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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Certiorari to Beaufort County
Court of Common Pleas
The Honorable William H. Seals, Circuit Court Judge
The Honorable Carmen T. Mullen, Trial Judge

Appellate Case No. 2019-001660

ADRIAN JENKINS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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STATEMENTS OF ISSUE ON CERTIORARI

Petitioner's Statement of Issue of Certiorari

Whether trial counsel provided ineffective assistance of counsel when she failed to object to the admission of the indictments and sentencing sheets of Petitioner's prior burglary convictions, used to enhance his current charge to first-degree burglary, where the redactions the trial court made on the indictments and sentencing sheets did not prevent the jury from learning unfairly prejudicial details of the prior crimes?

Respondent's Counterstatement of Issue of Certiorari

Did the post-conviction relief court correctly find trial counsel was not ineffective where she objected to the admission of the indictments and sentencing sheets from Petitioner's prior burglary convictions to enhance his current charge to first-degree burglary, where the trial court specifically instructed the jury to limit consideration of the indictments and sentencing sheets to the sole purpose of enhancing the current charge, and where Petitioner was not prejudiced?

STATEMENT OF THE CASE

Petitioner Adrian Jenkins is presently confined in the South Carolina Department of Corrections. During its January 2016 term, the Beaufort County Grand Jury indicted Petitioner for burglary – first degree (2015-GS-07-01617). Trasi Campbell of the Fourteenth Circuit Public Defender’s Office represented Petitioner. Assistant Solicitor Hunter Swanson of the Fourteenth Circuit Solicitor’s Office prosecuted the case. On April 18-20, 2016, Petitioner proceeded to a jury trial before the Honorable Carmen T. Mullen, circuit court judge. At the conclusion of trial, the jury found Petitioner guilty as indicted. Judge Mullen sentenced Petitioner to a term of imprisonment of twenty years.

Petitioner filed a notice of appeal and was represented on appeal by Appellate Defender David Alexander (Appellate Counsel) of the South Carolina Commission on Indigent Defense. Appellate Counsel filed a brief pursuant to *Anders*¹ on Petitioner’s behalf and a petition to be relieved as counsel. On appeal, Petitioner raised one issue:

- 1) Whether the trial court erred in admitting [Petitioner’s] indictments containing highly prejudicial details about his previous crimes as proof of prior convictions for burglary under section 16-11-311(A)(2) of the South Carolina Code?

On October 4, 2017, the Court of Appeals dismissed Petitioner’s appeal and granted Appellate Counsel’s motion to be relieved. *State v. Jenkins*, 2017-UP-393 (S.C. Ct. App. filed October 4, 2017).

On January 31, 2018, Petitioner filed an application for post-conviction relief, alleging ineffective assistance of counsel. On March 12, 2019, Petitioner filed an amended post-conviction relief application alleging “trial counsel was ineffective when she allowed [Petitioner’s] indictments that contained highly prejudicial details about previous crimes to be admitted as proof

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

of prior convictions for burglary” as well as other allegations of ineffective assistance of counsel. The State filed a Return on May 1, 2018. On April 2, 2019, an evidentiary hearing was held in Beaufort County before the Honorable Williams H. Seals, Jr. Ashley A. McMahan represented Petitioner. Benjamin Limbaugh represented the State. Judge Seals denied post-conviction relief by Order of Dismissal filed September 19, 2019.

Petitioner filed his Petition for Writ of Certiorari on April 8, 2020. Respondent filed its Return to Petition for Writ of Certiorari on September 21, 2020. On October 6, 2020, the Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR. Thereafter, the Court of Appeals granted certiorari and requested further briefing. Petitioner filed the Brief of Petitioner on April 26, 2022. This brief follows.

STATEMENT OF FACTS

On September 17, 2015, George Lawson (victim) arrived home and discovered items including video game consoles, video games, and other electronics were missing from his home. (App. 38, 120-121). After checking his surveillance camera footage, victim called law enforcement to report a burglary. (App. 38-39, 121). Victim informed the responding officer he recognized Petitioner as the person captured on his surveillance footage entering his home without permission; thereafter, victim provided Petitioner's name to law enforcement and identified Petitioner in a photo lineup. (App. 39-40, 42, 49, 121).

Victim testified he met Petitioner the day prior to the incident when Petitioner arrived at his home with Miranda Brock², Petitioner and victim's mutual friend, and came into victim's home to borrow a shirt. (App. 40, 115, 182-185). Victim then drove both Ms. Brock and Petitioner to a mobile home park on Roseida Road, then to Food Lion where they refused to get out of his vehicle, ultimately dropping both Ms. Brock and Petitioner off at Burton Wells Park. (App. 44-46, 112, 119).

The following day, the date of the incident, victim left for work around nine a.m. and arrived home at four p.m. (App. 120). After realizing items in his home were missing, victim checked his surveillance footage and called law enforcement to report a burglary. (App. 121). Victim testified at trial his surveillance footage showed Petitioner jumping over his fence, going towards the back of his house, and returning a few minutes later, whereupon Petitioner passed victim's items over his fence to two females. (App. 121, 136).

Responding officer Deputy Matthew Rios testified he also viewed the footage captured on

² Victim testified he had been acquainted with Miranda Brock for a couple years. (App. 116). Victim further testified Ms. Brock had stayed at his home "a couple days here and there" but had never lived at his residence. (App. 116-117).

victim's surveillance camera. (App. 48). Deputy Rios testified he recorded victim's surveillance feed on his department-issued camera, as victim could not pull the footage at the time of his report³, and then processed the scene – pulling DNA samples from the fence area where Petitioner can be seen jumping over the fence, as well as pulling samples from the lock on the fence where Petitioner can be seen manipulating the lock. (App. 48, 103). Four days after the initial report, Deputy Rios conducted a follow-up interview with victim which included a photo lineup. Deputy Rios testified victim immediately identified Petitioner as the assailant. (App. 104-106).

Witness Kelsey Krimmer also testified at Petitioner's trial. Ms. Krimmer testified she, Stephanie Campbell⁴, and Petitioner went to victim's home on the date of the incident. (App. 142). Ms. Krimmer testified Petitioner jumped over victim's fence, went to victim's back door, and came back with "a TV and some games." (App. 143).

During pre-trial motions, the solicitor took up the matter of settling the Petitioner's record and sought to introduce self-authenticating documents – the sentencing sheets – pursuant to *State v. Benton*⁵. (App. 69). In furtherance of trial counsel's argument regarding the inadmissibility of the documents, she argued the convictions were only relevant to sentencing. (App. 68-73). Judge Mullen expressed her skepticism about using sentencing sheets, stating that she did not think she had ever given a jury a sentencing sheet. (App. 70-72). Additionally, the solicitor offered to stipulate to the two prior burglaries, but Petitioner refused. (App. 71-72). Judge Mullen then ordered the solicitor to heavily redact the sentencing sheets. (App. 72-73). The solicitor asked if

³ Investigator Jennifer Snider of Beaufort County Sherriff's Department testified victim later a thumb drive containing the footage to her on September 23, 2015. (App. 151).

⁴ Investigator Snider testified she interviewed both Kelsey Krimmer and Stephanie Campbell prior to trial. (App. 148, 155). Investigator Snider further testified Ms. Krimmer and Ms. Campbell's interviews were consistent with each other and neither were charged in connection to the incident. (App. 155).

⁵ 338 S.C. 151, 526 S.E.2d 228 (2000).

she should detach the indictments. (App. 73). Judge Mullen replied, “I think you’d want the indictment to go in.” (App. 73). The court continued to review the documents and then took up another matter. (App. 73). Judge Mullen briefly returned to the issue and ordered further redactions ultimately accepting the State’s argument that the prior convictions were admissible pursuant to *State v. Benton*. (App. 68-73, 81-82). Court then adjourned for the evening. (App. 82).

The next day, immediately after opening statements, the solicitor offered two sets of documents to prove Petitioner’s prior convictions. (App. 100). Trial counsel stated she had reviewed them, and they were “subject to my prior objections.” (App. 100). Judge Mullen then admitted State’s Exhibit 1 and 2. (App. 100-101; Supp. App. 1-6).

In her charge to the jury, Judge Mullen explicitly outlined the scope and purpose for which Petitioner’s prior convictions were admitted. Judge Mullen charged the jury the following:

“Evidence of prior offenses committed by the defendant was not offered to prove the defendant has a bad character or to prove that the defendant committed the burglary on this occasion. The prior convictions may be considered by you only for the purpose of determining whether or not it satisfies that element of the offense that makes it first-degree burglary if you enter a dwelling without consent to commit a crime therein and you have two prior convictions for burglary and/or house breaking.” (App. 248).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give [] great deference to the post-conviction relief court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRPC; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review only evaluating questions of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court correctly found trial counsel was not ineffective where she objected to the admission of the indictments and sentencing sheets from Petitioner’s prior burglary convictions to enhance his current charge to first-degree burglary, where the trial court specifically instructed the jury to limit consideration of the indictments and sentencing sheets to the sole purpose of enhancing the current charge, and where Petitioner was not prejudiced.

Petitioner contends trial counsel provided ineffective assistance of counsel when she failed to object to the redacted indictments and sentencing sheets from Petitioner’s prior burglary convictions used to enhance Petitioner’s current charge to first-degree burglary. According to Petitioner, trial counsel was ineffective for failing to request additional redactions after the trial court ordered redactions on portions of the indictments and sentencing sheets. Petitioner asserts the redactions the trial court instructed to be made to the indictments and sentencing sheets did not prevent the jury from learning unfairly prejudicial details of the prior crimes and were insufficient.

The post-conviction relief court properly rejected Petitioner’s argument, finding trial counsel was not ineffective when trial counsel did challenge the admission of the records from the prior convictions being entered into evidence, finding the trial court admitted the redacted indictments and sentencing sheets over trial counsel’s objection, and finding the trial court specifically instructed the jury to consider the indictments and sentencing sheets for the sole purpose of enhancing the current charge. (App. 356). Consequently, this Court should affirm the PCR court’s findings in full.

Strickland⁶ Standard and Burden of Proof

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts

⁶ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] 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. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the

proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial 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 [an] adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed [at] the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under de novo review, the standard for judging counsel's representation is a most deferential one. *Harrington*, 562 U.S. at 105.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* At 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance 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 reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, it is not enough "to show that the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." *Id.* at 693 (emphasis added).

The performance and prejudice standards, however, "do not establish mechanical rules . . .

[t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

Petitioner Improperly Frames Issue as Trial Court Error

First, Petitioner improperly frames the issue in this case as one of trial court error. This distracts from the standard in question – whether trial counsel was deficient for her failure to object and whether trial counsel’s alleged deficiency prejudiced Petitioner as to so undermine the proper functioning of the adversarial process denying Petitioner a fair proceeding.

The allegation in Petitioner’s amended post-conviction relief application was “trial counsel was ineffective when she allowed [Petitioner’s] indictments that contained highly prejudicial details about previous crimes to be admitted as proof of prior conviction for burglary.” (App. 279; 290). Similarly, on direct appeal, Petitioner argued the trial court erred in admitting [Petitioner’s] indictments containing highly prejudicial information about his previous crimes as proof of prior convictions for burglary under section 16-11-311(A)(2) of the South Carolina Code. (Second Supp. App. p. 8). After consideration of Petitioner’s argument, the Court of Appeals correctly dismissed Petitioner’s appeal. (Second Supp. App. pp. 14 – 15).

In the Brief of Petitioner, Petitioner cites Rule 403, SCRE, and argues, “the detailed information about Petitioner’s prior convictions was unfairly prejudicial because it improperly

attacked his character and crossed the line from proving an element of the crime into impermissible propensity evidence.” (Brief of Petitioner, p. 9). Petitioner’s Brief further contends the unfair prejudice resulting from the admission of the indictments and sentencing sheets outweighed the probative value of the indictments. (Brief of Petitioner, p. 9). Petitioner asserts neither the indictments nor the sentencing sheets should have been admitted into evidence prior to further redactions. (Brief of Petitioner, p. 9). Petitioner’s allegation more accurately resembles a claim of trial court error in finding the documents admissible after redactions were made. Therefore, to the extent Petitioner bases his argument on trial court error in admitting the indictments and sentencing sheets, this Court should deny relief.

Trial court error is not a recognized claim for post-conviction relief. *See Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (noting that allegations of trial court error are not cognizable on PCR). It is firmly established law that, ordinarily, an issue must be presented to the trial court, or it is not preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (“Issues not raised and ruled upon in the trial court will not be considered on appeal.”); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) (“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court.”). *State v. Dial*, 429 S.C. 128, 838 S.E.2d 501 (2020).

Post-conviction relief is not a substitute for remedies incident to the proceedings in the trial court or on direct appeal. S.C. Code Ann. § 17-27-20(B). An applicant can allege constitutional violations in a PCR action unless he could have raised the issue on direct appeal. *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998) (citing *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (affirming the PCR court’s denial of relief because the applicant could have argued on direct appeal that the trial court erred in admonishing applicant’s defense attorney and that the

State improperly commented on the applicant's failure to call his wife as a witness at trial); S.C. Code Ann. § 17-27-20(b) (1976)); *but see Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37, 44 (2019) (instructing that, in some instances, an applicant may argue a claim for post-conviction relief based on constitutional violations other than a violation of his Sixth Amendment right to counsel due to the ineffective assistance of counsel; recognizing *Fortune* was entitled to a new trial because the State made improper statements during its closing arguments at trial).

In this case, trial counsel objected to the introduction of the indictments and sentencing sheets citing concern the jury would have information before them that was not relevant. (App. 70). Trial counsel further noted for the trial court, "I'm just very concerned that we may be setting ourselves up for a situation where we are impermissibly putting information in front of a jury that is not – if it's not properly in front of them." (App. 70). In furtherance of trial counsel's objection to the admission of the indictments and sentencing sheets, she argued, during pre-trial motions,

"that's really a sentencing issue...those are elements for sentencing but not for consideration by a jury. [Petitioner] is charged with burglary in the first degree and the two prior convictions, we would say would be improper even as elements of the offense of burglary in the first degree." (App. 72).

Following trial counsel's objection, Judge Mullen ordered the indictments and sentencing sheets be passed up for her review, informed the parties of the redactions she believed necessary, and noted she would later instruct the jury on the matter – overruling trial counsel's objection. (App. 72-73; 81-82).

After the redactions were made and at the time the indictments were introduced, trial counsel renewed her prior objections to the introduction of the documents on the record. (App. 100). Therefore, trial counsel properly preserved her objection to the introduction of the indictments and sentencing sheets. The issue raised on appeal was whether the trial court erred in admitting the indictments. (Second Supp. App. 6). The Court of Appeals dismissed the appeal.

(Second Supp. App. 14-15).

Petitioner now argues admitting the indictments and sentencing sheets that contained “severely prejudicial details” introduced “unnecessary and unfair prejudice to Petitioner that substantially outweighed its probative value.” (Brief of Respondent, pp. 13-14). Therefore, to the extent Petitioner alleges the documents were not admissible pursuant to Rule 403, SCRE, and bases his argument on the assertion the trial court erred in admitting the documents, this Court should deny relief.

***Trial Counsel Timely Objected to the Admission of Redacted
Indictments and Sentencing Sheets & Renewed Her Objection
When the State Sought to Introduce the Documents***

Petitioner asserts trial counsel erred in failing to request further redactions following the trial court’s colloquy and instruction regarding the necessary redactions. Petitioner also asserts “the indictments and sentencing sheets admitted in Petitioner’s case improperly provided particular information about his prior convictions and put the finger on the scale of credibility battle between Petitioner and Lawson.” (Brief of Respondent, p. 13). Again, Petitioner’s argument suggests he is in fact arguing trial court error. Notwithstanding Respondent’s argument above and limiting Petitioner’s issue to that which can be raised on post-conviction relief, Respondent addresses the issue regarding whether trial counsel provided ineffective assistance of counsel when she failed to object to the admission of the indictments and sentencing sheets of Petitioner’s prior convictions.

Addressing the merits of Petitioner’s issue as it relates to trial counsel deficiency for her alleged failure to object, the record reflects trial counsel *did* object to the introduction of the indictments and sentencing sheets. Specifically, trial counsel argued:

“[t]he defendant has been provided with copies of the previous indictments and the previous sentencing sheets. And we would take the position that providing the sentencing sheets to the jury is impermissible. That has matters that are not properly in front of the jury, such as the amount of the sentencing that he received, things

like violent or nonviolent.” (App. 69).

Additionally, as mentioned above, trial counsel raised concern that admitting the documents would be “setting ourselves up for a situation where we are impermissibly putting information in front of a jury.” (App. 70). Moreover, following the introduction of the indictments and sentencing sheets as State’s Exhibit 1 and 2, trial counsel renewed her objection on the same grounds as argued during pre-trial motions. (State’s Exhibit 1 and 2, App. 100, Supp. App. 1-6). Trial counsel properly preserved the aforementioned objections argued during pre-trial motions; therefore, the post-conviction relief court correctly found trial counsel was not ineffective for objecting to the admission of the documents. (App. 355-356).

In support of his argument that the inclusion of particular details of his prior convictions was impermissible, Petitioner cites to *James*⁷, which relied on the United States Supreme Court’s holding in *Old Chief*⁸. (Brief of Petitioner, p. 10). In *James*, the trial court allowed the State to admit seven prior burglary convictions instead of the two required to enhance the charge. *Id.* Our Supreme Court found that “if the State had submitted the evidence of two of *James*’ prior burglary convictions, the jury would have had sufficient evidence to convict James of first-degree burglary without the prejudice accompanying admission of seven prior convictions.” *Id.* Additionally, our Supreme Court found the probative value of admitting all seven prior convictions was outweighed by the potential for prejudice. *Id.* While Petitioner’s assertion our Supreme Court placed limits on the admission of prior convictions in burglary cases is correct, *James*’ case is distinguishable from the facts in the instant matter. In Petitioner’s case, the State admitted two of Petitioner’s prior burglary convictions, thus only introducing the number of prior convictions required to satisfy the

⁷ *State v. James*, 355 S.C. 25, 583 S.E.2d 745 (2003).

⁸ *Old Chief v. United States*, 519 U.S. 172 (1997).

enhancement element of first-degree burglary – the offense Petitioner was charged with. Therefore, the introduction of the required number of prior convictions was not unduly prejudicial despite trial counsel’s timely objection.

Also, as noted, the above-discussed case relied on the holding in *Old Chief*. In *Old Chief*, the United States Supreme Court held,

“A district court abuses its discretion under Rule 403 if it spurns a defendant’s offer to concede a prior judgment and admits the full judgment record over the defendant’s objection, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction”. *Id.*

Petitioner’s case is also distinguishable from *Old Chief*. In that case, *Old Chief* was willing to concede the admission of his prior convictions and allow the prosecution to prove an element of the offense in his case. In this case, Petitioner was not willing to stipulate the prior convictions being entered to prove the required element for first-degree burglary. As Petitioner was unwilling to stipulate to the admission of the prior convictions, the State sought to introduce probative evidence to prove the prior offense. Here, admission of those burglary offenses was required for the State to prove a statutorily necessary element of first-degree burglary. Therefore, neither *James*, nor *Old Chief* are applicable to the present case.

In furtherance of his argument that admission of prior burglary convictions is proper only if the State did not admit “detailed, particular information about the prior burglaries and/or house breaking convictions,” Petitioner cites to *State v. Simmons*, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). However, this Court’s holding in *Simmons* was not founded exclusively on the fact that particular information about the prior convictions was excluded. This Court in *Simmons* ultimately held:

It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first-degree burglary does not constitute

undue prejudice... Further, the trial judge specifically instructed the jury not to consider Cheatham's prior convictions as evidence of the Patel burglary and to limit their consideration of the prior convictions to whether an element of first-degree burglary was proven. *State v. Cheatham*, 349 S.C. at 109–110, 561 S.E.2d at 623 (internal citation omitted).

In his Brief, Petitioner alleges the type of “particular information” in *Simmons*, is exhibited in the indictments and sentencing sheets. Though some information is present within the indictments introduced at trial, Petitioner has presumed deficiency by trial counsel and focuses primarily on prejudice. However, trial counsel, as previously stated, properly preserved her objection to the introduction of the indictments and was therefore not deficient.

Petitioner Failed to Prove He Was Prejudiced and Failed to Prove A Reasonable Likelihood the Outcome of His Trial Would Have Been Different Had Trial Counsel Made Additional Objections

Petitioner asserts he was unfairly prejudiced because the redactions ordered by the court were insufficient and did not prevent the jury from learning details of Petitioner's prior convictions. (Brief of Respondent, p. 9). However, precautions were taken to ensure Petitioner was convicted on a proper basis. Despite overruling trial counsel's pre-trial objection to the admission of the indictments and sentencing sheets and overruling trial counsel's contemporaneous objection to the admission of the documents, the trial court took significant precaution to prevent the jury from improperly considering any particular information that exists pertaining to Petitioner's prior convictions within the indictments and sentencing sheets. Specifically, the trial court instructed the jury as to the scope and purpose of the admitted evidence as follows:

Evidence of prior offenses committed by the defendant was not offered to prove the defendant has a bad character or to prove that the defendant committed the burglary on this occasion. The prior convictions may be considered by you **only** for the purpose of determining whether or not it satisfies that element of the offense that makes it first degree burglary if you enter a dwelling without consent to commit a crime therein and you have two prior convictions for burglary and/or house breaking.

Before you even consider the evidence in the defendant's prior burglary and/or house breaking convictions, you must first find the State has proved beyond a reasonable doubt that a burglary was committed by the defendant. (App. 248; *emphasis added*).

As discussed in *Benton*, our Supreme Court held, “[p]articular information regarding the prior crimes should not be admitted.” *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000). However, *Benton* also found propensity evidence is not prohibited in all circumstances. Propensity evidence is admissible if offered for some purpose other than to show the accused is a bad person or he acted in conformity with his prior convictions. *Id.* As in *Benton*, Petitioner’s two prior burglary convictions were offered to prove a statutory element of the current first-degree burglary charge, not to suggest Petitioner was a bad person or committed the present burglary because he had committed prior burglaries. *Id.*

Therefore, the trial court properly followed the guidance in *Benton* to limit any potential prejudice by instructing the jury on the limited purpose for which the prior crime evidence can be considered. Rule 105, SCRE (when evidence is admissible for one purpose but not for another, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly); *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (noting the jury is presumed to follow the law as instructed to them in the trial court’s jury charge). Thus, the jury instruction provided by the trial court sufficiently cured any potential prejudice and cured concern the jury treated the indictments and sentencing sheets as propensity evidence.

Further, the evidence against Petitioner at trial was objectively strong enough to alleviate concern the jury’s verdict was based on anything other than the evidence they were specifically instructed to consider. *see CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (“The jury system is premised on the idea that rationality and careful regard for the court’s instructions will confine and exclude jurors’ raw emotions. Jurors routinely serve as impartial factfinders in cases

that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions.") As evidenced by the testimony elicited at both the trial and the evidentiary hearing, victim provided law enforcement with a videotape depicting Petitioner hopping over his fence, moving items of property belonging to victim over the fence, loading the items into a vehicle, and leaving the area. (App. 120-136; 327). Victim further testified he did not know Petitioner well and therefore, there was no reason for Petitioner to be removing items from his home. (App. 121; 327). At the evidentiary hearing, trial counsel testified she felt the video evidence in this case was very strong, noting she tried to weave it into her defense strategy. (App. 331). Clearly, significant evidence other than the indictments and sentencing sheets was presented to the jury to find Petitioner guilty of burglary. Therefore, the unredacted portions in the indictments Petitioner alleges are highly prejudicial, pale in comparison to the video surveillance footage presented to the jury which showed Petitioner going over victim's fence, going around the back of victim's home, and returning with victim's property. Moreover, any theory Petitioner had that he had permission to enter victim's home was firmly refuted by the victim.

Accordingly, Petitioner has failed to show any reasonable probability that trial counsel could have further objected to the admission of the indictments and sentencing sheets and achieved a different outcome. Therefore, this Court should deny relief.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's findings in full.

Respectfully submitted,

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