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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Pickens County

The Honorable John C. Few, Trial Judge
The Honorable R. Scott Sprouse, Post-Conviction Relief Judge
Lower Case No. 2013-CP-39-0836

JASON ERVIN BLACK,

Respondent-Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner-Respondent.

Appellate Case No. 2021-000525

**BRIEF OF PETITIONER
ON BEHALF OF PETITIONER-RESPONDENT**

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PETITIONER-RESPONDENT'S STATEMENT OF THE ISSUE

Whether the PCR Court erred in granting Jason Black PCR relief for appellate counsel's failure to raise how the original trial attorney did not object to the admission of a defense witness's third and less serious conviction for shooting or throwing a deadly missile on direct appeal when the conviction arose at the same time as the two already admitted voluntary manslaughter convictions and when our Supreme Court already decided their admission was harmless error?

STATEMENT OF THE CASE

In March 2007, the Pickens County Grand Jury indicted Jason Black (Respondent-Petitioner) for first-degree criminal sexual conduct with a minor (2007-GS-39-0675) and committing a lewd act upon a child¹ (2007-GS-39-0673). (App. 556–569). On June 25, 2007, Black proceeded to a trial by jury before the Honorable John C. Few. (App. 1). Assistant Public Defender John DeJong represented Black and Assistant Solicitor Peter Them prosecuted the case. On June 26, 2007, the jury found Black guilty as charged, and Judge Few sentenced Black to twenty years’ imprisonment for first-degree CSC with a minor and fifteen years for committing a lewd act upon a minor, to be run concurrent. (App. 333, App. 560–561).

Black filed a timely notice of appeal. Chief Appellate Defender Joseph L. Savitz, III, perfected Black’s appeal by filing a brief with the Court of Appeals on the following issue:

Whether the trial judge committed reversible error by allowing the State to impeach Black’s corroborating witness with two Florida manslaughter convictions from 1987, as this evidence violated Rules 404 and 609, SCRE.

(App. 341–349).

Following briefing and oral argument, the Court of Appeals affirmed Black’s convictions and sentences in an unpublished per curiam opinion. *State v. Black*, Op. No. 2010-UP-370 (S.C. Ct. App. filed July 19, 2010) (App. 366–367). Black then filed a petition for rehearing, which the Court denied by Order dated August 27, 2010. (App. 370–371). On November 3, 2011, our Supreme Court granted Black’s petition for writ of certiorari. (App. 393). Meanwhile, Counsel Savitz retired from the Office of Appellate Defense, and Appellate Defender Breen Stevens took

¹ The lewd act statute was repealed in 2012, and the “crime that was lewd act is now classified as criminal sexual conduct with a minor in the third degree.” *State v. McGaha*, 404 S.C. 289, 293, 744 S.E.2d 602, 604 (Ct. App. 2013).

over Black's case and filed the brief of petitioner. (App. 394–402). Following oral argument, our Supreme Court affirmed Black's convictions and sentences in a published opinion issued October 3, 2012. *State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (2012) (App. 420–437). The case was remitted back to the circuit court on October 19, 2012. (App. 438).

Black timely commenced the underlying PCR action July 2, 2013. (App. 439–463). However, the State was never served with the application and therefore did not know it had been filed prior to being contacted by the Pickens County Clerk of Court on August 21, 2019. (App. 464). The State submitted its return requesting an evidentiary hearing on December 12, 2019. (App. 464–478). Black, through PCR counsel, filed an amended application on December 27, 2019, and a second amended application September 7, 2020. (App. 479–482). An evidentiary hearing convened via WebEx on March 4, 2021, before the Honorable R. Scott Sprouse. (App. 483–529). Black was present and represented by Don A. Thompson, Esq. Assistant Attorney General Lillian L. Meadows represented the State.

On April 5, 2021, Judge Sprouse issued an Order granting relief on the claim of ineffective assistance of appellate counsel and denying the remaining claims. (App. 530–539). In response, on April 15, 2021, the State filed a motion to alter, amend, and reconsider pursuant to Rule 59(e), but Judge Sprouse denied the State's motion by order issued April 16, 2021. (App. 540–555). On October 28, 2021, the State filed a petition for writ of certiorari, and Black filed a cross-appeal petition for writ of certiorari on November 3, 2021. The State filed a return to Black's petition on February 23, 2022, and March 30, 2022, our Supreme Court transferred the case to the Court of Appeals on March 30, 2022. On October 19, 2023, the Court of Appeals granted both the State and Black's petitions for certiorari, and Black, as Respondent-Petitioner.

PETITIONER-RESPONDENT'S STATEMENT OF FACTS

On November 28, 2005, Lieutenant Tony Robinson of the Pickens County Sheriff's Office met with Jason Black about his new relationship with Victim. (App. 199-203). During this discussion, Lieutenant Robinson and Black discussed the age of Victim, and the lieutenant told Black that Victim was fifteen years old. (App. 200–201).

On May 16, 2006, Victim was living in Pickens County with her mother. Black, her boyfriend of approximately six months, was twenty-six years old and a twice-convicted sex offender. (App. 82–83, 157–159, 163). Throughout Black's relationship with Victim, Black had another girlfriend, whom he lived with in Liberty, South Carolina along with their two-year-old son. (App. 92, 129). Consequently, Victim never went to Black's home, but she spoke with him on the phone regularly. (App. 84, 93). Victim kept the relationship with Black a secret from her parents because he was eleven years older than her. (App. 83, 85–86).

On Saturday, May 10, 2006, Black and Victim had planned to spend the day together. (App. 83). That morning, Black called Victim's cell phone while she was at her father's house and arranged for her to meet him at a nearby landfill. (App. 85). He then took Victim to a beach near Clemson, where they stayed for three to four hours. (App. 84, 87). Around four o'clock, Black took Victim to meet a friend at a convenience store so that she could be at work by five o'clock. (App. 87–88). While Victim was at work, Black called her and told her to meet him at a trailer belonging to his friend, Richard Bush, later that night. (App. 89, 112).

After work, the Victim went with her friend Candie to a skating rink. (App. 88–89). While at the skating rink, Black called Victim and again asked her to come to Bush's home. (App. 89–90). Shortly after, Victim, Candie, and Candie's boyfriend left the skating rink to meet Black at Bush's home. (App. 91). Bush was a sixty-six-year-old former convict with an admitted drinking

problem. (App. 273). Prior to the night in question, Victim had met Bush five or six times, recalling that he always carried a water bottle filled with liquor. (App. 91–92). While Candie and her boyfriend entered Bush’s home with Victim, they left after just ten to twenty minutes to go to McDonald’s. (App. 95).

After Victim’s friends left, Black walked to the trailer bedroom and asked Victim to join him. (App. 95–96). After watching television briefly, Victim and Black engaged in sexual intercourse. (App. 96–98). Victim explained that throughout the duration of this incident Bush was in the living room watching the television. (App. 96). After the incident, Victim and Black returned to the living room with Bush. (App. 98). Five minutes later, Candie picked Victim up and they went to Candie’s home. (App. 98). Once back at Candie’s home, the Victim noticed her underwear was bloody, so she immediately showered and changed into clean clothes. (App. 99–100). Before deciding to wash her underwear, she discussed the sexual encounter with Candie and showed her the bloody underwear. (App. 100). At trial, Candie confirmed the Victim’s disclosure and having seen the bloody underwear. (App. 139–142). Several days after the sexual encounter, Victim told her mother what had happened at Bush’s trailer the previous Saturday. (App. 102–103).

Black testified on cross-examination that he had a prior conviction for criminal sexual conduct with a minor. (App. 249–250). Black admitted that Lieutenant Robinson had informed him months earlier that Victim was fifteen years old and acknowledged based on his prior criminal history that he knew the legal consequences of engaging in a relationship with a fifteen-year-old. (App. 255–257). Despite this knowledge, however, Black continued the relationship. (App. 256). On re-direct, Black admitted to meeting Victim two to three times after learning that she was fifteen years old. (App. 260). On the night in question, Black claims to have informed Victim that they could no longer see each other. (App. 260).

Richard Bush testified on Black's behalf, stating he was at the trailer with Black and Victim on the night in question. (App. 265-266). Specifically, Bush testified that Black never went in the bedroom with Victim. (App. 269). Prior to the State's cross-examination, Bush testified in camera that he had two convictions for second-degree murder in Florida from 1987, for which he received fifteen years' imprisonment. (App. 271-276). However, for whatever reason, he was released a short six years later in 1993. (App. 272). Bush was also convicted of one count of shooting or throwing a deadly missile during the same incident, for which he was sentenced to a consecutive sentence of seven years' imprisonment. (App. 275-276). The State indicated their intent to use the prior convictions as impeachment evidence. (App. 272-273). After hearing arguments of counsel, the trial court ruled all three convictions were admissible for impeachment purposes because the probative value substantially outweighed the prejudicial effect. (App. 280-282).

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved.² *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and review those conclusions *de novo*. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

² The State submits this Court need not defer to the PCR court because the PCR court granted relief on the same cold record that is currently before this Court. *See Hardy v. Comm'r, Alabama Dep't of Corr.*, 684 F.3d 1066, 1075 (11th Cir. 2012) (“The District Court ruled on a cold record, the record compiled in the Alabama Courts. We rule on the same cold record, meaning that we afford the District Court’s judgment no deference.”).

Although appellate counsel testified at the hearing, no facts are dispute in this case. *See Neely v. Thomasson*, 365 S.C. 345, 618 S.E.2d 884 (2005) (questions of law may be decided with no deference to the trial court); *McWilliams v. Dettore*, 387 Ill. App. 3d 833, 844, 901 N.E.2d 1023, 1032 (2009) (alterations in original) (citation omitted) (“When a trial judge bases [her] decision solely on the same ‘cold’ record that is before the court of review, it is difficult to see why any deference should be afforded to that decision.”).

ARGUMENT

Our Supreme Court already found the trial court’s admission of a defense witness’s two voluntary manslaughter convictions (for impeachment purposes) to be harmless error. Therefore, the PCR judge erred by granting Jason Black PCR relief for appellate counsel’s failure to raise the admission of the same witness’s third less serious conviction for the same purpose on direct appeal chiefly because he did not analyze *Strickland*’s prejudice prong.

Despite our Supreme Court’s previous determination that the admission of the defense witness’s previous manslaughter convictions were harmless beyond a reasonable doubt, the PCR court erroneously concluded that Black was prejudiced by appellate counsel’s failure to argue that defense witness’s other, less serious conviction for shooting or throwing a deadly missile was improperly admitted for impeachment purposes. (*See* App. 367–368, 530–559). Specifically, the PCR court failed to consider second prong of *Strickland*, or the “specific impact counsel’s error had on the outcome of the trial” and “the strength of the State’s case in light of all the evidence presented to the jury.” *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; *Strickland v. Washington*, 466 U.S. 668, 695–96 (1984). Had the PCR court properly weighed the strength of the State’s evidence against the specific impact of this prior conviction, it would have properly concluded that there is no reasonable likelihood Black would have prevailed on appeal had appellate counsel raised it. Accordingly, this Court should reverse the post-conviction Order granting relief and reinstate Black’s convictions and sentences.

Beyond the right to effective assistance of counsel at trial, a criminal defendant is constitutionally entitled to the effective assistance of appellate counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985) (finding that to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair). Generally, in analyzing a claim of ineffective assistance of appellate counsel, our Supreme Court applies the *Strickland* test just as it would when

analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 309, 680 S.E.2d 276 (2009); *e.g.*, *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999).

First, the burden of proof is upon Petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the petitioner must prove that he was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Southerland v. State*, 337 S.C. 616, 524 S.E.2d 83 (1999) (citing *Strickland v. Washington*, *supra*). *See also People v. Griffin*, 178 Ill. 2d 65, 687 N.E.2d 820 (1997) (defendant who contends appellate counsel rendered ineffective assistance, *e.g.*, by failing to argue an issue, must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed) (*cited with approval in Southerland*, 337 S.C. at 616, 524 S.E.2d at 836).

At the PCR hearing, Joseph Savitz (appellate counsel), testified that once he was assigned the case, he reviewed the transcript and noted the issues he believed were preserved. (App. 518). Specifically, he believed the issue pertaining to Bush's impeachment with prior manslaughter convictions from 1987 were potentially meritorious. (App. 518). Savitz could not recall why he made the decision to focus on the manslaughter convictions only without also including the missile conviction at the time of appeal. (App. 519). However, after reviewing the record, Savitz stated he believes the manslaughter convictions were clearly preserved because the court heard extensive argument from both sides regarding their admissibility. (App. 519). He further stated the missile conviction seemed to only be discussed in passing by the trial court, and that he did not see an objection in reference to that conviction in the transcript, leading him to believe the issue was not preserved. (App. 519). When asked about our Supreme Court's opinion, Savitz testified it was

unclear to him whether the opinion implied that the missile charge was preserved or not preserved. (App. 522–523). He further confirmed that our Supreme Court’s harmless error analysis was based in part on the prejudicial effect of Black’s own two priors for criminal sexual conduct. (App. 520–521).

Here, Black failed to meet his burden of proof to establish that Savitz acted unreasonably under prevailing professional norms, and the PCR judge erred in so finding. (App. 530–539). Savitz made a determination of the preserved issues based on the record and testified that he believed the manslaughter convictions were significantly more prejudicial than the throwing/shooting a missile conviction anyway. Reviewing courts must accord appellate counsel the “presumption that [they] decided which issues were most likely to afford relief on appeal.” *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993). Such decisions with respect to an appeal are “entitled to the same presumption that protects sound trial strategy.” *Id.*

Further, appellate counsel is not required to raise every nonfrivolous issue that is presented in the record. *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). As such, whether this Court addresses if the missile conviction issue was properly preserved by trial counsel is irrelevant to appellate counsel’s performance under prevailing professional norms. Appellate counsel explained that he made a reasonable decision in omitting the missile conviction and focusing on the manslaughter convictions due to that he believed them be of greater prejudice than the missile conviction (which he did not believe was objected to at trial), and that he believed that issue would prevail on appeal because it was clearly preserved.

In *Jones v. Barnes*, 463 U.S. 745 (1983), the United States Supreme Court held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.

Notwithstanding *Barnes*, it is still of course possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. *See, e.g., Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) (“Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome”). This is not the case here. The throwing/shooting a missile conviction is objectively less prejudicial than two manslaughter convictions, and there is no indication appellate counsel’s inclusion of that issue on appeal would have altered our Supreme Court’s harmless error analysis or the outcome of Black’s trial.

The PCR court rightly determined that trial counsel was not ineffective for failing to preserve the issue of Bush’s prior conviction for throwing/shooting a missile. This assertion fails under the same rationale as the Supreme Court’s finding in *Black*.

We conclude the factual findings and legal analysis the trial court relied upon do not demonstrate that the probative value of the remote manslaughter convictions substantially outweighed their prejudicial effect. Consequently, we hold the trial court abused its discretion in admitting these convictions.

However, Petitioner does not challenge on appeal the trial court's admission of the defense witness's prior conviction for shooting/throwing a deadly missile, and this conviction was also used to impeach the witness.

Since its admission is now the law of the case, we find any error in the admission of the two remote manslaughter convictions was harmless as the defense witness's character was similarly diminished by the admission of the unchallenged conviction for shooting/throwing a deadly missile, and the record as a whole indicates the error could not reasonably have impacted the result reached in this case.

State v. Black, 400 S.C. 30-31, 732 S.E.2d 891 (2012) (emphasis added).

The *Strickland* standard continues to apply, as Black still must first show counsel’s performance was deficient and that such deficiency prejudiced Black so that he was deprived of a fair trial. *Strickland, supra*. Black simply cannot satisfy such a burden, as the evidence respecting guilt is unchanged, and Bush’s credibility was undermined despite the introduction of the missile

conviction. *Strickland, supra*. As to the first prong, how could the PCR court be correct in finding trial counsel was not deficient in failing to object, but also be simultaneously correct in finding appellate counsel was ineffective for failing to raise the not-objected-to issue on appeal? As to the second prong, as the introduction of Bush's to prior manslaughter convictions to the jury were found to be harmless error, how then are the scales of prejudice so violently tipped by the introduction of a third, less serious conviction that arose out of the same incident?

Our Supreme Court's opinion in *Black*, affirming Black's conviction, dispels any speculation as to whether this issue would have prevailed on appeal. The Court found that "additional impeachment evidence against Bush could not reasonably have affected the jury's result in this case and we deem the error harmless beyond any reasonable doubt." (App. 435; emphasis added). If counsel had raised the issue of Bush's improper impeachment by the missile conviction in conjunction with the manslaughter convictions, the outcome would undoubtedly have been the same. Our appellate courts have repeatedly held that counsel is not ineffective for failing to argue an issue on appeal where the issue amounts to harmless error. *See Gilchrist v. State*, 364 S.C. 173, 179, 612 S.E.2d 702, 705 (2005); *see also Bennett v. State*, 383 S.C. 303, 309–10, 680 S.E.2d 273, 276 (2009) (reversing a decision by the PCR court that found appellate counsel ineffective for failing to brief an issue because even if appellate counsel's performance was deficient, such performance did not prejudice the petitioner).

While a finding of harmless error during a direct appeal review does not entirely foreclose an applicant's ability to establish the requisite prejudice for relief on the same or related issues, it would be an exceedingly rare case in which an applicant could do so. *See also Arnold v. State*, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (noting that the requirement that a constitutional error be harmless beyond a reasonable doubt "embodies a standard requiring reversal 'if there is a

reasonable possibility that the evidence complained of might have contributed to the conviction’ ”) (cleaned up.) Indeed, “the prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal.” *McFadden v. State*, 342 S.C. 637, 641, 539 S.E.2d 391, 393 (2000); *see Vaughn v. State*, 362 S.C. 163, 171 n.3, 607 S.E.2d 72, 76 n.3 (2004) (In deciding the prejudice prong of a PCR action, the PCR court “is to examine the same factors as those analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt.”).

“Harmless error review looks to the basis on which the jury actually rested its verdict.” *Lowry v. State*, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). Error is harmless where it could not reasonably have affected the trial’s outcome, but no definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. *State v. Page*, 378 S.C. 476, 483–84, 663 S.E.2d 357, 360 (Ct. App. 2008). In considering whether error is harmless, a case’s particular facts must be considered along with various factors including: the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution’s case. *Id.* The PCR judge failed to conduct such an analysis, and that was error.

Likewise, the Supreme Court in *Strickland* explained that:

[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by [counsel’s] errors, and factual findings that were affected will have been affected in different ways.

Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.

66 U.S. at 695–96.

In contrast to the PCR judge’s order, our Supreme Court in concluding the admission of Bush’s manslaughter convictions were harmless beyond a reasonable doubt properly analyzed the

*Van Arsdall*³ factors:

In the current appeal, we believe a review of the entire record indicates the error was harmless under the circumstances. In addition to the fact that Bush’s credibility had already been significantly compromised by the revelation that he was a former convict, we note, in considering the overall strength of the State’s case, that Petitioner’s own credibility was seriously impeached at trial as well by testimony that he had a criminal record that included two prior offenses for CSC with a minor.

In addition, an investigator with the Pickens County Sheriff’s Department testified that he had contacted Petitioner before the incident alleged here and specifically warned him that the Minor was only 15 years old. Petitioner acknowledged this conversation and conceded that he knew having a relationship with a 15-year-old could get him in “trouble.”

It was undisputed that the Minor was at Bush’s home to visit Petitioner the night of the incident, and there was evidence at trial that conflicted with that of Bush and Petitioner and that corroborated the Minor’s version of events. For example, despite Petitioner’s and Bush’s testimony that the Minor never left the confines of the living room, the Minor was able to describe some of the contents of Bush’s bedroom, where she maintained Petitioner had taken her to have sex.

Moreover, there was corroborating evidence from Candie Hudson, who picked up the Minor from Bush’s home around 11:00 p.m., that she saw blood on the Minor’s underwear after they returned to Candie’s home, that she helped the Minor wash the garment, and that the Minor asked to borrow another pair from her. There has been no allegation any limitation was placed on the parties’ ability to conduct cross-examination. Considering the foregoing and all of the other evidence adduced at trial, we find the admission of the

³ In *Delaware v. Van Arsdall*, the United States Supreme Court instructed appellate courts to consider the following factors in determining whether the erroneous exclusion of evidence of a witness’ bias constitutes harmless error: (1) the importance of the witness’ testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; and (4) the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case. 475 U.S. 673, 684 (1986); *see State v. Holmes*, 320 S.C. 259, 265, 464 S.E.2d 334, 337 (1995) (holding the *Van Arsdall* factors apply with equal force in determining a harmless error violation relating to any issue of witness credibility”).

additional impeachment evidence against Bush could not reasonably have affected the jury's result in this case and we deem the error harmless beyond any reasonable doubt.

State v. Black, 400 S.C. 29-30, 732 S.E.2d 891 (2012) (emphasis added).

The State finds no need to reword the Supreme Court's prejudice, or lack thereof, analysis. The PCR judge should have conducted the same analysis with the same set of facts but failed to do so. Here, assuming, *arguendo*, all three of Bush's prior convictions *were* erroneously admitted and properly preserved for appellate review, the totality of the evidence against Jason Black remains unaffected. Specifically, when considering Bush's credibility, his testimony was already undermined by other information unrelated to his prior convictions. Further, although Bush testified he was sober on the day in question, he admitted he was a "heavy drinker" who had problems with alcohol in the past. (App. 268, 274–75). He also testified he and Black were very close, and that he cared for Black "like a brother." (App. 286).

Despite Bush's claim that the sexual acts between Black and Victim could not have happened at his home on the day in question, he admitted he never contacted law enforcement or reported that information to them after Black was arrested and charged. (App. 288–289). Bush testified that he knew the charges Black was facing after he was arrested but failed to corroborate Black's story to law enforcement because "there was nothing I could do." (App. 288). Moreover, as our Supreme Court noted, Victim was able to describe some of the contents of Bush's bedroom. (App. 97, 123, 435). Additionally, there is no indication that the jury struggled with analyzing Bush's credibility due to the prior convictions or grappled with Blacks' guilt as a result. The trial court properly charged the jury on determining credibility to establish the facts of the case. (App. 322-23).

The record reflects that there were no questions from the jury, indicating they understood and applied the charges as instructed by the court. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480

(2016) (finding a jury instruction on the victim’s credibility to be prejudicial when the jury requested clarification on the charge but the court failed to provide clear instruction in response). Based on the totality of the evidence in relation to Bush’s credibility, it is within a reasonable jury’s determination that Bush’s testimony was undermined notwithstanding his prior convictions.

Ultimately, had the PCR court properly weighed the strength of the State’s evidence against the specific impact of the shooting/throwing a deadly missile conviction, it would have found no reasonable likelihood that Black would have prevailed on appeal. *See Strickland*, 466 U.S. at 687 (regarding the prejudice prong, “the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt”); *State v. Mitchell*, 330 S.C. 189, 199–200, 498 S.E.2d 642, 647–48 (1998) (highlighting that “the Constitution entitles a criminal defendant to a fair trial, not a perfect one”) (quoting *Van Arsdall*, 475 U.S. at 681). Black simply could not have been prejudiced by Bush’s shooting/throwing a deadly missile conviction in light of Black’s own credibility being “seriously impeached . . . by testimony that he had a criminal record that included two prior offenses for CSC with a minor.” *Black*, 400 S.C. at 29, 732 S.E.2d at 891. The State presented substantial evidence that inferred Black’s guilt including testimony from Victim and her friend about the bloody underwear, testimony that Black knew the Victim was fifteen, testimony from Victim describing the incident, and testimony regarding Black’s prior CSC convictions.

As Washington’s Court of Appeals aptly noted:

The considerations involved in impeaching a witness are different because the ruling is unlikely to influence the defendant’s decision to testify or not testify. Furthermore, there is less risk of prejudice to the defendant when a defense witness is impeached because it is unlikely a jury would infer the defendant’s guilt because a witness has a criminal record.

State v. Harris, 44 Wash. App. 401, 406–07, 722 P.2d 867, 870–71 (1986) (citations omitted); *see United States v. Lipscomb*, 702 F.2d 1049, 1063 (D.C. Cir. 1983) (noting that [t]here is less risk

of prejudice when a defense witness other than the defendant is impeached through a prior conviction because the jury cannot directly infer the defendant's guilt from someone else's criminal record"); *United States v. Logan*, 998 F.2d 1025, 1032 (D.C. Cir. 1993) (where the government improperly uses a conviction to impeach a witness, rather than the defendant, the error is "less prejudicial"); *United States v. Tse*, 375 F.3d 148, 164 (1st Cir. 2004) (explaining that the probability that prior convictions of an ordinary government witness will be unduly prejudicial is low in most criminal cases because the behavior of the witness is generally not the issue in dispute); *United States v. Huddleston*, 811 F.2d 974, 978 (6th Cir.1987) ("Any prejudice to the defendant is normally greater where the defendant's own character is being attacked.").

In sum, our Supreme Court found the admission of two voluntary manslaughter convictions to impeach Bush to be harmless error. Bush received all three convictions at the same time, the jury heard about the three convictions all at the same time, and the jury did not get to hear the sentences he received for them. The PCR judge found trial counsel was not ineffective for failing to object to the deadly missile conviction being admitted. (App. 537). How then could prejudice result to Black when it was harmless error for the jury to hear the first two much more serious convictions, and trial counsel was not ineffective for failing to object to the third? The PCR judge erred in granting PCR relief because appellate counsel failed to raise the lack of objection and admission of the deadly missile conviction on direct appeal. Appellate counsel validly articulated why he did not raise the issue, and this Court should reverse and reinstate Black's convictions and sentences.

CONCLUSION

Based on the foregoing argument, this Court should reverse the post-conviction order granting relief and reinstate Black’s convictions and sentences.

Respectfully submitted,

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