STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Steven H. John, Circuit Court Judge

RONALD COHENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212923

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether trial counsel provided ineffective assistance of counsel for neglecting to request a jury instruction on the law of proximate causation where under the evidence presented at trial, the jury could have found that Petitioner's actions did not cause the wreck involved in this case and he was therefore not guilty of assault and battery with intent to kill?

II. Whether trial counsel provided ineffective assistance of counsel by failing to request a jury charge on the defense of accident where one reasonable interpretation of the evidence supported a finding that the wreck was the result of an accident?

III. Whether trial counsel provided ineffective assistance of counsel for failing to argue to the jury during closing arguments that one reasonable interpretation of the evidence presented at trial supported a finding that the wreck was accidental?

IV. Whether trial counsel provided ineffective assistance of counsel for remarks he made during his opening and closing statements which (1) impugned the integrity and character of Petitioner in a case where Petitioner's credibility was crucial; (2) impugned the integrity of the victim and created the danger that the defense would be seen by the jury as attacking the character of the victim without foundation thereby inflaming the passions and prejudices of the jury against the Petitioner; and (3) diminished Petitioner's assertion that the wreck was the result of an accident?

V. Whether trial counsel provided ineffective assistance of counsel for (1) neglecting to advise Petitioner of the right to present character witnesses in support of his defense at trial in a case where Petitioner's credibility was essential; and (2) failing to call character witnesses at trial to present to the jury testimony concerning Petitioner's reputation for veracity in the community?

VI. Whether trial counsel provided ineffective assistance of counsel when he was late the second day of trial where (1) counsel's tardiness resulted in the cross-examination of the victim occurring after the full testimony of another State's witness; (2) counsel failed to object to and preserve for appeal the requirement that he apologize to the jury for arriving late as a condition to being allowed to cross-examine the victim where the defense has a constitutional right to cross-examine witnesses; and (3) counsel failed to request a mistrial and then a curative instruction where the trial judge admonished counsel for being late in the presence of the jury?

STATEMENT

Indictments, Trial and Sentence

On April 5, 2006, Petitioner Ronald Cohens was indicted by the Georgetown County Grand Jury for (1) assault and battery with intent to kill ("ABWIK"); and (2) failure to stop for a blue light. App. 801-807. On June 27-30, 2006, Cohens proceeded to trial before the Honorable J. Michael Baxley and a jury. App. 1. Cohens was represented by Charles David Barr, and the State was represented by Assistant Solicitors Matthew Modica and Dorie Bioglanti. Id. The jury found Cohens guilty as indicted on both charges. App. 424, ll. 20-25. Judge Baxley sentenced Cohens to twelve (12) years for ABWIK and three (3) years concurrent for failure to stop for a blue light. App. 433, ll. 7-14.

Direct Appeal

Cohens filed a direct appeal to the S.C. Court of Appeals. Appellate Defender Katherine H. Hudgins submitted an appellant's brief, arguing that the trial court erred in beginning the trial without the presence of counsel and then requiring counsel to apologize to the jury for arriving late as a condition for allowing cross-examination of the victim. App. 435-446. On February 9, 2009, the Court of Appeals affirmed, holding that the above raised issues were not preserved for appeal. App. 460-461. Tara Dawn Shurling, who took over Cohens' representation, sought a rehearing from the Court of Appeals which was denied on April 6, 2009. App. 462-469. Cohens further sought a Petition for a Writ of Certiorari with the S.C. Supreme Court which was denied on April 8, 2010. App. 471-493.

PCR Application, Evidentiary Hearing and Order of Dismissal

On October 8, 2010, Cohens filed his application requesting post-conviction relief ("PCR"). App. 495-501. Cohens specifically alleged his trial counsel was ineffective by:

(1) failing to be punctual during Cohen's trial where his late arrival to court resulted in him not being able to cross-examine the victim at the appropriate time and damaged his effectiveness as an advocate by making a negative impression on the jury;

(2) failing to adequately preserve for appellate review his objection to being required to apologize to the jury for being late to court during trial; and

(3) failing to request a mistrial after the trial judge required him to apologize to the jury in a manner that irreparably damaged his effectiveness as an advocate for the balance of the trial.

App. 497.

The State filed its Return on November 8, 2010. App. 502-506.

On April 25, 2012, Cohens filed a first amended PCR application where he alleged, among other things, the following additional claims:

(1) Trial counsel was ineffective for neglecting to request a jury instruction on the law of proximate causation where under the evidence presented at trial there was some evidence from which the jury could have found that Cohens' actions did not cause the wreck involved in this case.

(2) Trial counsel was ineffective for failing to make a motion for a mistrial following an exchange with the trial judge which tended to damage defense counsel's image in the eyes of the jury, and thereby violated Cohens' right to effective assistance of counsel in his defense.

(3) Trial counsel was ineffective for neglecting to request a curative charge after remarks from the bench damaged trial counsel's image and effectiveness as an advocate in the eyes of Cohens' jury.

(4) Trial counsel was ineffective for neglecting to advise the client of his right to present character witnesses as a part of his defense at trial and to call such witnesses at trial to present to the jury testimony concerning Cohens' reputation for veracity in the community.

App. 507-509.

Cohens subsequently filed a second amended PCR application on April 27, 2012 to add the following claims:

(1) Trial counsel was ineffective for making an opening argument to the jury in which he impugned the integrity of his client and thereby called into question his overall character.

(2) Trial counsel was ineffective for making an opening argument to the jury in which he impugned the integrity of the victim and thereby created the danger that the defense would be seen by the jury as impugning the character of the victim without foundation thereby inflaming the passions and prejudices of the jury against Cohens.

(3) Trial counsel was ineffective for failing to request a jury instruction on the law as it relates to the defense of accident where one reasonable interpretation of the evidence adduced at trial would have supported a finding of that defense.

(4) Trial counsel was ineffective for failing to argue to the jury in closing arguments that one reasonable interpretation of the evidence supported a finding that the car wreck involved in this case was accidental.

App. 616-617.

An evidentiary hearing was held before the Honorable Steven H. John on April 26, 2012, which was continued on June 14, 2012. App. 511-615; 619-746. Cohens was represented by Tara Dawn Shurling, and the State was represented by Salley W. Elliott. App. 511. Cohens and his trial counsel, Charles David Barr, testified at both the first and second hearings. App. 524-612; 674-742. Cohens also presented the testimony of four character witnesses in support of his claim that his trial counsel failed to present such witnesses at trial: Travis Brown, David Robinson, James Allen Brittain, and Vonda Gail Johnson. App. 623-673.

On July 30, 2012, Judge John denied Cohens' PCR application on all claims raised. App. 773-779. This petition for writ of certiorari follows.

STATEMENT OF FACTS

The charges in this case arose from an incident in which Cohens' wife was involved in a car wreck which the State charged that Cohens deliberately caused. In addition, Cohens was charged with failure to stop for a blue light in connection with the State's assertion that Cohens subsequently failed to timely pull over in response to a blue light when he was being pursued by law enforcement following the incident. It was the State's theory of the case that Cohens had lay in wait for his estranged wife and after a protracted car chase, deliberately rammed her SUV with his car causing her to run off the road, wreck in the trees and flip over her car. App. 803. Cohens' wife, Nadine Cohens, testified that just before the wreck, she and Cohens were in the left lane. She stated that Cohens was directly behind her and that when he hit her vehicle, she "lost control and . . . went off the road." App. 111, ll. 16-19.

State witness, Ronnie Lewis, testified that just prior to the wreck, he observed Cohens and his wife both traveling in the left lane. He too claimed that Cohens struck his wife's vehicle from behind causing her vehicle to leave the road and wreck. He testified that a bus was traveling in the right lane and when the victim lost control and left the road, her car went across the right lane in front of the bus. App. 141, l. 18 – 146, l. 16.

Another State witness, Frederick Kinloch, initially testified that the victim was traveling in the slow, right lane just before being hit by Cohen's Honda and losing control of her vehicle. He described her as "getting ready to turn in the slow lane." App. 201, ll. 18-20. In response to questioning by the solicitor, Kinloch then stated that the SUV driven by the wife was "moving in the slow lane and then the Honda came on the side and knocked her off the road." App. 201, ll. 21-24.

On cross-examination, however, Kinloch's testimony clearly indicated the SUV driven by the wife was changing lanes from the fast, left lane to the slow, right lane when it was struck by the Honda and went off the side of the road. Although Kinloch testified that Cohens was in the fast lane when he came up beside his wife's vehicle, Kinloch's testimony is otherwise consistent with the position of Cohens in that Kinloch described the wife's SUV as changing from the left lane to the right lane when she was struck on the side by Cohens causing her to leave the road. App. 216, l. 21 – 218, l. 12.

The driver of the bus did not appear as a witness for the State at Cohens' trial.

Cohens, on the other hand, countered that he and his family lived near his estranged wife and that his seeing her in morning traffic on the date in question was entirely coincidental. App. 101, ll. 8-24; 102, ll. 1-5; 339, l. 24 – 340, l. 9. He explained that on the morning in question, he was headed to the IRS office in Myrtle Beach to make arrangements for a payment plan, which happened to be on the same route that his wife would take to her work in Myrtle Beach. App. 341, ll. 5-10; 354, ll. 21-25. For much of the route, Cohens was ahead of his wife in traffic, and his wife agreed with this fact. App. 109, ll. 2-21; 167, ll. 16-19; 168, l. 22 – 169, l. 2; 171, ll. 21-22; 174, ll. 2-4; 341, l. 12 – 342, l. 14. Cohens acknowledged that he had called his wife on her cell phone and that they had been making gestures at each other as they came side by side in traffic. Cohens admitted that at one point their two vehicles hit each other and then they both proceeded down the highway. App. 340, ll. 10-23; 342, ll. 13-23.

Cohens also testified that immediately prior to the wreck, he was traveling in the right lane and his wife was in the left lane. According to Cohens, when his wife went to change

lanes from the left to the right, she clipped the front left side of his car and left the road across the front of his car and wrecked. App. 342, l. 22 – 343, l. 8.

Cohens further admitted that he came back to the scene of the wreck, saw that his wife was moving and free of the wreckage, and then got back in his car and headed to his mother's house. Cohens testified that he had just turned off to go to his mother's house when he saw the police and just put his hands up in the air. He denied having seen any blue lights or hearing a siren before that point in time. App. 343, l. 9- 344, l. 6. He was nervous and upset. App. 344, l. 3; 367, ll. 19-22.

ARGUMENT

To establish ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted). A reasonable probability has been defined by this Court as a probability sufficient to undermine the confidence in the outcome of a trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

Where defense counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Defense counsel may not, however, explain away errors and omissions which acted to the prejudice of his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, this Court held that:

> Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (emphasis in original) (internal citations

omitted).

I. Trial counsel provided ineffective assistance of counsel for neglecting to request a jury instruction on the law of proximate causation where under the evidence presented at trial, the jury could have found that Petitioner's actions did not cause the wreck involved in this case and he was therefore not guilty of assault and battery with intent to kill.

The State specifically alleged in the indictment against Cohens for ABWIK that Cohens committed ABWIK specifically by "ramming his vehicle into the victim's vehicle while the vehicles were in motion causing the victim's vehicle to wreck into trees and overturn, resulting in the victim having to seek medical intention in violation of [S.C. CODE ANN.] § 16-2-620." App. 803.

"In South Carolina, [i]t is a rule of universal observance in administering the **criminal** law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." Bailey v. State, 392 S.C. 422, 433, 709 S.E.2d 671, 677 (2011) (emphasis in original) (internal citations omitted). A defendant cannot be convicted of an act not specifically alleged in the indictment. Id. at 444, 709 S.E.2d at 677. Where the State includes a more specific description in the indictment, the State undertakes the burden of proving the specific allegations to obtain a conviction. Id.

Therefore, under the indictment, it was not sufficient for the State to prove that Cohens' vehicle struck his wife's vehicle *at some point* but rather, that a specific act of ramming her vehicle *caused* her vehicle to wreck and overturn. There is evidence in the record that it was not Cohens' actions of ramming her vehicle that caused his wife to wreck.

According to Cohens, when his wife went to change lanes from the left to the right, she clipped the front left side of his car and left the road across the front of his car and wrecked. App. 342, l. 22 – 343, l. 8. Under this scenario, Cohens' actions would not have

been the proximate cause of the wreck and he would have not been guilty of ABWIK as alleged by the State in the indictment. Trial counsel was therefore ineffective for neglecting to request a jury instruction on the law of proximate causation. Where the State elected to charge Cohens with ABWIK by expressly alleging that a specific act by Cohens – ramming his wife's vehicle - caused her vehicle to wreck and overturn, trial counsel should have requested a charge on proximate causation.

At the PCR hearing, trial counsel testified that he never even considered a charge of proximate causation, did not see how it had anything to do with the case and offered no strategic reason for not requesting such a charge. App. 541, ll. 18-22; 542, ll. 12-15.

An appropriate charge on the law relating to causation was particularly necessary where the evidence arguably established more than one way that Cohens' wife could have ran off the road and wrecked. It was therefore crucial that the Trial Court charge the jury in a manner which focused the jury on the necessity that they find, beyond a reasonable doubt, that Cohens (1) rammed his wife's vehicle; and (2) that this specific contact *caused* the victim's vehicle to wreck. On the unusual facts of this case, defense counsel was ineffective for failing to request that the jury be appropriately instructed on proximate cause. This Court has recognized the need for a trial judge to tailor an appropriate jury instruction to unusual facts and circumstances present in a given case. State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). The law to be charged in any case must be determined by the evidence presented at trial. State v. Patterson, 367 S.C. 219, 231-32, 625 S.E.2d 239, 245-46 (Ct. App. 2006).

Cohens was furthermore prejudiced by his trial counsel's failure to request a charge on proximate causation. Nowhere in its jury instructions did the Trial Court instruct the jury that Cohens could be found guilty of ABWIK only if the State proved that it had to be the specific act

of ramming his wife's car that caused her to wreck and overturn as alleged in the indictment. App. 400, l. 3 – 420, l. 5. The Trial Court only gave a jury charge about the general elements of ABWIK. App. 408, l. 21 – 413, l. 16. The Trial Court's jury charge did not sufficiently cover the substance of the proximate causation charge that Cohens' trial counsel should have requested which resulted in prejudice to Cohens. See State v. Niles, 400 S.C. 527, 537, 735 S.E.2d 240, 245 (Ct. App. 2012).

Absent a charge on causation, it is impossible to know if the jury understood that they had to find that the wreck was caused by the specific act alleged in the indictment – that Cohens' actions at the moment the wreck happened were the proximate cause of the wreck. This further prejudiced Cohens where if the jury had understood the above, the jury may have reached a different verdict against Cohens. See State v. Harrison, 343 S.C. 165, 175, 539 S.E.2d 71, 76 (Ct. App. 2000) (holding defendant was prejudiced when based on the evidence at trial, a different verdict might have been reached if the jury had been charged with the instruction requested by the defendant).

On the facts of this case, and the narrow charge contained in the ABWIK indictment against Cohens, a charge of proximate causation was necessary and appropriate and should have been requested by trial counsel. Trial counsel was ineffective in failing to request a charge on proximate causation, and Cohens is accordingly entitled a new trial.

II. Trial counsel provided ineffective assistance of counsel by failing to request a jury charge on the defense of accident where one reasonable interpretation of the evidence supported a finding that the wreck was the result of an accident.

Cohens testified at trial that while he was traveling in the right lane, his wife was traveling in the left lane and she began to merge left into his path. Cohens testified that she hit him, caught the front of his vehicle, and then lost control of and wrecked her vehicle. App. 342,

l. 22 – 343, l. 5; 344, l. 18 – 345, l. 15. Cohens' testimony alone would have supported his request for a jury charge on the defense of accident, and his trial counsel was ineffective for refusing to request a charge on the defense of accident.

A trial court's refusal to grant a jury instruction based upon a sound principle of law applicable to the case before the trial court is an error law. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). If there is any evidence to support a jury charge, the trial judge should give the charge in question. State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). "In South Carolina, the defense of accident requires a showing that that the harm caused was unintentional, that the defendant was acting lawfully at the time of the incident, and due care was exercised in handling the weapon." State v. Harris, 382 S.C. 107, 116, 674 S.E.2d 532, 537 (Ct. App. 2010).

In this case, the State alleged that Cohens used his car as a weapon. App. 67, ll. 12-23; 803. Cohens clearly testified that he was driving in the right lane when his wife hit his car while attempting to change lanes from the left to the right lane. App. 342, l. 22 – 343, l. 5; 344, l. 18 – 345, l. 15. If the jury believed Cohens, his testimony would have established the defense of accident. See Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008). Cohens met his burden of proof regarding this defense. Had the jury been instructed by the trial court that it could have found Cohens was not guilty under an accident defense, the jury could have reached a different verdict against Cohens and as a result, Cohens was prejudiced by his trial counsel's failure to request a jury charge on the defense of accident. State v. Harrison, 343 S.C. 165, 175, 539 S.E.2d 71, 76 (Ct. App. 2000).

III. Trial counsel provided ineffective assistance of counsel for failing to argue to the jury during closing arguments that one reasonable interpretation of the evidence presented at trial supported a finding that the wreck was accidental.

The testimony of the State's witnesses was far from consistent as it pertained to the events immediately preceding the wreck. Furthermore, Cohens testified that it was his wife who accidentally clipped the front end of his car as she changed from the left to the right lane where he was traveling. Cohens did not claim that his wife deliberately stuck his car when she changed lanes, but rather that she accidentally hit him while changing from the left to the right lane thereby causing her to lose control of her car, go off the road, wreck into the trees, and flip her car. App. 674, l. 16 – 675, l. 5.

Despite his client's testimony, defense counsel did not argue to the jury in his closing statement that the wreck was accidental. App. 373, l. 10 – 389, l. 20. While defense counsel argued that the testimony of the eye witnesses was "somewhat different," defense counsel made no attempt to advance his client's position that his wife hit him while changing lanes thereby accidentally causing the wreck. App. 380, l. 2 – 381, l. 24.

Defense counsel only argued that the State failed to prove the elements of ABWIK in more general terms, at one point asking the jury if Cohens "intended to kill her?" App. 370, l. 14 – 378, l. 13; 380, l. 2 – 382, l. 6; 387, l. 25 – 389, l. 20. This type of argument made it seem like Cohens may have intended to hit his wife's vehicle but not kill her. Defense counsel further focused on the fact that the couple's marriage had "gotten kind of out of hand" for his explanation of the wreck. App. 375, ll. 2-11.

At the PCR hearing, defense counsel admitted that Cohens had never testified at trial that his wife deliberately hit his car when she clipped Cohens' car while changing lanes. App. 706, ll. 3-15; 707, ll. 4-7. Despite his client's position that his wife accidentally hit his

car before she went off the road and overturned, defense counsel did not assert the defense of accident. App. 709, ll. 14-16. At the PCR hearing, defense counsel never gave any valid reason why he did not request an accident defense charge or argue to the jury that the wreck was an accident. App. 735, ll. 19-22; 736; ll. 8-11.

Cohens testified at the PCR hearing that the intent of his trial testimony was to convey that his wife accidentally hit his car. App. 675, ll. 2-5. Cohens informed his defense counsel what happened during the wreck, but his defense counsel never discussed the defense of accident with him. App. 675, ll. 9-25.

Defense counsel's purported strategy at trial was inconsistent with his client's testimony. This Court has found ineffective assistance of counsel where the arguments made by defense counsel to the jury were not consistent with the defendant's own theory of the case and damaged the defense case because the closing argument did not support the petitioner's account of what had happened. Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 651-52 (2008).

In this case, defense counsel declined to argue the theory advanced by his client's own testimony – an accident. Throughout the cross-examination by the State, Cohens resisted repeated attempts by the solicitor to have Cohens portray his wife's actions as deliberate. App. 345, ll. 16-24; 354, ll. 16-20; 363; ll. 13-14. Cohens' testimony plainly presented a claim of accident. As discussed above, Cohens' defense counsel was ineffective for failing to request a jury charge on the defense of accident, and defense counsel was also ineffective for neglecting to argue to the jury the defense of accident advanced by his client and for failing to point out in his closing to the jury the specific portions of the trial testimony which supported the defense of accident.

IV. **Trial counsel provided ineffective assistance of counsel for remarks he made during his opening and closing statements which (1) impugned the integrity and character of Petitioner in a case where Petitioner's credibility was crucial; (2) impugned the integrity of the victim and created the danger that the defense would be seen by the jury as attacking the character of the victim without foundation thereby inflaming the passions and prejudices of the jury against the Petitioner; and (3) diminished Petitioner's assertion that the wreck was the result of an accident.**

In his opening remarks to the jury, defense counsel stated:

> But in any situation where people have done less than they ordinarily would be required to do, you wind up with some bad consequences; in other words, sometimes you give your word and you don't keep it, you wind up having to pay. And just like anything wrong, it has consequences. Now this situation involves two people who over 14 years ago stood up before God and took an oath to love and to cherish one another until death do them part.
>
> Well, it didn't quite work out that way. They had marital problems. As a result of having the marital problems - of course they had the marital problems, number one – they were disobedient to the oath that they took. They were disobedient to the oath that they took. I don't [think] the evidence will show anything other than that. As a result of that they went off on their individual courses, and as a result of going off on their individual courses, they forgot the oath that they took. God's hands did not cause this, in fact He is what sustains us, but they got in trouble because they were disobedient. They didn't keep the oath they took.

App. 72, l. 15 - 73, l. 11.

In his closing argument, Cohens' defense counsel reiterated that the marriage had "gotten out of hand" and the case had come down to "a family being broken to the point where the husband has allegedly tried to kill his wife." App. 375, ll. 10-18.

Trial counsel was ineffective in making these remarks where (1) he impugned the integrity of his client and called into question Cohens' overall character and credibility in a case where the credibility of the defendant was very important; (2) he impugned the integrity of Cohens' wife and thereby created the danger that the defense would be seen by the jury as impugning the character of the victim without foundation thereby inflaming the passions and

prejudices of the jury against Cohens; and (3) such remarks diminished Cohens' version of the events that the wreck was the result of an accident.

Defense counsel's opening and closing remarks regarding the parties' disobedience during their marriage were unnecessary, highly inflammatory, and unsupported by the evidence at trial. There was no evidence that either party was unfaithful or anything of the like. App. 678, ll. 24-25. Defense counsel's remarks undermined the credibility of his client in a case where credibility was the key to his defense. Defense counsel portrayed Cohens as someone who did not take oaths seriously and whose testimony could therefore not be believed. Defense counsel's remarks also did not support his client's argument that the wreck was the result of an accident where defense counsel repeatedly focused on the broken down marriage and the case coming down to a husband trying to kill his wife. See Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 651-52 (2008).

Defense counsel provided no justification or valid strategy for making these remarks, and Cohens is entitled to a new trial for his counsel's error.

V. Trial counsel provided ineffective assistance of counsel for (1) neglecting to advise Petitioner of the right to present character witnesses in support of his defense at trial in a case where Petitioner's credibility was essential; and (2) failing to call character witnesses at trial to present to the jury testimony concerning Petitioner's reputation for veracity in the community.

Whether Cohens was guilty of the act specifically alleged in the indictment for ABWIK came down to a question of credibility and accuracy of perception. Defense counsel failed to provide Cohens with reasonable professional assistance of counsel where he failed to advise Cohens of his right to present character witnesses at trial.

At the PCR hearing, Cohens presented the testimony of four character witnesses. App. 623, l. 3 – 673, l. 4. Each of these witnesses were well established members of the

community in which Cohens was born and had lived the majority of his life. These witnesses, a retired school principal, two business owners who had previously employed Cohens, and the Deputy Treasurer for Georgetown County, universally testified to Cohens' positive reputation for truthfulness and veracity. They each affirmed that they would have been willing to testify on Cohens' behalf if they had been asked to do so.

During his PCR testimony, defense counsel was questioned about his failure to advise his client about his right to present character witnesses. He responded that he rarely used character witnesses and explained that on the rare occasion when he did present a character witness, it was because of some connection known to him between a potential character witness and a juror. App. 699, ll. 9-21; 728, l. 9 – 729, l. 19. Defense counsel dismissed the possibility that some carefully chosen character witnesses might, because of their own background and position in the community, have universal appeal to an entire jury absent some specific connection to a single juror. App. 730, ll. 3-19.

In its Order of Dismissal, the PCR court held that Cohens had no initial right to present character witnesses. App. 789. This is an error of law, however, as this Court has specifically held that "[i]t is well settled that a criminal defendant may introduce evidence of his good character." State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010); see also Rule 401(a)(1),SCRE; Rule 405, SCRE.

Moreover, the credibility of Cohens was perhaps the most crucial issue during the trial. For example, Cohens' wife interpreted having seen Cohens near her home the morning of the incident and later on the highway as evidence Cohens was following her or lying in wait. Cohens, on the other hand, explained that his family lived near his estranged wife and that he had been on his way to the IRS office in Myrtle when he and his wife spotted each

other in traffic. App. 101, ll. 8-24; 102, ll. 1-5; 339, l. 24 – 340, l. 9; 341, ll. 3-10; 352, ll. 5-11. While his wife claimed that Cohens intentionally struck her SUV multiple times prior to the impact that caused the wreck, Cohens painted a far different picture. He recalled that they got up next to each other in traffic, began gesturing at each other, and then suddenly made contact. App. 342, ll. 13-18.

During the trial, the solicitor also attacked Cohens' credibility with comments like "You also want our jury to believe that as you're traveling down 51 you didn't see any blue lights . . . ." App. 368, ll. 14-15. The solicitor also repeatedly derided Cohens' credibility during the closing argument:

> And even if you believe, which I don't think you do, but even if you believe he came back . . . .
>
> . . .
>
> And come on, Ladies and Gentlemen, in terms of credibility, do you think for a moment that he didn't look through those papers and it didn't bother him at all?
>
> . . .
>
> [B]y the way, there is no person in this courtroom that has a greater stake in the outcome than the defendant. If you believe him, he walks. And if you don't, he gets convicted. You can't think of a person who has a greater motive not to tell the truth than the defendant, that's clear.

App. 391, ll. 6-7; 392, ll. 4-7; 397, ll. 18-22.

Where this case hinged on Cohens' credibility, his defense counsel should have at a minimum advised Cohens of his right to present character witnesses. Cohens testified at the PCR hearing that he was unaware that he could have presented these witnesses and would have wanted to do so if he had known it was possible. App. 685, ll. 11-19.

Defense counsel and the PCR court both indicated that if Cohens had presented character witnesses, this would have opened the door for the State to have presented evidence of other bad acts of Cohens, including "evidence as to incidents of [Cohen's] prior violence toward the victim." App. 787. The State presented absolutely no evidence that Cohens had ever engaged in any violence toward his wife, and this ruling by the PCR court lacks any basis. Cohens testified he had never acted violently towards his wife. App. 678, ll. 13-16. Cohens had been cited for contempt of court by making telephone calls to his wife in violation of a family court order, but that evidence was already admitted during the State's case. App. 100, ll. 16-23; 163, l. 21 – 164, l. 6.

The PCR court also held that if Cohens had presented character witnesses, the State may have also been able to introduce a prior conviction for failure to stop for a blue light. The State presented no evidence that Cohens had actually been convicted previously for failure to stop for a blue light. In his PCR testimony, Cohens testified that he had no prior criminal record with the exception of a prior charge for failure to stop for a blue light from approximately fifteen (15) years earlier. App. 682, ll. 5-18. This charge likely would not have even been admissible as there was no evidence of a conviction, it was not a crime involving dishonesty, and was more than ten years old. See Rule 609(a) and (b), SCRE.

In any event, Cohens testified that he would have risked the jury finding out about this prior charge for the opportunity to have the jury hear testimony regarding his truthfulness from character witnesses. App. 685, l. 11 – 687, l. 14.

The character witnesses presented by Cohens were highly credible individuals whose background and stature in the community were such that their testimony would likely have been given consideration by Cohens' jury. Defense counsel was ineffective for failing to

even advise Cohens of the right to have presented character witnesses. Cohens should have been able to have made the decision whether to present these witnesses. Instead, defense counsel left Cohens uninformed about the ability to present these witnesses in a case where credibility of the parties was key. Defense counsel provided no valid reason for not even informing Cohens of the right to present character witnesses. Defense counsel's failure to advise Cohens of his right to present character witnesses was particularly prejudicial where Cohens' credibility was crucial to his defense. Cohens is therefore entitled to a new trial.

VI. Trial counsel provided ineffective assistance of counsel when he was late the second day of trial where (1) counsel's tardiness resulted in the cross-examination of the victim occurring after the full testimony of another State's witness; (2) counsel failed to object to and preserve for appeal the requirement that he apologize to the jury for arriving late as a condition to being allowed to cross-examine the victim where the defense has a constitutional right to cross-examine witnesses; and (3) counsel failed to request a mistrial and then a curative instruction where the trial judge admonished counsel for being late in the presence of the jury.

The first day of trial ended with the conclusion of the direct examination of Cohens' wife. App. 121, l. 25 – 122, l. 18. The trial judge informed counsel and the jurors that court would be begin at 9:30 a.m. the next morning. App. 122, ll. 19-20.

When the trial reconvened the following morning, defense counsel was not present. In defense counsel's absence, the trial judge stated:

> Now we ended the day with closing direct examination of the witness, Mrs. Cohens. And is Mrs. Cohens present? She is. And is there cross-examination of Mrs. Cohens? *Mr. Barr is not present and therefore it appears at this time there is not.* Please call your next witness, Mr. Modica.

App. 125, l. 25 – 126, l. 5 (emphasis added).

After the State called its next witness, defense counsel arrived in court at which time the following colloquy took place:

The Court: Mr. Barr, good morning. Sir, where have you been? We began court at nine-thirty this morning, everyone was here. Where have you been?

Mr. Barr: Judge, I had to stop in Kingstree this morning on my way over there. I apologize to the court for being late.

The Court: Well, please understand as a courtesy to the jury who is here giving their time when we say we're going to start at a particular time, we begin at that time. We've called another witness. Please come forward and take the oath of a witness, sir [referring to the State's next witness].

App. 126, l. 14 – 127, l. 1.

The next witness was sworn, but before his examination began, defense counsel asked to approach the bench. App. 127, ll. 4-5. The trial judge initially denied counsel's request, but ultimately relented and an off-the-record bench conference occurred. App. 127, ll. 4-10. After the bench conference with defense counsel, the State was permitted to go forward with its direct examination of Ronnie Lewis.

After the conclusion of the Lewis' testimony, the trial judge directed the State to call its next witness. App. 151, l. 12. The State called its next witness, but before his examination could begin, another bench conference took place after which the jury was excused from the courtroom. App. 151, ll. 13-25. During the conference that followed, defense counsel acknowledged being fifteen minutes late for court and asked to be allowed to cross-examine Cohens' wife. App. 152, ll. 6-20. The trial judge responded by telling defense counsel that he asked the attorneys to be in court by 9:00 a.m. to resolve an evidentiary matter, indicating that defense counsel was actually forty-five (45) minutes late to court. App. 152, ll. 12-25. The trial judge then advised defense counsel that it would permit the cross-examination of Cohens' wife only after defense counsel apologized to the jury for being late to court that morning. App. 154, ll. 1-9. Defense counsel stated that while

he did not mind apologizing to the jury, he would prefer to do so in closing as opposed to during the trial. App. 154, ll. 10-14. Defense counsel did not, however, object to being required to apologize to the jury immediately before he began his cross-examination of Cohens' wife. Id. In response, the trial judge stated:

> Well, I would require you when they come back in and when you begin to question this witness, you just turn to the jury and just tell them you're sorry, you apologize for being late this morning. And I would require that to be contemporaneous so that it will have some effect.

App. 154, ll. 15-20.

Defense counsel apologized to the jury and neither made any further objections regarding his required apology, nor requested a mistrial and a subsequent curative jury charge for the trial judge's remarks in the presence of the jury admonishing him for being late. App. 155, l. 23 – 156, l. 6.

On appeal, Cohens argued the trial judge erred in requiring counsel to apologize to the jury for arriving late as a condition to the cross-examination of Cohens' wife. App. 435 – 442. The Court of Appeals found this issue unpreserved. App. 460-461.

First, defense counsel was ineffective for being inexcusably late to court. Cohens was prejudiced by his defense counsel's unexcused tardiness because the trial judge initially ruled there would be no cross-examination of Cohens' wife and went forward with another State witness. Even though Cohens' defense counsel was eventually allowed to cross-examine Cohens' wife, Cohens was still prejudiced where the entire presentation of another witness interrupted his wife's testimony. She, being an unsequestered witness, was able to hear the full testimony of a witness to the wreck before being cross-examined. App. 53, l. 4 – 54, l. 11. She then had the ability to make her testimony consistent with this witness' testimony.

Defense counsel was also ineffective for failing to object to being required to apologize to the jury as a condition of cross-examining the victim. The right to confront witnesses guaranteed by the Sixth and Fourteenth Amendments includes the right to cross-examine witnesses. California v. Greene, 399 U.S. 149 (1970). If defense counsel had objected to this condition, Cohens could have successfully appealed the trial judge's error in conditioning the exercise of Cohens' constitutional right to cross-examine adverse witnesses upon the requirement that counsel apologize to the jury for being late. Instead, the Court of Appeals refused to find error because Cohens' defense counsel failed to object at trial. App. 461.

Finally, Cohens' defense counsel failed to seek a mistrial or thereafter request a curative instruction to mitigate the prejudice caused to Cohens for the trial judge's remarks in front of the jury admonishing defense counsel for his tardiness and indicating that defense counsel must have seen no need to cross-examine Cohens' wife. References by a trial judge to an attorney's competence are improper and constitute reversible error upon a showing of prejudice to the defendant. See State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). As the dissent stated in State v. Mitchell, "[t]he remarks of the court tended to impugn the credibility of counsel and to diminish him and his defense of appellant in the eyes of the jury." 261 S.C. 452, 461, 200 S.E.2d, 448, 453 (1973).

Defense counsel's failure to ask for a mistrial, or at a minimum a subsequent curative charge advising the jury that they were not to hold defense counsel's actions or the court's remarks concerning defense counsel against Cohens, constituted ineffective assistance of counsel. This case was largely a credibility battle between Cohens and his estranged wife. Remarks from the court indicating that Cohens' own lawyer evidently saw no need to even

cross-examine the wife were highly prejudicial. Remarks admonishing defense counsel in the presence of the jury for his tardiness in a manner and tone which called into question counsel's general competence were highly improper. Cohens' defense counsel's tardiness and the subsequent events that occurred because of his tardiness entitle Cohens to post-conviction relief.

CONCLUSION

Based upon the foregoing arguments set forth herein, Petitioner Ronald Cohens requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Steven H. John, Circuit Court Judge

RONALD COHENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Tyson Andrew Johnson, Sr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ronald Cohens, at Darlington County Prison, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 24th day of July, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of July, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 3023.