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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to Lexington County

Honorable Perry H. Gravely, Circuit Court Judge

RICKY ESAW,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001407

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether the PCR court erred by refusing to find trial counsel ineffective for failing to object to several written statements of trial witnesses and where petitioner was prejudiced by trial counsel's deficient performance?

II.

Whether the PCR court erred by refusing to find trial counsel ineffective for failing to object to the trial court's instruction to the jury that the offense of attempted murder could be proven through the theory of accomplice liability and its failure to instruct that attempted murder required a specific intent to kill and where petitioner was prejudiced by trial counsel's deficient performance?

STATEMENT

In January of 2016 the Lexington County grand jury indicted petitioner for one count of attempted murder, one count of murder, one count of armed robbery, two counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime. App. 760-771. On October 16, 2017, petitioner proceeded to a jury trial before the Honorable Thomas W. Cooper. App. 6. Rhonda Patterson and Angela Martin prosecuted the case for the state. App. 6. Jason Chehoski and Elizabeth Fullwood represented petitioner. App. 1. The jury ultimately found petitioner guilty as indicted. App. 740, l. 13 – 741, l. 15. Judge Cooper imposed a life without possibility of parole sentence pursuant to S.C. Code Ann. § 17-25-45. App. 751, ll. 14-22; 754, ll. 5-12. Judge Cooper also imposed a concurrent five-year sentence as to the weapons charge. App. 754, ll. 3-5. Petitioner filed a timely notice of appeal; after briefing, the South Carolina Court of Appeals affirmed his convictions. App. 772-825.

On March 3, 2020, petitioner filed an application for post-conviction relief. App. 826-838. On September 9, 2020, the state filed a return. App. 842-857. On May 27, 2022, on behalf of petitioner, Ola Johnson, filed an amended application. App. 858-862. On June 8, 2022, the Honorable Jocelyn Newman signed an order relieving Johnson as PCR counsel due to a conflict and continued the matter to the next term of court. App. 863-864. On June 14, 2022, an order was entered appointing Ashley McMahan as counsel. App. 865. On November 29, 2023, on behalf of petitioner, Ashley McMahan filed a second amended PCR application. App. 866-867. On December 18, 2023, an evidentiary hearing was held before the Honorable Perry Gravely. App. 868-959. Donald Zelenka represented the state and Ashley McMahan represented petitioner. App. 868. On June 6, 2025, Judge Gravely signed an order denying PCR and dismissing petitioner's application with prejudice. App. 960-1060. This petitioner follows.

ARGUMENTS

I.

The PCR court erred by refusing to find trial counsel ineffective for failing to object to several written statements of trial witnesses and where petitioner was prejudiced by trial counsel's deficient performance.

Relevant facts

Trial

Officers were dispatched to Charleston Highway at 9:19 p.m. for an armed robbery shooting incident on August 9, 2015. App. 319, l. 10 – 320, l. 2; 338, ll. 3-16. When Brandon Steen, a law enforcement officer with the Lexington County Sheriff's Department, arrived he saw Hector Vasquez lying on the ground with a gunshot wound in the middle of his torso. App. 320, ll. 5-16. No shell casings were recovered from the scene. App. 328, ll. 6-8; 347, ll. 3-4. Law enforcement spoke to several witnesses from the incident.

Christy Vasquez, the decedent's wife, testified that on August 9, 2015, they were having a baptism party that began around 2:00 or 3:00 p.m. App. 253, ll. 19-20; 254, ll. 6-7. She described that around 9:00 or 10:00 p.m., while she was inside the trailer, "some guy ran into the trailer." App. 255, ll. 3-9. She testified that she walked to the door and went outside. App. 255, ll. 11-23. She testified that she saw her husband being held by a Black man and they were struggling. App. 255, l. 25 – 256, l. 6. She stated that the Black man told her if she came any closer he would shoot her. App. 256, ll. 10-13. She testified that she saw a dark four-door sedan with the driver's door open. App. 257, ll. 13-20. She explained that the man who was holding her husband got into the driver's side of the car and drove off. App. 258, ll. 4-18. She testified that she did not see anyone else in the car. App. 258, ll. 10-11. She called 911. App. 258, l. 25

– 259, l. 1. She explained that she met with police that night and gave a statement, however, the statement was not complete as she was trying to get to the hospital. App. 262, l. 24 – 263, l. 17. She was shown a lineup, but she was not able to identify anyone. App. 266, ll. 2-4.

On cross-examination, she agreed that she spoke with police for approximately 30 minutes. App. 268, ll. 21-25. She wrote the statement in her own hand. App. 269, ll. 4-6. She did not indicate in her statement that more than one robber was involved. App. 269, ll. 7-11. Trial counsel inquired if she wrote, “A black man with a gun, he told me that if he got any closer he was going to kill me. And then they left and I saw my son had a shot burn to his legs.” App. 269, l. 23 – 270, l. 2. She agreed. App. 270, ll. 3-5. On re-direct examination, the state entered State’s Exhibit 10, Christy Vasquez’s statement, into evidence. App. 271, ll. 1-8. Trial counsel did not object to the admission of the statement. App. 271, ll. 3-6.

Rafael Izaguirre testified that on August 9, 2015, he was at a party with Hector Vazquez. App. 272, ll. 6-17. He described a black car approaching and two Black men getting out of the car each with a gun in their hand. App. 272, l. 22 – 273, l. 2. The men asked for money, and they took his wallet and cellphone. App. 273, ll. 2-5. He testified that he walked away and heard gunshots. App. 273, ll. 20-25. When he returned, the decedent was on the ground. App. 274, ll. 21-23. He testified that all he remembered was a man pointing a gun at him and that the man took his wallet and phone. App. 275, ll. 1-4. On cross-examination, Izaguirre testified that in the week following the incident he spoke with police but told them he did not recognize the faces only that there was a black car. App. 276, ll. 4-20. Then, on re-direct examination, the state entered State’s Exhibit 12, Izaguirre’s August 9, 2015, statement into evidence without objection. App. 277, ll. 2-20. He read his statement as follows, “They pointed a gun at me and took my phone and wallet, a small black car with two African-Americans.” App. 278, ll. 7-13.

Franklin Vasquez, the decedent's son, testified that on August 9, 2015, he had gone up the street to play basketball with his friends and when he was heading home he saw the decedent talking with Izaguirre by the fence. App. 284, l. 2 – 285, l. 1. He testified that he went to the cooler to grab a drink and a black car arrived. App. 285, ll. 4-14. The driver pointed a gun at him and told him to empty his pockets. App. 285, ll. 16-18. He identified the car as a black four-door sedan and testified that both the driver and passenger exited the car. App. 286, ll. 1-9.

He testified that when the driver told him to empty his pockets, the decedent stepped in front of him. App. 287, ll.1-6. The driver pointed the gun at the decedent, tried to shoot the gun, but the gun stalled. App. 287, ll. 6-8. He testified that the decedent hit the driver with a beer bottle and they began struggling over the gun. App. 287, ll. 23-25. He testified that the gun went off after which the passenger shot through the car resulting in a bullet grazing him. App. 288, ll. 1-6. He testified that he only saw the driver, not the person who shot him. App. 290, l. 24 – 291, l. 1. He testified that the driver was smaller than the passenger. App. 291, ll. 12-13. He flagged an officer down and explained the incident. App. 291, ll. 19-23.

He gave a statement which he testified was full and complete. App. 292, ll. 2-8. He testified that the only thing missing in his statement was that he said the car was gray, but he meant a dark gray color. App. 292, ll. 9-13. The state entered State's Exhibit 13, Franklin Vasquez's statement, without objection. App. 294, ll. 8-14. He was shown a lineup on August 13, 2015, and he selected petitioner as the driver. App. 298, ll. 1-25. On cross-examination, he agreed that he did not give a detailed description of the men involved until he spoke with Detective Moore. App. 312, l. 25 – 313, l. 2. Trial counsel asked him to read the last sentence of his statement as follows, "Then the passenger driver had shot gun inside the car and it grazed me and hit the white truck. The passenger driver was the fat guy." App. 314, l. 18 – 315, l. 2.

Evidentiary hearing

During his evidentiary hearing, petitioner testified that his lawyers did not discuss the statements from Christy Vasquez, Franklin Vasquez, or Rafael Izaguirre with him. App. 880, l. 25 – 881, l. 3.

Jason Chehoski, one of petitioner's trial lawyers, testified that he did not recall the testimony or his cross-examination of Christy Vasquez after which the state introduced her statement. App. 927, ll. 17-21. He testified that he would defer to the record. App. 927, l. 23. As to Rafael Izaguirre's testimony and the subsequent introduction of his statement, Chehoski testified that he did not recall but would defer to the record. App. 927, l. 24 – 928, l. 5. Similarly, as to Franklin Vasquez's statement, he testified that he would defer to the record. App. 928, ll. 6-9. On cross-examination, he agreed that Franklin Vasquez was the only witness who positively identified petitioner. App. 934, l. 25 – 935, l. 1. In addition, he testified that as to whether he had a reason to object to Christy and Franklin Vasquez's statements coming into evidence, "I'm sure there should be good reason – best evidence or obviously prior consistent – you know, prior consistent statements would be basis." App. 938, ll. 1-5. He continued that "if I didn't object to it, I didn't object to it. It was not part of the strategy." App. 938, ll. 5-6.

Elizabeth Fullwood, one of petitioner's trial lawyers, testified that she did not object to State's Exhibit 10, Christy Vasquez's statement, because she had insinuated that it was fabricated. App. 947, ll. 1-12. She explained it was "probably admissible under the rule of completeness." App. 947, ll. 13-18. She provided similar reasoning for Franklin Vasquez and Rafael Izaguirre's statements. App. 947, l. 19 – 948, l. 2.

The PCR court's ruling

a. Christy Vasquez's statement

In the order of dismissal, the PCR court addressed petitioner's allegation that trial counsel rendered ineffective assistance by failing to object to Christy Vasquez's statement. App. 1024. The PCR court noted that in her direct testimony she testified that she gave a statement to law enforcement, but it was neither full nor complete because she wanted to get to the hospital to see her husband. App. 1025. State's Exhibit 10 was entered into evidence on re-direct examination by the state. App. 1026. The PCR court then wrote,

This Court must find that defense counsel *was deficient* in failing to object to the admission of the written statement of Christy Vasquez, State Exhibit 10. The focus of counsel Fullwood's cross-examination of Christy was to show that in her contemporaneous written statement she represented that there was more than one person involved in the event by the use of 'they' in her statement, whereas in the direct examination by the State she made no mention of seeing a second perpetrator. This Court cannot find that the strategy conclusively revealed in the trial testimony by the trial testimony by the defense was not sound strategy or that no reasonable competent counsel would have acted similarly.

App. 1026-1027 (emphasis added). The PCR court concluded that defense counsel opened the door by mentioning the language in the statement. App. 1027. The PCR court determined that the statement was authorized under the rule of completeness, SCRE 106. App. 1027-1028. The PCR court stated that once defense counsel posed questions challenging the sufficiency of the statement compared to the trial testimony, the state was free to question the witness regarding the details of the statement or introduce the entire statement. App. 1028. The PCR court concluded that "[c]ounsel was not deficient in failing to object where no reasonable attorney would have objected after opening the door to its admission." App. 1029. The PCR court then stated that petitioner likewise failed to establish prejudice. App. 1029.

b. Rafael Izaguirre's statement

The PCR court found that petitioner failed to prove deficient performance by credible evidence. App. 1030. The PCR court noted that defense counsel referred to the written statement during cross-examination, and, as the PCR court addressed with the allegation concerning Christy Vasquez's statement, counsel opened the door. App. 1031. The PCR court found that under the rule of completeness the statement was admissible, and thus, deficient performance had not been shown due to a failure to object or hearsay or cumulative evidence grounds. App. 1031. The PCR court also found that had counsel objected there was not a reasonable probability that the result of the proceeding would have been different. App. 1031.

c. Franklin Vasquez's statement

The PCR court acknowledged that the state admitted the contested statement during Franklin Vasquez's direct examination. App. 1031. The PCR court found "that the record reflects a sound strategic reason to not object to the introduction of Franklin's written statement when it was offered by the state." App. 1034. The PCR court determined it was "clear" that the strategy was to show the evolving written and oral statements Franklin Vasquez gave. App. 1034. The PCR court continued that "the defense's intent to seek to question the witness on his written statement was sound strategy to question the reliability of the series of statements he made." App. 1034. The PCR court concluded that counsel was not deficient for failing to object to the introduction of the statement because "it was obviously a planned inquiry by the defense." App. 1034. The PCR court then determined that the failure to object was not prejudicial and was cumulative to Franklin Vasquez's testimony. App. 1035. Accordingly, the PCR court denied the allegation. App. 1035.

Discussion

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and that the deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687. Under the second prong, petitioner must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (citing *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016)).

“Hearsay is not admissible.” Rule 802, SCRE. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801, SCRE.

Under Rule 801 of the South Carolina rules of evidence, “prior consistent statements of a witness are not inadmissible hearsay if: (1) the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement; (2) the statement is consistent with the declarant’s testimony; (3) the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; and (4) the statement was made before the alleged fabrication, or before the alleged improper influence or motive arose.” *State v. Foster*, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003) (citing Rule 801(d)(1)(B), SCRE,

and *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240 (2001)). “[E]vidence of a prior consistent statement is *only* permitted when the elements of Rule 801(d)(1)(B) are met.” *Id.* at 621, 582 S.E.2d at 430 (citing *Saltz*, 346 S.C. at 124, 551 S.E.2d at 245) (emphasis in original). “This rule renders a hearsay statement potentially admissible if it is consistent with the declarant’s trial testimony and is offered to rebut and express or implied charge against the declarant of recent fabrication or improper influence or motive.” *State v. Jeffcoat*, 350 S.C. 392, 396, 565 S.E.2d 321, 323 (Ct. App. 2002) (quoting Rule 801(d)(1)(B), SCORE).

“For evidence to be admissible, it must be relevant.” *State v. Daise*, 421 S.C. 442, 464, 807 S.E.2d 710, 721 (Ct. App. 2017); *see also* Rule 402, SCORE (“Evidence which is not relevant is not admissible.”). Generally, relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Rule 401, SCORE. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCORE.

When looking at Rule 403, SCORE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. “‘Probative’ means ‘[t]ending to prove or disprove.’” *State v. Gray*, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). “‘Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.’” *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993)). “Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation.” *State v. Lyles*, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008) (citing *State v. Pipkin*, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct. App.

2004) and Rule 403, SCRE). Specifically, “[c]umulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point.” *State v. Funderburke*, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968).

Under Rule 106, SCRE it is clear that the remainder of a statement which explains and provides context to another portion of the statement is admissible. Rule 106, SCRE plainly states “when a writing or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

a. Christy Vasquez’s statement

Trial counsel was deficient for failing to object to the admission of Christy Vasquez’s statement into evidence. Trial counsel Chehoski testified that failing to object to the statement was “not part of the strategy,” and acknowledged that there were objections that could have been raised. App. 938, ll. 1-6. While trial counsel Fullwood testified that the statement was “probably admissible under the rule of completeness” and explained she did not object because she insinuated the statement was fabricated, App. 947, ll. 1-18, her articulated strategy was not reasonable where the state elicited testimony itself that Christy Vasquez’s statement was neither full nor complete, App. 262, l. 24 – 263, l. 17; App. 1025; Rule 106, SCRE; *see Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (“[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel) (emphasis in original). The PCR court similarly erred by concluding trial counsel opened the door to admission of the entire statement where trial counsel merely clarified portions of Christy Vasquez’s statement on cross-examination after the state elicited from Vasquez that her statement was not complete. App. 1029; *State v. Young*, 364 S.C. 476, 485, 613 S.E.2d 386,

391 (Ct. App. 2005) (“It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.”); *State v. Heyward*, 426 S.C. 630, 637, 828 S.E.2d 592, 595 (2019) (citing *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018) (“Testimony in response must be proportional and confined to the topic to which counsel has opened the door.”) (internal quotations omitted)). The result is that trial counsel was deficient for failing to object to the statement. *Strickland*, 466 U.S. at 687.

Petitioner was also prejudiced by trial counsel’s deficient performance. The admission of Christy Vasquez’s written statement was needlessly cumulative as the statement merely provided additional evidence of the same kind and to the same point. *Funderburke*, 251 S.C. at 540, 164 S.E.2d at 311. The admission of the statement allowed the state to improperly bolster the impact of Christy Vasquez’s trial testimony. In addition, the state pointed to Christy Vasquez’s statement in its closing argument. App. 682, ll. 4-5 (“But she did tell law enforcement that she saw two black males in a dark colored four-door sedan.”). Therefore, there is a reasonable probability that but for trial counsel’s failure to object to the admission of Christy Vasquez’s statement, the result of the proceeding would have been different. *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625; *Strickland*, 466 U.S. at 688.

b. Rafael Izaguirre’s statement

Trial counsel was deficient for failing to object to the admission of Rafael Izaguirre’s statement into evidence. Trial counsel Chehoski testified during the evidentiary hearing that he would defer to the record as to the admission of Izaguirre’s statement. App. 927, l. 24 – 928, l. 5. He acknowledged, however, in regard to the Vasquez’s statements, that failing to object was “not part of the strategy.” App. 938, ll. 5-6. Moreover, while trial counsel Fullwood testified that her reasoning for any failure to object to the admission of Izaguirre’s written statement was

similar to her reasoning related to Christy Vasquez’s statement—Rule 106 and the opening the door doctrine—such reasoning is immaterial where trial counsel Chehoski conducted Izaguirre’s cross-examination rather than Fullwood. *See generally* App. 275-277; *see also* App. 947, l. 19 – 948, l. 2. Moreover, as trial counsel Chehoski acknowledged an objection on prior consistent statement or cumulative evidence grounds may have been raised as no allegation was made that the statement was fabricated and the statement was redundant of Izaguirre’s testimony. Rule 801(d)(1)(B), SCORE; Rule 403, SCORE; *Foster*, 354 S.C. at 621, 582 S.E.2d at 429; *Funderburke*, 251 S.C. at 540, 164 S.E.2d at 311; App. 938, ll. 1-5. In addition, petitioner was prejudiced by trial counsel’s deficient performance. The admission of the statement allowed the state to improperly bolster the impact of Rafael Izaguirre’s trial testimony. Therefore, there is a reasonable probability that but for trial counsel’s failure to object to the admission of his statement, the result of the proceeding would have been different. *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625. Therefore, the PCR court erred by denying relief where trial counsel was deficient for failing to object to the admission of the statement and petitioner was prejudiced as a result. *Strickland*, 466 U.S. at 687-688.

c. Franklin Vasquez’s statement

Trial counsel was deficient for failing to object to the admission of Franklin Vasquez’s statement. Regarding his statement, trial counsel Fullwood testified her reasoning for failing to object was similar to the reasoning she provided related to Christy Vasquez’s statement. App. 947, l. 19 – 948, l. 2. However, the reasoning she provided was that the statement was “probably admissible under the rule of completeness,” and that she insinuated the statement was fabricated. App. 947, ll. 1-18. Such reasoning does not constitute a valid reason to refuse to object where the state entered Franklin Vasquez’s statement during its direct examination. App. 294, ll. 8-14.

Instead, the PCR court erroneously concluded that trial counsel's strategy was to show the evolving nature of the witnesses' statements where the questioning "was obviously a planned inquiry by the defense," despite trial counsel Fullwood failing to articulate such a strategy. App. 1031-1034. The PCR court therefore erred by finding that trial counsel was not deficient for failing to object to the statement since as trial counsel Chehoski acknowledged an objection on hearsay or cumulative evidence grounds may have been raised. App. 938, ll. 1-5.

Petitioner was prejudiced by trial counsel's deficient performance. The admission of Franklin Vasquez's written statement was needlessly cumulative as the statement merely provided additional evidence of the same kind and to the same point. *Funderburke*, 251 S.C. at 540, 164 S.E.2d at 311. Interestingly, the PCR court acknowledges that the written statement was cumulative to Franklin Vasquez's trial testimony. App. 1035. The result was that the admission of the statement allowed the state to improperly bolster the impact of Franklin Vasquez's trial testimony. In addition, the state points to the statement Franklin Vasquez gave to law enforcement on the night of the incident during closing arguments. App. 682, l. 17 – 685, l. 8. Therefore, there is a reasonable probability that but for trial counsel's failure to object to the admission of Franklin Vasquez's statement, the result of the proceeding would have been different. *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625; *Strickland*, 466 U.S. at 688.

Accordingly, the PCR court erred by denying relief as to these allegations because petitioner's trial counsel rendered deficient performance by failing to object to the admission of the contested statements and where petitioner was prejudiced by the deficient performance because there is a reasonable probability that the result of the proceeding would have been different absent trial counsel's deficient performance. *Strickland*, 466 U.S. at 687-88; *Thomson*, 423 S.C. at 245, 814 S.E.2d at 492; *Rutland*, 415 S.C. at 577, 785 S.E.2d at 353.

II.

The PCR court erred by refusing to find trial counsel ineffective for failing to object to the trial court's instruction to the jury that the offense of attempted murder could be proven through the theory of accomplice liability and its failure to instruct that attempted murder required a specific intent to kill and where petitioner was prejudiced by trial counsel's deficient performance.

Relevant facts

Trial

During trial, the trial court provided the following jury instruction as to attempted murder,

Now, the defendant is also accused of the attempted murder of Franklin Vasquez through the acts of Mr. Pitts.¹ So in order to prove the charge of attempted murder, the State has to prove beyond a reasonable doubt that this defendant, either alone or in concert with somebody else . . . attempted to kill in this case Franklin Vasquez, with malice aforethought either express or implied . . .

App. 721, l. 18 – 722, l. 1. The trial court defined malice as follows:

Malice aforethought is a deliberate and well-formed purpose to do the unlawful act. Aforethought means that the intention to do the unlawful act was conceived or planned sometime before it actually occurred, but it need not exist for any particular length of time prior to the act to meet the test of malice aforethought.

Malice itself is a word that suggests a wickedness or a hatred or a determination to do what one knows to be wrong without just cause or legal provocation. Malice need not be in the mind of the one doing the act for any particular length of time in order to render the killing murder. If it is present in the mind of the one doing the killing any length of time before the act, then its presence would be sufficient to render the killing murder.

¹ Wilfred Pitts, Jr. was petitioner's co-defendant.

Malice can be express or it can be inferred. Malice is said to be expressed when there is shown a deliberate, violent intention to unlawfully take away the life of another human being. Malice may be inferred when no legal provocation or excuse for the killing appears and when the circumstances attending the killing show an abandoned heart or a malignant heart fatally bent on mischief.

App. 720, l. 19 – 721, l. 17. The trial court then charged the jury concerning accomplice liability as follows,

[S]ome of these charges arise out of allegations of [petitioner] being in concert with Mr. Pitts. And the State brings a theory – those cases under the theory of the law known as accomplice liability or the hand of one is the hand of all.

And I tell you, ladies and gentlemen, that when two or more person aid, encourage, and abet each other in the commission of a crime, all who are present are principals and are equally guilty. When two or more persons combine together and commit a crime and the crime is committed, all of those who are present to aid and abet and assist in the commission of the crime are guilty. The act of one becomes the act of all, the hand of one becomes the hand of all; it makes no difference by whose immediate hand the crime is committed, all are principals.

However, I tell you that mere presence at the scene of the crime, even with knowledge of the commission of the crime but without an intent to aid, abet, or assist in its commission, does not constitute guilt. And so the burden is upon the State then to establish beyond a reasonable doubt that the defendants, and each of them as to those particular charges, those charges in concert with Mr. Pitts, they were with each other, they were present, and that they were there with a criminal intent; that is, with the intent to aid, encourage, and abet each other in committed the offense of attempted murder and armed robbery.

App. 725, l. 6 – 726, l. 11. While the trial court instructed the jury as to the verdict form, it explained to the jury, “The attempted murder of Franklin Vasquez, guilty or not guilty; guilty is the State has met its burden of proof under the theory of hand of one is the hand of all . . .” App. 733, ll. 6-10.

Following the charge on the law, trial counsel objected to the portion of the charge wherein the trial court instructed “that malice is implied where not legal provocation or excuse appears.” App. 735, l. 24 – 736, l. 3. Trial counsel argued the instruction was burden-shifting as it could be interpreted to require the defense to disprove legal provocation or excuse. App. 736, ll. 3-8. The trial court noted the objection and declined to recharge the definition of malice. App. 736, ll. 9-18.

The jury ultimately found petitioner guilty as indicted. App. 740, l. 13 – 741, l. 15. Petitioner received a life without possibility of parole sentence pursuant to sentence pursuant to S.C. Code Ann. § 17-25-45. App. 751, ll. 14-22; 754, ll. 5-12.

Evidentiary hearing

During his evidentiary hearing, petitioner testified that he did not have a conversation with either of his trial lawyers about transferred intent or anything concerning attempted murder. App. 880, ll. 21-24. He also testified that he never had a conversation with either of his trial lawyers about jury instructions or what they might request or object to. App. 897, ll. 10-20.

Chehoski testified that he would defer to the record as to any failure to object to an instruction on transferred intent for attempted murder. App. 931, ll. 18-22. On cross-examination, he explained that at the time he did not see an issue with the attempted murder instruction but in hindsight he did. App. 932, ll. 13-16. He agreed that *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), provided that implied malice does not encompass the essential specific intent to kill. App. 932, ll. 17-20. He agreed that he did not object. App. 932, l. 23. PCR counsel then adopted the argument in footnote 1 of petitioner final brief on appeal which addressed the erroneous instruction and argue that the issue was not preserved for appeal. App. 932, l. 24 – 933, l. 4. On re-direct examination, Chehoski testified that the state’s theory for the

shooting of Franklin Vasquez was hand of one hand of all. App. 938, ll. 15-19. He did not recall a specific instruction on transferred intent being given. App. 938, ll. 20-22.

In her summation argument to the PCR court, PCR counsel pointed to footnote 1 in petitioner's final brief on appeal. App. 952, ll. 14-20. She clarified that the trial court instructed the jury that malice had to be proven for attempted murder and that it could be inferred. App. 953, ll. 3-5. She argued that the trial court instructed the jury that malice could be inferred from the transferred intent of the co-defendant's shooting victim. App. 953, ll. 5-7. She argued that the instruction was not objected to, and thus, was not preserved for appellate review. App. 953, ll. 7-9. Following questioning from the PCR court, counsel argued that the issue was not preserved and that appellate counsel did not believe the issue was preserved. App. 954, ll. 8-14.

The PCR court's ruling

In its order of dismissal, the PCR court addressed petitioner's allegation that trial counsel failed to object to the transferred intent instruction on attempted murder or a failure to request a specific intent instruction. App. 968. The PCR court concluded that no transferred intent instruction was given at petitioner's trial but noted that the allegation arose from the final brief of appellant wherein appellate counsel cited *King* and argued the attempted murder instruction was erroneous. App. 968-969. The PCR court concluded that based on a review of the record a transferred intent instruction was not given, and thus, petitioner failed to establish his burden of proof related to a transferred intent instruction and denied relief in that respect. App. 972-973. As to the "newer arguments by counsel," the PCR court identified the issue as "counsel should have either objected to the attempted murder charge or requested an additional charge related to attempted murder based upon *State v. King*." App. 973. The PCR noted that *King* was decided on October 25, 2017, while petitioner was tried from October 16-19, 2017. App. 973. The PCR

court concluded that a retroactive application of *King* therefore did not apply to petitioner's 2017 trial. App. 973. The PCR court continued that counsel could not be deemed ineffective for failing to object to an instruction that the Supreme Court did not decide was error until after petitioner's trial. App. 975-976. The PCR court wrote that,

Looking to the relevant language employed in the attempted murder charge as presented, the trial judge: (1) advised the jury of the exact language used by the statute to define the offense; (2) explained the general concept of malice as hatred, ill will, hostility, and the intentional doing of an unjustified act; (3) defined that 'aforethought' component of the malice as requiring malice to exist before and at the time of the act[]; (4) defined attempted murder as 'an attempt to commit an act is done in part in execution of a plan or a design to commit a crime. There has to be an intent that the action be committed and an act done, not in full execution of the crime, but in pursuing the intent to commit a crime' and (5) explained that malice can be proven when there is shown 'a deliberate, violent intention to unlawfully takeaway the life of another human being,' and (6) explained various ways the required intent could potentially be inferred, including through when no legal provocation or excuse for the killing appears and when the circumstances attending the killing show an abandoned heart or a malignant heart fatally bent on mischief and (7) never indicated that specific intent to kill was not an element of the offense. Significantly, when giving that language its natural meaning and viewing the charge as a whole, the jury could have *only* convicted [petitioner] if they found he or [co-defendant] committed an *intentional* act with the *specific intent to kill* his victim with an unlawful and malicious purpose.

App. 980 (footnote omitted and emphasis in original).

The PCR court then determined that assuming *arguendo* that counsel was deficient for failing to request an instruction on specific intent to kill as an element of attempted murder, petitioner failed to demonstrate prejudice. App. 982. The PCR court determined that petitioner and his co-defendant entered into a plan to commit armed robbery. App. 983. The PCR court

concluded that like *Perry*² and unlike *Burdette*,³ it could not be said that petitioner's jury returned a guilty verdict only on general intent rather than a specific intent to kill. App. 984. The PCR court concluded that the failure to charge specific intent to kill was not prejudicial under *Strickland* because there was no reasonable probability that the result of the verdict on attempted murder would have been different. App. 984-985. The PCR court wrote that "[t]he record supports the showing overwhelming of a specific intent to kill Franklin by [co-defendant] when he fired the weapon at Franklin who was aiding his father in the struggle with [petitioner] and grazed his leg." App. 985. The PCR court stated that there was overwhelming evidence to show specific intent to kill by co-defendant where co-defendant admitted that after he fired a warning shot he shot at Franklin. App. 985. The PCR court concluded that "[p]etitioner has failed in his burden of proof of Sixth Amendment prejudice on this issue where the evidence of attempted murder and specific intent to kill by [co-defendant] was overwhelming." App. 986.

Discussion

Trial counsel was deficient for failing to object to the trial court's instruction attempted murder instruction where the trial court informed the jury that the state could prove attempted murder by petitioner through the acts of his co-defendant under an accomplice liability or hand of one is the hand of all theory and failed to request an instruction that attempted murder required a specific intent to kill. App. 720, l. 19 – 726, l. 11; 735, l. 24 – 736, l. 18. First, although petitioner proceeded to trial on October 16-19, 2017, a mere week before our Supreme Court issued a decision in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), on October 25, 2017, the South Carolina Court of Appeals decided *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), and *overruled by State v.*

² See *State v. Perry*, 440 S.C. 396, 892 S.E.2d 273 (2023).

³ See *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), well before petitioner’s trial on April 22, 2015. Specifically, in *King*, the Court of Appeals wrote, “[w]e find the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.” 412 S.C. at 411, 772 S.E.2d at 193. The South Carolina Supreme Court affirmed, as modified, the finding by the Court of Appeals writing, “[c]onsidering the legislative history as a whole, we conclude that section 16-3-29 is not a codification of the offense of ABWIK. We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a ‘specific intent to kill’ as an element.” *King*, 422 S.C. at 63–64, 810 S.E.2d at 26–27 (n. #5 omitted). Specifically, our Supreme Court addressed “the implications of the phrase malice aforethought, either express or implied,” as used in S.C. Code Ann. § 16-3-29. *Id.* at 56, 810 S.E.2d. at 22. The Court explained that “The highest possible mental state for criminal attempt, specific intent, is necessary because criminal attempt focuses *on the dangerousness of the actor, not the act.*” *Id.* at 56, 810 S.E.2d at 22-23 (emphasis added).

Although the PCR court relies on *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993), and related cases for the proposition that our Supreme Court has never required an attorney to anticipate or discover changes in the law, App. 975-976, such reliance is inapplicable in petitioner’s case, *See* App. 6. The PCR judge overlooked the fact that case law existed at the time of petitioner’s trial to support the argument that attempted murder requires a specific intent to kill. Prior to the *King* decisions, and prior to petitioner’s trial, the South Carolina Supreme Court in *Sutton* wrote:

In general, “[a]ttempt is a specific intent crime.” 21 Am.Jur.2d Criminal Law § 176 (1998). “The act constituting the attempt

must be done with the intent to commit that particular crime.” *Id.* See also Wharton's Criminal Law Attempt §§ 694-695 (1996) (“To constitute an attempt, there must be an intent to commit a particular crime . . . Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.”)⁵ In the context of an “attempt” crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. *United States v. Calloway*, 116 F.3d 1129 (6th 1997). Attempted murder would require the specific intent to kill and conduct towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not. However, simply because convictions for both offenses would not violate double jeopardy, we are not constrained to recognize the offense of attempted murder.

Trial counsel was ineffective in failing to object to the trial court’s attempted murder instruction which failed to inform the jury that specific intent was an essential element of attempted murder, based on the *Sutton* case and general laws of statutory construction discussed in *King*. While trial counsel was not expected to “anticipate” changes in the law, the status of the law concerning the attempted murder charge at the time of petitioner’s 2017 trial did not require trial counsel to “discover” changes in the law, given that *Sutton* established that an attempt offense is generally a specific intent crime, the Court of Appeals decision in *King* was issued several years before petitioner’s trial, and our Supreme Court’s decision in *King* was published a week following petitioner’s trial reaffirming that attempted murder includes a specific intent to kill as an element. *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285; *King*, 422 S.C. at 63-64, 810 S.E.2d at 26-27.

Likewise, trial counsel was deficient for failing to object the trial court’s erroneous charges concerning attempted murder and the hand of one hand of all theory of accomplice liability. See *State v. Reid*, 383 S.C. 285, 292-93, 679 S.E.2d 194, 198 (Ct. App. 2009) (quoting

State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (“In the context of an attempt crime specific intent means that the defendant consciously intended the completion of acts comprising the choate offense.”); *United States v. Hansen*, 599 U.S. 762, 774-775 (2023) (explaining that in a criminal prohibition, attempt means to take a substantial step toward the completion of a crime with the requisite *mens rea*); see e.g., *State v. Geter*, 445 S.C. 139, 912 S.E.2d 255 (2025) (our Supreme Court holding that transferred intent does not apply to attempted murder and discussing the elements of attempted murder noting that “the attempt to kill must be directed toward a person the defendant specifically intended to kill.”); but see *State v. Campbell*, 443 S.C. 182, 190, 904 S.E.2d 441, 445 (2024) (explaining that malice aforethought as referenced in “section 16-3-29 can be proven by direct evidence, circumstantial evidence, or by a combination of the two.”). Nor did trial counsel articulate a strategy for failing to object to the jury instructions. See App. 931, l. 18 – 933, l. 4; 938, ll. 15-22. Trial counsel’s performance therefore fell below reasonable professional norms by failing to object to the trial court’s attempted murder charge which relied on accomplice liability and failed to inform the jury that the state was required to prove specific intent. *Strickland*, 466 U.S. at 687. The PCR court thus erred by concluding that deficient performance was not shown. App. 973-981.

Petitioner was also prejudiced by trial counsel’s deficient performance. In evaluating whether petitioner “has suffered prejudice as a result of a jury charge, the jury charge must be viewed in its entirety and not in isolation.” *Gibbs v. State*, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013) (internal quotations omitted). Viewing the charge on attempted murder as a whole, trial counsel’s deficient performance by failing to object to the trial court’s instruction that attempted murder could be proved through accomplice liability and its omission that specific intent was required to be proven by the state was prejudicial. App. 720, l. 19 – 726, l. 11; 735, l.

24 – 736, l. 18. Based on the facts of this case, there is a reasonable probability that, but for trial counsel's deficient performance, the outcome of the proceeding would have been different. *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625 (1989) (citing *Strickland*, 466 U.S. at 688). In its order of dismissal, the PCR court focuses on petitioner's co-defendant's specific intent to kill Franklin Vasquez. App. 985-986; *State v. Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) ("In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct."). Particularly, the erroneous instructions diluted the state's burden of proof by omitting the specific intent to kill element of attempted murder, which the state would have been required to prove beyond a reasonable doubt had the proper attempted murder instruction been charged. See *King*, 422 S.C. 47 at 64, 810 S.E.2d at 27 (noting that charging the jury that specific intent to kill is not an element of attempted murder is an error that cannot be deemed harmless). Notably, petitioner received a concurrent life without the possibility of parole sentence as to the attempted murder conviction. App. 754, ll. 5-12. Thus, petitioner was prejudiced by counsel's failure to object the defective charge on attempted murder, and the PCR court erred by denying the allegation. *Strickland*, 466 U.S. at 687-688.

CONCLUSION

Based on the foregoing arguments, petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.



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ATTORNEY FOR PETITIONER

This 25th day of September, 2026.