

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari
to Lancaster County
Brian Gibbons, Trial Judge
Daniel Hall, PCR Judge

Appellate Case No. 2023-000224

RECEIVED

Jan 08 2024

S.C. SUPREME COURT

DEMARIO THOMPSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION
FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Petitioner's Questions

1. Did the PCR court err in ruling trial counsel was effective when he failed to conduct any investigation concerning prior damage to the apartment door when informed by both the petitioner and victim the door was already damaged and broken prior to petitioner's alleged forcible entry to commit burglary?
2. Did the PCR court err in finding trial counsel did not have a duty to object to the testimony of the responding officer that petitioner's girlfriend had been strangled based solely upon his lay opinion as to the cause of marks on her neck?

Respondent's Counterstatement of Questions

- I. Did the PCR court properly find Petitioner did not prove counsel was ineffective for failing to investigate prior damage to the door when (1) counsel articulated a valid reason for not investigating in that introducing evidence of the prior damage could open the door to evidence of a prior altercation between Petitioner and Victim, and (2) Petitioner did not show a reasonable likelihood the outcome would have been different if evidence of the prior damage was introduced at trial?
- II. Did the PCR court properly find Petitioner did not prove counsel was ineffective for not objecting to Deputy Silberman's testimony when Petitioner did not articulate an objection that would have excluded this testimony and it is not reasonably likely an objection would have changed the outcome?

STATEMENT OF THE CASE

Procedural History

Petitioner is confined in the South Carolina Department of Corrections serving a fifteen-year-sentence. In October 2014, the Lancaster Grand Jury indicated Petitioner for attempted murder (2014-GS-29-1322), first-degree burglary (2014-GS-29-1321), two counts of pointing and presenting a firearm, and possession or display of a firearm or knife during the commission of a violent crime. These charges arose after Petitioner entered the apartment of his girlfriend, Keasha Drafton (Victim), and they got into an argument, resulting in Victim and a neighbor calling 911.

On January 5-6, 2015, Petitioner proceeded to a jury trial before the Honorable Brian M. Gibbons. Petitioner was represented by T. Brandon Steen. Assistant Solicitor Andy Cook prosecuted the case. After the State rested, the court granted Petitioner's directed verdict motion on both pointing and presenting charges. The jury convicted Petitioner of first-degree burglary and, on the attempted murder indictment, the lesser-included offense of third-degree assault and battery. The jury acquitted Petitioner of the remaining weapon charge. Judge Gibbons sentenced Petitioner to fifteen years for first-degree burglary and time-served for assault and battery.

Petitioner filed a timely notice of appeal, which was perfected by Appellate Defender John Strom. On appeal, Petitioner argued the trial court erred in (1) admitting a trespass notice letter into evidence, (2) admitting a 911 call into evidence, (3) denying his motion for a directed verdict on first-degree burglary, and (4) denying his motion for a new trial. The Court of Appeals affirmed on the merits. State v. Thompson, 420 S.C. 386, 803 S.E.2d 44 (Ct. App. 2017). Petitioner filed a petition for rehearing, which was denied. Thereafter, Petitioner petitioned for a writ of certiorari to the Supreme Court of South Carolina. The Supreme Court initially granted certiorari but later

dismissed it as improvidently granted. The remittitur was sent April 3, 2019.

On April 8, 2020, Petitioner filed this application for PCR.¹ On September 2, 2022, an evidentiary hearing convened before the Honorable Daniel D. Hall. Petitioner was represented by Tommy Thomas, Esquire. Assistant Attorney General Danielle Dixon represented the State. Petitioner testified at the hearing and called as a witness his trial attorney T. Brandon Steen, Esquire. On October 28, 2022, Judge Hall issued an order denying relief and dismissing Petitioner's application with prejudice.

Trial

During trial, Deputy Rueben Silberman testified he responded to a disturbance call at an apartment complex between 4:00 and 5:00 a.m. on July 2, 2014. When he arrived, he spoke with Victim, who was very upset. Deputy Silberman averred Victim had been in a physical altercation, explaining she had wounds on her head and neck and her clothes were torn. Deputy Silberman also noticed Victim's apartment door had been kicked in and was hanging off the hinges; he took pictures of the door, which were entered into evidence. Petitioner was not present, but Deputy Silberman spoke with Victim's neighbors. (App. 52-61).

Dominique Huff testified he lived across the hall from Victim and was in his apartment the morning of July 2, 2014, when he heard a disturbance coming from Drafton's apartment. He went outside and saw Victim's apartment door hanging off the hinges. Huff stated it was dark inside the apartment, but he heard "a whole bunch of commotion." He initially returned to his apartment but heard someone yell "he had a gun," so Huff grabbed his gun and went back outside. Huff testified he saw Petitioner downstairs arguing with another neighbor. He also saw Victim come out of her

¹ The State filed a motion to dismiss, which was denied after the Court found equitable tolling should apply pursuant to Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017).

apartment crying hysterically. (App. 62-70).

Jamie Hunt, who lived with Huff, recalled waking early on the morning of July 2, 2014, after hearing “the disturbance and someone kicking in doors and stuff.” She testified Huff went outside and then returned and told her to call 911. (App. 71-73).

Janice Sager, Victim’s apartment complex manager, testified Petitioner had never been a resident. She testified she prepared a letter on March 18, 2014, advising Victim that Petitioner was banned from the complex. (App. 73-76). The letter was entered into evidence over objection.

Victim did not appear at trial. Over objection, the State entered a 911 call placed the night of the incident. (App. 77-83). In the call, the caller identified herself as Victim and Petitioner as the perpetrator, and stated Petitioner had a gun. Ultimately, Petitioner was convicted of first-degree burglary and third-degree assault and battery.

PCR Testimony

At the PCR hearing, Petitioner testified Victim was his girlfriend, and her door was damaged prior to the incident giving rise to the burglary charge. Petitioner explained police had kicked in the door after being notified of a prior altercation involving Petitioner and Victim. He averred trial counsel should have obtained the incident report to show the door was previously damaged. (App. 189-91). Petitioner maintained he did not damage the door on the night of the incident giving rise to the burglary charge. (App. 190-91).

Petitioner recalled reviewing the discovery with trial counsel. (App. 190). He testified he did not plead guilty because he was told the trial would not go forward if Victim did not appear, and Petitioner’s understanding was Victim was not going to appear. He explained Victim did not want the case to be prosecuted and had signed a document to that effect. (App. 191-94). Petitioner also contended he was charged with the wrong offense; he believed malicious injury to property

and possibly assault and battery were the appropriate charges. (App. 194-95). When asked why he believed malicious injury to property would be appropriate, he replied, “[the door] was already messed up when I was hitting on it.” (App. 205-06). Petitioner acknowledged Victim told him to leave that night. He also acknowledged telling the trial court during sentencing that Victim would not let him into the apartment. When asked what he did when she did not let him in, Petitioner stated he “[k]ept beating on the door, then it came off.” (App. 207).

Trial counsel testified he was appointed to represent Petitioner shortly after Petitioner was arrested and had ample time to prepare for trial. (App. 208). He stated Victim called him frequently because she wanted the charges dropped, but she never said the incident did not occur. (App. 209, 225). Counsel’s strategy was to attempt to keep Victim’s statements out. (App. 209).

Trial counsel stated he did not further investigate the broken door because Victim told him the door had been kicked in during a prior altercation with Petitioner. He did not recall Petitioner raising this issue with him. (App. 210-11). Trial counsel acknowledged the State presented evidence and made argument about the door being kicked in.

Trial counsel acknowledged he did not object when Deputy Silberman testified, “I took a picture to show that there was a wound on her neck, it appeared to be the result of some sort of strangulation.” (App. 59-60; 214-16). Trial counsel agreed the 911 call was the strongest evidence. (App. 217-19; 221-22). Trial counsel believed he did everything he could to keep out the 911 call. He stated he also challenged the introduction of the no-trespass letter. (App. 223).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court properly found Petitioner did not prove counsel was ineffective for failing to investigate prior damage to the door when (1) counsel articulated a valid reason for not investigating in that introducing evidence of the prior damage could open the door to evidence of a prior altercation between Petitioner and Victim, and (2) Petitioner did not show a reasonable likelihood the outcome would have been different if evidence of the prior damage was introduced at trial.

Petitioner asserts trial counsel was ineffective for failing to investigate the prior damage to Victim's door after being informed by Petitioner and Victim that the door was damaged by police a few weeks prior. (Pet. 5-6). Petitioner asserts counsel did not assert a valid strategy by not wanting to "open the door" to a prior altercation between Petitioner and Victim because no charges were filed in that incident and police damaged the door. (Pet. 6-7). Petitioner further avers he was prejudiced by counsel's failure to investigate because the damage to the door was central to the State's case. (Pet. 9-11). However, the PCR court properly found counsel articulated a valid reason for not further investigating the damage to the door in that introducing such evidence could open the door to a prior altercation involving Victim and Petitioner. (App. 244). Further, Petitioner did not introduce any evidence at the PCR hearing—other than his own self-serving testimony—that the door had been damaged by law enforcement. Thus, Petitioner did not prove deficiency or prejudice.

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel, Applicant must prove "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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the

two-pronged test outlined in Strickland. First, Applicant must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. To prove prejudice, an applicant must show “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, 386 S.E.2d at 625.

A. Counsel articulated a valid reason for not further investigating the damage when introducing evidence of the prior damage could open the door to evidence of a prior altercation between Petitioner and Victim.

The PCR court properly found counsel articulated a valid strategy in not wanting to draw attention to a prior altercation between Petitioner and Victim. “Courts must be wary of second-guessing counsel’s trial tactics.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). When counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). If counsel articulates a valid strategy, “it is measured under an objective standard of reasonableness.” Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690). Additionally, “[a] fair assessment of attorney performance

requires that every effort be made to eliminate the distorting effects of hindsight.” Weldon v. State, 436 S.C. 69, 81, 870 S.E.2d 183, 189 (Ct. App. 2021) (quoting Strickland, 466 U.S. at 689).

Here, the PCR court correctly determined counsel articulated a valid trial strategy for not further investigating damage on Victim’s door. Counsel testified Victim told him the door was previously damaged during an argument between her and Petitioner. Counsel elaborated that if evidence of the prior damage to the door was introduced at trial, “that opens the door for a lot of other things since [Petitioner] was the other participant in the situation with the door being caved in.” (App 210). Counsel’s reason for not further investigating and introducing evidence of the damage to the door was reasonable under prevailing professional norms. Had counsel introduced evidence of the door’s prior damage at trial, it would have opened the door to evidence of a prior altercation involving Petitioner and Victim. This would *not* have been a reasonable strategy.

In his petition, Petitioner attempts to undercut the reasonableness of counsel’s stated strategy by minimizing the prior altercation and claiming it was only verbal. (Pet. 7). However, Petitioner by his own testimony described it as an *altercation that led to the neighbors calling the police*. (App. 203). He further admitted that due to the frequency of altercations between him and Victim, Victim’s landlord had threatened to evict her if Petitioner continued to visit her apartment. (App. 203). This is not a minimal incident, and introducing evidence of prior altercations between Victim and Petitioner would have *strengthened* the State’s case—not undermined it.

Notably, as part of his strategy, counsel challenged the introduction of the no-trespass letter based on relevance, hearsay, prior bad act, and unfair prejudice. Had counsel then sought to introduce evidence that could reasonably lead to the introduction of a prior altercation between Victim and Petitioner, it would have undermined his strategy of keeping out evidence of prior bad acts. In short, it strains credibility to suggest evidence that could open the door to a prior altercation

between Petitioner and Victim should have been introduced—especially here where Petitioner faced charges of both first-degree burglary and attempted murder. Thus, counsel’s failure to further investigate this prior altercation—which prompted a phone call to police—was reasonable under prevailing professional norms.

Further, the PCR court found credible counsel’s testimony that Petitioner never asked counsel to investigate the damage done to Victim’s door, and this Court should defer to that finding. See Foye, 335 S.C. at 589, 518 S.E.2d at 267 (providing great deference should be given to the trial court “[w]here matters of credibility are involved”). Here, counsel testified he was aware that the door had been damaged during a prior altercation between Petitioner and Victim, but he did not recall Petitioner asking him to further investigate the door.² (App. 210-11). Based on this testimony, coupled with counsel’s valid strategy of not wanting to open the door to evidence of a prior altercation between Petitioner and Victim, the PCR court properly found Petitioner did not prove deficiency.

B. Petitioner failed to show prejudice because it is not reasonably likely the outcome would have been different had evidence of the prior damage to the door been introduced at trial.

Petitioner alleges the State’s case centered around Petitioner’s “violence” to Victim’s door, and the jury would have evaluated his intent to commit first-degree burglary differently had evidence of the prior damage to the door been admitted. (Pet. 9, 11). However, the PCR court properly found it was not reasonably likely the outcome would have been different had Petitioner presented evidence of prior damage to the door when the only evidence before the PCR Court

² Assuming arguendo Petitioner *did* ask counsel to further investigate damage to the door—which the PCR court did *not* find—counsel’s decision to not further investigate based on his stated strategy of not wanting to open the door to evidence of the prior altercation was reasonable under prevailing professional norms and not deficient.

showed that damage arose from a prior altercation between Petitioner and Victim. (App. 245).

Critically, counsel testified the damage to the door did not matter when analyzing the elements of first-degree burglary because even if Petitioner had not damaged the door, he still entered Victim's apartment without consent.³ (App. 220-21). Thus, it is not reasonably likely Petitioner would have been acquitted of first-degree burglary had counsel introduced evidence that the door had previously been damaged—especially considering the damaging nature of Victim's 911 call.⁴

Additionally, had Counsel brought up the prior damage to the door, it would have opened the door to evidence about the prior altercation between Petitioner and Victim, which would have damaged Petitioner's defense. Counsel's strategy was to keep out adverse testimony. (App. 209-10; 225). Had evidence of the prior damage been admitted, it could have reasonably led to evidence of Petitioner and Victim's prior altercation, which would have compounded the State's evidence against Petitioner.

Finally, and importantly, Petitioner did not introduce at the PCR hearing any evidence—other than his own self-serving testimony—of what counsel would have uncovered upon further investigation related to the door that would have reasonably changed the outcome of trial. Specifically, Petitioner did not enter the police report itself or testimony from law enforcement that they—and not Petitioner—caused the damage to the door. Thus, he did not prove this critical claim that his argument rests upon (i.e. that law enforcement damaged the door). In the absence of any evidence (other than Applicant's self-serving testimony) that law enforcement damaged the

³ Petitioner admitted he did not have Victim's consent to enter the apartment both during sentencing and again at the PCR hearing. (App. 152-53, 207).

⁴ This call was admitted and played at the PCR hearing. Respondent requests this Court listen to the call, as it is especially probative in evaluating this issue.

door, the evidence shows only that the door was damaged during a prior altercation involving Petitioner and Victim. Petitioner failed to show a reasonable likelihood that the outcome would have been different had counsel further investigated this damage and thus failed to show prejudice.

II. The PCR court properly found Petitioner did not prove counsel was ineffective for not objecting to Deputy Silberman’s testimony because Petitioner did not articulate an objection that would have excluded this testimony and it is not reasonably likely an objection would have changed the outcome.

Petitioner alleges the PCR court erred by determining Deputy Silberman’s testimony regarding Victim’s injuries was proper. Petitioner further alleges counsel should have objected because this testimony was improper opinion testimony, and counsel’s deficiency prejudiced Petitioner because the State continuously argued that Victim was strangled. (Pet. 12-15). However, the PCR court properly found Deputy Silberman’s testimony was proper lay testimony under Rule 701, SCRE, and Petitioner failed to show deficiency and prejudice. (App. 245).

A. Petitioner did not prove deficiency because he did not articulate an objection that would have excluded this testimony.

Petitioner did not prove counsel was deficient because he did not articulate an objection that would have excluded this testimony. In asserting counsel should have objected, Petitioner merely asserts this testimony did not meet the requirements of Rule 701, SCRE. However, Petitioner never actually cites the language of Rule 701 or analyzes the testimony under this Rule. Rather, Petitioner loosely relies on an out-of-circuit case that is distinguishable. Petitioner thus failed to meet his burden of proof.

If the witness is not testifying as an expert, the witness testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience , or training. is limited to “opinions or inferences which (a) are rationally based on the

perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE. “Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury.” State v. Williams, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996). “Some statements are not mere opinions but are impressions drawn from collected, observed facts.” Id. at 464, 469 S.E.2d at 54. “A natural inference based on stated facts is not opinion evidence.” Id.

Here, the PCR court properly found this testimony was admissible under Rule 701, SCRE. At trial, Deputy Silberman testified he responded to the 911 call and spoke with Victim, who “was very upset” and “appeared to have a wound on her head, wound on her neck, [and] her clothes were torn.” (App. 53-54). When asked why he took a picture of Victim from a certain angle, he replied, “I took the picture to show that there was a wound on her neck, *it appeared* to be the result of some sort of strangulation.” (App. 59-60, emphasis added).

Deputy Silberman’s foregoing testimony was rationally based on his perception, was helpful to a clear understanding of his testimony, and did not require special knowledge, skill, experience, or training. Critically, Deputy Silberman testified he took a picture of what *appeared* to be a strangulation. He did not testify Petitioner had in fact been strangled or otherwise elaborate on the cause of the injury. Deputy Silberman’s testimony that he observed an injury that *appeared* to be a strangulation is an impression drawn from collected, observed facts. It is a natural inference to conclude an injury to a persons’ neck could be caused by strangulation. Thus, the PCR court properly found this testimony admissible under Rule 701, SCRE.

Petitioner’s reliance on Kirk v. State, 160 So. 3d 685 (Miss. 2015)—an out-of-state case—is misplaced. Kirk dealt with an officer providing lay-opinion testimony to show that the defendant

satisfied specific elements of the crime charged. In Kirk, the defendant was indicted for aggravated domestic violence, and his indictment specifically alleged that he strangled or attempted to strangle his wife. Id. at 693. An officer testified at trial that the defendant’s wife had strangulation marks on her neck and that her injuries were ““things that could happen in a strangulation to the neck.”” Id. at 692. The Mississippi Supreme Court found the officer could testify the wife had marks on her neck because this was related to the officer’s observations. Id. However, the officer could not testify that the defendant’s wife was strangled because “an issue to be determined at trial was whether the injuries sustained by Casey were caused by strangulation.”⁵ Id. Here, unlike Kirk, strangulation is not an element of any of the crimes Petitioner was charged with. Petitioner was charged with first-degree burglary, attempted murder, and three charges involving a firearm. None of the elements for any of these charges require the accused to strangle or attempt to strangle a victim. Thus, Kirk differs greatly from Petitioner’s case.

Ultimately, Deputy Silberman’s testimony that he took a picture of what *appeared* to be a strangulation mark was permissible under Rule 701, especially when (1) Deputy Silberman did not testify the mark was actually caused by strangulation, and (2) strangulation was not an element of any offense for which Petitioner was charged. Petitioner did not set forth any valid legal objection counsel should have raised to this testimony that would have excluded this testimony. Thus, the PCR court properly concluded Petitioner did not prove deficiency.

⁵ The Court noted the officer’s testimony relating to whether the defendant’s wife had been strangled “constituted the sort of testimony properly reserved to an expert” because the strangulation was an issue to be decided by the jury. Id.

B. Petitioner failed to show he was prejudiced by counsel's failure to object to Deputy Silberman's testimony.

The PCR court properly found Petitioner failed to prove prejudice from counsel's failure to object to Deputy Silberman's testimony. Initially, the PCR court properly found the testimony was proper under Rule 701, SCRE—making it not reasonably likely any objection would have excluded the testimony. More critically, however, Petitioner was *acquitted* of the attempted murder charge and convicted of the lesser-included offense of *third-degree* assault and battery. Here, where Petitioner was acquitted of attempted murder and was not convicted of the lesser-included offenses of assault and battery of a high and aggravated nature (which requires great bodily injury" or an act "accomplished by means likely to produce death or great bodily injury"); first-degree assault and battery (which requires an offer or attempt to injure another person "accomplished by means likely to produce death or great bodily injury"); and second-degree assault and battery (which requires moderate bodily injury or injury an act that could have caused moderate bodily injury), it strains credibility to suggest that the jury determined that Petitioner did, in fact, attempt to strangle Victim. Thus, it is not reasonably likely any objection to this testimony would have changed the outcome.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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This 8th day of January, 2024