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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2021-CP-17-00506

TYREEK HAYES, SCDCID #366300,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable J. Derham Cole, dated March 28, 2023, and filed April 3, 2023, granting post-conviction relief to Respondent. The State filed a timely motion to reconsider, which was denied in an order dated June 2, 2023, and received by the State on June 6, 2023. A copy of the order on appeal is attached to this notice.

[signature page to follow]

Respectfully submitted,

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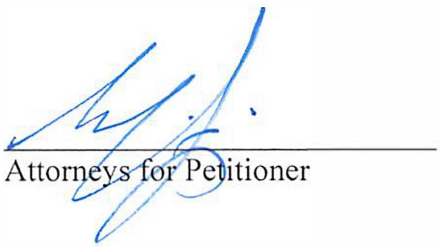

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June 8, 2023

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STATE OF SOUTH CAROLINA)
FILED IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON) GWEN T. HYATT
2023 APR -3 A 10: 29
Tyreek Hayes, #366300,) CLERK OF COURT ORDER
Applicant,) DILLON COUNTY GRANTING RELIEF IN PART, DENYING IN PART
v.)
2021
State of South Carolina,) Civil Action Case No.: ~~2022~~-CP-17-00506
Respondent.)

This matter comes before this Court by way of Applicant's post-conviction relief application filed December 6, 2021. Respondent made its return on April 12, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on July 26, 2022, at the Darlington County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Matthew S. Swilley, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant is entitled to relief based upon Counsel's failure to object to the jury instructions stating that specific intent is not an element of attempted murder. Relief is denied on all other grounds.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dillon County Clerk of Court. Applicant was indicted by the Grand Jury for two counts of attempted murder (2016-GS-17-0875 and -0879), kidnapping (2016-GS-17-0877), and possession of a weapon during the commission of a violent crime (2016-GS-17-0878).[1] Applicant was represented by Matthew Swilley, Esq. Assistant Attorneys General Megan B. Burchstead and Joel A. Kozak prosecuted the case. On July 23-26, 2019, Applicant proceeded to trial before circuit judge Roger E. Henderson and a jury. Applicant was found guilty of attempted murder, kidnapping, and possession of a weapon during the commission of a violent crime. He was found not guilty of first degree criminal sexual conduct. Judge Henderson sentenced

[1] Applicant was also charged with first degree criminal sexual conduct, which he was found not guilty of at trial.

him to thirty years for each count of attempted murder, fifteen for kidnapping and five for possession of a weapon, sentences running consecutively.

Applicant filed a timely notice of appeal on August 5, 2019, that was perfected by Susan B. Hackett, Esquire, through filing a brief raising the following issue:

> The trial judge erred by allowing the state to present hearsay testimony from a police officer that the complaining witness identified Appellant as her assailant where the state failed to satisfy the requirements of the excited utterance exception, which it invoked in order to admit the improper testimony, and credibility of the complaining witness was essential to proving the State's case.

Briefing concluded on January 4, 2021. The South Carolina Court of Appeals affirmed the conviction by unpublished opinion. *State v. Hayes*, 2021-UP-378 (S.C. Ct. App. filed Nov. 3, 2021). The remittitur was issued on November 29, 2021.

Summary of Relevant Facts

Candace Simpson met Reedy Boss, or Reedy All Boss, on Facebook and began communicating with him. (T. 106-07). Boss was later identified as Applicant. On the evening of September 30 and into the morning of October 1, 2016, Simpson planned to head to a local club called Strikers with some friends and left her kids at her mom's house where her sister, Ann Covington also lived. (T. 106, 108-09). After going to Strikers, Simpson and a friend went to T Lees, another club. (T. 111-12). While at T Lees, Simpson saw Applicant. (T. 113).

Applicant asked for a ride home from T Lees because he lived in the apartment complex next to the one Simpson lived in. (T. 113). When they all got out of the car, Applicant asked about coming into Simpson's apartment. (T. 115). Simpson went to wash off the smoke and change her clothes. When she came back out, she originally sat in a recliner while Applicant sat on her sectional. He asked her to come over by him, and when she did, he started trying to kiss her. Simpson told Applicant to leave, but he would not. (T. 116).

Instead, Applicant pulled Simpson into her bedroom. She tried to scream and bang on the wall to get the attention of her neighbor, but Applicant choked her immediately. He continued to drag her into the bedroom by the waist such that her feet were not touching the ground. (T. 117). She begged him to stop, but he refused. She begged him to wear a condom at least, they ended up on the floor getting a condom. Applicant then raped Simpson. (T. 118-119). Simpson passed out

after Applicant began penetrating her with his penis. (T. 119).

When she woke up, it was daylight and Applicant was just standing there watching her. (T. 119-20). Appellant indicated he wanted to have sex again, but Simpson did not want sex. He asked her to do oral sex, and she agreed believing she would be choked if she did not perform oral sex. (T. 120). Ultimately, Applicant choked Simpson again. She begged him to stop, telling him she had children. Applicant said Simpson would tell and she kept begging for her life. She woke up again after the choking and could barely walk. (T. 120).

Someone came over, and Simpson saw that it was her sister. Simpson told Covington that Applicant raped her. Covington told him to leave, but instead he and Covington started "fussing" and Simpson believed Applicant was punching Covington, at the time not knowing he had a knife. (T.123-24). Simpson jumped on Applicant and Covington was able to get free. Simpson tried to run, but Applicant grabbed her. He then tried to cut her neck, but she was able to get her hands up. He dragged her into the kitchen and stabbed her. (T.123-25). Ultimately, Applicant went to the front door because he heard it open, and Simpson was able to escape out the sliding door in the back. (T. 126). Simpson had to bust through the screen to get out and away from Applicant. She ran to her neighbor's house without clothes on and with multiple stab wounds. (T. 127).

Someone called 911 and an ambulance arrived to take Simpson to the hospital. (T. 128). After being treated and receiving stiches and staples, she was shown a photo lineup. She identified Applicant in the lineup. (T.129, 303, State's Exhibits 84 & 86). At trial, Simpson again identified Applicant as the person who raped her, choked her, wounded her and her sister with a knife, and held her against her will. (T. 137-138).

Covington testified that when she brought Simpson's son back, she walked in on what she thought was Simpson and someone having sex. After she backed out of the bedroom, she explained that Simpson came out and said the person was trying to kill her. Covington was not going to allow the person to go back in the room where Simpson was located, but he got on top of Covington. Covington thought he was hitting her, but instead he was stabbing her. (T. 197-98). She managed to escape when Simpson jumped on Applicant's back. Covington went next door and asked them to call 911. (T.199-200). She stated Simpson finally came around the building and to the neighbor's apartment. Simpson had no clothes on, and both Simpson and Covington were bleeding from the knife wounds inflicted by Applicant. (T. 203).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective assistance of counsel by his failure to object to the jury charge for attempted murder.
    a. The court charged specific intent is not an element of attempted murder and counsel did not object.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel.
    a. Failure to object to jury charge re: specific intent.
    b. Failure to object to admission of knife.
    c. Failure to enter body camera footage.
    d. For telling the jury he never gave a statement.
    e. Failure to enter Applicant's police statement.
    f. Failure to request lesser-included instructions.
    g. Failure to call witness Elaine Manning.
    h. Failure to procure and play 911 call.
    i. Failure to properly impeach the victims during cross-examination.
    j. Failure to call the private investigator to testify.
    k. Failure to enter CAD report.
    l. Failure to present third-party guilt defense.
    m. Failure to call DNA expert to testify.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant claimed Counsel was ineffective for failure to object to the erroneous jury instructions stating that specific intent is not an element of attempted murder. He stated that Counsel should have objected to the Court saying one only needs to prove general intent to commit great bodily injury to find Applicant guilty of attempted murder. He stated that if the correct jury instructions were given, he may have been found not guilty.

He stated that one knife was discovered at the apartment, which the lead investigator discovered and brought into evidence. He stated that two other knives were also discovered by people other than the investigator. He stated that the knives were placed into evidence and used against him at trial. He stated that Counsel should have objected to the knives because they were

unrelated to the incident but were used against him at trial anyway. He stated that there was not a proper chain of custody over the knives and no SLED involvement in their handling. He stated that he thought Counsel objecting may have resulted in an acquittal. He stated that the knives were discovered five days after the officers searched every inch of the apartment.

He stated that there was video footage from the victims' father, stating that he thought one of the victim's boyfriends was to blame. He stated that this was helpful to his case but was never entered at trial.

He stated Counsel was ineffective for telling the jury he never gave the police a recorded statement. He stated he told the police detail by detail about what happened. He stated Counsel told the jury that he never tried to tell his story. He stated Counsel should have showed audio and video, of him, about what happened. He stated that, during deliberations, the jury requested a copy of his police narrative. He stated that they could not show the jury his statement because it was never entered into evidence. He stated that if the jury saw his statement, it would have changed the outcome at trial.

He stated that Counsel never asked the Court to charge the jury on lesser-included instructions. He stated that Elaine Manning, the next-door neighbor, was not called to testify at trial. He stated she was the first person to see the victims after the incident and called 911. He stated Counsel did not call this witness because she did not want to be involved in the criminal matter. He stated Counsel addressed her absence at trial during closing argument, but never called her to testify. He stated he talked to Counsel about this issue, but Counsel said she did not want to be involved and knew about certain things that the victims told her.

He stated that James Smiley called 911. He said Smiley stated he was on scene and knew the victim. He stated Counsel never investigated this witness. He stated that the call was deleted a year after it was placed. Applicant claimed this constituted tampering. He stated Counsel should have preserved this call in a timely matter and could have investigated the guy that placed the call.

He testified that there were conflicting testimonies presented at trial. He stated that one of the victims stated that her sister ran into the room with her kids, but also stated she came up behind her. She stated that the other victim denied this happened. She stated that one of the victims was questioned about jumping on the bed, but she denied this. He stated that several witnesses denied this happened.

On cross-examination, he stated that there were two competing narratives brought up at

trial: the State's theory and the defense's theory. He stated that he met one of the victims at the club, a rape occurred that night, and the victim's sister arrived at the house. He stated that the weapon used during the crime was a steak knife. He stated that his story was that the victim's boyfriend caught him in bed with her, but this was never mentioned at trial.

He stated that the victims' stories were inconsistent. He stated that both victims described the first victim's mention of being raped was different. He stated he was acquitted of the criminal sexual conduct offense. He stated he did not recall how long the jury deliberated for or if an Allen charge was given. He stated that two knives were found. He stated that one of the knives was found in the home. He stated that a knife was found, detached from the handle.

He stated that he thought the lesser-included offenses and correlating charges should have been explored more thoroughly. He stated that Counsel requested lesser-included offense jury charges. He stated that Elaine Manning was not present in the courtroom to testify at the PCR hearing. He stated he never talked to her and had no way of determining if she was favorable to him, beyond what Counsel said. He stated that Counsel spoke to her prior to trial.

He stated that the 911 tape was destroyed before trial. He stated that his police statement was consistent with what he said happened that night. He stated that the Court did not charge that attempted murder is a specific intent crime. He stated he had an investigator on the case but was unsure what happened to him.

Counsel Testimony

Counsel testified that he represented Applicant, probably starting sometime in 2017. He stated he met with him several times before trial. He stated that they discussed trial preparation, investigation into the evidence in the case, and potential plea offers. He stated that Applicant was accused of sexual assault and attempted murder. He stated that he met one of the victims in a night club. He stated he was accused of sexually assaulting and choosing her. He stated that this victim's sister came to visit with the children, and he allegedly tried to attack her too. He was later arrested after Elaine called 911.

He stated he contacted Elaine and met with her. He stated he thought he had her subpoenaed but, based on his observations, he thought she had a mental illness. He stated that her statements were not coherent or consistent. He stated he did not want to put her on the stand because he was unsure if she would be helpful or hurtful to the defense.

He stated that he could not remember if he asked for lesser-included instructions to be

charged, but would not be surprised if he did, as that is his general practice. He stated he recalled the judge giving jury instructions. He stated he forgot to object to the judge charging that specific intent is not an element of attempted murder.

He stated that he recalled Applicant giving a police statement. He said this statement was inadmissible and self-serving. He stated it was exculpatory but would be excluded because it was hearsay. He stated that he tells his clients not to talk to the police because it will be used against them.

Counsel testified that he was told the 911 call recording was destroyed and he did not get an answer as to the policy backing the destruction. He stated that the lady he contacted told him she thought Applicant committed the crime. He stated he was suspicious because he was never given a solid reason why the call was destroyed but stated that the prosecutors were also perplexed. He stated that the State subpoenaed her at trial, but she did not want to be there.

He stated that he vaguely recalled cross-examining the two victims. He stated that his strategy in cross-examination was to impeach their credibility by highlighting inconsistencies in what they said. He stated that Candace was on body camera while in the hospital. He stated he used this footage to impeach her credibility. He stated that he tried to reveal the consensual nature of their sexual encounter, which was "obvious." He stated that he thought the victims' stories were deviant from one another but could not recall. He stated he did not recall if he brought this out in cross-examination.

He stated that he remembered the body camera footage featuring the victims' father. He stated he did not enter this into evidence. He stated that excited utterances were made, and that the victims' father blamed the victim's boyfriend. He also said there were excited utterances made by Candace as she was taken away by EMS. He stated that he did not think it would be worth admitting because the father's statements were speculative. He stated that Candace made some statements unfavorable to the defense in the video, which he did not think would be worth admitting.

He stated that he did not think they could exclude the knife on the grounds of incomplete chain of custody. He stated that the chain of custody covers fungible items and did not think it was analyzed. He stated that he thought he could have objected on relevance grounds but did not think it would impact the outcome at trial. He stated he did not recall how many knives were entered. He stated a knife blade was found in a field nearby that was connected to Candace. He stated that

the handle was missing, which he thought was strange.

On cross-examination, Counsel stated that he recruited an investigator, but he did not testify at trial. He stated that the investigator mostly just interviewed witnesses and gained rapport. He stated that anything he would have testified to would have been testimonial, as it was based on what others told him. He stated that the investigator issued some subpoenas, including a lady that was close to Candace. He stated that the investigator also looked at evidence and talked to Applicant. He stated he did not think the scope of the investigator's role was explained to Applicant because he ran out of time. He stated that the investigator never stopped working on the case and found more people that could be helpful to the case, but it was too late.

He stated that he did not call Elaine to testify because she was inconsistent in her telling of what happened, and he questioned her competency. He stated that she may have been helpful or unhelpful, depending on the day. He stated she could substantiate the victims' narratives by testifying that they ran to her house after the assault and called 911.

He stated he did not recall requesting lesser-included instructions, but stated he usually does. Counsel stated he should have objected to the charge that specific intent is not an element of attempted murder. He stated that he did not enter the CAD report into trial and could not remember if it was helpful or not. He stated that he did not enter the body camera footage of the victims' father because there were unfavorable statements made in the video. He stated that the man the victims' father blamed in the video was James Smiley, who spent time in jail because of committing violent crimes. He stated this was the man Applicant accused of assaulting the victims. He stated that he did not think there was anything to support this speculation. He stated that he was unsure if the judge would have let it into evidence or if it would have helped the defense.

He stated that several knives were taken into evidence by the Dillon police, along with a blade that was turned in days later. He stated that he could not recall if SLED analyzed the knives. He stated that he had a DNA expert look at the knives. He stated that there was DNA on the knives that could not be attributed to Applicant. He stated that tried to run additional tests to exclude Applicant but the person running the test could not come up with a DNA profile. He stated that the DNA expert did not testify at trial because he was less than helpful. He stated that no fingerprints were collected. He stated he could not recall if there were DNA profiles. He stated he did not object to admission of the knives because he was confident the judge would enter then anyway. He stated that he thought the video could have been spliced to only enter the favorable

statements. He stated he did not recall if there were chain of custody issues or whether he objected to its entry. He stated he hired a DNA expert that did not testify at trial.

On re-direct, he stated that he thought that the CAD report could hurt them. He stated he did not think the State would allow him to enter a spliced video. He stated that he thought the video in its entirety would not be admitted because of hearsay. Counsel acknowledged that he requested lesser-included offense charges based upon review of the transcript and the instructions were given by the judge.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Dillion County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

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 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*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is

determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Specific Intent

Applicant claims Counsel was ineffective for failure to object to the Judge charging the jury that specific intent is not an element of attempted murder. When analyzing the prejudicial effect of erroneous jury instructions, the Supreme Court has "often applied harmless-error analysis to cases involving improper instructions." *Neder v. United States*, 527 U.S. 1, 9 (1999); *see United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000) ("[W]e join our sister circuits in holding that . . . [erroneous jury instructions are] subject to harmless error analysis."). Whether or not the error was harmless is a fact-intensive inquiry. *State v. Jeffries*, 316 S.C. 13, 22, 446 S.E.2d 427, 432

(1994) ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.") (citations omitted). When considering whether an error with respect to a jury instruction was harmless, appellate courts must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Kerr*, 330 S.C. 132, 144, 498 S.E.2d 212, 218 (Ct. App. 1998). This is determined based on all of the evidence presented to the jury. *State v. Gibson*, 416 S.C 260, 265, 786 S.E.2d 122, 124 (2016); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992).

Courts may find an erroneous instruction harmless if it "conclude[s] beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17. In cases where the defendant has contested the omitted element, we ask "whether the record contains evidence that could rationally lead to a contrary finding with respect to that omitted element. If not, then the error was harmless." *United State v. Ramos-Cruz*, 667 F.3d 487, 496 (4th Cir. 2012).

In this case, the jury instructions were erroneous because the judge stated that Applicant could be found guilty of attempted murder if he showed only a general intent to commit serious bodily injury. (T. 585). However, attempted murder is a specific-intent crime, which requires that "the defendant consciously intended the completion of acts comprising the [attempted] offense." *State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (quoting *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "Attempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact." *Id.* at 56, 810 S.E.2d at 22 (quoting *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988)). "Express malice is the 'deliberate intention unlawfully' to kill a human." *Id.*

Here, the trial court provided erroneous jury instructions when addressing attempted murder. The instruction provided here was almost identical to what was found to be an error in *King*. Counsel was clearly deficient for failure to object to erroneous jury instructions. Counsel did not provide any strategic reason for why he did not object.

This was also prejudicial to Applicant. The Court found fit to charge the jury on the lesser-included offenses of assault and battery of a high and aggravated nature and first-degree assault and battery. The jury charge in this case negated the requirement of any proof of an essential element of the charge against Applicant. Given the facts of the case, this error cannot be seen as harmless. Thus, this Court grants post-conviction relief and Applicant's convictions for attempted

murder are reversed and remanded to the Court of General Sessions for a new trial.

Objection to Knife

Applicant claims Counsel was ineffective for failure to object to the knife. Counsel credibly testified that he thought that the knife would be entered and that it did not affect the outcome at trial in anyway. Accordingly, relief is denied on this ground.

Body Camera Footage

Applicant claims Counsel was ineffective for failure to enter body camera footage featuring the victims' father. Counsel said he did not enter it because it was inadmissible hearsay and contained statements harmful to the defense. He also testified that he did not think he could enter a statement spliced in an explicitly favorable way. This is a reasonable strategic reason for not entering it and Counsel is not deficient as a result. Further, because it is not admissible or particularly helpful, no prejudice is found. Accordingly, relief is denied.

Telling Jury Defendant Never Gave Statement

Applicant claims Counsel told the jury he never gave a police statement and that this statement constitutes ineffective assistance of counsel. Counsel informed the jury that he did, in fact, give a recorded statement. There was nothing unreasonable in mentioning this in closing, as it was seemingly used in a way to inform the jury of Applicant's intent to explain what happened to law enforcement. The jury was seemingly taken with this narrative, given their request to see the police statement. Counsel was not deficient in using this strategy. Additionally, this statement did not impact the outcome at trial. Accordingly, relief is denied on this ground.

Failure to Enter Statement to Police

Applicant claims that Counsel was ineffective for failure to enter his police statement at trial. Counsel credibly testified that this statement was not admissible because it was a self-serving statement. This Court concurs and finds this rationale reasonable. If Counsel moved to enter the statement, the State's objection would have been sustained. Accordingly, relief is denied.

Elaine Manning

Applicant claims Counsel was ineffective for failure to call Elaine Manning. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent

with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State*, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Counsel credibly testified that he thought Ms. Manning had mental health or competency issues and acknowledged her narrative of what occurred changed dramatically. He stated that because of this issue, he thought Manning would be unhelpful or potentially harmful to the defense. This is a reasonable decision and Counsel is not deficient as a result. Further, Applicant has failed to meet his burden of proof by failing to call Ms. Manning to testify. Accordingly, relief is denied

on this ground.

Lesser-Included Offense Instructions

Applicant claims Counsel was ineffective for failure to request that the judge charge the jury on the lesser-included offenses of ABHAN and first-degree assault and battery. Counsel requested these charges be presented to the jury. (T. 522-23). The State did not object. (T. 523). These charges were given by the judge. (T. 588-89). Accordingly, this claim is without merit and relief is denied on this ground.

911 Call

Applicant claims Counsel was ineffective for failure to procure and play the 911 call. Counsel credibly testified that the 911 call was destroyed when he attempted to procure it. Counsel is not deficient for failure to procure a destroyed tape. Regarding prejudice, Applicant candidly testified that he had no way of knowing whether the tape would be helpful. Because there is no way of telling whether the tape is helpful, prejudice cannot be established. Accordingly, relief is denied.

Impeach Victims

Applicant claims Counsel was ineffective for failure to properly impeach the victims based upon their inconsistent statements. This Court finds Counsel credible in his assertion that that was the focus of his cross-examinations. This is also backed by the trial transcript. This Court has been presented with no evidence or specific lines of questioning Counsel needed to go down to be reasonable. This Court also finds that Applicant has presented this Court with no lines of questioning that, had Counsel explored them, would have changed the results of the proceedings. Accordingly, relief is denied on this ground.

Private Investigator

Applicant claims Counsel was ineffective for failure to call the private investigator to testify. Counsel credibly testified that the investigator's proffered testimony was testimonial in nature and would be based primarily on what he was told by other people. Counsel is not expected to call individuals that cannot testify in accordance with the rules of evidence. Additionally, because the proffered testimony is not before the Court, Applicant has not met his burden of proof in establishing prejudice. Accordingly, relief is denied on this ground.

CAD Report

Applicant claims Counsel was ineffective for failure to enter the CAD report. Counsel

credibly testified that this report could be harmful to the defense. This is a reasonable reason for not entering the evidence. Further, upon review of the CAD report, this Court finds that there is nothing in the report where, if it was presented to the jury, it would change the results at trial. Accordingly, relief is denied on this ground.

Third-Party Guilt

Applicant claims Counsel was ineffective for failure to assert a third-party guilt defense. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland,* 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State,* 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

This Court has been shown no evidence substantiated in something other than Applicant's unsupported word and mere speculation that the victim's boyfriend committed the crime. Counsel is not deficient for failure to assert a baseless defense. This Court declines to find prejudice because of the lack of evidence to support the defense and its plausibility of being supported at trial. Accordingly, relief is denied on this ground.

DNA Expert

Applicant claims Counsel was ineffective for failure to call the DNA expert to testify at trial. Counsel credibly testified that the expert was unable to generate any exculpatory results and could not have helped at trial as a result. Failing to call an unhelpful witness is not a deficiency. This Court finds Applicant failed to meet his burden of proving prejudice on this allegation, given his failure to call this person as a witness. Accordingly, relief is denied on this ground.

Conclusion

Based on all the foregoing, this Court finds Applicant is entitled to relief based upon Counsel's failure to object to the jury instructions stating that specific intent is not an element of attempted murder. Relief is denied on all other grounds raised. The parties have thirty days in which to file an appeal from this order.

IT IS THEREFORE ORDERED:

1. The PCR application be granted as it pertains to the attempted murder charges;
2. The PCR application be denied concerning the remaining offenses; and
3. Applicant's attempted murder convictions be vacated and the matter remanded to General Sessions court for a new trial.

AND IT IS SO ORDERED this 28th day of **MARCH**, 2023.

J. DERHAM COLE, Presiding Judge
The Fourth Judicial Circuit Court

Spartanburg, South Carolina.

State of South Carolina
The Circuit Court of the Seventh Judicial Circuit

J. Derham Cole
Judge

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MEMORANDUM

To: The Honorable Gwen Hyatt

From: Sue Pardue on behalf of Judge Derham Cole

Subject: 2022-CP-17-00506/Tyreek Hayes

Date: March 29, 2023

Please clock, file and disburse to appropriate parties. Thank you!