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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Honorable Diane Schafer Goodstein, Circuit Court Judge

DEREK MANER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000230

BRIEF OF PETITIONER

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for not objecting to testimony from an officer that, fifteen months after the disappearance of Ericka Bradley, he stopped Petitioner's brother for a tag violation and noticed that the car was missing a backseat and the trunk would not open when there was no link between the brother's car and the disappearance, making the testimony irrelevant?

2. Did the PCR judge err in refusing to find trial counsel ineffective for not objecting to testimony about purported hidden jewelry when there was no connection between the jewelry and the disappearance of Ericka Bradley, making the testimony irrelevant?

STATEMENT

In August of 2008, the Allendale County Grand Jury indicted Petitioner, Derek Maner, for murder, indictment #2008-GS-03-0135. On February 9, 2009, Petitioner proceeded to jury trial before the Honorable Michael G. Nettles. Byron E. Gipson represented Petitioner at trial. T. DeWayne Pearson and Natalie R. Armstrong prosecuted the case. The jury found Petitioner guilty and Judge Nettles sentenced Petitioner to life in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Maner, 2012-UP-550 (S.C.Ct.App. filed October 10, 2012). (App. pp. 838-839).

On September 12, 2013, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on August 20, 2014. On June 9, 2017, an evidentiary hearing was held before the Honorable Diane Schafer Goodstein. Deborah J. Butcher represented Petitioner at the PCR hearing. Ruston W. Neely represented the State. In a written order filed October 11, 2017, Judge Goodstein denied relief and dismissed the application. The notice of intent to appeal was not filed.

On August 27, 2018, Petitioner filed a second PCR application. The State consented to the grant of a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. p. 975). In an order signed by the Honorable Perry M. Buckner, III, on January 15, 2019, Judge Buckner granted the belated appeal. On October 4, 2022, this Court granted Austin review as to questions one and two in the Austin brief. This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

ARGUMENTS

1. **The PCR judge erred in refusing to find trial counsel ineffective for not objecting to testimony from an officer that, fifteen months after the disappearance of Ericka Bradley, he stopped Petitioner's brother for a tag violation and noticed that the car was missing a backseat and the trunk would not open when there was no link between the brother's car and the disappearance, making the testimony irrelevant.**

On November 6, 2006, Ericka Bradley disappeared. Her body was never found. Bradley is the mother of Petitioner's son. In November of 2006, Bradley and the infant son were staying with Petitioner and his family. (App. p. 672, lines 9-18). Petitioner was 18 years of age. (App. p. 672, lines 19-20). On the evening of November 6, 2006, Bradley questioned Petitioner about whether he was seeing another female, Maggie Aldrich. (App. pp. 675-679). Bradley's cousin, Peter Tony Cooper, testified that Bradley took a bat out of the trunk of Petitioner's car and swung the bat at Petitioner, but Petitioner blocked the swing. (App. p. 112, lines 1-7). Cooper testified that he put the bat back in the trunk while Petitioner and Bradley talked. (App. p. 112, lines 6-15). Eventually Cooper left Bradley and Petitioner because Bradley told Cooper that she was all right and he could leave. (App. p. 112, line 17 – p. 113, line 1). Petitioner testified that after he calmed Bradley she got in the car and they were on their way home when she got agitated again. (App. p. 677, lines 16-24). Petitioner testified, "And, you know, she looked at me after the second time she said, fine. Let me out. I'll walk. So you know, I said okay. All right. And then she threw my car in park and she didn't jump out. The car stopped and then she got out." (App. p. 679, line 22 – p. 680, line 1). Petitioner left her and called her cousin Cooper to go pick her up. (App. p. 681, line 24 – p. 682, line 1).

Cooper confirmed that Petitioner called him and asked him to go look for Bradley because she would not get back in the car with Petitioner. (App. p. 113, lines 5-13). Cooper

looked for his cousin but was unable to find her. (App. p. 113, line 14 – p. 114, 115, lines 1-12). Bradley was not seen again.

Officers executed a search warrant of Petitioner's car and processed the car for evidence. (App. p. 447, line 10 – 448, lines 1-22). SLED Agent Jennifer Clayton testified that a DNA sample from two spots underneath Petitioner's car were, "consistent with that of a female offspring of Jackie Bradley and Henry Bradley." (App. p. 503, line 25 – p. 504, lines 1-2). Robert M. Bennett testified as an expert in forensic science and DNA. (App. p. 644, line 25 – p. 645, lines 1-15). Bennett testified that he studied the underbody of appellant's car and stated he did not see a blood spatter that was of the quantity or the location "where I would expect to see if a human was drug underneath a car." (App. p. 653, lines 19-20).

On January 12, 2008, fifteen months after the disappearance of Bradley, Officer James Hutto with the Allendale Police Department stopped an individual, who the officer testified was Petitioner's brother[1], for a tag violation. (App. p. 354, lines 14-19; p. 324, line 19 – p. 325, 326, lines 1-25). When the officer started testifying about the traffic stop, trial counsel failed to object as irrelevant. (App. p. 324, line 19 – p. 325, 326, lines 1-25). Trial counsel finally objected when the officer testified as to hearsay statements made by the brother during the stop. (App. p. 327, lines 1-4). The trial judge sustained the objection. (App. p. 327, line 5). Trial counsel failed to object when the State asked the officer if he noticed anything about the car that stood out. (App. p. 327, lines 17-18). The officer testified, without objection, that the car was missing a backseat. (App. p. 327, line 19). Trial counsel failed to object when the State asked the officer if he searched the car. (App. p. 328, line 2). The officer testified, without objection, that he searched the inside of the vehicle. (App. p. 328, line 3). Trial counsel failed to object

[1] The officer was later recalled and testified that the individual was Petitioner's brother, George Hayes Elmore, Jr. (App. p. 378, line 23 – p. 379, lines 1-11).

when the State asked the officer if he attempted to search any other part of the car. (App. p. 328, lines 4-5). The officer testified, without objection, that he attempted to search the trunk. (App. p. 328, line 6). The officer additionally testified, without objection, that he did not complete the search of the trunk.

Trial counsel objected as irrelevant and on hearsay grounds to questioning of the officer about what happened in court as a result of the traffic stop of the brother. (App. p. 328, lines 9-17). The trial judge sustained the objection. (App. p. 328, lines 16-25). The judge held a bench conference and then the State asked the officer what happened to the brother's vehicle. (App. p. 329, lines 7-10). The officer testified that the car was taken to a recycling center and crushed three days before the brother's court date. There was an objection to recycle center testimony that the judge overruled. The objection was placed on the record after the cross-examination of the officer. (App. p. 360, 361, 362, lines 1-3). Trial counsel, however, did not object to the testimony about the missing backseat and the incomplete search of the trunk.

On cross-examination the officer testified that the brother did not refuse consent to search the trunk but instead told the officer the trunk would not open. (App. p. 354, lines 7-13). The officer admitted that he never sought a search warrant for the brother's car and trunk and the car and trunk were never processed. (App. p. 355, lines 2-7). The officer testified that he did not have probable cause to obtain a search warrant. (App. p. 358, lines 1-2).

Petitioner was arrested in April of 2008, seventeen months after the disappearance of Bradley. (App. p. 603, line 20 – p. 604, lines 1-18). At the time of his arrest Petitioner was a student at Benedict College studying mathematics and computer science. (App. p. 670, lines 2-13). At sentencing the judge was told that Petitioner had no history of criminal issues. (App. p. 830, lines 2-3).

During the PCR hearing PCR counsel questioned trial counsel about the failure to object to testimony by Officer Hutto about Petitioner's brother's car. (App. pp. 883-892). Trial counsel first testified, "Again, my strategy and your strategy may be different but in this county where I try many cases, I think there can be some times when there is police mistrust and when a jury can start to see that a police officer or law enforcement are singling people out and trying to do things to people without evidence that substantiates it, then that can cause the jury to begin to understand the theory of our case a lot better because they've experienced that." (App. p. 890, line 20 – p. 891, lines 1-3). Trial counsel later testified, "I objected to the testimony, and when the judge said that it was – he allowed the things in that were allowed in, I dealt with it on cross-examination, which I was already prepared to do." (App. p. 896, lines 16-19). Trial counsel, however, did not object to the testimony about the missing backseat and inability to open the trunk.

In the order of dismissal the PCR judge did not specifically find that trial counsel had a strategic reason not to object to the highly prejudicial and irrelevant testimony about the missing back seat and trunk that would not open. Instead, in the order of dismissal, with regard to the failure to object to James Hutto's testimony concerning Applicant's brother's car, the PCR judge wrote:

> The State presented Hutto's testimony concerning his personal experiences and observations. The State used that circumstantial evidence to present a factual theory of how the victim's body was disposed to the jury. Tr. 420-421, Vol. III. This Court finds the evidence was relevant and proper for the jury's consideration. Counsel properly argued the jury should give it very little weight and consideration. This Court finds any objection by Counsel would have been overruled. Therefore, this Court finds Counsel was not deficient for failing to object.

(App. p. 957). The PCR judge additionally found that Petitioner failed to prove prejudice. (App. p. 957). The PCR judge erred. Trial counsel was ineffective for not objecting to

testimony from Officer Hutto that fifteen months after the disappearance of Ericka Bradley, he stopped Petitioner's brother for a tag violation and noticed that the car was missing a backseat and the trunk would not open. There is a reasonable probability that the judge would have sustained the objection, if made. The judge sustained the objection to the hearsay testimony and the testimony about what happened in court with regard to the tag violation. The testimony was irrelevant because there was no link between the brother's car and the disappearance. Petitioner was prejudiced by the deficient performance. The testimony was particularly prejudicial in this case where the body of Ericka Bradley was never found.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The testimony about the condition of Petitioner's brother's car fifteen months after the disappearance of Bradley was irrelevant and trial counsel was ineffective for failing to object to the testimony. In State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

> Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Preslar, 364 S.C. at 476, 613 S.E.2d at 386 (citing In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); Adams, 354 S.C. at 378, 580 S.E.2d at 794); accord State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 311 (2001); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct.App.2002). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation. See State v. Pipkin, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct.App.2004); see also Rule 403, SCRE.

The officer's testimony about the condition of Petitioner's brother's car fifteen months after the disappearance of Bradley did not make more or less probable the matter in controversy. The testimony was not relevant as a theory of how Bradley's body was disposed when there is no evidence linking Petitioner or Bradley to the brother's car. There was no evidence that the body was disposed as the body was never found. Trial counsel was deficient for failing to object to the irrelevant testimony. Petitioner was prejudiced by trial counsel's deficient performance. The State relied on the testimony in closing argument. (App. p. 783, line 6 – p. 784, lines 1-4). The State's evidence was not overwhelming. There is a reasonable probability that, if counsel had objected to the testimony, the outcome of the proceeding would have been different.

In the generalized findings of fact and conclusions of law included in the order of dismissal, the PCR judge wrote, "This Court finds Applicant's testimony lacked credibility and Counsel's testimony was credible. This Court finds counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and

preparing for trial." (App. p. 951). The determination of whether trial counsel was ineffective for failing to object to the testimony about the condition of the brother's car is not dependent on Petitioner's credibility. While the judge did not specifically find that trial counsel had a strategic reason not to object to the testimony about the condition of the brother's car when discussing the issue later in the order, any purported strategy would not be valid under the facts of this case.

An attorney's performance is not immunized from 6th Amendment challenge by simply labeling the actions as "trial strategy." Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984). See also Quartararo v. Fogg, 679 F Supp 212, 247 (ED NY, 1988) (noting that "not all strategic choices are sacrosanct" and that "[m]erely labeling [counsel's] errors 'strategy' does not shield his trial performance from Sixth Amendment scrutiny"). In United States v. McCoy, 410 F.3d 124, 135 (3d Cir. 2005), the Third Circuit Court of Appeals wrote:

> We agree with the Government that courts have been highly deferential to counsel's strategic decisions, *see, e.g.,* Strickland, 466 U.S. at 690, 104 S.Ct. 2052 (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"); United States v. Otero, 848 F.2d 835, 838 (7th Cir.1988), but merely labeling a decision as "strategic" will not remove it from an inquiry of reasonableness. *See generally* Davidson v. United States, 951 F.Supp. 555, 558 (W.D.Pa.1996); *see also* Gov't of the V.I. v. Weatherwax, 77 F.3d 1425, 1431–32 (3d Cir.1996).

"Tactical decisions do not render assistance ineffective merely because in retrospect it is apparent that counsel chose the wrong course. Baldwin v. Blackburn, 653 F.2d 942 (5th Cir.1981). However, certain defense strategies or decisions may be "so ill chosen" as to render counsel's overall representation constitutionally defective. Adams v. Balkcom, 688 F.2d at 738; Washington v. Watkins, 655 F.2d 1346, 1366 (5th Cir.1981), *cert. denied,* 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982)." Willis v. Newsome, 771 F.2d 1445, 1447 (11th Cir. 1985). In the present case trial counsel's failure to object to the testimony about the condition of

the brother's car when there was no link between the brother's car and the disappearance was a decision "so ill chosen" as to render counsel's overall representation constitutionally defective.

In Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017), the South Carolina Supreme Court wrote:

> As we have often stated, counsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. *E.g.*, Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. See Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (finding counsel's performance was deficient in making a decision not to object to the admission of testimony when the underlying strategy was not sound).

Trial counsel testified that he wished to capitalize on the community's mistrust of the police as a strategic reason for not objecting. (App. p. 890, line 20 – p. 891, lines 1-3). Later in his testimony at the PCR hearing, however, it appears he believed that he objected to the testimony and when the judge overruled his objection, he addressed the issue on cross-examination. (App. p. 896, lines 16-19). Trial counsel only objected to the testimony about the recycle center and the car being crushed and this issue was not raised on direct appeal. Trial counsel could capitalize on mistrust of the police with regard to the crushed car. The underlying strategy with regard to the specific testimony about the missing back seat and trunk that would not open, however, was not sound, especially in light of the fact that counsel appears to believe that he objected to the testimony

Trial counsel was ineffective in failing to object to the testimony from the officer about the brother's car with the missing back seat and trunk that would not open fifteen months after the disappearance. The State failed to establish the minimal link between the brother's car and

the disappearance to render the testimony relevant. Petitioner was prejudiced by the irrelevant testimony.

2. The PCR judge erred in refusing to find trial counsel ineffective for not objecting to testimony about purported hidden jewelry when there was no connection between the jewelry and the disappearance of Ericka Bradley, making the testimony irrelevant.

When Petitioner was arrested in April of 2008, seventeen months after the disappearance of Ericka Bradley, he was a student at Benedict college and dating another Benedict student, Madoree Pipkins. (App. p. 601, line 15 – p. 602, lines 1-11). Pipkins testified that while Petitioner was in jail awaiting trial he called her and told her that he bought some jewelry from an incarcerated individual who she later learned was Dawan Doe. (App. p. 618, line 18-p. 619, lines 1-6). Petitioner told her that the jewelry was in a flower pot at a brown building on Lake Warren. (App. p. 606, line 16 – p. 607, lines 1-10). Pipkins testified that Petitioner told her to wipe the jewelry off, take it home with her and not tell anyone where it came from. (App. p. 610, lines 15-19). Pipkins testified that she and Petitioner's brother Donald looked for the jewelry but were unable to find it. (App. p. 608, line 10 – p. 609, lines 1-4).

During the PCR hearing PCR counsel asked trial counsel about the failure to object to the jewelry testimony. (App. pp. 869 – 876). PCR counsel specifically questioned trial counsel about any connection between this purported jewelry and Ericka Bradley. (App. p. 870, lines 7-9; p. 872, lines 6-12). Trial counsel agreed that he did not object to the testimony and explained that it showed the State was grasping at straws. (App. p. 874, lines 9-24). Trial counsel testified that, " . . .[I]t spoke to the weakness of the case because the things that needed to be there

weren't there, and so strategically, I didn't think there was something that needed to be objected to." (App. p. 874, line 24 – p. 875, lines 1-3). PCR counsel asked trial counsel, "Did it not go through your thought process that the State was then able to put in the jury's mind that the idea that he had actually -- that Mr. Maner actually had murdered the victim and kept her jewelry and hid it, even though they couldn't find the body?" (App. p. 875, lines 4-8). PCR counsel answered, "I think strategically, based on the other information that I had and learned through the investigation of the case over a period of a year plus that I didn't think that was something I needed to object to." (App. p. 875, lines 9-13).

The State failed to link the jewelry another inmate sold[2] to Petitioner, sight unseen, with Ericka Bradley. The State failed to establish that at the time of her disappearance Bradley was even wearing any jewelry. The State only had an earlier photograph of Bradley wearing jewelry. (App. p. 870, lines 10-14). No jewelry was ever found. (App. p. 871, lines 24-25).

In the order of dismissal the PCR judge did not specifically find that trial counsel had a strategic reason not to object to Pipkins' testimony about the jewelry. Instead, in the order of dismissal the PCR judge first wrote, "It was properly the jury's providence to determine the weight of the jewelry as evidence of Applicant's guilt. '[I]f the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Rule 403, SCRE. Once the evidence is admitted under thee standards, the jury may give it such weight as it deems appropriate.' State v. Council, 335 S.C. 1, 20-21, 515 S.E.2d 508, 518 (1999)." (App. p. 961). The allegation included in the order of dismissal under subsection (h) is failure to object to testimony of Madoree Pipkins regarding jewelry on the basis

[2] Petitioner testified that the alleged jewelry was in exchange for Petitioner allowing another inmate to purchase food items on Petitioner's jail commissary account. (App. p. 690, line 6 – p. 691, lines 1-25).

of relevancy. (App. p. 948). Rule 702 involves the testimony of experts. Madoree Pipkins was not called as an expert witness.

The order then discusses Pipkins' testimony at trial and then addresses the audiotape of the jail calls. (App. pp. 961-062). The PCR judge then wrote, "This Court finds the State's presentation of the jewelry as circumstantial evidence was not more prejudicial than probative under a Rule 403 analysis. Therefore, this Court finds Counsel was not deficient for failing to object to the admissible conversations between himself and Pipkins." (App. p. 962). Petitioner submits that the testimony from Pipkins about the purported jewelry was more prejudicial than probative because the State failed to establish the minimal link between the jewelry and the disappearance of Bradley seventeen months earlier. The testimony was not relevant.

The PCR judge additionally found that Petitioner failed to prove prejudice writing, "Applicant failed to prove he was prejudiced by Pipkins' testimony. Pipkins' testimony was merely one piece of circumstantial evidence. Further, Applicant provided an explanation for the jewelry during his testimony. Tr. 361-363, Vol. III. This Court finds it unreasonable to conclude the jury would not have found Applicant guilty without Pipkins' testimony. Therefore, this Court finds Applicant has failed to show how the introduction of Pipkins' conversation prejudiced Applicant under the Strickland standard." (App. p. 962). The PCR judge erred. Trial counsel was ineffective for failing to object to the jewelry testimony. The State failed to prove that there was ever any jewelry hidden in a flower pot on Lake Warren. The State failed to present evidence that the jewelry request, made over seventeen months after the disappearance of Bradley, had any connection to Bradley. The testimony was irrelevant.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The testimony about the jewelry was irrelevant and trial counsel was ineffective for failing to object to the testimony. Again, as discussed above, in State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

> Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Preslar, 364 S.C. at 476, 613 S.E.2d at 386 (citing In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); Adams, 354 S.C. at 378, 580 S.E.2d at 794); accord State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 311 (2001); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct.App.2002). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation. See State v. Pipkin, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct.App.2004); see also Rule 403, SCRE.

The testimony about the jewelry did not make more or less probable the matter in controversy. Pipkin's testimony about the jewelry was irrelevant because the State failed to

show a connection between the purported jewelry and Bradley. Trial counsel was deficient for failing to object to the irrelevant testimony. Petitioner was prejudiced by trial counsel's deficient performance. The State relied on the testimony in closing argument. (App. p. 787, lines 8-25). The State's evidence was not overwhelming. There is a reasonable probability that, if counsel had objected to the testimony, the outcome of the proceeding would have been different.

As discussed above, in the generalized findings of fact and conclusions of law included in the order of dismissal, the PCR judge wrote, "This Court finds Applicant's testimony lacked credibility and Counsel's testimony was credible. This Court finds counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial." (App. p. 951). While the judge did not specifically find that trial counsel had a strategic reason not to object to Pipkins' testimony, any purported strategy would not be valid under the facts of this case.

There was no valid strategic reason for failing to object to the testimony. An attorney's performance is not immunized from 6th Amendment challenge by simply labeling the actions as "trial strategy." Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984). See also Quartararo v. Fogg, 679 F Supp 212, 247 (ED NY, 1988) (noting that "not all strategic choices are sacrosanct" and that "[m]erely labeling [counsel's] errors 'strategy' does not shield his trial performance from Sixth Amendment scrutiny"). "Tactical decisions do not render assistance ineffective merely because in retrospect it is apparent that counsel chose the wrong course. Baldwin v. Blackburn, 653 F.2d 942 (5th Cir.1981). However, certain defense strategies or decisions may be "so ill chosen" as to render counsel's overall representation constitutionally defective. Adams v. Balkcom, 688 F.2d at 738; Washington v. Watkins, 655 F.2d 1346, 1366 (5th Cir.1981), *cert. denied,* 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982)." Willis v. Newsome, 771 F.2d

1445, 1447 (11th Cir. 1985). In the present case trial counsel's failure to object to Pipkins' testimony when there was no link between any jewelry and the disappearance was a decision "so ill chosen" as to render counsel's overall representation constitutionally defective.

In Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017), the South Carolina Supreme Court wrote:

> As we have often stated, counsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. *E.g.,* Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. See Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (finding counsel's performance was deficient in making a decision not to object to the admission of testimony when the underlying strategy was not sound).

Trial counsel testified that the testimony showed the State was grasping at straws. If trial counsel had objected and the testimony was not allowed, trial counsel could have argued there were no straws for the State to grasp. Trial counsel's purported strategy was not sound.

Trial counsel was ineffective in failing to object to Pipkins' testimony about purported jewelry. The State failed to establish the minimal link between any purported jewelry and the disappearance of Bradley to render the testimony relevant. Petitioner was prejudiced by the irrelevant testimony.

CONCLUSION

Based on the arguments made above, this Court should reverse the finding of the PCR court and find that trial counsel was deficient, Petitioner was prejudiced by the deficient performance, and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 2nd day of November, 2022.