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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari from Horry County

Benjamin H. Culbertson, Trial Judge
Heath P. Taylor, Post-Conviction Relief Judge

Appellate Case No. 2024-002167

JAMAR ANTONIO HUGGINS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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STATEMENT OF ISSUES ON PETITION FOR CERTIORARI

Petitioner's Issue Statements

- I. Did the PCR court err in finding trial counsel was effective when he admittedly failed to present evidence that bolstered trial counsel's assertions during his opening statement to the jury that the State's entire case against Petitioner centered on the improper identification by the State's star witness, co-defendant Montgomery, of Petitioner as a participant in the crime through the confusion surrounding nicknames of the criminal actor (Juice) and the misidentified Petitioner (Junk)?
- II. Did the PCR court err in finding trial counsel was effective when trial counsel believed he was ethically prohibited from eliciting evidence regarding the identity of "Juice" because a lawyer representing "Juice" on separate charges provided information that "Juice" had an alibi for the crimes charged against Petitioner?
- III. Did the PCR court err in finding trial counsel was effective when he failed to object to the trial court's instructions to the jury that they were to seek the truth so that they could render a true and just verdict?

Respondent's Counterstatements

- I. Whether the PCR court erred in determining Petitioner failed to show that trial counsel provided ineffective assistance of counsel where trial counsel changed his trial strategy during trial to utilize unexpected testimony favorable to Petitioner which necessarily resulted in some parts of trial counsel's opening statement not having evidentiary support during trial.
- II. Whether the PCR court erred in determining Petitioner failed to show that trial counsel provided ineffective assistance of counsel by not eliciting evidence that a third party was involved in those crimes instead of Petitioner.
- III. Whether the PCR court erred in determining that Petitioner failed to show he was prejudiced by trial counsel's failure to object to the trial court's opening statements regarding "truth" based on *State v. Beaty*.¹

¹ 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018).

STATEMENT OF THE CASE

In March 2013, an Horry County grand jury indicted Petitioner for first-degree burglary, armed robbery, and kidnapping. (App. 190-98). On September 15-17, 2014, Petitioner proceeded to a jury trial before the Honorable Benjamin H. Culbertson. (App. 1).

In its opening remarks to the jury, the trial court stated that, "The primary function of this trial is a search for the truth to determine what happened." (App. 33). The trial court, in explaining the role of counsel, stated that attorneys are sworn to uphold the integrity and fairness of the judicial system and "to help you in a search for the truth." (App. 34). After stating that the jury's job was to take the law as provided by the court and apply it to the facts as the jury found them to be, the trial court stated that the jury would be "in a position to render [its] verdict, a true and just verdict[,] under the solemn oath you just took as jurors." (App. 36). In concluding its opening remarks, the trial court cautioned the jury against wandering thoughts and stated that if the jury gave strict attention, then it would be able to determine the "true facts" and render a "true and just verdict." (App. 38). The trial court also stated that its remarks were not instructions or charges on the law; rather, its remarks were an explanation of procedure. (App. 34). It also informed the jury about the State's burden to prove the elements of each crime beyond a reasonable doubt. (App. 35). At no point during or after the trial court's opening remarks did Petitioner's trial counsel object.

In his opening argument, trial counsel informed the jury that they might hear "a lot of names" throughout the trial. (App. 43). Trial counsel asserted "evidence will show that Adrian Moore and Deaungela or Shanta[,] they got their crack cocaine from one guy named Juice. Juice had the crack. As a matter of fact, the evidence will show that Juice introduced Shanta and Drake." (App. 44). Trial counsel argued that Drake owed Juice money for drugs and went into the hospital

about a week before the incident in this case occurred. (App. 45). Trial counsel asserted that Deaungela knew Adrian was getting money from Angela Eckler, the victim, to purchase drugs and argued that evidence would show that "Shanta, Deaungela and Juice" went to Eckler's house. (App. 45). Trial counsel asserted that Petitioner's nickname was Junk and that when Deaungela initially talked to law enforcement, she identified Junk as one of the two men who went with her on the night of the incident. (App. 45-46). Trial counsel argued that Deaungela could not keep her story straight and intermingled Juice and Junk in her statement to law enforcement. (App. 46).

At trial, Deaungela Montgomery testified that she had previously pled guilty to two counts of armed robbery and was then presently incarcerated. (App. 49). She received no help from the State when she was sentenced and had not been offered anything in exchange for her testimony. (App. 49-50). Deaungela recalled planning the armed robbery of Eckler with Tyjuan McKeithan. (App. 50). She stated that Tyjuan called someone in connection with their planning of the armed robbery. (App. 50). According to Deaungela, Petitioner did not look like the same person Tyjuan called. (App. 50). However, she confirmed that Tyjuan said the person's name was Junk. (App. 50-51).

When the State asked if Deaungela recalled telling a detective that Junk was with her on the night of the incident and if she recalled that she picked Junk out of a photo lineup, Deaungela stated that law enforcement asked her if Petitioner was Junk and she assumed that he was. (App. 51). She claimed not to remember Petitioner and not to know him. (App. 51). Deaungela did not recognize the picture the State showed her, which the State informed her was the photo the detective had shown her previously. (App. 51). She did not initially recall whether she gave a statement to law enforcement before remembering both the name Junk and that she had made a

statement. (App. 52). She stated that Petitioner was not the same person she previously identified as Junk. (App. 52).

Deaungela confirmed that in her statement to law enforcement, she said that she rode to Eckler's house in Petitioner's car and that Petitioner was driving. (App. 53). She also confirmed that she told law enforcement that Petitioner had a mask on when he went into Eckler's house with a weapon. (App. 53). Petitioner and another male were with her. (App. 54). In her statement, Deaungela said that she went to Eckler's front door and knocked. (App. 54). When Eckler opened the door, leaving the screen door closed, Deaungela asked for Dre. (App. 55). Eckler informed Deaungela that Dre was not there. (App. 55). Deaungela turned to leave, and Eckler opened the screen door to stop her so she could tell Deaungela where Dre was. (App. 55). Deaungela got back into Petitioner's car as the two men went into the house. (App. 55). In her statement, Deaungela confirmed that Petitioner was one of the two men. (App. 55). She also confirmed that she knew she was in Petitioner's car and that she had previously described the car as a specific make and color. (App. 55). While testifying, Deaungela stated that she could only recall who went with her but otherwise could not recall that night. (App. 56).

Deaungela confirmed that she knew one of the two men who went with her, whom she previously described as best she could, including his vehicle and where he lived. (App. 56). She knew when she knocked on Eckler's door that Eckler would be robbed by Tyjuan and his friend, whom she identified as Petitioner in her statement. (App. 58). She could not recall telling law enforcement how she knew Petitioner or that she knew him as Junk. (App. 58). She stated that it was possible she told law enforcement that she knew Petitioner, saw him everyday, and knew him as Junk, but she could not remember at the time of trial. (App. 59).

Deaungela testified that she initially told law enforcement that she and Drake, Eckler's boyfriend, got drugs from Junk, but stated that her previous statement was a lie. (App. 59-60). She also testified that she told law enforcement shortly after the incident that Junk was involved, but testified that her previous statement was also a lie. (App. 60). According to Deaungela's trial testimony, Junk was not looking for Drake, did not know Drake, and had never seen Drake before. (App. 60).

Deaungela stated that Junk went with her on the night of the incident, but she did not remember Petitioner at trial. (App. 61). She stated that it was possible that Petitioner looked substantially different and might not look like the same person who went with her on the night of the incident. (App. 61). On cross-examination, Deaungela stated that Petitioner was not the person who went with her that night and was not one of the two men who went into Eckler's home. (App. 62). On redirect, she confirmed that she identified one of the men who went with her that night as Junk. (App. 62). She stated that she did not know his real name until she read her "motion of discovery." (App. 62). Deaungela again confirmed that she previously identified Junk as Petitioner after law enforcement showed her a picture of him. (App. 62).

Angela Eckler Dillon testified that the incident occurred shortly before Christmas. (App. 64). She had not seen Adrian, her fiancé, in almost a week. (App. 65). She and her daughter were watching movies in bed when she heard a knock at the door, which she believed to be a neighbor. (App. 66-67). When she opened her front door, Eckler saw a well-dressed woman who was not her neighbor. (App. 67). Eckler stated that her dog was barking and she could not hear the woman through her closed storm door. (App. 67). As she tried to quiet her dog, two men came into her house as the woman ran off. (App. 67). The men asked her where the money was kept. (App. 68). She did not see the men's faces. (App. 68-70). The men left after taking some of her

daughter's birthday money, video games, and a camera; Eckler then went to the police station. (App. 70, 73-74). Eckler was unable to identify the two men, but she did identify the woman as Deaungela based on a photo lineup. (App. 71).

Jonathan Martin, a detective in the violent crimes section of the Horry County Police Department, testified that Eckler's then-fiancé, Adrian, had a street name of Dre. (App. 95, 98). When Martin talked to Adrian, who had self-admitted to the hospital for medical treatment, Adrian identified Deaungela as the woman who went to Eckler's house. (App. 98-99). Martin interviewed Deaungela at the Horry County detention center; she had been arrested on a separate armed robbery charge. (App. 99). With the information Martin obtained from Deaungela, Martin developed Petitioner as the person Deaungela identified as Junk. (App. 100). Deaungela described where Junk lived and the kind of car he drove. (App. 100). She also gave a physical description of Junk. (App. 100). Martin confirmed that he arrested Petitioner solely based on his interviews with Deaungela. (App. 103-04). Concerning Deaungela's testimony, he stated that while Deaungela claimed Petitioner was not involved in court, she had identified Petitioner, as Junk, being involved in the incident. (App. 104). Martin also confirmed that Deaungela told him that she used crack cocaine and that he knew Deaungela was a convicted felon. (App. 105).

In closing, trial counsel focused on Deaungela's testimony that Petitioner was not Junk. (App. 142). Trial counsel did not raise any objections or challenges to the trial court's jury charges. (App. 164-65).

The jury found Petitioner guilty as indicted. (App. 170). The trial court sentenced him to concurrent sentences of fifteen years for first-degree burglary, fifteen years for kidnapping, and ten years for armed robbery. (App. 187-88). Petitioner filed a timely direct appeal of his

convictions and sentences, which the Court of Appeals affirmed in a unpublished opinion on March 30, 2016. *See State v. Huggins*, 2016-UP-146 (S.C. Ct. App. filed March 30, 2016).

On September 26, 2016, Petitioner filed a motion for a new trial based on after discovered evidence based on a new affidavit in which Deaungela identified a different person—Jasmine Mitchell—and denied Petitioner's involvement in the incident. (App. 199). Petitioner argued that when Martin talked to Adrian in the hospital, Adrian told him that Tyjuan and Jasmine could have been looking for him. (App. 208-09). The State argued that everything Petitioner argued has already been presented to the jury. (App. 215). The State asserted that the only new thing Petitioner presented was a name. (App. 216). The trial court indicated that the new information—the new name—was or could have been available at the time of trial. (App. 220).

On June 15, 2017, the trial court issued an order denying Petitioner's motion for a new trial. (App. 228). In that order, the trial court determined that Deaungela's post-trial identification of a third person was not newly discovered evidence, but rather cumulative evidence because the jury heard testimony from Deaungela that Petitioner was not a co-perpetrator. (App. 229). The trial court further determined that this third person's name could have been discovered prior to trial with due diligence. (App. 229). Petitioner filed an appeal of the trial court's denial of his motion for a new trial, which the Court of Appeals affirmed in an unpublished opinion on July 3, 2019. *See State v. Huggins*, 2019-UP-247 (S.C. Ct. App. filed July 3, 2019).

On March 16, 2017, Petitioner filed his PCR application, which was subsequently held in abeyance pending the outcome of his motion for a new trial and the related appeal. (App. 230). On April 24, 2023, Petitioner filed an amended application. (App. 237). Petitioner alleged, in part, that trial counsel failed to utilize evidence and witnesses to attack the State's case and put up a proper defense, specifically a third party guilt defense; trial counsel failed to object to improper

burden shifting statements to the jury by the trial court; and trial counsel's opening statement was prejudicial to Petitioner's defense and bolstered the State's case. (App. 239-40, 442). On November 13, 2023, Petitioner proceeded to a PCR evidentiary hearing before the Honorable Heath P. Taylor. (App. 251).

At the PCR hearing, Petitioner presented testimony from Mitchell Phillips, who lived on the same street as Eckler. (App. 264). Phillips, who at no point contacted law enforcement, testified that "suspicious activity" occurred at Eckler's residence, including people coming and going during the night and a nursery operating out of the house. (App. 266). Phillips never personally observed any drug activity at Eckler's residence. (App. 268).

Natasha Hanna, Petitioner's counsel for his motion for a new trial, confirmed that the trial court determined that Petitioner did not present evidence of newly discovered evidence that could not have been discovered before trial with the exercise of due diligence. (App. 290).

Matthew Thornton, a private investigator, testified that Eckler's fiancé, Adrian, was only interviewed by law enforcement while he was in the hospital, which Thornton speculated could have been under duress. (App. 327). Thornton also stated that Adrian did not mention Petitioner in his interview with law enforcement. (App. 343).

John Rueben Long, III, Petitioner's trial counsel, testified that he received discovery from the solicitor's office and reviewed it. (App. 346). He recalled reviewing a police report, search warrants, cellphone records, text messages, and recorded interviews. (App. 346-47). Trial counsel believed that Deaungela's long-established relationships with Tyjuan and Jasmine meant that the cellphone records reflecting conversations between the three and without Petitioner were not exculpatory. (App. 352). Further, trial counsel stated that Petitioner was assuming on PCR that the cell phone records implied a conspiracy to commit a crime, which is not necessarily what those

records suggest. (App. 352). Trial counsel confirmed that it was possible his opening statement at trial focused on the relationship between Deaungela, Adrian/Dre, and Juice, including that Petitioner was not part of that grouping. (App. 353).

According to trial counsel, his entire trial strategy "completely" changed during Deaungela's testimony. (App. 361). His initial strategy included cross-examining Investigator Martin about the phone records and going into evidence and information that Hanna later discussed in Petitioner's motion for a new trial. (App. 361). Trial counsel's strategy regarding Deaungela was initially to discredit her and contradict her testimony though other evidence. (App. 362). However, once Deaungela testified, trial counsel believed the case became a question of identification and whether any witness could place Petitioner at the crime scene. (App. 362). Trial counsel testified he planned to introduce a third-party defense regarding Juice but Deaungela's testimony, in which she did not recognize Petitioner, meant that her trial testimony would have caused him to contradict his opening statement if he did not alter his strategy. (App. 362). Trial counsel testified that he kept his questioning of Deaungela and Eckler simple because Deaungela testified that Petitioner was not with her during the incident and Eckler could not identify the men who broke into her home. (App. 363). Further, he acknowledged that he would have presented a different opening argument if he had known what Deaungela's testimony was going to be. (App. 421).

Trial counsel stated that he identified Petitioner as Junk in his opening argument because "it seemed to be common knowledge based on the interviews" and because Deaungela, in her pretrial interview, referred to her masked accomplice as Juice and as Junk almost interchangeably. (App. 368-69). Trial counsel's strategy before Deaungela's testimony was to identify Petitioner as Junk and emphasize Junk was not the actual culprit because Juice was. (App. 369). Trial counsel

did not believe he could address Juice after his opening and Deaungela's testimony. (App. 370). His initial intention was to explain to the jury that Deaungela committed these crimes with Juice, not Junk, but as trial counsel kept repeating, his strategy changed when Deaungela testified that Petitioner was not involved in these crimes. (App. 370). Trial counsel stated that Deaungela's testimony could be viewed as confusing, which is why he mostly focused his cross-examination on whether Petitioner—not Juice, not Junk, but Petitioner—was involved in these crimes. (App. 372). Deaungela replied that Petitioner was not involved. (App. 372). Trial counsel confirmed that he did not ask for any sort of continuance based on the change in his trial strategy. (App. 371).

Trial counsel agreed that in his opening statement, he asserted that Deaungela was not a truthful person. (App. 372-73). He confirmed that the State argued in closing that Deaungela was not truthful and referred back to trial counsel's opening where he labeled her as an "addicted crackhead." (App. 373). However, trial counsel believed that this strategy of relying on Deaungela's testimony was reasonable. (App. 373). He stated that continuing with his initial strategy would have been more inculpatory than exculpatory. (App. 374).

Regarding Tyjuan, trial counsel interviewed him after law enforcement did and confirmed he was prepared to cross-examine Tyjuan. (App. 364-65). However, after the State did not call Tyjuan, trial counsel believed Tyjuan could not add anything to Deaungela's testimony. (App. 365). Trial counsel acknowledged differences between Eckler's trial testimony and information Eckler provided to law enforcement before trial. (App. 353-55). Additionally, trial counsel stated that he did not have a reason for not objecting to statements about "truth" in the trial court's opening statement to the jury. (App. 367-68).

Trial counsel confirmed that he did not ask Deaungela who was involved with the incident during his cross-examination, which was strategic because if no witness could put Petitioner at the

scene of the crime, then there would not be enough testimony to go forward, which he believed would have result in a directed verdict. (App. 372). He stated that any cross-examination of Deaungela concerning her relationship with Adrian was not important because his strategy was to focus on Deaungela's testimony that Petitioner was not involved in these crimes and to limit the State's re-direct. (App. 382).

Trial counsel confirmed that he identified Jasmine Mitchell during the course of his investigation and noted that Jasmine was represented by counsel. (App. 406). Trial counsel contacted Jasmine's attorney, who provided a "valid reason" why Jasmine was not involved in this incident. (App. 406). Trial counsel could not recall that reason, stating that he did not write it down. (App. 407). He confirmed that "it was enough . . . to know that [Jasmine] was a dead end, that he was actually not involved in the crime." (App. 407). Thus, trial counsel believed he could not ethically accuse Jasmine of being one of the men who broke into Eckler's residence while knowing Jasmine had an alibi. (App. 407). However, trial counsel was comfortable using the term Juice during trial as that name had not been associated with Jasmine during trial. (App. 407). Trial counsel reaffirmed that his initial trial strategy included emphasizing that Deaungela interchanged Juice and Junk. (App. 407-08). He noted that the identity of Juice was not important to this case. (App. 407-08). Trial counsel confirmed that he would have had concern if Deaungela had identified Jasmine on the stand because he had a "good understanding" that Jasmine was not involved in these crimes. (App. 424). He believed that he could not ethically argue that Jasmine was involved in the crimes when he knew otherwise. (App. 424). Trial counsel stated that had Deaungela identified Jasmine on the stand, then he would have needed to move for a mistrial, which could have been harmful to Petitioner. (App. 425-26).

On October 8, 2024, the PCR court issued its order of dismissal with prejudice. (App. 436). First, the PCR court determined that Petitioner failed to meet his burden of proving that trial counsel was deficient and that Petitioner was prejudiced by such a deficiency related to Petitioner's allegation that trial counsel made an opening argument that was prejudicial to his defense and also bolstered the State's case. (App. 466). The PCR court found trial counsel's testimony credible as it related to trial counsel starting trial with one defense theory and strategy and, due to Deaungela's testimony, having to abruptly change course. (App. 466). The PCR court emphasized that trial counsel did not have psychic abilities to determine that Deaungela would change her story on the stand before making his opening statement. (App. 466). The PCR court determined that trial counsel articulated a reasonable strategy for his shift in defense strategy and for why he conducted the rest of Petitioner's defense in the way he did. (App. 466). Thus, the PCR court found that Petitioner failed to show that trial counsel's performance was deficient. (App. 467). The PCR court also determined that Petitioner failed to meet his burden of showing that trial counsel's performance prejudiced him in any way. (App. 467).

Second, the PCR court determined Petitioner failed to meet his burden of proving trial counsel was deficient, and that such deficiency prejudiced him, concerning Petitioner's allegation that trial counsel failed to utilize evidence and witnesses to attack the State's case and present a defense of alibi, third-party guilt, and/or actual innocence.² (App. 454-55). The PCR court found trial counsel's testimony credible *and agreed* that counsel could not ethically "go down the third-party guilt path" about Jasamine. (App. 454-55). The PCR court determined that trial counsel's performance, given his knowledge of Jasamine's alibi, was sound and reasonable. (App.

² Petitioner withdrew his ineffective assistance of counsel for failure to present an alibi defense at the PCR hearing. (App. 409-10).

455). Thus, the PCR court determined that Petitioner failed to show that trial counsel provided deficient performance. (App. 455). Further, the PCR court determined that Petitioner failed to present specific and compelling evidence to show that any alleged errors or omissions by trial counsel prejudiced Petitioner. (App. 455).

Third, regarding Petitioner's allegation that trial counsel's failure to object to "improper burden-shifting statements" made by the trial court in its opening statement to the jury, the PCR court determined that the trial court's statement did not unconstitutionally shift the burden of proof and that the outcome of Petitioner's trial was not reasonably likely to have been different without the "search for the truth" language. (App. 455-59). Citing to *State v. Beatty*,³ the PCR court determined that the trial court's "truth" comments did not constitute reversible error or otherwise shift the burden of proof to Petitioner in contravention of the Constitution. (App. 458-59). The PCR court then included quotations to no less than eighteen instances in the trial court's charges to the jury that definitively placed the burden on proof on the State. (App. 459-61). The PCR court found that based on the record as a whole and in context, the trial court's opening remarks did not shift the burden of proof or otherwise prejudice Petitioner. (App. 461). Therefore, the PCR court found that Petitioner failed to show that any deficiency in trial counsel's performance had prejudiced him. (App. 462).

On October 28, 2024, Petitioner filed a Rule 59(e), SCRCR, motion for reconsideration, which the PCR court denied. (App. 494-504, 529).

This appeal followed.

³ 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) (finding no reversible error in a court's preliminary comments because "they were a mere statement to the jury and not a charge on the law" and such preliminary comments "were not linked to either the reasonable doubt or circumstantial evidence charges").

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the court. *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 839 (2018). The burden is on the petitioner to prove the allegations in the PCR application. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). Appellate courts will defer to a PCR court's findings of fact and will uphold them if evidence in the record supports the findings of fact. *Id.* Appellate courts review questions of law de novo with no deference to the conclusions of the PCR court. *Id.* Appellate courts will reverse the decision of the PCR court when such a decision 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 that trial counsel did not provide ineffective assistance of counsel to Petitioner because evidence in the record shows Petitioner failed to prove that trial counsel's performance was deficient and that any such deficient performance prejudiced him such that the outcome of his trial would have been different but for trial counsel's performance.

A two-prong test for determining effective assistance of counsel has been set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must show that counsel's performance was deficient. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 669. The defendant is required to overcome the presumption that counsel was effective to receive relief. *See Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

I. The PCR court properly determined that Petitioner failed to show that trial counsel provided ineffective assistance of counsel by changing trial strategy during trial to utilize unexpected testimony favorable to Petitioner, which resulted in some parts of trial counsel's opening statement not having evidentiary support.

Petitioner asserts that trial counsel was constitutionally ineffective for making an opening argument that was prejudicial to his defense and that bolstered the State's case. This argument is without merit.

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003); *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Review of counsel's actions is afforded great deference because "it is all too

tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Due to legal representation being an art rather than a science, no particular set of rules for defense counsel could satisfactorily take into account the variety of differing circumstances faced by counsel and the accompanying decisions regarding how to best represent a criminal defendant. *Id.* at 688-89; *see also id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn v. Reeves*, 594 U.S. 731, 738 (2021) (quoting *Harrington v. Richter*, 562 U.S. 86, 104 (2011)). "Such decisions are particularly difficult because certain tactics carry the risk of 'harming the defense' by undermining credibility with the jury or distracting from more important issues." *Dunn*, 594 U.S. at 738 (quoting *Harrington*, 562 U.S. at 108).

Therefore, for a fair assessment of defense counsel performance, every effort should be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at that time. *Strickland*, 466 U.S. at 689; *see also Mazzell v. Evatt*, 88 F.3d 263, 269 (4th Cir. 1996) ("We decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial.").

At the PCR hearing, trial counsel testified that he identified Petitioner as "Junk" in his opening statement because it was common knowledge, based on law enforcement's interviews, that Petitioner's nickname was Junk. (App. 369). He stated that because Deaungela referred to

one of the men who participated in these crimes interchangeably as both Junk and Juice during her pretrial interviews, his trial strategy during opening statements consisted of identifying Petitioner as Junk, identifying Juice as a third party and actual culprit, and establish that Petitioner was not Juice. (App. 369). Trial counsel testified that he was confident going into trial that Deaungela's testimony would be consistent with her pretrial statements, which identified Petitioner as Junk and as involved in these crimes. (App. 369-70). Trial counsel confirmed that he changed his trial strategy mid-trial because Deaungela changed her testimony to say that Petitioner was not Junk. (App. 370). Trial counsel specifically asked Deaungela whether Petitioner was involved in the crimes, and she testified that he was not involved. (App. 371-72).

Trial counsel testified he believed it was reasonable to rely on Deaungela's testimony that Petitioner was not involved and that if he elicited testimony or presented evidence of third-party guilt it would be more inculpatory than exculpatory. (App. 374). He stated that had he known Deaungela would change her testimony at trial, he would have proceeded differently. (App. 421). However, once she changed her testimony, the issue at trial became one of identification, and Deaungela's testimony *helped* Petitioner because Deaungela was the only witness who could place Petitioner at the scene of the crime and she testified he was not present. (App. 421). Trial counsel's strategy was to keep the identification simple and clear in the minds of the jury. (App. 422). The PCR court found trial counsel's testimony credible. (App. 466).

Given the shift in Deaungela's testimony, it was reasonable for trial counsel to shift strategy during trial to emphasize that the only witness who could place Petitioner at the scene of the crime now said that he was not present. While this meant that trial counsel did not elicit testimony or present evidence of third-party guilt as referenced in his opening statement, trial counsel reasonably believed that *helpful* testimony of Petitioner not being involved in these crimes would

help Petitioner and would also keep the issues clear for the jury. Trial counsel sought to emphasize Petitioner's innocence based on unexpected and helpful testimony. Thus, the choices trial counsel made were well within the "wide range of professional assistance," and the PCR court properly determined that Petitioner failed to show that trial counsel's performance was deficient. *Strickland*, 466 U.S. at 689.

Further, Petitioner failed to show that he was prejudiced by trial counsel's opening statement such that the outcome of his trial would have been different but for trial counsel's opening statement. *Strickland*, 466 U.S. at 669 (requiring a showing that counsel's deficient performance prejudiced the defendant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). The evidence that Petitioner produced at the PCR hearing—testimony from Mitchell Phillips, Matthew Thornton, and Natasha Hanna—consisted of evidence that was either not relevant, speculative, or related to the immaterial identity of a later identified third party. Petitioner has not shown a likelihood that had trial counsel made a different opening argument, or alternatively elicited testimony and presented evidence to fully support his opening argument as given, that the outcome of the trial reasonably would have been different. Therefore, because Petitioner failed to establish both the deficiency of trial counsel's performance and prejudice therefrom, the PCR court properly denied and dismissed this claim.

II. The PCR court properly determined that Petitioner failed to show that trial counsel provided ineffective assistance of counsel by not eliciting evidence that a third party was involved in the crimes alleged instead of Petitioner.

Petitioner argues the PCR court erred in finding that trial counsel provided effective assistance of counsel based on trial counsel's reasonable belief that he was ethically prohibited from eliciting testimony regarding the identity of Juice at trial after trial counsel learned from Juice's attorney that Juice had an alibi for the crimes charged in this case. (Pet. 13).

At a minimum, trial counsel must interview potential witnesses and make independent investigations into the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). To show that counsel's performance was deficient for failing to call a witness, the witness must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation about the witness's testimony is insufficient to establish prejudice. *Id.* at 499, 458 S.E.2d at 540.

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436 (2018); *see also, e.g., Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011) (deferring to trial counsel's strategic considerations); *Jackson v. State*, 329 S.C. 345, 350, 495 S.E.2d 768, 770-71 (1998) (same); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same). A PCR court's analysis of counsel's strategic decisions must be "highly deferential" to counsel's judgment, and "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

Further, prejudice can generally be found if the testimony was significant and favorable enough to the defendant that the results of the trial likely would have been different due to the testimony. *See Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (holding trial counsel provided deficient performance by failing to call witnesses for no reason other than trial counsel's

lack of preparation where those witnesses may have corroborated or bolstered the defendant's credibility to the extent that the results of the trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (holding that an uncalled witness's testimony would have cast doubt on the sole witness's identification of the petitioner, which would have made a difference at trial).

Here, trial counsel testified during the PCR hearing that he believed he could not have addressed Juice after both his opening and Deaungela's testimony. (App. 370). His initial intention was to explain to the jury that Deaungela committed these crimes with Juice rather than Junk but that changed when Deaungela testified that Petitioner was not involved in these crimes. (App. 370). Trial counsel confirmed that he did not ask Deaungela who the two men involved in these crimes were, which was a strategic decision. (App. 372). He believed that if no witness could place Petitioner at the scene of the crime, then there would be insufficient testimony to convict Petitioner, which could result in a directed verdict. (App. 372).

Trial counsel testified that he identified Jasmine Mitchell, who was represented by an attorney. (App. 406). He contacted Jasmine's attorney, who gave him a "valid reason" why Jasmine was not involved in these crimes. (App. 406). While trial counsel did not recall what that reason was and did not write it down, he confirmed that "it was enough . . . to know that [Jasmine] was a dead end, that he was actually not involved in the crime." (App. 407). Trial counsel testified that he could not ethically point the finger at Jasmine while knowing that Jasmine had an alibi. (App. 407). He was comfortable using the nickname Juice at trial, as that had not been associated with Jasmine during trial. (App. 407). Trial counsel confirmed that had Deaungela identified Jasmine on the stand, he would have needed to move for a mistrial, which

would have been harmful to Petitioner. (App. 425-26). The PCR court found trial counsel's testimony credible. (App. 454).

The PCR court properly found that trial counsel's performance was not deficient for failing to present evidence concerning Jasmine. At the PCR hearing, Petitioner failed to present testimony from Deaungela, Jasmine, or Jasmine's counsel. Petitioner had an affidavit from Deaungela, which was used in his motion for a new trial based on after discovered evidence.

Further, trial counsel presented a valid and reasonable trial strategy when questioned during the PCR hearing, namely focusing on Deaungela's testimony that Petitioner was not involved in these crimes. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) ("Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness."). The identity of the two men, if neither were Petitioner, does not make a difference to the outcome of Petitioner's case because *their identity* does not make it any more or less likely that Petitioner committed these crimes. Therefore, as the PCR court held, trial counsel's performance was sound and reasonable, in part because evidence of Juice's identity as Jasmine only raised a conjectural inference that a third party, Jasmine, committed the crimes rather than Petitioner. *See State v. Gregory*, 198 S.C. 98, 105, 16 S.E.2d 532, 534 (1941) (holding evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime is inadmissible).

As to prejudice, Petitioner failed to present any evidence that the outcome of his trial would have been any different if trial counsel had elicited evidence of Jasmine. Trial counsel specifically testified that he would have had to request a mistrial if Deaungela so much as mentioned Jasmine because he knew Jasmine had an alibi for these crimes. (App. 424-26). Therefore, Petitioner

failed to show any likelihood that his trial would have resulted in a different outcome if trial counsel had elicited evidence of Jasmine.

Because Petitioner failed to show that trial counsel's performance regarding evidence of Jasmine was deficient and that any such deficiency prejudiced him, the PCR court properly denied and dismissed this allegation.

III. The PCR court properly determined that Petitioner failed to show he was prejudiced by trial counsel's failure to object to the trial court's opening statements regarding truth because such assertions are not reversible error as they are not charges on the law and are not charges on reasonable doubt or circumstantial evidence.

Petitioner argues trial counsel provided ineffective assistance of counsel for failing to object to what he believes was improper burden-shifting statements made by the trial court during the trial court's opening remarks to the jury. In support of his argument, Petitioner relies heavily on *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).

In *Daniels*, this Court held that trial courts should "remove any suggestion" from general sessions *jury charges* that a jury's duty is to return a "'just' or 'fair' verdict" to all parties involved in criminal cases. *Id.* at 256, 737 S.E.2d at 475. This Court explained that such a charge could alter the jury's understanding of the State's burden of proving its case beyond a reasonable doubt by substituting justice and fairness for a defendant's presumption of innocence. *Id.* Further, this Court stated that to a lay person, all parties involved in a criminal case could extend beyond the State and the defendant and also include any victim. *Id.* This Court specifically determined that any such "inaccurate and misleading *charges* risk depriving a criminal defendant of his right to a fair trial." *Id.* (emphasis added).

Here, the trial court's comments concerning a "search for the truth" and a "true and just verdict" were limited to the trial court's opening remarks to the jury instead of any sort of jury charge. (App. 33, 36, 38). Additionally, at the end of the trial, the trial court gave a detailed

reasonable doubt charge that definitively placed the burden of proof squarely on the State. (App. 150). The trial court's jury instructions also included charges on jurors' role and on credibility. (App. 151-53).

At the PCR hearing, trial counsel stated that he was not familiar with *Daniels* at the time of Petitioner's trial and, therefore, did not have a reason for not objecting to the trial court's opening remarks to the jury. (App. 366-68). The PCR court determined that the trial court's opening remarks did not unconstitutionally shift the burden of proof to Petitioner and the Petitioner failed to show prejudice from trial counsel's failure to object to the court's opening remarks because it was not reasonably likely the outcome of Petitioner's trial would have been different without the "search for the truth" language. (App. 458).

Pursuant to *State v. Beaty*, the PCR correctly determined that Petitioner failed to show that any prejudice resulted from trial counsel's performance. 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018). In *Beaty*, this Court determined that when preliminary comments were a "mere statement to the jury and not a charge on the law" and were "not linked to either the reasonable doubt or the circumstantial evidence charges," no reversible error exists. *Id.* In addition to the trial court's "search for the truth" remarks occurring at the outset of trial, the court gave a proper reasonable doubt charge and lengthy set of charges that all squarely placed the burden of proving Petitioner's guilt beyond a reasonable doubt on the State. (App. 152-63). The PCR court made direct reference to no less than eighteen of these jury *charges* in its order of dismissal. (App. 459-61).

When the trial court's jury instructions are viewed as a whole and in context, the trial court's opening statements, which were not jury charges or instructions, did not shift the burden of proof to Petitioner or in any other way prejudice him. *See State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[J]ury instructions should be considered as a whole, and if as a whole they are

free from error, any isolated portions which may be misleading do not constitute reversible error."); *id.* ("The standard of review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.").

Because Petitioner failed to show that he was prejudiced by trial counsel's performance, the PCR court properly denied and dismissed this allegation. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").


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CONCLUSION

Based on the foregoing, the PCR court correctly determined that Petitioner failed to show that trial counsel provided constitutionally ineffective assistance. Therefore, this Court should deny Petitioner's Petition for Writ of Certiorari.

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