ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

RECEIVED
AUG - 4 2014
S.C. Supreme Court

KEVIN WALTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000018

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

1.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when appellate counsel failed to appeal the trial court's erroneous ruling that Petitioner was not entitled to a directed verdict of acquittal on both the murder and grand larceny charges since the prosecution failed to present substantial circumstantial evidence tending to prove Petitioner's guilt?

2.

Whether the PCR court erred in finding trial counsel was not ineffective for failing to preserve Petitioner's right to last closing argument when Petitioner and trial counsel had agreed before trial not to present any evidence in order to preserve this substantial right and where Petitioner was prejudiced because counsel's error prevented him from being able to fully address and respond to the argument made by the solicitor in his closing and because Petitioner waived his constitutional right to testify in his own defense based on his reliance on trial counsel's strategy to preserve the last closing argument?

STATEMENT

A Florence County Grand Jury indicted Petitioner at the September 2004 term of General Sessions for murder and grand larceny. App. 762-763. On February 14, 2005, the state served Petitioner and his counsel, Karen E. Parrott, with a notice of intent to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45. App. 746. On February 9, 2007, approximately two months before trial, Parrott was relieved as counsel and Patrick J. McLaughlin was appointed to represent Petitioner.[1] App. 1-20. Subsequently, the state also served McLaughlin with a notice of intent to seek a sentence of life without parole. App. 746.

Petitioner's case was called to trial on April 23, 2007 before the Honorable Thomas A. Russo, and a jury. App. 30. On that same day, Petitioner filed a Motion to Dismiss the Indictment with Prejudice Due to Violation of Defendant's Right to a Speedy Trial. App. 22-29. After arguments were heard, Judge Russo denied Petitioner's motion to dismiss. App. 55, l. 22 – 71, l. 21. Assistant Solicitors Jack Lawson and Stephen Hill represented the state. App. 30.

On April 26, 2007, the jury found Petitioner guilty. App. 602, l. 3-15. Judge Russo sentenced him to life imprisonment for murder pursuant to S.C. Code Ann. § 17-25-45 after the court found Petitioner's 1985 conviction from Michigan for assault with intent to rob while armed was equivalent to armed robbery in South Carolina. Judge Russo also sentenced Petitioner to five years imprisonment for grand larceny. App. 604, l. 25 – 606, l. 16.

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[1] Petitioner filed a motion to relieve Parrott as his counsel on August 24, 2006 because he maintained during the nearly four years she represented him she failed do to any investigation, failed to communicate with him, and refused to file a motion for a speedy trial. Supp. App. 1-8; App. 5, ll. 6-7; App. 8, ll. 4-6. Judge Russo ultimately relieved Parrott as counsel because Petitioner had filed a complaint presumably with the Office of Disciplinary Counsel. App. 6, ll. 9-20; App. 6, l. 23 – 7, l. 5; App. 11, ll. 22-25.

On May 2, 2007, Petitioner filed a Motion for a New Trial Based on Insufficiency of the Evidence. App. 615-616. A hearing was held on Petitioner's motion on December 12, 2007. App. 617. Judge Russo denied the motion finding "the jury's verdict was not inconsistent with the evidence." App. 620, l. 16 – 621, l. 1.

McLaughlin was subsequently appointed to represent Petitioner on appeal. He ultimately filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). In his brief, McLaughlin raised two issues: (1) the court erred by denying Petitioner's motion to dismiss the indictment due to a violation of his right to a speedy trial and (2) the trial judge erred by not recusing himself from trial. Supp. App. 14-28. The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Walton, Op. No. 2011-UP-255 (S.C. Ct. App. Filed June 1, 2011).

On November 14, 2011, Petitioner filed an application for post-conviction relief (PCR) raising the issues contained in this petition. App. 623-659. The state filed a return to this application dated September 27, 2012. App. 660-664. The matter proceeded to an evidentiary hearing on October 10, 2013 before the Honorable William H. Seals, Jr. App. 665. Assistant Attorney General Joshua Thomas represented the state, and J. Rene Josey represented Petitioner. App. 665. By order dated November 25, 2013, Judge Seals denied Petitioner relief. App. 745-761.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when appellate counsel failed to appeal the trial court's erroneous ruling that Petitioner was not entitled to a directed verdict of acquittal on both the murder and grand larceny charges since the prosecution failed to present substantial circumstantial evidence tending to prove Petitioner's guilt.

Evidence Presented at Trial

Petitioner and Shannon Carter were involved in a romantic relationship and were living together in March 2003. App. 205, ll. 15-17; App. 290, l. 16 – 291, l. 1. The two had met in early February 2003 at a local nightclub. Petitioner went home with Shannon that night and lived with her until her death on March 28, 2003. App. 201, l. 20 – 202, l. 11.

Around eight or nine o'clock on the night of March 27, 2003, Petitioner, Shannon, and Sherrie Bennett, who lived two apartments down from Shannon, went to "a little hole-in-the-wall bar," called Mona Lisa's. App. 206, l. 18 – 207, l. 12. While they were at the bar, Sherrie's daughter, Theresa, stayed at Shannon's apartment with Shannon's daughter, B.B.[2] App. 208, ll. 13-25; App. 534, ll. 1-3. Petitioner, Shannon, and Sherrie stayed at Mona Lisa's until around one o'clock in the morning when Sherrie, the designated driver, drove them home in Shannon's car. App. 207, l, l. 13 – 208, l. 12; App. 534, ll. 3-4. Sherrie testified that she parked Shannon's car right in front of Shannon's apartment, said goodnight, and went straight home. App. 209, ll. 1-21. A few minutes later, Sherrie's daughter, Theresa, left Shannon's apartment and also went home. App. 209, ll. 5-10; App. 335, ll. 14-18; App. 534, ll. 18-25.

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[2] B.B. was eleven years old in March 2003 and fifteen when she testified at the trial in April 2007. App. 208, ll. 16-20; App. 531, ll. 12-13. Her name is redacted pursuant to the April 15, 2014 order from this Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings." Theresa was fourteen years old in March 2003 and eighteen when she testified at trial. App. 278, l. 23 – 279, l. 4.

B.B. testified that when Petitioner and her mother, Shannon, came home around one o'clock, Petitioner made a sandwich in the kitchen and then took a shower. While Petitioner was eating and showering, B.B. was in Shannon's room, sitting on the bed, talking to her mother. App. 534, ll. 5-17; App. 535, l. 14 – 536, l. 10. B.B. could not remember what she and her mother talked about. App. 536, ll. 11-15. When Petitioner finished showering, he came into Shannon's bedroom. Upon his entrance, B.B. left to go to sleep in her own room, which was directly across the hall. App. 536, l. 16 – 537, l. 1.

B.B. testified that she was woken by her mother's alarm clock at six o'clock in the morning. She explained that as she got out of bed she looked out her bedroom window and noticed Shannon's car was gone. App. 537, ll. 1-3; App. 540, l. 5 – 541, l. 3. B.B. said she thought her mother had already gone to work and left the alarm clock on so B.B. would wake up for school. App. 541, ll. 12-16. B.B. then went to her mother's room to turn the alarm clock off and saw Shannon lying in bed. B.B. testified that after she turned the alarm off, she started shaking her mother, but her mother did not move. She then pulled the covers down and discovered Shannon was dead. App. 537, ll. 4-6; App. 542, ll. 13-19.

B.B. testified that she immediately called Sherrie and Theresa's house, but the telephone line was busy. She then ran to their apartment, banged on the door, and, when Sherrie and Theresa finally answered, she told them, "Kevin killed momma" and took her car. App. 210, ll. 6-24; App. 282, l. 20 – 283, l. 2; App. 543, l. 5 – 544, l. 15. Sherrie, Theresa, and B.B. then ran back to Shannon's apartment. App. 284, ll. 7-8; App. 544, ll. 19-20. Both Sherrie and Theresa testified that as they were running to Shannon's apartment they noticed her car was gone. App. 212, l. 24 – 213, l. 4; App. 285, l. 6 – 286, l. 15.

While B.B. and Theresa waited outside, Sherrie went into Shannon's bedroom. App. 284, ll. 7-19; App. 544, l. 21 – 545, l. 5. Sherrie testified Shannon "was covered up and lying on her right side."

After she could not find a pulse, Sherrie "pulled the covers back" and saw Shannon "was in a fetal position." She testified that she rolled Shannon over and attempted to do CPR, but was unsuccessful. Sherrie then called 911. App. 211, l. 10 – 212, l. 13.

Officer Joseph Poston, the first officer who arrived at the apartment that morning, testified that he "immediately treated this as crime scene" because B.B. "made the statement that Kevin killed her mother." App. 107, ll. 6-14. Poston testified that there were no cars parked outside Shannon's apartment. However, he claimed he had seen Shannon's car earlier that morning between 5:00 and 5:30 while he was patrolling the area. He said, "I was traveling north on [Highway] 51 on Walnut Street and the car came pulling up to the stop sign at First Avenue and [Highway] 51. Poston said he noticed the vehicle "because it's a small town and typically we don't have traffic between that time in the morning." App. 101, l. 25 – 102, l. 19. He claimed he was familiar with Shannon's car because he had pulled her over months earlier in front of her apartment for a minor traffic violation.[3] App. 103, ll. 4-19.

The law enforcement officers who investigated the death testified that all Shannon was wearing was a T-shirt that was pulled up above her chest so that her breasts were exposed. App. 111, ll. 12-15; App. 144, ll. 8-13; App. 446, ll. 3-5. Numerous sex toys and a burning candle were found on the nightstand next to Shannon's bed. Another sex toy and "climax personal lubricate" [sic] were found on Shannon's bed. App. 112, ll. 2-8; App. 152, ll. 20 – 153, l. 2; App. 172, l. 15-17; App. 184, l. 1 – 185, l. 1. Additionally, a toy handcuff was found on Shannon's left wrist. App. 110, l. 23 – 111, l. 8; App. 125, ll. 6-8; App. 144, ll. 14-18; App. 183, ll. 23-25; App. 442, ll. 1-22.

Kenneth Bogan, a DNA analyst from SLED, testified that he received ten cuttings from the

[3] Poston did not indicate he saw Shannon's car that morning in his original incident report. It was not until several months later in August 2003 that Poston recorded this information in a supplemental report. App. 112, l. 21 – 115, l. 1.

bedspread found on Shannon's bed. He identified Petitioner's semen on seven of the ten cuttings. On two of the cuttings, Bogan testified he received "partial results" because there was an insufficient amount of DNA material present. However, he could not exclude Petitioner as a possible contributor to the semen found on these two cuttings. According to Bogan, the third cutting was too small to perform any testing on. App. 246, l. 23 – 247, l. 21. Bogan also explained that it is impossible to determine how long the semen had been on the bedding since bodily fluids would remain on the bedspread until it was washed. App. 253, ll. 6-23.

Janice Edwards Ross, the pathologist who performed the autopsy, testified that the cause of death was "asphyxia meaning not enough oxygen getting to the brain due to compression of the neck" or, put more simply, strangulation. App. 297, ll. 7-13; App. 298, ll. 9-14; App. 302, ll. 2-4. She said she observed petechia on Shannon's face and around the whites of her eyes. She explained, "When you compress the front of the neck, you're closing off blood vessels so that blood cannot get up to the brain and blood cannot come back down to the brain. And when blood cannot be released back down . . . towards the heart, then it congests and go[es] backward and that's when you get the little hemorrhages that's called petechia. It look[s] like little red dots all over." App. 298, l. 15 – 299, l. 11. Ross also testified that there was bruising around the muscles in the neck and that one of the cartilages of the larynx in the voice box was fractured. App. 300, ll. 14-18. According to Ross, the manner used to compress the neck "must have been something soft" because there were no marks on the outside of the skin around the neck. App. 301, ll. 4-12. Additionally, Ross maintained that the manner of death was homicide and that, in order to cause death, one would have to continuously maintain "pressure on the neck for a good four to five minutes." App. 299, ll. 21-24; App. 302, ll. 5-7.

On cross-examination, defense counsel questioned Ross about "autoerotic asphyxia." Ross explained, "[A]utoerotism is a procedure some people use. They set up a way to put pressure on their neck to decrease blood flow to the brain while they are masturbating and it heightens the sexual

feelings." She testified that sometimes individuals who practice autoerotism "don't escape [the apparatus] and they end up essentially hanging themselves [or] strangulating themselves." App. 309, ll. 7-25. While autoerotism is more often done as a solo activity, Ross testified that it can also be done with a partner. App. 310, ll. 1-6.

In addition to Shannon's car, Sherrie testified "two lock boxes" that were in the computer room in Shannon's apartment were missing. She said one of the boxes belonged to her and the other was Shannon's. Sherrie claimed she had $1,980 in her lock box, which was from her "tax refund." She testified she had to keep the money at Shannon's apartment because her son would often steal from her. According to Sherrie, the only people who knew about the lock boxes were Shannon, Petitioner, and "the kids." App. 212, l. 24 – 214, l. 21. She also claimed a picture of Petitioner and Shannon taken at the beach and a drawing of a rose Petitioner had made for Shannon were missing from where they had been hanging on Shannon's bedroom wall. Tr. 214, l. 22 – 215, l. 15.

Not a single witness testified that Shannon and Petitioner were not getting along or that they were concerned for Shannon's safety. Sherrie testified Shannon "enjoyed [Petitioner's] company" and that she was never fearful of him. App. 219, l. 21 – 220, l. 2. She said she did not notice anything different between Petitioner and Shannon on March 27, 2003 and that it was "just the same as any other night going out." App. 225, ll. 19-21. Shannon's older daughter, Jennifer Ketchum, testified that Petitioner "seem[ed] sweet most of the time" and that he would clean Shannon's house and "draw her little pictures." She also explained that Petitioner worked odd jobs and would give Shannon money whenever he had any. Ketchum claimed "the only thing that really bothered" Shannon was that Petitioner was "controlling" and always wanted to be with Shannon. Ketchum said Petitioner "went to work with [Shannon]. He went to school with her. He was with her every moment." According to Ketchum, this was "getting on [Shannon's] nerves." App. 510, ll. 13-23; App. 512, ll. 3-13.

Evidence from Florida and Virginia

Officer Kurt Brower of the Boca Raton Police Department in Florida testified that on April 16, 2003, he responded to a burglary. App. 314, l. 1 – 316, l. 3. Stolen from the residence during the burglary was the homeowner's silver 2003 Lexus SC430, the keys to the Lexus, a wallet, and a money clip. App. 317, ll. 18-24; App. 366, ll. 15-21. While processing the scene, law enforcement found a set of keys in the front lawn that did not belong to the homeowners. App. 324, l. 14 – 325, l. 6. They also found a boot print underneath a window, which was determined to be the point of entry. App. 315, l. 25 – 317, l. 14; App. 331, l. 22 – 332, l. 21.

On April 23, 2003, the Lexus stolen from Boca Raton, Florida on April 16, 2003 was found parked in front of a bar in Chesterfield County, Virginia. App. 390, l. 3 – 391, l. 3; App. 404, ll. 3-4. After discovering the Lexus was stolen, law enforcement in Virginia processed the exterior of the car. App. 391, ll. 4-9; App. 400, ll. 14-16; App. 408, l. 11 – 409, l. 11. Eleven latent fingerprints were lifted. App. 421, l. 19 – 422, l. 7. It was later determined that seven of the eleven fingerprints lifted from the exterior of the Lexus matched Petitioner's fingerprints. App. 402, ll. 2-20; App. 421, l. 19 – 422, l. 7; App. 429, l. 14 – 431, l. 9; App. 370, ll. 13-19.

A couple of months later, on June 21, 2003, Shannon's car was recovered in Boca Raton, Florida near where the burglary occurred on April 16, 2003. App. 317, l. 25 – 318, l. 20; App. 319, ll. 6-12. The car was abandoned in a parking lot behind several businesses. App. 322, ll. 3-10. Its license plate was missing. App. 319, ll. 2-5; App. 340, ll. 4-11. The officers who processed Shannon's car found thirteen cigarette butts in an ash tray, a single cigarette butt on the floorboard, and male clothes and a pair of boots in the trunk. App. 343, l. 11 – 345, l. 2; App. 347, ll. 3-25; App. 351, l. 19 – 352, l. 9. All fourteen cigarettes were submitted to the Palm Beach County Sheriff's Office for DNA testing. However, only one cigarette was tested. App. 363, l. 23 – 364, l. 2. Petitioner's DNA was found on this cigarette. App. 362, l. 7 – 363, l. 13. Law enforcement also compared the boots found in the trunk

of Shannon's car with the boot print found at the scene of the burglary. These boots did not match the boot print. App. 323, l. 15 – 324, l. 10; App. 328, ll. 7-19; App. 457, l. 15 – 458, l. 3. Additionally, the officers in Boca Raton discovered that the keys found in the front lawn of the residence that was burglarized in April 2003 belonged to Shannon's car. App. 342, l. 23 – 343, l. 10; App. 366, l. 9 – 367, l. 19.

Petitioner turned himself into authorities in Chesterfield County, Virginia on April 22, 2003. App. 402, ll. 8-12; App. 403, l. 9 – 404, l. 2. It is unclear from the record whether Petitioner knew he was wanted in South Carolina or whether he was turning himself in for a parole violation. See App. 711, ll. 2-5. The boots Petitioner was wearing when he was arrested were compared to the boot print found at the scene of the burglary in Boca Raton. The results indicated "that due to a lack of identifying characteristics, it could not be determined that the right boot of Kevin Walton's made the question impression" found at the burglarized residence in Boca Raton. App. 464, ll. 14-15. However, the boot print impression "correspond[ed] in physical shape and size, design and specific wear characteristics" with Petitioner's right boot. App. 462, l. 15 – 463, l. 11. Florida never charged Petitioner for the burglary or the theft of the Lexus because the prosecutor determined that the evidence collected by law enforcement did not "rise to the amount of evidence needed to prosecute the defendant." App. 372, ll. 20-25.

Shannon's older daughter, Jennifer Ketchum, testified that she eventually gained possession of Shannon's car, which was a 1996 Chevrolet Cavalier, sometime in 2003. She paid a company out of Fort Lauderdale to transport the car to Florence, South Carolina. App. 495, ll. 4-23. Ketchum said she originally planned on selling the car, but "couldn't part with it until all this was over." App. 496, ll. 16-19. She claimed that when she considered selling the car in July 2003, she looked up the value on Kelley Blue Book and discovered the vehicle in good condition was valued at approximately $1,930 and in fair condition was worth approximately $1,525. App. 497, l. 5 – 499, l. 18.

Motion for a Directed Verdict

At the conclusion of the state's case, Petitioner moved for a directed verdict of acquittal for the murder charge arguing the evidence presented by the state failed to prove malice aforethought. He noted there was no testimony presented by the state that there were any problems between Shannon and Petitioner before her death. McLaughlin also moved for a directed verdict of acquittal for the grand larceny charge. App. 550, l. 9 – 551, l. 21.

Judge Russo denied the motion for a directed verdict. He said, "[A]t this point in the trial of the case, obviously the jury is the trier of facts and the Court is not to weigh evidence. It's simply to determine the existence of evidence. And if there is evidence in existence whereby a jury could find, everything that you have argued may very well be what you argue to convince the jury that the evidence does fall short, but there is at least evidence in the case whereby a jury could find [Petitioner guilty] . . . I think it is appropriate at this point to respectfully deny your motion for a directed verdict as to both . . . counts." App. 551, l. 22 – 552, l. 8.

Motion for New Trial Based on Insufficiency of the Evidence

On May 2, 2007, Petitioner filed a motion for a new trial based on insufficiency of the evidence. In his motion, Petitioner argued the evidence presented by the state at trial created a reasonable doubt in favor of the defendant. He further argued that based on the evidence presented, the verdict given by the jury could only have been the result of passion and prejudice. App. 615-616.

A hearing was held on Petitioner's motion on December 12, 2007 before Judge Russo. Trial counsel told the court that "the grounds for our motion are pretty much what our grounds were for [our motion for a] directed verdict of not guilty [made] after the State presented their evidence strictly that it was all circumstantial evidence." He maintained that none of the forensic evidence presented by the state tied Petitioner to "the actual act of committing murder." He also argued that "given the emotional . . . nature of the charges," the jury convicted Petitioner based on passion alone. App. 619, ll. 5-19.

The solicitor admitted that it was "a case of circumstantial evidence," but claimed the evidence was proof of Petitioner's guilt beyond a reasonable doubt. He also claimed there was direct evidence of Petitioner's flight. App. 619, l. 22 – 620, l. 4.

Judge Russo ultimately denied Petitioner's motion finding the jury's verdict was not inconsistent with the evidence. App. 620, l. 8 – 621, l. 1.

PCR Hearing

Petitioner testified at the PCR hearing that the Office of Appellate Defense (OAD) was originally appointed to represent Petitioner on appeal. However, after he filed a complaint with the Office of Disciplinary Counsel, OAD was relieved as counsel and trial counsel, Patrick McLaughlin was appointed to represent him on appeal. App. 680, l. 24 – 682, l. 682, l. 1. Petitioner explained that McLaughlin filed an Anders brief on his behalf and failed to argue the trial court erroneously denied his motion for a directed verdict and his motion for a new trial. App. 682, ll. 5-21.

McLaughlin testified that when he found out he was going to be representing Petitioner on appeal he went to speak to Petitioner. He maintained Petitioner told him which issues he thought were the best issues on appeal. However, McLaughlin said he explained to Petitioner that he had reviewed the case and "would probably [wind] up doing [an] Anders brief." He testified he did not think the issue regarding whether the trial court erroneously denied Petitioner's motion to dismiss the indictment due to a violation of his right to a speedy trial had merit because he "couldn't really point to something where [Petitioner] had been specifically prejudiced." App. 701, l. 18 – 702, l. 9.

McLaughlin admitted that he preserved the directed verdict issue and the insufficiency of the evidence issues for appeal. App. 720, ll. 10-13. However, he did not raise them in a merits brief.

Order of Dismissal

In the order of dismissal, the PCR court stated it found "credible trial counsel's testimony he did not believe any non-frivolous issue existed on appeal." The court found Petitioner's "assertion trial

counsel should have briefed the issue of the denial of his directed verdict and new trial motions" "not credible, or legally accurate." Consequently, the court found trial counsel was not deficient for unreasonably failing to discover non-frivolous issues. App. 755.

Moreover, the court found Petitioner failed to show he would have prevailed on appeal had these issues been raised. The court noted the "Court of Appeals conducted a thorough review of the record before dismissing the appeal and would have ordered full briefing if trial counsel failed to brief a meritorious issue." App. 755-756. The court indicated Petitioner "would likely have been unsuccessful in arguing [that] Judge Russo erred in denying the directed verdict and new trial motions." App. 756.

Discussion

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when appellate counsel failed to raise in a merits brief the trial court's erroneous ruling that Petitioner was not entitled to a directed verdict of acquittal on both the murder and grand larceny charges since the prosecution failed to present substantial circumstantial evidence tending to prove Petitioner's guilt.

A criminal defendant is entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). "[T]he proper standard for evaluating [a defendant-appellant's] claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citing Smith v. Murray, 477 U.S. 527, 535-536 (1986)). Petitioner "must first show that his counsel was objectively unreasonable . . . in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." Id. (citing Strickland, 466 U.S. at 687-691). "If [Petitioner] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable

probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." Id. (citing Strickland, 466 U.S. at 694).

"With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the *Strickland* test [than a claim based on counsel's failure to raise a particular claim in a merits brief], for it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief, rather than showing that a particular nonfrivolous issue was clearly stronger than issues that counsel did present. In both cases, however, the prejudice analysis will be the same." Id. at 288.

In this case, it is clear appellate counsel was "objectively unreasonable" because he failed to discover and raise in a merits brief the non-frivolous issue that the trial court erred in finding Petitioner was not entitled to a directed verdict of acquittal since the prosecution failed to present substantial circumstantial evidence tending to prove Petitioner's guilt. See Robbins, 528 U.S. at 285; see also Strickland, 466 U.S. at 687-691. A "reasonably competent attorney" would have easily recognized the directed verdict issue as non-frivolous. See Robbins, 528 U.S. at 288.

Additionally, there is "a reasonable probability that, but for [appellate] counsel's unreasonable failure to file a merits brief" raising the directed verdict issue, Petitioner "would have prevailed on his appeal." See Robbins, 528 U.S. at 285; see also Strickland, 466 U.S. at 694. Petitioner would have prevailed on appeal because it is clear the trial court erroneously denied Petitioner's motion for a directed verdict at the conclusion of the state's case.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Pearson, Op. No. 5251 (S.C. Ct. App. filed July 30, 2014) (Shearouse Adv. Sh. No. 30 at 33-41); State v. Brown, 103 S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove

the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963)). The prosecution must prove the identity of the defendant as the person who committed the charged crime beyond a reasonable doubt. State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (citing Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013)).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, our supreme court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, this Court in Lollis directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), this Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. In Odems, this Court used the traditional circumstantial evidence jury charge in making its directed verdict determination. "The traditional charge provided that if the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless:"

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and . . . all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), this Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt finding instead that the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the murder victim in a burn pile behind a house belonging to Bostick's mother, this Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. In addition to this evidence, the state also presented evidence that gasoline was used to start the fire at the victim's home and Bostick had a chemical pattern on his shoes that matched gasoline and,

DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

In this case, the state failed to present any direct evidence or substantial circumstantial evidence tending to prove Petitioner's guilt. While the state presented evidence Petitioner was with Shannon approximately four to five hours before her death and that he was not at the apartment when her body was found, this evidence merely raised a suspicion Petitioner was involved in Shannon's death. See Lollis, 343 S.C. at 584, 541 S.E.2d at 256; see also Arnold, 361 S.C. at 389-390, 605 S.E.2d at 531. As noted above, this Court has defined a suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." See Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing Hyder, 242 S.C. 372, 131 S.E.2d 96). While it is possible one could form a belief or opinion Petitioner was responsible for Shannon's death because he was the last one seen with her, this does not amount to sufficient proof of his guilt.

Additionally, the state failed to show Petitioner had any motive to harm Shannon. There was no evidence Shannon and Petitioner had an unstable relationship or that they were not getting along prior to her death. Instead, the testimony established Shannon and Petitioner enjoyed each other's company. Notably, Sherrie testified she did not notice anything different between Petitioner and Shannon on March 27, 2003 and that it was "just the same as any other night going out." See App. 225, ll. 19-21.

Moreover, the state failed to present any direct or substantial circumstantial evidence of flight. The cigarette with Petitioner's DNA on it found in Shannon's car merely established Petitioner had been in the car before. However, we know Petitioner had ridden in Shannon's car numerous times over the course of the previous two months and had been in the car the night before Shannon's death. Additionally, the fact that Petitioner's fingerprints were found on the *outside* of the Lexus found in Virginia established only that Petitioner had touched the outside of the vehicle at some point and we

know Petitioner was in the area where the Lexus was found since the evidence indicated Petitioner turned himself in to authorities in Chesterfield County, Virginia. Nevertheless, assuming this Court finds the state presented evidence Petitioner fled South Carolina, flight alone is not substantial circumstantial evidence of a defendant's guilt. See Odems, 395 S.C. at 590, 720 S.E.2d at 52 ("We decline to hold that flight alone is substantial circumstantial evidence of a defendant's guilt.").

Furthermore, there was no direct evidence or substantial circumstantial evidence tending to prove Petitioner was guilty of grand larceny. As mentioned above, the cigarette with Petitioner's DNA on it found in Shannon's car merely established Petitioner had been in the car before, not that he had stolen the vehicle. Additionally, there was absolutely no evidence presented Petitioner took the lock boxes from the computer room. The lock boxes were not found in Shannon's vehicle or in the Lexus. In fact, there was no testimony that they were ever found. Furthermore, there was no testimony cash was found on Petitioner's person when he was arrested in Virginia.

Therefore, the PCR court erred in finding appellate counsel provided effective assistance of counsel because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989) (internal citations omitted); See Strickland, 466 U.S. 668.

2.

The PCR court erred in finding trial counsel was not ineffective for failing to preserve Petitioner's right to last closing argument when Petitioner and trial counsel had agreed before trial not to present any evidence in order to preserve this substantial right and where Petitioner was prejudiced because counsel's error prevented him from being able to fully address and respond to the argument made by the solicitor in his closing and because Petitioner waived his constitutional right to testify in his own defense based on his reliance on trial counsel's strategy to preserve the last closing argument.

PCR Hearing

Petitioner testified at the PCR hearing that "the whole time from day one" he told his counsel, "I was innocent, I didn't do it." App. 670, ll. 15-17. He explained, "[T]wo weeks before trial he [trial counsel] came to me, he said look, I have a deal, they don't have any evidence, they just came to me, and I have a letter here saying that you're - - that they don't have enough evidence to charge you in Florida and they're not sure about the boot print. They had someone else come up with a, I guess SLED come up with a thing saying that wasn't the boot. And he said if we don't call any witnesses, I don't take the stand, and he doesn't put forth any evidence, that we will get last closing argument to the jury. Now I thought that that was crucial to have that last closing argument especially when there wasn't any evidence." App. 676, l. 13 – 677, l. 4. Petitioner testified that he accepted trial counsel's recommendation and chose not to testify for that reason. App. 677, ll. 5-8. However, trial counsel lost the right to last closing argument because he entered evidence during the course of the trial. App. 677, ll. 9-13.

Petitioner testified, "[H]e [trial counsel] was supposed to just abide by the rules [not to present evidence] and we were supposed to get last closing argument and obviously he dropped the ball." App. 677, ll. 14-18. He said, "I had heard [a] conversation he had with the judge and he said he had last closing argument. And the State says, no, you do not, you filed evidence. And he at that point he

realized what he had done wrong, and he had - - he was honest with me. He said he had dropped the ball. And I at my point I'm thinking we got this trial to finish and hopefully win it; and what do I do, do I get mad at him or do I accept it as him being, you know, young and inexperienced." App. 677, l. 19 – 678, l. 5.

Petitioner explained that he had already informed the trial court that he would not testify when he first learned trial counsel had waived his right to present last closing argument by presenting evidence. He testified, "This was after I had done that. I didn't find - - he didn't find out that he had dropped the ball until after I had given up my rights [to testify]." App. 693, ll. 5-11. Petitioner said their defense strategy at trial was always "[t]hat he [trial counsel] wouldn't submit any evidence and he wouldn't call any witnesses and I wouldn't testify." App. 694, ll. 2-4. He again clarified that he didn't present a defense because he and trial counsel had an understanding that they were going to preserve his right to last closing argument and that trial counsel's failure to preserve last closing argument was not revealed to him until after he had made the decision not to testify. App. 694, l. 23 – 695, l. 5.

Trial counsel, Patrick McLaughlin, testified that "we didn't put up a case at all," but acknowledged he submitted four exhibits during his cross-examination of various state witnesses. App. 705, l. 10 – 707, l. 13; App. 716, l. 18 – 717, l. 22. When questioned about whether he realized he would lose the right to last closing argument by admitting these exhibits, McLaughlin admitted that "it slipped my mind to think about that." App. 707, ll. 14-20. However, he admitted that "Kevin was right" that they had agreed not to present any evidence before trial in order to preserve the right to last closing argument. App. 707, ll. 19-20.

McLaughlin testified that if he would have known he was going to give up last closing argument, he would have still advised Petitioner not to testify because of his prior record. App. 721, ll. 5-18; App. 707, l. 21 – 708, l. 19. However, he said, "Now whether or not he [Petitioner] would have taken that [advise not to testify], I don't know." App. 708, ll. 20-21. Moreover, McLaughlin admitted

that when Petitioner made the decision not to testify at trial, he was "misinformed about whether [he] would have the last argument." App. 708, ll. 22-25.

Furthermore, McLaughlin explained, "Kevin [Petitioner] was adamant that he had not been there at the time this was committed and that was the position that he took from the day I met him till today." App. 710, ll. 2-5. McLaughlin said he thought "a theory that, you know, things had gotten out of hand in the bedroom. He was out on parole, knew he shouldn't have been in South Carolina, this happened, he panicked and fled, that, maybe that defense may work a little better. But to his credit though, Kevin was also very adamant with me that he had not been there [when Shannon died]." App. 711, ll. 2-11.

Order of Dismissal

The PCR court found Petitioner "failed to demonstrate trial counsel was ineffective by inadvertently waiving the right to give the final closing argument." App. 754. The court noted that "[t]rial counsel introduced four (4) pieces of evidence during the State's case: a photograph of the victim's neighborhood, two (2) forensic reports, and a memo from the Florida prosecutor." The court indicated trial counsel used each of these exhibits to bolster his arguments that Petitioner was not responsible for Shannon's death and that the police did not perform a sufficient investigation. App. 754. The court ultimately found trial counsel articulated a valid strategic reason for introducing these items and was not deficient "in spite of his prior arrangement with [Petitioner] to preserve [last] closing argument." App. 754.

Moreover, the PCR court found Petitioner failed to prove he was prejudiced by the introduction of these exhibits. App. 754. The court noted that the "State's closing argument [was] largely a summary of the evidence in the case and not devoted in any significant way to attempting to counter any points raised by trial counsel." App. 755. Additionally, the court found "trial counsel could not have more adequately addressed the issues in this case had he been allowed to argue last." App. 755.

Discussion

Trial counsel was ineffective for failing to preserve Petitioner's substantial right to last closing argument. Petitioner was prejudiced by counsel's error because counsel's failure prevented him from being able to fully address and respond to the arguments made by the solicitor in his closing argument. Petitioner was also prejudiced because he decided to waive his constitutional right to testify in his defense and assert his innocence based on his reliance that trial counsel had preserved this substantial and important right.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686; see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

"In a criminal prosecution, where a defendant introduced no testimony, he is entitled to the final closing argument to the jury." State v. Mouzon, 326 S.C. 199, 203, 485 S.E.2d 918, 921 (1997) (citing State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)). The right to the last closing argument to the jury is a substantial right, the denial of which is reversible error. State v. Rodgers, 269 S.C. 22, 24-25, 235 S.E.2d 808, 809 (1977); see Mouzon, 326 S.C. at 204, 485 S.E.2d at 921.

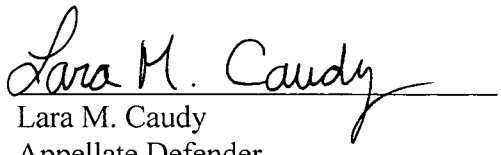
In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Despite Petitioner and trial counsel's agreed upon strategy not to present any evidence at trial in order to preserve Petitioner's substantial right to last closing argument, counsel absentmindedly submitted four exhibits during the state's case in chief thereby inadvertently waiving this important right. Petitioner testified at the PCR hearing that he thought it "was crucial to have [the] last closing argument especially when there wasn't any evidence [tending to prove his guilt]." Therefore, he accepted trial counsel's recommendation not present any witness testimony, including his own testimony, or "put forth any evidence." App. 676, l. 13 – 678, l. 5. Trial counsel admitted at the PCR hearing that this was their agreed upon strategy before the start of trial and that "it slipped his mind" when he submitted the four exhibits. App. 707, ll. 10-20.

Petitioner was prejudiced by trial counsel's failure to preserve last closing argument because he relied on counsel's strategy not to present any evidence when he decided to waive his constitutional right to testify in his own defense. Petitioner testified that the only reason he did not testify was because he wanted to preserve the right to last closing argument. App. 676, l. 13 – 678, l. 5. Additionally, trial counsel admitted that at the time Petitioner announced his decision not to testify to the court, he was misinformed about whether they would have the last closing argument. App. 708, ll. 22-25. The record at trial supports this testimony. After Petitioner informed the court on the record that he would not testify, the jury returned to the courtroom where both the state and the defense rested, then there was a break in the proceedings before closing arguments where trial counsel likely learned off the record that he had inadvertently waived the right to last closing argument. See App. 552, l. 16 – 558, l. 5. Moreover, Petitioner was prejudiced by trial counsel's failure to preserve last closing argument because it prevented counsel from being able to fully address and respond to the state's argument in his own closing.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issues presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
William H. Seals, Jr., Circuit Court Judge

KEVIN WALTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari, a copy of the appendix, and a copy of the supplemental appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of August, 2014.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of August, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .