

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-001755

MARVIN BOWENS-GREEN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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RESPONDENT'S ISSUES PRESENTED

Did the post-conviction relief court properly dismiss Petitioner's application where Petitioner failed to show trial counsel to be deficient for failing to object to the mention of the victim being an immigrant, permissible remarks in the Solicitor's closing argument about the credibility of witnesses, or a comment on the trial being a search for the truth?

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

Petitioner was indicted by a Charleston County grand jury on April 4, 2011, for the charges of armed robbery and possession of a firearm during the commission of a violent crime. App. 899 - 902. He proceeded to trial before the Honorable Kristi L. Harrington and a jury on June 11, 2012. App. 1. D. Bruce Durant and Rutledge Durant prosecuted the charges, and Petitioner was represented by Andrew Grimes and Cody Groeber. The state served a notice of intention to seek a sentence of life without parole. App. 270 1. 25 - App. 271 1. 12. After a four day trial, Petitioner was found guilty as indicted. App. 771 1. 20 - App. 772 1. 7. Judge Harrington sentenced Petitioner to five years' incarceration on the weapon charge and life without the possibility of parole on the armed robbery charge. App. 779 11. 15-23.

Petitioner's convictions were affirmed. State v. Green. 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015). He then filed a timely application for post-conviction relief, on or about December 18, 2015. App. 763. His application contained allegations of ineffective assistance of counsel, including failure to object to the solicitor's comments as prejudicial and vouching for the credibility of the state's witnesses. App. 790 - 792. In response, on or about September 7, 2016, the state filed a return and motion to dismiss based upon the belief that Petitioner's PCR application was successive. App. 793 - 797. The PCR court entered a conditional order of dismissal on October 4, 2016.

Petitioner filed a pro se response to the conditional order of dismissal noting that his application did not refer to different armed robbery charges from the same county; therefore the application was not successive. App. 804 - 806. On or about January 24, 2017, the state filed an amended return and motion to vacate the conditional order of dismissal. App. 807 - 812. An Order vacating the conditional order of dismissal was filed on February 3, 2017. App. 814 816.

An evidentiary hearing was held on May 21, 2018, before the Honorable Roger M. Young, Sr. App. 817. Christopher Murphy represented Petitioner, and Kelly Oppenheimer appeared on behalf of the state. Petitioner and one member of his defense team testified at the hearing.

At the conclusion of the hearing, the PCR court agreed to hold the record open for thirty days so that PCR counsel could provide the court with information regarding Petitioner's contention that he was ordered to wear an ankle monitor prior to the time of the robbery which would have proven he was not at the scene of the crime. App. 61 1. 8 - App. 862 1. 12. The PCR court issued its Order of Dismissal on or about August 23, 2018. App. 872 - 897. It contained the PCR judge's findings that Petitioner failed to meet his burden on each of the three allegations which were pursued during the hearing: failure to object to the solicitor's comments in closing argument, failure to object to perjured testimony, and ineffective assistance of counsel for advising Petitioner not to testify.

RELEVANT FACTS

At approximately 7:45 a.m. on the morning of December 24, 2010, a man wearing sunglasses, a red hat, a black jacket, and khaki pants entered the Quick Stop convenience store and gas station on Savannah Highway in Ravenel with a gun. App. 288 1. 10 - App. 289 1. 20. Through an interpreter, Natubhai Patel, the owner of the store, testified that he was able to see the man's face. App. 289 11. 21 - 23. Patel indicated that he had seen the man before. App. 289 1. 24 - App. 291 1. 3. According to Patel, this man would routinely come into the store to purchase cigarettes and lottery tickets; the two allegedly joked about an ID with President Obama's signature on it. Id.

Patel testified that the man took sixty dollars and Newport cigarettes from him. App. 291 11. 7-16. Patel called 911. App. 291 11. 17 - 22. Law enforcement viewed the surveillance video from the incident; the video was shown at Petitioner's trial. App. 291 1. 23 - App. 294 1. 11. Patel did not know the man's name but supposedly recognized him as a regular customer. App. 294 11. 14-23.

Patel identified Petitioner pre-trial and at trial. App. 291 11. 1-3; App. 296 1. 5 - App. 299 1. 1. Patel's identification notwithstanding, none of the eight latent prints taken from the convenience store matched Petitioner's prints. App. 467 1. 18 - App. 468 1. 1.

At the evidentiary hearing, Petitioner indicated that he had only spoken with trial counsel Groeber three times. App. 823 11. 2 - 19. They did not exchange any written correspondence. App. 823 1. 24 - App. 824 1. 2. Although he had previously been sentenced to twenty years on a different charge and was offered a concurrent plea deal for this matter, he declined the offer because he was not guilty. App. 824 1. 3 - App. 825 1. 20.

Applicant also testified he took issue with multiple comments made during the solicitor's closing argument. He elaborated his comments served to bolster his personal opinion, vouch for the witnesses presented at trial, put the weight of the government behind the witnesses, and appeal to the racial and ethnic biases of the jurors. App. 884. Counsel also testified he should have objected during closing, particularly in light of the fact Victim was an immigrant and the solicitor was telling the jury the witnesses were telling them the truth. He elaborated, however, at the time, he did not believe these comments were objectionable and only now believes that they were. App. 886-887.

ARGUMENT

The post-conviction relief court properly dismissed Petitioner's application where Petitioner failed to show trial counsel to be deficient for failing to object to the Solicitor mentioning that the victim was an immigrant, permissible remarks in the Solicitor's closing argument about the credibility of witnesses, or a comment on the trial being a search for the truth.

In his Petition, Appellant enumerates a number of instances where he believes counsel should have objected to remarks made by the Solicitor during closing argument. The first being a comment on the victim being an immigrant:

But maybe the thinking was who would believe this immigrant anyway. Who would believe this man who couldn't even come into this courtroom and couldn't speak English? I don't know if that's what was thought but if that was he is dead wrong. App. 725 ll. 8-12.

The second remark related to Dr. Beaudry's testimony concerning the quality of the surveillance video:

Before I show [the surveillance video] to you though I don't think all of you are going to be able to identify this man, obviously. I don't think that can be done, and that is just what Dr. Beaudry was telling you about. Strangers have a lower level of being able to identify somebody. So just because all of you can't, and some of

you may, does not mean you have reasonable doubt. This case is based on the witnesses who knew him, not on your ability to look at this video and determine if it is him. App. 729 l. 20- App. 730 l. 3.

The third remark was a general comment on witness credibility and the truth:

You judge their credibility and you determine if they are lying to you, and they are not. Why would they? Why would they go through a lie to frame somebody and say things they don't know? This isn't about their credibility. They are just telling you the truth. App. 734 ll. 10-14.

The fourth remark related to testimony from the victim's wife:

So you have three people, and that case made its way to my office. Three people who knew him. But you heard from a fourth person. You heard from Mrs. Patel, and you'll decide to believe her or not. There's every reason in the world to believe her.

She told you she was certain. We know that. She told you she was sure. We know that. She told you why she knew him. . . . She came in and she told you that.

You decide for yourself what happened. Does she know or is she lying? She is not.

It is the search for truth. She came in here and she was positive. She came in here and I pointed at this man. I wanted to know absolutely sure if she could look at you and say this with as much meaning and conviction as she could. Could she tell you that? Could she look at you and say that? And that's important. And she did.

You can believe all those witnesses and you can believe the truth in this case.

App. 738 l. 6- App. 739 l. 4.

Counsel, when questioned at the PCR hearing, testified as to two comments he believes not to be objectionable but did not at the time of the trial:

I think that the two that come to mind, for me, is one was the comment about the victim being an immigrant, and I think that arguably could be inflammatory and should have been objected to, and then there was at least one point where the prosecutor said they're telling the truth, and so that was another part where I felt like, looking back, I should have objected. App. 858 ll. 13-24

The State argues that the Solicitor's comment concerning the victim being an immigrant should not be interpreted as an attempt to inflame the jury, the Solicitor's comments concerning

the credibility of the witnesses does not amount to improper bolstering, and the mention of searching for the truth was non-prejudicial and was not meant as an attempt to shift the burden to the defense.

Discussion

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCJP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

“A solicitor’s closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Furthermore, a closing argument should stay within the content of the record and the reasonable inferences to be drawn therefrom and must not be intended to arise the passions or prejudices of the jury. *Id.* at 609-10, 602 S.E.2d at 744 (citing *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *Copeland*, 321 S.C. at 324, 468 S.E.2d at 624). A solicitor must also not vouch for a witness’ credibility. *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)). A solicitor vouches for the credibility of a witness by placing “the government’s prestige behind a witness by making personal assurances, or indicating that information not presented to the jury supports the testimony.” *Id.* However, “[a] solicitor’s argument concerning the credibility of the State’s witnesses based on the record and its reasonable inferences is not error.” *State v. New*, 338 S.C. 313, 319-20, 526 S.E.2d 237, 240 (1999) (quoting *State v. Caldwell*, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) (finding the solicitor’s remarks referencing credibility of State witnesses permissible and directly related to the evidence where biases of the witnesses were apparent from the record)). *See also State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995) (the State may comment on the credibility of witnesses in argument).

Here, the comments made by the Solicitor during closing argument were all based within the confines of the record, reasonable inferences therefrom, did not work to arise the passions of the jury, and were not improper assurances.

The first comment Petitioner contends trial counsel was deficient for not objecting relates to the Solicitor referencing the fact that the victim in the case was an immigrant. Petitioner has

wholly failed to show how the Solicitor's comment was in any way inflammatory or could have aroused the passions of the jury. The Solicitor's comment simply reiterated to the jury a point to which they would have been made well aware through various other means in the trial, the victim's last name was Patel and they were an immigrant. The simple fact that a person, especially the victim, is an immigrant is in no way inflammatory to a jury. The argument could potentially be made if the defendant was an illegal immigrant or there was some allegation of a hate-crime, however, that is simply not the case in this instance. The simple mention of a fact that the jury would already have been made well aware is in no way improper and certainly did not warrant an objection by trial counsel. Petitioner has failed to show how the post-conviction relief court erred in finding that counsel was not deficient for failing to object to this comment by the Solicitor.

The second comment Petitioner contends trial counsel was deficient for not objecting relates to a reference made by the Solicitor in closing argument about the testimony of an expert witness, Dr. Beaudry. Petitioner has failed to show how this comment by the Solicitor was in any way an improper comment on the witness' and should have been objected to by counsel. The Solicitor's comment directly refers to Dr. Beaudry's testimony concerning the surveillance video in evidence, agreeing that it might be difficult for some of the jurors to identify Petitioner on the video. First, this comment is not improper in that the Solicitor is commenting on the surveillance video that is in evidence and is arguing that the State's case is not based solely on the video but on other witness testimony. The Solicitor properly commented on facts in evidence and reasonable inferences therefrom. Second, if nothing else the comment made by the Solicitor actually helps Petitioner's defense by bolstering the testimony of one of his most essential witnesses. Dr. Beaubry's testimony concerned itself with the quality of the video and the

potential difficulties of identifying Petitioner from said video. The Solicitor stating that he did not believe the jurors were going to be able to identify Petitioner from the video and that he agreed with Dr. Beaudry's testimony was helpful to the defense Petitioner was trying to pursue. Ultimately, Petitioner has failed to show how trial counsel was deficient for failing to object to a comment made by the Solicitor that was not objectionable and was potentially helpful to his defense. The post-conviction relief court properly found trial counsel was not deficient for failing to object to this comment made by the Solicitor.

The third comment Petitioner contends trial counsel was deficient for not objecting relates directly to remarks made by the Solicitor concerning the witness' lying, their credibility, and that they were telling the truth. Petitioner has failed to show how these comments by the Solicitor amounted to improper bolstering or an improper comment on the credibility of the witnesses. The first point made and highlighted by the Solicitor during this sequence in the argument was that it was the jury's job to judge the credibility of the witnesses and determine whether or not they are lying. The Solicitor makes a point to remind the jury that it is their sole responsibility to make a credibility assessment of each witness presented during trial. The Solicitor does go on to say that the witnesses were not lying and that they are telling the truth. Stating that the witnesses did not have a reason to lie is perfectly within the bounds of proper commentary on the credibility of a witness and simply stating that they were telling the truth does not amount to the level of improper bolstering. In this situation, the Solicitor stating that the witnesses were telling the truth would only amount to improper bolstering if he went further and personally vouched for the witness by making personal assurances backed by the government's prestige or by referencing facts outside the purview of the trial that would support the testimony. Petitioner, and the facts, fail to support the contention that the Solicitor did either of those

impermissible acts in reference to these remarks to the jury. Petitioner has failed to show how trial counsel was deficient for failing to object to comments made by the Solicitor that were not objectionable. The post-conviction relief court properly found that counsel was not deficient for failing to object to these proper comments made by the Solicitor.

The fourth comment Petitioner contends trial counsel was deficient for not objecting to comments made by the Solicitor referencing the testimony of the victim's wife. Petitioner has failed to show how these comments made by the Solicitor amounted to improper bolstering or were improper comments on the witness' credibility. Similar to the previous sequence, the Solicitor mentions multiple times throughout this sequence of the argument that it is the jury's job to decide whether or not they believed a witness and to decide what actually happened in the case. The Solicitor makes mention that the jury has every reason in the world to believe her and that she is not lying. Again, the Solicitor does not proceed to make personal assurances as to the veracity of the testimony or incorporate evidence from outside the purview of the jury in an effort to bolster the credibility of the witness. The remarks simply referenced earlier proper argument that the witness did not have any reason to lie to the jury, so a reasonable inference would be that they are telling the truth. Further, the other remarks did attempt to bolster the certainty of the witness, but were simply highlighting the witness' testimony that they were in fact certain as to what they testifying. The Solicitor did not further or bolster that testimony, they highlighted what was already in the record to the jury. The post-conviction relief court properly found trial counsel was not deficient for failing to object to these remarks made by the Solicitor that were not objectionable.

Finally, Petitioner contends trial counsel was deficient for failing to object to the Solicitor telling the jury that the trial was a search for the truth. Petitioner has failed to show how this

potential error by trial counsel was not cured by the jury instructions given by the trial court or how he was ultimately prejudiced. The Solicitor commented on the jury seeking the truth twice during closing arguments. The first instance is in reference to the jury reviewing video thoroughly and as many times as they feel is necessary. The second instance was immediately prior to referring to testimony of the witness where she made a certain identification of Petitioner in court. The Solicitor mentioning to the jury that the trial is a search for the truth is not automatically reversible error and should be analyzed in the context of the case in which it arises. The mentions of the truth by the Solicitor in this case were not attempts to unconstitutionally shift the burden to the defendant, but were rather commenting on how seriously the jury should take the process of their deliberations and their considerations of the facts. The Solicitor did not make attempts to shift the burden from the State's responsibility to prove the defendant's guilty beyond a reasonable doubt.

This Court need also consider if the trial court's jury instructions were sufficient to cure any potential improper implications of the Solicitor's remarks on the truth. The trial court repeatedly emphasizes to the jury that Petitioner is presumed to be innocent, the State must prove Petitioner's guilt beyond a reasonable doubt, and the burden rests solely on the State to prove the guilt of Petitioner. App. 744-745. The trial court also reminds the jury that they alone determine the credibility of witness testimony and that they can believe all of the testimony, part of the testimony, or none of it. App. 746-747. The trial court again emphasizes to the jury that Petitioner is not required to prove his innocence that the burden of proof remains on the State to prove guilt beyond a reasonable doubt. App. 748. The trial court reiterates a number of times to the jury that the burden firmly lies with the State. App. 750, 752, 753. The trial judge's jury instructions – when viewed as a whole as required – were sufficient to ensure the jury properly

decided Appellant's case as they were substantially correct, accurately covered the applicable law, thoroughly identified and explained the State's burden of proving Appellant's guilt beyond a reasonable doubt, and made clear Appellant had no duty of any kind to prove his own innocence. See Ezell, 321 S.C. at 425, 468 S.E.2d at 681 ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994). Therefore, the trial court's instructions were sufficient to cure the Solicitor's remark on searching for the truth. Accordingly, the trial judge's manner of instructing the jury resulted in no actual prejudice to Petitioner.

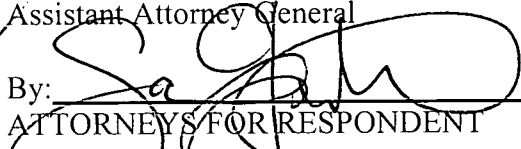
CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies addressed to:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
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This 12th day of November , 2019.



Jennifer Jenkinson
Administrative Coordinator for Respondent