STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO COLLETON COUNTY

Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-000182

MACK WASHINGTON,

Petitioner,

v.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON CERTIORARI

I.

Washington's argument that trial counsel was deficient for failing to object to the solicitor's comment "who among us is safe?" is not preserved for review because it was not ruled on by the PCR court.

II.

The PCR court did not abuse its discretion by finding trial counsel was not ineffective and Washington suffered no prejudice where counsel articulated a reasonable trial strategy for declining the trial court's offer of a curative instruction following his objection to the State's closing argument.

STATEMENT OF THE CASE

Mack Washington (Petitioner) was indicted by a Colleton County grand jury for two counts of kidnapping and armed robbery, and for possession of a weapon during the commission of a violent crime. On March 17-20, 2014, Washington proceeded to trial before The Honorable Perry M. Buckner, III and a jury and was convicted as indicted on all charges. Judge Buckner sentenced Washington to thirty years' incarceration for each charge of kidnapping and armed robbery, to be served concurrently. Washington was sentenced to five years for the weapons charge, to be served consecutively.

Washington filed a timely notice of appeal. Tiffany Lorraine Butler, Esquire, represented Washington on appeal and filed an Anders brief. Washington also filed a pro se supplemental brief. On March 2, 2016, the South Carolina Court of Appeals dismissed Washington's appeal after review. State v. Washington, Op. No. 2016-UP-101 (S.C. Ct. App. , Filed March 2, 2016). The Remittitur was returned on March 21, 2016.

Washington filed an application for post-conviction relief (PCR) on April 7, 2016. An evidentiary hearing was held on October 11, 2017, at the Beaufort County Courthouse before the Honorable Thomas A. Russo, Circuit Court Judge. Washington was present at the hearing and represented by James Falk, Esquire. The PCR court heard testimony from Washington, Bennett, and both assistant solicitors who prosecuted the case.

Two of the allegations of ineffective assistance of counsel contained in Washington's application concerned the prosecutor's closing statement. Of those two allegations, Washington appeals only the PCR court's ruling concerning the prosecutor's comment that Washington had a "pattern of manipulating young people and luring them and intimidating them" and a "pattern of

robbing old folks, intimidating old folks, kidnapping old folks, holding them up." App.696-99.[1] Trial counsel objected to this portion of the prosecutor's closing argument and moved for a mistrial on the basis that the comment unfairly referenced Washington's prior record even though no evidence was presented thereof. App.497-98. The prosecutor responded that the "pattern" comment did not refer to Washington's prior record, but rather to the multiple victims involved in the case and Washington's actions organizing, executing, and covering up the crime. App.498-99. The trial judge denied the motion for mistrial but offered to give a curative instruction that the jury should disregard the reference to a "pattern." App.499-500. Trial counsel declined to accept a curative instruction on the basis that it would serve only to call attention to the remark. App.499.

The PCR court found trial counsel was not deficient for failing to accept a curative instruction in response to the trial court's denial of his mistrial motion. The lower court found that trial counsel's decision was based on reasonable trial strategy. App.697. The PCR court further found that even had counsel accepted the curative instruciton, the result of trial would not have changed. App.698-99. This appeal follows.

Relevant Facts Adduced at Trial

Frank and Joan Klem were making their annual trip from Michigan to Florida when they decided to stop at the Rice Planters Inn in Walterboro around midnight on January 7–8, 2012. App. 397-98. After checking in to their ground-floor room, Mrs. Klem walked their dog while Mr. Klem parked their vehicle. App.220. When Mrs. Klem returned to the hotel room, two men were at the door. App.220. One of the men grabbed Mrs. Klem around the waist and placed a knife near her throat. App.220. When Mr. Klem returned, the men began shouting "we want your wallet, your

[1] As explained below, Petitioner's argument regarding the comment "Who among us is safe?" was not included in his application and was not ruled upon by the PCR court.

purse, and your car keys, or we'll kill her!" App.220-21. Mr. Klem complied. App.402. The Klems explained how the men took their wallet, purse, and keys and "yanked the phone out of the wall" before fleeing the scene in the Klems' car. App.220-23, 402. Frank Klem ran to the hotel's main office, where the receptionist called the police. App.223.

Tyneshia Young testified she and Washington were close friends. App. 288. Young testified Mack Washington came to her home several times on January 7. App.291. At around 3:30 a.m. on the morning of January 8, Washington and his friend Tyheem Lewis came to Young's home. App.292. They had an object that Young thought resembled a guitar. App.292. Lewis told her it belonged to Washington. App.292. Washington and Lewis left, but Washington returned later that night. App.293.

On January 8, police received a tip that two guns taken during the armed robbery at the Rice Planters Inn may be located inside Young's apartment. App.314. Police went to Young's apartment and made contact with Tyneshia Young. App. 323. Young testified that when police knocked on the door, Washington pushed her into the bathroom to prevent her from opening the door. App. 294. He then took two guns out of her closet and put them underneath her bed. App.294. Young called her mother, who lived in the neighboring building, from the bathroom to tell her there were police outside her home. App.294. Her mother immediately walked over to Young's apartment and convinced Young to allow the police to come in. App.297.

Police found two guns that belonged to the Klems. App.323. Young denied Washington had the guns, blaming it on another individual, but later told police Washington and Tyheem Lewis brought the guns to her apartment. App.335–36. Young further testified she started having problems with her toilet the next day. App.298. She called a plumber who inspected the toilet and discovered an ID card that belonged to "an older white woman." App.298-99. When there

continued to be issues with the toilet, the plumber took the toilet apart and found credit cards belonging to the Klems. App.280. Young testified Washington must have flushed the credit cards down the toilet because it started clogging after he had been in the bathroom. App.300.

On January 30, police received information that Washington had been driving a white Chevrolet Impala like the one stolen from the Klems. They further learned that Washington had sold the vehicle and that remnants of the car were behind a house on Turkey Hill Road in Green Pond. App.327–28. Police located the remnants of the vehicle and identified it as the vehicle stolen from the Klems. App.333-34.

Based on Young's statement that Tyheem Lewis and Washington brought the guns to her apartment, police located Lewis at the high school he attended and interviewed him. App. 335-36. Lewis admitted to robbing the Klems and implicated Washington. They were both charged with armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. App.338. Lewis pled guilty to strong-arm robbery and was sentenced under the Youthful Offender Act for a term not to exceed six years. App.375-76. At trial, Lewis testified in detail how he and Washington carried out the robbery, explaining Washington was the mastermind of the robbery and the one who held the knife on Joan Klem. App. 360-69. According to Lewis, they found the guns inside the trunk of the car. App.372. After discarding the clothes found in the vehicle, he and Washington hid the guns at Young's apartment. App. 373. They then drove to "the village" to park the car until they could take it to the "chop shop" the next day. App.373-74.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; 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, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or 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, 466 U.S. at

689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner 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, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the Petitioner 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I.

Washington's argument that trial counsel was deficient for failing to object to the prosecutor's comment "Who among us is safe?" is not preserved for appellate review because it was not ruled on by the PCR court.

Petitioner claims the PCR court erred by not granting Petitioner a new trial on the basis that the prosecutor made an improper "golden rule" argument to the jury when she asked the jury "who among us is safe?" during her closing argument. This issue is not preserved for review because it was not ruled on by the PCR court. The claim was not raised in Washington's PCR application. App.567–63. While Washington did raise the issue orally to the PCR court during the evidentiary hearing, the court did not rule on the claim. Rather, the PCR court indicated it would reserve its ruling and take the matter under advisement. App.682. When the PCR issued its ruling in a written order dated November 30, 2017, the court ruled on the allegations contained in Washington application. The court did not rule on Washington's additional claim, made orally at the evidentiary hearing, concerning the solicitor's comment "who among us is safe?" App.695–99. The record contains no motion to alter or amend the court's ruling. Accordingly, Washington's sole issue on appeal was not ruled on by the PCR court. An argument not ruled on by the trial court is not preserved for review. State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997). Accordingly, this issue is not preserved.

II.

The PCR court did not abuse its discretion by finding trial counsel acted reasonably when he declined to accept a curative instruction after the trial court denied his motion for mistrial related to the prosecutor's closing argument.

Washington claims the PCR abused its discretion when it found trial counsel acted reasonably when it refused a curative instruction after the trial court denied his motion for mistrial based on the prosecutor's closing argument. Trial counsel moved for a mistrial based on the prosecutor's comment that Washington demonstrated a "pattern" of criminal conduct in carrying out his crimes. App.497-99. The trial court refused to grant a mistrial but offered to give a curative instruction informing the jury not to consider any conduct for which Washington was not currently on trial. App.499. Trial counsel refused the curative instruction because he did not want to draw attention to the prosecutor's comments. App.499. At the PCR hearing, he explained he refused the instruction because he thought drawing attention to the comment would harm Washington's case, and believed he had preserved a meritorious issue for appellate review. App. 633-34, 643.

The PCR court did not abuse its discretion by finding trial counsel acted reasonably. PCR courts apply a deferential standard to assess whether trial counsel's performance was so deficient as to deprive a defendant of a fair trial. "Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Brown v. State, 375 S.C. 464, 481, 652 S.E.2d 765, 774 (Ct. App. 2007) (collecting cases and holding defense attorney's decision not to object to prosecutor's closing argument was reasonable trial strategy). In the PCR context, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Edwards v. State, 392 S.C. 449, 546–57, 710 S.E.2d 60, 64 (2011). "The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of

hindsight' and evaluate counsel's decisions at the time they were made." Id. Accordingly, courts must be wary of second-guessing trial counsel's tactics. Id. Evidence supports the PCR court's finding that trial counsel acted reasonably.

Washington's claim that a "valid trial strategy cannot include failing to preserve a client's direct appeal" is incorrect. Our case law is replete with examples where a trial lawyer reasonably chose to forego objections or curative instructions for strategic reasons. See e.g. Brown, 375 S.C. at 481, 652 S.E.2d at 774; Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (reversing PCR court's finding of deficiency where trial counsel "did not request curative instructions because they tend to bring into focus precisely the item the objector has kept out"). The PCR court properly applied a deferential standard of review to assess the reasonableness of counsel's decision to decline a curative instruction, and evidence supports its finding.

Washington's claim that trial counsel failed to preserve the issue because he insisted on a mistrial rather than accepting a curative instruction is also incorrect. A party is not required to accept a curative instruction in lieu of a mistrial motion to preserve the issue for appeal. See State v. Wilson, 389 S.C. 579, 584, 698 S.E.2d 862, 865 (Ct. App. 2010) ("When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, **or move for a mistrial if such a cure is insufficient,** in order to create an appealable issue."). Trial counsel moved for a mistrial based on the "pattern" comment and the trial court ruled on his motion. The correctness of the trial court's ruling denying Washington's motion for mistrial was preserved for review. There is no evidence the Court of Appeals dismissed Washington's direct appeal because it believed the issue was unpreserved.

Trial counsel in this case gave a valid reason for refusing a curative instruction; he did not want to draw attention to the comment. App.499. The lower court found this to be reasonable

trial strategy. App.697. Trial counsel's testimony supports the PCR court's ruling. Because there is evidence to support the PCR court's ruling, his decision should not be disturbed on appeal.

Even if counsel was deficient, the PCR court correctly found Washington suffered no prejudice. App.699. The PCR court agreed with the trial court that the "pattern" comment referred to Washington's pattern of conduct in carrying out and covering up the actions for which he was on trial. App.698. The lower court further found that the comment did not affect the outcome of the trial, and Washington therefore failed to establish prejudice. App. 698. The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Because the record supports the PCR court's finding that Washington failed to show prejudice, its ruling should be affirmed.

Furthermore, the record demonstrates overwhelming evidence of Washington's guilt. Police discovered several items of the Klems' stolen property in Washington's close friend's apartment while Washington was present. Young testified Washington brought the Klems' guns to her apartment at 3:30 in the morning after the robbery. App.297–301. She further testified she found the Klems' credit cards in her toilet after Washington used the bathroom just before police arrived to search the apartment. App.280, 300. In addition to substantiated confidential information that Washington was involved in the robbery, his co-defendant pleaded guilty and testified in detail against him, conclusively proving his guilt. App.364–70. Evidence supports the PCR court's decision that the prosecutor's comment had no effect on the outcome of trial. See Von Dohlen v. State, 360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004). This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BY: _____
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

RECEIVED
Aug 20 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-000182

Mack Washington,

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Brief of Respondent has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Taylor D. Gilliam, Esquire
tgilliam@sccid.sc.gov

This 20th day of August, 2021.

Vickie T Hall

Vickie Hall
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
vickiehall@scag.gov

ALAN WILSON
ATTORNEY GENERAL

August 20, 2021

The Honorable Patricia A. Howard
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211
(by electronic filing)

RE: Mack Washington v. State of South Carolina
Appellate Case No.: 2018-000182

Dear Ms. Howard:

Enclosed please find the original Brief of Respondent in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
S.C. Bar # 101188

JAE/vh
Enclosures

cc: Taylor D. Gilliam, Esquire
Victim Advocacy Division