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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Chesterfield County
Honorable Roger E. Henderson, Circuit Court Judge

Opinion No. 2023-UP-261 (S.C. Ct. App. Filed July 12, 2023)
Lower Court Case No. 2015-CP-13-00108
Appellate Case No. 2017-002302

MITCHELL RIVERS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2023-001757

RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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PETITIONER'S STATEMENT OF THE ISSUE ON CERTIORARI

Did the Court of Appeals err in reversing the post-conviction relief court's determination that Rivers failed to establish that his trial counsel, in a prosecution for homicide by child abuse, was ineffective for failing to object to admission of collateral injuries suffered by the infant victim which support an expert conclusions that the child suffered from "Battered Child Syndrome" and thus prove Rivers' intent and rebut River's express defense of accident?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE

Did the Court of Appeals correctly reverse the PCR court's improper denial of relief where Rivers' trial counsel failed to object, on multiple occasions, to evidence of collateral injuries sustained by Child in a homicide by child abuse case, where the collateral injuries were entirely unrelated to Rivers, where the Court of Appeals found the issue was unpreserved for direct appellate review, and where there was not overwhelming evidence of Rivers' guilt?

STATEMENT OF THE CASE

Rivers was indicted by a Chesterfield County grand jury for Homicide by Child Abuse during its October 2010 term following the death of Child in August 2005. App. 556-557. The State called his case to trial before the Honorable Paul M. Burch and a jury on February 8, 2011. Suzanne Mayes and Adam Foard served as the Assistant Solicitors, and Matthew Swilley and Tiffany Gibson represented Rivers. App. 1. Following a multi-day trial, the jury found Rivers guilty as indicted. App. 373 ll. 4-10. Judge Burch sentenced him to a life imprisonment. App. 382 ll. 14-16.

An Anders brief was filed on Rivers' behalf on or about August 15, 2012. App. 393-416. The South Carolina Court of Appeals issued an Order on September 5, 2013, which directed the parties to brief the following issue and any other issues of arguable merit: "Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?" App. 417. The Brief of Appellant was submitted on December 6, 2013. App. 419-430. The State filed its Brief of Respondent on or about February 27, 2014. App. 432-455.

The Court of Appeals, after oral argument, issued an opinion affirming Rivers' sentence and conviction on February 11, 2015, holding that the issue of whether the trial court properly admitted the evidence of collateral injuries was not preserved. App. 457-461. Rivers filed a timely application for post-conviction relief on February 27, 2015. App. 462-470. Counsel for Rivers would later file an amendment to the PCR application on May 31, 2017. App. 471. The State made its Return on December 16, 2016. Ap. 473-478.

An evidentiary hearing was held on July 17, 2017, before the Honorable Roger E. Henderson. App. 480. Lance Boozer represented Rivers, and Johnny Ellis James, Jr. appeared on

behalf of the State. Rivers, Matthew Swilley, Tiffany Gibson, and Benjamin Tripp testified at the hearing.

Following the evidentiary hearing, the State filed a Memorandum Opposing Post-Conviction Relief on August 9, 2017. App. 539-544. By way of a written Order¹, Judge Henderson dismissed Rivers' claims and denied relief. App. 547-557. He found that Rivers "suffered no prejudice because the evidence was properly admitted to the jury." App. 551.

Rivers timely appealed the dismissal of his PCR application. The Petition for Writ of Certiorari was filed on June 18, 2018. The State filed a Return on November 5, 2018. The case was transferred to the Court of Appeals on November 19, 2018, and certiorari was granted on October 28, 2020. Final briefing was completed on May 14, 2021, and oral argument was held in the case on December 5, 2022. The Court of Appeals reversed the PCR court's denial of relief in an unpublished opinion on July 21, 2023, finding that trial counsel provided ineffective assistance by not contemporaneously objecting to the admission of evidence of collateral injuries to Child. Rivers v. State, Op. No. 2023-UP-261 (S.C. Ct. App. filed July 12, 2023). The State filed a Petition for Rehearing and suggestion for Rehearing En Banc on August 10, 2023. Rehearing was denied on October 12, 2023. The State filed a Petition for Writ of Certiorari in this Court on November 13, 2023. This Return to the Petition for Writ of Certiorari follows.

¹ The Order of Dismissal contained many similarities, including the same citation errors, to the State's Memorandum Opposing Post-Conviction Relief. App. 539-544.

STATEMENT OF FACTS

Rivers was married to Kimberly Quick Rivers, and the two lived in a house with many other people.² App. 196, ll. 16-25; App. 260, l. 8-App. 261, l. 4. The couple began caring for Child after the birth mother, Kimberly's sister, was deemed unfit to have custody of Child. App. 107 l. 8-App. 112 l. 6; App. 261 ll. 12-19. The South Carolina Department of Social Services performed a home study and, finding no problems with the Rivers' home, placed Child with them on April 22, 2005. App. 114, l. 18-App. 116, l. 9, App. 112, ll. 1-4. In late June 2005, Child developed breathing problems and was diagnosed with bronchitis. App. 262, l. 16-App. 263, l. 23. Child was taken to the doctor's office and subsequently spent three days in the hospital with Rivers and Kimberly. App. 263, ll. 20-25.

On the night of August 6, 2005, Kimberly bathed Child, and Rivers picked out some clothes for him to sleep in. Rivers, with Child in his lap, Kimberly, and Rivers' brother played video games for a couple of hours before Kimberly placed Child in their bed to go to sleep. A few hours later, Rivers and Kimberly got in their bed, and Rivers placed child on his right side before going to sleep. Rivers awoke around 6:00 a.m. to discover that Child was not breathing, and Child's face was under his armpit. Rivers immediately began performing CPR, blowing in Child's mouth, until Child began to wheeze and cry. Once Child began breathing again and his color had returned, Rivers laid him in the playpen and went outside to finish some yard work. App. 265, l. 1-App. 267, l. 22.

Approximately an hour later, Kimberly came up to Rivers as he finished cutting the lawn and informed him that Child had stopped breathing. Rivers ran into the home and began

² Lead investigator Wayne Jordan estimated that somewhere between five to seven people lived in the home.

performing CPR a second time while he directed Kimberly to call 911. App. 128, ll. 2-5; App. 268, l. 4-App. 270, l. 21; App. 300, ll. 10-14. Rivers and three family members rushed to the hospital behind the ambulance that came to pick up Child. App. 268, l. 15-App. 269, l. 14. Tragically, Child passed away. App. 270, ll. 4-21.

Rivers was arrested on September 19, 2005, after giving a statement to law enforcement. App. 221, ll. 14-22. Trial counsel was appointed to Rivers' case. App. 487, ll. 5-7. The two met three or four times before Rivers' plea-turned-trial. App. 487, ll. 8-10. Counsel began representation of Rivers in 2010 or 2011, five to six years after his arrest. App. 487, l. 11-App. 488, l. 3. Rivers confided in counsel and explained all the facts in his case. App. 493, ll. 5-7. Rivers was adamant that he wanted a trial. App. 493, l. 21-App. 496, l. 13; App. 507, ll. 16-24.

The State brought in Suzanne Mayes of the Prosecution Commission to try the case. App. 378, ll. 2-14. Following the selection of a jury, Rivers began the process of entering a guilty plea. App. 51, l. 3 - App. 55, l. 22. Immediately after hearing the allegations, Rivers indicated that he was unable to plead guilty:

The Court: Mr. Rivers, I may [have] caused some confusion in there. That's what the State's alleging, and I fully understand that you're pleading under Alford. You're not pleading guilty straight up. But that's what the allegation in the indictment alleges.

Does that clarify it for you a little bit?

Rivers: Yes, sir, that clarifies it, **but I can't do that. I'm sorry. I'm sorry. I can't do that. Over my heart, now, I'm sorry, I can't, I can't plead guilty to that. I'm sorry Mr. Man. I'm, I'm just sorry. I can't do that.**

App. 54, l. 17-App. 55, l. 2. (emphasis added). The trial court reminded Rivers that he could possibly be facing a life sentence, and the pre-trial hearing resumed. App. 55, ll. 3-22.

Counsel moved pre-trial to suppress evidence of collateral injuries. App. 86, l. 16-App. 87, l. 12. The brief exchange between the trial court and counsel would become a major point of contention during the direct appeal and post-conviction relief stages of Rivers' case:

Counsel: Your Honor, we may have already given Ms. Mayes a copy of this as far as the motion. I think we made cross-motions to keep out certain aspects of the collateral evidence that was observed during the autopsy.

...

Court: I'm going to have to deny that motion too based especially on the recent case. These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases.

All right. You're protected on the record on that.

App. 86, l. 16-App. 87, l. 12; App. 385-392; App. 509, l. 25-App. 511, l. 12.

The State's opening statement began with the following: "Ladies and gentlemen, what this case is about is child abuse, and you're [going to] be hearing the testimony about this case that might be difficult to listen to." App. 95, ll. 20-23. The State introduced the concept of prior, collateral injuries, mentioned abuse half a dozen times in the opening sentences of the trial, and promised that "[t]he medical evidence suggests something" other than an accident. App. 95, l. 21-App. 99, l. 9.

Counsel countered this contention in opening statements, and the below ideas are the ones that have carried this case through both the direct appeal and the post-conviction relief process:

[Rivers] loved Child. He would never do anything to harm Child, and it will - - it's [going to] come into evidence that there were injuries discovered on this child. Pay attention. **Not one shred of evidence will link anything bad that happened to that child to my client at all. Not through testimony. Not through medical evidence. No[t] through anything. Mitchell Rivers never intentionally, or under circumstances that exhibit great indifference to human life, ever harmed this child and you're [going to] see this.**

App. 102, l. 17-App. 103, l. 1. (emphasis added).

Ron Martin, the paramedic who arrived at Rivers' home and transported Child to the hospital, was the State's first witness to discuss the collateral injuries Child. App. 137, l. 16-App. 139, l. 8. Counsel did not object to this line of questioning. On cross-examination, Martin admitted that he was unable to form a link between the prior injuries and Child's death. App. 142, ll. 10-14.

The State's next witness was Doctor Janice Ross, an admitted "arm of the prosecution in this matter." App. 166, ll. 12-15. Dr. Ross was qualified as an expert witness in the field of forensic pathology, and she was the second witness to testify about collateral injuries to Child. App. 146, ll. 4-8; App. 148, l. 7-App. 152, l. 6. The State elicited testimony that contusions that Dr. Ross observed were consistent with "trauma such as a knuckle or a fist" and that there was no other pattern to explain them. App. 152, ll. 3-7. Dr. Ross also testified about "old rib fractures" and indicated that they were likely caused by "squeezing of the chest cavity" in the front or side to side. App. 157, ll. 7-18.

Counsel objected to this testimony on the grounds of speculation and cumulative testimony under Rule 403, SCRE, but did not object subject to the prior motion to exclude evidence of the collateral injuries. App. 149, l. 5-App. 151, l. 21. On cross-examination, Dr. Ross conceded that she changed the manner of death after receiving a call from Suzanne Mayes. App. 164, l. 22-App. 165, l. 10.

Clay Nichols, a forensic pathologist, was the next witness during the State's case-in-chief to remark on "the physical abuse resulting in multiple rib fractures as well as multiple abrasions and contusions" on Child's body. Once more, counsel objected on the grounds that the testimony was cumulative and speculative but did not refer to the pre-trial motion. App. 182, l. 5-App. 183,

l. 7; App. 184 ll. 21-24. Dr. Nichols was the only witness to testify that the injuries to Child represented a “classic case of Battered Child Syndrome.” App. 186, ll. 12-19. On cross examination, Dr. Nichols admitted that nothing he viewed connected the alleged abuse to Rivers. App. 187 ll. 6-9.

Counsel testified at the evidentiary hearing that he did not object because he believed the matter had already been decided, and further argument would have been superfluous. App. 512, l. 16-App. 513, l. 1. He admitted that such an understanding was incorrect and that he made a mistake in assuming as such. App. 513, ll. 2-6. Counsel indicated at the evidentiary hearing that he believed he was protected when each of the State’s witnesses testified. App. 513, ll. 7-15.

The State rested following the testimony of Rick Charles, and counsel moved for a directed verdict. App. 254, l. 16-App. 256, l. 15. Counsel put up a defense consisting of five witnesses, including Rivers who testified in his own defense.

In addition to testifying about the events of August 6, 2005, Rivers testified regarding how Child came into his custody, how they agreed to name Child after him, and to Child’s health prior to the day of his death. Rivers also testified about his full-time job which sometimes required him to work weekends as well. He worked from five in the morning to six at night, during which Kimberly took care of Child. App. 261, l. 1-App. 264, l. 11

Rivers testified that at the time of the incident he weighed over three hundred pounds. App. 264, ll. 12-25. He also stated that he lost his faith as a result of Child’s death, and he struggled to pay for Child’s funeral expenses. App. 27, ll. 4-21; App. 274, ll. 8-19. During cross-examination, Rivers was asked where the various injuries to Child came from. Each time he was asked about a particular injury, he responded with some variation of “I have no idea.” App. 287, l. 13-App. 288, l. 5.

Various family members testified to the care they saw Rivers give Child. Charles Rivers spoke about how his son “really loved” Child and worked tirelessly to support his family. He never observed Rivers mistreat Child. App. 291, ll. 10-21. Terry Johnson, Rivers’ older brother who was living in the home with Rivers and Child, similarly never saw Rivers “do anything wrong to the child.” App. 297, ll. 8-23. He stated under oath that he never saw Rivers be careless with Child or harm Child, either intentionally or unintentionally. App. 297, ll. 8-23.

Rivers’ niece, who was also living in the home at the time Rivers and his wife cared for Child, never saw Rivers mistreat the baby. She never recalled seeing the child injured. App. 306, l. 12-App. 307, l. 15. Rivers’ younger brother, who was also living at the house in 2005, never saw Rivers mistreat the baby. He never saw the baby get hurt and opined that Rivers treated the baby well. App. 312, l. 5-App. 313, l. 18.

After the conclusion of the defense’s case, counsel for both parties discussed jury charges with the trial court. In particular, the State sought a charge under S.C. Code Ann. § 16-3-85(A)(2) for aiding and abetting, even though Rivers was only charged under (A)(1). App. 326, l. 1-App. 330, l. 16; App. 556-557. The State relied on State v. Smith, 391 S.C. 352, 705 S.E.2d 491 (Ct. App. 2011).³ The State related alleged abuse from Smith to the child’s injuries in Rivers’ case, even though none of the witnesses were able to connect the two. App. 329, ll. 4-25.⁴ The trial court indicated that it would charge the jury accordingly and did so. App. 330, ll. 9-15; App. 361, l. 24-App. 363, l. 5.

³ Reversed and remanded by State v. Smith, 406 S.C. 215, 750 S.E.2d 612 (2013), in which this Court held that the jury instruction on aiding and abetting was improper based on defendant being indicted solely as the principal.

⁴ The undersigned believes the transcript contains a scrivener’s error at line 22 on page 329. It is believed that Mr. Swilley was responding to Ms. Mayes by arguing that Rivers never placed the blame on anybody else. App. 329 ll. 4 – 25.

Defense counsel had the first closing argument after the State waived. App. 330, ll. 24-25.

Counsel attempted to distance the evidence of Child's prior injuries from Rivers:

Well, I am telling you what I am denying, and what I submit to you is that Mitchell Rivers did not cause any injuries to the child. He would not have allowed any of those injuries to be caused to that child. And there is no evidence in the record of that.

App. 333, ll. 18 -22.

The State would later concede that Child's collateral injuries were unrelated to his death. App. 345, ll. 18-19. However, towards the end of the State's closing argument, the following improper remarks, which not only instructed the jury to speak the truth but also linked the prior injuries to Rivers, were offered:

You have before you the most noble of opportunities. The chance to strike back against injustice, and deliver a verdict that speaks the truth.

In this case, the truth is that Child was battered. Child was beaten. That Child was smothered to death. Mitchell is guilty as charged with failure to act with the omission and omissions that lead to the death of Child.

App. 351, ll. 1-17.

During deliberations, the jury sent a note requesting "a better definition of aiding and abetting." App. 369, l. 3-App. 370, l. 3. The jury found Rivers guilty of homicide by child abuse, and the trial judge sentenced him to life in prison. App. 373, ll. 4-10; App. 382, ll. 14-16. During the sentencing phase, Rivers maintained his innocence. App. 379, l. 23-App. 380, l. 24; App. 382, ll. 17-22. Following the conclusion of Rivers' trial, counsel sent Rivers a letter indicating that the day the jury read the guilty verdict was the worst day of his career. App. 499, ll. 17-24.

Rivers' appeal to the South Carolina Court of Appeals began with a two-issue brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 393-416. Interestingly, the Anders brief contained a rather predictive footnote: "In the event the Court deems the matter unpreserved

for direct appeal for failure to timely object contemporaneously when the testimony was elicited, then the issue may be proper for post-conviction relief.” App. 404. The Court of Appeals issued an order on September 5, 2013, directing the parties to file briefs regarding the trial court’s admission of collateral injuries. App. 417.

Briefs were filed by both parties. App. 419-456. The State devoted a substantial portion of its brief to addressing the preservation issue. App. 446-448. The Court of Appeals affirmed Rivers’ conviction and sentence by way of a published opinion. State v. Rivers, 411 S.C. 551, 769 S.E.2d 263 (Ct. App. 2015); App. 457-461. The Court of Appeals noted that the trial court never ruled on the issue of admission of collateral injuries. Id. at 554, 769 S.E.2d at 265. Notably, the Court of Appeals found the issue unpreserved and remarked that the State admitted its strongest argument was the issue was unpreserved: “During oral argument, the State admitted its strongest argument was the issue presented is unpreserved. We remind the bar that our appellate courts have ‘consistently refused to apply the plain error rule’ and ‘it is the responsibility of counsel to preserve issues for appellate review.’” Id. at 555, 769 S.E.2d 266, n. 2 (internal citations omitted).

STANDARD OF REVIEW

“Our standard of review in PCR cases depends on the specific issue before us.” Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). “[The appellate] Court[s] will uphold the lower court's findings if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Reversal is warranted where no evidence of probative value supports the PCR court’s decision, Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999), or where the PCR court’s decision is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). “We review questions of law *de novo*, with no deference to trial courts.” Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839 (footnote omitted).

ARGUMENT

The Court of Appeals correctly reverse the PCR court's improper denial of relief where Rivers' trial counsel failed to object, on multiple occasions, to evidence of collateral injuries sustained by Child in a homicide by child abuse case, where the collateral injuries were entirely unrelated to Rivers, where the Court of Appeals found the issue was unpreserved for direct appellate review, and where there was not overwhelming evidence of Rivers' guilt.

Despite Petitioner's florid characterization of the matter, the core issue in this case is whether Rivers received constitutionally effective assistance of counsel during his trial for Homicide by Child Abuse. The Court of Appeals, in a well-reasoned opinion, found that Rivers' trial counsel was deficient in failing to object to and obtain a final ruling on the admissibility of Child's collateral injuries and that deficiency prejudiced Rivers, entitling him to a new trial. The opinion issued by the Court of Appeals was in line with decades of jurisprudence in South Carolina which has repeatedly held that evidence of collateral injuries in Homicide by Child Abuses cases is admissible **only when the evidence is the subject of a prior conviction, or the prior bad acts are linked to the defendant by proof that is clear and convincing**. Petitioner's argument that the evidence of prior injuries was properly admitted is without merit. This Court should deny certiorari.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. McKnight v. State, 378 S.C.

33, 40, 661 S.E.2d 354, 357 (2008). “The PCR applicant has the burden of proving both prongs.” Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000).

Deficient Performance

“To prove trial counsel’s performance was deficient, an applicant must show ‘counsel’s representation fell below an objective standard of reasonableness.’” Smalls v. State, 422 S.C. 174, 818, 810 S.E.2d 836, 840 (2018). “[C]ounsel’s strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy.” Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). “Under certain circumstances, [] counsel may employ a strategy of not objecting—even when counsel has a good argument for exclusion—if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration.” Id. at 383, 798 S.E.2d at 568. “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.” Id. at 384, 798 S.E.2d at 569.

The appellate courts of our state have repeatedly held that making a pre-trial motion to exclude or suppress evidence does not preserve the issue for appellate review because a ruling on a pre-trial motion is not a final determination. Therefore, the party challenging the evidence **must** make a contemporaneous objection when the evidence is introduced at trial to preserve the matter for review. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840(2001); State v. Wood, 362 S.C. 520, 526, 608 S.E.2d 435, 438-439 (Ct. App. 2004); State v. Moses, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010). Two exceptions to this rule exist. The first exception “is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence. The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there

is no basis for the trial court to change its initial ruling.” State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021). The second exception to the contemporaneous objection requirement occurs “where a court rules after a hearing on a constitutional issue. Under those circumstances, the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review.” Id.

Neither exception to the preservation rules was applicable in the present case. The evidence involving the collateral injuries to Child was introduced for the first time with the third witness, not directly after the judge denied the motion and the issue was not one of constitutional law. Therefore, trial counsel was required to contemporaneously object to the admission of the evidence when the State elicited the testimony at trial. The failure to object and obtain a ruling on the key evidentiary issue in the case was deficient performance.

Notably, deficiency was established in this matter when, on direct appeal, the Court of Appeals held that the issue of the admission of Child’s collateral injuries was not preserved for review because trial counsel did not make a contemporaneous objection when the State offered the evidence at trial. The Court of Appeals further noted that the trial court could not have made a pre-trial ruling purely on the motions, further highlighting the necessity of counsel to make a contemporaneous objection, writing

Rather, in denying Rivers's motion to exclude evidence of the victim's other injuries, the trial court stated, “These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases.” Although Rivers argued in his pre-trial memoranda that “[e]vidence of alleged prior child abuse is inadmissible where there is no evidence that the [d]efendant inflicted the previous injuries,” **the trial court's ruling that “child cases are getting a little different treatment” does not indicate it considered whether there was any evidence connecting Rivers to these injuries. Moreover, Rivers never objected or requested clarification from the trial court regarding its ruling. We further note that at the time of the pre-trial hearing,**

there had been no evidence presented as to who was responsible for the victim's other injuries. The parties had not proffered any testimony on this issue, and they had not submitted any affidavits indicating the evidence they intended to present at trial. Thus, the trial court could not have made a pre-trial ruling as to whether there was any evidence connecting Rivers to the victim's other injuries.

State v. Rivers, 411 S.C. 551, 554, 769 S.E.2d 263, 265 (Ct. App. 2015).

At the PCR hearing trial counsel did not offer a valid strategy for his failure to object. Tellingly, counsel thought that the trial court's ruling denying his motion was a final ruling sufficient for appellate review. Trial counsel did not fail to object because he perceived some benefit in allowing the evidence in, he failed to object because he was unaware of the rules of error preservation at the time of Rivers' trial. This was deficient performance which resulted in significant prejudice to Rivers.

Prejudice

To prove prejudice, an appellant must show a "reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting Strickland, 466 U.S. at 695). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing Strickland, 466 U.S. at 694). In making the determination of whether a PCR applicant met their burden, "we must consider the totality of the evidence before the jury." Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (footnote omitted). "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696.

The PCR court found that Rivers did not suffer prejudice because the evidence of the collateral injuries was properly admitted. The PCR court also found that Rivers' own statements

and testimony established the “extreme indifference” element of homicide by child abuse, therefore Rivers could not suffer prejudice as a result of the admission of the evidence. As the Court of Appeals held, the record does not support the PCR court’s finding.

Evidence of collateral injuries in Homicide by Child Abuse cases is considered prior bad act evidence. The jurisprudence surrounding the admission of prior bad act evidence has been firmly established in South Carolina for decades. “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923) (indicating that the admission of prior bad acts creates propensity evidence that has “the inevitable tendency ... to raise a legally spurious presumption of guilt in the minds of the jurors”). “It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Rule 404(b), SCRE. “To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). “Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established.” Id. at 24, 664 S.E.2d at 483. “Further, even though the evidence falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

There are three hurdles that the State must overcome before prior bad act evidence can be admitted. First, the State must prove the prior bad act was the subject of a prior conviction or that the prior bad act was committed by the defendant through clear and convincing evidence. Second, the State must articulate a logical connection between the prior act and at least one of the five

exceptions listed in Rule 404(b), SCRE. Finally, if both of those hurdles are crossed, the trial court must conduct an analysis under Rule 403, SCRE, to determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. At Rivers' trial, the State failed to overcome the first hurdle, therefore the evidence was not admissible. There was no evidence entered at trial that connected the collateral injuries of Child to Rivers, and prior counsel for the State even admitted during oral argument on direct appeal⁵ of this matter that there was no evidence Rivers caused the collateral injuries to Child. The State wholly failed to present any proof, much less clear and convincing proof, connecting Rivers to the collateral injuries but used evidence of those injuries to convict and incarcerate him for his natural life. The admission of the collateral injuries to Child was both improper and highly prejudicial.

The Court of Appeals correctly held that the admission of the evidence of collateral injuries was prejudicial because there was not a nexus between the collateral injuries, conduct by Rivers, and Child's death such that the evidence could relevantly establish Rivers' intent. The Court of Appeals also noted that the injuries related to asphyxia are "separate and chronologically distinct from other collateral injuries," indicating that the evidence did not serve to rebut the defense of accidental smothering while sleeping. Rivers v. State, Op. No. 2023-UP-261 at *3 (S.C. Ct. App. filed July 12, 2023). Further, the evidence of collateral injuries was not entered "explicitly" to support the finding of Battered Child Syndrome as the evidence was initially admitted through two witnesses who made no such connection.

Petitioner primarily relies upon State v Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991), and Estelle v. McGuire, 502 U.S. 62 (1991), to argue that evidence of collateral injuries is essentially

⁵ Audio of Oral Argument in State v. Mitchell Rivers, Appellate Case No. 2011-186026 dated January 8, 2015 at 18:49 – 21:36.

per se admissible in Homicide by Child Abuse cases, regardless of whether the evidence of prior injuries can be connected to the defendant. Petitioner then cites various cases from various other jurisdictions to support its proposition and wholly ignores the jurisprudence of our State. In every Homicide by Child Abuse case prosecuted in South Carolina where there was evidence of collateral injuries admitted, the appellate courts affirmed the conviction **only** where the State was able to show, by clear and convincing proof, that the defendant was connected to those prior injuries. *Compare* State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) (holding evidence of child’s previous injuries was inadmissible absent conviction or clear and convincing proof that defendant inflicted the prior injuries); State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008) (holding clear and convincing evidence did not show that defendant placed child victim in attic or handcuffed victim to a bed, and thus evidence was inadmissible under other-acts rule); *with* State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011) *overruled on other grounds by* State v. Smith, 406 S.C. 215, 705 S.E.2d 612 (2013) (holding evidence of “other acts” admissible where the record supported the trial judge’s ruling that the evidence was clear and convincing that Smith committed the “other acts”); State v. Cook, 440 S.C. 308, 891 S.E.2d 35 (Ct. App. 2023) (holding that there was clear and convincing evidence in the record that supported admission of prior bad act evidence that minor’s prior arm injury was caused by Cook). Petitioner fails to acknowledge that the appellate courts of our State have never relied upon Estelle⁶ for the proposition that evidence of prior injuries or Battered Child Syndrome evidence is admissible, regardless of whether it can be connected to the defendant.

⁶ Estelle has been cited by ten cases in South Carolina, most frequently for its holding on the propriety of jury instructions. It has been cited by the Dissent in one Homicide by Child Abuse, State v. Pierce, 326 S.C. 176, 485 S.E.2d 813 (1997).

Notably, neither Lopez nor Estelle created a rule that evidence of collateral injuries or evidence of Battered Child Syndrome is automatically admissible – the cases set forth the proposition that the evidence is generally **relevant** and therefore admissible subject to the rules of evidence and case law of a particular jurisdiction. Further, in both cases, there was clear and convincing proof offered by the State that the defendants had caused the prior injuries. In Lopez, the defendant's other minor stepchildren testified to the abuse of the minor victim that they witnessed; in Estelle, both a neighbor and the defendant's wife offered testimony of prior instances of rough treatment at the hands of the defendant.

The State repeatedly asserts in its petition that the evidence was not introduced to establish the identity of the perpetrator but to disprove accident or mistake and establish intent. However, as the Court of Appeals correctly held, the evidence fails to establish the intent of Rivers and the collateral injuries are distinct and separate from the ultimate cause of death such that they do not rebut the defense of accident or mistake. The jurisprudence is clear that evidence of this nature must be connected to the accused to be admissible. The State did not submit clear and convincing evidence connecting Rivers to the prior injuries. Trial counsel failed to object and obtain a final ruling on this issue, precluding it from appellate review. Rivers has established prejudice in this matter.

Sufficiency of Remaining Evidence

Rivers' own statements do not lessen the prejudice he suffered by trial counsel's failure to object to and obtain a ruling on the admissibility of the collateral injuries. The State avers that Rivers' statements that after he revived his child, he placed him in the play pen and went outside to do yardwork, meet the definition of extreme indifference within the Homicide by Child Abuse statute. However, our appellate courts have defined extreme indifference to human life in

Homicide by Child Abuse cases to be when a “defendant displays sheer apathy in the face of a life-threatening situation to a child.” State v. Thompson, 420 S.C. 192, 209, 802 S.E.2d 623, 631 (Ct. App. 2017) (finding extreme indifference where a mother failed to help her child bleeding out through a shirt); State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) (finding extreme indifference when a mother left her child at her residence knowing that he would be killed).

In the case *sub judice*, Rivers did not act with sheer apathy. He performed CPR and made sure Child had started breathing again, and that Child’s color had returned. He believed he had done what was necessary to save Child’s life at that time. As the Court of Appeals wrote,

“There is a stark difference between **failing to act when doing so would prevent certain death, and negligently failing to follow up with additional care after an action which would have prevented death based on a mistaken belief that a child is no longer in danger.** Thus, in the absence of the prior-bad-acts evidence, there is a reasonable probability that a jury could have had a reasonable doubt that Rivers exhibited an “extreme indifference to human life,” integral to a finding of HCA.”

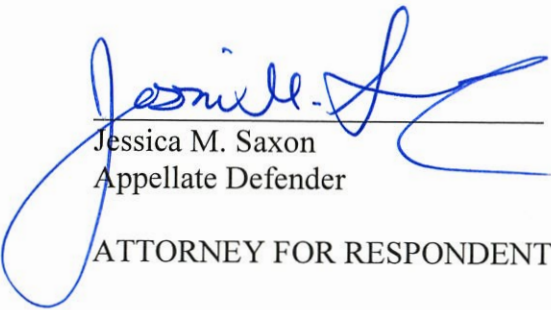
Rivers v. State, Op. No. 2023-UP-261 at *4 (S.C. Ct. App. filed July 12, 2023) (emphasis added).

Further, the State concedes the lack of evidence to support a conviction by stating Rivers may have been by trial counsel’s reliance on Judge Burch’s statement that he was protected “as the other evidence to refute Rivers’ accident defense is limited.” Pet. pg. 17.

Rivers has shown both deficient performance and prejudice which is supported by the record. The remaining evidence was not sufficient, by itself, to support a conviction for Homicide by Child Abuse. This Court should uphold the opinion of the Court of Appeals and deny certiorari.

CONCLUSION

Based on the foregoing arguments, this Court should deny the Petition for Writ of Certiorari and uphold the opinion of the Court of Appeals finding Rivers received constitutionally ineffective assistance of counsel. Should this Court grant the Petition, Respondent respectfully requests to more fully brief the issue in this case.



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Appellate Defender
ATTORNEY FOR RESPONDENT

This 2nd day of January, 2024.