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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LANCASTER COUNTY
Paul M. Burch, Trial Judge
Daniel McLeod Coble, PCR Judge

Appellate Case No. 2023-001080

CHRISTOPHER MOORE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Petitioner's Questions

- I. Whether the PCR court erred by finding defense counsel was not ineffective for failing to request an instruction that a person “did not have the duty to retreat if it would increase the danger to himself” in this self-defense case particularly where the solicitor in closing focused on how petitioner allegedly could have avoided the fatal situation, and where defense counsel was conflated principles of immunity not being the proper subject of a jury charge with this retreat instruction to being a proper and warranted jury charge?
- II. Whether the PCR court erred by finding defense counsel was not ineffective for failing to request a jury instruction that the defendant had the right to “act on appearances” and that “he did not have to wait of the decedent to get the drop on him” since the jury understanding these principles of self-defense would have assisted the defense given the facts of this case?
- III. Whether the PCR court erred by finding defense counsel was not ineffective for failing to object to the solicitor’s closing argument that the defense attorney’s job was to confuse the jury and for it to belief the defendant’s lies whereas the solicitor was seeking the truth and justice for the decedent and his family since this was a highly improper prosecution argument was prejudicial to petitioner?

Respondent's Counterstatement of Questions

- I. The PCR court properly found counsel was not ineffective for not asking the court to charge the jury that a person does not have a duty to retreat if it would increase the danger to himself when (a) the charge is strikingly similar to the charge that was condemned in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), and (b) the uncontradicted evidence showed Petitioner and his co-defendants *did* retreat, making it not reasonably probable the outcome would be different had the court charged the jury that Petitioner had no duty to retreat.
- II. The PCR court properly found counsel was not ineffective for not requesting a charge that the defendant had the right to “act on appearances” and “did not have to wait for the decedent to get the drop on him” when (1) the trial court properly charged the jury that the defendant had the right to act on appearances, (2) the charge adequately conveyed to the jury that Petitioner did not have to wait until he was actually under attack to employ force, and (3) counsel articulated a valid reason for not requesting “get the drop” language in that it did not fit his theory of the case.
- III. The PCR court properly found counsel was not ineffective for not objecting to the State’s closing argument when the mere passing statement here is distinguishable from the statements in Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019), and the comments did not so infect the trial with unfairness as to violate due process.

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving a life sentence. In June 2015, the Lancaster County Grand Jury indicted Petitioner for for murder (2015-GS-12-0086) and possession of a firearm during the commission of a violent crime (2015-GS-12-0085). The charges arose from the fatal shooting of Odell Williams.

On April 18, 2016, Petitioner proceeded to a jury trial before the Honorable Paul M. Burch. William P. Frick and Devon Nielson, Esquires, represented Petitioner. Solicitor Randy Newman and Assistant Solicitors Julie Hall and Riley Maxwell prosecuted the case. Petitioner's first trial ended in a mistrial after the jury announced it was deadlocked.

On June 27-30, 2016, Petitioner proceeded to a second jury trial before Judge Burch. The jury convicted Petitioner as indicted, and Judge Burch sentenced him to consecutive sentences of life for murder and five years for the weapon charge.

Petitioner timely appealed, which was perfected by Appellate Defender Susan B. Hackett through the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1976). The Court of Appeals dismissed pursuant to Anders, and the remittitur was sent November 7, 2018.

On September 24, 2019, Petitioner timely filed this PCR application. On February 16, 2023, an evidentiary hearing convened before the Honorable Daniel Coble. Petitioner was present and represented by Dayne Phillips, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. On July 17, 2023, Judge Coble issued an order vacating Petitioner's five-year weapon sentence but dismissing the remaining claims with prejudice. Petitioner filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. On July 19, 2023, Judge Coble issued an order denying the motion to alter or amend.

Pertinent Trial Testimony

Petitioner's charges stem from the fatal shooting of Odell Williams (Victim). At trial, Lieutenant Kyle Cummings testified he responded to a 911 "shots fired" call one evening and found Victim in a vehicle that had crashed into a home. (App. 70, 72-74). He stated it was obvious Victim had been shot in the face. (App. 74).

Lousie Williams, Victim's wife, recalled seeing a strange truck parked outside her home earlier that evening; she called Victim, who "said he would come check it out." (App. 88-89). Williams drove down the road, stopped, and waited for Victim. (App. 90). She testified after she left, the strange truck began driving down the road as Victim entered the neighborhood. (App. 90). After pointing out the truck for Victim, Williams left. (App. 91). She later received a call and learned Victim had been shot. (App. 92). Lana Akin, Victim's daughter, also recalled seeing the truck, which she identified it as a tan Dodge Ram. (App. 103). Like Williams, she testified they called Victim and told him about the truck. (App. 101-04).

Several people who lived in the area testified to witnessing a car chase that evening. Jennifer Lowery testified she saw Victim's burgundy car chasing a Dodge Ram¹ and then heard gunshots. (App. 117-20). Kiera Bagley recalled seeing a burgundy Cadillac chasing a gray or silver truck and hearing two gunshots followed by "bigger gunshots." (App. 132-33). Maurice James recalled hearing gunshots and seeing a man run across the road; the man briefly spoke to a person in a white SUV but did not get in. James testified that as the man approached the SUV, "he was walking stiff like he had something to the side of his leg." (Tr. 141-45). Additionally, the State entered video footage of the car chase from a home security system. (App. 127-30).

The State presented evidence that Petitioner was in the area shortly after the shooting.

¹ Jason Binnall testified he had loaned his Dodge Ram to co-defendant Quinton McClinton the evening of the shooting; investigators later recovered Petitioner's fingerprint from the truck. (App. 111-15).

Rafaell Jackson testified he saw Petitioner in the area; Petitioner asked for a ride, but Jackson refused. Although Jackson denied telling investigators that Petitioner had a rifle, he recalled seeing what appeared to be a stick in Petitioner's hand and averred Petitioner had recently been in a fight. Cornell Johnson, who was in the vehicle with Jackson, also testified Petitioner approached their vehicle. (App. 161-67). Lashonda Wray testified she picked up Petitioner, Derrick Dixon, and "Debo" from the area later that evening. (App. 173-74).

The State also presented evidence that Victim had a revolver in his vehicle with spent cartridge casings. Additionally, police recovered spent casings in the area that matched a rifle law enforcement found stashed nearby; Petitioner's DNA could not be excluded from a DNA mixture recovered from the rifle.

Petitioner's co-defendants Terrance Buchanan, Derrick Dixon, and D'Angelo Roseboro testified Petitioner was with them that evening while they were being chased by Victim, and Petitioner got out of the truck with the rifle. Additionally, Stevie Breland testified he was detained with Petitioner, and Petitioner admitted to shooting Victim. Petitioner testified in his defense and acknowledged shooting Victim. However, he claimed he fell out of the truck as he was attempting to stash the rifle nearby during the chase; after he fell out the truck, he shot Victim in self-defense.

Pertinent to this petition, the trial court charged the following elements of self-defense:

The following elements are required to establish self-defense. One, without fault. First, the defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty, and would not be entitled to an acquittal based on self-defense. Second element, imminent danger. The second element of self-defense was that the defendant was actually in imminent danger of death or serious bodily injury, or that the defendant tactually believed that he was in imminent danger of death or serious bodily injury. If the defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person of ordinary firmness

and courage to strike the fatal blow to prevent death or serious bodily injury. If the defendant believed he was in imminent danger of death or serious bodily injury, it must be shown that a reasonable prudent person of ordinary firmness and courage would have had the same belief. In deciding whether the defendant tactually was or believed he was in imminent danger of death or serious bodily injury you should consider all of the facts and circumstances surrounding the crime, including the physical condition and characteristics of the defendant and the victim. **Let me speak to you about a right to act on appearances. The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. The defendant has the right to act on appearances even though the defendant's belief may have been mistaken.** It is for you to decide whether the defendant's fear of imminent danger of death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation. Third element, no other way to avoid danger. The final element of self-defense is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance. A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm, therefore in self-defense the defendant has the right to use the force needed to avoid death or serious bodily harm. The force used in self-defense does not have to be limited to the degree or amount of force used by the victim. The defendant has the right to use so much force as appeared to be necessary for complete self protection in which a person of ordinary reason and firmness would have believed would be needed to prevent death or serious bodily harm. If the defendant is justified in defending himself and in firing the first shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serous bodily injury has completely ended.

(App. 780-82, emphasis added).

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, the 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. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are 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

I. The PCR court properly found counsel was not ineffective for not asking the court to charge the jury that a person does not have a duty to retreat if it would increase the danger to himself when (a) the charge is strikingly similar to the charge that was condemned in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), and (b) the uncontradicted evidence showed Petitioner and his co-defendants *did* retreat, making it not reasonably probable the outcome would be different had the court charged the jury that Petitioner had no duty to retreat.

Petitioner argues the PCR court erred in finding counsel was not ineffective for failing to request a charge that a person does not have the duty to retreat if it would increase the danger to himself. He specifically contends trial counsel conflated the principles of immunity not being the proper subject of a jury charge with this retreat instruction not being proper. However, because the charge Petitioner believes should have been requested is strikingly similar to the charge condemned in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the PCR court and trial counsel properly concluded the “no duty to retreat” language was not a proper jury charge under these facts. Thus, counsel’s performance was reasonable under prevailing professional norms. Further, because the uncontradicted evidence showed Petitioner and his co-defendants *did* retreat, it is not reasonably probable the outcome would be different had the court charged the jury that Petitioner had no duty to retreat.

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 v. Washington, 466 U.S. 668, 687-88 (1984). A PCR applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). “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 received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

a. Because the “no duty to retreat” charge Petitioner asserts counsel should have requested is strikingly similar to the charge condemned in Curry, the PCR court properly concluded counsel articulated a valid reason for not requesting the charge and thus was not deficient.

In State v. Curry, the South Carolina Supreme Court found it was error for the trial court to charge the following language from section 16-11-440(C):

I tell you that if the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, even to the extent of using deadly force or great bodily injury if it was necessary to prevent death or great bodily injury to himself or others.

State v. Curry, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013) (“[T]he trial court had denied Appellant immunity, and section 16-11-440(C) should not have been charged to the jury.”). The Court further noted that the absence of a duty to retreat in the Castle Doctrine only extends to a person’s dwelling place—it “does not extend to a visitor or social guest in the home of another unless ‘the attacker is an intruder.’” Id. at 373-74, 52 S.E.2d at 267.

Under Curry, counsel’s decision to *not* request a charge on the duty to retreat was reasonable under prevailing professional norms and not deficient. At the PCR hearing, counsel explained he had previously successfully requested a similar charge, but the Supreme Court found the trial court should not have given that charge. (App. 929). Counsel elaborated, “I’m afraid that it gets closer to what I ask[ed] for in the Curry case where I got the judge to formulate a charge that the Supreme Court said you can’t get that charge. So having had that experience, no, I would not have asked for that specific charge.” (App. 929).

Counsel correctly assessed that the charge Petitioner asserts counsel should have requested (that a person doesn't have a duty to retreat when it would increase their danger) is akin to the charge condemned in Curry. In fact, the requested charge is strikingly similar to the charge condemned in Curry. See 406 S.C. at 364, 752 S.E.2d at 267 (finding it was error for the court to charge, "I tell you that if the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, **he had no duty to retreat and had the right to stand his ground and meet force with force**, even to the extent of using deadly force or great bodily injury if it was necessary to prevent death or great bodily injury to himself or others" (emphasis added)).

In light of the similarities, counsel's assessment that trial court could not charge that Petitioner had no duty to retreat under these facts was reasonable under prevailing professional norms and not deficient. Likewise, the PCR court properly found counsel articulated a valid reason for not requesting this charge and thus was not deficient.

b. The uncontradicted evidence showed Petitioner and his co-defendants did retreat from Victim, making it not reasonably probable the outcome would be different had the court charged the jury that Petitioner had no duty to retreat.

Here, the uncontradicted evidence showed Victim pursued the vehicle Petitioner was in for an extended period of time before Petitioner got out of the vehicle. Thus, it is not reasonably probable the outcome would be different had counsel requested and received this charge.

"When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695.

Here, it is undisputed that Victim was chasing the car Petitioner was in for an extended time before Petitioner got out of the vehicle with a semiautomatic weapon and began firing.

Although the circumstances under which Petitioner got out of the vehicle are disputed, the uncontroverted evidence showed Victim chased the car for an extended period of time before Petitioner got out. Thus, Petitioner (and his codefendants) *did* attempt to retreat. The probative question for the jury here was whether the State disproved beyond a reasonable doubt that Petitioner (after being in a vehicle that attempted to retreat) had no other probable means of avoiding the danger than to shoot at Victim with a semiautomatic weapon. Because Petitioner (and his co-defendants) *did* attempt retreat before Petitioner exited the vehicle, it is not reasonably probable the jury would have reached a different result had the court charged it that Petitioner had no duty to retreat. Thus, the PCR court properly denied relief.

II. The PCR court properly found counsel was not ineffective for not requesting a charge that the defendant had the right to “act on appearances” and “did not have to wait for the decedent to get the drop on him” when (1) the trial court properly charged the jury that the defendant had the right to act on appearances, (2) the charge adequately conveyed to the jury that Petitioner did not have to wait until he was actually under attack to employ force, and (3) counsel articulated a valid reason for not requesting “get the drop” language in that it did not fit his theory of the case.

Petitioner next contends counsel was ineffective for not requesting a jury charge that a person does not have to wait for an assailant to “get the drop on him” and may “act on appearances,” especially when the defense theory was Petitioner acted on the appearances of the decedent chasing him down with a car and handgun. However, the trial court *did* charge the jury that a defendant has the right to act on appearances. Further, under State v. Harris, 382 S.C. 107, 115, 674 S.E.2d 532, 536 (Ct. App. 2009), the charge here adequately conveyed to the jury that Petitioner did not have to wait until he was under attack to employ force. Finally, counsel articulated a valid strategy in not requesting “get the drop” language in that it did not fit his theory of the case. Thus, the PCR court properly found Petitioner failed to prove deficiency or prejudice.

a. *The trial court properly charged the jury that Petitioner had the right to act on appearances.*

The PCR court properly found the charge adequately conveyed to the jury that a defendant can act on appearances. (Tr. 781-82). Specifically, the court charged,

Let me speak to you about a right to act on appearances. The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. **The defendant has the right to act on appearances** even though the defendant's belief may have been mistaken.

(Tr. 781, emphasis added). Because the trial court instructed the jury that a defendant can act on appearances, counsel was not ineffective for not requesting a charge that a defendant can act on appearances.

b., *The charge adequately conveyed to the jury that Petitioner did not have to wait until he was actually under attack to employ force.*

In Harris, the Court of Appeals examined whether it was error for the trial court to “refuse[] to include the ‘gets the drop on him’ language” in its self-defense charge when requested by the defendant. State v. Harris, 382 S.C. 107, 114, 674 S.E.2d 532, 536 (Ct. App. 2009). There, the trial court charged,

You may consider the deceased's conduct[,] actions and general demeanor immediately before the incident as bearing on the deceased's temper and state of mind at the time of the fatal encounter[,] and **the defendant does not have to show that he was actually in danger.** It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. **The defendant has the right to act on appearances even though the defendant's beliefs may have been mistaken.**

Id. at 115, 674 S.E.2d at 536. In examining whether the court erred in refusing to include “gets the drop on him” language, the Court of Appeals explained, “This language has been interpreted to

mean a defendant does not have to wait until actually fired upon to use force to defend his life.” Id. at 114, 674 S.E.2d at 536. The Court concluded the charge provided by the trial court was proper—even without the requested “get the drop” language:

The trial court's instructions made it clear Harris did not have to wait until he was actually under attack in order to employ force to defend his life. The trial court informed the jury that Harris had a right to act on appearances even if those appearances may have been erroneous. The simple fact that the trial court refused to use the “[gets] the drop on him” language does not render the charge improper.

State v. Harris, 382 S.C. 107, 115, 674 S.E.2d 532, 536 (Ct. App. 2009).

Here, the trial court’s charge is identical to the charge given in Harris. Like the charge in Harris, this charge adequately conveyed to the jury that Petitioner “did not have to wait until he was actually under attack in order to employ force to defend his life.” Id. at Thus, counsel was not deficient for not requesting “get the drop” language. Further, because the charge adequately conveyed to the jury that Petitioner did not have to wait for Victim to attack him, it is not reasonably probable the outcome would be different had counsel requested and received this charge.

c. Counsel articulated a valid reason for not requesting “get the drop” language in that it did not fit the defense theory.

The PCR court properly found counsel articulated a valid reason for not requesting the “get the drop” language. At the PCR hearing, counsel testified,

I don’t know that it applies in this case because, I mean, [Victim] is not laying in wait, he’s chasing them. So, I mean, the person that they would accuse of laying in wait would have been [Petitioner] because he’s the one who’s on the side of the road that shoots. So I don’t think it necessarily applied in this case because it’s not a laying in wait kind of thing.

(App. 931). This was consistent counsel’s strategy, as articulated by his closing argument:

Now, you've got 18 shell casings, you can go look at them all you want, this gun got fired 18 times, nothing to change that. Six of them hit this Cadillac, six of them. Is that somebody laying in wait? Does that make sense? And they're in the front, you've got some on the side, they're all kinds of different direction, and one, one hit [Victim], one unfortunate shot strikes him through and through in the jaw. Is that somebody lying in wait or is that somebody who's scared running?

(App. 738-39). Critically, counsel's self-defense strategy was premised on evidence showing (1) Victim chased the vehicle Petitioner was in, (2) Victim had a gun, and (3) Victim fired at the vehicle Petitioner was in.² Under the defense theory, this was not a situation where Petitioner fired the first shot; rather, the defense argued Victim had been chasing and shooting at the car Petitioner was in. The "get the drop" language did not fit the defense theory. Thus, the PCR court properly concluded counsel articulated a valid reason for not requesting this language.

III. The PCR court properly found counsel was not ineffective for not objecting to the State's closing argument when the mere passing statement here is distinguishable from the statements in Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019), and the comments did not so infect the trial with unfairness as to violate due process.

Petitioner asserts trial counsel was ineffective for failing to object and move for a mistrial when the solicitor argued, "The defense's job is to confuse you and to believe the defendant's lies. Don't fall for it. We come seeking the truth and we come seeking justice for Odell Williams, but we also come seeking justice for his family." Although the solicitor's comment that "the defense's job is to confuse you and to believe the defendant's lies" was not appropriate, the PCR court properly found this mere passing reference in a twenty-four-page closing argument did not so infect the trial with unfairness such as to constitute a due process violation.

"Improper comments do not automatically require reversal if they are not prejudicial to the

² Although the State disputed whether Victim actually fired at the vehicle, the undisputed evidence showed Victim chased the vehicle and Victim had a gun.

defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) “To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we 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). In determining whether an improper comment prejudiced a defendant, “[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 181 (1986). On appeal, the appellate court will 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.” Vasquez, 388 S.C. at 458, 698 S.E.2d at 566.

a. The mere passing statement here is distinguishable from the statements our Supreme Court found “inexcusable” in Fortune.

In support of his contention that the solicitor’s closing argument violated due process, Petitioner cites a passage from Fortune, 428 S.C. at 551, 837 S.E.2d at 37. Critically, however, Petitioner omitted the following language that the Fortune Court found improper:

[W]e both have jobs here. My job is to present the truth. In fact if you look in the South Carolina Code of Laws which mandates what a solicitor's job is we can't be like a normal attorney is.

A normal lawyer has to advocate on behalf of his client. But on the other hand the Solicitor can't. We have to say what the truth is.

.....

And what that means is that we have something in law that [is] called nolle prosee, and [to] nolle prosee a person that has been indicted for a crime or charged with a crime. After further investigation somebody else did the crime where you can dismiss

it and nolle prosequere is the notification] in which we dismiss the case.

And [if] I know the person has done something that I think the facts show they're guilty of, then I can't nolle prosequere it. I have to go forward with it. And as I said my job is to show the truth. On the other hand, the defense attorneys' jobs are to manipulate the truth. Their job is to shroud the truth. Their job is [to] confuse jurors. Their job is to do whatever they have to -- without regard for the truth -- to get a not guilty verdict.

428 S.C. at 551, 837 S.E.2d at 40 (emphasis added).

This omitted language highlights the difference between the “inexcusable comments” in Fortune and the mere passing statement here. Unlike the solicitor in Fortune, the solicitor here did not convey to the jury that (1) she had a statutory duty to screen cases, (2) she had already determined Petitioner was guilty, and (3) she would have dismissed the case if she believed otherwise. Contra Fortune, 428 S.C. at 551, 837 S.E.2d at 41 (“The assistant solicitor told the jury he has a statutory duty to screen cases, he suggested he had already determined Fortune was guilty, and he claimed he would have dismissed the case if he determined otherwise.”). The solicitor here likewise did not “boast[] of [her] responsibility to prosecute defendants the prosecutor knows to be guilty” or misrepresent her role. Contra id. at 553, 837 S.E.2d at 41 (“Courts have also condemned the specific misconduct in this case, when the prosecutor invokes his duty to dismiss unfounded cases and boasts of his responsibility to prosecute defendants the prosecutor knows to be guilty.”); id. at 559-60, 837 S.E.2d at 45 (“[T]he assistant solicitor's misconduct was to misrepresent his own role, improperly claiming for himself the responsibility to decide truth, as though his opinions as to what happened were in itself evidence.”). Likewise, the solicitor here did not convey to the jury that her job was to tell the truth. Id. at 551, 837 S.E.2d at 40. Finally, unlike the comments in Fortune, which encompassed multiple paragraphs of the closing argument, the comments here were a mere few lines in a closing argument that spanned more than twenty-four

pages of the trial transcript. Overall, the solicitor's mere passing comment here is different than the statements in Fortune. Thus, Fortune is not controlling.

b. The solicitor's mere passing statement did not so infect the trial with unfairness as to violate due process.

In context of the entire closing argument, the solicitor's mere passing statement here did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. See Fortune, 428 S.C. at 560-61, 837 S.E.2d at 45 (finding the solicitor's comments "absolutely inexcusable" but noting the question of whether the comments "violated Fortune's due process rights is a tougher judgment call"); Darden, 477 U.S. at 168 (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").

Initially, the "truth" language here did not violate due process. Cf. Aleksey, 343 S.C. at 28-29, 538 S.E.2d at 252-53 (finding trial court's truth-seeking language did not shift the burden of proof when it was not given in conjunction with the charge on the State's burden of proof); Beatty, 423 S.C. at 32-34, 813 S.E.2d at 505-06 (finding defendant not prejudiced by court's pretrial comments that a trial is a search for the truth and the jury's role is to render true and just verdict and determine true facts when these comments "were a mere statement to the jury and not a charge on the law" and "the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges").

Further, in context of the argument as a whole—which spans more than twenty-four pages of the transcript—the mere passing statement about defense counsel did not so infect the trial with unfairness as to violate due process. See United States v. Brockington, 849 F.2d 872, 875 (4th Cir.

1988), *overruled on other grounds by* Bailey v. United States, 516 U.S. 137 (1995) (providing courts should consider *inter alia* “whether the remarks were pronounced and persistent, creating a likelihood that the remarks would mislead the jury to the prejudice of the defendant,” when assessing prejudice from a solicitor’s improper comments); United States v. Chorman, 910 F.2d 102, 113 (4th Cir. 1990) (providing courts should consider *inter alia* “whether the remarks were isolated or extensive” when assessing prejudice from a solicitor’s improper comments). Unlike the extensive comments in Fortune, the comment here was very brief. In context, this mere passing statement did not so infect the trial with unfairness as to violate due process.

CONCLUSION

Based on the foregoing, this Court should deny Petitioner’s Petition for a Writ of Certiorari.

Respectfully Submitted,

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