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**Dec 23 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Florence County  
The Honorable D. Craig Brown, Trial Judge  
The Honorable Thomas A. Russo, Post-Conviction Relief Judge

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Appellate Case No. 2018-002110

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TROY DARNELL HUNTER,

Petitioner,

v.

THE STATE,

Respondent.

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**BRIEF OF RESPONDENT**

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## **STATEMENT OF ISSUE ON APPEAL**

**Did the PCR judge properly deny relief for the allegation that trial counsel was ineffective for failing to object to comments made by the solicitor in closing argument that Victim was telling the truth when trial counsel articulated a valid strategy for not objecting and when Petitioner failed to prove he was prejudiced by trial counsel's failure to object?**

## STATEMENT OF THE CASE

In June 2012, the Florence County Grand Jury indicted Petitioner for attempted murder, armed robbery, second degree assault and battery, and possession of a firearm by a person convicted of a violent crime. (App. 481-82). On December 14-16, 2013, a jury trial was held in the Florence County Court of General Sessions with the Honorable D. Craig Brown, presiding. Appellant was represented by the Honorable<sup>1</sup> H. Steven DeBerry, IV, Esquire. The State was represented by Assistant Solicitor Matthew Ozment of the Twelfth Circuit Solicitor's Office. The State proceeded to trial on one count of armed robbery and one count of second degree assault and battery. At the conclusion of trial, the jury convicted Petitioner as indicted on both charges. The trial judge sentenced Petitioner to thirty years' imprisonment for armed robbery and three years for second degree assault and battery to be served concurrently.

Petitioner filed a timely notice of appeal to this Court. This Court affirmed Petitioner's convictions and sentences in an unpublished opinion on December 3, 2014. State v. Hunter, Op. No. 2014-UP-437 (S.C. Court App. filed December 3, 2014). The remittitur was issued on December 22, 2014.

Petitioner filed an application for post-conviction relief on January 8, 2015. Respondent filed its Return on November 21, 2016. An evidentiary hearing into the matter convened on August 31, 2017 in the Florence County Court of General Sessions with the Honorable Thomas A. Russo presiding. Jonathan Waller, Esquire, represented Petitioner. Lindsey A. McCallister of the South Carolina Attorney General's Office, represented Respondent. By written order filed October 29, 2018, the PCR court denied Petitioner's claims and dismissed his application for relief with prejudice. Petitioner appealed the dismissal of his application to the South Carolina

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<sup>1</sup> Steven DeBerry is currently a circuit court judge.

Supreme Court on November 29, 2018. On January 29, 2020, the Supreme Court transferred Petitioner's case to this Court. On September 28, 2021, this Court granted certiorari as to Petitioner's Question 3 and denied certiorari on the remaining questions.

## STATEMENT OF FACTS

At approximately 2:00 p.m. on November 30, 2011, Demetrius Holloman (Victim) and Roderick Titus returned to Titus' home after attending a funeral. (App. 63-64, 130). According to Titus, he, Victim, and Petitioner were all friends. (App. 60-61). Titus testified that on November 30, 2011, he and Victim attended a funeral together and then returned to his residence. (App. 63-64). Titus went inside the home to change clothes, while Victim walked to the side of the house. (App. 65). Titus testified he heard a "loud bang noise" that could have been gunshots, at which time his sisters ran inside screaming and upset. (App. 66, 69-70).

Nate Orgbon testified he was also at Titus's house on November 30, 2011, and saw Petitioner there later in the day, after lunch. (App. 84-85). Orgbon testified Petitioner was looking for Victim, and someone told Petitioner where to find Victim. (App. 86). Orgbon explained Petitioner walked up to Victim and "clean clocked" him with his fist. (App. 87). Orgbon testified, "He just punched the man, you know what I mean, so they (sic) fighting." (App. 87, lines 12-13). Orgbon stated he left after he saw Victim "go back" after Petitioner hit him. (App. 87).

The State also called Idena Titus Simmons, Roderick Titus's mother, who lived at the address where the incident occurred. (App. 109). She testified when she returned from the funeral after lunch, she heard a loud boom. (App. 112). She recalled telling her husband it sounded like a truck hitting a transmitter, and her husband said it sounded like a gun. (App. 112).

Deloris Titus Johnson, Simmons' sister, testified she was also at the Simmons' residence on November 30, 2011. (App. 119). Johnson testified she was parked in the front yard talking on her cell phone when she saw Petitioner arrive with a man she did not know. (App. 119-21). Next, she recalled hearing gunshots and saw the people in the backyard begin to scatter. (App. 121).

She testified she saw Petitioner and the unknown man walk back to their car and leave. (App. 122).

Victim testified regarding the details of the assault and robbery. According to Victim, when he arrived at the home, he walked to the side of the house, where he had his cell phone charger plugged in, and kneeled down to unplug it. (App. 131). While Victim was kneeling down, Petitioner came up behind him and hit him in the mouth with a .357 Magnum. (App. 131-32). Victim testified he fell to the ground, and Petitioner hit him on the top of the head with the gun, stood over him, and asked where "it" was. (App. 132-33). Victim testified Petitioner shot the gun right by Victim's head and then reached into Victim's pants pocket, taking \$1,000. (App. 133-34). Victim testified Petitioner then threatened to kill Victim if he said anything, and left the scene. (App. 133).

Immediately after he saw Petitioner drive away, Victim got up and walked straight to his mother's house and told her what happened and who did it. (App. 135-36). However, initially, Victim told police he did not know who did it, but he eventually gave Petitioner's name. (App. 137-39). Victim testified he went to the hospital and spoke to police there, but he did not give Petitioner's name at first because he was afraid. (App. 139). Victim testified he told the police what really happened a couple days later once he realized the full extent of his injuries and the money it would cost to repair them. (App. 138-39). Victim testified he was so scared after telling police Petitioner's name, he stayed inside for two weeks, fearing for his life. (App. 140).

On cross-examination, Counsel thoroughly questioned Victim regarding the timing of when he named Petitioner to police as the person who assaulted and robbed him. (App. 146-48). Counsel asked several times whether Victim realized he could not receive money to have his teeth fixed unless he gave a statement and cooperated with the investigation. (App. 154-56).

Specifically, Counsel asked, “Because of your recorded statement, you said to Sergeant Davis that it was only when you realize[d] that you couldn’t get your mouth fix[ed] without giving a statement, that you decided to tell that it might have been Troy Hunter?” (App. 154, line 25 App. 155, lines 1-4).

Victim’s mother, Debra Singleton, also testified. Singleton testified Victim came into her house, calling out to her. (App. 170). She said she saw blood everywhere, “just pouring,” and asked him what happened. (App. 170). She testified, “He say [Petitioner] hit me in my mouth with a gun.” (App. 170, line 19). Singleton accompanied Victim to the emergency room and told Victim he needed to tell the police what happened. (App. 172). She recalled Victim was scared to say anything because he knew Petitioner carried a gun and was afraid Petitioner could kill him. (App. 173). Singleton further testified she sensed Victim might still have been scared even after he told police because he stayed at her house for several weeks and did not return to his own place until after Petitioner was arrested. (App. 173-74).

Investigator Lee Davis of the Florence Police Department testified he got involved in the case when Victim contacted the police department’s Victim’s Services division and was told he had to cooperate with the investigation in order to receive services. (App. 181-82). Davis testified, at that time, Victim then reported Petitioner assaulted him. (App. 182). Davis took a recorded statement from Victim, and Victim’s Services took photographs of Victim’s injuries, which were admitted without objection. (App. 182-83). Davis also testified he went out to the incident location but could find no evidence at the scene to indicate a gun was used in the commission of the crime. (App. 205).

## 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 defer 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. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. 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).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "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). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

## ARGUMENT

**The PCR judge properly denied relief for the allegation that trial counsel was ineffective for failing to object to comments made by the solicitor in closing argument that Victim was telling the truth because trial counsel articulated a valid strategy for not objecting and because Petitioner failed to prove he was prejudiced by trial counsel's failure to object.**

Petitioner argues the PCR court erred in not granting relief for the allegation that trial failed to object to impermissible comments in the solicitor's closing argument. Specifically, Petitioner asserts that trial counsel should have objected to the solicitor's statement that Victim was telling the truth. (App. 259). Because trial counsel failed to object the solicitor's comments, Petitioner argues trial counsel was deficient and the outcome of Petitioner's trial would have been different had trial counsel lodged an objection. Petitioner's argument fails for two reasons. First, trial counsel was not deficient for failing to object to the solicitor's comments. Trial counsel articulated a valid strategic reason for not objecting during opposing counsel's closing argument. Therefore, trial counsel's representation was not deficient. Second, even if trial counsel were ineffective in his representation of Petitioner, Petitioner was not prejudiced by trial counsel's refusal to object to the solicitor's comments in closing, because Petitioner has failed to prove the outcome of his trial would have been different if not for the solicitor's comment.

"To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different." Gilchrist v. State, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002). "A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). "Improper vouching occurs when the prosecution places the government's prestige

behind a witness by making explicit assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." Id.

Counsel is not required to object at every opportunity if Counsel has a reasonable explanation for not doing so. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010); See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel).

Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial. . .," and Petitioner "has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

Here, Petitioner's argument fails because trial counsel was not deficient for failing to object to the solicitor's comments in closing argument. Trial counsel testified regarding his strategy<sup>2</sup> for objections during closing arguments. Trial counsel explained he felt it was risky to object during opening and closing arguments. Trial counsel testified that he believes it is appropriate for an attorney to comment on the evidence in closing, and he did not feel the

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<sup>2</sup> PCR counsel asked trial counsel the following question: "What was the strategy behind not objecting to the Solicitor saying that he – that [Victim] told the truth, I think he did, in fact I know he did?" (App. 415, lines 16-18). The form of PCR counsel's question recognizes that trial counsel's decision not to object was a strategic one.

solicitor's statement that Victim was telling the truth was sufficiently objectionable to risk alienating the jury. (App. 415-16). Trial counsel explained he watches the jury very closely, and felt this jury was clearly ready for the case to conclude. (App. 416). Counsel testified he might have objected if the solicitor had continued to belabor the point. (App. 416). Because trial counsel articulated a valid reason for failing to object to the solicitor's comments, he was not deficient in his representation of Petitioner.

Even if trial counsel was deficient in his representation of Petitioner by not objecting during the solicitor's closing argument, Petitioner has not shown there was a reasonable probability the outcome of his trial would have been different had trial counsel objected. At the PCR hearing, Petitioner never addressed trial counsel's failure to object to the solicitor's closing argument. (App. 441-46). In fact, when Petitioner was asked to specify how trial counsel was deficient in his representation, Petitioner testified trial counsel was ineffective for failing to object to the trial judge's jury instructions. (App. 446). However, Petitioner never testified that he thought trial counsel was ineffective for failing to object to the solicitor's closing or that he thought the outcome of the trial would have been different if trial counsel had objected. The PCR court correctly found "it [is] not reasonably likely" that the solicitor's comment in his closing argument caused the jury to act in a "manner inconsistent with the notion that the State has the burden of proof beyond a reasonable doubt." State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012). (App. 479). Therefore, Petitioner has not met his burden of showing he was prejudiced by the improper comment. Because trial counsel was not deficient for his failure to object to the State's closing argument and because Petitioner has failed to show prejudice, this Court should affirm the PCR Court's denial of Petitioner's application for relief.

**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

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