for the community." (App. 639). A hearing was held on February 15, 2023. Trial Counsel for Petitioner testified at the hearing. PCR counsel asked trial counsel whether he objected to the comment by the solicitor asking the jury to convict for the "Mr. Hall's sake, for Spartanburg County's sake, for this community." (App. 664). Trial counsel admitted that he did not object to it and that it possibly merited an objection. (App. 664). No further questions regarding the statement were asked by PCR counsel. On cross examination trial counsel was asked "you testified in retrospect you would have objected to the State stating that the jury must convict for the good of Spartanburg, South Carolina correct?" (App. 678). In his response, trial counsel stated "I, I think that in retrospect I think that I should have objected to that point. As to the egregiousness of the comment, I don't think it was that egregious, but it probably merited an objection." (App. 678). However, when asked whether he thought it would have changed the outcome of the trial, trial

counsel testified that it would not have. (App. 680). In its order of dismissal, the PCR court denied relief stating that Petitioner did not prove prejudice. (App. 695).

ARGUMENT

I. The post-conviction relief court properly found that counsel was not ineffective for failing to object to the solicitor's comments in closing argument.

Petitioner argues that the PCR court erred in denying post-conviction relief where the solicitor argued in closing that the jury should convict Petitioner “for Mr. Hall’s sake, for Spartanburg County’s sake, for this community.” Specifically, Petitioner argues that the failure to object was not strategic and there was a reasonable probability the result of the trial would have been different absent counsel’s error. 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 what his version of the testimony was and the weight it should be given. He argued that the evidence presented at trial prove that Petitioner was the one who shot at the victim and was guilty of attempted murder and because of this proof he should be convicted. Though the solicitor stated to convict for the victim’s sake and the community, he made clear it was the jury’s decision concerning the credibility of the witnesses, in conjunction with other evidence presented, when determining whether Petitioner was guilty. (App. 233-37). The statements did not appeal to personal biases of the jury, inflame their passions, make improper insinuations or 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. Whether proper or not, the solicitor’s statements could not have rendered Petitioner’s trial fundamentally unfair or denied Petitioner a fair determination of his guilt or innocence. See State v. Smith, 298 S.C. 482, 486, 381 S.E.2d 724, 726 (1989) (“[Neither of the solicitor’s arguments rose to a level mandating reversal.”) 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.

Petitioner has failed to meet his burden of establishing prejudice based on the solicitor’s statements. See State v. Lunsford, 318 S.C. 241, 247, 456 S.E.2d 918, 922 (Ct. App. 1995) (“Further, Lunsford failed to demonstrate as he was required to do, that the result of the solicitor’s comment was to materially prejudice his right ‘to obtain a fair and impartial trial.’” (citations omitted)); See Darden v. Wainright, 477 U.S. 168, 180-181 (1986) (concluding Darden’s murder trial was not rendered fundamentally unfair by the prosecutor’s closing argument remarks, which attempted to place some blame on the Florida Department of Corrections for releasing Darden on weekend furlough prior to the incident, implied the death penalty was the only way to ensure Darden would not commit a future similar crime, employed the term “animal” to describe Darden, and expressed a personal desire for Darden to have been killed or be killed).

Here, evidence was presented that Petitioner drove a car to the scene to rob Victim, Petitioner got in the car with the victim and pulled a gun on him, they began wrestling and a gun went off. (App. 256-261). Petitioner’s phone was found inside the victim’s car and Petitioner had placed 5 phone calls to the victim that day. (App. 190-206). 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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April 8, 2023