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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Calhoun County
Court of Common Pleas
The Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2023-001435

DAVID J. BENJAMIN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's Statement of Issue on Certiorari

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A. Did the Court of Appeals improperly agree with the lower court that even if trial counsel ineffectively utilized the expert, any deficiency did not prejudice Petitioner.

B. Did the Court of Appeals improperly find that the record supports the lower court's finding that counsel did not ineffectively utilize the lay witness.

Respondent's Counterstatement of Issue on Certiorari

I. Did the Court of Appeals properly affirm the PCR court's dismissal of Petitioner's post-conviction relief application because Petitioner failed to establish trial counsel was constitutionally ineffective for failing to effectively utilize lay witness, Antonio Gidron, and expert witness, Kelly Fite, at trial where Petitioner cannot establish he suffered any prejudice and where trial counsel was not deficient in the preparation and presentation of either witness because he made reasonable and adequate efforts to prepare and discuss the case with both witnesses prior to trial and because trial counsel made adequate efforts to utilize both witnesses' testimony?

A. Did trial counsel properly prepare and utilize Kelly Fite as an expert witness at trial?

B. Did trial counsel properly prepare and utilize witness Antonio Gidron at trial?

STATEMENT OF THE CASE

Procedural History

Petitioner David Jamar Benjamin is confined in the South Carolina Department of Corrections. During its February 2013 term, the Calhoun County Grand Jury indicted Petitioner for murder (2013-GS-09-00051) and two counts of attempted murder (2013-GS-09-00052 & 2013-GS-09-00053). Petitioner was represented by Nicholas Gray Thomas (Counsel). Donald N. Sorenson and Theodore N. Lupton of the First Circuit Solicitor's Office prosecuted the case. On March 4-7, 2013, Petitioner proceeded to a jury trial before the Honorable Diane Schafer Goodstein. At the conclusion of trial, the jury found Petitioner guilty as indicted. Judge Goodstein sentenced Petitioner to concurrent sentences of forty years for murder and thirty years for each of the attempted murder convictions. On March 15, 2013, Petitioner filed a motion for a new trial and a motion to reconsider the sentence. By separate Orders, both filed July 9, 2013, Judge Goodstein denied Petitioner's motion for a new trial and motion to reconsider the sentence.

Petitioner filed a notice of appeal and was represented by Wendy Keefer (Appellate Counsel). During the appeal process, Petitioner was also represented by James Lee Goldsmith, Jr., Esquire, and Robert L. Sirianni, Jr., Esquire. Applicant perfected his appeal alleging:

1) The trial court erred in not granting defendant's motion for directed verdict where the state failed to produce any direct or substantial circumstantial evidence reasonably tending to prove defendant Benjamin's guilt and
2) The trial court abused its discretion in denying defendant's motion for new trial where there was insufficient evidence to support the jury's finding and where, as a matter of law, the state failed to produce substantial circumstantial evidence to support its accomplice liability theory to convict defendant.

On December 16, 2015, the South Carolina Court of Appeals affirmed Petitioner's convictions, finding the court properly submitted the case to the jury because the State met its

burden of producing any direct or substantial circumstantial evidence that reasonably tended to prove Benjamin was guilty of the murder and attempted murder charges and that the court did not abuse its discretion in denying Benjamin's motion for a new trial because competent evidence supported the jury's verdict on the murder and attempted murder charges. *State v. Benjamin*, 2015-UP-554 (S.C. Ct. App. Filed December 16, 2015). Petitioner filed a petition for rehearing on December 21, 2015. On January 20, 2016, the Court denied the petition. The remittitur was issued on May 27, 2016.

On April 20, 2016, Petitioner filed an application for post-conviction relief (PCR). Respondent made its return on January 18, 2017. On July 12, 2018, the PCR court convened an evidentiary hearing at the Dorchester County Courthouse before the Honorable Robin B. Stilwell. Assistant Attorney General Christian Saville appeared on behalf of the State. Tricia A. Blanchette, Esquire, represented Petitioner. By order dated February 1, 2019, Judge Stilwell denied Petitioner relief and dismissed the PCR application with prejudice. Petitioner filed a motion pursuant to Rule 59, SCRCP, on April 14, 2019. On February 26, 2019, Judge Stilwell issued an order denying Petitioner's motion.

Petitioner filed a notice of appeal from the PCR court's dismissal on April 1, 2019. On June 29, 2019, Petitioner filed a Petition for Writ of Certiorari. On December 3, 2019, Respondent filed the Return to Petition for Writ of Certiorari. On January 5, 2022, this Court issued an Order denying certiorari in part and granting certiorari in part.

The Court of Appeals—following briefing and oral argument—issued an unpublished opinion unanimously affirming the lower court. *Benjamin v. State*, Op. No. 2023-UP-243 (S.C. Ct. App. filed June 21, 2023). On June 29, 2023, Petitioner filed a Petition for Rehearing and Petition for Rehearing *En* Banc. On August 16, 2023, the South Carolina Court of Appeals

denied the Petition for Rehearing and withdrew, substituted and refiled the Opinion. *Benjamin v. State*, Op. No. 2023-UP-243 (S.C. Ct. App. filed August 16, 2023). Petitioner then filed a Petition for a Writ of Certiorari in the Supreme Court.

Summary of Relevant Testimony at Trial

Joshua Haggood testified that he was twenty-six years old. On Friday, September 16, 2011, he came to Orangeburg with the .40 caliber pistol "to visit." On Saturday night, the 17th, Haggood went and picked up Petitioner at his Orangeburg County residence. Petitioner placed his silver, .45 caliber semi-automatic pistol in the trunk of the car.[1] They picked up Kevin Frazier at a trailer in Calhoun County and then went to the Piggy Park, for Nevadria Miller's birthday party. Petitioner drove Haggood's 2009, black, Toyota Camry to Piggy Park because he knew how to get there. (App'x pp. 264-70).

Haggood's brother, William Pinckney, followed them to Piggy Park in a tan car. (State's Exhibit 12). When they arrived at Piggy Park, Petitioner backed the car up "to the edge of the club." Pinckney likewise backed in and he parked his tan car between them and the van. When they initially entered the club, Haggood's pistol was in the console of his car and both Petitioner's and Frazier's silver, .32 caliber revolver were in the trunk. (App'x pp. 270-72; 301-02; 390).

Inside the club, "plenty of people were dancing." Haggood only drank beer[2] while in the club, but both Petitioner and Frazier drank beer and free liquor. The entire time Haggood was at the club, he only drank four or five beers. Sometime later, Petitioner told Haggood that there had been an incident and he pointed out two individuals that he thought Haggood needed to look out

[1] Haggood had previously seen Petitioner with the .45 "a few times. (App'x p. 267).
[2] The liquor was free, but patrons had to pay for beer. (App'x p. 273).

for because one person had a book bag and the other one was reaching inside the bag. Petitioner thought that one of these men had a gun. (App'x pp. 273-75; 278).

Petitioner "was kind of agitated," and Haggood asked him what he wanted to do. Petitioner said that "he wasn't trying to get caught slipping," meaning that he wanted to get his gun. So, the three defendants went to the car and each man armed himself. Petitioner and Haggood stuck their weapons in their waistbands, but Frazier put his .32 in his pocket. This was an hour and a half to two hours after they first got to the club, and they went back inside after they had armed themselves. (App'x pp. 275-78).

There was "a normal club environment" when they re-entered the club and they continued to drink. Eventually, the music stopped and the lights came on, signaling that the club was closing. Haggood went outside and talked to a woman while waiting on his friends. As soon as Petitioner and Frazier came outside, Dominique Lawton "charged" his weapon, or pulled the slide back, and the gun ejected a live bullet. This happened near the front door." [E]verything became chaotic" after that occurred.[3] (App'x pp. 278-82; 304-05).

Frazier pulled out his gun and waived it in the air, saying, "I'm just trying to get home. I don't want any trouble." As Haggood and Petitioner headed for the car, he also reached for his gun. However, Petitioner pressed his shoulder, as if to tell him to "fall back. Chill out." A lot of people attempted to intervene and Frazer was ushered to the car. Dominique and his crowd went towards the road. (App'x pp. 282-83).

"By the time I got in front of my brother's William's car, ... the first shots came out. They started shooting. And then it was like everybody was scattering." Haggood did not know who fired these shots but testified that they came from "towards the road." He did not hear these shots

[3] Dominique seemed to be the aggressor and Haggood said that this was like an "ambush." (App'x p. 304).

hit anything; neither he nor his friends were shot; and his car, his brother's car, and the area of the club near him were not hit. However, Petitioner pulled out his .45, "outstretched [his] arm like downward ... from the waist" and began shooting in the direction of the car in front of Haggood's car (which was Shawn DeFreitas' car). Petitioner was at the passenger side corner when he began but continued moving as he shot. (App'x pp. 284-86; 303; 310-12).[4]

Someone then threw a post, which hit the passenger side mirror of Haggood's car and knocked out the mirror itself. Haggood heard shots coming from "behind the van." So, he moved to the back of his car and he fired "three or four" shots from his .40 caliber pistol in that direction. Then, Petitioner got behind the wheel and Haggood got into the front passenger seat. Frazier fired "two or three" shots in the air before getting into the back seat. (App'x pp. 286-88; 312).

Initially, Shawn DeFreitas' car was blocking them in, but that car backed up and they left the parking lot. As Petitioner was driving them away, Frazier said that he had fired in the air and he asked his friends if either of them had to shoot. Haggood was on his cell phone with his brother and did not respond. However, Petitioner's response was to the effect that he had not shot into the air because he was not going to waste bullets. Also, Frazier rolled down his window as they rode. Haggood later learned that he had thrown out shell casings from his .32. (App'x pp. 289-92).

[4] Frazier was near the rear driver's side.

Testimony Presented at the Post-Conviction Relief Hearing

Antonio Gidron

Antonio Gidron was present at the Piggy Park nightclub when the shooting occurred and testified at Petitioner's trial. According to Gidron, he did not have time to prepare for his testimony with trial counsel before testifying at trial. Nevertheless, Gidron also testified he went out to the scene with trial counsel, but "don't know who that guy was from." (App'x p. 882, ll. 2). Further, Gidron never spoke to or gave a statement to law enforcement because he didn't "meddle in people business." (App'x p. 912, ll. 18-19). At the evidentiary hearing, Gidron testified the victim, Dominique Lawton, had a gun in his hand when he was shot, but never thought to mention it at Petitioner's trial. (App'x p. 904).

Gidron testified the crime scene was handled poorly, and law enforcement was having difficulty locking down the scene. (App'x p. 898). Gidron could not recall the difficulty the solicitor had in contacting him prior to the trial. (App'x p. 919).

Gidron recalled his trial testimony that he was "99% sure" Petitioner didn't do anything. (App'x p. 910). Gidron claimed he was able to see Petitioner and Lawton at the same time, "like a big-screen tv" when Lawton was shot. However, when asked why he would not say he was one-hundred-percent sure Petitioner did not shoot Lawton, he responded, "you can never be exact." (App'x p. 910).

Robert Tressel

Petitioner called Robert Tressel, an expert in homicide investigations and crime scene reconstruction, to testify at the evidentiary hearing regarding his review of the case. Tressel was qualified, without objection, as an expert in the area of homicide investigation and crime-scene reconstruction. Tressel explained he felt the preservation and investigation of the crime scene by

law enforcement was substandard for a homicide case and had a problem reviewing this case because the crime scene photographs were taken after virtually all of the cars had left the parking lot where the shooting occurred. (App'x p. 929). Although Tressel was able to go to the scene and take measurements, he conceded he himself was unable to reconstruct the crime scene. (App'x p. 932). Tressel likened the chaotic shooting scene in this case to "a shootout at the O.K. Corral." (App'x p. 938). He was aware Kelly Fite was offered as an expert by the defense at trial, and had known Fite for over forty years, and the two often referred each other. As Tressel explained, he went in March 2018 to review the exhibits which were presented at trial.

Tressel stated he had a problem reviewing this case because all of the photographs were done after virtually all of the cars had scattered from the crime scene. (App'x p. 929). He also claimed there was no documentation in the investigative file regarding where certain vehicles were parked. (App'x p. 929). Based on Gidron's representations made to Tressel when they visited the scene, Tressel testified Gidron was able to see Petitioner and the victim at the same time during the shooting. (App'x p. 930). As Trial Counsel's investigator was unable to meet with Gidron at the scene prior to trial, Tressel testified, now years later, it would have been vital to do so.

Although Tressel was able to go to the scene and take measurements, he conceded he himself was unable to produce a diagram. He explained outside crime scenes are difficult to work. Furthermore, Tressel opined there were not enough measurements taken when law enforcement responded for him to make a diagram. (App'x p. 932). It was Tressel's opinion the investigation of the crime scene by law enforcement fell "well below" the standards for a homicide investigation, and he understood it was the investigator's first homicide investigation. (App'x p. 934; p. 943). In preparation for the evidentiary hearing, Tressel also reviewed Kelly

Fite's testimony in the trial transcript. According to Tressel, he did not remember Fite offering an opinion regarding the level of investigation in the case. (App'x p. 946). Tressel testified that if he would have been retained at trial, he would have been more adamant that the defense offer the other diagram into evidence which contained the location of shells. However, the diagram he was speaking of was color-coded and only the black and white copy has been able to be located, and therefore Tressel has not seen what the colors would indicate. (App'x p. 949-50; p. 969). On cross-examination, Tressel testified he did not consult with Fite regarding this case, and conceded he did not speak with any eyewitnesses other than Gidron. (App'x p. 960; p. 957). Tressel did not think Fite could have reconstructed the crime scene with the materials available. (App'x p. 963).

Tressel testified there was no ballistics evidence to corroborate codefendant Haggood's testimony at trial that Petitioner fired two shots on the move to his car due to the absence of shells to the right and rear of where Petitioner would have been. However, Tressel later conceded the resting place of the shells after being ejected from the gun would "absolutely" depend on what angle Petitioner was holding the gun. (App'x p. 958). Furthermore, Tressel conceded he had no way of determining how Petitioner was holding the gun. (App'x p. 958). Tressel also conceded that the problem with shell casings is they are very movable, and he recalled testimony from trial and the PCR hearing that there was a large group of people coming and going at the scene. (App'x p. 958).

Tressel acknowledged there was a positive gunshot residue result in the apex of the driver door of the car in which Petitioner was allegedly standing during the shooting. (App'x p. 958). He also acknowledged a group of .45 caliber shell casings in the general vicinity of the rear of Petitioner's car. (App'x p. 966). Tressel was unable to determine what caliber bullet caused the

fatal wound to Lawton. (App'x p. 966). Tressel speculated a .40 caliber bullet was more likely to have caused the fatal injury in this case than a .45 caliber bullet. (App'x p. 941).

Trial Counsel

According to trial counsel, the testimony of codefendant Josh Haggood changed the entire approach of the defense strategy, as before there had been "strength in unity," but it became "havoc in division" once Haggood decided to testify. (App'x p. 997). This is because, as trial counsel explained, it gave rise to accomplice liability. (App'x p. 998).

Trial counsel testified Kelly Fite came highly recommended by two "very good friends who are very successful criminal defense attorneys ... They had had great success with Mr. Fite." (App.x p. 1003, ll. 24-25). Trial counsel's notes revealed he spoke with Fite in September 2012, and mailed the entire discovery package to him with copies of the evidence disks in October 2012. (App'x p. 1004). He noted that although Fite's testimony at trial indicated Fite did not have some of the discovery material, like the DNA report regarding ballistics evidence, trial counsel explained he had given Fite everything he had been provided in discovery. (App'x p. 1004). As the trial progressed, trial counsel had actually considered not calling Fite because he felt the jury was losing interest and had heard "about enough" and knew the scene was chaotic from just about every other witness. (App'x p. 1006). Given the jury's lack of interest at that point in time, trial counsel explained, if he had a regret in this case, it was using Fite, with the hindsight of knowing how the testimony went, but noted Fite is "heralded by all." (App'x p. 1007, ll. 5-6). After hearing Tressel's testimony, trial counsel mentioned that, in hindsight, he would have preferred Tressel's PCR testimony over Fite's trial testimony. Trial counsel believed Fite was going to create a crime scene reconstruction, but Fite did not, and trial counsel wished he would have been more precise in what he asked him to do. (App'x p. 1008; p. 1012). Further,

trial counsel stated he "barely wanted to touch on him [Fite] in closing – I didn't feel it was necessarily harmful to the case. But I didn't feel it was beneficial." (App'x p. 1008, ll. 8-10).

Furthermore, trial counsel reasserted that while he would have liked to have Tressel's testimony at trial, "it goes back to the change in our defense approach due to the testimony of Mr. Haggood ... it created a major roadblock for us and a major impediment to the type of defense we were going to present. (App'x p. 1012-13). As he explained, a chaotic crime scene was not going to change the testimony and believability of codefendant Haggood's testimony that Petitioner went to the car and retrieved a .45 caliber pistol and returned to the club before the incident. (App'x p. 1036).

Haggood made an excellent witness for the State according to trial counsel. (App'x p. 1028). After watching Haggood's interviews with law enforcement, trial counsel did not feel Haggood would make a very good witness for the State, but then Haggood put on a different persona in the courtroom once he was able to plead guilty and testify against Petitioner. (App'x p. 1028). Trial counsel testified Haggood presented incredibly well, was charismatic, and felt the jury found Haggood to be credible. (App'x p. 1028).

Trial counsel recalled great difficulty in securing Gidron prior to trial. Trial counsel personally visited the scene ten to twelve times and visited the scene with his private investigator. (App'x p. 1009). In fact, trial counsel testified the best he could do with Gidron was two telephone conversations as Gidron was difficult to locate and even had a physical altercation with his investigator. (App'x p. 1009). Although Gidron did not want to be involved, trial counsel was able to go over his trial testimony by phone. (App'x p. 1009; p. 1039). Trial counsel testified Gidron's testimony at the PCR hearing was more on-point at trial as Gidron was calm, cool, and collected at the PCR hearing. Trial counsel noted he wished Gidron would have

presented himself in that same fashion at trial. (App'x p. 1011). Instead, trial counsel testified Gidron's nervousness during his trial testimony made him seem hostile. (App'x p. 1038).

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STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id; Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. The Court of Appeals properly affirmed the PCR court's dismissal of Petitioner's post-conviction relief application because Petitioner failed to establish trial counsel was constitutionally ineffective for failing to effectively utilize lay witness, Antonio Gidron, and expert witness, Kelly Fite, at trial where Petitioner cannot establish he suffered any prejudice and where trial counsel was not deficient in the preparation and presentation of either witness because he made reasonable and adequate efforts to prepare and discuss the case with both witnesses prior to trial and because trial counsel made adequate efforts to utilize both witnesses' testimony at trial.

Petitioner contends the lower court erred in finding trial counsel was not ineffective for his use of Fite as an expert witness at trial, arguing Fite's trial testimony was subpar compared to that of post-conviction relief hearing witness Robert Tressel, and therefore, trial counsel was deficient for not retaining an expert who would have testified more favorably at trial. Respondent asserts this contention is not supported by the record and is without merit. Additionally, Petitioner alleges trial counsel was ineffective for failing to fully prepare Antonio Gidron to testify as a witness and that the lack of preparation prejudiced Petitioner at trial. Respondent contends this allegation is also without merit.

A. *Trial counsel properly prepared and utilized Kelly Fite as an expert witness at trial.*

Petitioner argues Counsel's decision to employ the services of Fite over those of Tressel, or another similar expert witness of Tressel's, prejudiced Petitioner's defense at trial and that, had counsel obtained a different expert witness, Petitioner would have been acquitted. Trial counsel took reasonable measures in selecting and preparing Fite for Petitioner's case. Review of the record does not provide a single clear instance where Fite's testimony "undermined" the defense. Although Counsel did state, after hearing Tressel testify, his only potential regret at trial was calling Fite because in hindsight, he would have preferred Tressel's testimony over Fite's,

this admission from Counsel in no way suggests he was unreasonable in deciding to use Fite as an expert witness. Furthermore, Counsel clarified that Fite's testimony was not "harmful to the case." (App'x p. 1008, ll. 8-10).

Trial counsel emphasized Fite came highly recommended by other criminal defense attorneys, who had great success using Fite, adding Fite was "heralded by all, did such a great job." (App'x p. 1004, ll. 24-25; p. 1005, ll. 1-4; p. 1007, ll. 5-6). Referring to his notes at the evidentiary hearing, Counsel testified that in September 2012 he called Fite about the case, and in October 2012, mailed Fite all discovery materials he had been given. (App'x p. 1004). Counsel further indicated at the evidentiary hearing that he exchanged emails with Fite regarding what he believed the State's theory would be. (App'x p. 1004). Counsel testified that he communicated to Fite his belief the State would attempt to attribute a .45-caliber-automatic weapon used in the shooting to Petitioner. (App'x pp. 1004-05).

Petitioner's argument further centers on Petitioner's alleged use of a .45 caliber weapon when the evidence suggests that a .40 caliber weapon inflicted the fatal injury to Lawton. It is Petitioner's assertion that Fite was defective in his capacity as an expert witness because he did not clearly draw the distinction between the likelihood of a .40 caliber round being able to penetrate through the skull compared to the likelihood of a .45 caliber round. Indeed, Counsel noted Fite testified he was not able to explicitly rule out a .45 caliber round as the cause of the fatal injury to Lawton. "Usually, you don't expect a large caliber hollow point bullet to penetrate a person's head, but it does happen." (App'x p. 554, ll. 3-4). However, Tressel, the expert witness used by Petitioner to establish Fite's testimony as subpar, was also not able to rule out the possibility of a .45 caliber round causing the fatal injury to Lawton. (App'x p. 941, ll. 13-16). All Tressel could state was that of all the weapons known to be present at the time of the

shooting, the .40 caliber weapon attributed to Petitioner's codefendant, Joshua Haggood, most likely fired the fatal shot, but was not able to affirmatively state with one-hundred-percent certainty that Lawton was killed by a .40 caliber round.

There is nothing in the record to indicate Counsel failed to adequately prepare Fite to testify at trial. Trial counsel provided Fite with all discovery materials available to him. Moreover, Fite came highly recommended, and Tressel himself testified he has known Fite for forty years and the two often refer persons each other. As Petitioner's own expert witness testified at the PCR hearing, Tressel himself was unable to reconstruct the crime scene in this case. The fact the crime scene was allegedly too inadequately documented to give rise to a reconstruction was no fault of Fite or Counsel.

Here, Counsel's decision to retain Fite was based on the strong recommendations he received from other members of the profession. Trial counsel had no reason to suspect Fite would appear at trial relatively unprepared, as he provided Fite with all relevant discovery, and nothing in the record indicates Counsel failed to adequately prepare him. To the extent Fite was unprepared to testify, it was not because trial counsel was ineffective, but rather because Fite was, and our Federal Courts have consistently held that there is no constitutional right to effective assistance of an expert witness. *See, e.g., Thomas v. Taylor*, 170 F.3d 466, 472 (4th Cir. 1999) (trial counsel cannot be held ineffective for preparing an expert witness to testify); *Wilson v. Greene*, 155 F.3d 396, 401-02 (4th Cir.1998) (holding that the Constitution does not entitle a criminal defendant to the effective assistance of an expert witness); *See also Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008) (counsel is not ineffective for structuring a case on the basis of opinion received at the time counsel consulted expert). Moreover, contrary to Petitioner's assertion that Counsel should have found an expert willing to give more favorable ballistics

testimony, it was unnecessary for Counsel to shop for a more favorable opinion as Fite did not advise counsel of an adverse opinion prior to trial. Though Fite may have not testified as favorably as counsel would have hoped at trial, Counsel reasonably retained and employed Fite who he believed would be well suited to this case.

The court established in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), that the failure of counsel to take reasonable steps to open communication with the State's expert, which would have rendered information that would create substantial reasonable doubt in the jury, amounted to ineffective assistance of counsel. In the current matter, there is no evidence that any failure on the part of Counsel amounted to a similar offense. Furthermore, the court in *Ard* very carefully stated that:

> "The PCR court's findings are based almost exclusively on Powell's testimony as to what information he would have provided to counsel if only they had asked-either prior to trial or on cross-examination. Neither this Court, nor the PCR court, has handed respondent a "second chance" because he has, many years after conviction, found a favorable expert. Instead, the PCR court properly focused on the evidence that counsel failed to appropriately examine the State's forensics evidence and failed to obtain the assistance of an appropriate expert." *id.* 642 S.E.2d at 336.

There was no testimony offered to establish that had Counsel acted in another manner, Fite would have granted more information than that which was gathered from him during the process of the trial. As was held in *Ard*, Petitioner's ability to find a favorable expert many years after his conviction is not enough to establish ineffective assistance of counsel.

Notwithstanding trial counsel's lack of deficiency, Petitioner has also failed to satisfy his burden of proving he was prejudiced regarding trial counsel's use of Fite as an expert witness. Even if trial counsel could have forced Fite to review every piece of material provided, and given a better explanation of the ballistic evidence in this case, the outcome of trial would remain

unchanged. As noted in the Opinion, Petitioner's own expert, Tressel, was unable to reconstruct the crime scene, so had Fite been prepared in the same manner as Tressel, he still would not have been able to reconstruct the crime scene. Tressel, like Fite, was also not able to unequivocally testify that a .45 caliber bullet could not have caused the wound that killed victim.

In direct opposition to their claims, Petitioner's largest problem at trial was not the quality of an expert witness, but rather, accomplice liability. The Petitioner faced this enormous burden at trial given the testimony of codefendant Haggood and other witnesses, which clearly placed Petitioner, codefendant Haggood, and codefendant Fraizer together as a group the entire night. (App'x p. 1027-1036, p. 1098).

The record shows all three codefendants acted together and each possessed and fired a weapon that night. Petitioner's group exited the club, retrieved weapons, returned to the location where there was potential for an altercation with Lawton, remained in that location, then codefendant Frazier fired a shot in the air and it led to an exchange of gunfire. (App'x p. 1033-32). Codefendant Haggood explicitly stated that he carried a .40 caliber semiautomatic pistol. (App'x p. 265). Therefore, even if Fite did a better job at highlighting that a .40 caliber round was more likely to have inflicted the fatal injury to Lawton than a .45 caliber round from the weapon attributed to Petitioner, it would not overcome the presumption of guilt under accomplice liability.

The record here establishes, through witness testimony, the three codefendants were acting in conjunction with one another through the entirety of the commission of these crimes. While the State would agree that the issue herein is not whether the State established accomplice liability at trial, as the record clearly establishes that it has. The issue instead, continues to be whether credibility would have been shaken and a reasonable doubt established if counsel was

found to be deficient through its utilization of the expert and lay witness.

Petitioner asserts that had trial counsel more effectively utilized Mr. Fite, there would have been reasonable doubt established and the outcome of the trial would have been different. This claim is speculative and without merit. The trial strategy of Counsel was established and upheld by the lower court in the Order of Dismissal issued on February 1, 2019. Wherein, proper utilization of the expert was found in Counsel's use of testimony to attempt to establish a reasonable doubt due to the nature of the crime scene. (App'x p. 1097). Furthermore, the Petitioner in this argument fails to consider the well-established case law surrounding accomplice liability.

"Under the hand of one is the hand of all theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by this confederate incidental to the execution of the common design and purpose" *State v. Condrey*, 349, S.C. 184, 194, 562, S.E.2d 320,324 (Ct.App.2002) "Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." *State v. Langley*, 334 S.C. 643,648-49,515 S.E2d 98, 101 (1999) (quoting *State v. Austin*, 299 S.C. at 459, 385 S.E.2d at 832). "Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing." *State v. Zeigler*, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005).

The evidence regarding the lower court's findings of accomplice liability in this matter are in line with the facts arising from witness testimony at the trial. Specifically, we look to the testimony of Mr. Haggood, who along with numerous other witnesses alerted the court to the fact that the three men exited the club in unison to retrieve their weapons from the car that Petitioner

drove to the party before returning to the scene of the crime (App'x p. 1095). This testimony was an essential factor in establishing that the men were involved a conspiracy sufficient to prove accomplice liability. This fact was further confirmed by Counsel's testimony that the decision of Mr. Haggood to testify at trial "threw things into a redirection" in the case. (App'x p. 1027-1036). Petitioner's contention that the utilization of the expert in this case calls into question the State's investigation, theory of the case, and witnesses, therefore, is without merit.

Petitioner through this claim is making the assumption that had Counsel utilized the expert and witness in a different manner then, the findings gained from those witnesses would have proved that Benjamin was not responsible for firing the specific bullet that killed Mr. Lawton. However, based upon the fact that the charges are arising under the accomplice liability statute, whether or not Benjamin fired that specific bullet is not an essential factor to establish his guilt. The expert and witness through any other utilization as can be imagined by Petitioner would not have rendered claims sufficient to refute the witness testimony of Mr. Haggood and change the outcome of this trial.

As the Circuit Court explained in its Order of Dismissal, "a chaotic crime scene was not going to change the testimony and believability of codefendant Hagood's testimony that [Petitioner] went to the car and retrieved a .45 and returned to the club before the shooting which left the victim, with whom the [Petitioner] had been in conflict throughout the night, dead directly in front of [Petitioner's] car." (App'x p. 1098). Accordingly, Petitioner has failed to show prejudice and this Court should deny certiorari.

B. ***Trial counsel properly prepared and utilized witness Antonio Gidron at trial.***

In support of Petitioner's claim Counsel was ineffective for failing to properly prepare Antonion Gidron to testify as a witness and that Counsel's lack of preparation prejudiced Petitioner at trial, Respondent contends this allegation is also without merit.

Petitioner asserts Counsel's testimony regarding his failures as to Mr. Gidron were erroneously ignored by the Circuit Court and the Court of Appeals in failing to find ineffective assistance of counsel. However, Petitioner fails to mention that those failures were no fault of Counsel. It has been well established in the record that both Counsel and the solicitor's office had great difficulty locating Mr. Gidron. (App'x. p. 1040, 11. 11-25). The record reflects Counsel took reasonable steps to investigate, locate, and prepare Gidron, given Gidron's aversion to involvement in the case. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel, especially when the allegation is supported only by mere speculation as to result. *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

At the evidentiary hearing, Counsel explained Gidron was extremely nervous to testify, which made him come across as a hostile witness. (App'x p. 1038, ll. 9-17). Furthermore,

Counsel testified he had extreme difficulty locating Gidron, let alone communicating with him, and the record reflects even the solicitor was entirely unable to contact Gidron. (App'x p. 568; p. 1009). To complicate matters, Counsel described how Gidron became combative when the private investigation came to subpoena him, resulting in a physical altercation. Counsel noted that, despite Gidron's hostility, he was able to speak with Gidron on the phone the Friday prior to trial, adding it was the best he could do. (App'x p. 1009). Counsel further explained Gidron's demeanor at trial was markedly different from his demeanor at the PCR hearing. Counsel testified Gidron's testimony at the PCR hearing was more on-point than at trial as Gidron was calm, cool, and collected at the PCR hearing. Counsel stated he wished Gidron would have presented himself in that same fashion at trial. (App'x p. 1011).

Though counsel testified that Mr. Gidron's demeanor and testimony was different, in a positive way, at the evidentiary hearing, the lower court properly found Counsel made reasonable and adequate efforts to effectively utilize Gidron as a witness at trial, despite Gidron's hostility which was no fault of trial counsel" (App'x p. 1099).

It is clear trial counsel made reasonable and adequate efforts to effectively utilize Gidron as a witness at trial, despite Gidron's hostility which was no fault of trial counsel. Despite Gidron's demeanor, Counsel was still able to elicit from Gidron that he never saw Petitioner leave the car and he did not want to see Petitioner "go down" for something he was "99% sure" Petitioner did not do. (App'x p. 564; p. 567). Furthermore, the fact that Gidron was more willing to cooperate with PCR counsel *five years* after Petitioner's trial, does not create a presumption that trial counsel was ineffective. It is not incumbent upon trial counsel to ensure that a witness is likeable or completely at ease testifying during a murder trial. For these reasons, Petitioner has

failed to satisfy his burden of proving trial counsel was deficient regarding the use of Gidron at trial.

Notwithstanding Counsel's adequate performance regarding this allegation, Petitioner has also failed to satisfy his burden of showing prejudice from Counsel's performance with Gidron. Although trial counsel stated he would have preferred the calmer demeanor of Gidron exhibited at the PCR hearing, Gidron's substantive testimony did not significantly deviate from his testimony at trial. Despite Gidron's lack of cooperation, he still testified at trial that the "rain of fire" came from Haggood, not Petitioner. (App'x p. 576-577). Gidron testified at the hearing that the shots he believe to have struck Lawton came from the road, which is consistent with his earlier trial testimony. (App'x p. 562). Clearly, the jury heard significantly similar testimony from Gidron at trial but chose not to believe it. Accordingly, Petitioner failed to show any reasonable probability that trial counsel could have handled Gidron any differently to achieve a different outcome.

CONCLUSION

For the reasons stated above, this Court should deny certiorari. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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