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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CALHOUN COUNTY
Honorable R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2023-001809

JERRY MCKNIGHT,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

PETITIONER'S STATEMENT OF THE QUESTION

Did the PCR court err finding defense counsel was not ineffective for failure to object to inflammatory comments made by the solicitor during closing arguments?

RESPONDENT'S COUNTERSTATEMENT OF THE QUESTION

Whether the PCR court correctly found Petitioner failed to prove he was prejudiced by Counsel's failure to object to the solicitor's comments in closing arguments where there was overwhelming evidence of Petitioner's guilt; the comments were supported by the evidence presented at trial; the solicitor did not ask the jury to speak on behalf of the victim; and the solicitor used first-person "I" language while speaking in their role as an advocate.

STATEMENT OF THE CASE

In January 2015, the Calhoun County Grand Jury indicted Petitioner for murder (2014-GS-09-0057), kidnapping (2014-GS-09-0054), and possession of a firearm by a person convicted of a violent crime (2014-GS-09-0056). On March 2-6, 2015, Petitioner proceeded to a jury trial before the Honorable Maite Murphy. Solicitor David Pascoe, Deputy Solicitor Donald Sorenson, and Assistant Solicitor Kyle Ward prosecuted the case. Mark Leiendecker, Esq., represented Petitioner.[1] The jury convicted Petitioner, and Judge Murphy sentenced him to a concurrent sentence of life imprisonment for murder, thirty (30) years for kidnapping, and five (5) years for the weapon charge.

A notice of appeal was timely filed. The appeal was perfected by Howard W. Anderson, III, Esquire, and Chief Appellate Defender Robert M. Dudek. The South Carolina Court of Appeals affirmed. *State v. McKnight*, 2017-UP-406 (Ct. App. filed Oct. 25, 2017). The Supreme Court denied certiorari.

On May 30, 2018, Petitioner filed an application for post-conviction relief ("PCR"). (App. 837-61). On August 24, 2020, Respondent filed its Return. (Ap. 862-75). On September 7, 2022, an evidentiary hearing convened before the Honorable R. Kirk Griffin. At the hearing, Clarissa W. Joyner, Esq., represented Petitioner, and Lauren Mims represented Respondent. On October 16, 2023, Judge Griffin vacated Petitioner's sentence for kidnapping pursuant to *State v. Vick*[2] and S.C. Code Ann. § 16-3-910 (2015) and denied Petitioner PCR relief on remaining grounds. (App. 938-58). Petitioner appealed.

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[1] Petitioner was tried in a joint trial with his co-defendant, Bryant McKnight, who was represented by Martin Banks, Esq.

[2] *State v. Vick*, 384 S.C. 189, 201, 682 S.E.2d 275, 281 (Ct. App. 2001).

STATEMENT OF THE FACTS

Petitioner's charges arose from the fatal shooting of K.R. ("Victim") on February 13, 2014. At trial, Tameka Williams, Victim's roommate, testified she last saw Victim February 13th at their home, and Victim told her "B" – whom Williams identified as Bryant McKnight ("Bryant") (Petitioner's brother and co-defendant) - was picking her up. (App. 109-12). Jamal Pearce, Bryant's friend testified that he, Bryant, and James Keller picked up and hung out with Victim. (App. 154-56). Pearce testified that Bryant and Victim left, and Bryant returned that later evening and told Pearce that he "had to smoke that girl." (App. 154-65). Pearce understood that to mean Bryant shot Victim. (App. 162). James Keller, a friend of Pearce, testified that Bryant was carrying a gun that evening, and Victim was last seen alive with Bryant. (App. 190; 196).

Jonathan McKnight ("Jonathan"), Petitioner's cousin, testified Petitioner asked him to take Petitioner to his girlfriend's house. (App. 220). Under the impression that they were going to Petitioner's girlfriend's house, Jonathan testified that he, Bryant, and Victim were in the car together. (App. 220). Petitioner asked Jonathan to pull the car over. (App. 222). After pulling over, Petitioner asked Victim to get out of the car; she refused several times. (App. 222). Jonathan testified Petitioner grabbed Victim, snatched her out of the car, dragged her to the back of the car, and opened fire on her. (App. 222). Jonathan testified that after emptying the revolver clip, Petitioner handed the gun to Bryant, who reloaded the gun and shot Victim a few more times. (App. 223). Jonathan testified that he saw Petitioner drag victim to the side of the road, then Petitioner and Bryant returned to the car. (App. 224). Jonathan testified that Petitioner and Bryant threatened that if he told what happened, they would do the same to him. (App. 225). Jonathan testified Petitioner and Bryant killed Victim because they believed she was involved in a burglary that occurred at their mother's home in 2014. (App. 229).

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the 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 v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and "every effort [should] be made to eliminate the distorting effects of hindsight.". *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689).

ARGUMENT

The PCR court correctly found Petitioner failed to prove he was prejudiced by Counsel's failure to object to the solicitor's comments in closing arguments where there was overwhelming evidence of Petitioner's guilt; the comments were supported by the evidence presented at trial; the solicitor did not ask the jury to speak on behalf of the victim; and the solicitor used first-person "I" language while speaking in their role as an advocate.

The PCR court correctly found Petitioner failed to prove Counsel was ineffective for failing to object to the solicitor's closing arguments because Petitioner failed to prove there's a reasonable probability the result of trial would have been different if Counsel had objected. Failing to object does not automatically constitute ineffective assistance of counsel; an applicant must prove that counsel's failure to object was both deficient and resulted in prejudice. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018). Improper comments do not automatically require reversal if they are not prejudicial to the defendant. *Fortune v. State*, 428 S.C. 545, 549-50, 837 S.E.2d 37, 39-40 (2019). The inquiry for prejudice is whether the solicitor's comments so infected the trial with unfairness as to result in a denial of the defendant's due process right to a fair trial. *Id.* (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). A solicitor's closing argument must be carefully tailored so as not to appeal to the passions or personal biases of the jury. *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (citation omitted). The State's closing arguments must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence. *Id.*; *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

At the end of closing arguments in Petitioner's trial, the solicitor stated the following:

> Ladies and gentlemen, a year ago, Kimberly Livingston set out coming over to St. Matthews, Calhoun County, where we are today, trying to find some answers, trying to find her daughter. Tragically, ultimately kind of searching into trying to find some justice.
>
> ...
>
> And ultimately, ladies and gentlemen, your voice is going to be the strongest, loudest voice in this courtroom. What I ask of you, the people of Calhoun County, the people of the State of South Carolina, is I ask you to

> come back with a voice that's loud and clear, a voice that tells Jerry McKnight and Bryant McKnight that they didn't get away with murder.
>
> Prove them wrong. Find them guilty of the brutal, cold, malicious killing of 17-year-old [K.R.]. Prove them wrong, find them guilty of kidnapping her, and in Jerry's case, in possessing that weapon that he was not allowed to have. Thank you.

(App. 805:19-23; 806:7-18).

A. Petitioner failed to prove there is a reasonable probability the result of trial would have been different but for Counsel's failure to object to the solicitor's closing argument because there was overwhelming evidence of Petitioner's guilt as Petitioner's cousin, an eyewitness, testified that Petitioner shot and killed Victim.

Petitioner failed to prove he was prejudiced by Counsel's failure to object to the solicitor's comments because there was overwhelming evidence of Petitioner's guilt. In *Darden*, the United States Supreme Court held a prosecutor's comments in closing, referring to the defendant as an "animal" did not prejudice the defendant because the evidence against the defendant was heavy. *Darden*, 477 U.S. at 181-82 ("The weight of the evidence against petitioner was heavy: the 'overwhelming eyewitness and circumstantial evidence support a finding of guilt on all charges'"). In *Brown*, the South Carolina Supreme Court determined that a defense attorney's failure to object to a solicitor's improper closing argument did not warrant reversal where there was overwhelming evidence of the PCR applicant's guilt. *Brown v. State*, 383 S.C. 506, 518, 608 S.E.2d 909, 916 (2009) (noting the State presented testimony from four eyewitnesses who saw applicant committing sexual misconduct on the child).

Here, there was overwhelming evidence of Petitioner's guilt because Jonathan McKnight, Petitioner's cousin, testified that he witnessed Petitioner drag Victim out of the car and shoot her several times. (App. 222). Jonathan testified that Petitioner gave the gun to Bryant McKnight, who also shot Victim several times. (App. 222). Jonathan testified that he saw Petitioner drag Victim's

body to the side of the road and threatened Jonathan not to say anything about what he witnessed. (App. 224-25).

Petitioner contends the evidence of Petitioner's guilt was not overwhelming since there was no physical evidence tying Petitioner to the crime. However, physical evidence is unnecessary where an eyewitness, Petitioner's own cousin, testified that Petitioner committed the murder. Petitioner suggests Jonathan was a biased witness, alleging he was involved in the cover-up and was an initial suspect. However, Jonathan testified that he voluntarily gave statements to law enforcement, was not offered any deals for his testimony, and there were no discussions with the solicitor regarding his charges. (App. 232:3-7).

Petitioner also suggests Derrick Sumter was a biased witness. Sumter, who helped Petitioner and his co-defendant get rid of evidence after the murder, testified that Petitioner's co-defendant told him that he would "do harm" to the person that was involved in the burglary at his mother's house. (App. 332). Sumter's testimony corroborated Jonathan's testimony that Petitioner and his co-defendant killed Victim because they believed she was involved in a burglary. (App. 229). Sumter was charged with accessory after the fact and denied making any deals or promises with the solicitor in exchange for his testimony. (App. 350-51).

The jury, as finder of fact, accessed the credibility of both Jonathan McKnight and Derrick Sumter and convicted Petitioner of murder, kidnapping, and possession of a weapon. The evidence was overwhelmingly in favor of a finding of guilt since an eyewitness to the murder and another witness involved in the cover-up testified against Petitioner. Thus, Petitioner failed to prove that there's a reasonable probability the result of trial would have been different if Counsel had objected to the solicitor's closing argument.

B. The solicitor's comments referring to the murder as "brutal, cold, and malicious" did not appeal to the passions or personal biases of the jury because the comments were

supported by the evidence presented at trial and reasonable inferences drawn from the evidence.

The solicitor's comments did not appeal to the passions or personal biases of the jury because the comments were supported by the evidence presented at trial and the reasonable inferences drawn from the evidence. A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. *Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566.

In *Vasquez*, the Supreme Court found a defense attorney was ineffective for failing to object to the solicitor's comments where the solicitor referred to a Muslim defendant as a "domestic terrorist." *Id.* at 464, 698 S.E.2d at 570. The solicitor correlated the defendant's conduct to the events of September 11, 2001. *Id.* at 452, 698 S.E.2d at 563. The Court found the solicitor's comments sought to inflame the passions and prejudices of the jury because reference to the events of September 11th were neither related to nor supported by the evidence presented at trial. *Id.* at 459-60, 698 S.E.2d at 567-68. The Court found the defendant was prejudiced by counsel's failure to object because the comments were so egregious. *Id.* at 570, 698 S.E.2d 464.

Here, the solicitor asked the jury to find Petitioner guilty of the "brutal, cold, malicious killing" of Victim. The solicitor's comments were supported by the evidence presented at trial as Jonathan McKnight, Petitioner's cousin, testified that Petitioner shot Victim several times on the side of the road at night in February because Petitioner believed Victim was involved in a burglary. (App. 222-29). The solicitor's characterization of the killing as "brutal" was a reasonable inference because Petitioner shot Victim several times. The solicitor's characterization of the killing as "cold" was a reasonable inference because the killing was both senseless and occurred outdoors, at night, in February. The solicitor's characterization of the killing as "malicious" was a reasonable inference because Petitioner killed Victim to get revenge on her for what he believed was her

involvement in a burglary. The solicitor's description of the murder in Petitioner's trial was related to and supported by the testimony presented at trial, unlike the arguments by the solicitor in *Vasquez*. Accordingly, the comments by the solicitor in Petitioner's trial did not so infect the trial with unfairness as to result in a denial of due process because the solicitor was allowed to comment on his version of the events based on the evidence. *See Darden*, 477 U.S. at 181-82 (holding a prosecutor's closing arguments in a capital case, referring to the defendant as an "animal[,]" did not so infect the trial with unfairness as to make the resulting conviction a denial of due process because the prosecutor did not manipulate or misstate the evidence). Thus, the solicitor did not seek to inflame the passions and prejudices of the jury in making the argument.

C. The Solicitor's comments asking the jury to come back with a voice that tells Petitioner he would not get away with murder was not improper because the solicitor did not ask the jury to speak on behalf of the Victim.

The solicitor's comments were not improper because the solicitor did not ask the jury to speak on behalf of the Victim. A "Golden Rule Argument" which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and decide the case on the basis of personal interest and bias rather than evidence. *Brown*, 383 S.C. at 516, 608 S.E.2d at 915 (citing *State v. Reese*, 359 S.C. 169, 175 (Ct. App. 2004), *aff'd in part and rev'd in part*, 370 S.C. 31, 633 S.E.2d 898 (2006) (affirming the solicitor's golden rule closing argument as improper), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)).

In *Daniels*, the Supreme Court determined a trial judge's jury charge that the jury was acting for the community is not similar to a Golden Rule Argument because it does not ask the jury to consider the victim's perspective. *State v. Daniels*, 401 S.C. 251, 254-55, 737 S.E.2d 473, 475 (2012) (instructing trial judges to remove from jury charges any suggestion that the jury's duty

is to return a verdict that is "just" or "fair" for all parties). In *Harris*, the Court of Appeals determined that a solicitor did not make a Golden Rule Argument where the solicitor told the jury not to "let [the defendant] go" because the solicitor did not ask or suggest that the jury place themselves in the shoes of the victims. *State v. Harris*, 382 S.C. 107, 120-22, 674 S.E.2d 532, 539-40 (Ct. App. 2009).

In referring to the jury as "the people of Calhoun County" and "the People of South Carolina," the solicitor merely referred to the jury in their capacities as a jury of Petitioner's peers. The solicitor did not ask the jury to put themselves in Victim's shoes or consider Victim's perspective, unlike the solicitor in *Brown*. The solicitor's arguments to the jury not to let Petitioner get away with murder is not a Golden Rule Argument either, as the court determined in *Harris*.

Petitioner alleges it was improper for the solicitor to reference Victim's mother trying to find her daughter and trying to find justice (App. 805:19-23). However, the solicitor merely recited evidence presented at trial as Victim's mother testified that she attempted to locate Victim after Victim disappeared. (App. 88-92). In making the remark, the solicitor neither asked the jury to seek justice on behalf of the Victim or her mother.

D. The Solicitor's use of first-person language was not improper because the solicitor spoke within his role as an advocate to convince the jury to convict Petitioner.

The solicitor's comments were not improper because the solicitor's use of "I" during closing arguments were not improper because the solicitor spoke within his role as an advocate for the State. Prosecutors must be cautious how they use first person language in all phases of trial. *State v. Busse*, 439 S.C. 104, 112, 886 S.E.2d 208, 212 (2023). However, a prosecutor is completely within her proper role and duty-bound to tell the jury in closing argument what evidence she believes the jury should consider during its deliberations. *Id.* "Statements such as, 'I am going to outline for you the evidence I want you to focus on because this is the evidence that

demonstrates the defendant's guilt'...are appropriate during closing argument because the prosecutor is staying within her role as an advocate, to convince the jury – based on the evidence before it – the State has proven the defendant guilty beyond a reasonable doubt." *Id.*

In *Busse*, the Supreme Court determined although a solicitor technically should not have used first person language in the way he did, the comments did not warrant reversal where there was a minimal risk the jury would perceive the solicitor stepped outside of his role as an advocate. *Id.* at 114-15, 886 S.E.2d 213-14. In a criminal sexual conduct case, the solicitor stated in closing arguments, "what was compelling to me, how does she know that [,]" referring to the minor victim's knowledge of the defendant's erectile dysfunction. *Id.* at 108, 886 S.E.2d at 210. The Court held although the solicitor should not have used first person language "to me" in the way that he did, his comments did not warrant reversal because the point of his statement was to highlight the importance of the evidence presented. *Id.* at 114-15, 886 S.E.2d 213-14.

Here, the solicitor stated, "what I ask of you, the people of Calhoun County, the people of the State of South Carolina, is I ask you to come back with a voice that's loud and clear, a voice that tells Jerry McKnight and Bryant McKnight that they didn't get away with murder." (App. 806:9-13). The solicitor's use of "I" was not improper because the solicitor spoke within his role as an advocate on behalf of the State to convince the jury, based on evidence presented at trial, that the State had proven Petitioner guilty of murder beyond a reasonable doubt. Similar to *Busse*, there is no prejudice to Petitioner because there is minimal risk that the jury would perceive the solicitor stepped outside of his role as an advocate. Thus, the solicitor's comments were not improper, and Petitioner failed to meet his burden.

CONCLUSION

Based on the foregoing argument, the PCR court correctly found trial counsel was not ineffective. Respondent respectfully asks this Court to deny Petitioner's petition.

Respectfully submitted,

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