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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County Court of Common Pleas
The Honorable Deadra L. Jefferson, Circuit Court Judge

App. Case No. 2025-000602

Nicholas J. McIver, # 00376157,..Petitioner,

v.

State of South Carolina,..Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

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II. WHETHER THE PCR COURT ERRED IN CONCLUDING TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO SEVER THE JOINT TRIAL.

STATEMENT OF THE CASE

In December 2016, the Horry County Grand Jury indicted Petitioner Nicholas McIver for the kidnapping and murder of Amanda Fisher, as well as for possession of a weapon during the commission of a violent crime, and grand larceny valued at $2,000 to $10,000. (App. pp. 666-671). Codefendant Terrell Freeman was charged with the same offenses. (App. pp 14-16). Assistant Solicitors George H. Debusk, Jr. and Seth A. Oskin prosecuted the case. G. Scott Bellamy, Esquire represented Petitioner.

Petitioner and Codefendant Freeman were tried in a joint jury trial before the Honorable Steven H. John on April 23rd - 27th, 2018 in Horry County. A directed verdict was granted in favor of both Petitioner and Freeman on the kidnapping charge. (App. p. 542, line 16—p. 544, line 10). The jury found Freeman guilty of grand larceny but acquitted him of murder and the weapon possession charge. (App. p. 650, line 23—p. 651, line 14). Freeman was sentenced to five (5) years imprisonment for grand larceny. (App. 663, line 21—p. 664, line 4). The jury found Petitioner guilty of murder, the weapons charge, and grand larceny. (App. p. 650, lines 6-22). Petitioner was sentenced to forty-five (45) years imprisonment for murder and five (5) years each for grand larceny and the weapon charge. (App. p. 660, line 25—p. 661, line 16). The sentences were ordered to run concurrently. (App. p. 660, line 25—p. 661, line 16; pp. 672-674).

Petitioner appealed to the South Carolina Court of Appeals. The Court of Appeals ultimately affirmed his convictions and sentences on October 13, 2021. *State v. McIver*, Op. No. 2021-UP-353 (Ct. App. filed Oct. 13, 2021). (App. pp. 862-867).

Petitioner subsequently filed a post-conviction relief application, alleging ineffective assistance of counsel on the following grounds:

> (a) Trial Counsel failed to object to irrelevant, inflammatory, and prejudicial testimony regarding an incident in which Applicant allegedly filmed his codefendant and the victim's friend having sex without their knowledge.
>
> (b) Trial Counsel failed to object or otherwise challenge the hand of one, hand of all accomplice liability instruction given to the jury.
>
> (c) Trial Counsel failed to object to the State's opening statement which contained references to hand of one, hand of all accomplice liability.
>
> (d) Trial Counsel failed to object to unsupported arguments and references not in evidence during the State's closing argument.
>
> (e) Trial Counsel failed to request an instruction on "cover up evidence" or preserve this issue for review.
>
> (f) Trial Counsel failed to object to the photo-line up and identification of Applicant on the basis of the witness's age and competency. Trial Counsel likewise failed to argue that the identification was unreliable due to the witness's age and competency.
>
> (g) Trial Counsel failed to object to the State's improper presentation of conflicting theories, in violation of due process

(App. pp. 870-878). Respondent filed a Return on January 18, 2022. (App. pp. 879-889). On December 20, 2022, Petitioner filed the following additional PCR allegations to amend his application:

> I. Trial Counsel was ineffective for failing to move for severance of the trial from Applicant's codefendant. This error was deficient and prejudicial because the joint trial of Applicant and his codefendant limited Applicant's trial strategy and cross-examination opportunities.
>
> II. Trial Counsel was ineffective for repeatedly making statements that incriminated Applicant during his opening statement and closing argument. Trial Counsel not only repeatedly told the jury that Applicant was guilty of grand larceny, one of the charges for which he was on trial, but he also stated Applicant was guilty of offenses he was not even charged with, like accessory after the fact, and commented that Applicant should be punished for that.
>
> III. Trial Counsel was ineffective for acquiescing to the State's theory of accomplice liability and for making statements in his opening statement and closing argument that bolstered that theory.

(App. pp. 890-892). On July 30, 2024, an evidentiary hearing was held before the Honorable Deadra L. Jefferson. Assistant Attorney General Bryan T. Hall, Esq. appeared for the Respondent.

Undersigned Counsel appeared for Petitioner. Petitioner and his prior trial counsel, Gregory Scott Bellamy, Esq. both testified. At the close of the hearing, Judge Jefferson issued an oral ruling from the bench denying relief and instructed Respondent to prepare a proposed order of dismissal. (App. p. 989, line 19—p. 990, line 18). A form order denying relief with the same instructions was filed that same day. (App. p. 992). A Final Order of Dismissal was issued and filed on March 17, 2025. (App. pp. 993-1007). This appeal follows.

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STATEMENT OF THE FACTS

The charges arose during a trip Petitioner and Codefendant Freeman took to Myrtle Beach on July 8, 2016. (App. pp. 196-199). They knew each other from working together in Charlotte, North Carolina. (App. p. 306, lines 14-15; p. 391, lines 5-6). The victim, Amanda Fisher, and her cousin, Tabetha Oxendine, were also visiting Myrtle Beach from North Carolina and had checked into a nearby hotel at 1:00 a.m. on July 9, 2016. (App. p. 201, line 23—203, line 25). From their hotel's balcony, they called out to Petitioner and Freeman on the street below and they began chatting. (App. p. 490, line 22 — p. 491, line 6). The pairs of friends, who had not met before, exchanged phone numbers. (App. p. 491, lines 7-8; p. 492, lines 1-4).

At 2:41 am, the women met the men on a nearby beach. (App. p. 491, lines 9-10; lines 15-16). After strolling on the beach, they returned to the women's hotel and "just hung out in the room and got to know each other," while Oxendine took pictures of the group. (App. p. 491, lines 11-14, lines 19-20; p. 506, lines. 21-22). Throughout the early morning hours of July 9th, 2016, they all drank heavily and used drugs. (App. p. 491, lines 21-25; p. 511, lines 15-18). Oxendine and Freeman also had consensual sex multiple times in her hotel room and then again later in the men's hotel room. (App. pp. 493-494; p. 503, lines 11-13). Oxendine testified that Petitioner had filmed them having sex using his cell phone without her consent or knowledge. (App. p. 493, line 15—p. 494, line 22; p. 503, line 11—p. 504, line 1; p. 513, lines 11-15). Investigators indeed found five (5) videos of Freeman and Oxendine having sex on Petitioner's cell phone. (App. pp. 351-352; p. 369; p. 475, pp. 467- 468).

Both pairs of friends were to return home to their respective residences in North Carolina the next day, but the plan then changed to where they would drop off Oxendine in North Carolina in Fisher's white Chevrolet Malibu, and then Fisher and the men would return to Myrtle Beach. (App. p. 497, lines 16-19; p. 498, lines 14-21). Oxendine planned to go back to Myrtle Beach that

night to continue the fun after spending the day at her aunt's house in North Carolina. (App. p. 519, lines 17-24). Oxendine testified that at no time did she hear Freeman or Petitioner make threats towards Fisher and there was no indication that either would do Fisher any harm. (App. p. 507, lines 21-25, p. 508, lines 1-4; lines 21-24). Likewise, no security calls or complaints had been made at either the women's or men's respective hotels. (App. p. 456, lines 3-20).

Oxendine testified that on the ride to her aunt's home, Fisher was in the driver's seat with Petitioner in the front passenger seat while she and Freeman sat in the back. (App. p. 500, lines 15-22, p. 517, lines 12-16). When asked about the mood in the car, Oxendine testified, "They all seemed fine," with no tension between the four. (App. p. 499, line 23—p. 500, line 5). Oxendine sat in Freeman's lap and slept during the drive. (App. 496, lines 21-22). She stated she did not think Freeman had a gun on his person; but noted that she could not feel his back pockets while on his lap. (App. p. 496, line 23—p. 497, line 1; p. 506, lines 1-14). An hour into the drive, Fisher called her mother to say that after they dropped Oxendine off at her aunt's house, Fisher was going to get some clothes from her house before heading back to Myrtle Beach. (App. p. 180, lines. 8-10). According to trial testimony, Fisher gave her family no reason to be concerned during that phone call. (App. p. 174, lines 19-22). Fisher's stepfather also stated the home showed no signs of distress after she picked up her clothes with the men. (App. p. 183, lines. 8-16). After getting her clothes, the three headed back to Myrtle Beach in Fisher's car.

At around 11:15 a.m., a bystander, Kenneth Thompson, heard a popping sound while in the parking lot of the K&W Cafeteria restaurant located on Highway 17 in North Myrtle Beach. (App. p. 87, lines 5-6, 8; p. 89, lines 1-6; p. 425, lines 21-25). Thompson then saw a man pull a woman out of a white car by her arm while another man inside the car appeared to be pushing her out of the car. (App. p. 89, lines 9-15). Thompson ran away in fear and the white car was gone by the

time he turned back around. (App. p. 89, lines 15-20). Thompson promptly reported the incident. (App. p. 89, line 21—p. 90, line 5). When asked to describe the men, Thompson could only describe the man outside the car as a black male of a medium complex with short or pulled-back hair and could not recall his clothing. (App. p. 92, lines 1-8). He could not provide any description of the man inside the car. (App. p. 92, lines 9-12; p. 102, lines 4-5). Thompson did not identify Freeman or Petitioner from a photo lineup or make an identification at trial.

Freeman and Petitioner arrived back at their hotel in Fisher's vehicle just before noon and collected their belongings. (App. p. 429). Video surveillance captured one of the men throw a luggage bag over the balcony and into the back of Petitioner's pickup truck that they had driven to Myrtle Beach. (App. p. 430, line 23—p. 431, line 3).[1] After Freeman left the hotel in Petitioner's truck and Petitioner left in Fisher's car, phone records[2] show they were in communication over the next few hours via a number of phone calls. (App. p. 432, line 14—p. 433, line 10).

At approximately 1:45 p.m., Petitioner bought matches, $7.00 worth of gas, and a pack of cigarettes using Fisher's credit card at a gas station in Bennettsville, and later bought $49.40 worth of gas and more cigarettes at a gas station in Marshville. (App. p. 217; pp. 227-228; p. 434, lines 8-13; pp. 438-439; pp. 696-697; pp. 699-700; pp. 743-744). At both gas stations, no blood could

[1] The State argued that the grainy footage showed Petitioner taking an object, argued to be a gun, from his waistband. This theory is merely conjecture and speculation and is refuted by other evidence discussed at the PCR hearing. *See infra* pp. 19-22.

[2] Petitioner voluntarily turned over his cellphone to investigators when he turned himself in to the Charlotte Metropolitan Police Department ("CMPD"). (App. p. 353, lines 20-23; p. 370, lines 5-7). Freeman did not turn over his cellphone voluntarily upon his arrest and investigators did not seek a search warrant to search Freeman's cellphone. (App. p. 471).

be seen on the same white t-shirt Petitioner had been wearing that day. (App. 59-60; Video[3]; p. 219, line 25—p. 220, line 2; p. 230, lines 6-10; pp. 433-434; p. 460, lines 4-22)

Investigators were unable to piece together the specifics of the incident from the existing evidence and forensics. The K&W Cafeteria did not have surveillance cameras in the area of the parking lot where the shooting occurred, and thus law enforcement was unable "to find any evidence that actually showed what occurred during this incident." (App. 109, lines 11-17; p. 119, line 21—p. 120, line 1; p. 123, lines 7-15). A bullet fragment was found between Fisher's legs but was not collected as evidence. (App. p. 136, line 15-24). No DNA evidence taken from Fisher's fingernail clippings was presented at trial. Law enforcement did not submit Fisher's clothing for blood spatter analysis or for any other forensic testing. (App. p. 450, lines 7-13; p. 137). Moreover, on the way to Myrtle Beach, no calls were made by other motorists reporting someone in distress or any other disturbances involving a white Malibu, such as erratic driving. (App. p. 141, lines 2-6). Detective Lyman also conceded that nothing in the texts or data extracted from Petitioner's phone indicated a plan or preparation to kill Fisher, and no text, photo, or other data contained an admission of guilt. (App. p. 357, lines 16-19; p. 358, lines 1-5; p. 458, lines 19-22).

Fisher's white Malibu was found burned in Charlotte, North Carolina less than a mile away from Petitioner's girlfriend's residence at the time. (App. p. 391, lines 6-8; p. 392, lines 3-20; p. 296, lines 11-16; p. 297, lines 23-25). A seven-year-old girl who lived down the street said she witnessed the car catch on fire and saw a light-skinned male with dreadlocks standing nearby. (App. pp. 327-328; p. 330; pp. 275-276; p. 280). She stated the man then drove off with a woman. (App. pp. 329-330). She positively identified Petitioner from a lineup with "100 percent" certainty.

[3] Please also refer to the State's Exhibits of the video and surveillance footage, including St. Ex. 26-27, and 29 as per Petitioner's Motion for Release/Transportation of Exhibits.

(App. p. 321, p. 331, line 21—p. 332 line 1; pp. 709-716). The other witness that reported to have seen this incident was unable to select anyone from the lineup and had written "no" next to Petitioner's photo. (App. pp. 271-272). This witness was unavailable to testify because he died prior to trial. (App. p. 266, lines 4-8).

The CMPD Arson team initially processed the car and generated a report, but the State did not present it at trial. (App. p. 300, lines 9-11, p. 452, lines 7-11). SC investigators took photos of the car on July 13, 2016 and four (4) months later, investigators returned to Charlotte to process the vehicle. (App. p. 302, lines 10-14; p. 394, lines 14-23; pp. 683-684; pp. 703-705). Detective Lyman described the car as "completely burned up" and apart from Fisher's purse and melted key fob, they were unable to find any bullets, casings, blood, or other evidence. (App. p. 394; p. 476, lines 10-16; p. 479, line 12; pp. 706-708). No other forensic analysis, ballistics, or other testing was able to be performed. (App. p. 452, lines 3-8).

Pathologist Dr. Edward Proctor performed the autopsy and concluded the cause of death was a fatal gunshot wound to the head. (App. p. 237, lines 16-22; p. 238, lines 3; p. 242, lines 10, lines 20-21). He found no other injuries or signs of assault, nor did he find injuries consistent with being pushed from a car. (App. p. 240, lines 17-20; p. 246, lines 11-22). Fisher was also determined to have a blood alcohol level of .068 and her blood screen was positive for Valium and cocaine metabolite, indicating she used cocaine shortly before her death. (App. 241, lines 13-23; p. 242, lines 3—244, line 9). The bullet entered above her right ear and exited above the left ear and was slightly anterior. (App. p. 238, lines 4-6). A contact wound indicated the gun's muzzle was right up against her head. (App. p. 239, lines 13- 19).

A pivotal issue at trial became whether Freeman or Petitioner was the shooter. No witness indicated who was the shooter, let alone that Petitioner shot Fisher. (App. p. 359, lines 1-2). The

gun used in the shooting was also never recovered. The State presented certain theories of the events and identity of the shooter by possible seating arrangement inside the car. But this could also not be used to determine the shooter's identity because there was no evidence as to where Fisher, Freeman, and Petitioner had been sitting at the time of the shooting. The only known seating arrangement was when Oxendine was dropped off, it unknown what occurred on the drive back to Myrtle Beach during which the group could have made stops and changed seats. Regardless, no expert, investigator, or other witness could make a conclusive determination. For instance, Dr. Proctor could not determine from which direction the single shot was made in relation to the shooter according to the possible seating arrangements in the car. (App. p. 244, line 25—245, line 8). Determining the shooter according to possible seating arrangement would also depend on whether the shooter was right or left-handed, and Detective Lyman testified he did not know whether Freeman or Petitioner was right or left-handed. (App. p. 461, line 2-5). Detective Lyman acknowledged that "[t]here was one shot and there's two people" and "[a]t the end of the day, we did not know who pulled the trigger in that car." (App. p. 465, line 25— p. 466, line 11). Detective Lynch's involvement in the investigation also did not lead him to determine the identity of the shooter, let alone that it was Petitioner. (App. p. 358, line 25—p. 359, line 3). Apart from mere conjecture, no motive could also be ascertained.

Even without knowledge of the events that unfolded inside the car that day, the State proceeded on proving guilt pursuant to "the hand of one is the hand of all" accomplice liability doctrine, but stressed in closing that Petitioner must have been the shooter.[4] The trial court gave

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[4] Note the State practically acknowledged in closing that the shooter's identity could not be fully determined. Different scenarios of the shooting relative to possible seating positions in the car along with various potential motives were also suggested to the jury. (App. p. 569, lines 8-12; pp.

"the hand of one is the hand of all" accomplice liability charge as well instructions on mere presence and the law of principal (App. pp. 637-649).

576-80; pp. 583-584; p. 586). As further addressed herein, Petitioner respectfully asserts such portions of the State's closing are mere conjecture and are unfounded pursuant to the record.

ARGUMENT

A criminal defendant has the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI. The defendant has the burden of proof and relief is warranted upon the showing that counsel's performance was deficient, and the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1985). Counsel is deficient when his performance falls below an objective standard of reasonableness according to prevailing professional norms. *Id.* at 688. However, no deficiency results when an attorney articulates an "objectively reasonable strategy". *E.g., Ingle v. State*, 348 S.C. 467, 474, 560 S.E.2d 401, 405 (2002). The prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694.

I. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO TESTIMONY THAT PETITIONER FILMED HIS CODEFENDANT AND THE VICTIM'S COUSIN HAVING SEX WITHOUT CONSENT.

At trial, Oxendine testified several times that she and Freeman's sexual activity was filmed without her knowledge or consent by Petitioner. (App. p. 493, line 15—p. 494, line 22; p. 503, line 2—p. 505, line 2; p. 513, lines 11-15). The State was the first to elicit testimony on this matter. (App. pp. 351-352; p. 493, line 15—p. 494, line 22). Testimony of investigators that searched and analyzed Petitioner's cell phone data confirmed the existence of five (5) separate videos that he recorded of them having sex. (App. pp. 351-352; p. 417; p. 369; p. 457; pp. 467- 468; p. 475). A log showing the time each video was recorded was also admitted into evidence as an exhibit. (App. p. 735; p. 417). Trial Counsel made no objection to any of these instances, and even elicited more testimony from Oxendine about the matter on cross-examination. (App. p. 503, line 2—p. 505, line 2). Trial Counsel's questioning only emphasized the lack of consent element as she testified

that Petitioner recorded their sexual activity while hidden from view in the bathroom with the door cracked and on other occasions throughout the night while hidden in other parts of the room and adjoining suite. (App. p. 503, line 2—p. 505, line 2). The videos were also discussed during the closing arguments by the prosecutor, Freeman's counsel, and even Petitioner's counsel. (App. p. 585, pp. 591-592; p. 614; p. 622; p. 626).

The PCR Court concluded Trial Counsel was not deficient and had articulated "a reasonable strategic reason" for not objecting to this testimony and evidence. (App. pp. 997-998). The PCR Court found credible his testimony that he believed the cellphone sex video evidence was beneficial to the defense's theory of a "casual encounter" and that there was no plan to commit the murder, thereby refuting the State's theory of the "hand of one is the hand of all" accomplice liability doctrine. (App. pp. 997-988). The PCR Court also found credible his belief that the cellphone video testimony "corroborated the defense's theory that the parties were all getting along and depicted that the Applicant wasn't doing 'anything bad.'" (App. pp. 997-998). The PCR Court further concluded that Petitioner failed to prove prejudice. (App. pp. 997-998).

The denial of post-conviction relief is founded upon various errors of law and there is otherwise no evidence of probative value to support the PCR Court's findings. The failure to object was deficient because the cell phone video testimony is inadmissible under various evidence rules. *E.g. Holman v. State*, 381 S.C. 491, 674 S.E.2d 171 (2009) (holding the failure to object to irrelevant, inadmissible evidence is deficient performance).

For instance, Petitioner's filming of their multiple sexual encounters without consent does not have the tendency to make any fact more or less probable and is therefore irrelevant and inadmissible. *See* Rules 401-402, SCRE. At the PCR hearing, Trial Counsel even acknowledged it was irrelevant and "didn't think it went to the core issue of who did the shooting the following

day." (App. p. 930, lines 22-24). He also noted that it was irrelevant during in his closing at trial. (App. p. 592, lines 11-14). Even if there were some relevance to this evidence, any derived probative value is substantially outweighed by the danger of unfair prejudice and misleading the jury due to the inflammatory nature of Petitioner's actions. *See* Rule 403, SCRE.

The surreptitious filming of a couple's sexual activity without consent is obviously an extreme violation of privacy and deviant and morally repugnant according to universal standards of decency. Significantly, Petitioner's behavior was also illegal. *See* S.C. Code Ann. § 16-17-470(B). The testimony was thus inadmissible under Rule 404, SCRE as impermissible prior bad act/character evidence, which only served to imply to the jury Petitioner had an unsavory and immoral character. Indeed, Trial Counsel told the jury during closing that Petitioner's filming of their sexual activity may make the jury not like him. (App. p. 592, line 12). Further, the illegality and deviant nature of this behavior belies Trial Counsel's explanation that the testimony about it was "helpful" to the defense's theory because "did not depict my client doing anything bad." (App. p. 930, lines 8-20; p. 931, lines 1-11).

Thus, it was an error of law for the PCR Court to conclude that the failure to object was not deficient. There is also no evidence of probative value to support the PCR Court's findings. Significantly, the final Order of Dismissal fails to account for the fact that the record shows Petitioner filmed the couple having sex ***without Oxendine's knowledge and consent.***[5] (App. p. 493, line 15—p. 494, line 22; p. 503, line 2—p. 505, line 2; p. 513, lines 11-15).

[5] The PCR Court's oral ruling at the end of the hearing also overlooks that the videos were made without Oxendine's consent or knowledge. (App. p. 977, line 6-p.978, line 7). This may explain the otherwise puzzling finding Trial Counsel had an objectively reasonable basis to not object.

Moreover, the PCR Court's finding that Trial Counsel gave a reasonable strategic basis to not object is likewise wholly unsupported by the record and is founded upon several errors of law. While Trial Counsel may have articulated *a* reason for not objecting and explained it was part of a strategy, this was nonetheless not an *objectively reasonable strategy* that would preclude deficiency. *E.g., Ingle*, 348 S.C. at 474, 560 S.E.2d at 405 ("Where counsel articulates a strategy, it is measured under an objective standard of reasonableness").

Trial Counsel's failure to object cannot be excused as an objectively reasonable strategy because as previously discussed, Petitioner's behavior was illegal and objectively offensive. Also, contrary to the PCR Court's statement that "there would have been no basis for him to have objected" (App. p. 978, lines 8-9), the testimony was inadmissible under several evidence rules. *See Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("[C]ounsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.")); *Holman*, 381 S.C. at 493 (rejecting the suggestion that the failure to object to "clearly inadmissible" evidence "can be justified as a valid trial strategy").

What's more, it not as though this evidence logically served to benefit or corroborate the defense's theory or overall trial strategy. *See Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (holding an attorney's reasoning for failing to call witnesses was not objectively reasonable given the defense theory of the case). Recall that Trial Counsel felt that this evidence nonetheless served to benefit Petitioner by showing no plan existed with Freeman to murder or harm anyone because that they were all getting along. (App. p. 930, line 8—p. 931, line 11). However, the cell phone video evidence simply fails to serve this purpose and Oxendine's testimony that the videos were made without consent or her knowledge invalidates Trial Counsel's explanation for not objecting.

The cell phone video testimony also fails to refute the State's "the hand of is one hand of all" theory nor the theory that Petitioner was the principal. How the shooting occurred cannot be determined and this evidence simply has no relation to the events or interactions between them at the time of the shooting. If there was a plan to kill Fisher, it did not exist until shortly before the shooting, perhaps not until the very moment of the gunshot or even immediately thereafter, as per the State's closing argument. (App. p. 583, line 25—p. 584, line 25; p. 572, lines 16-25; p. 573, lines 1-8, lines 11-25). Thus, because the videos were made the night before the shooting, the testimony about it lacks any temporal proximity that would make it even a little bit relevant or helpful to the defense. At the time the videos were made and including up until after Oxendine was dropped off, there were no altercations or tension that would logically induce such a murder plan.

Moreover, the credibility findings on this matter do not preclude ineffective performance here. *See Simuel v. State*, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010) (the court will reverse on review despite a PCR Court's credibility findings if there is an error of law or there is no evidence of probative value to support those findings); *see also Garren v. State,* 423 S.C. 1, 16, 813 S.E.2d 704, 712 at fn. 4 (2018) ("While we acknowledge the deference owed to the PCR court, deference to a credibility finding is not the issue. The lack of evidence is.").

The PCR Court further erred in finding no prejudice. The PCR Court's prejudice analysis overlooks the unlawful and morally reprehensible nature this evidence. The cell phone video testimony also improperly injected the Petitioner's character into the case. The resulting insinuation that he has a bad or criminal character carried the "inevitable tendency" "to raise a legally spurious presumption of guilt" in the jurors' minds. *State v. Lyle*, 125 S.C. 406, 412, 118 S.E. 803, 807 (1923). *See also State v. Smith*, 309 S.C. 442, 447, 424 S.E.2d 496, 499 (1992) (holding improper bad act evidence was not harmless in part because the evidence was destructive to the defendant's

character). This testimony was thus unduly prejudicial and created the risk that the jury would make their decision on an improper basis, such as an emotional one. *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). With this being a circumstantial case, the resulting prejudice is compounded by the lack of direct or forensic evidence Petitioner committed the murder, either alone or in concert with Freeman. *See generally Mitchell v. State,* 298 S.C. 186, 379 S.E.2d 123 (1989). The prejudicial effect of the sex tape testimony is not negated by the State's presentation of after-the-fact evidence, such as Petitioner's possession and burning of Fisher's vehicle and the use of her credit cards. After-the-fact evidence is akin to evidence of flight, which "'tends to be only marginally probative.'" *See Smalls v. State* , 422 S.C. 174, 845, 810 S.E.2d 836, 192 (2018) (quoting *State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980)). *See also generally*, *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2012) (holding the evidence of flight, possession of stolen goods, and cover-up attempts were insufficient evidence of guilt of burglary to withstand directed verdict); *State v. Lewis*, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013) (evidence of flight and a suicide attempt were insufficient evidence of guilt to withstand directed verdict)). Overall, there is a reasonable probability that but for Trial Counsel's failure to object, the result of trial would have been different.

In light of the foregoing, Trial Counsel's performance was deficient and prejudicial. The PCR erred in concluding Trial Counsel was not ineffective and that he employed an objectively reasonable strategy.

II. THE PCR COURT ERRED IN CONCLUDING TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO SEVER THE JOINT TRIAL.

The PCR Court's conclusion that the failure to move for a severance was not deficient or prejudicial performance but rather a reasonable strategic decision is founded upon errors of law and there is otherwise no evidence of probative value to support its findings.

Freeman made several statements to investigators following his arrest that were recorded. (App. p. 377, lines 6-13; p. lines 901 6-9). *Bruton*[6] prevented introduction of the statements into evidence or elicit their contents through testimony, and Freeman chose not to testify in his own defense at the joint trial.

In Freeman's statements, he told investigators that it was he, not Petitioner, that had the gun at that time and threw it away in a gutter/drainpipe after leaving the hotel. (App. p. 901, lines 18––p. 902, line 9; p. 910, line 24—p. 911, line 8). In cooperating with police, Freeman even went with investigators to look for the gun along the route he drove when discarding it. (App. p. 901, lines 14-24). The gun was unable to be located though as Freeman was unfamiliar with the area. (App. p. 927, lines 3-5; p. 901, lines 10-24). Trial Counsel conceded that Freedom's statements tied him to the gun. (App. p. lines 902, lines 6-9). Trial Counsel did not move for a severance of the joint trial in order to utilize these statements because Freeman inculpated Petitioner as the shooter and his statements were otherwise self-serving and inconsistent. (App. p. 927, lines 1-5).

Trial Counsel was deficient in failing to move for a severance because the joint trial compromised the ability to present a complete defense using these statements. *E.g., Hughes v. State*, 346 S.C. 554, 552 S.E.2d 315 (2001) ("A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent

[6] *Bruton v. United States,* 391 U.S. 123 (1968).

the jury from making a reliable judgment about a co-defendant's guilt")). A separate trial would have enabled the presentation of Freeman's statements to the jury through the testimony of the investigators, notwithstanding that Freeman would likely invoke the Fifth Amendment if called to testify at Petitioner's separate trial.

The joint trial also prevented the jury from making a reliable judgment about Petitioner's guilt. As previously discussed, the identity of the shooter was the pivotal issue in the case and could not been determined from the evidence presented. The lack of evidence indicating the triggerman's identity or even a plausible motive inevitably created the dynamic in which each defendant attempted to show they were not the shooter, *ergo* the other must be. It is true that the presentation of mutually antagonistic defenses is typically not enough to warrant severance. *E.g., State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004). However, this is not the typical case, given the State's reliance on "the hand of one is the hand of all" doctrine despite the lack of evidence that they joined together in any common scheme or plan to commit murder. The confusion of the jury and unreliable assessment of guilt is further evident in the jury's inconsistent verdicts in that Petitioner was found guilty on all counts while Freeman was acquitted of all charges except grand larceny for the taking of Fisher's car. Given the facts of the case, finding Freeman guilty of the charge of grand larceny only makes sense if the jury also believed that he was guilty under the accomplice liability doctrine by acting in concert with Petitioner. The jury also asked questions and made several requests for hard copies of the jury instructions during deliberations.

The failure to move for a severance was also prejudicial. Although Freeman statements exonerated himself and implicated Petitioner, (App. p. 901, lines 8-13; p. 956, lines 9-12), his statements nevertheless directly refuted the State's prevailing theory that Petitioner was the shooter. The State had argued he must be the triggerman because he had the gun when the men

returned to their hotel after the shooting. The State primarily relied upon grainy surveillance footage from the hotel parking lot while the men packed up. The State stressed Petitioner took an object from his waistband, arguing it must have been the gun from the "glint" of sunlight on its metallic surface. (App. p. 577, lines 11-21; p. 582, lines 12-17; p. 910, lines 3-123). In sum, the State's theory is that the object must have been the gun and thus he must have been shooter. However, this proposition is debunked by Freeman's statements, albeit if believed. As Trial Counsel acknowledged, according to Freeman's statements it could not have been a gun that he took out of his waistband in the footage. (App. p. 911). In light of the lack of reliable evidence that otherwise proved who owned/possessed the gun or was the shooter, Freeman's statements would have dismantled the State's entire case. Therefore, there is a reasonable probability that had Trial Counsel moved for a severance of the joint trial, the result of the proceeding would have been different.

In finding Petitioner failed to establish prejudice, the PCR Court reasoned: "there was sufficient evidence for the jury to convict Applicant of murder if he were tried separately, including...Applicant driving Victim's car, using her credit cards, placing a gun-like object from his waistband into his truck, and attempting to cover-up the crime by burning Victim's car after the murder." (App. p. 1004). This is error because this is merely after-the-fact evidence, which is insufficient evidence of guilt to preclude a finding of prejudice. *See supra* p. 18.

Lastly, Trial Counsel's decision not to move for separate trials cannot be held as an objectively reasonable strategy to preclude a finding of ineffective performance. Trial Counsel did not move to sever largely because Freeman's statements pointed to Petitioner as the shooter and were otherwise self-serving and inconsistent. Trial Counsel had recognized though that the State's case centered around whether Petitioner had a gun and relied upon the surveillance footage to

prove he was the shooter. (App. p. 910). As previously stated, the object could not have been a gun in the footage according to Freeman's statements. (App. p. 911). Moreover, Trial Counsel testified the State failed to prove Petitioner's guilt for murder under "the hand of one is the hand of all" accomplice liability doctrine and even disagreed with the Court of Appeals's opinion that there was sufficient evidence to otherwise convict him as the principal. (App. p. 904, lines 3-11; p. 905, lines 14—p. 906, lines 4; p. 906, line 23—p. 907, line 2, lines 17-20; p. 908, lines 1-8; p. 923, lines 9-25; p. 924—p. 925, line 2). The advantages of Freeman's statements in refuting the State's theory, while bolstering Petitioner's defense, outweighed the potential detriment of the portions of the statements that inculpated Petitioner. Trial Counsel thus did not provide a valid or objectively reasonable reason to justify his decision not to move for a severance of the joint trial.

The PCR Court therefore erred in concluding Trial Counsel was not ineffective and that he employed an objectively reasonable strategy.

CONCLUSION

light of the foregoing, Petitioner thus respectfully urges this Court to reverse the Order of Dismissal and remand for a new trial.

Respectfully Submitted,

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