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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO SUMTER COUNTY

Court of Common Pleas
The Honorable George C. James, Circuit Court Judge

Appellate Case No. 2018-001121

NATHANIEL BRADLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

A Sumter County grand jury indicted Petitioner Nathaniel Bradley for murder. Bradley proceeded to jury trial on January 14–18, 2008, before the Honorable Ferrell Cothran, circuit court judge. Bradley was represented by Ernest A. Finney, III. Bradley was convicted and sentenced to 30 years' incarceration. On direct appeal, Bradley raised only one issue: whether the trial court should have granted his motion for directed verdict. The Court of Appeals affirmed in an unpublished opinion on November 8, 2010. Bradley petitioned the Supreme Court for certiorari, which was denied on June 21, 2012. The remittitur was issued on July 5, 2012.

Bradley filed an application for post-conviction relief on July 27, 2012. The State filed a return on February 12, 2013. An evidentiary hearing was convened in Sumter on April 15, 2015 and a recess taken at the end of that day. The hearing was reconvened on July 5, 2016. Judge James took the matter under advisement and denied relief in a written order filed September 9, 2017. Judge James denied Bradley's motion to alter or amend the judgment on May 15, 2018.

Bradley filed a notice of appeal on June 15, 2018, and a petition for writ of certiorari on March 12, 2019, raising seven issues. The State filed a return on June 4, 2019. On June 17, 2019, the Supreme Court transferred the case to this Court. On April 15, 2022, this Court granted certiorari on three of the seven grounds raised in the petition. Bradley filed a brief on July 13, 2022. This Brief of Respondent follows.

Facts adduced at trial.

Petitioner Nathaniel Bradley and victim Ernest James were friends and partners in a painting business. (App.154–55). The State's case against Bradley centered on six types of evidence: 1) evidence establishing Bradley's motive to kill James; 2) evidence of Bradley's threats to kill James; 3) circumstantial evidence establishing Bradley had the means and opportunity to kill James and dispose of his body; 4) evidence that Bradley was the last person seen with James before he went missing; 5) Bradley's false statements to police about his whereabouts on the night James went missing and other false and suspicious statements; and 6) an eyewitness identification of Bradley driving a blue Volvo like James's on the morning of Sunday, May 22, near the pond where James's body was discovered the following day, and approximately 5–6 hours before James's burned car was discovered approximately 23 miles away. The basic facts are as follows.

In May 2005, James was arrested while driving a van he and Bradley used in their painting business, and the van was impounded. (App.155). Bradley became furious about the van and made threats against James to several people. (App.155, 200, 207, 235, 370–75). James and Bradley had also had another personal disagreement regarding Bradley's relationship with a woman. (App.155, lines 8–10, App.556–57, App.1012, lines 16–20).

Bradley's son-in-law testified that he heard Bradley threaten James before the murder. (App.542–44). Bradley called James and told him he was "going to send some boys" at James, and that James was going to "leave here." (App.542). Johnson testified that Bradley and James had a disagreement over a "lady friend."

(App.555–56). Johnson testified he was afraid of Bradley and recounted an instance where he armed himself prior to meeting Bradley at Bradley's request. (App.560–61).

James's friend Leonard McCray observed James and Bradley arguing on Thursday the 19th. (App.158–59). McCray could not hear what they were saying, but it was clearly an argument. (App.163–64). James was upset afterward and told McCray that Bradley had threatened him. (App.164–65).

Bradley came to James's home in Rembert on Saturday, May 21, looking for James. (App.155–56, 183–85). Bradley was with another man he referred to as his "partner" and "friend," but refused to introduce the man to anyone. (App.156, 184, 189–90). Bradley wanted to talk with James privately. (App.185). James went outside to speak with Bradley, and then got in the blue Volvo he was driving and left following Bradley and his companion, who were in Bradley's blue Chevrolet. (App.185–86, 194). This was the last time any of James's friends or family saw him alive.

Thomas and Robin McCutchen discovered James's blue Volvo on the afternoon of Sunday, May 22, near a cemetery by their property in Bishopville. (App.349–51). The car had been completely burned. (App.349). Thomas McCutchen testified the car was not on fire when he found it, but that it was "recently burned." (App.349, 353). The McCutchens did not touch the car and could not say whether it was still hot. (App.353, 357). The McCutchens testified that the burning car would have been visible from the roadway adjacent to their home, but

would not necessarily have been visible from their house. (App.354–58). The McCutchens called police to report the burned vehicle at around 3:35 in the afternoon. (App.360, lines 10–11).

Deputy Claude Lloyd responded to the McCutchens' call. He believed the car was recently burned because there was still a very strong burning smell coming from the car. (App.361). Lloyd was able to recover a partial VIN number, allowing the police to determine that it was James's car. (App.363, 701).

James's body was discovered in Boyle's Pond near Rembert on Monday, May 23. (App.104). A fisherman observed James's head protruding from the water. (App.104). He called police and an officer arrived about 10–15 minutes later. (App.108). The officer estimated he received the call at around 1:00 or 2:00 in the afternoon. (App.117). There was a cinder block attached to James's leg weighing him down in the water. (App.112–13). There were no defensive injuries or signs of a struggle, which the State theorized showed James was killed by someone he knew. (App.1020). A forensic toxicologist determined James had a very high blood-alcohol content when he died, but there were no drugs in his system. (App.484–85).

There were "linear scrapes" on James's body, indicated he was dragged after his death. (App.411, 420–22). James's body had begun to decompose, indicating it had been in the water for some time, but a forensic pathologist could not give an exact time of death due to decomposition and an uncertain timetable. (App.430–35, 441). The coroner's report and final autopsy report gave Sunday, May 22, as the

death date, but the pathologist testified it was possible James died on the 21st. (App.441–46).

James had been shot three times. There was a gunshot wound to the left side of James's head, one at his left elbow and side, and one to his back that struck his spinal canal. (App.411–12). The pathologist testified it was likely that the bullet that went through James's head was fired last, and this wound was the cause of death. (R.p.413–14). Based on the trajectory of the bullet that entered James's arm and side, the pathologist testified James's arm would have been "up and out to the side" when the bullet struck. (App.418). A SLED firearms expert testified that the bullets recovered from James's body were fired by a .38 Special or .357 Magnum pistol. (App.467). The rifling characteristics were consistent with a .38 caliber handgun. (App.469). The two bullets were damaged but appeared to be "of the same size and kind." (App.473).

Police learned through their investigation that James was last seen with Bradley. (App.682). Bradley gave a voluntary interview with police on Tuesday the 24th. (App.594, 683). Bradley told police he had last seen James on May 21. (App.684). Regarding the unidentified black male whom witnesses saw with Bradley, Bradley originally claimed the man was already at James's home when he arrived. (App.685–86). Bradley then changed his story and claimed he picked up the man as he was walking down the driveway towards James's house. (App.686). Bradley claimed that when they reached James's home, James got into his car and they left all left at the same time. Bradley claimed they stopped at the end of the

driveway and the man he picked up got into James's car and they drove off and Bradley did not see him again. (App.595, 686). Bradley had previously told James's brother that the two men planned to rob a drug dealer. (App.682, lines 9–12). Witness Leonard McCray contradicted Bradley's claim that he picked up the man from the side of the road while approaching James's home, testifying he saw Bradley with an unknown black male at a softball game next to James's house just before Bradley went to James's house, where McCray also lived. (App.156–58).

Bradley then told police he went to Donna McDuffie's house and spent the night there. (App.595, 687). Bradley claimed McDuffie was his girlfriend. (App.687–88). Bradley agreed to call McDuffie but told investigators she did not answer. (App.596). An officer called the number back and Donna McDuffie answered. (App.689). McDuffie denied that Bradley had spent the night with her that Saturday, and denied she was his girlfriend. (App.689). Officers continued questioning Bradley, but he became agitated and terminated the interview. (App.596, 689).

Police spoke with Bradley again the next day. (App.702). When officers confronted Bradley with Donna McDuffie's denial that he stayed with her the previous Saturday, Bradley changed his story and claimed he stayed with a different woman, Barbara Jean Williams, on Saturday night. He claimed he spent most of Saturday evening helping Williams's daughter Tanisha get ready for her prom. (App.701–03). Barbara Jean Williams had already spoken with police and apparently denied that Bradley spent the night with her. (App.703). When officers

told Bradley that did not match other information they had, Bradley then changed his story again and claimed he had spent the night at a house he was painting, but did not tell police where the house was located. (App.703–04). When asked to explain inconsistencies in his story, Bradley got agitated and left. (App.705).

Investigator Clarence McMillan noticed an injury to one of Bradley's eyes. (App. 704–05). Bradley claim he scratched his eye on a tree limb. (App.705). He had previously told Donna McDuffie that he injured it on a cabinet. (App.722, lines 10–13).

Donna McDuffie was a client of Bradley and James's painting business. She explained that Bradley did some painting work at her house the week before James was killed. (App.234). McDuffie left a key out for Bradley so that he could come inside and paint, and Bradley knew where she normally kept the spare key. (App.290). Bradley had been to McDuffie's house before when she wasn't home, and even spent the night there once. (App.291). Bradley complained to McDuffie at that time that James "had stolen" the van they purchased together and that he was going to "get" James. (App.235). Bradley said he was "tired of [James] doing what he was doing" and that he would "take care of whatever it was." (App.241–42). Bradley told McDuffie that if he "got in trouble" that McDuffie should call his sister, whose husband was a bail bondsman. (App.242–43). McDuffie spoke with Bradley on the phone that Friday. He said he was at a cemetery cleaning his mother's grave stone. (App.237). Bradley said he was in the woods and McDuffie could hear him speaking to someone else during the call. (App.244).

McDuffie owned a .38 caliber handgun, the same caliber gun that was used to kill Ernest James. (App.285). McDuffie testified Bradley knew where she kept her gun. (App.286, 290). McDuffie's gun went missing the week after James was killed. (App.280, 722). She told police she noticed it missing that Thursday, but testified at trial she noticed it was missing on Tuesday. (App.280, 722). She reported it missing on Friday, May 27. (App.287). There was no evidence of forced entry into her home. (App.289).

Police went to McDuffie's home on Friday the 27th. They observed a row of concrete blocks at the border of McDuffie's yard. (App.724). There was a block missing that was apparently "freshly removed." (App.724–28). McDuffie had not noticed it was missing. (App.725).

Darrell Koenig lived on the road leading to the pond where James's body was recovered. On Sunday, May 22, Koeing was out "very early in the morning," to do some working cleaning up trees on his property. (App.627, lines 1–2). While he was working, he observed a blue Volvo with two black males pass his lot. He estimated it was "around 9:30" a.m. when he saw the car because he had been working since "shortly after sun-up" and it was still "well before noon" when he saw the car pass. (App.629). The car turned around and came back, and it "was no more than probably two minutes." (App.656). Koenig made eye contact with the driver for several seconds. (App.627). Upon hearing about James's body being recovered from the pond, and that police were looking for a blue Volvo, Koenig called the police. (App.634–65). Koenig picked Bradley from a six-person lineup. (App.639). The

officer who took Mr. Koenig's identification testified he picked out Bradley immediately and stated he was 100% sure of his identification. (App.715).

STANDARD OF REVIEW

The appellate court will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them, but reviews questions of law de novo with no deference to trial courts. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). The prejudice analysis in a claim of ineffective assistance of counsel rests on factual findings. Smalls, 422 S.C. at 195, 810 S.E.2d at 847 (explaining "[o]rdinarily, the PCR court should make findings of fact on [the issue of prejudice]").

ARGUMENT

I. The record supports the PCR court's finding that trial counsel provided effective assistance and that Bradley was not prejudiced by counsel's decision to call Paul Bradley as a witness at trial.

Bradley claims trial counsel was ineffective for calling his brother Paul as a witness at trial because Paul testified that on Monday, May 23, Bradley "came to [him] crying telling me that his friend got killed." (App.934). When asked when this occurred, Paul said it was "around 1:00 in the afternoon." (App.934). An officer estimated he received the call about James's body at around 1:00 or 2:00 Monday afternoon. (App.117). Bradley claims Paul's testimony caused him to be convicted because he should not have known about James's death before police did. He also alleges an inconsistency between Paul Bradley's testimony and the testimony of other witnesses who testified Bradley was working a painting job until approximately 4 or 5 p.m. that day. (App.905, 913). His claim is meritless because Paul Bradley's testimony that he spoke with Bradley "around 1:00 o'clock" was only an estimate based on his recollection at trial. There was no hard evidence establishing when the conversation actually took place. Contrary to Bradley's argument, the testimony of other witnesses placing Bradley's discovery of James's death later in the afternoon, mitigates, rather than exacerbates, Paul's testimony. On the whole, trial counsel provided competent representation and Bradley was not prejudiced by his decision to call Paul as a witness. This Court should affirm.

A. Counsel provided effective representation.

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness under the circumstances. Strickland v. Washington, 466 U.S. 668, 687–88 (1984). Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Id. "Judicial scrutiny of counsel's performance must be highly deferential. 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. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . . a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Id.

Trial counsel acted reasonably when he decided to call Paul Bradley as a witness. Paul offered some useful testimony. First, Paul testified Bradley was genuinely upset about James being killed. Second, Paul testified about their mother's burial site, which offered an explanation and corroboration for Bradley's statement to Donna McDuffie on the Thursday before the murder that he was at a graveyard cleaning his mother's grave. (App.237, 934–35). This may have helped to rebut any implication that Bradley was making preparations to dispose of James's car at the cemetery. Third, trial counsel believed Paul was a good witness because he was "stable" and would convey that Bradley came from a good family.

(App.1471). Paul showed that Bradley "wasn't walking around mad saying I'm going to get Ernest James" in the days surrounding the murder. (App.1471). Instead, he "was doing things with his family, and taking care of young people in his family." (App.1471). Paul corroborated Bradley's story about spending time with Tanisha Williams before and after she went to the prom on Saturday night. (App.932–33). This was the closest thing Bradley had to an alibi.

Overall, trial counsel's decision to call Paul as a witness and his examination was within the range of competence required by the Sixth Amendment. Defense lawyers cannot be expected to anticipate every faulty recollection a witness may offer at trial. While it is often a good idea for an attorney not to ask a question to which he does not know an answer, this is not universally true. The Sixth Amendment allows attorneys room to exercise reasonable professional judgment in a fluid trial settings, and does not judge competence through the benefit of hindsight. The constitution requires competence, it does not require perfection. See Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991), aff'd, 992 F.2d 1077 (10th Cir. 1993) (the extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (courts should not second-guess trial counsel's decisions on questions of strategy as basic as handling of a witness).

B. Bradley was not prejudiced.

Even if this Court finds trial counsel was ineffective for not fully fleshing out Paul's likely responses to each potential question, Bradley was not prejudiced. Paul's testimony was not "incredibly damaging." Brief of Petitioner at 16. Paul

testified his brother told him about James on Monday afternoon and guessed it was "around 1:00 o'clock." All reasonable jurors know that people misremember times, especially when asked about it years later. Paul testified he talked to Bradley Monday afternoon and Bradley told him James was dead. This is consistent with defense witnesses Tina Leon and Terrell Johnston's testimony that Bradley found out about James's death on Monday afternoon, except that Leon and Johnston testified it occurred later in the afternoon. (App.905, 911).

Leon and Johnston's testimony generally mitigated Paul's mistake. Johnston testified that he was painting with Bradley throughout Monday afternoon, and that he was with Bradley when Bradley found out about James's death. (App.912–13). Johnston's testimony was much more detailed than Paul's, and he was in a better position to remember accurately when Bradley found out about James's death. Trial counsel further mitigated Paul's mistake in a follow-up question by emphasizing that Paul's testimony was based solely on his recollection of an event that happened two and a half years previously. (App.934, lines 6–7).

Paul Bradley's testimony did not affect Bradley's "alibi," and it did not reasonably affect the result of trial. Rather, it showed only that one witness had a faulty recollection about what time he talked to Bradley on the day after the murder. It had no bearing on Bradley's whereabouts when the murder was committed. No reasonable juror would have based his decision on this testimony. As a whole, trial counsel provided competent representation. The PCR court correctly found Paul's Bradley's mistaken recollection about what time he spoke

with Bradley on Monday afternoon did not reasonably affect the result of trial. (App.1777). Its finding is entitled to deference from this Court. See Smalls, 422 S.C. at 195, 810 S.E.2d at 847. This Court should affirm.

II. The record supports the PCR court's finding that trial counsel provided effective assistance and that Bradley was not prejudiced by counsel's decision not to present a telecommunications expert at trial.

Bradley alleges trial counsel was ineffective because he did not call a telecommunications expert to testify at trial. However, Bradley does not explain how retaining an expert would have changed his trial strategy in any way, how it would have made the phone records any more probative, or how retaining an expert would have affected the result of trial. Rather, he makes conclusory assertions that a "true expert" could have somehow explained the phone records in a better way and expects this Court to assume prejudice. The reality is that retaining an expert would not have changed the content of the phone records, would not have opened up any different arguments tending to show Bradley's innocence, would not have affected the State's arguments, and would not have changed the result of trial. This Court should affirm.

A. Counsel provided effective representation.

Trial counsel provided effective assistance when he introduced Bradley's cell phone records into evidence at trial, enabling him to make legitimate arguments that the records supported Bradley's version of events. Counsel used the records to argue that Bradley was not present at Boyle's Pond at 9:30 a.m. on Sunday, when Darrel Koening estimated that he saw him there. The content of the records was apparent from the records themselves, and an expert would not have substantially enhanced their probative value. Introduction of the cell phone records was a valid

trial strategy that enabled trial counsel to make the best arguments available to him.

The Constitution did not require trial counsel to hire an expert to "explain" the records. Bradley was not a rich man, and trial counsel did not have infinite resources at his disposal. In fact, trial counsel had to request funds from the court, which he used to hire an investigator. (App.1459). Trial counsel did not have the luxury of calling expert for every conceivable issue, and the Constitution did not require him to do so. See Harrington v. Richter, 562 U.S. 86, 107 (2011) (explaining counsel was not ineffective for not calling a serology expert because "there were any number of hypothetical experts . . . whose insight might possibly been useful. An attorney can avoid activities that appear 'distractive from more important duties'"). Attorneys are "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." Id.

This is especially true in this case because the records' probative value is apparent from the documents themselves. The records show the exact times Bradley's cell phone was used and from which towers. While Bradley complains that trial counsel should have called an expert such as Ben Levitan, who could have showed the jury "charts and maps" to illustrate the information, trial counsel did use maps to demonstrate the locations of the cell towers. Levitan's testimony added almost nothing of value to what trial counsel actually presented. The probative value of the phone records was apparent without any explanation from an expert witness. See Smith v. Angelone, 111 F.3d 1126, 1132 (4th Cir. 1997) (no deficiency

in decision not to call expert where trial counsel "reasonably chose to rely upon cross-examination of the State's own witnesses to establish his case"). The jury did not need to understand how cell phones work to understand the information contained in the records.

Counsel was able to explain based on the records themselves how he believed they supported his defense. He argued in closing that the records showed Bradley could not have been at Boyle's Pond at 9:30 a.m., when Koenig estimated he saw them there. (App.989). He also argued effectively that the State did not put the records into evidence because it did not want the jury to see them. (App.990). Expert testimony would not have enhanced these arguments, and it was within trial counsel's discretion not to devote his resources to a pointless, expensive expert witness.

B. Bradley was not prejudiced.

Even assuming counsel was somehow deficient by not hiring an expert to "explain the records," Bradley has not shown prejudice. First of all—contrary to Bradley's claims—the records did not provide him with an "alibi." They arguably corroborated his story about his whereabouts on Saturday night up until 8:06 p.m., and parts of Sunday and Monday. (App.1605–06). But this was far from an alibi because it did not account for his whereabouts when the crime almost certainly occurred: the early morning hours of Sunday, May 22. Bradley did not make any calls between 8:06 p.m. Saturday and 6:39 a.m. Sunday. (App.1605–06). Yet, Bradley continues to assert that expert analysis of the records would have

"established his alibi." Brief of Petitioner at 19. While the records had some value, they were not exculpatory and most certainly did not "establish his alibi."

Levitan's testimony had little probative value. It did not discredit Darrell Koenig's identification of Bradley. Levitan claimed Bradley's phone records showed he could not have been at Boyle's pond on Sunday morning at 9:30. After discussing the call logs, Levitan presented a map showing the location of towers 6471 and 6472, to which Bradley's phone connected several times on Sunday morning. (App.1283). Levitan concluded: "I'd say the phone between 8:34 and 10:32 was in this blue shaded area" near I-20 between Camden and Bishopville. (App.1285). In his powerpoint slide labeled "conclusions," Levitan claimed Bradley's phone was not near Boyle's Pond between between 9:30 and 10:15 on Sunday morning. (App.1579).

Looking past the fact that trial counsel made this exact same argument based on the exact same information, the claim that the records refuted Koenig's testimony has a gaping hole. There is a 50-minute gap in the calls from Bradley's phone on Sunday morning. The records show there were no calls between 8:45 (which connected to tower #6472 near the cemetery) and 9:34 (also tower #6472). (App.1065). Levitan explained Boyle's Pond was roughly 23 miles away from the "cloud" where he estimated Bradley's phone would have been when it made those calls. (App.1285). Bradley could easily have driven from the "zone" established by Levitan to Boyle's pond and back within that 49-minute period. Assuming a 25-minute drive each way, this would have put Bradley on Cobblestone road near

Boyle's Pond at around 9:10 a.m. Koenig estimated he saw Bradley at "around" 9:30 a.m., but was clear that this was only an estimate. If anything, this 49-minute gap strengthened the State's case, as it was the longest gap between any two calls Bradley made that morning. Levitan apparently did not even consider this possibility.

Similarly, Bradley claims that Levitan's testimony showed that "between the hours of 9:30 a.m. and 3:00 p.m. on the day the burnt Volvo was found, Petitioner's phone was nowhere near the cemetery." Brief of Petitioner at 19. This claim is also extremely dubious. Again, there is a 30-minute gap 9:52 a.m. and 10:24 a.m. where Bradley did not use his cell phone. (App.1605). The 9:52 and 10:34 calls connected to tower #6472, which is quite near the cemetery, and close to tower #6473, which Levitan claimed would have been the tower used by Bradley's cell phone if he had made a call from the cemetery. (App.1303, 1561, 1563). Bradley or his "partner" could easily have driven the car to the cemetery in that time frame.

Regardless, to the extent the records did cast doubt on Koenig's identification, an expert would not have strengthened Bradley's arguments. Trial counsel elicited this exact same information. (App.787–88). The call times and tower numbers were plain to see on the call records. The jury could read them themselves, and no expert testimony was needed. See United States v. Tarricone, 21 F.3d 474, 476 (2d Cir. 1993) (finding no prejudice from counsel's decision not to call handwriting expert where "the jury could, on its own, recognize that the handwriting" did not belong to defendant). Trial counsel got the police officer who

authenticated the records to admit that the records showed Bradley's phone was not used near Boyle's Pond at 9:30 and that Bradley "couldn't be at two places at one time." (App.788, lines 5–6). Expert testimony such as Levitan's would have added next to nothing to this argument.

Finally, presentation of an expert would not have changed the State's arguments. The State did not attempt to refute the records or counsel's arguments. In response to defense counsel's arguments related to the phone records, the State argued that the records had little value because they only showed the location of Bradley's phone, not Bradley's person. (App.1035). Likewise, Levitan admitted in his testimony that he "can't tell you who was on the phone obviously." (App.1248). The State's arguments would have been exactly the same even with Levitan's "charts and maps." See Washington v. Murray, 4 F.3d 1285, 1289–90 (4th Cir. 1993) (holding defendant was not prejudiced by trial counsel's decision not to hire forensic expert where "prosecution did not even introduce [disputed evidence], much less rely heavily on [it] as evidence ").

Trial counsel effectively used Bradley's phone records to make legitimate arguments about weaknesses in the State's case. The probative value of the records was apparent in the records themselves, and expert testimony would have added nothing. Again, the PCR court's finding that Bradley was not prejudiced is entitled to deference from this Court. See Smalls, 422 S.C. at 195, 810 S.E.2d at 847. This Court should affirm.

III. The record supports the PCR court's finding that trial counsel provided effective assistance and that Bradley was not prejudiced by counsel's decision not to present an arson expert at trial.

Bradley claims trial counsel was ineffective because he did not hire an arson expert to testify at trial. Bradley claims an arson expert would have shown that the burning of James's car did not fit within the State's version of events, particularly Darrel Koenig's identification of Bradley as the man he saw driving James's car near Boyle's Pond on Sunday morning. This claim is meritless because Bradley failed to show that James's car could not have burned up in the time between when Koenig saw Bradley and when the car was found that afternoon. Bradley has not shown deficiency or prejudice. This Court should affirm.

Bradley's argument is based on the opinions of Daniel Olson, the arson expert he presented at the PCR hearing. Olson gave an opinion that it was "more probable than not" that Koenig did not see James's blue Volvo at Boyle's Pond at 9:30 on Sunday morning because there was not time for Bradley to burn the car such that it was completely consumed by fire by the time it was discovered around 3:30 that afternoon. (App.1357). However, Olson's testimony was extremely flawed. The PCR court correctly held there was not a reasonable probability that Olson's testimony would have changed the result of trial had Bradley presented it.

Olson based his conclusions on two premises: 1) that the vehicle would have still been hot when it was discovered; and 2) that the car's tires would have still been smoldering. First, there was little value in Olson's opinion that the body of the car would not have had time to completely cool before witnesses discovered it. His

opinion rested on the false premise that the evidence showed that the Volvo had completely cooled off when it was discovered. The evidence did not establish this. None of the witnesses stated the car was not hot at 3:00 p.m. The deputy who responded to the report of the burned vehicle testified the vehicle was "pretty much burnt to a crisp." He thought the car was "recently burned," but he did not actually touch the vehicle. (App.360–62). When asked whether the car was still burning when he arrived, he responded "I did not see any smoke to my recollection." (App.369, line 15). Thomas McCutchen, who first discovered the vehicle, testified the car was "not burning" when he and his wife discovered it, but he also did not touch the car. (App.353). Neither did Robin McCutchen. (App.357). Tow truck operator Derrick Slater did not testify at trial, but at the PCR hearing explained that the car had already burned up when he arrived at 5:30 or 6:00 o'clock in the evening. (App.1442). He testified the car was not hot to the touch, but added that he was wearing gloves when he touched the car. (App.1444).

Olson testified that the car would not have had time to "completely cool off" by 2:30 or 3:00, when the McCutchens estimated they observed the car. (App.1347, lines 20–21). However, he qualified his testimony in an important way. He testified some of the parts, such as sheet metal, may have been cool by that time, but that the axle and denser steel parts would have "still been hot." (App.1347–48). He specifically testified that the rear axle, transmission case, and the "brakes and suspension parts" were made from denser steel and would have remained hot for longer. (App.1349). However, there is no indication that anyone ever touched these

parts of the car. PCR counsel could have easily asked the tow truck driver which parts of the car he touched, but he did not. Slater testified he arrived at 5:30 or 6:00 o'clock in the evening. (App.1442). Olson did not address this time difference at all. He did, however, opine that if the car had burned in the "earlier morning hours of Sunday morning," it would have had time to cool. (App.1362).

Olson's second major opinion was that the tires on the car would have still been smoldering at 2:30 or 3:00 if it had been set on fire around 10:17 that morning. But Olson did not conduct any tests on accurately sized tires to see how long they would burn. In fact, didn't conduct any tests at all. He merely relied on the work of others and anecdotal experience to come up with a generic guess that the tires on James's car would have still been smoldering at 2:30 or 3:00 o'clock on Sunday afternoon. He admitted he could not say with any certainty how long the tires would have burned, but only that it was "more probable than not on the basis of the experience I've had, and from discussions I've had with other investigators." (App.1369). Without even knowing the size of the tires on James's car, Olson's opinion had little probative value.

Underlying both of these conclusions is another major flaw. Olson assumed as a starting point that the car was set on fire at "10:17" on Sunday morning. To do this, he took Darrell Koenig's estimate that he saw Bradley at 9:30 as fact. But Koenig's estimate was just an estimate. He never claimed certainty. Olson then assumed that it would have taken Bradley 46 minutes to drive from Boyle's Pond to the cemetery based on "posted speed limits," even though the two locations were

only separated by 26 miles of road. (App.1328–30). Based on these questionable assumptions, he concluded the car was set on fire at 10:17 that morning.

But in fact, the phone records showed that Koenig was likely mistaken about the exact time he saw Bradley, and that it was probably around 9:10 a.m. See supra at 19. If one were to assume that Koenig actually saw Bradley at 9:10 a.m., and that Bradley could have driven the 26 miles to the cemetery in 25 minutes, Olson's estimate would be off by 30 minutes. Thus, Olson's entire timetable was questionable at best. Even thirty minutes are important because Olson testified that "based on what other experts" had told him, it would only take the car "somewhere between 45 minutes and an hour" to burn up once the windows had been destroyed by the heat. (App.1356). Olson's testimony came nowhere close to disproving Koenig's rock solid identification. See Simmons v. State, 331 S.C. 333, 337, 503 S.E.2d 164, 166 (1998) ("The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application.").

Because Olson's testimony had little probative value and did not disprove Koenig's identification, trial counsel was not ineffective for not presenting similar testimony at trial. It bears repeating that the Sixth Amendment does not require a defense attorney to present expert testimony on every conceivable issue, particularly evidence as dubious as that presented by Olson. See Richter, 562 U.S. at 107. Defense counsel reasonably chose to rely on the evidence presented at trial to cast doubt on the State's case rather than attempt to disprove it entirely. See Richter, 562 U.S. at 109 ("To support a defense argument that the prosecution has

not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates.").

Because Olson's testimony did not disprove Koenig's identification, Bradley has not shown prejudice. For the same reason, trial counsel was not ineffective because of his decision not to present similar flawed testimony. Again, the PCR court's finding that Bradley was not prejudiced is entitled to deference from this Court. See Smalls, 422 S.C. at 195, 810 S.E.2d at 847. This Court should affirm.

CONCLUSION

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

Respectfully submitted,

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November 14, 2022

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STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO SUMTER COUNTY

Court of Common Pleas
The Honorable George C. James, Circuit Court Judge

Appellate Case No. 2018-001121

NATHANIEL BRADLEY, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Joshua A. Edwards, certify that I have served the within Brief of Respondent on Susan B. Hackett, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 14th day of November, 2022.

s/ Joshua A. Edwards

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