ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

L. Casey Manning, Circuit Court Judge

FRED R. RUTLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000381

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did trial counsel render ineffective assistance by failing to cross examine a key prosecution witness regarding prior inconsistent statements she made concerning whether the deceased was armed with a gun at the time of the shooting?

II. Did trial counsel provide ineffective assistance by failing to present a critical witness to establish the deceased's tendency toward violence and actual threats made by the deceased to his wife?

III. Did trial counsel provide ineffective assistance by failing to request the trial judge instruct the jury as to defense of others to preserve this issue for appeal where the evidence supported the instruction and the prosecution consented to its issuance?

STATEMENT OF THE CASE

On November 30, 1992, a Lexington County grand jury indicted Petitioner for murder (1992-GS-32-3398). App. 847-848. On February 25, 1993, Petitioner was indicted for possession of a firearm during the commission of a violent crime (1993-GS-32-586). App. 850-851. Then, on May 20, 1993, Petitioner was indicted for pointing a firearm (1993-GS-32-1514). App. 853-854. On May 26-29, 1993, Petitioner was tried before the Honorable Frank Eppes and a jury. Dayton Riddle and Knox McMahon prosecuted Petitioner. H. Jackson Gregory[1] represented Petitioner. App. 1.[2] Petitioner was found guilty as charged. App. 574, lines 13-24. Judge Eppes sentenced Petitioner to life imprisonment for the murder conviction, five years' imprisonment for possession of a firearm during the commission of a violent crime, and ten years' imprisonment for pointing a firearm. App. 575, lines 4-10. On June 7, 1993, Petitioner's trial counsel filed a motion for new trial. App. 595-599. It appears that motion was denied by Judge Eppes on June 10, 1993. On June 21, 1993, Petitioner's trial counsel filed a motion for new trial based on after-discovered evidence. App. 600-602. According to the order denying post-conviction relief, this motion was subsequently denied. App. 832.

Petitioner filed a timely notice of appeal. Robert Dudek represented Petitioner on appeal. This Court affirmed his convictions and sentences in an unpublished per curiam opinion. State v. Rutland, Op. No. 95-MO-263 (S.C. Sup. Ct. filed Aug. 25, 1995). App. 603. Subsequently, Petitioner filed a petition for rehearing. App. 604-608. This Court denied rehearing on October 9, 1995. App. 609.

Thereafter, Petitioner filed a pro se motion for new trial based on after discovered evidence. App. 610-619. Through trial counsel, Petitioner filed a memorandum of law in

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[1] H. Jackson Gregory was disbarred by this Court on May 30, 2000. In re H. Jackson Gregory, 340 S.C. 413, 532 S.E.2d 605 (2000); App. 747, line 22 – App. 748, line 6.

[2] Petitioner's counsel has been unable to locate a copy of the trial transcript despite diligent efforts. However, Petitioner's counsel located a copy of the record on appeal, which has been included in the appendix.

support of his motion. App. 620-645. The state, represented by the solicitor's office, responded to the motion with the filing of an affidavit. App. 646-647.[3] Petitioner then supplemented his motion with affidavits. App. 648-663. On July 27, 2001, the state, represented by the Attorney General's Office, formally responded to the motion. App. 663-685. According to the order denying Petitioner post-conviction relief, Petitioner voluntarily withdrew his pending new trial motion with the intent of filing a post-conviction relief application. The state agreed not to seek to dismiss the application as barred by the statute of limitations. App. 832.

On May 29, 2003, Petitioner filed an application for post-conviction relief (2003-CP-32-1983). App. 686-694. The matter proceeded to an evidentiary hearing on April 19, 2006 before the Honorable L. Casey Manning. Jennifer N. Williams represented Petitioner, and Sabrina C. Todd represented the state. App. 701. On August 30, 2007, Judge Manning denied Petitioner relief. App. 831-844. On September 21, 2007, Petitioner filed a motion to alter or amend. App. 845. Six years later on August 13, 2013, Judge Manning denied Petitioner's motion. App. 846.

Petitioner filed a notice of appeal. This petition for writ of certiorari follows.

[3] After trial counsel was disbarred, the Honorable William P. Keesley appointed David Farrell to represent Petitioner concerning his motion for new trial. App. 705, lines 6-10.

STATEMENT OF FACTS

Sally and Jimmy Peele (hereinafter, the deceased) were married, but estranged. App. 212, lines 12-16; App. 290, lines 17-18. Sally and Petitioner worked together. App. 202, line 5; Tr. 203, lines 12-13; App. 347, lines 1-5; App. 376, lines 9-10. Petitioner learned from Sally that the deceased was physically abusing her, including one incident in which he had beaten her with a pipe. App. 201, line 22 – App. 202, line 1; App. 202, line 3; App. 299, lines 9-12. Quite naturally, Sally was afraid of the deceased. App. 202, line 2. On September 3, 1992, Sally called Petitioner because the deceased "was getting violent." App. 202, lines 5-6; App. 306, lines 16-17; App. 380, lines 1-5. On the morning of September 4, 1992, Sally, Petitioner, and Robin Hunt[4] went to a pawn shop and purchased two firearms – a .25 caliber semi-automatic pistol and a Mossberg twelve gauge shotgun[5] – and ammunition. App. 197, lines 7-19; App. 197, line 21 – App. 198, line 3; App. 202, lines 13-17; App. 266, line 24 – App. 267, line 10; App. 313, lines 23-25; App. 315, lines 14-16; App. 382, line 24 – App. 384, line 14. After learning Sally's daughter was not in school, they called the sheriff's department. App. 202, lines 19-21.

Then, the trio went to the deceased's home to get Sally's car. App. 198, lines 19-22; App. 199, lines 9-16; App. 384, line 21 – App. 385, line 3. Unexpectedly, the deceased was at home and smoking marijuana[6] with a neighbor. Sally, armed with a pistol, entered alone. Shortly, Sally and the deceased exited through the back door yelling at each other. Petitioner exited the van with a shotgun. Petitioner said he was there to help Sally. When

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[4] Robin Hunt had worked as trial counsel's legal secretary. Hunt introduced Petitioner to trial counsel for legal representation in the murder case. Trial counsel agreed to represent Petitioner for $1,000. App. 711, lines 6-22; App. 785, lines 23-25. However, trial counsel received only $1 for his representation. App. 749, lines 12-25; App. 836.

[5] The shotgun was owned by the deceased and Sally. The deceased had pawned the shotgun several months prior to his death. App. 270, lines 22-25; App. 313, lines 3-22.

[6] The toxicology report showed the deceased had ingested marijuana and valiums. App. 275, line 23 – App. 276, line 4.

the deceased approached Petitioner, he shot the gun once into the air. App. 211, lines 10-11; App. 248, line 1 – App. 253, line 23; App. 316, line 5 – App. 321, line 21; App. 386, line 3 – App. 392, line 6. Despite the gunfire, the deceased repeatedly asked Sally to return to the home to talk. App. 210, line 21 – App. 211, line 9; App. 322, line 20 – App. 323, line 6; App. 392, line 24 – App. 399, line 6. Sally attempted to talk to the deceased but he began to act violently again; therefore, Sally and Petitioner got into the van with Hunt and left. App. 211, lines 15-16; App. 254, lines 6-9; App. 323, lines 7-14; App. 394, lines 2-3.

Later that day, Sally and Petitioner went to the Bow Wow Boutique, a pet grooming shop, to buy a car so they "could get away." App. 199, lines 19-20; App. 202, lines 21-24; App. 324, line 21 – App. 325, line 4; App. 396, lines 5-12.[7] Petitioner entered the Boutique with the pistol in his back pocket. App. 202, line 24 – App. 203, line 1; App. 397, lines 20-23.[8] The deceased unexpectedly arrived at the Boutique. The deceased pointed his gun at Sally. Petitioner repeatedly attempted to calm the deceased, but he was undeterred. Petitioner pulled the pistol from his pocket and warned the deceased not to do anything. Petitioner was forced to shoot the deceased. When the deceased turned from Sally and began his approach to Petitioner, he was forced to shoot him again. App. 399, line 12 – App. 408, line 20; App. 791, line 4 – App. 792, line 1.[9]

Petitioner did not attempt to flee. Instead, Petitioner attempted to render aid to the deceased. App. 134, lines 16-17; App. 342, line 22 – App. 343, line 8; App. 401, lines 10-19. Further, when the police arrived, Petitioner admitted he had shot the deceased and asked

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[7] The shooting occurred at approximately 1:30 p.m. on September 4, 1992. App. 176, lines 2-8.

[8] Petitioner testified that he armed himself because of the incident involving the deceased earlier that morning: "I just had a man promise to take me out; blow my shit away, fuck up my world, just moments before." App. 397, lines 22-24.

[9] The statement made by Petitioner to law enforcement indicated that when the deceased reached toward his back, Petitioner pointed his gun at the deceased, who pulled a gun from his back. Petitioner shot the deceased once, but when the deceased continued to approach him with the gun, Petitioner was forced to fire three more rounds. App. 203, lines 2-11.

the police to help the deceased. App. 91, lines 4-13; App. 177, lines 15-18; App. 345, lines 2-3; App. 410, line 20 – App. 411, line 6. When Petitioner was questioned by the police, he cooperated fully and admitted his role. App. 179, lines 24-25; App. 180, lines 13-14; App. 413, lines 16-25; App. 418, line 16 – App. 420, lines 12.

There was never any question that Petitioner shot the deceased. The only question for the jury was whether Petitioner acted in self-defense or the defense of others.

ARGUMENT

I. Trial counsel rendered ineffective assistance by failing to cross examine a key prosecution witness regarding prior inconsistent statements she made concerning whether the deceased was armed with a gun at the time of the shooting.

Relevant facts

Evidence produced at trial

Kimberly Kestner worked at the Bow Wow Boutique, which was owned by Robin Hunt. App. 117, lines 16-18; App. 118, lines 6-7; App. 118, lines 17-21. Kimberly was working on September 4, 1992 when Sally and Petitioner arrived at the Boutique to buy her car. App. 119, lines 9-12; App. 124, lines 21-25; App. 144, lines 3-7.

According to Kimberly, the deceased arrived not long after Sally and Petitioner's arrival. App. 128, lines 12-17. When Sally saw the deceased, she said "Oh my God." App. 141, lines 5-7; App. 145, lines 15-18. Upon hearing Sally utter those words, Kimberly ducked behind the dog she was grooming. App. 146, lines 4-6. The prosecution asked Kimberly: "Did you see at that point in time anything in [the deceased's] hand?" App. 130, line 10. Kimberly responded she did not because his hands were below the lattice work. App. 130, line 11. When the deceased got closer to Kimberly, she observed he had a pack of cigarettes in his hands, which he placed on the counter. App. 131, lines 6-15. The prosecutor pressed forward: "Did you ever see anything else in Mr. Peele's hand - - besides those cigarettes?" Kimberly responded "No." App. 131, line 25 – App. 132, line 3. The prosecutor again asked Kimberly: "Now again, prior to that time, up until this time you'd never seen Jimmy with any weapon?" Kimberly responded, "No." App. 134, lines 22-24. For a third time the prosecutor asked Kimberly if she saw the deceased with a gun, and Kimberly responded yet again in the negative. App. 137, lines 24-25.

Kimberly claimed she saw Appellant put a pack of cigarettes in his mouth and reach behind his back as the deceased walked through the door. App. 132, line 13 – App. 133, line 13. When Kimberly glanced at the deceased, "he appeared to be doin' the same thing."

App. 133, line 23 – App. 134, line 1. Petitioner and the deceased were between ten and fifteen feet apart. App. 137, lines 5-10. Then, Kimberly heard two shots. App. 134, lines 6-9. After moving from where she had taken cover, Kimberly saw Petitioner and Sally approach the deceased and begin CPR. App. 134, lines 13-17; App. 149, lines 21-23. Kimberly called 911 from her apartment attached to the Boutique. App. 135, lines 10-14.

When the 911 operator asked Kimberly to ask Petitioner to put his weapon down, Kimberly saw Petitioner for the first time with a gun. Petitioner placed the gun on the floor. App. 136, lines 3-11. Kimberly saw another gun on the floor about eight to ten feet behind the deceased to his left. App. 136, lines 19-21; App. 150, lines 7-12; App. 150, line 25 – App. 151, line 1.[10]

Trial counsel cross-examined Kimberly, but never mentioned she had made prior inconsistent statements regarding the incident, particularly whether the deceased had a gun. App. 138, lines 4-7. Thus, the evidence before the jury from the only neutral witness was that the deceased was unarmed.

During his closing argument, the prosecutor relied upon Kimberly's testimony to argue to the jury the deceased never pulled his gun. App. 548, lines 19-23. The prosecutor emphasized that Kimberly was an "independent witness" and she never saw the deceased with a weapon. App. 549, lines 20-21.

Evidence produced during the PCR hearing

At the PCR hearing, trial counsel recalled that Kimberly had been interviewed by a reporter for a newspaper and had given a statement to law enforcement. According to the newspaper article, Kimberly observed the deceased enter the Boutique armed with a .9 millimeter gun and present it "in the effort to threaten the lives of the folks that were in the

[10] The officer in charge of processing the scene found the loaded weapon about four or five feet from the deceased. App. 156, line 1. Sally testified that she moved the gun out of the way so that she could roll the deceased on his back to administer CPR. App. 342, lines 8-21.

boutique." App. 718, lines 3-9; App. 720, lines 20-24. Consistent with her statements to the reporter, Kimberly told law enforcement the deceased was armed at the time he entered the Boutique. App. 718, lines 9-12; App. 721, lines 4-25; App. 821. According to the incident report, Kimberly stated the deceased pulled a weapon out prior to the shooting. App. 721, lines 14-25. Trial counsel was armed with Kimberly's statement to police and the incident report prior to trial. App. 720, line 25 – App. 721, line 25. Although trial counsel was unable to locate the newspaper article prior to trial, he was aware of its existence and the statements made by Kimberly to the reporter. App. 722, line 25 – App. 723, line 9.

Trial counsel found Kimberly's trial testimony was "surprising" because it was "180 degrees" different from her pretrial statements. App. 722, lines 1-10. Candidly, trial counsel admitted he failed to confront Kimberly with her prior inconsistent statements during his cross-examination of her due to his "oversight." App. 722, lines 11-21; App. 723, lines 10-16; App. 752, lines 2-10. One primary issue at trial was whether the deceased was armed – particularly, in light of the prosecutor's closing argument that Petitioner had planted the gun found at the scene. App. 736, line 11 – App. 737, line 10. Although Sally and Petitioner testified the deceased was armed, both were interested parties in the case, but Kimberly was a disinterested party who was presented as an objective witness. App. 764, line 7 – App. 765, line 3.[11]

In her closing, the state conceded "there may be some showing here [of] deficient performance." The state only argued a lack of prejudice. App. 812, line 25 – App. 813, line 2.

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[11] The prosecutor, Dayton Riddle, stated that he was aware Kimberly's testimony was inconsistent with her statement to police, and he expected trial counsel to cross-examine her on the inconsistencies because the statement had been provided to the defense during discovery; however, Riddle did not elicit any testimony from Kimberly about the inconsistent statements. App. 796, line 21 – App. 797, line 9. Riddle admitted Kimberly's testimony was important because she was an independent witness and any discrepancies between her statement to police and her trial testimony would have affected her credibility and "would be important to bring out." App. 804, line 20 – App. 805, line 6.

Order denying relief

The PCR court found trial counsel's failure to impeach Kimberly with her prior statements that she saw the deceased draw a weapon constituted deficient performance. App. 839. However, the PCR court held Petitioner failed to show prejudice because Kimberly did not testify at the PCR hearing. App. 839. According to the PCR court, Kimberly "might have denied the statements attributed to her, requiring they be proved through extrinsic evidence which [Petitioner] also did not provide at his PCR hearing, or she might have provided some satisfactory explanation for the difference between her pretrial statements and her trial testimony." App. 839. The PCR court stated it was left "to speculate as to the impact the proposed impeachment of [Kimberly] would have had at [Petitioner]'s trial." App. 839. Thus, the PCR Court denied Petitioner relief.

Discussion

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

When trial counsel fails to impeach a witness with prior inconsistent statements, deficient performance that prejudices a defendant results. See Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097 (3d Cir. 1996) (trial counsel failed to impeach with inconsistent eyewitness identifications). Driscoll was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach an alleged eyewitness who claimed he saw Driscoll stab the guard and that Driscoll confessed to the murder. Driscoll's attorney knew the witness had told police that he only spoke to Driscoll after the stabbing and that Driscoll had not claimed responsibility. Id. at 709-12. The centrality of the witness's testimony was an important factor in the court's consideration in finding the failure to impeach prejudicial. The court found the failure "was a breach with so much potential to infect other evidence, that without, there is a reasonable probability that the jury would find reasonable doubt of Driscoll's guilt." Id.; See also Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998) (holding that defendant was prejudiced by trial counsel's failure to impeach a witness with a prior denial that a crime occurred); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009) (remanding case for prejudice inquiry because of trial counsel's failure to impeach police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

In Black v. State, 151 S.W.3d 49, 56 (Mo. 2004), trial counsel failed to impeach several witnesses regarding prior inconsistent statements that "related directly to the central issue of whether Mr. Black acted with deliberation or in a fit of rage or out of self-defense." The Missouri court rejected the state's argument that Black "was required to have called each of the witnesses in question at his post-conviction motion hearing so that he could show what they would have stated had his counsel attempted to impeach them with their prior inconsistent statements." Id. at 57. The court held "a movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective

in failing to use it, to movant's prejudice." Id. The court found counsel's failure prejudiced Black because it went to the key issue of deliberation where the record showed the jury was focused on that issue based on its note requesting further information on "cool reflection." Id.

In this case, the PCR judge found trial counsel was deficient in failing to cross-examine Kimberly with her prior statements. The state filed no motion to alter or amend challenging this decision and the state conceded deficient performance at the PCR hearing. Thus, the only issue before this Court is whether trial counsel's failure to impeach Kimberly with her prior inconsistent statements prejudiced Petitioner. Trial counsel provided ineffective assistance by failing to cross-examine Kimberly on three prior statements made by her in which she stated the deceased had a weapon at the Boutique when she had testified at trial that she saw no weapon in the deceased's possession. The PCR court erred in holding that Petitioner was required to present the testimony of Kimberly at the PCR hearing in order to show prejudice. The issue is not what would Kimberly have said – some hypothetical trial. The issue is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. That is, whether trial counsel's failure undermines confidence in the outcome of the trial. Without question, Kimberly's testimony was critical to the prosecution. She was one of only three people who witnessed the shooting. Petitioner and Sally were interested parties, but Kimberly had no interest in the outcome of the trial. She was an independent witness, as the prosecutor stated in his closing argument. In fact, the prosecutor relied upon Kimberly's testimony that the deceased had no weapon to suggest to the jury that the gun had been planted. App. 549, lines 14-23.

Whether the deceased had a gun was the heart of the case because Petitioner had admitted to shooting the deceased. The only issue for the jury was whether Petitioner acted in self-defense or in defense of others. The jury struggled with this issue as evidence by the question: "Whose fingerprints were on the 9mm gun?" App. 569.

Further, the jury repeatedly requested to be instructed on murder, manslaughter, and self-defense. App. 566, line 15 – App. 568, line 21; App. 571 (jury note); App. 571, lines 21-24; App. 572 (jury note). Even after multiple instructions, the jury was unable to reach a verdict. App. 572, line 21 – App. 573, line 1. Only after the judge instructed the jury "to have a round of talk and let everybody say what they want to say and see if you can come to an agreement" did the jury reach a verdict fifteen minutes later. App. 573, line 2 – App. 574, line 10.

Trial counsel's deficient performance in failing to impeach Kimberly – the only independent witness – with multiple prior inconsistent statements concerning the critical issue in the case of whether the deceased was armed at the time of the shooting. This evidence was critical to Petitioner's claim of self-defense and defense of others.

II. Trial counsel provided ineffective assistance by failing to present a critical witness to establish the deceased's tendency toward violence and actual threats made by the deceased to his wife.

Relevant facts

Evidence produced at trial

The prosecutor called Robin Hunt as a reply witness. App. 480, lines 5-6. Hunt was with Petitioner and Sally at the deceased's residence on the morning of September 4, 1992. App. 480, lines 13-21. Also, Hunt, Petitioner, and Sally were at Hunt's home around noon that day. App. 481, lines 1-3. Hunt claimed that while she was in her bathroom, she overheard Sally on the phone in Hunt's bedroom. App. 481, line 18 – App. 482, line 4. Hunt did not know to whom, if anyone, Sally was speaking, but she claimed she heard Sally address the person on the other end of the phone as "Jimmy" and asked the person to meet her at the Boutique in forty-five minutes. App. 482, lines 7-9; App. 482, line 17 – App. 483, line 2.[12]

Although trial counsel cross-examined Hunt, he limited his examination to the particulars of the phone call. Although he knew that Hunt had been with Petitioner and Sally at the deceased's residence earlier in the day and witnessed the violence that occurred there, he asked Hunt no questions about the events of the morning. Further, trial counsel failed to ask Hunt about any of her interactions with the deceased showing his propensity for violence. App. 483, line 8 – App. 486, line 9.

Evidence produced at the PCR hearing

Trial counsel claimed he was unable to find Hunt prior to trial. App. 716, line 16 – App. 717, line 3; App. 723, lines 17-24. However, he acknowledged Hunt testified as a

[12] Subsequent to the trial, Hunt recanted this testimony in a sworn affidavit. App. 657-662. At the PCR, Hunt testified she was always unsure about the telephone call, but "was told" she could not say she was unsure. She "trusted" trial counsel to cross-examine her on this point so she could say she was unsure. App. 775, lines 13-21.

witness for the prosecution and was available for cross-examination. App. 717, lines 8-20. Additionally, prior to trial, defense counsel had received statements by Hunt to law enforcement. App. 724, lines 7-16; App. 822-824. From those statements, trial counsel was aware that (1) Hunt knew Petitioner was assisting Sally in getting out of town due to threats and prior violence by the deceased against Sally and (2) Hunt's life had been threatened by the deceased. App. 725, lines 3-12; App. 822-823.[13] Despite having Hunt's prior statements that were supportive of Petitioner's defense, trial counsel failed to question Hunt regarding those prior statements. App. 726, lines 18-22.

Hunt[14] testified that Sally purchased the .25 caliber pistol at the pawn shop on the day of the shooting because the deceased had been attacking her and threatened to killer her. The deceased even attacked Hunt. App. 773, lines 9-19; App. 774, lines 4-10. Two days before the shooting, the deceased threatened to kill Hunt. App. 773, line 23 – App. 774, line 5. The deceased destroyed the engine of Sally's car by striking it with a 2x4. He attempted to run Hunt off the road while she and Sally walked to a nearby home to call for a ride. App. 774, lines 6-10. Hunt affirmed that she provided a written statement to police about the threats and violent conduct of the deceased. App. 774, lines 12-19. According to Hunt, Sally and Petitioner intended to leave the area to escape the deceased. They went to the Boutique to purchase a car for this purpose. App. 775, lines 1-12; App. 776, lines 13-18.

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[13] Hunt told police that the day before the shooting, the deceased and Sally had fought. After fighting, the deceased had used a board to hit the engine of Sally's car disabling it. When Hunt and Sally started walking away from the disabled car, the deceased approached them in his car. He forced them off the road. Later, the deceased arrived at Hunt's house cursing Sally and stating that "if he couldn't have her no one could." When Hunt threatened to call the police, the deceased threatened to kill her too. On the day of the incident, Hunt witnessed the deceased grab Sally at their home. App. 822-824.

[14] Hunt used the name Robbie Lankford at the time of the PCR hearing. App. 771, lines 13-20.

In her closing, the state conceded "there may be some showing here [of] deficient performance." The state only argued a lack of prejudice. App. 812, line 25 – App. 813, line 2.

Order denying relief

The PCR court recounted the testimony of Hunt at the PCR hearing that the deceased had threatened to kill her and Sally, had attacked Sally's car with a 2x4, and had attempted to run them off the road. App. 840. Further, the PCR court noted the testimony of Hunt that Petitioner and Sally were planning to leave the area together, not go after the deceased. App. 840. Despite Hunt being called as a witness by the prosecution, trial counsel failed to cross-examine Hunt on these matters to establish the deceased's threats to Sally and his reputation for violence and dangerousness. App. 840. The PCR court found Hunt was "not a credible witness" because she claimed to be friends with the deceased and Sally but "spent the last few days before the shooting with Sally and [Petitioner] and helped [Petitioner] after his arrest." The PCR court also discredited Hunt's testimony because she was not present during the shooting and had no personal knowledge of how it took place. The PCR court found trial counsel's "failure to elicit testimony that [the deceased] was threatening and aggressive in the days before the shooting and Sally and [Petitioner] were simply trying to get away from him" was "arguably deficient, but not ineffective." The PCR court held Petitioner "failed to show how his defense suffered because of the lack of this non-credible and biased testimony." App. 841.

Discussion

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984).

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have

actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978).

In a self-defense case, evidence of other specific instances of violence on the part of the deceased are admissible if they were "directed against the defendant, or if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm." State v. Day, 341 S.C. 410, 419-420, 535 S.E.2d 431, 436 (2000)(citing State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996) and State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945)). In Day, this Court held the trial court erred in excluding evidence of a prior act of violence against a third party where the prior act occurred only four months prior to the death and could have been used by Day to show he had a reasonable apprehension of violence from the deceased. Id. at 421, 535 S.E.2d at 437. See also, State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005).

Trial counsel provided ineffective assistance by failing to question Hunt regarding her observations of the acts of violence committed by the deceased against her and Sally in the days preceding his death. Trial counsel was aware of Hunt's prior statement to law enforcement regarding the deceased's conduct. However, he failed to ask one question about the deceased's actions. This failure prejudiced Petitioner because the evidence went to the very heart of the case – whether Petitioner acted in self-defense or defense of others.

III. Trial counsel provided ineffective assistance by failing to request the trial judge instruct the jury as to defense of others to preserve this issue for appeal where the evidence supported the instruction and the prosecution consented to its issuance.

Relevant facts

Evidence produced at trial

During the trial, the prosecutor moved to exclude evidence of prior difficulties between Sally and the deceased despite having introduced some evidence of those prior difficulties during the prosecution's case-in-chief. The prosecutor argued the evidence was not relevant to self-defense. App. 285, line 15 –App. 286, line 17. Petitioner argued the evidence was relevant to the deceased's propensity for violence. App. 284, line 23 – App. 285, line 13. The judge remarked:

> Anybody has a right to come to the defense of a member of their family. They have a right to come to their defense. They stand in the same shoes they stand in, but I don't think there are any shoes to stand in at this particular time accordin' to the facts this far that this jury's heard.

App. 286, lines 18-23. Thus, the judge granted the state's motion to exclude the evidence. App. 287, lines 8-10. During this discussion, however, the solicitor stated he had no problem with charging the jury on defense of others: "I don't have any problem with that charge whatsoever." App. 288, lines 9-13.[15]

In addition to Petitioner's statement and testimony regarding the circumstances of the shooting and the testimony of Kimberly detailed in the statement of facts and Issue I, Sally testified that the deceased entered the Boutique and pulled a gun on her. App. 330, lines 20-24; App. 350, lines 2-5. She identified the 9 mm found at the scene as the gun used by the deceased. App. 331, lines 2-10. Sally heard Petitioner say "Please don't." She then saw Petitioner with his gun pointed toward the floor. App. 339, lines 4-17. Only when the

[15] During the charge conference, trial counsel inquired about a litany of instructions, including defense of others. The judge did not indicate he was not charging defense of others and the prosecution did not object to the charge. App. 501, lines 1-5. Trial counsel even argued defense of others to the jury. App. 514, line 25; App. 522, lines 16-25.

deceased saw Petitioner's gun did he take aim at Petitioner and remove his sights from Sally. App. 340, line 21 – App. 342, line 7. Then, Sally started to move between the two men. App. 340, lines 8-10. She then heard shots. App. 340, lines 11-12. Sally believed the deceased had shot because she saw him "pullin' the trigger." App. 341, lines 13-18.

Although the trial judge charged the jury concerning self-defense, the judge did not instruct the jury concerning defense of others. App. 556, line 19 – App. 559, line 16. During deliberations, the jury requests to be re-instructed on murder, manslaughter, mutual combat, and self-defense. The judge instructed the jury concerning those four again. App. 566, line 15 – App. 568, line 21; App. 571. At that point, trial counsel requested a charge of defense of others, but the judge refused to do so. App. 570, lines 21-25.[16] The jury was unable to reach a verdict after deliberating several hours. App. 572, line 21 – App. 573, line 1.

Direct appeal

This issue was raised by Petitioner in his direct appeal. This Court held the issue was not preserved for review because "no request or contemporaneous objection to charge as given" was made. App. 603. Although Petitioner argued the issue was preserved in his petition for rehearing, this Court denied the petition; thus, this Court's decision that the issue was not preserved for appellate review was the final word. App. 604-609.

Evidence produced at the PCR hearing

Trial counsel recalled discussing the defense of others with the trial judge and arguing defense of others in his closing argument. App. 741, lines 3-9. According to trial counsel, defense of others was crucial to Petitioner's case. Trial counsel recalled the jury having several questions concerning the elements of murder, manslaughter, and self-defense. App. 742, lines 3-25. However, the jury was not allowed to consider defense of others because the judge did not instruct the jury on the defense, and trial counsel failed to

[16] Petitioner had submitted written requests to charge, including the defense of others. App. 584.

preserve the matter for review. App. 742, lines 1-13. Trial counsel "dropped the ball." App. 743, line 13. In her closing argument, the Assistant Attorney General conceded "there may be some showing here [of] deficient performance." The state only argued a lack of prejudice. App. 812, line 25 – App. 813, line 2.

Order denying relief

The PCR court determined "a defense of others charge was not appropriate" because Sally "was not in imminent danger at the time [Petitioner] fired the gun at her husband, Jimmy Peele." App. 842. Further, the PCR court found "Sally was not without fault in bringing on the difficult as she had pointed a pistol at [the deceased] earlier in the day." App. 842-843. Nevertheless, the PCR court recognized that the prosecution did not object to the judge charging the jury concerning the defense of others, but was not persuaded trial counsel erred in failing to request the charge. App. 842.

Discussion

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984). Without question, trial counsel failed to request a charge on defense of others as this Court has held there was no preservation of such an error. State v. Rutland, Op. No. 95-MO-263 (S.C. Sup. Ct. filed Aug. 25, 1995). This failure was deficient performance prejudicing Petitioner. The PCR court erred in concluding Petitioner was not entitled to a defense of others charge because Sally was not in imminent danger when Petitioner shot the deceased where the evidence demonstrated the deceased held the gun to Sally only seconds before setting his sights on Petitioner.

This Court has held that in order for the trial judge to give a defense of others instruction, there must be "some evidence adduced at trial that the defendant was indeed lawfully defending others." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). "Under the theory of defense of others, one is not guilty of taking the life of an

assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." State v. Starnes, 340 S.C. 312, 322-323, 531 S.E.2d 907, 913 (2000). This Court noted that a defendant is entitled to a defense of others instruction if the person whom he is seeking to protect would likewise have the right to act in self-defense. State v. Long, 325 S.C. 359, 480 S.E.2d 62 (1997).

This Court's opinion in State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985) is instructive due to the similar nature of the facts. Sales' sister and her boyfriend were fighting in their shared home over the boyfriend's use of grocery money to buy liquor. The boyfriend hit the sister in the face with an iron poker. Sales' nieces ran to his home and begged him to help sister. Sales found sister at her home holding her face. When sister and boyfriend began to struggle over a heavy object, Sales separated the two. The boyfriend then swung the heavy object at Sales. A fight between Sales and the boyfriend ensued. The boyfriend died. This Court held the trial judge properly instructed the jury on the defense of others, but found error in the trial court's failure to instruct the jury that Sales had no duty to retreat because sister had no duty to retreat from her home and Sales assumed the rights and limitations of the person he acted to protect. Id. at 114-15, 328 S.E.2d at 619-620.

The evidence here clearly entitled Petitioner to a jury instruction on the defense of others. The deceased held a gun to Sally only moments before turning to Petitioner who shot him instantaneously. The suggestion that Sally was not in imminent danger is preposterous. Clearly, Sally was in danger while the deceased held a gun to her, but she remained in danger of the deceased even when the deceased turned his gun on Petitioner. Sally, and Kimberly, would have been justified in using deadly force to repel the deceased.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the lower court and grant Petitioner relief from his convictions and sentences based upon ineffective assistance of trial counsel.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of August, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

L. Casey Manning, Circuit Court Judge

FRED R. RUTLAND,

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 John Walt Whitmire, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Fred R. Rutland #197903, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of August, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of August, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.