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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari
to Beaufort County
Thomas W. Cooper, Trial Judge
Robert J. Bonds, PCR Judge

Appellate Case No. 2024-000078

AARON SCOTT YOUNG, SR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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

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QUESTIONS PRESENTED

Petitioner's Questions

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II. Did the Post-Conviction Relief Judge err in failing to find trial counsel was ineffective in failing to object to a hearsay statement of Tyrone Robinson that he had been shot at by Aaron Young, Jr. as the statement did not qualify as an excited utterance?

III. Did the Post-Conviction Relief Judge err in failing to hold trial counsel was ineffective when he failed to object to the 911 call in which hearsay statements of other witnesses were given on the tape as the alleged crime was being reported?

IV. Did the Post-Conviction Relief Judge err in holding that trial counsel was not ineffective for the failure to object to the general intent charge as to attempted murder when trial counsel admitted he researched the issue and did not object to the implied malice alleged in the indictment?

Respondent's Counterstatement of Questions

I. Did the PCR court properly find Petitioner's murder conviction did not violate the ex post facto clause when the murder statute and the theories of liability relied upon by the State predated the offense date, and the application of these preexisting legal theories to murder did not aggravate the offense, alter the State's burden of proof or the requisite criminal intent, or increase the penalty for murder?

II. Does probative evidence support the PCR court's finding that Petitioner did not prove counsel was ineffective in his objection to Charlese Mitchell's hearsay testimony when the trial court acted within its discretion in finding the statement fit the excited utterance exception, and Petitioner's argument (raised for this first time in this Petition) that Robinson was somehow amped up by an earlier incident where he shot at the Youngs rather than the more recent incident of the Youngs shooting at him is unpreserved and incredulous?

III. Did the PCR court properly find Petitioner did not prove counsel was ineffective for not objecting to the 911 calls when the calls were nontestimonial and did not violate the Confrontation Clause or contain inadmissible hearsay?

IV. Did the PCR court properly conclude counsel was not ineffective for not objecting to a jury charge that had not been deemed improper at the time of Petitioner's trial?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving an aggregate thirty-year sentence. In October 2014, the Beaufort County Grand Jury indicted Petitioner for murder (2012-GS-07-2173) and attempted murder (2014-GS-07-1941). On August 10, 2015, Petitioner proceeded to a jury trial before the Honorable Thomas W. Cooper. Robert Ferguson, Esquire, represented Petitioner. Solicitor Isaac McDuffie Stone, III, and Deputy Solicitor Sean Thornton prosecuted the case. The jury convicted Petitioner as indicted, and Judge Cooper sentenced him concurrently to thirty years for murder and twenty years for attempted murder.

Petitioner filed a timely notice of appeal, which was perfected by Appellate Defender Kathrine Hudgins. On appeal, Petitioner argued the trial court erred in denying his motion for a directed verdict on murder when (1) the State's evidence of murder depended upon a combination of mutual combat, accomplice liability, and transferred intent; and (2) the State failed to establish mutual combat at the time of the fatal shooting. The Court of Appeals affirmed. See State v. Young, 2019-UP-233 (Ct. App. filed June 26, 2019). Petitioner filed a motion to reconsider, which was denied. Petitioner filed a petition for a writ of certiorari in the South Carolina Supreme Court, which was also denied. The remittitur was sent March 13, 2020.

On March 14, 2020, Petitioner filed this PCR application. On March 16, 2023, an evidentiary hearing convened before the Honorable Robert J. Bonds. On October 2, 2023, Judge Bonds issued an order denying relief and dismissing the application with prejudice. Petitioner filed a motion to reconsider, which was denied.

Brief Summary of Trial Testimony

On September 1, 2012, eight-year-old Khalil Singleton was fatally shot during an ongoing gun battle between Petitioner, Petitioner's son, Aaron Young, Jr. and Tyrone Robinson. Over the course of an hour, the three men traversed several locations in Hilton Head, eventually ending in front of a group of children jumping on a trampoline. It was there Khalil was shot and killed. The evidence indicated Robinson fired the fatal shot. At trial, the State proceeded against Petitioner on the murder charge under a theory of mutual combat.

Jontu Singleton testified that on the afternoon of the incident, he and Robinson drove to the Youngs' residence. When they arrived, Petitioner and Young Jr. were outside; Robinson exited his vehicle and pointed a .38 caliber revolver at Young, Jr. According to Singleton, Petitioner began struggling with Robinson when Petitioner saw the gun. Singleton stated Robinson fired the gun and Petitioner backed away; Robinson fired one or two more shots before returning to his vehicle and speeding away. (App. 569-71).

Singleton testified the Youngs went inside and retrieved a semi-automatic pistol and ammunition after Robinson left. The Youngs and Singleton then entered Petitioner's gray truck and began to search for Robinson. Petitioner drove while Young, Jr. assembled the pistol in the passenger seat. (App. 571-77). The three men drove around for about ten minutes but could not find Robinson. Singleton then exited the vehicle.

During trial the State entered four 911 calls placed that afternoon involving the shootout.¹ In the first call, the caller (Kathleen Fayfich) indicated she had just heard eight gunshots in rapid succession at the beginning of Allen Road. She relayed there were children in the area. The operator indicated she would dispatch an officer to the area.

¹ These 911 calls were also entered into evidence and played at the PCR hearing.

In the second call, the unidentified caller relayed she heard possible gunshots somewhere on Allen Road or Marshland Road. She relayed she heard six or eight shots that sounded like they were coming from an automatic weapon. The caller stated the shots began at one end of the road, and it sounded like they drove to the other end of the road and fired again. The dispatcher asked, “Just now?” The caller replied, “Just now.” The dispatcher stated officers had been dispatched.

In the third call, the caller screamed hysterically, “We need an ambulance. Somebody got shot.” The caller—who remained hysterical—stated a boy had been shot and was bleeding from his mouth. The dispatcher stated officers were on the way. The dispatcher asked if the caller knew the child, where the child had been shot, and if the caller saw cars in the area. At that point, the caller hysterically yelled, “They shot my cousin! I know him! Listen, who was the guy who had on red shorts?” Shortly thereafter the call was disconnected.

In the fourth call, the caller said, “We have a lady on the line who has some information about where the shots were fired just now.”² In the background a voice is yelling. The caller stated, “She say a gray truck and a gray Lexus. They came towards Spanish Wells and she do know one of them.” The caller stated the vehicles were shooting at each other. The dispatcher asked who she thought the shooter was, and a voice in the background said Tyrone Robinson.

The State also produced witnesses who testified about the shootout. Charlese Mitchell, who lived off Allen Road, testified she heard ten or more rapid gunshots around 4:00 p.m. that afternoon. After the shots, she saw Petitioner speeding away in a grey truck. (App. 511-13). Mitchell stated Robinson, who was related to Mitchell, came to her door shortly thereafter, and Mitchell noticed something with a black handle sticking out of his pocket. (App. 518-19). Mitchell testified Robinson, who was hyper and “amped up,” said, “Those M. F. was out there shooting at

² At trial, the 911 records custodian clarified the “calm” voice in the call was “a dispatcher from [the] Hilton Head dispatch. They originally received the call and then transferred it to [Beaufort County].”

him.” (App. 519). Mitchell stated her boyfriend Tyrone Delaney and Robinson stepped outside to talk. After Robinson left, Mitchell heard another set of rapid gunshots. A few minutes later, Mitchell heard three more shots that sounded different than the first two sets of gunshots; she then saw Petitioner speeding down Allen Road. (App. 521-26).

Delaney testified he was driving down Spanish Wells Road around 4:30 that afternoon when a grey truck almost hit him head-on. (App. 539-40). When he arrived home, Robinson was there and asked Delaney if he had seen a grey truck. (App. 542-43R. 333). After Delaney told Robinson about his encounter with the truck, Robinson replied, “That mother was shooting at me, so I shot at them.” (App. 543). He stated Robinson had a revolver. (App. 544). Delaney testified he heard rapid gunshots after Robinson left. (R. 334). Shortly thereafter, he heard three gunshots that seemed to come from a different type of weapon. (App. 545-546).

Later that day police stopped Petitioner, Young, Jr., and Petitioner’s girlfriend Ebony Campbell in Petitioner’s grey truck. (App. 582-83). Police recovered spent 9-millimeter shell casings from the back of the truck, and an expert in firearms marks testified the casings were fired by the same type of weapon as projectiles recovered from Robinson’s car. (App. 584, 614, 636). Petitioner was transported to the police station, where he gave a statement admitting that Young, Jr. shot at Robinson after Robinson shot at them. (App. 587, 601-02).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENTS

- I. **The PCR court properly found Petitioner’s murder conviction did not violate the ex post facto clause when the murder statute and the theories of liability relied upon by the State predated the offense date, and the application of these preexisting legal theories to murder did not aggravate the offense, alter the State’s burden of proof or the requisite criminal intent, or increase the penalty for murder.**

Much of Petitioner’s argument on this issue is premised on his assertion that the Supreme Court created new law that was improperly applied to Petitioner in violation of the ex post facto clause.³ Petitioner specifically asserts that the doctrine of mutual combat has traditionally been used to prevent a criminal defendant from requesting a charge on voluntary manslaughter as a lesser-included offense of murder when the evidence shows the participants were engaged in mutual combat. Petitioner asserts that here, however, the doctrine of mutual combat was used for the first time to elevate an offense to murder. This argument is incredulous in light of the fact Petitioner was *indicted for* and convicted of murder—a crime that preexisted the offense date. There was simply no ex post facto elevation of an offense here; Petitioner was indicted for *murder*, and the jury concluded that the State submitted evidence to prove the elements of murder beyond a reasonable doubt. Petitioner now attempts to argue that dicta in a Supreme Court opinion

³ On direct appeal in Young, Jr.’s case, the Supreme Court of South Carolina found the theories of mutual combat and accomplice liability could combine to make the Youngs criminally responsible for the murder of an innocent bystander during a gun battle. See State v. Young, 429 S.C. 155, 166, 838 S.E.2d 516, 521-22 (2020) (“Given the Youngs and Robinson’s collective actions in carrying out the gun battle, it is reasonable for the law of mutual combat to serve as the foundation of a murder charge—to hold each one responsible for both his own actions and the actions of the others. Because we find the deadly force used in this case was the result of collective action, we hold the responsibility for the victim’s death was collective as well. Accordingly, we hold Young Jr. was properly charged with the victim’s murder under the theory of mutual combat.”); *id.* at 162-65, 838 S.E.2d at 519-21 (examining other jurisdictions and concluding the “aiding and abetting approach” used to establish criminal liability for the death of an innocent bystander in a mutual combat situation “dovetails with [South Carolina’s] ‘hand of one is the hand of all doctrine’”).

somehow created the new offense of murder. This argument patently lacks merit, and the PCR court properly denied relief.

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCF; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The United States Constitution prohibits states from passing *ex post facto* laws. U.S. Const. Art. I § 10. “[A]n *ex post facto* law ‘is an enactment, criminal or penal in nature, which is retrospective and disadvantages the offender affected by it.’” State v. Huiett, 302 S.C. 169, 171, 394 S.E.2d 486, 487 (1990) (quoting United States v. Mest, 789 F.2d 1069, 1071 (4th Cir.1986), Weaver v. Graham, 450 U.S. 24 (1981)). The following constitute *ex post facto* laws:

1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 171, 394 S.E.2d at 487 (quoting Calder v. Bull, 3 U.S. 386, 390 (1798)). A statutory change to the rules of evidence that would allow a conviction “upon less proof . . . than was required when the offense was committed, might, in respect to that offense,” violate the provision against *ex post facto* laws. Hopt v. People, 110 U.S. 574, 590 (1884). However, changes that

do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which . . . the state . . . may regulate at pleasure.

Id.

The PCR court properly found Petitioner’s murder conviction did not violate the *ex post facto* clause. Initially, the criminal statute for murder and both the doctrines of mutual combat and accomplice liability existed prior to the 2012 incident. See Young, 429 S.C. at 160, 838 S.E.2d at 518 (2020) (“The doctrine of mutual combat has existed in South Carolina since at least 1843”); State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) (“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 his confederate incidental to the execution of the common design and purpose.”).

Further, the application of mutual combat here did not elevate Petitioner’s crime. Petitioner was indicted for and convicted of murder. This is not a situation where he was somehow indicted for a lesser offense and convicted of a greater offense (which, concededly, would be improper). It is simply incredulous to assert that a theory of liability somehow elevated the charged offense.

Likewise, the PCR court properly found the application of mutual combat was not a law applied retroactively to Petitioner’s disadvantage. Mutual combat is a theory of liability; it is not a change in the statutory definition of murder. Although the Supreme Court held that it would “extend our jurisprudence” to use mutual combat and transferred intent to reach the death of innocent bystanders, that extension was based on well-established and pre-existing legal theories. In fact, it was well-established that one engaged in criminal activity was criminally liable for the actions of co-defendants, and actors engaged in mutual combat were “presumed to know and intend the consequences that naturally flow from their unlawful acts.” Young, 429 S.C. at 161, 838 S.E.2d at 519. Thus, the application of mutual combat to this set of facts did not violate the *ex post facto* clause.

The PCR court also properly found the application of mutual combat did not alter the

State's burden of proof or the requisite criminal intent. Rather, the State's burden remained "beyond a reasonable doubt," and the criminal intent remained malice aforethought. Killing an innocent bystander is a consequence that naturally flows from actors engaged in an ongoing gun battle. Combining the theories of mutual combat and accomplice liability did not alter the State's burden or the requisite criminal intent and thus did not violate the *ex post facto* clause. Finally, the application of mutual combat did not increase the penalty. Based on the foregoing, the PCR court properly found the application of mutual combat did not violate the *ex post facto* clause.

Petitioner's reliance on Horne is misplaced. In Horne, the South Carolina Supreme Court considered whether an unborn, viable fetus was a "person" within the statutory definition of murder. Id. at 446, 319 S.E.2d at 704. After concluding an unborn, viable fetus was a "person" under the statutory definition, the Court reasoned that because "no South Carolina decision had held that killing a viable human being *in utero* could constitute criminal homicide," the decision should not be applied retroactively. Id. at 447, 319 S.E.2d at 704. Here, however, the victim was an eight-year-old child, which is undisputedly a "person" under the statutory definition. Further, unlike Horne, the issue in Young concerned *liability*—not whether a murder even occurred. Using pre-existing theories of mutual combat and accomplice liability, the South Carolina Supreme Court determined the Youngs could be liable for the death of the eight-year-old innocent bystander. This was not new law.

Based on the foregoing, the application of mutual combat to this fact pattern did not violate the *ex post facto* clause. The statute upon which Petitioner was indicted predated the underlying offense, and the theories of liability (mutual combat and accomplice liability) predated the underlying offense. Nothing about this extension was novel or unexpected. Ultimately, the Supreme Court's decision did not "change the ingredients of [murder] or the ultimate facts

necessary to establish guilt.” Hopt, 110 U.S. at 590. Thus, the PCR court properly found Petitioner’s murder conviction did not violate the *ex post facto* clause.

II. Probative evidence supports the PCR court’s finding that Petitioner did not prove counsel was ineffective in his objection to Charlese Mitchell’s hearsay testimony when the trial court acted within its discretion in finding the statement fit the excited utterance exception, and Petitioner’s argument (raised for this first time in this Petition) that Robinson was somehow amped up by an earlier incident where he shot at the Youngs rather than the more recent incident of the Youngs shooting at him is unpreserved and incredulous.

Petitioner argues the PCR court erred in finding counsel was not ineffective for not objecting to Charlese Mitchell’s hearsay testimony about a statement made by co-defendant Tyrone Robinson. Specifically, although Petitioner acknowledges counsel *did* object to this statement based on hearsay, he avers counsel should have further argued the statement did not qualify as an excited utterance. However, Petitioner raises this specific argument for the first time, making it not preserved. Further, based on the actual statement made by Robinson—that those “MFs were shooting at him”—and additional testimony that Robinson was “amped up,” the PCR court properly concluded counsel was not ineffective in this regard for not further arguing against this testimony once the trial court concluded it fit the excited utterance exception to hearsay.

An applicant alleging ineffective assistance of counsel must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625.

a. Petitioner is raising this specific argument for the first time, making it not preserved.

At trial, Charlese Mitchell testified Robinson went to her house on the day of the shooting “really amped up.” (App.518). Mitchell stated, “When he came to my house, he asked me if my cousin—.” Trial counsel objected, and the State argued the testimony fit the excited utterance exception to hearsay. (App. 518-19). The Court agreed and overruled the objection. (App. 519). Thereafter, Mitchell testified Robinson told her “those MFs was out there shooting at him.” (App. 519). Likewise, Delaney testified Robinson—who was “pretty excited”—asked Delaney if he saw a gray truck and said “That mother was shooting at me, so I shot at them.” (App. 542-43).

At the PCR hearing, when asked whether he believed Mitchell's testimony about Robinson's statement hurt his case, Petitioner replied, “Well, it . . . was like the splitting the baby in that situation, because she also testified later on in trial . . . to us leaving ten minutes prior to the final shot.” (App. 1180). Trial counsel testified he made a hearsay objection when Mitchell testified about Robinson's statement, but it was overruled. When asked if he made any further objection, counsel explained it was his practice to not continue arguing after a judge has ruled. (App. 1143-45).

In its ruling, the PCR court found Petitioner did not prove counsel was ineffective for not further objecting to Mitchell's testimony because counsel *did* object, but the court overruled that

objection because it found Robinson's statement fit the excited utterance exception. In his Petition to this Court, Petitioner argues counsel was deficient for not arguing the excited utterance exception did not apply because Robinson had a chance to cool. In support, Petitioner argues—*for the first time*—that Robinson must have been amped up about the fact that he (Robinson) shot at the Youngs *earlier* that day while at the Youngs house. However, Petitioner did not advance this argument at the PCR hearing. In fact, counsel for Petitioner questioned trial counsel specifically about whether anything in the record showed “when this shooting *at him* [Robinson] allegedly occurred.” (App. 1147, emphasis added). During this line of questioning, Petitioner did *not* question counsel about the earlier incident at the Youngs house where Petitioner shot at the Youngs. Petitioner likewise did not clearly raise this argument in his Motion to Reconsider.⁴ Petitioner's specific argument that the statement did not fit the excited utterance exception to hearsay because Robinson had a chance to cool from the incident at the Youngs house is thus unpreserved.

b. Probative evidence supports the PCR court's finding that Petitioner failed to meet his burden of proving counsel was ineffective in this regard.

Probative evidence supports the PCR court's finding that Petitioner failed to meet his burden of proving counsel was ineffective in this regard. In its order, the Court found,

⁴ In his Rule 59 Motion to Alter or Amend Judgement, Petitioner argued:

The Court erred in finding that the hearsay statement of the co defendant was admissible as an excited utterance. In making this finding, the Court failed to consider that the record fails to consider the time since the co-defendant had seen what he alleges in his statement. In addition, this Court failed to consider that the co defendant had the reason to distort the truth as to what allegedly happened on the road as he had been the primary aggressor at the residence of Mr. Young when the co defendant fired his weapon at the Youngs.

(App. 1243).

Likewise, this Court finds Petitioner did not prove counsel was ineffective for not further objecting to Mitchell and Delaney's testimony⁵ about Robinson's statements. Notably, counsel *did* object during Mitchell's testimony, but the court overruled that objection based on testimony that Robinson's statement fit the excited utterance exception.

This finding is supported by the trial transcript. Critically, counsel *did* object to Mitchell's hearsay testimony, but the judge overruled that objection. Petitioner did not set forth at the PCR hearing any additional argument related to hearsay⁶ that counsel should have raised to this testimony and thus did not meet his burden of proving deficiency or prejudice.

In his attempt to argue that Robinson's statement did not meet the excited utterance exception because Robinson had a chance for cool reflection, Petitioner—for the first time—cites to an earlier incident where Robinson shot at the Youngs while at the Youngs' house. In doing so, Petitioner ignores the more recent event that was directly referenced by Robinson in his statement—that the Youngs were shooting at him. It is incredulous to speculate that Robinson was “amped up” from this *prior* event but not the more recent event when his very statement to Mitchell referenced the more recent event of “those MF was out there shooting at him.” Not only is Petitioner advancing this argument for the first time in this Petition, the argument that Robinson was somehow “amped up” about previously shooting at the Youngs rather than the Youngs more recently shooting at him is simply incredulous. It is not reasonably likely, had this argument been raised to the trial court, that the trial court would have agreed the *prior* event was the source of stress rather than the more recent event. Thus, the PCR court properly found Petitioner did not

⁵ Although the PCR court also ruled Petitioner did not prove counsel was ineffective for not objecting to Delaney's hearsay testimony, Petitioner did not address this portion of the ruling in his argument, making this ruling law of the case.

⁶ At the PCR hearing, Petitioner additionally argued the hearsay testimony violated the Confrontation Clause. However, Petitioner does not raise any argument related to the Confrontation Clause in his Petition to this Court, making it law of the case.

meet his burden of proof in this regard.

III. The PCR court properly found Petitioner did not prove counsel was ineffective for not objecting to the 911 calls when the calls were nontestimonial and did not violate the Confrontation Clause or contain inadmissible hearsay.

Petitioner contends the 911 calls⁷ violated the Confrontation Clause and contained inadmissible hearsay, and counsel was ineffective for not objecting to the calls. However, the PCR court properly found the 911 calls were nontestimonial and thus did not violate the Confrontation Clause. Further, the PCR court properly found Petitioner failed to prove the calls should have been excluded based on hearsay.

The Confrontation Clause bars testimonial statements of a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36 (2004). “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Davis v. Washington, 547 U.S. 813, 822 (2006). Thus, the Supreme Court of South Carolina has concluded that a victim’s statements in a 911 call were nontestimonial when they “were made to obtain police assistance, and the questions during the call were to elicit more information to enable police to assist her.” State v. Thompson, 420 S.C. 386, 401-02, 803 S.E.2d 44, 52 (Ct. App. 2017).

At the PCR hearing, Petitioner averred the outcome would have been different if the court had excluded hearsay statements from the 911 calls. Trial counsel testified he listened to the 911

⁷ The content of the 911 calls is recounted on pages 3-4 of this Return.

calls prior to trial and recalled discussing whether they created a Confrontation Clause issue. He testified he was concerned about statements that two cars were shooting at each other because that supported the State's theory that this was a running gun battle. However, trial counsel testified no one identified Petitioner as a shooter in the 911 calls, and he was less concerned about information regarding Robinson. Trial counsel averred the calls would come in under a business records exception, and he was not aware of an objection he could have made. He testified that in his experience 911 calls are often entered into evidence.

The PCR court properly found Petitioner failed to meet his burden of proving counsel was ineffective for not objecting to the 911 calls based on a Confrontation Clause issue because the statements in the calls were non-testimonial and did not violate the Confrontation Clause. Here, the 911 callers reported hearing multiple sets of gunshots in a broad area, and police were gathering information to address an ongoing emergency. This is further evidenced by the dispatcher telling callers they were dispatching law enforcement to the area. Thus, these calls were nontestimonial and did not violate the confrontation clause. See also Thompson, 420 S.C. at 401-02, 803 S.E.2d at 52 (finding 911 call nontestimonial when victim's "statements on the 911 call were made to obtain police assistance, and the questions during the call were to elicit more information to enable police to assist her"). Based on the foregoing, counsel's assessment⁸ that there was not a viable

⁸ Petitioner's argument that counsel testified he did not research this issue is based on testimony that is taken out of context. Although counsel testified he did not specifically research this issue, he recalled discussing whether the 911 calls violated the Confrontation Clause. He further explained he was familiar with "the line of cases that distinguish between 911 calls asking for help and 911 calls reporting a crime"—showing this was an issue he was, in fact, familiar with. Ultimately, because the 911 calls were nontestimonial, counsel's decision to not extensively research this issue was reasonable within prevailing professional norms and not deficient. Further, trial counsel explained he was not too concerned about the 911 calls because "there was no incriminating information given to 911. Nobody ever said Mr. Young, Sr. shot somebody. And so, you know, I was less concerned about information about Tyrone Robinson" (App. 1161). Thus, counsel's decision to not further research this issue was reasonable under prevailing professional norms and not deficient.

basis to object that would have excluded the 911 calls was reasonable under prevailing professional norms and not deficient. Further, Petitioner did not set forth an argument that would have likely excluded the calls based on Crawford and thus did not prove prejudice.

Likewise, the PCR court properly found Petitioner failed to meet his burden of proving counsel was ineffective for not objecting to the calls based on hearsay. Initially, the PCR court properly found the 911 calls met several exceptions to the rule against hearsay. See Rule 803(1), SCRE (providing “[a] statement describing or explain an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter,” is not excluded by the rule against hearsay); Rule 803(2), SCRE (providing “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” is not excluded by the rule against hearsay); Rule 803(6), SCRE (providing “[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity” is not excluded by the rule against hearsay). At the PCR hearing, Petitioner did not set forth any argument counsel should have made that would have excluded the calls based on hearsay. Although Petitioner referenced the 911 dispatcher repeating the words of the excited speaker, the dispatcher’s statements merely described or explained “an event or condition made while the [dispatcher] was perceiving the event or condition, or immediately thereafter.” Thus, those statements met an exception to the rule against hearsay. See Rule 803(1). Based on the foregoing, Petitioner did not prove deficiency or prejudice in this regard.

Finally, Petitioner did not show a reasonable probability the outcome would have been different had the 911 calls been excluded. Although the calls themselves supported the State’s

theory of an ongoing gun battle, none of the callers identified Petitioner or implicated him as one of the shooters. Thus, it is not reasonably likely the calls—in and of themselves—led to Petitioner’s conviction, or that the outcome would be different had the calls been excluded.

IV. The PCR court properly concluded counsel was not ineffective for not objecting to a jury charge that had not been deemed improper at the time of Petitioner’s trial.

Petitioner contends the PCR court erred in not finding trial counsel was ineffective for not objecting to the general intent charge as to attempted murder when counsel admitted he researched the issue and did not object to the implied malice alleged in the indictment. However, the PCR court properly concluded that under the law that existed at the time of trial, the charge was proper and there was no basis to object. To the extent Petitioner’s argument can be construed as an argument that counsel was ineffective for not objecting when the court did not charge attempted murder is a specific intent crime, this argument is raised for the first time in this petition and is not preserved. Further, the charge provided by the court was proper under the law that existed at the time of trial. Thus, counsel was not ineffective.

At trial, the trial court charged the jury on murder, mutual combat, transferred intent, and voluntary manslaughter. (App. 818-25). As part of the murder charge, the trial court properly charged the jury that malice could be inferred. (App. 819-20). Thereafter, the court provided the following attempted murder charge:

The Defendant is also charged with attempted murder. The murder of Khalil S., the attempted murder of Tyrone Robinson. I’ve already defined for you the crime of murder. It’s the unlawful killing of another person with malice aforethought either express or implied. So what is attempted murder? It’s the attempt to kill another person with malice aforethought either expressed or implied. So since you know what murder is, let me tell you under the law what an attempt is.

An attempt is an act which is done in partial execution of a design

to commit the crime itself. There has to be, first of all, an intent that the act should be committed.

And an act done, not in full execution of it, but in pursuance of it, intent. An attempt is different from preparation to commit a crime. It's also different from the intent to commit a crime. The law doesn't punish the mere entertainment of a criminal intent. To bring the law into action it is necessary that some act should be done in pursuant of the intent, immediately and directly tending to the commission of the crime of murder.

An act which, would the murder be perpetrated, would constitute a part and parcel of the crime itself. But it doesn't reach the accomplishment of the original intent, because it's prevented or abandoned.

(App. 825-26).

a. Petitioner's argument related to counsel's failure to object to the general intent charge as to attempted murder is not preserved.

In his amended application and at the PCR hearing, Petitioner's argument related to the attempted murder jury charge dealt with whether malice could be implied for attempted murder—not whether attempted murder was a general or specific intent crime.⁹ At the PCR hearing, PCR counsel's argument on this issue likewise focused on his contention that counsel should have anticipated that attempted murder is a crime that requires express (rather than implied) malice.

(App. 1204-05). Specifically, counsel argued,

[I]n King the South Carolina Supreme Court said attempted murder is a specific intent crime, **but you can't do it implied**. It's that the indictment in this case, **which led to the malice that was expressed or implied**, would have been quashed under King as it existed there. There's no question about that. But I want to point out one thing to this Court that, again, this is not difficult research to do. In 1973,

⁹ In his original application, Petitioner did not raise any issue with the attempted murder charge. (App. 1041-88). In his amended application, Petitioner argued, "Trial counsel was ineffective in not objecting to the use of implied malice as part of the definition of attempted murder." (App. 1115). In support, he alleged, "Trial counsel was ineffective in failing to conduct basic research that would have shown the law is that malice cannot be implied in an attempted murder case. The law was then and is today that the State must prove expressed malice to convict of attempted murder." (App. 1116).

there was an AR adaptation titled *What Constitutes Attempted Murder* and 54 AR.3d 612. It's an easy AR to find. It talks about attempted murder being a specific intent crime. If you go read the King case it cites a case out of Nevada that was years before this. The research needed to determine the mens rea for attempted murder was not difficult to find, even before the King decision. And I think a reasonably competent trial lawyer should have done some basic research to determine the mens rea required on attempted murder and would have raised the issue in this case that **the indictment was wrong because they allowed a conviction for attempted murder on implied matters.** And that is, I think, ineffective assistance of counsel. I understand the argument that counsel is not supposed to be clairvoyant, we talk about counsel doing some honest and serious research on a new law in South Carolina that was in existence in many states, and many states were required a specific intent. We're not asking the Court—the trial counsel to anticipate the Supreme Court overturning their decision because King did not overturn any decision. We're asking the trial counsel to simply be diligent enough to do some basic research to determine that the proper mens rea is in an attempted murder case. And is a specific intent to kill. And that was not done in this case. And had that been done in this case, the Supreme Court clearly would have reversed the attempted murder conviction.

(App. 1204-05, emphasis added). This argument was consistent with the argument raised in Petitioner's amended application, which specifically focused on the distinction between express and inferred malice rather than the distinction between a general intent crime and a specific intent crime. Consistent with this argument, the PCR court analyzed this issue in the context of whether counsel was ineffective for not objecting when the Court charged malice could be implied for attempted murder *rather than* in the context of whether counsel should have raised an objection based on the Court's failure to define attempted murder as a specific intent crime. (App. 1238-40).

In his motion to reconsider, Petitioner merely stated:

In holding that trial counsel was not ineffective for failing to object to the charge to the jury on attempted murder which permitted the jury to infer malice, this Court failed to consider that in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), the South Carolina Supreme Court stated what attempted murder meant. They did not modify any previous decision. Therefore, the decision in *King*

should be applied retroactively. As Mr. Young was convicted of attempted murder under a definition that does not properly define attempted murder, Mr. Young should be given a new trial.

(App. 1244-45). Thus, to the extent Petitioner's argument on appeal can be construed as an argument that counsel was ineffective for not objecting to the trial court's failure to charge that attempted murder requires specific intent, that argument is not preserved.

b. The trial court's charge, viewed as a whole, was proper under the law that existed at the time of trial.

The Constitutional requirement of effective assistance of counsel does not require attorneys to be clairvoyant or anticipate changes in the law. See Teamer v. State, 416 S.C. 171, 182-83, 786 S.E.2d 109, 114-15 (2016) (finding PCR court erred in finding counsel deficient for not objecting to a charge that had not yet been found improper). Notwithstanding this, Petitioner's argument is premised on a decision that came out *after* Petitioner's trial. Further, although the Court of Appeals had previously determined that attempted murder is a specific intent (rather than a general intent) crime, at the time of Petitioner's trial no South Carolina Court had addressed whether malice could be inferred under the statutory offense of attempted murder. Thus, the PCR court properly determined Petitioner did not meet his burden of proof in this regard.

In 2015, the South Carolina Court of Appeals examined the statutory offense of attempted murder and concluded it was a specific intent crime. State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) (hereinafter "King I"). On certiorari, the South Carolina Supreme Court agreed that attempted murder requires a specific intent. However, the Court further found:

[T]he Court of Appeals focused on the phrase "with intent to kill" in isolation and did not consider the remainder of the statute concerning "malice aforethought." Had the court done so, the decision would have been much clearer as to why attempted murder requires a specific intent to kill.

Additionally, it is necessary to address both parts of section 16-3-29 as it demonstrates that the General Assembly created the offense of attempted murder by purposefully adding the language “with intent to kill” to “malice aforethought, either express or implied” to require a higher level of mens rea for attempted murder than that of murder.

State v. King, 422 S.C. 47, 56, 61, 810 S.E.2d 18, 22, 25 (2017) (“King II”). In expanding on the Court of Appeals’ analysis, the Supreme Court “acknowledge[d] the ambiguity created by the language in section 16-3-29.” Id. at 62, 810 S.E.2d at 25-26. The Court thus “respectfully suggested to the General Assembly to re-evaluate the language following “malice aforethought” as the inclusion of the word implied in section 16-3-29 is arguably inconsistent with a specific intent crime.” Id. at 64 n. 5, 810 S.E.2d at 27 n.5.

Here, the PCR court properly found the issue of whether malice could be implied in statutory attempted murder was not addressed by an appellate court until *after* Petitioner’s trial. Given the ambiguity of this issue (as noted by the South Carolina Supreme Court) and the fact the statute itself contained the language “express or implied,” it is incredulous to suggest that counsel should have somehow known the Supreme Court would subsequently conclude that malice could not be implied for attempted murder. This was an ambiguous issue that had not been resolved by our appellate courts at the time of trial. The PCR court thus properly found counsel was not deficient for not objecting. See Teamer, 416 S.C. at 182-83, 786 S.E.2d at 114-15 (finding PCR court erred in finding counsel deficient for not objecting to a charge that had not yet been found improper); Strickland, 466 U.S. at 690 (“[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.”).

As to the unpreserved issue raised by Petitioner, unlike the charge in King, the Court here did not charge that specific intent to kill was not an element of attempted murder. Thus, as to the

issue of general versus specific intent, the trial court's charge here was not improper, and counsel's failure to object was reasonable under prevailing professional norms and not deficient. Finally, it is not reasonably probable an objection on this basis would have changed the outcome—especially when the trial court never instructed the jury that attempted murder is a general intent crime.

CONCLUSION


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

Respectfully Submitted,

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