STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2012-212923

THE STATE,

Respondent,

vs.

RONALD COHENS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Petitioner Ronald Cohens was indicted in the April 2006 term of the Court of General Sessions for assault and battery with intent to kill (ABWIK) ((2006-GS-22-354) and failure to stop for a blue light (2006-GS-22-355). Charles D. Barr, Esquire, (trial counsel) represented Petitioner. On June 27-30, 2006, Petitioner proceeded to trial before a jury, with the Honorable Michael Baxley presiding. Petitioner was found guilty as charged and was sentenced to confinement for twelve (12) years for ABWIK and three (3) years, concurrent, for failure to stop for a blue light.

Petitioner appealed and was represented by Kathrine H. Hudgins, Appellate Defender. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Ronald Cohens, 2009-UP-064 (S.C. Ct. App. filed February 9, 2009). A Petition for Rehearing was submitted on Petitioner's behalf by Tara D. Shurling, Esquire. The petition was denied by the South Carolina Court of Appeals on April 6, 2009. Petitioner submitted a Petition for Writ of Certiorari on August 4, 2009. The State submitted a Return to the Petition for Writ of Certiorari on August 31, 2009. The Petition was denied by the South Carolina Supreme Court by Order dated April 8, 2010. The Remittitur was issued on April 12, 2010.

Petitioner filed an Application for Post-Conviction Relief on October 8, 2010, an Amended Application on April 26, 2012, and a Second Amended Application darted April 27, 2012. The State made Return on November 8, 2010. Evidentiary hearings into the matter were convened on April 26, 2012 and June 14, 2012, at the Georgetown County Courthouse. Petitioner was again represented by Tara D. Shurling, Esquire. Salley W. Elliott, Senior Assistant Deputy Attorney General, represented the State. The PCR court denied the Application by order dated July 30, 2012.

Petitioner appealed the denial of post-conviction relief. Petitioner filed a Petition for Writ of Certiorari on July 24, 2013. This Return to Petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

Petitioner was served at 9:00 p.m. on March 22, 2006, with a Rule to Show Cause regarding a violation by Petitioner of a family court order of protection involving harassing calls to his estranged wife, Nadine Cohens, the victim in this case. App. 297 – 298; 100 – 101; 121; 163 -165. During the early morning hours of March 23, 2006, as Nadine drove past a church on her normal route to work, Petitioner - who had been lying in wait—followed her. App. pp. 103 – 107; 161- 351. Nadine saw him pick up his cell phone and dial it. Petitioner called Nadine on her cell phone, in violation of an order of protection, but Nadine immediately turned the phone off. App. 106; 267; 340. Petitioner admitted that he knew he was not supposed to call Nadine and that he had been to family court many times before and that family court papers did not bother him. App. 340; 351. Petitioner followed Nadine onto Highway 701 towards Myrtle Beach. App. 107-110. While on the highway, Petitioner aggressively weaved past several cars to get directly behind Nadine. App. 110; 177. Nadine called her mother to tell her that Petitioner was following her. App. 110; 180. During the call, Petitioner accelerated and rammed into the back of Nadine's vehicle, disconnecting the phone. Id. Panicked, Nadine dialed 911 and reported that her ex-husband was ramming her car. Id.; 180 Nadine increased the speed of her car to escape. App. 111. Petitioner rammed Nadine's vehicle three more times before Nadine finally lost control and careened into the trees. App.185. Both cars were traveling at least 70 miles per hour in a 55 mph zone. App. 130. Nadine testified that she was running for her life. App. 186. Nadine's vehicle flipped twice before coming to a rest upside down. App.

111; 130-131; 202. Nadine was taken to the emergency room, fortunately with minor injuries, but her car was destroyed. App. 113, 115.

Two eyewitnesses saw the entire incident: Ronnie Lewis and Frederick Kinloch. See App. 127 (Lewis Testimony), 196 (Kinloch Testimony). Nadine, still conscious, reported that her husband had run her off the road. App. 131- 132; 221 - 227. The police located Petitioner, but he refused to pull over, which led to a chase. App. 235. Eventually, Petitioner stopped and was arrested. App. 239.

At trial, the State introduced evidence from Nadine, the 911 operator who took Nadine's call, Lewis, and Kinloch. The PCR order denying relief characterized the evidence in this case "overwhelming." App. 787, 790. Other incidents which occurred during trial will be set out fully in the relevant argument sections.

ARGUMENT

Respondent submits that the rulings of the post-conviction relief court were correct and supported by probative evidence. Thus, the petition for writ of certiorari should be denied.

Standard for Ineffective Assistance of Counsel

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "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, 686, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. at 441. 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. at 668. Second, counsel's deficient performance must have prejudiced the Applicant such that "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. Where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel. Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006). Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decision in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

When reviewing the decision of the post-conviction relief court, the appellate court is concerned with whether there is probative evidence to support the decision. Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011), citing Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010). Our appellate courts will reverse the post-conviction relief court only where there is no probative evidence to support the findings or where the court's decision is controlled by an error of law. Id. Deference is accorded to the post-conviction relief court. Id.

I.

THE PCR COURT CORRECTLY RULED THAT PETITIONER FAILED TO ESTABLISH THAT TRIAL COUNSEL'S FAILURE TO REQUEST A JURY INSTRUCTION ON PROXIMATE CAUSE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THE MATTER IN QUESTION WAS ALREADY INCORPORATED INTO THE DEFINITION OF ASSAULT AND BATTERY WITH INTENT TO KILL, AND THE PCR COURT'S FINDINGS WERE SUPPORTED BY PROBATIVE EVIDENCE.

Petitioner claims trial counsel provided ineffective assistance of counsel for failing to request jury charges on proximate causation. The PCR court found the allegations to be without merit. App. 794-797. Since the PCR court made sound findings and supported them with probative evidence, this Court should deny the Petition.

"The law to be charged to the jury must be determined by the evidence presented at trial." State v. Harris, 382 S.C. 107, 114, 674 S.E.2d 532, 535 (2009). "A jury charge is correct, if, when read as a whole, it contains the correct definition and adequately covers the law." State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 422 (2011). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). When a jury instruction provides the proper test for determining the issues, the failure to give a requested instruction in not prejudicial. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), *overruled on other grounds by* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009). When considering the trial court's refusal to provide an instruction requested by a defendant, the appellate court must consider the evidence in the light most favorable to the defendant. State v. Commander, 396 at 422, 721 S.E.2d at 422. "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial." State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 422 (2011). "Failure to give a requested jury

instruction is not prejudicial error where the instructions given afford the proper test for determining issues." State v. Harris, at 114, 674 S.E.2d at 536.

Proximate cause is the immediate cause. State v. Clary, 222 S.C. 549, 73 S.E.2d 681 (1952). It is defined as "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." State v. DeChamps, 126 S.C. 416, 416, 120 S.E. 491, 492 (1923). "But that doctrine is more broadly, rather than more narrowly, applied against the wrongdoer in a criminal prosecution than against a tort-feasor in a civil action. Thus, in a criminal action, the wrongdoer whose crime has resulted in injury to another will not be absolved on the ground that the wrongful act of negligence of the person injured contributed to the injury as a proximate cause." State v. DeChamps, 126 S.C. 416, 416, 120 S.E. 491, 492 (1923); see also State v. Hanahan, 111 S.C. 58, 96 S.E. 667 (1918); see also State v. Badget, 87 S.C. 543, 70 S.E. 301 (1911) (stating if intervening acts were the result of defendant's negligence, the intervening acts do not prevent the result from being attributed to defendant). Additionally, the intervening act which was reasonably foreseeable by the defendant does not absolve the defendant of the original wrong. Id.

Counsel testified that he did not request an instruction on proximate cause as suggested by Petitioner at the post-conviction relief proceeding because the charge given by the trial judge properly addressed the matters in issue for the jury as the issues related to assault and battery with intent to kill. App. 541 - 542; See App. 408-410 (ABWIK jury instruction). The PCR court agreed and dismissed the allegation. App. 794 - 797.

Respondent submits the PCR court made findings that were correct under the law and supported by probative evidence. The instruction provided by the trial judge made clear that the

jury could only find Petitioner guilty of assault and battery with intent to kill if the State showed beyond a reasonable doubt that Petitioner possessed the requisite criminal intent in conjunction with an act or omission. The jury was charged that the State was required to prove beyond a reasonable doubt that Petitioner committed an unlawful act of violent nature with malice aforethought. The additional charge on proximate cause as suggested by Petitioner was not warranted based upon the evidence adduced at trial and the charge provided to the jury. Petitioner claimed he made no contact with Nadine's vehicle causing it to wreck but, rather, Nadine ran into him and then lost control of her vehicle. The issue of the act that caused the wreck was squarely before the jury.

Moreover, the State's evidence revealed Petitioner forced Nadine off of the road by chasing her down and repeatedly ramming her vehicle with the last impact causing Nadine to lose control and flip over. The State's evidence also revealed that even if there is dispute as Petitioner claims about the final act that forced Nadine off of the roadway, Petitioner set into motion a continuous sequence, unbroken by any intervening cause, which produced the injury, and without which the result would not have occurred. Therefore, no issue of law is presented, and this Court should deny the Petition for Certiorari.

II.

THE PCR COURT CORRECTLY RULED THAT PETITIONER FAILED TO ESTABLISH THAT COUNSEL'S FAILURE TO REQUEST A JURY CHARGE ON THE DEFENSE OF ACCIDENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN NO EVIDENCE SUPPORTED THE DEFENSE OF ACCIDENT—PETITIONER CLAIMED THE VICTIM STRUCK HIS CAR RATHER THAN ACTUALLY COMMITTING AN ACCIDENTAL ACT—AND THE PCR COURT'S FINDINGS WERE SUPPORTED BY PROBATIVE EVIDENCE.

Petitioner also asserts he received ineffective assistance of counsel for counsel's failure to request a jury charge on the defense of accident. The PCR court found the allegation to be

without merit. App. 794-797. Respondent submits that the PCR court made sound findings and supported them with probative evidence. The Petition should be denied.

The standard of review for a jury charge is outlined above in Issue I. "Harm caused to another, including death, cannot entail criminal responsibility for the actor if the harm was accidentally inflicted without intent to harm and without recklessness or negligence." MCAninch, Fairey, and Coggiola, THE CRIMINAL LAW OF SOUTH CAROLINA (5th Ed. 2007), citing State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945); State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904). "Accident is not an affirmative defense because the existence of the mens rea, be it intent to kill or criminal negligence, is an element of the offense which must be established by the state by proof certain beyond a reasonable doubt." Id., citing State v. McDaniel, at 316-17, 43 S.E. at 388-89. "In South Carolina, the defense of accident requires showing the harm caused was unintentional, the defendant was acting lawfully at the time of the incident, and due care was exercised . . . ." Id. at 114, 674 S.E.2d at 537.; see also State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945).

Trial counsel testified that the theory Petitioner suggested at the post-conviction relief hearing - that the wreck was an accident - did not comport with the Petitioner's version of the facts as explained to counsel by Petitioner, with the evidence presented at trial, or strategy developed for the defense. App. 702 – 703; 709; 723. Counsel stated that he did not argue to the jury facts supporting the theory of accident because Petitioner denied that he committed any act that caused the wreck; rather, Petitioner insisted that the victim hit his car while he was driving in his lane and he did nothing wrong. App. 343, 348; 356-363. Counsel did not request a charge on the law of accident because the instruction was not warranted based upon the evidence

presented at trial and in view of the charges Petitioner faced and the instructions given to the jury. App. 723.

The PCR court found that the evidence presented at trial failed to disclose any contention by Petitioner that he committed an act accidentally; on the contrary, Petitioner specifically denied that his vehicle struck the victim's when the wreck occurred. App. 796. Instead, Petitioner testified that the victim drove her vehicle into his lane of travel and struck him while she was attempting to make a lane change and thereafter traveled off of the highway. App. 342 – 343; 348; 362-363; 367. The evidence also reflects that Petitioner was driving his vehicle in excess of the posted speed limit and admitted at trial that he intentionally sped up between the first and second collisions to catch Nadine before the second impact. App. 130 (Witness testifying as to approximate speed of the vehicles); App. 347 - 349 (Petitioner admits he sped up after Nadine). Petitioner committed an intentional act, was not exercising due care and was not acting in a lawful manner. Thus, an instruction on the law respecting accident was not warranted. It is also clear that counsel did not entertain the view that accident was applicable at the time of trial and counsel's argument to the jury was consistent with Petitioner's testimony, Petitioner's version of the events, and the strategy developed for trial based upon Petitioner's version of events and did not constitute ineffective assistance of counsel. Petitioner is merely second-guessing the trial strategy.

The Court made findings that were correct under the law and supported by probative evidence. State v. Glover, 27 S.C. 602, 4 S.E. 564 (1888). Therefore, this Court should deny the Petition for Certiorari.

III.

THE PCR COURT CORRECTLY RULED THAT PETITIONER FAILED TO ESTABLISH HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL'S FAILURE TO ARGUE THE DEFENSE OF ACCIDENT IN OPENING AND CLOSING ARGUMENTS WHEN ACIDENT WAS CONTRARY TO THE INFORMATION PROVIDED BY PETITIONER BEFORE TRIAL AND NO EVIDENCE SUPPORTED THE DEFENSE OF ACCIDENT.

The State restates and incorporates its arguments from Issue II above. As counsel articulated a reasonable trial strategy for not asking for a jury instruction on accident, Petitioner failed to show that counsel's failure to argue a theory to the jury that was not supported by the information provided by his client prior to or during testimony presented by Petitioner at trial. Petitioner's testimony reflects a total denial that he did not travel into Nadine's lane of travel or run into her vehicle. The theory Petitioner attempts of offer after trial is inconsistent with his sworn testimony and his version of events as communicated to counsel before trial. App. 723. Petitioner failed to establish that counsel's failure to pursue and argue the theory of accident was deficient or that the requisite prejudice resulted. The PCR court correctly denied Petitioner's claim on this issue. As noted in Argument II above, the findings were supported by probative evidence, and thus this Court should deny the Petition for Certiorari.

IV.

THE PCR COURT CORRECTLY RULED THAT PETITIONER FAILED TO ESTABLISH THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN OPENING AND CLOSING ARGUMENT COMMENTS ABOUT PETITIONER'S MARITAL STATUS WHEN THE COMMENTS WERE BASED ON REASONABLE TRIAL STRATEGY.

Petitioner also alleges counsel was ineffective for purportedly impugning the integrity of Petitioner and the victim during his opening and closing arguments to the jury. He contends that the comments called his character into question and that his references to the victim inflamed the passions and prejudices of the jury against Petitioner. The PCR court found the allegations to be

without merit. App. 793-794. Specifically, the PCR court found that trial counsel's opening and closing argument comments were based upon reasonable trial strategy and that Petitioner failed to establish deficient performance and prejudice. Id. Respondent submits that the PCR court's findings and conclusions are supported by the record. This Court should deny the Petition.

The purpose of the opening argument is to inform the jury generally of the nature of the charges so that the jury will be better able to understand the case and the significance of evidence as it is presented during trial. 75 Am Jur 2d Trial, Section 429. During closing argument the parties may argue the evidence presented at trial and its reasonable inferences. State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (2006); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996).

Petitioner testified at the post-conviction relief hearing that he was surprised by counsel's opening and closing argument references to Petitioner, the victim and their marriage and expressed concern that the victim might have taken the comments personally and reacted negatively toward him in her testimony. App. 679-80. Trial counsel testified that he was aware of the evidence the State would present at trial and developed a strategy for his opening and closing arguments based upon the State's evidence, information provided by Petitioner and his experience in the trial of criminal cases in Georgetown County. App. 694-96. Counsel stated that the portions of his opening and closing arguments about which Petitioner complains was his effort to portray Petitioner and the victim as a couple married for some time and who had a history of separations and reconciliations. App. 696-698. Counsel stated that he was portraying Petitioner and the victim as a couple engaged in a continued domestic dispute arising from their marital separation – a husband and wife who had lost their way - rather than a defendant engaged in criminal conduct. App. 696-697; 740. Counsel disputed that he maligned the victim but, as a

matter of strategy, was portraying the victim and Petitioner on equal footing and attempting to humanize them and the situation in which they found themselves. Id.; 715 – 719; 740.

Based upon counsel's testimony and a review of counsel's opening and closing arguments in view of the record as a whole, including the evidence about marital strife, facts leading to and respecting the incident, and arguments of the prosecutor, the PCR court found that trial counsel's strategy was reasonable. See See Simpson v. Moore, 367 S.C. 587, 603, 627 S.E.2d 701, 709-710 (2006) (stating where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (same). McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (same).

The Court made findings were correct and supported by probative evidence. Therefore this Court should deny the Petition for Certiorari.

V.

THE PCR COURT CORRECTLY RULED THAT PETITIONER DID NOT MEET HIS BURDEN OF ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL'S FAILURE TO ADVISE PETITIONER OF AND PRESENT CHARACTER WITNESSES AT TRIAL BECAUSE THE WITNESSES WOULD HAVE HAD LITTLE IMPACT ON THE CASE BASED UPON THE SUBSTANCE OF THE TESTIMONY, THE RELATIONSHIPS WITH PETITIONER AND THE OVERWHELMING EVIDENCE AGAINST PETITIONER.

Petitioner also asserted in his amended application that he received ineffective assistance of counsel for counsel's failure to advise him of the right to present character witnesses to testify as to his reputation in the community for veracity. Petitioner presented four witnesses at the evidentiary hearing in support of this claim. The PCR court noted that the character witnesses would have added little to Petitioner's defense and that counsel's strategy in electing not to present character witnesses was reasonable in light of the questionable foundation for the

character witness testimony, the friendships and relationships between Petitioner, Petitioner's family and the character witnesses, the unpredictable nature of domestic violence of the sort involved in this case, and the overwhelming evidence against Petitioner, including two eyewitnesses who observed the actions of Petitioner and the victim at the time of the incident. App. 787. Respondent submits the findings and conclusions of the PCR court were correct and are supported by probative evidence.

The character witnesses were a former employer, a family friend, and two close personal friends to Petitioner. The witnesses generally testified that they knew nothing negative about Petitioner and felt he was truthful based upon their interaction with him. App. 623-635; 636-645; 646-659; 660-673. Some of the witnesses also volunteered that Petitioner was a calm person, a good employee, and a good person. App. 623; 657; 663-664; 667

Counsel testified that he considered the use of character witnesses and made a decision not to use character witnesses as a matter of trial strategy in this case based upon the facts of the case, the issues presented at trial, and his extensive experience in the trial of criminal cases and experience in using character evidence. App. 698 – 701; 719 - 720. Counsel stated that he rarely uses character witnesses at trial because the evidence is viewed skeptically by jurors, is usually of minimal probative value and could open the door to admission of evidence detrimental to the defense. App.698 – 701; 732; 740 - 41. It was counsel's experience that character evidence of the sort offered by Petitioner at the post-conviction relief hearing is not persuasive and counsel does not use character evidence unless absolutely necessary and only when special circumstances are present which did not exist in this case. App. 728-29; 731. Counsel also testified that he would not have used the character witnesses to testify as they did at the post-conviction relief hearing. App. 701. Counsel voiced concern that presentation of the character witnesses as they

testified at the post-conviction relief hearing would have opened the door to admission of evidence about the Petitioner's previous domestic assaults upon the victim in this case. App. 732. Counsel represented Petitioner in the domestic case and was familiar with Petitioner's past actions toward the victim, including acts of domestic violence, and did not want to open the door to this information. App. 722; 724-27; 732. Counsel also testified that the attorney –client relationship developed with Petitioner was one in which Petitioner depended upon him to make such strategic decisions after he discussed possible witnesses for trial. App. 736 – 737. For these reasons, The PCR court found that counsel's trial strategy regarding the use of character witnesses to be reasonable. App. 785-790.

The PCR court found counsel articulated a reasonable strategy for electing not to present character witnesses and that Petitioner failed to demonstrate counsel's performance in this regard was deficient or that he suffered the requisite prejudice. See Simpson v. Moore, 367 S.C. 587, 603, 627 S.E.2d 701, 709-710 (2006) (stating where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (same). McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (same). The PCR court also found the suggestion that counsel was ineffective for failing to present character evidence in this case to be a clear example of second-guessing counsel's trial strategy after learning the defense strategy used for trial was not successful. The PCR court declared that it would "not engage in an exercise of second-guessing the reasonable strategy used in this case, particularly in light of the overwhelming evidence of Petitioner's guilt." App. 790. Moreover, Respondent submits that, as feared by counsel, the character witness testimony that Petitioner was a good, calm man would have opened the door to the acts of domestic violence committed

by Petitioner against the victim to correct any misapprehension that Petitioner's character was peaceful and law-abiding. State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (1991). Additionally, the testimony was of no value to Petitioner's defense in view of the questionable foundation and close relationships between the witnesses and Petitioner and the overwhelming evidence presented of Petitioner's guilt, including two unrelated, neutral eye witnesses.

The Court made findings that were correct under the law and supported by probative evidence. Therefore, no issue of law is presented, and this Court should deny the Petition for Certiorari.

VI.

THE PCR COURT CORRECTLY RULED THAT PETITIONER FAILED TO PROVE PREJUDICE FOR TRIAL COUNSEL ARRIVING FIFTEEN MINUTES LATE AND FAILING TO OBJECT TO THE REQUIREMENT THAT HE APOLOGIZE TO THE JURY FOR HIS TARDINESS, WHERE THE COURT FOUND COUNSEL EXERCISED REASONABLE TRIAL STRATEGY IN DECIDING TO MOVE FORWARD WITH CROSS-EXAMINATION AND THOSE FINDINGS WERE SUPPORTED BY PROBATIVE EVIDENCE.

Petitioner contends that he received ineffective assistance of counsel when trial counsel failed to appear in court in a timely manner on the second day of trial resulting in an admonition from the presiding judge, an apology to the jury, and late cross-examination of the victim. He also asserts that he received ineffective assistance of counsel when counsel failed to ascertain the remarks made by the trial judge in his absence and when counsel failed to object and move for mistrial for not being allowed to immediately cross-examine the victim, for being admonished in the jury's presence, and for being required to apologize to the jury for his late arrival. Petitioner contends the late arrival damaged counsel's effectiveness as an advocate by making a negative impression on the jury. Petitioner further alleges that counsel's exchange with the trial judge and

apology to the jury damaged counsel's image and effectiveness in the eyes of the jury and violated Petitioner's right to effective assistance of counsel.

A.

The trial transcript reflects the State presented the testimony of the 911 operator and direct examination of the victim on the first day of trial. When the trial recessed for the evening the trial court indicated that the trial would resume the following morning at 9:30 a.m. App. 122. When the trial resumed the next morning, the trial court inquired of the jury whether any juror had any discussion or contacts about the case and, after confirming the victim's presence for cross-examination, stated that counsel for Petitioner was not present to cross-examine the victim. The trial court directed the State to call its next witness. App. 125-126. The State announced its next witness and the trial court explained to the jury that the witnesses were sequestered and would be brought into the courtroom as they were called to testify. The court followed that explanation to the jury with a greeting and inquiry to Petitioner's counsel. The trial court stated "we began court at nine-thirty this morning, everyone has been here. Where have you been?" App. 126. Counsel apologized for being late and explained that he "had to stop in Kingstree." App.126. The trial court responded, "Please understand as a courtesy to the jury who is here giving their time when we say we're going to start at a particular time, we begin at that time. We've called another witness." App. 126. This colloquy occurred in the presence of the jury. Counsel for Petitioner twice approached the trial court for bench discussions. App. 127; App. 136. Thereafter, an eye-witness testified, followed by the morning break for the jurors.

In the jury's absence and referencing the earlier bench discussions, counsel for Petitioner conceded he arrived fifteen (15) minutes late for court, explained the reason for being tardy, and requested permission to cross-examination the victim rather than calling the victim as a defense

witness. App. 151-153. The trial court agreed but required counsel to apologize to the jury for being late. App. 154. Counsel stated that he would be delighted to apologize to the jury but requested permission to do so during closing arguments. The trial court required a contemporaneous apology. App. 154.

When the jury returned to the courtroom, the trial court explained that counsel requested cross-examination of the victim so that the jury would not be deprived of facts counsel might elicit during his examination. App. 155. Counsel thereafter apologized to the jury for his tardiness and stated that he did not believe in making excuses but explained that he was late and was sorry. App. 155. Counsel then cross-examined the victim.

At the post-conviction relief hearing, Petitioner testified that he did not know his attorney would be late for court and that he did not receive any messages from counsel about counsel's tardiness. App. 603. Petitioner stated that he was not questioned by the trial court about his attorney's absence. App. 603. Petitioner testified that he had little confidence in his attorney after the tardy arrival and now wishes his attorney had moved for a mistrial or requested curative instructions but was not presented with the options by counsel. App. 603. Petitioner testified that, upon his arrival in the courtroom, counsel inquired about the proceedings to which Petitioner responded that court started a few minutes before counsel's arrival. App. 605.

At the post-conviction relief hearing, trial counsel testified that the morning of the second day of trial, he drove to his office in Kingstree to obtain material from the prior family court proceeding between Petitioner and the victim for use in cross-examination of the victim and that doing so caused him to arrive approximately fifteen (15) minutes late for court. Counsel testified that he did not try to contact his client or the court to advise that he might arrive late because counsel did not have a cellular telephone at the time and did not want to expend additional time

searching for a telephone to make the call. App. 532-533. Instead, counsel traveled as fast as he could with the hope that he would not be late. Counsel testified that the prosecutor was in the process of calling a witness when he arrived, that the witness was being brought up, that examination of the witness had not begun, and that he ascertained from the prosecutor what transpired in the courtroom prior to his arrival. App. 525. Counsel stated that he requested a bench conference during which he asked permission to cross-examine the victim. Counsel rejected the idea of making an objection on the record because cross-examination of the victim had already been delayed by the evening recess and he knew he could call the victim as a defense witness if he needed to do so; however, he was provided the opportunity to cross-examine the victim after an intervening witness. App. 526. Counsel also determined that he was not absent from the courtroom during the presentation of testimony or other evidence, and did not want to cause negative consequences for Petitioner by objecting or further highlighting the matter for the jury and trial court. App. 529. Counsel also did not object, move for mistrial, or request a curative instruction in response to the trial court's comments about his tardiness or for being required to apologize to the jury because he did not find the comments or timing of the apology to be sufficiently objectionable, and because most of the discussion about the tardiness and all of the discussion about the apology occurred outside the jury's presence. App. 530. Counsel also did not want a mistrial at that point in the trial because he felt the jury composition was favorable to Petitioner. App. 572. Instead, counsel employed a trial strategy to present an apology to the jury for his tardiness in which he accepted responsibility for his actions in order to develop a rapport with the jury and to put an early end to the matter. App. 558-559. Counsel did not request a curative instruction because he did not want to draw additional attention to the issue. App. 537. Counsel stated that was not hindered in any way in his ability to cross-examine the

victim or other witnesses, make motions and objections, or to present a defense for Petitioner. App. 569.

B.

The trial court is vested with wide discretion in the conduct of a trial. State v. DeBerry, 250 S.C. 314, 157 S.E.2d 637 (1967). However, the trial court must act with impartiality in the performance of its judicial duties. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). References by a judge to an attorney's age, gender, or competence are improper and constitute reversible error upon a showing of prejudice. Id.

Although counsel was tardy for trial as alleged and elected not to object, move for mistrial or request curative instructions, Petitioner failed to establish the requisite prejudice from counsel's tardy arrival or for failing to object to the comments made in the jury's presence about counsel's absence, for being required to apologize and for not demanding immediate cross-examination of the victim. He offers mere speculation. The PCR court properly determined that Petitioner failed to establish the necessary prejudice and thereafter correctly declined to address whether counsel's performance respecting these matters was deficient. See Edmond v. State, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2000) ("[A] PCR applicant must show both error and prejudice to win relief in a PCR proceeding."). App. 782.

The PCR Court found that that the matter of counsel's tardiness, the comments by the trial court, apology respecting the late arrival, and the timing of the victim's cross-examination were minor incidents occurring during a four day trial that included the presentation of overwhelming evidence against Petitioner. App. 782. First, the PCR court found that counsel's absence did not occur during a critical stage of trial and Petitioner failed to establish it had an adverse impact on the verdict or the jury's perception of counsel or Petitioner. No substantive

rights of Petitioner were affected. See McKnight v. State, 465 S.E.2d 352 (1995) (stating counsel's absence during cross-examination of victim constituted denial of right to counsel for which prejudice will be presumed). The record reflects that Petitioner enjoyed full, extensive cross-examination of the victim and all other witnesses and had the advantage of hearing the testimony of the intervening eye-witness before he cross-examined the victim.

Second, the PCR court found that the timing of the victim's cross-examination did not have an adverse impact upon the jury's verdict. App. 783. Respondent submits that a break between the victim's direct examination and cross-examination had already occurred as a function of the evening recess and Petitioner was able to gain the benefit of hearing and cross-examining of one of the eye-witnesses before conducting cross-examination the victim in this case. Other than pure speculation, Petitioner failed to show that he was prejudiced by the timing of counsel's cross-examination of the victim.

Third, the PCR found that the jury was not aware of any discussions about counsel's tardiness other than the initial comment by the trial court when counsel arrived. App. 783. The jury was also unaware of any of the discussions between counsel and the trial judge about counsel's apology to the jury. Petitioner failed to show that the remarks of the trial judge that occurred in the jury's presence impugned the credibility of counsel or diminished him in the eyes of the jury. It is reasonable for the trial court to make some comment about counsel's obvious absence and any additional comment by the trial court occurred outside the jury's presence. Obviously, comments made outside the jury's presence had no influence on the jury. Graves v. State, 309 S.C. 307, 442 S.E.2d 125 (1992).

Respondent submits that the trial court's acknowledgement of counsel's obvious absence from the courtroom did not constitute an improper personal comment about counsel, was not

hostile or threatening in nature, did not tend to impugn counsel' credibility, and did not insinuate a lack of skill or professionalism in counsel's representation of Petitioner. The comments made by the trial judge to counsel were not such as would have influenced the jury and would have been prejudicial to Petitioner. Further, counsel was clearly uninhibited by his interaction with and comments made by the trial court about his tardiness. Counsel specifically testified that his subsequent performance was not influenced by the judge's comments and that he vigorously defended Petitioner by way of objections, motions, examinations, and cross-examination as planned.

Despite the lack of error preservation, counsel's continued pursuit of the matter at trial could have caused him to lose the opportunity to cross-examine the victim. The decision whether to forego defense witnesses in favor of the last argument had not yet been made, and it might have been necessary for Petitioner to call Nadine as a witness. As acknowledged by Petitioner in his Petition for Writ of Certiorari on direct appeal, further pursuit of objections would come at the risk of further damage to Petitioner. Counsel had the option of persisting, but made a strategic decision not to pursue the objections or motions. This is a reasonable exercise of trial strategy. See Simpson v. Moore, 367 S.C. 587, 603, 627 S.E.2d 701, 709-710 (2006) (stating where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (same). McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (same). The trial court would not have granted a motion for mistrial and a curative instruction would have emphasized the matter for the jury. Any prejudice is speculative and is insufficient to establish ineffective assistance of counsel.

Oddly, Petitioner complains that Nadine Cohens was allowed to listen to the entire presentation of another witness before being cross-examined. Cert. Pet. 23. This makes no sense, because Nadine had an inviolable right to watch the trial unsequestered under S.C. Code Ann. § 16-3-1550(B) ("A person must not be sequestered from a proceeding adjudicating an offense of which he is a victim.") Additionally, Petitioner did not suffer prejudice because of the change in the order of witnesses.

The Court made findings that were correct under the law and supported by probative evidence. Therefore, this Court should deny the Petition for Certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

BY: 
Salley W. Elliott
S.C. Bar No: 1871

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 12, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Georgetown County
The Honorable Steven H. John, Presiding Judge

Appellate Case No: 2012-212923

RONALD COHENS,

Petitioner,

vs.

THE STATE,

Respondent.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to Tara Shurling, Esquire, 3614 Landmark Drive, Suite A, Columbia, South Carolina 29204

I further certify that all parties required by Rule to be served have been served.

This 12th day of November, 2013.

Angela Bennett
Administrative Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

November 12, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

RE:
Ronald Cohens v. The State
Appellate Case No: 2012-212923

Dear Mr. Shearouse:

Please find enclosed the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari along with proof of service in the above mentioned case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: Tara D. Shurling, Esquire