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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Florence County
Honorable William H. Seals, Jr., Trial Judge
Honorable Walton J. McLeod, IV, Post-Conviction Relief Judge

Appellate Case No. 2024-000952

DIONDRAE E. JACKSON, SCDC # 241391,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Did the post-conviction relief court properly find Jackson failed to meet his burden of establishing any constitutional ineffectiveness based on counsel's purported failure to object to the additional language included on the verdict form where Jackson failed to present evidence the scriveners error confused the jury in believing he had pled guilty to the charges, and where the trial court's charge to the jury clearly instructed them on their duty and the charges on which they could convict Jackson?

STATEMENT OF THE CASE

During the August 2018 term, the Florence County Grand Jury indicted Diondrae E. Jackson ("Jackson") for Murder and Attempted Murder (2018–GS–21–01599). Jackson was represented by William F. Edgeworth, III, Esquire. Twelfth Circuit Assistant Solicitor Todd S. Tucker prosecuted the case. Jackson's case proceeded to a jury trial on April 15–18, 2019, before the Honorable William H. Seals, Jr. The jury convicted Jackson of the lesser included offense of Voluntary Manslaughter only. Judge Seals sentenced Jackson to twenty-eight (28) years imprisonment. Jackson filed a timely notice to set aside the verdict, which Judge Seals denied on May 23, 2019.

Jackson filed a timely Notice of Appeal. Appellate Defender David Alexander perfected Jackson's appeal by filing an Anders[1] brief to the Court of Appeals presenting the following issue:

> Whether the trial court erred in charging voluntary manslaughter at the State's urging and over the objection of appellant where the reason given by the trial judge could not serve as sufficient legal provocation?

The Court of Appeals affirmed Jackson's conviction and sentence. State v. Jackson, Op. No. 2021–UP–375 (S.C. Ct. App. filed November 3, 2021). The Remittitur was returned to the lower court on November 3, 2021.

Jackson timely filed his post-conviction relief application on December 9, 2021, alleging he was being held in custody unlawfully based on the following reasons:

1. Ineffective Assistance of Counsel
   a. "Counsel failed to investigate case presented by the state when its evidence was tampered with by the state. The state admitted the video was altered to combine audio/video together."
   b. "Counsel failed to investigate all the evidence presented by state used, which could exonerate Jackson in proving that victim did have a gun."
   c. "Counsel had alibi witness in courtroom but failed to call this witness to testify and instead told the witness to leave."

[1] Anders v. California, 386 U.S. 738 (1967).

d. "Counsel failed to object to state closing arguments when prosecutor made inflammatory comments."
e. "Counsel failed to object after prosecutor made a request for court to charge manslaughter."
f. "Counsel failed to object during sentencing was improper information given by state."
g. "Counsel failed to object to the erroneously including certain language on verdict form ambiguous and confusing to the charge of not guilty and guilty plea."
h. "Counsel failed to object to charge of self-defense and mutual combat."
i. "Counsel argument during post-trial motion constituted as ineffective assistance of counsel."

Respondent filed its Return on March 21, 2022, requesting an evidentiary hearing. On June 2, 2023, an evidentiary hearing convened at the Florence County Courthouse before the Honorable Walton H. McLeod, IV. Jackson was present and represented by Steven W. Fowler, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Jackson proceeded forward on the claims set forth in his original application. In support of these claims, Jackson testified on his behalf, as did Charles Drayton and Marcus Harrison. Respondent presented testimony from William F. Edgeworth, III, Esquire (trial counsel). Judge McLeod denied Jackson's application by Order filed on May 28, 2024. This appeal follows.

STATEMENT OF THE FACTS

On the day of the shooting, Jackson was driving to a friend's house when he saw another friend, Latesha Newton (Newton). (App'x p. 424). Jackson and Newton talked for a while, and Newton eventually invited Jackson to a club with her and her friends. (App'x pp. 424 – 426). Newton drove her car, a black Dodge Charger, and they picked up her friends, Everett Frierson (Frierson), Ernestine Mack (Mack), and Lawanda Johnson (Johnson). (App'x pp. 144 – 145).

Newton had her .9mm firearm in the glove box of her car. (App'x pp. 146 – 147). Johnson also had a gun in the car, but she had given it to her fiancé, Frierson. (App'x pp. 187 – 188; pp. 223 – 224). Frierson testified that he asked Johnson if they could take the gun to the club "for self-defense purposes because of everything that has been going on in the news about shootings happening at nightclubs." (App'x pp. 223 – 224). Frierson claimed to know about other shootings at the Downbeat Club, which the lead investigator for the police corroborated. (App'x p. 246; p. 399).

Most of the witnesses, including Jackson, agreed that Jackson got into an altercation at the club over a pool game. Newton was unsure what had happened, but he heard quarters being thrown at Jackson. (App'x pp. 151 – 152). Johnson saw Jackson argue with a man wearing a red shirt. (App'x p. 190). Frierson said Jackson played a game of pool with his cousin, and Jackson lost the game and went to the bar to get more quarters. (App'x pp. 226 – 230). Jackson placed his quarters on the table, left, and returned to find Maurice Hickson (Hickson) playing pool. (App'x pp. 227 – 230). Jackson objected to Hickson cutting in line, and Frierson described Hickson as "apologetic." (App'x pp. 227 – 230). Jackson was very angry, and another man in a red shirt came over to calm the situation. (App'x pp. 227 – 230).

According to testimony, the men continued to offer the quarters to Jackson, but he refused

to take them and remained angry. (App'x pp. 227 – 230). Frierson testified that Hickson became angry and told Jackson, "F you," and threw the quarters at Jackson. (App'x pp. 228 – 229). Frierson testified that he, Newton, and others separated the men and took Jackson outside. (App'x pp. 229 – 230).

Jackson testified in agreement that he played one game of pool and lost, then went to the bar to get more quarters to play another game. (App'x p. 434). When Jackson returned from the bar, someone else's quarters were on the pool table. (App'x p. 434). Jackson testified that they waited for the owner of the quarters to return, but no one came back, so Jackson began playing. (App'x p. 434). Once they started playing, a man wearing a red hat, red shirt, and red pants showed up, pushed the balls around on the pool table, and accused Jackson of using his "MF'ing quarters." (App'x pp. 434 – 435).

Jackson later learned the man in all red was Malcolm Spates (Spates). (App'x p. 435). Jackson testified that he offered to get Spates his four quarters, and another person walked up to calm the situation, but Spates was "mooshing" Jackson in his chest. (App'x p. 436). According to Jackson, Spates flicked a quarter into his face. (App'x p. 436). At this point, Newton took Jackson outside. (App'x p. 436).

Before entering the club, Newton encouraged Jackson to take her gun for protection. (App'x p. 431). When Jackson left the club after the altercation over the pool game, he returned to the car with Newton and smoked a cigarette. (App'x pp. 436 – 437). Jackson testified he saw a man wearing a black hoodie watching him and tried to convince Newton to leave, but she wanted to stay. (App'x p. 437). Jackson testified that the bouncer asked him if he was alright, and he told the bouncer that he had been in an altercation with a guy. (App'x pp. 237 – 239). Jackson testified he went back into the club because he did not feel safe in the parking lot. (App'x pp. 456 – 457).

Jackson testified he could not leave because he did not know anyone to give him a ride, and he could not just walk because he had no idea where he was. (App'x pp. 456 – 457).

Once back in the club, Newton said she watched Jackson's facial expressions and could see he was upset. (App'x p. 155). Newton testified she decided to get Jackson to leave and took him by the arm. (App'x p. 155). Jackson then pushed Newton out of the way and started shooting. (App'x pp. 156 – 157). Jackson fired in the direction of the pool table. (App'x p. 157). Newton and the rest of their group testified that they did not see anyone else with a gun. (App'x p. 158; p. 190; p. 214; p. 233).

Jackson testified that he was in the bar watching "about eight" guys make gang signs at him, and he was scared. (App'x pp. 440 – 441). Frierson testified that he saw the group of men in the back of the club making gang signs at Jackson. (App'x pp. 232 – 234). Jackson testified that he saw the man in the black hoodie from the parking lot enter the club and hand a pistol to Spates. (App'x pp. 441 – 442). According to Jackson, Spates then drew a gun, and Jackson pushed Newton out of the way and fired at Spates. (App'x p. 442). Jackson testified that Spates dropped the gun and ran for the bathroom, and then Ronald Oliver (Oliver) reached for the gun, and Jackson shot Oliver in the hip. (App'x p. 442). At this point, testimony revealed that everyone, including Jackson, ran to the parking lot. (App'x p. 443).

Further testimony was provided that Jackson and the group got into Newton's car and left the scene. (App'x p. 443). A police officer responding to the call turned around after seeing Newton's car, and when he activated his blue lights, Jackson threw the gun out of the window. (App'x p. 443). According to testimony, the police never recovered the gun. (App'x pp. 386 – 387). Testimony provided that police denied taking a gun from Spates, but evidence forms indicated the opposite. (App'x pp. 311 – 313; pp. 373 – 374). The lead investigator testified that

the forms were in error, and the only gun recovered was Lawanda Johnson's gun from the Charger. (App'x pp. 373 – 374). Spates died due to his gunshot wound, and Oliver survived his gunshot wound. Jackson was charged and indicted for murder and attempted murder.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support 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 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief 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).

To establish ineffective assistance of counsel, the PCR Jackson must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the Jackson sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington , 466 U.S. 668, 687-88 (1984); Cherry v. State, 300 S.C. 1 15, 1 17-18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the Jackson must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 694).

ARGUMENT

I. The post-conviction relief court properly found Jackson failed to meet his burden of establishing any constitutional ineffectiveness based on counsel's purported failure to object to the trial court's jury instruction on mutual combat as evidence was presented to support charging mutual combat alongside self-defense, and where charging mutual combat alongside self-defense does not burden-shift.

The post-conviction relief court properly found trial counsel was not ineffective for failing to object to the trial court charging the jury on mutual combat. Jackson argues trial counsel was deficient because there was no evidence in the record of an antecedent agreement to fight or of any preexisting ill will or dispute between Jackson and Spates before this incident. Specifically, Jackson avers the record was insufficient to support the charge, and Jackson was prejudiced because the mutual combat charge under-cut his requested self-defense charge and shifted the burden to disprove self-defense, citing State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). However, trial counsel was not deficient because Taylor is distinguishable from the instant case, and the record supported the mutual combat charge, and any such objection would have been overruled. Further, the trial court's charge on self-defense and mutual combat was a correct statement of law and did not cause burden-shifting. Therefore, this Court should affirm the post-conviction relief court's order denying relief.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile

objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[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.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

As Jackson noted, "the trial [court] is required to charge only the current and correct law .

. . and the law to be charged to the jury is determined by the evidence at trial." Taylor, 356 S.C. at 231, 589 S.E.2d at 3 (internal citations omitted). "[A] trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "In reviewing jury charges for error, [appellate courts] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 583 (2010).

To constitute mutual combat, there must be "mutual intent and willingness to fight." State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). The intent to fight is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." Graham, 260 S.C. at 450, 196 S.E.2d at 495. "The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs." Taylor, 356 S.C. at 232, 589 S.E.2d at 2.

In Graham, the testimony established that the defendant and victim "met in town shortly before the shooting and engaged in a heated discussion, during which appellant waved a pistol in the face of the deceased." 260 S.C. at 451, 196 S.E.2d at 496. Thereafter, the victim drove home, retrieved a pistol, and drove back to the scene with the pistol in his hand. Id. As the victim exited his vehicle, the defendant "walked into the street, placing himself in a position where an encounter with the deceased could be expected." Id. In affirming the trial court's decision to give a mutual consent combat charge, the Supreme Court found "there was ill-will between the parties," it was inferable that they armed themselves to settle their differences at gunpoint, and they were engaged in mutual combat at the time of the killing. Id. at 496.

In Jackson's case, the post-conviction relief court found trial counsel was not ineffective for failing to object to the trial judge instructing the jurors on mutual combat. Specifically, the

post-conviction relief court found that trial counsel was not deficient, as evidence was presented that an altercation ensued between Jackson and Spates prior to the shooting. (App'x p. 743). Additionally, the court found that trial counsel could not be deficient for failing to object to a proper jury charge, as the Supreme Court had held that mutual combat and self-defense can be charged if the evidence presented at trial supports the charges. (App'x p. 743).

At Jackson's trial, evidence was presented that Jackson and Spates had a heated exchange over a couple of quarters while playing pool, resulting in several people having to break up Jackson and Spates and take Jackson outside of the club. (App'x pp. 151 – 158, 226 – 230, 434 – 457). Notably, Jackson agreed with the testimony of various witnesses that he had an argument with Spates prior to the shooting and testified that he informed the bouncer that he had a confrontation with a guy right before he went back into the club. (App'x pp. 437 – 439). Testimony was presented to the jury that Jackson had the opportunity to leave and chose not to, but entered the club, faced Spates after the altercation, that Spates had a gun, and they exchanged fire. (App'x pp. 155 – 157, 232 – 234, 431 – 443).

Jackson's reliance on Taylor to support his argument is misguided and dismisses the glaring evidence presented at trial. Furthermore, Taylor is distinguishable from the instant case because the instant case is more akin to State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973). Here, the record supported the mutual combat charge, and trial counsel was not deficient for not objecting to the charge.

In Taylor, Therl Taylor was arrested for the murder of Kevin Carter. 356 S.C. at 229-31, 589 S.E.2d at 2-3. Taylor and Robert Murphy got off work and went to Angela Wallace's house to meet Wallace, Myranda Stillinger, and Carter for drinks. Id. at 229, 589 S.E.2d at 2. At some point in the evening, Carter and Stillinger began arguing; Taylor intervened in an attempt to stop

the argument. Id. Thereafter, Taylor and Carter began to fight. The fight began inside but eventually moved outside. Id. at 229-30, 589 S.E.2d at 2. Eventually, Taylor drew a knife from his pocket and began stabbing Carter. Taylor stabbed Carter fifteen times. An autopsy report revealed that Carter died from a stab wound to the heart. Id. at 230, 589 S.E.2d at 2. At trial, Taylor admitted that he stabbed Carter, but claimed he acted in self-defense. Id. The trial court charged self-defense; however, the trial court also charged mutual combat. Id. at 230—31, 589 S.E.2d at 2-3. The jury convicted Taylor of murder and possession of a weapon during the conviction of a violent crime. Id. at 231, 589 S.E.2d at 3. On appeal, this Court reversed Taylor's convictions.

The Taylor Court stated, "Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the 'no fault' element of self-defense cannot be established." 356 S.C. at 232, 589 S.E.2d at 3. The Court concluded the mutual combat charge was unwarranted because there was no evidence that Carter knew Taylor was armed, and there was no pre-existing ill will between the parties. Id. at 234, 589 S.E.2d at 5.

This case is factually similar to Graham. Jackson erroneously asserts no evidence was presented of a pre-existing ill will and that the parties had knowledge that they were armed, while also admitting that evidence was presented, but was "at best contradictory." (PWC p. 13). Testimony was presented from various witnesses, including Jackson, that there was a heated exchange between Jackson and the victims. Additionally, contrary to Jackson's assertion, he testified at trial that prior to the shooting, he saw the hooded man from the parking lot hand a firearm to Spates prior to the shooting. (App'x pp. 441 – 442). In fact, Jackson relied on this fact—the knowledge that Spates was armed—to support his self-defense theory. Moreover, testimony was elicited that the club where the shooting took place had a reputation for violence,

and it was well known that shootings took place there, and Frierson testified that he always brought a gun when he would go to that club. (App'x pp. 245 – 246).

It was clearly and repeatedly presented to the jury that a verbal and physical altercation had occurred between the parties, in a place well known for deadly violence, specifically, shootings. The jury could easily infer from the evidence presented that Jackson and Spates had a pre-existing ill will or conflict prior to the shooting. Further, it could be inferred that the parties were aware that they were armed with a deadly weapon. Thus, the post-conviction relief court correctly found there was evidence to support a finding of pre-existing ill will or conflict.

Further, Jackson avers that "there was no antecedent agreement to fight between petitioner and decedent," stating that there was no evidence that Jackson and Spates knew they would see each other again that evening, nor planned to see each other. (PWC p. 13). However, a verbal and precisely pre-planned agreement between the parties is not required to show an antecedent agreement to fight, but it can be inferred from the acts and conduct of the parties. Graham, *supra*. The Court in Graham noted the following in supporting their holding that there was ill-will between the parties:

> They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point. Under these circumstances, the apparent willingness of each to engage in an armed encounter with the other, *sustained an inference that they were engaged in mutual combat at the time of the killing, and required that the issue be submitted to the jury for determination.*

260 S.C. at 452, 196 S.E.2d at 496 (emphasis added).

Similarly, the testimony presented concerning the surrounding circumstances and conduct of Jackson and Spates raised an inference of mutual combat that warranted the issue being submitted to the jury to determine. The mere fact that contradictory evidence was presented does not prohibit a charge, and the jury is the ultimate judge of the credibility and believability of the

evidence. The record provides the post-conviction relief court was correct in its findings because the testimony provided evidence Jackson and Spates had a mutual intent and willingness to fight.

Additionally, Jackson avers that the post-conviction relief court erred in finding trial counsel was not ineffective for failing to object to mutual combat being charged alongside self-defense, as it confused the jury and caused burden shifting. Jackson contends that by "comingling two separate and distinct principles of law, the trial court effectively shifted the burden of disproving self-defense from the State to petitioner to disprove mutual combat." (PWC p. 14). However, in Campbell v. State, the Court of Appeals found that "when evidence warrants a mutual combat charge, it may be charged to a jury even when read alongside a self-defense charge." 441 S.C. 361, 893 S.E.2d 492, 498 (2023); State v. Bowers, 436 S.C. 640, 647, 875 S.E.2d 608, 612 (2022) ("Mutual combat relates primarily to the law of self-defense."). As there was evidence to support the charge, and the trial court's instruction was a correct statement of the law, any objection to the challenged charge would have been futile. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

To show trial counsel's performance was deficient, Jackson "must show that counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Respondent submits Jackson has failed to prove trial counsel's performance fell below an objective standard of reasonableness. The post-conviction relief court properly denied relief, and this Court should deny certiorari.

II. The post-conviction relief court properly found Jackson failed to meet his burden of establishing any constitutional ineffectiveness based on counsel's purported failure to object to the additional language included on the verdict form where Jackson failed to present evidence the scriveners error confused the jury in believing he had pled guilty to the charges, and where the trial court's charge to the jury clearly instructed them on their duty and the charges on which they could convict Jackson.

Additionally, Jackson avers that the post-conviction relief court erred in finding that trial counsel was not deficient for failing to object to the verdict form reading "guilty plea" rather than "guilty," as it likely confused the jury and resulted in the jury finding Jackson guilty. Jackson bases this assumption on the fact that the jury found him not guilty of murder, but guilty of the charges that listed "not guilty" and "guilty plea" on the verdict form. In support of his contention, Jackson cites Wertz v. State, 349 S.C. 291, 562 S.E.2d 654 (2002). However, Wertz is distinguishable from Jackson's case, as it concerned an error directly related to the charge submitted to the jury. Further, Jackson ignores that the trial court's instructions were correct, curing any confusion. Therefore, the post-conviction relief court properly found that trial counsel was not ineffective for failing to object to the scrivener's error within the verdict form, and this Court should deny certiorari.

In Wertz, Wertz was charged with second-degree burglary, and during the jury charge, the trial court charged the jury on second-degree and third-degree burglary. Wertz, 349 S.C. at 293-294, 562 S.E.2d at 656. Subsequently, the trial court charged the jury regarding the verdict forms, but only made reference to burglary third degree. Id. Wertz was found guilty, but it was unclear whether he had been found guilty of burglary second or third degree, and trial counsel failed to poll the jury or ask for clarification. Id. The trial court sentenced Wertz to the maximum for second-degree burglary. Id. In holding that trial counsel was ineffective for failing to seek

clarification of the degree to which Wertz was convicted, the Supreme Court took into consideration the trial court's instructions to the jury, determining that the trial court's instructions to the jury were unclear in how to render the verdict. Id. at 297.

Wertz is distinguishable from the facts of Jackson's case, as the error committed in Wertz related to the difference of the degree of the charge itself, whereas the error on the verdict form in Jackson's case pertained to an additional word that amounted to a scrivener's error; an error which as trial counsel testified, no one noticed. (App'x p. 90). At most, even if language were to be deemed erroneous, it would be a harmless error. See United States v. Espino, 892 F.3d 1048 (9th Cir. 2018) (finding that including additional language that the jury find the defendant guilty beyond a reasonable doubt on the verdict form was erroneous, but that it was harmless error, as it did not constitute plain error affecting the defendant's substantial rights).

Critically, any confusion caused by the scrivener's error was cured by the trial court's instruction. As the post-conviction relief court noted, the trial court instructed the jury as follows:

> You must decide each charge separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other charge. **The defendant may be convicted or acquitted on any or all of the offenses charged. You will be asked to write a separate verdict of guilty or not guilty for each charge. To these charges, the defendant has entered a plea of not guilty**… If you find that the State has failed to prove beyond a reasonable doubt that the defendant committed murder, you may consider whether the State has proved beyond a reasonable doubt that the defendant committed voluntary manslaughter.

(App'x pp. 523, 528) (emphasis added). The trial court clearly instructed the jury that Jackson had pled not guilty to the offenses he was charged with, as was also clearly demonstrated by the ongoing trial the jury was present for and were charged to render a verdict. Moreover, the trial court clearly instructed the jury that if they found Jackson not guilty of murder, they could consider whether he was guilty of voluntary manslaughter. See United States v. Rodriguez, 735 F.3d 1, 12

(1st Cir. 2013) ("[W]e customarily assume that jurors follow the instructions given to them by the district court. See Morales–Vallellanes v. Potter, 605 F.3d 27, 34–35 (1st Cir. 2010) ("A basic premise of our jury system is that the jury follows the court's instructions, and therefore we assume, as we must, that the jury acted according to its charge.").

Jackson cannot rely on his self-serving speculation to support his contention that the jury was confused by the addition of one word to the exclusion of the trial court's clear instructions, the surrounding circumstances of an ongoing trial, and the evidence presented to the jury. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice); see Jones v. United States, 527 U.S. 373, 394–95 (1999) ("Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights."); see also Rodriguez, 735 F.3d at 12-13 (holding that the defendant's general argument that the erroneous language imposed an "impermissible burden" which "negated" their "entitlement as a matter of law to an acquittal should the Government's evidence ... be deemed insufficient" was insufficient to show the error likely affected the outcome of the proceedings).

Therefore, the post-conviction relief court properly found that Jackson failed to show that trial counsel was ineffective for failing to object to the scrivener's error in the verdict form, and this Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Jackson failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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