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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to the Court of Common Pleas
Appeal from Lexington County
Honorable Courtney Clyburn Pope, Circuit Court Judge
Appellate Case No. 2021-001217

RAPHAEL LAMARR PONTOO,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON CERTIORARI

“Did the PCR err finding trial counsel was not ineffective for failure to request the trial court include the element ‘in the absence of mitigating circumstances’ in its charge for failure to stop for a blue light resulting in death where there was mitigating evidence presented to the jury and where this Court, on direct appeal, found the issue was not preserved for appellate review?”

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief judge correctly determine Pontoo’s defense counsel was not constitutionally ineffective for failing to ask the trial judge to include the “in the absence of mitigating circumstances” language in the jury charge on failure to stop for a blue light resulting in death when: (1) that particular statutory language was not an element of the offense; and (2) the trial judge’s instructions as a whole properly and sufficiently conveyed to the jury the law—including the law on the affirmative defense of duress—that was applicable to the case based on the evidence presented such that Pontoo could not have suffered any resulting prejudice under the circumstances involved?

STATEMENT OF THE CASE

In January of 2014, Petitioner Raphael Lamarr Pontoo was arrested following an investigation into an armed robbery and subsequent high-speed vehicle chase that ended in a fatal crash. In June of 2014, the Lexington County Grand Jury indicted Pontoo for armed robbery and failure to stop for a blue light resulting in a death. On January 26, 2015, a jury trial was commenced in the Lexington County Court of General Sessions with the Honorable Thomas A. Russo, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Pontoo as indicted. Following the verdict, the trial judge sentenced Pontoo to consecutive terms of imprisonment of ten years for armed robbery and twenty years for failure to stop for a blue light resulting in a death. Pontoo then timely filed and perfected an appeal.

On appeal, the Court of Appeals—following briefing and oral argument—issued an unpublished opinion in which it unanimously affirmed Pontoo’s convictions. State v. Pontoo, Op. No. 2015-UP-467 (S.C. Ct. App. filed Dec. 28, 2017). Thereafter, on January 16, 2018, remittitur was issued.

Subsequent to the issuance of the remittitur, Pontoo timely filed an application for post-conviction relief (“PCR”), and, in response, the State filed a return, partial motion to dismiss, and request for a more definite statement. Pontoo—through counsel—then filed several amendments to the PCR application. On July 2, 2021, an evidentiary hearing was conducted in the Lexington County Court of Common Pleas with the Honorable Courtney Clyburn Pope, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement. Thereafter, through an order dated September 22, 2021, the PCR judge denied and dismissed Pontoo’s PCR application. Pontoo then timely filed a notice of appeal.

After initiating his appeal, Pontoo filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to the Court of Appeals. Subsequently, on August 18, 2023, the Court of Appeals granted the petition.

STATEMENT OF FACTS

Summary of Pontoo's Crimes and the Results of the Ensuing Investigation

In the early morning hours of January 24, 2014, Jonathan Ruple was hanging out with a friend at the Mile High Club, a bar located in West Columbia, when he decided to show his friend his new Hi-Point nine-millimeter pistol. (App'x p. 71; p. 73; pp. 253-254). The two headed out to the bar's parking lot, and Ruple retrieved the pistol from a book bag stowed in the trunk of his car. (App'x p. 73; pp. 254-255). At that point, two men, including one who had dreadlocks and was wearing a black t-shirt, light-colored jeans, and a green puffy jacket, approached Ruple and his friend, and the man with dreadlocks introduced himself as "Los" before striking up a conversation with the pair. (App'x p. 72; pp. 75-76; pp. 255-256; p. 259). During the conversation, Ruple and the others discussed a wide variety of topics, and Ruple showed the men his gun. (App'x p. 74; p. 256). In return, "Los" showed Ruple a .22-caliber revolver he indicated he had obtained earlier that day, and his companion showed Ruple a chrome-plated .25-caliber pistol. (App'x p. 74; pp. 256-257; p. 263). The men then continued to converse with one another for roughly ten to fifteen minutes before Ruple put his pistol back into his book bag, secured the bag on the front passenger's seat of his vehicle, and re-entered the bar with his friend. (App'x p. 75; pp. 257-258; pp. 260-261).

Over the course of the next hour or two, Ruple socialized and drank with his friend inside the bar while "Los" and four of his companions hung out by themselves nearby. (App'x p. 78; pp. 260-261; p. 273). As the night wound down, Ruple decided to head home, and, when he walked towards the exit, "Los" stopped him and asked him where he was going. (App'x p. 80; p. 262). In response, Ruple told "Los" he was going home and then exited the bar, chatted outside with his friend for a few minutes, and got into his car to leave. (App'x p. 80; p. 262). At that

moment, “Los” approached Ruple’s car from the passenger’s side, knocked on the window, and briefly talked with Ruple about a set of vehicle rims. (App’x p. 81; pp. 262-263). Then, “Los” suddenly stuck his hand into Ruple’s vehicle, grabbed the book bag that contained Ruple’s gun, and took off running. (App’x p. 81; p. 263).

In response, Ruple speedily chased after “Los” and caught him as he tried to get into a vehicle parked nearby. (App’x pp. 81-82; p. 263). The two briefly fought over the book bag before “Los” pulled out his revolver and pointed it at Ruple’s face. (App’x p. 82; p. 263). At that point, Ruple immediately threw up his hands in surrender, and “Los” got into the nearby vehicle and sped away from the area with Ruple’s bag. (App’x p. 83; pp. 264-265). However, as “Los” fled, Ruple was able to take down the license tag number of the getaway vehicle, and he quickly reported the robbery to the authorities along with a description of the robber’s vehicle. (App’x p. 83; pp. 125-126; p. 142; p. 163; p. 264).

Shortly thereafter, Trooper Brandon Lee of the South Carolina Highway Patrol spotted a vehicle matching the description and license tag number of the vehicle involved in the armed robbery, and he pulled the vehicle over to the side of the road. (App’x pp. 125-128; pp. 130-131). He then drew his weapon, requested back-up from his fellow officers, and began ordering the occupants out of the vehicle one at a time starting with the driver. (App’x p. 128; p. 132). While he was doing so, an individual seated in the rear of the vehicle on the driver’s side repeatedly opened his door and had to be commanded to remain in the vehicle. (App’x pp. 133-134). That individual then stayed in the vehicle while the driver, Carlisle Jones (“Carlisle”), and two of the other passengers, Iquawn Jones (“Iquawn”) and Patrick Johnson, exited the vehicle

and were secured.¹ (App'x pp. 132-134; pp. 282-283; p. 289; p. 313; pp. 316-318; pp. 347-348; p. 371). At that point, one of the individuals remaining in the vehicle suddenly jumped into the driver's seat and sped off, and several officers at the scene quickly pursued. (App'x pp. 134-135; pp. 142-143; p. 283).

Over the course of the next few minutes, the driver of the vehicle led officers on a high-speed chase that reached speeds in excess of one-hundred miles per hour. (App'x pp. 143-144; p. 160). The chase continued until the driver, who had dreadlocks that were visible to the pursuing officers, lost control as he approached the intersection of two separate highways, and the vehicle veered off the road before crashing into a nearby wooded area. (App'x p. 136; pp. 145-146; pp. 152-153; pp. 163-164). The pursuing officers then quickly exited their vehicles and ran to the crash site. (App'x p. 137; p. 166). When they reached it, they found Pontoo pinned in the driver's seat by a tree branch that went through the vehicle's windshield along with another individual, Alexander Clemmons, unconscious and severely injured in a rear seat.² (App'x pp. 137-139; pp. 147-149; p. 171; pp. 176-177). Additionally, the officers observed a black Hi-Point nine-millimeter pistol resting on the front passenger's seat near Pontoo's outstretched hand, and that weapon was quickly secured. (App'x p. 149; p. 167; p. 169).

In the ensuing minutes, emergency medical personnel responded to the scene of the crash, and they rapidly transported Clemmons, who was unconscious and unresponsive, to a landing zone so he could be taken to a hospital by helicopter. (App'x pp. 175-178; pp. 190-192; pp. 194-195). As they waited for the helicopter, Clemmons's condition began to deteriorate, and paramedic Amanda Sucher from Lexington County Emergency Medical Services removed his

¹ Neither Carlisle, Iquawn, nor Johnson had dreadlocks at that time. (App'x p. 283; p. 304; pp. 374-377).

² At the time of the crash, Pontoo had dreadlocks and Clemmons had short, frizzy hair. (App'x p. 139; p. 145; p. 166; p. 191; pp. 194-195; pp. 200-201; p. 233).

clothing to aid in the provision of medical treatment. (App’x p. 173; pp. 179-181). Upon doing so, she discovered a handgun hidden behind Clemmons’s left knee. (App’x pp. 181-182; p. 192). Clemmons was then transported to the hospital by helicopter. (App’x p. 232).

Meanwhile, firefighters cut into the crashed vehicle to enable Pontoo’s removal, and Pontoo was rapidly transported to the hospital once he was extricated from it. (App’x p. 193; p. 197). Notably, while Pontoo received treatment at the hospital, a .22-caliber pistol fell out of his clothing. (App’x pp. 222-223; p. 229). That gun was then secured and subsequently turned over to the Lexington County Sheriff’s Office. (App’x p. 223). Likewise, officers also obtained Pontoo’s clothing from the hospital, which included a black t-shirt and light-colored jeans. (App’x p. 239-240).

A few days later, Clemmons succumbed to the traumatic head injuries he sustained in the crash and died. (App’x p. 232; pp. 234-235). Following that, Pontoo—upon being released from the hospital—was arrested for his involvement in the armed robbery and Clemmons’s death. (App’x p. 249).

Relevant Details from Pontoo’s Trial

During Pontoo’s ensuing trial on charges of armed robbery and failure to stop for a blue light resulting in a death, the law enforcement officers who responded to the report of the armed robbery testified about the details of the stop of the vehicle involved in that crime, the subsequent high-speed chase that followed the stop, and their discovery of Pontoo in the driver’s seat of the robber’s vehicle after it crashed. (App’x p. 11; pp. 125-139; pp. 142-153; pp. 163-169; pp. 281-285; pp. 288-290; pp. 637-638; pp. 640-641). Similarly, the medical personnel and other emergency responders involved in the case testified about their responses to the crash and the fatal injuries sustained by Clemmons as a result of that incident. (App’x pp. 173-173; pp.

187-201; pp. 231-235). Likewise, testimony was presented establishing a book bag and a Hi-Point nine-millimeter pistol were recovered from the scene of the crash while a .22-caliber revolver was recovered from the hospital after it fell out of Pontoo's clothing there. (App'x p. 149; p. 167; p. 169; pp. 204-205; pp. 222-223; p. 229).

In addition to the presentation of that testimony, Detective Todd Garrick from the Lexington County Sheriff's Office testified about his investigation into the crash and subsequent arrest of Pontoo for his role in the crimes. (App'x p. 236; p. 249). Likewise, Ruple testified about the details of the armed robbery that preceded the fatal crash, and he identified Pontoo in the courtroom as the robber. (App'x pp. 253-269). Beyond that, Ruple identified the gun recovered from the scene of the crash as the one stolen from him on the night of the incident and confirmed the serial numbers of the recovered gun matched the serial numbers of his gun. (App'x p. 271).

Furthermore, Carlisle and Johnson—two of the Pontoo's associates who were present on the night of the armed robbery and fatal crash—recounted their experiences from that night. (App'x p. 299; p. 331). Specifically, they both stated they went to a bar with Pontoo, Iquawn, and Clemmons, and each of the men confirmed Pontoo was the only one in their group with dreadlocks. (App'x pp. 303-306; pp. 333-335). Furthermore, Carlisle stated he observed Pontoo snatch a bag out of another person's car when they were all getting ready to leave the bar for the evening, Pontoo began "tussling" with a man, Pontoo pulled out a gun, and the other man stuck his hands up in response. (App'x pp. 310-312). After that, Carlisle testified Pontoo jumped into their car, he chastised Pontoo for what he had done while receiving no response, they were subsequently stopped by a trooper after they went to get something to eat, and someone took off in his car during the course of the stop after he, Iquawn, and Johnson exited the vehicle. (App'x

pp. 313-319). Similarly, Johnson recounted he was in the car waiting to head home from the bar when he observed Pontoo, whom he had seen with a black revolver earlier that evening, “tussling” with another man until that man put up his hands. (App’x pp. 331-332; pp. 342-343). Johnson stated Pontoo then got into the car with a bag and appeared to put something into his pants. (App’x p. 342; p. 344). After that, Johnson indicated they went to get something to eat, they were subsequently stopped by a trooper, he was ordered out of the car along with Iquawn and Carlisle, and the car then sped off with Pontoo and Clemmons still inside. (App’x pp. 345-349).

Thereafter, the State rested its case, and Pontoo elected to testify in his own defense. (App’x pp. 363-364). During his testimony, Pontoo acknowledged he went to the bar with Clemmons and the others on the night of the incident and claimed he observed a man attempt to trade his gun to Clemmons for Johnson’s .25-caliber pistol, which he asserted was in Clemmons’s possession. (App’x pp. 364-368). Subsequent to that, Pontoo asserted he got into Carlisle’s car to go home and began watching a movie in the car. (App’x pp. 368-369). A few minutes later, Pontoo claimed Iquawn, Clemmons, and Johnson returned to the car with Johnson in possession of the nine-millimeter pistol that belonged to the man he encountered earlier at the bar. (App’x pp. 369-370). After that, Pontoo asserted they all went to get food together, he remained in the car while the others did so, they all left the restaurant, they were subsequently stopped by a trooper, and everyone but him and Clemmons was ordered from the vehicle. (App’x p. 371). At that point, Pontoo claimed Clemmons stated he was not going to jail, grabbed the stolen nine-millimeter pistol, cocked it, pointed it at him, and forced him to drive away from the stop at gunpoint. (App’x p. 372). Pontoo insisted he then continued to drive until

Clemmons grabbed the wheel, and he asserted he could not remember anything after that. (App'x pp. 372-373).

Subsequently, during cross-examination, the solicitor questioned Pontoo about the gun he was alleged to have possessed on the night of the incident, and Pontoo admitted he had a .22-caliber revolver that night, asserted he carried the gun into the bar for “the protection of society,” claimed he gave it to Clemmons while inside the bar, and insisted he never got it back. (App'x pp. 384-387; p. 396). As the cross-examination continued, the solicitor asked Pontoo if he remembered speaking with Detective Garrick at the hospital following the incident, and Pontoo—consistent with earlier in camera testimony he had given—claimed the detective came into the hospital room and he told him he did not want to talk to him. (App'x pp. 60-63; p. 411). The solicitor then asked Pontoo whether he told the detective at the hospital he did not know anything and did not remember anything about the incident, and Pontoo denied that he did while claiming he simply told the detective he did not want to speak with him. (App'x p. 411). After that, the solicitor asked Pontoo if he admitted to having had an opportunity to tell the detective the story he testified to during trial, and, over defense counsel's objection, Pontoo responded he could have told the detective his story that day but did not want to talk to him. (App'x p. 412).

Thereafter, the defense rested, and Detective Garrick was recalled to the witness stand in reply to testify about his meeting with Pontoo at the hospital after the crash. (App'x p. 420; p. 423). Through his reply testimony, the detective recounted he asked Pontoo to tell him what happened and Pontoo responded by repeatedly stating he did not know and did not remember what happened. (App'x pp. 423-425).

Following the presentation of that testimony, the State again rested its case, and the trial judge conducted a charge conference to discuss his intended jury instructions with the parties.

(App'x pp. 425-426). During the charge conference, the solicitor noted duress was an affirmative defense a defendant was required to prove by a preponderance of the evidence, and the trial judge confirmed his proposed instruction included such language. (App'x pp. 427-428). The trial judge then asked defense counsel if he had any issues with the proposed instruction while noting a duress instruction suggested by defense counsel during an off-the-record discussion was covered by his proposed instruction. (App'x p. 428). In response, defense counsel conceded he believed the trial judge's proposed instruction to be a correct statement of South Carolina law while asserting he objected to that statement as burden shifting based on his belief a defendant should not "have to prove anything." (App'x p. 428). The trial judge then noted defense counsel's objection for the record. (App'x p. 429).

As the trial proceeded forward, the parties presented their closing arguments to the jury. (App'x pp. 431-446). During his closing argument, defense counsel focused the jury's attention on the fact the State allegedly failed to present any evidence about what occurred in the car prior to the crash and called the jurors' attention to perceived weaknesses and inconsistencies in the evidence presented. (App'x pp. 431-435). Conversely, the solicitor used his closing argument to point out the lack of credibility in Pontoo's testimony and discuss the strength of the evidence of Pontoo's guilt. (App'x pp. 436-446).

At the conclusion of the closing arguments, the trial judge instructed the jury on the relevant and applicable law. (App'x pp. 447-457). During his jury instructions, the trial judge explained to the jury the burden of proof was on the State, a defendant was presumed to be innocent, and a defendant was not required to prove his innocence to the jury. (App'x pp. 448-449). Additionally, the trial judge instructed the jury in regard to the elements of the indicted

offenses. (App’x pp. 452-455). Specifically, in instructing the jury on failure to stop for a blue light resulting in a death, the trial judge stated:

Now, he’s charged in this case with failure to stop for a blue light resulting in death. In order to prove this crime the State must prove beyond a reasonable doubt that the defendant was driving the motor vehicle on a road, street or highway of this state; that the defendant was signaled to stop by a law enforcement vehicle by means of a siren and/or flashing light, and that the defendant did not stop. An official signal requiring a motorist to stop may be a siren or flashing lights, but both are not required. An attempt to increase speed of a vehicle or in some other manner to avoid the pursuing law enforcement vehicle when signaled by a siren and/or flashing light may be considered as evidence of failure to stop for a blue light. However, it is merely an evidentiary fact to be taken into consideration by you along with the other evidence in this case and is to be given whatever weight that you think it should receive. If you find that the State has proved beyond a reasonable doubt that the defendant failed to stop for a blue light and his actions resulted in the death of another, that would satisfy the elements of the offense of failing to stop for a blue light resulting in death.

(App’x pp. 452-453). Furthermore, the trial judge explained to the jury duress or coercion had been raised as a defense in Pontoo’s case and indicated such a defense had to be proven by a preponderance of the evidence. (App’x p. 455).

Following the presentation of those instructions, the trial judge inquired of the parties if they had any objections to his jury instructions aside from defense counsel’s earlier objection to the duress instruction. (App’x pp. 457-458). In response, both defense counsel and the solicitor stated they did not have any additional objections. (App’x pp. 457-458).

Thereafter, the case was submitted to the jury. (App’x p. 458). And, after just over two hours of deliberations, the jury convicted Pontoo as indicted. (App’x p. 458; pp. 461-462).

Relevant Details from Pontoo’s Appeal

After he was convicted and sentenced, Pontoo appealed, arguing—in part—the trial judge erred through the manner in which he instructed the jury on duress and failure to stop for a blue

light resulting in a death. (Supp. App'x p. 6; pp. 13-17). More specifically, Pontoo contended the trial judge's jury instructions, which placed the burden of proving duress on the defense and did not include the "in the absence of mitigating circumstances" statutory language, were defective because the State was purportedly required to prove the "absence of mitigating circumstances" in order to establish the elements of failure to stop for a blue light resulting in a death. (Supp. App'x pp. 13-17).

On appeal, this Court affirmed. (App'x pp. 79-82). In affirming, this Court concluded—amongst other things—the trial judge correctly instructed the jury on the affirmative defense of duress. (Supp. App'x p. 80). Furthermore, to the extent Pontoo argued the trial judge's jury instructions on failure to stop for a blue light resulting in a death were defective or incomplete due to the missing language, this Court found that particular argument was not properly preserved for appellate review because it was not raised to the trial judge. (Supp. App'x p. 80).

Summary of the PCR Proceedings

Following his unsuccessful appeal, Pontoo sought relief through the filing of a PCR application, and, after counsel was appointed to him, several amendments to it were filed on his behalf. (App'x pp. 474-479; pp. 493-495; pp. 501-503). Amongst the claims raised, Pontoo alleged his defense counsel was constitutionally ineffective for failing to object to the absence of "the element of 'in the absence of mitigating circumstances' " from the trial judge's jury instruction on failure to stop for a blue light resulting in a death. (App'x p. 494).

In response, an evidentiary hearing was conducted on the matter. (App'x pp. 507-508). During it, testimony was presented from Pontoo, Pontoo's defense counsel, and Pontoo's appellate counsel. (App'x pp. 509-572).

Notably, as part of his testimony, defense counsel acknowledged he did not raise any objections to the trial judge's failure to instruct the jury on the "in the absence of mitigating circumstances" language when charging the jury on failure to stop for a blue light resulting in a death. (App'x p. 541). However, defense counsel explained he did request a jury instruction on duress and believed such an instruction, which was given, was sufficient to cover the substance of the "in the absence of mitigating circumstances" language under the specific circumstances of Pontoo's case. (App'x pp. 541-542).

At the conclusion of the hearing, the PCR judge took the matter under advisement and, upon giving it consideration, declined to grant relief. (App'x p. 578; pp. 582-636). In declining to grant relief, the PCR judge—in part—concluded Pontoo failed to establish defense counsel's performance was deficient because: (1) the "in the absence of mitigating circumstances" language constituted a proviso creating an exception to the charged offense; and (2) even if that statutory language did constitute an element of the offense, it was immaterial to the duress defense, which excuses a crime when established but does not negate any element of the offense. (App'x pp. 628-629). Likewise, the PCR judge concluded Pontoo failed to establish he was prejudiced by defense counsel's supposed deficient performance because the jury was nevertheless instructed on the defense of duress, which was the defense Pontoo actually advanced during trial, in a manner consistent with South Carolina law. (App'x pp. 593-594; p. 629). Accordingly, for those reasons, the PCR judge denied and dismissed Pontoo's application with prejudice. (App'x p. 635).

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge’s factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (“Under the proper standard of review, the appellate court’s ‘view’ must be limited to whether there is probative evidence to support the PCR court’s factual findings.”). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge’s rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge’s decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief judge correctly determined Pontoo’s defense counsel was not constitutionally ineffective for failing to ask the trial judge to include the “in the absence of mitigating circumstances” language in the jury charge on failure to stop for a blue light resulting in death because: (1) that particular statutory language was not an element of the offense; and (2) the trial judge’s instructions as a whole properly and sufficiently conveyed to the jury the law—including the law on the affirmative defense of duress—that was applicable to the case based on the evidence presented such that Pontoo could not have suffered any resulting prejudice under the circumstances involved.

On appeal, Pontoo contends the PCR judge reversibly erred by failing to find defense counsel’s performance was constitutionally ineffective. In raising such a contention, Pontoo maintains defense counsel performed in a deficient manner during trial by failing to ask the trial judge to instruct the jury on the “in the absence of mitigating circumstances” language from the failure to stop for a blue light statute because: (1) that particular language purportedly constituted “the very first element” of the offense; and (2) in light of that, the State was supposedly required to disprove the affirmative defense of duress since that defense would negate the “in the absence of mitigating circumstances” element. Pontoo further maintains he was prejudiced by defense counsel’s deficient performance because the trial judge’s jury instructions as presented somehow so undermined the proper functioning of the adversarial process his trial could not be relied on as having produced a just result. Contrary to Pontoo’s current contentions, the “in the absence of mitigating circumstances” language was *not* an element of the offense of failure to stop for a blue light in South Carolina and, instead, was a statutory exception that Pontoo bore the burden of establishing. And, the trial judge’s jury instructions correctly conveyed just that, were substantially correct, and—when considered as a whole—adequately covered all the law applicable to the case based on the evidence presented. Under such circumstances, defense counsel could not have been deficient for failing to either object to the jury instructions as presented or request any additional instructions, and there was not and could not have been a

reasonable likelihood of a different outcome at trial but for defense counsel's performance.

Accordingly, the PCR judge correctly declined to grant relief. The PCR judge's ruling should be affirmed.

Law Applicable to Ineffective Assistance of Trial Counsel Claims

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). Pursuant to that right, the defendant is entitled to effective assistance of trial counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). However, that does not mean entitlement to perfect or mistake-free representation. Burt v. Titlow, 571 U.S. 12, 24 (2013). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Meanwhile, trial counsel's assistance is considered constitutionally ineffective only when it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of trial counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant must establish: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for trial counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether trial counsel provided representation within the objectively reasonable range of

competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). To establish deficiency, the applicant must demonstrate trial counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. Thus, trial counsel’s performance will be considered deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply “deviated from best practices or most common custom.” Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691. For that burden to be met, trial counsel’s deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the trial would have been different but for trial counsel’s unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). Moreover, “[t]he likelihood of a different result must be substantial, not just conceivable.” Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

Law Applicable to Jury Instructions

The purpose of a trial judge’s jury instructions is “to enlighten the jury and to aid it in arriving at a correct verdict.” State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge must instruct the jury on the substance of the law but does not have to use any

particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). Significantly, a trial judge’s jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case based on *the evidence presented*, which itself is determinative of what law should and must be presented. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (explaining a trial judge is required to instruct the jury on sound principles of law that are applicable to the case based on the evidence presented); State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009) (“The law to be charged must be determined from the evidence presented at trial.” (citation and internal quotations omitted); see also State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) (“A jury charge which is substantially correct and covers the law does not require reversal.”).

Law Applicable to Affirmative Defenses, Statutory Exceptions, and Provisos

Unquestionably, in a criminal case, the prosecution is constitutionally required to prove beyond a reasonable doubt “every fact necessary to constitute the crime with which [the defendant] is charged” in order to convict a defendant of a criminal offense. In re Winship, 397 U.S. 538, 364 (1970); see Jackson v. Virginia, 443 U.S. 307, 316 (1979) (“[N]o person shall be made to suffer to onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”). Importantly though, “[p]roof the nonexistence of all affirmative defenses has never been constitutionally required” in order for the prosecution to satisfy its burden of proof. Patterson v. New York, 432 U.S. 197, 210 (1977). In light of that, the prosecution must only bear the burden to disprove an affirmative defense when it negates an element of the crime; conversely, the prosecution has no constitutional duty to disprove such a

defense when it merely *excuses* conduct that would otherwise be punishable. Smith v. United States, 568 U.S. 106, 110 (2013).

Relatedly, “when the State has made out a prima facie case under a statute and the defendant claims to fall within an ‘exception’ or ‘proviso’ in the statute[.]” the well-established general rule in South Carolina and elsewhere is “the burden is on the defendant to establish such a defense.” State v. Attardo, 263 S.C. 546, 552, 211 S.E.2d 868, 871 (1975); see State v. Clarke, 302 S.C. 423, 425, 396 S.E.2d 827, 827 (1990) (“The general rule, when dealing with statutory crimes to which there are exceptions, is that the defendant has the burden of excusing or justifying his act; and hence the burden may be on him to bring himself within an exception in the statute or to prove the issuance of a license or permit.” (citation and internal quotations omitted)); see also McKelvey v. United States, 260 U.S. 353, 357 (1922) (“By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it.”). And, importantly, that general rule is only inapplicable “if the language of the exception must be regarded as descriptive of the offense.” Clarke, 302 S.C. at 425, 396 S.E.2d at 827.

For well over a century, a statutory exception has ordinarily been considered to be descriptive of the offense when it is so incorporated with the language defining the offense “that the ingredients of the offen[s]e *cannot* be accurately and clearly described if the exception is omitted[.]” United States v. Cook, 84 U.S. 168, 173 (1872) (emphasis added). Meanwhile, when the “ingredients” of the offense “may be accurately and clearly defined without any

reference to the exception,” an exception typically has not been considered to be descriptive of the offense, and the general rule placing the burden on the defendant to prove that exception would be applicable. Id. at 173-174; see State v. Bouknight, 55 S.C. 353, ___, 33 S.E. 451, 453 (1899) (“If . . . the language of the exception, found in any part of the statute, must be regarded as descriptive of the offense created by such statute, then such exception must be negatived; but, if it cannot properly be so regarded, then it becomes a matter of defense, and need not be negatived.”).

Application of the Relevant Law to Pontoo’s Case

In the case sub judice, Pontoo—in addition to being convicted of armed robbery—was convicted of failure to stop for a blue light resulting in a death, an aggravated form of the general offense of failure to stop for a blue light. S.C. Code Ann. § 56-5-750. Pursuant to South Carolina law, failure to stop for a blue light in general is statutorily defined as follows:

In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is *prima facie evidence* of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

Id. (emphasis added).

Based on the plain language of that statutory provision, all that is needed to establish a *prima facie* violation of the offense is proof: (1) a driver on a South Carolina roadway was signaled to stop by a law enforcement vehicle’s flashing light or siren; and (2) instead of stopping, the driver attempted to avoid the law enforcement vehicle in any manner, including by

increasing speed. *Id.*; see Black's Law Dictionary 638-639 (9th ed. 2009) (defining “prima facie evidence” as “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced”). Meanwhile, the statute’s “in the absence of mitigating circumstances” language establishes an *exception* to the broader conduct prohibited by the statute’s other language. S.C. Code Ann. § 56-5-750. And, in setting out that exception, the legislature elected to expressly limit it by indicating failure to see the flashing light or hear the siren does not “excuse” the offense when it would have been reasonable under the circumstances for the driver to have heard or saw the law enforcement vehicle’s signals. *Id.*

Viewing the broad language of the portion of the statute defining what conduct is prohibited in conjunction with the portion containing the narrow language carving out a limited exception to that prohibited conduct, the offense of failure to stop for a blue light “may be accurately and clearly defined without any reference to the exception[.]” Cook, 84 U.S. at 173-174. Indeed, the statute itself says as much through the portion identifying all that is necessary to establish a prima facie violation of the offense while making no reference whatsoever to the exception.³ See S.C. Code Ann. § 56-5-750 (“An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section.”).

³ Moreover, in a previous version of the offense, our legislation defined the offense *without* including any exceptions, which unmistakably demonstrates the offense was and is capable of accurate and clear description with or without the “in the absence of mitigating circumstances” language. See Act No. 1042, 1968 S.C. Acts 2497 (enacting a penal statute that mandated: “It shall be unlawful for any motor vehicle driver, while driving on any road, street or highway of the State, to fail to stop when signaled by any law enforcement vehicle by a means of a siren or flashing light. Any attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light shall constitute prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren shall not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.”).

And, further demonstrating the legislature did not intend—and could not have intended—to require the State to disprove the existence of any and all undefined mitigating circumstances in order to be able to obtain a conviction for failure to stop for a blue light, such a requirement would be virtually impossible to satisfy in light of the fact it would require the State to prove a negative, which ordinarily cannot be done. See Burkhart, 350 S.C. at 265, 565 S.E.2d at 305 (Pleicones, J., concurring in resulting) (recognizing the imposition of a requirement upon the State to disprove a defense “imposes an impossible burden on the State” by, in essence, forcing the State to prove a negative); see also State v. Lee, 375 S.C. 394, 402, 653 S.E.2d 259, 263 (2007) (Toal, C.J., dissenting) (“No Court may justifiably ask a litigant to prove a negative[.]”); cf. Piedmont & Arlington Life Ins. Co. v. Ewing, 92 U.S. 377, 378 (1875) (“While it may be easy enough to prove the affirmative of one of these questions, it is next to impossible to prove the negative.”). In essence, such a requirement would force the State to prove the absence of any conceivable circumstance that could potentially be construed as mitigating, which would be impossible to do without knowledge that typically could only be possessed by the driver accused of the crime and would lead to absurd results not permitted by our rules of statutory construction.⁴ See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) (“[A] court must reject a statute’s interpretation leading to absurd results not intended by the Legislature.”); State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011) (“[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention.”); see also Morrison v. California, 291 U.S. 82, 88 (1934) (“The decisions are manifold that within limits of reason and fairness the burden of proof

⁴ Notably, defense counsel aptly argued to the jury during his closing argument “[t]he only evidence about what happened in that car from the time it left to the time it crashed is what Mr. Pontoo said on the stand and that’s all you have to go on.” (App’x p. 435).

may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of *the opportunities for knowledge* the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.” (emphasis added)); cf. Spann v. Phoenix Ins. Co. of Hartford, Conn., 83 S.C. 262, ___, 65 S.E. 232, 233 (1909) (“To hold that the insurer must prove that there was no waiver would impose the impossible task of proving not one fact, but an indefinite number of negatives. It is not conceivable how the insurance company would set about putting in array all the forms which waiver might assume, and proving that it did not do any one of the indefinite number of things which might tend to show waiver.”).

Therefore, applying the pertinent over-century-old test to South Carolina’s failure to stop for a blue light statute, the “in the absence of mitigating circumstances” language constitutes an exception instead of an element. See Clarke, 302 S.C. at 425, 396 S.E.2d at 828 (instructing “statutory exceptions are matters of defense for which a defendant bears the burden of production” when the exceptions are not descriptive of the offense); cf. Attardo, 263 S.C. at 553, 211 S.E.2d at 871 (“If the defendant had alleged that he was legally entitled to the drugs under a valid medical prescription, he would have the burden of proving the existence of the prescription.” (footnote omitted)); State v. Twiggs, 123 S.C. 47, ___, 101 S.E. 663, 663-664 (1919) (“[The penal statute making it unlawful to—amongst other things—keep or possess alcoholic liquors] then provides the manner in which one quart a month may be procured and kept. The rule in such cases is that a defendant must bring himself within the exception. For instance, where the statute prohibits sale without a license, and defendant is charged with selling

without license the state makes out a prima facie case by proving the sale, and the burden is on the defendant to prove, by way of defense, that he had a license.”); State v. Stone, 320 S.C. 395, 398, 465 S.E.2d 576, 577 (Ct. App. 1995) (“Although [the penal statute] has no application to an employee lawfully engaged in the sale or delivery of beer in an unopened container, the burden of proving the exception to the statute’s application belonged to the defendants and not to the State.”). As a result, a criminal defendant in our state bears the burden of demonstrating at trial the conduct at issue fell within that exception if the defendant wishes to rely on it as a defense. See Clarke, 302 S.C. at 425, 396 S.E.2d at 827 (instructing a defendant in South Carolina generally has the burden of excusing or justifying his act when charged with a statutory crime to which there are exceptions).

With that in mind, Pontoo raised a claim of duress during trial as the *sole* basis upon which he sought for his admitted failure to stop for a blue light to be excused, and, in response, the trial judge properly instructed the jury on the law regarding the defense of duress while—consistent with South Carolina law—explaining Pontoo bore the burden of proving his duress defense by a preponderance of the evidence. See State v. New, 371 S.C. 523, 526-527, 640 S.E.2d 871, 873 (2007) (“Duress excuses the crime but does not negate any element of the offense. . . . Generally, affirmative defenses must be established by a preponderance of the evidence.”); see also Patterson, 432 U.S. at 210 (declining “to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused”). Under such circumstances, the trial judge’s jury instruction as presented were neither erroneous nor improper because they were substantially correct and adequately covered the law applicable to the case—including everything the jury needed to know about both the indicted offense of

failure to stop for a blue light and the defense raised by Pontoo—based on the actual evidence presented and issues raised. See State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008) (“The law to be charged to the jury is determined by *the evidence presented at trial*.” (emphasis added)); State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975) (instructing “[n]o instruction should be given by the trial judge . . . which tenders an issue which is not presented or supported by the evidence”); cf. New, 371 S.C. at 526-527, 640 S.E.2d at 873 (“[T]he trial judge properly charged the jury that [New] had the burden to prove his defense of duress by a preponderance of the evidence.”).

Critically, because the trial judge’s jury instructions as presented were proper and sufficient to communicate to all the relevant law applicable to Pontoo’s case based on the evidence presented, defense counsel had no legitimate need to request any additional jury instructions even though the “in the absence of mitigating circumstances” statutory language was not expressly included, and, thus, his performance was not deficient for failing to do so. See Burkhart, 350 S.C. at 261, 565 S.E.2d at 302 (“A jury charge is correct if it contains the correct definition of the law when read as a whole.”); see also Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) (“One of the key circumstances a court must consider in its examination of counsel’s decision not to make a particular objection is whether there was any law to support the objection.”). And, for precisely the same reason, there was not and could not have been a reasonable likelihood of a different outcome but for defense counsel’s supposedly-deficient performance since the jury was provided with all the instructions necessary for it to be able to properly and correctly resolve Pontoo’s case. See Lowry v. State, 376 S.C. 499, 506, 657 S.E.2d 760, 764 (2008) (“The relevant inquiry for the Court . . . is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the

Constitution.”); see also Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (explaining a petitioner must prove defense counsel’s representation fell below an objective standard of reasonableness *and* there is a reasonable probability the result at trial would have been different but for counsel’s conduct in order to be entitled to post-conviction relief).

Accordingly, the PCR judge correctly declined to find defense counsel was constitutionally ineffective because the jury instructions given during Pontoo’s trial were unobjectionable as they were sufficient to cover the applicable law with or without the “in the absence of mitigating circumstances” language and there was no reasonable likelihood the result of the proceedings would have been different but for defense counsel’s performance. See Strickland, 466 U.S. at 700 (“Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.”). The PCR judge’s ruling should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

Respectfully submitted,

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