

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Debra R. McCaslin, Circuit Court Judge

JONATHAN ART LINCOLN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-002138

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUES PRESENTED

I.

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II.

The PCR court erred by refusing to find trial counsel ineffective for failing to properly object and preserve the record as to the solicitor's improper closing argument that scales were found in the same bag as the narcotics and petitioner claimed ownership of those scales, and where petitioner was prejudiced by trial counsel's deficient performance?

STATEMENT

In December of 2020, the Aiken County grand jury indicted petitioner for possession with intent to distribute cocaine, possession with intent to distribute heroin, trafficking in methamphetamine, failure to stop for blue lights, and resisting arrest. App. 458-463. On July 22, 2021, petitioner proceeded to a jury trial before the Honorable Jocelyn J. Newman. App. 1. J. William Weeks and Ashley Hammack prosecuted the case for the state, and Suzzane Hayes and Barry Thompson represented petitioner. App. 1. Judge Newman directed a verdict as to the charge of resisting arrest. App. 162, l. 24. The jury acquitted petitioner of failure to stop for blue lights; however, the jury returned verdicts of guilty on the remaining charges. App. 220, l. 9 – 221, l. 7. Judge Newman sentenced petitioner to a total sentence of 30-years' imprisonment, with each sentence set to run concurrently. App. 228, ll. 19-24. Judge Newman also imposed a \$50,000 mandatory fine as to the trafficking methamphetamine offense. App. 228, ll. 21-22. Petitioner filed a timely notice of appeal, and his appeal was dismissed pursuant to the *Anders*¹ procedure. App. 231-32.

On June 16, 2023, petitioner filed an application for post-conviction relief (PCR), which included several attachments and a memorandum in support of his application. App. 233-354. On February 28, 2024, the state filed a return. App. 355-364. On June 12, 2025, on behalf of petitioner, Chelsey F. Marto, Esquire, filed an amended PCR application. App. 365-66. On June 10, 2025, an evidentiary hearing was held before the Honorable Debra R. McCaslin. App. 367-436. T. Cruise Mitchell represented the state, and Chelsey F. Marto represented petitioner. App. 367. On September 22, 2025, Judge McCaslin signed an order denying PCR and dismissing petitioner's application with prejudice. App. 437-457. This petition follows.

¹ *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967).

ARGUMENTS

I.

The PCR court erred by refusing to find trial counsel ineffective for failing to object to the improper constructive possession jury charge where her decision not to object was neither valid nor strategically sound and where petitioner was prejudiced by trial counsel's deficient performance.

Relevant facts

Trial

Sergeant Brandon Jay Knight testified that on February 26, 2020, he was on duty and stationed at I-20 Eastbound at mile marker 25. App. 41, l. 24 – 42, l. 9. He observed a white Dodge Durango with dark tinted windows. App. 42, ll. 10-12. He could not see a silhouette of anyone in the car. App. 42, ll. 12-13. He pulled out behind the car, ran the tag, and initiated blue lights to perform a traffic stop on the car. App. 43, ll. 6-8. He observed that the vehicle was not stopping and turned on his sirens. App. 43, ll. 12-14. During the pursuit, he advised dispatch and Highway Patrol the car was not stopping. App. 43, l. 25 – 44, l. 2. At that time, Highway Patrol took over the pursuit because Sergeant Palmer was Precision Immobilization Technique (PIT) certified. App. 44, ll. 7-22. Knight testified that he did not know how many people were in the car or who was driving. App. 44, ll. 19-22. The chase continued for approximately 30-to-35 miles. App. 51, l. 9. Eventually, the car went in a field near Highway 39. App. 46, ll. 9-10. Knight's car got stuck in a plowed cornfield. App. 47, ll. 16-17. Knight then testified that the person he was chasing went down the middle of the cornfield, and he observed the driver's door open to petitioner's car. App. 47, l. 22 – 48, l. 5. No one else was in the car. App. 48, ll. 6-7.

The Aiken Bloodhounds tracking team was brought out, but they did not locate anyone. App. 50, ll. 1-6.

Knight described what was recovered from the car. In the back passenger area, there was a black shotgun with a pistol grip, and in the “front passenger seat in a bag was the narcotics.” App. 51, ll. 14-17. He recovered registration in the glove box, mail with appellant’s name in the front and rear of the car, and prescription bottles with petitioner’s name. App. 51, ll. 15-20. In addition, he testified that there was an “alcohol bottle from the front passenger area, scales, baggies” that were used to weigh the weight of the narcotics. App. 53, ll. 11-15. He testified that the scales were “located in the front passenger seat of the vehicle with the narcotics.” App. 53, ll. 18-20. He described that “little Ziploc bags” were also found in the vehicle along with the narcotics. App. 54, ll. 19-23. On cross-examination, Knight clarified that he did not see petitioner driving the car and that he was not present at the scene when the car was searched. App. 62, ll. 6-11. Knight also testified that the cocaine, methamphetamine, and heroin was found in the passenger seat, and it was not packed with all the other belongings in the car. App. 62, ll. 12-19.

Sergeant Palmer testified that he decided not to perform a PIT maneuver during the chase, but he kept his lights and sirens on for the duration of the pursuit. App. 72, l. 11 – 73, l. 24. He also testified that he did not see who was driving the car and was not present during the search of the car. App. 80, ll. 1-5. Colt Woody then testified that around 9:30 or 10:00 p.m., he heard sirens going up and down Anderson Road. App. 82, ll. 1-5. Around 5:00 or 5:30 a.m. the next morning, he saw a man sitting on his back porch steps with a light jacket, no shoes, socks, and his back towards him. App. 83, ll. 6-13. He grabbed his shotgun and called the police.

App. 83, ll. 22-24. He did not confront the person, and he was still sitting on his porch when the police arrived. App. 83, l. 25 – 84, l. 21.

Petitioner testified in his defense. On the night of February 26, 2020, he was preparing to move and had all his belongings packed in his car. App. 128, ll. 2-9. He went to his nephew's house to see if he wanted to ride with him to the new place he was moving to. App. 129, ll. 4-8. He pulled into the yard at his nephew's house and got out of his truck with his tablet in his hands. App. 129, l. 15 – 130, l. 24. He was using the restroom outside when he noticed his truck was pulling out of the yard. App. 131, ll. 6-10. He thought his nephew took his truck in a playful way. App. 131, ll. 16-23. He knocked on the trailer where his nephew lived, but there was no answer. App. 132, ll. 14-18. He waited approximately 10-to-15 minutes, then began walking. App. 132, l. 19 – 133, l. 15. He was looking for open Wi-Fi signal so he could track his cellphone on his tablet, which was in his truck. App. 133, l. 25 – 134, l. 14.

While he was walking, a white car pulled up, and the woman driving the car allowed him to use her Wi-Fi hotspot. App. 135, l. 23 – 136, l. 17. The same woman agreed to drive him to where the application showed his truck was located, which was the intersection of Shaws Fork and New Holland Road. App. 137, ll. 8-16. After he was dropped off, he saw officers, cars, and police cars. App. 138, ll. 4-9. When he got to the point where the application said his phone and truck were located, he saw “a big swamp of darkness.” App. 140, ll. 5-9. He went to the first house that looked “like they won't shoot me if I walk on their property,” and sat on the back steps trying to look unthreatening. App. 140, l. 19 – 141, l. 11. He testified that he did not have illegal drugs in his truck when he had it. App. 143, ll. 1-8. He reiterated that all of his belongings were in his car because he was moving. App. 143, ll. 9-11.

On cross-examination, he agreed that the truck was registered to him. App. 145, l. 25 – 146, l. 5. He agreed that the prescription drugs were his. App. 147, ll. 10-12, 17-20. As to the scales, petitioner testified that he assumed they were in the truck and that it was “a possibility” that he put them in the truck. App. 148, ll. 5-9. He agreed that it was his shotgun in the truck. App. 148, ll. 16-18. He agreed his mail was in the truck. App. 153, ll. 20-23.

After the defense rested, *see* App. 160, l. 3, the trial court granted trial counsel’s motion for directed verdict on the charge of resisting arrest. App. 162, l. 24.

During its closing argument, the state argued that the car was registered to petitioner, his mail was in the car with his name and address, his prescription bottles were in the car, his phone was in the car, his baggies were in the car, and his shotgun was in the car. App. 173, ll. 10-19. The state argued that “everyone in here agrees, that in the [petitioner’s] own car off of New Holland, the same time he’s found off of New Holland, there’s a bag and in that bag is full of drugs.” App. 174, ll. 6-11. The state contended that petitioner wanted the jury to believe that “everything in the car was mine, except for the illegal stuff.” App. 175, ll. 2-3. The state reiterated that the car was petitioner’s, and his “stuff is in the car.” App. 178, ll. 22-25.

During the charge on the law, the trial court charged the jury that:

Constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found. Therefore, the State must prove beyond a reasonable doubt that the Defendant had both the power and the intent to control the disposition of use of the cocaine and of the heroin.

Mere presence at the scene where the drugs were found is not enough to prove possession. *The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control.*

App. 211, l. 23 – 212, l. 8 (emphasis added). Trial counsel made no objection to the trial court’s charge on the law. App. 218, ll. 2-3.

Ultimately, the jury found petitioner not guilty of failure to stop for blue lights and resisting arrest but found petitioner guilty of trafficking in methamphetamine, possession with intent to distribute heroin, and possession with intent to distribute cocaine. App. 220, l. 9 – 221, l. 7. The court noted on the record that it erred by sending the resisting arrest indictment to the jury since the court had granted a directed verdict, however, trial counsel agreed with the court that any error was harmless since the jury acquitted petitioner of that offense. App. 223, l. 20 – 224, l. 4. Judge Newman sentenced petitioner to a total sentence of 30 years' imprisonment, with each sentence set to run concurrently. App. 228, ll. 19-24.

Evidentiary hearing

During his post-conviction relief evidentiary hearing, petitioner testified that the trial court gave an improper instruction that the jury could infer his knowledge or possession of drugs found on property under his control. App. 387, ll. 12-15. He cited *State v. Stewart*, 433 S.C. 382, 858 S.E.2d 808 (2021), to support his allegation of ineffective assistance of counsel. App. 387, l. 16 – 388, l. 12. Petitioner further testified that he believed the outcome of his trial would have been different had trial counsel objected because he believed that he would have been acquitted on all offenses. App. 388, ll. 13-16. He explained that he was acquitted of the failure to stop offense, but because of the jury instruction, the jury was told that he did not have to be in the car to find him guilty of the narcotics offenses. App. 388, l. 22 – 389, l. 1.

Trial counsel Hayes then testified that petitioner's defense at trial was that he was not driving the car, someone stole his car, and he was not aware of anything that happened after he stopped at his nephew's house because he was not there. App. 415, ll. 15-21. As to the constructive possession charge, she testified that she did not believe that the charge would be harmful to petitioner's defense. App. 425, ll. 6-12. She explained that the defense was that the

car was not under petitioner's control when the drugs were found or immediately before. App. 425, ll. 14-21. She agreed that the defense argued petitioner was not in control of the property at all. App. 425, ll. 17-21.

At the close of petitioner's evidentiary hearing, the state conceded that *Stewart* was decided "a month prior to the trial." App. 433, ll. 6-8. However, the state argued that trial counsel gave a valid reason for the failure to object, and the instruction would not "necessarily be harmful to his defense" because the defense argued petitioner did not have control of the property. App. 433, ll. 8-18.

The PCR court's ruling

In the order of dismissal, the PCR court determined that petitioner failed to overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment because trial counsel explained that she "chose not to object to the instruction because it aligned with their defense strategy—that the vehicle was not under [petitioner's] control." App. 445. The PCR court found trial counsel's explanation for not objecting to be a valid strategic reason, and thus, determined that trial counsel was not deficient. App. 445. The PCR court explained that the state introduced evidence that the drugs were found alongside scales that petitioner admitted could have been his, petitioner's vehicle registration, mail addressed to petitioner, and prescription medication prescribed to petitioner. App. 445. The PCR court determined the drugs being "found on [petitioner's] property was not the only evidence presented by the State at trial." App. 445. Thus, the PCR court concluded that because of the additional evidence supporting an inference the drugs belonged to petitioner, he failed to meet his burden of demonstrating the instruction had any effect on the verdict. App. 446. Accordingly, the PCR court determined that "[petitioner] has failed to prove a reasonable

probability that the outcome at trial would have been different had Counsel objected to the jury instruction.” App. 446. The PCR court thus denied relief as to this allegation. App. 446.

Discussion

The PCR court erred by refusing to find trial counsel ineffective for failing to object to the improper constructive possession jury charge where *State v. Stewart*, 433 S.C. 382, 858 S.E.2d 808 (2021), was decided several months before petitioner’s July 2021 trial, and trial counsel’s deficient performance prejudiced petitioner.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and that the deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687. Under the second prong, petitioner must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Thomson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (citing *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016)).

To prove constructive possession, the “State must show a defendant had dominion and control, or the right to exercise dominion and control over the [illegal substance].” *State v. Heath*, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006) (emphasis omitted); *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981); *see also State v. Brown*, 267 S.C. 311, 315,

227 S.E.2d 674, 676 (1976) (explaining that conviction of possession . . . requires proof of possession, either actual or constructive, coupled with knowledge of its presence).

In *Stewart*, our Supreme Court explained that the inference that a defendant's knowledge and possession may be inferred when a substance is found on the property under defendant's control is a valid one for the jury to draw or trial attorneys to argue, however, "the jury instruction explaining the inference," is improper. *See Stewart*, 433 S.C. at 391, 858 S.E.2d at 813.² The *Stewart* court thus held that "[t]he jury charge instructing a jury it may infer knowledge or possession when a substance is found on property under the defendant's control should no longer be given." *Id.* Our Supreme Court further explained that the prejudicial effects of the inference charge are similar to those described in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019)³ and *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013). *Id.* at 392, 858 S.E.2d at 813. The Court wrote

The trial court's definition of constructive possession—including the requirement the State prove knowledge and intent—was followed almost immediately with the opposite statement, permitting the jury to infer the defendant's knowledge from the simple fact the drugs were on his property. To the extent the trial court earlier explained the knowledge and intent requirement, the inference of knowledge instruction negated that explanation. The improper explanation of the inference of knowledge and possession permitted the jury to find *Stewart* guilty of simple possession and trafficking without the State proving knowledge and intent . . .

² Moreover, the *Stewart* Court expressly overruled the prior, contradictory caselaw on this point in *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987), which held that "[t]he proper charge on constructive possession is to instruct the jury that the defendant's knowledge may be inferred if the substance was found on premises under his control." *See State v. Custer*, 443 S.C. 172, 180-81, 903 S.E.2d 237, 241 (Ct. App. 2024).

³ Notably, the *Burdette* court in determining that an instruction allowing the jury to infer malice from the use of a deadly weapon is improper, explains that the inferred malice charge is improper because it allows the trial court to directly comment on facts in evidence, elevate those facts, and emphasize it the jury. *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582.

Id. Specifically, inference charges like at issue in petitioner’s case allow the trial court to improperly comment on the facts of a case. *See State v. Brown*, 443 S.C. 196, 904 S.E.2d 448 (2024) (collecting cases where certain jury instructions were held to be improper).

First, the PCR court erred because trial counsel’s performance fell below reasonable professional norms since she failed to object to the improper inference charge contained in the court’s constructive possession instruction. Specifically, the trial court instructed the jury that “The Defendant’s knowledge and possession may be inferred when a substance is found on the property under the Defendant’s control.” App. 211, l. 23 – 212, l. 8. That is the exact language that the *Stewart* Court determined should no longer be given in its May 19, 2021, decision. *See Stewart*, 433 S.C. at 390-91, 858 S.E.2d at 812-13. Trial counsel made no objection to this improper constructive possession inference instruction at the time of petitioner’s July 2021 trial. App. 1; 218, ll. 2-3. Trial counsel’s performance was thus deficient.

Although trial counsel explained during petitioner’s evidentiary hearing that she did not object to the instruction because it “aligned” with their defense strategy, such a strategy does not cure trial counsel’s deficient performance. App. 423, ll. 6-21. While trial counsel will not be found ineffective where she articulates a valid reason for employing the strategy, the strategy must still be a sound one. *See Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (citing *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002) and *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (“We have recognized that when counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel.”) (emphasis in original)). It cannot be said that refusing to object to an improper jury instruction which allows the trial court to comment upon the facts and diminish the state’s burden of proof because it “aligned” with defense strategy is a sound strategic decision. *See e.g.*,

Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (“[C]ounsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.”); *Weldon v. State*, 436 S.C. 69, 870 S.E.2d 183 (Ct. App. 2021) (finding no evidence to support the PCR court’s finding that trial counsel articulated any valid trial strategy with respect to alibi witnesses where trial counsel hypothesized he may have declined to call alibi witnesses because he wanted to have the last closing argument); *Thompson*, 423 S.C. at 244-45, 814 S.E.2d at 492 (determining that trial counsel was on notice well before petitioner’s criminal trial that it was improper for a witness to vouch for the credibility of another witness, and thus, because the testimony was patently inadmissible there was no strategic reason for trial counsel not to object).

Moreover, that trial counsel’s defense strategy was that petitioner was not driving the car does not remove the need to object to the inference charge that would allow the jury to infer possession when the substance is found on property under petitioner’s control. App. 415, ll. 15-21. Even further, the reason trial counsel articulated for not objecting was not a sound decision where petitioner himself testified that the car was registered to him and that various of the items found in the car were his. App. 145, l. 25 – 146, l. 6; 147, ll. 10-12, 17-20; 148, ll. 16-18; 153, ll. 20-23. Nor can trial counsel’s reasoning for refusing to object to a jury instruction be said to be a sound strategic decision when our Supreme Court has clearly held the instruction should no longer be given. *Stewart*, 433 S.C. at 391, 858 S.E.2d at 813. Accordingly, the PCR court erred by determining that trial counsel’s performance was not deficient because her explanation for her decision to not object could not constitute a valid strategic reason. App. 445; *Strickland*, 466 U.S. at 687.

Second, the PCR court erred by finding that petitioner could not meet his burden to demonstrate that he was prejudiced by trial counsel's failure to object to the improper constructive possession charge. App. 445-46. "In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (citing *Todd v. State*, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003)). In order for petitioner to be convicted on the narcotics offenses, the jury had to determine that he was in constructive possession of the narcotics found in the truck because the narcotics were not found on petitioner's person and he was not with the truck when it was searched, and the narcotics were subsequently discovered. App. 47, l. 22 – 48, l. 5; 51, l. 14 – 54, l. 23. Therefore, constructive possession was crucial to the outcome of petitioner's case. See e.g., *Taylor v. State*, 312 S.C. 179, 439 S.E.2d 820 (1993) (where trial judge gave erroneous instruction on critical issue of intent, PCR applicant was prejudiced by counsel's failure to object); see also *High v. State*, 300 S.C. 88, 386 S.E.2d 463 (1989) (ineffective assistance of counsel where trial counsel failed to object to burden shifting charge with regard to intent element where the critical dispute at trial was whether petitioner had the requisite intent to kill in order to convict petitioner of voluntary rather than involuntary manslaughter).

Contrary to the PCR court's finding, the improper jury instruction had a meaningful effect on petitioner's verdict. App. 445-46. The evidence the state presented during petitioner's trial was that the truck was registered to petitioner and that many of his belongings were in that truck. App. 145, l. 25 – 153, l. 23; see also App. 174, ll. 6-11 (The state arguing in closing that in petitioner's own car there was a bag full of drugs). The improper jury instruction therefore

allowed the jury to infer that petitioner possessed the narcotics simply because the narcotics were found in his truck. App. 211, l. 23 – 212, l. 8; *See Stewart*, 433 S.C. at 392, 858 S.E.2d at 813 (explaining that the trial court’s definition of constructive possession which required the state to prove knowledge and intent was followed by the opposite statement permitting the jury to infer knowledge from the mere fact the drugs were on the defendant’s property meaning that the inference of knowledge instruction negated the explanation of the state’s requirement *to prove* knowledge and intent). In effect, that inference allowed the jury to find petitioner guilty of possession with intent to distribute cocaine and heroin without the state proving petitioner’s knowledge of the presence of the narcotics or his intent. *See Stewart*, 433 S.C. at 392, 858 S.E.2d at 813; *Brown*, 267 S.C. at 315, 227 S.E.2d at 676.

Moreover, the jury acquitted petitioner of failure to stop for blue lights, a charge upon which the state alleged that petitioner engaged in a high-speed chase in the truck that the narcotics were subsequently found in. App. 41, l. 24 – 51, l. 9; 220, l. 9 – 221, l. 7. Given that petitioner was not present with the truck at the time the narcotics were recovered, there is a reasonable probability that had the jury not been expressly instructed by the trial court that it could infer petitioner’s knowledge and possession when a substance is found on property under petitioner’s control, that the result of the proceeding would have been different. App. 446; *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625. Importantly, the improper instruction allowed the trial court to directly comment on facts in evidence, to elevate those facts, and to emphasize them to the jury by expressly explaining to the jury what it could infer from the location that the narcotics were found. *See Burdette*, 427 S.C. at 502, 832 S.E.2d at 582. The result is that petitioner was prejudiced by the improper instruction.

Accordingly, the PCR court erred by denying relief on this allegation because petitioner's trial counsel failed to provide a valid reason underlying her decision not to object to the improper constructive possession charge following our Supreme Court's decision in *Stewart*, which constituted deficient performance. Petitioner was prejudiced by trial counsel's deficient performance because there is a reasonable probability that the result of the proceeding would have been different absent trial counsel's deficient performance. *Strickland*, 466 U.S. at 687-88; *Thomson*, 423 S.C. at 245, 814 S.E.2d at 492; *Rutland*, 415 S.C. at 577, 785 S.E.2d at 353.

II.

The PCR court erred by refusing to find trial counsel ineffective for failing to properly object and preserve the record as to the solicitor's improper closing argument that scales were found in the same bag as the narcotics and petitioner claimed ownership of those scales, and where petitioner was prejudiced by trial counsel's deficient performance.

Relevant facts

Trial

During her closing argument before the jury, the assistant solicitor argued, "And, **importantly, in that bag in the front passenger seat, is scales.** [Petitioner] answered Solicitor Weeks on cross-examination, **Yeah, it's possible I left my scales in my truck.** These don't measure out hamburger meat or chicken." App. 173, ll. 20-24 (emphasis added). She continued:

But when you're thinking about possession with intent to distribute or trafficking, you don't have to just consider weight. You can consider how the drugs were packaged and you can consider what else was with them. In this case, these drugs were found in a bookbag in the [petitioner's] car in the passenger seat. **But that bookbag didn't just have drugs in it. That bookbag had these scales that are commonly used to weigh drugs,** to weigh drugs, to measure out how much you're going to sell.

App. 184, l. 14 – 185, l. 16 (emphasis added). The solicitor subsequently exclaimed, "Everything else in the car is his, but not this. **These scales are his that he left in his truck, that were found in the same bag as his drugs. So the scales are his, but the drugs aren't?**" App. 187, ll. 2-5 (emphasis added).

Trial counsel Thompson ultimately interrupted the assistant solicitor and informed the judge that he had an objection and a matter of law that needed to be addressed outside the presence of the jury. App. 187, ll. 10-12. Once the jury was excused, counsel asserted that the solicitor was arguing facts not in evidence. App. 187, ll. 18-25. Specifically, he argued there

was no testimony that the scales were found on the passenger seat of petitioner's car. App. 187, l. 18 – 188, l. 1. He continued that evidence the scales were “right there with the drugs” would be “very damning” to Appellant and “critical” to the state's case. App. 188, ll. 2-11. However, trial counsel maintained such evidence was not presented during trial. App. 188, ll. 8-10. Consequently, trial counsel moved for a mistrial. App. 187, l. 13 – 188, l. 11.

The assistant solicitor responded and claimed her recollection was that Sergeant Knight testified there was a bookbag on the passenger seat that contained both the scales and the drugs. App. 188, ll. 13-17; 189, ll. 5-8. She further maintained that while petitioner did not testify as to the location of the scales in the car, he did admit that they were his. App. 188, l. 25 – 189, l. 1. Specifically, she asserted, “Mr. Weeks [the solicitor] asked him [petitioner] a two part question. A, are these your scales; and B, were they in your truck? He said, Yes, they are my scales and it's possible they could have been in my truck.” App. 188, l. 25 – 189, l. 4. She further argued that the judge would later instruct the jury that arguments of counsel are not evidence and that the jurors must rely on their own recollection of the testimony. App. 188, ll. 21-24.

Trial counsel argued the dispute would be “easy” to “resolve” if the court reporter looked back at the testimony. App. 189, ll. 13-15. Trial counsel continued:

I would argue that unless the officer testified that the scales were found on the passenger seat with the drugs - - because the argument was that they were actually in a bag with the drugs. Unless there's testimony to that effect, then the argument that the scales were physically right there with the drugs, I would tell you that as a juror, I don't know that I would be able to overcome anything like that. I don't think there's any jury instruction to fix that. And I would ask for a mistrial.

App. 189, ll. 16-24.

The judge merely responded by stating, “Let's go off the record briefly.” App. 190, l. 24. A recess was then taken. App. 190, l. 25. When the trial continued, the judge immediately asked

for the jury, and once the jury entered the courtroom, the state's closing argument resumed. App. 191, ll. 1-6. What occurred during the remainder of the time the jury was out of the courtroom was never placed on the record.

Evidentiary hearing

During his post-conviction relief evidentiary hearing, petitioner testified that trial counsel failed to properly object during the state's closing argument and preserve the record for appeal. App. 374, ll. 13-20. He testified that the solicitor referred to "matters that were not supported by the trial record." App. 374, ll. 21-24. Specifically, petitioner explained that the solicitor argued that in the bag in the front passenger seat was scales. App. 374, l. 24 – 375, l. 4. He further explained that the solicitor argued that the bookbag in the front passenger seat did not only have drugs in it, but it also had scales which were commonly used to weigh drugs. App. 375, ll. 7-13. Petitioner testified that trial counsel "half-heartedly" objected and informed the court of a matter of law that needed to be addressed outside the presence of the jury. App. 375, ll. 20-25. Petitioner clarified that he wanted trial counsel to object because the solicitor was making statement of facts that were outside the record in testimony. App. 376, ll. 12-16. Petitioner testified that trial counsel made the wrong objection. App. 377, ll. 10-16. In addition, petitioner explained that the trial court never gave an instruction that the arguments of counsel were not evidence, despite the state's argument that the court could cure any harm by instructing the jury to rely on their own recollection of the testimony. App. 379, ll. 2-9. Petitioner highlighted that the court went off the record briefly, and when the court returned, it asked for the jury. App. 379, ll. 7-11. Petitioner testified that the court overruled his objection off the record, and the ruling was never placed on the record. App. 380, ll. 1-5. He continued that trial counsels did not preserve the record for appeal. App. 380, l. 6. He agreed that his issue was that trial counsel did

not properly preserve the record for appeal because the closing argument objection was addressed at a bench conference that was held off the record. App. 380, ll. 15-22.

Trial counsel Hayes testified that, as to the state's closing argument, her co-counsel objected to the closing and made a motion for mistrial. App. 416, ll. 9-15. She testified that the court denied the motion for mistrial, and the motion was renewed at the close of trial. App. 416, ll. 16-18. She agreed that sergeant Knight testified that he found narcotics in a bag in the front passenger seat. App. 417, ll. 13-15. She also agreed that Knight testified that the scales were found in the front passenger seat with the narcotics. App. 418, ll. 3-5. She testified that the scales were found in the same vicinity as where the drugs were found. App. 418, ll. 13-17.

The PCR court's ruling

In the order of dismissal, the PCR court determined that the solicitor's comments during closing arguments were proper. App. 442. The PCR court explained that sergeant Knight testified that the narcotics were found in a bag located in the front passenger seat, and the scales were "found in the front passenger seat with the narcotics." App. 444 (internal quotation marks omitted). The PCR court further noted that petitioner testified at trial that it was possible he placed the scales in his truck. App. 444. The PCR court concluded that "[t]aken together with Sgt. Knight's testimony, it is reasonable to infer, and proper to argue, that [petitioner] claimed ownership of the scales and that both the scales and narcotics were found together in the same bag in the front passenger seat." App. 444. Accordingly, the PCR court denied the allegation because it found the solicitor's comments were proper, and petitioner failed to establish either deficiency or prejudice as to this allegation. App. 444.

Discussion

The PCR court erred by refusing to find trial counsel ineffective for failing to properly object and preserve the record as to the solicitor's improper assertion in closing argument that scales were found in the same bag as the narcotics and that appellant claimed ownership of the scales, given that the evidence in the record did not support such an inference, and where petitioner was prejudiced by trial counsel's deficient performance.

"A solicitor may not rely on statements not in evidence during closing argument." *State v. Webb*, 389 S.C. 174, 181, 697 S.E.2d 662, 666 (Ct. App. 2010) (quoting *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997)) (internal quotation marks omitted). "Arguments must be confined to evidence in the record (and reasonable inferences therefrom), although failure to do so will not automatically result in reversal." *Id.* (quoting *Huggins*, 325 S.C. at 107, 481 S.E.2d at 116) (internal quotation marks omitted); *See State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.").

In *State v. Cannon*, 229 S.C. 614, 618, 93 S.E.2d 889, 891 (1956), our Supreme Court exclaimed, "The rule that it is the duty of the prosecuting attorney to always treat the defendant in an impartial manner applies to his argument to the jury, and he should at all times confine himself to the evidence adduced in the trial. 'It is most certainly proper, especially in criminal cases, that counsel, in addressing the jury, should keep themselves strictly within the record. This rule is essential, and must be enforced.'" *Id.* (quoting *State v. McDonald*, 184 S.C. 290, 192 S.E. 365, 370 (1937)).

In petitioner's case, trial counsels were deficient for failing to properly object and preserve the record concerning the state's improper closing argument. Although trial counsel Thompson objected, and subsequently moved for a mistrial, he failed to put the off the record discussion and court's ruling on the record. *See Smalls v. State*, 422 S.C. 174, 182 & n.3, 810 S.E.2d 836, 840 & n.3 ("When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record."). By failing to do so, trial counsel failed to preserve the record for appeal. *See Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (finding trial counsel was deficient for failing to place his argument about the jury seeing his client in chains on the record, and thus failing to adequately preserve the issue for appeal). Moreover, trial counsel Hayes did not offer an explanation or testimony as to her reasoning for failing to place the off the record discussion and court's ruling on the record, and thus, counsel failed to articulate a valid strategic decision. App. 416, l. 9 – 418, l. 17. The PCR court thus erred by determining that petitioner failed to establish deficient performance. *See App. 444.*

Petitioner was also prejudiced by trial counsels' deficient performance. As discussed, constructive possession was critical to petitioner's case. Therefore, the location where the narcotics and scales were discovered was important evidence. The PCR court erred by determining that the assistant solicitor's misrepresentation of the record during her closing argument was proper because she argued facts not in evidence and made unreasonable inferences. App. 442, 444. Specifically, the assistant solicitor argued that the scales were found in the bag in the front passenger seat and that the drugs were also found in that bag. App. 173, ll. 20-24; 184, l. 14 – 185, l. 16; 187, ll. 2-5. However, sergeant Knight testified that the scales were "located in the front passenger seat of the vehicle with the narcotics." App. 53, ll. 18-20.

At no point did Knight testify the scales were found in the same bag as the drugs, which is what the assistant solicitor argued during closing. Significantly, Knight later contradicted himself and claimed he found the drugs “in the passenger seat *in the back.*” App. 62, ll. 12-19 (emphasis added). Nor did petitioner testify that the scales were his, but rather that he “assumed” the scales were in the vehicle, since sergeant Knight maintained they were and that it is possible he put the scales in the vehicle. App. 148, ll. 5-9.

Contrary to the PCR court’s conclusion that, given petitioner and Knight’s testimony, it was reasonable to infer and proper to argue that petitioner claimed ownership of the narcotics and that the scales were found in the same bag as the narcotics in the front passenger seat, the testimony elicited at trial does not support such an inference. App. 444; *Cannon*, 229 S.C. at 618, 93 S.E.2d at 891. Importantly, the trial court failed to instruct the jury during her charge on the law that the closing arguments of counsel are not evidence, and thus, the trial court’s instructions could not have cured the important argument made by the solicitor in closing. *See generally* App. 203-217;⁴ *See also State v. Mazique*, 419 S.C. 282, 296, 797 S.E.2d 730, 737 (Ct. App. 2016) (explaining that on appeal, an appellate court will review 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 . . .”). Therefore, because there is a reasonable probability that the result of the proceeding would have been different, absent trial counsel’s deficient performance, the PCR court erred by finding that petitioner failed to establish either deficient or prejudice as to this allegation. App. 442; *Strickland*, 466 U.S. at 687-88; *Thomson*, 423 S.C. at 245, 814 S.E.2d at 492; *Rutland*, 415 S.C. at 577, 785 S.E.2d at 353.

⁴ While the trial court told the jury during her opening remarks that “[w]hat the attorneys tell you during their *opening statement* is not evidence in this case,” she did not similarly instruct the jury during her charge on the law that the arguments of counsel during trial, or more specifically closing, are not evidence. *See* App. 29, ll. 12-17.

CONCLUSION

Therefore, based on the foregoing arguments, this Court should grant the petitioner for writ of certiorari to allow full briefing on the issues.



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ATTORNEY FOR PETITIONER

This 6th day of May, 2026.