



RECEIVED

MAR 25 2015

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

March 25, 2015

VIA HAND DELIVERY

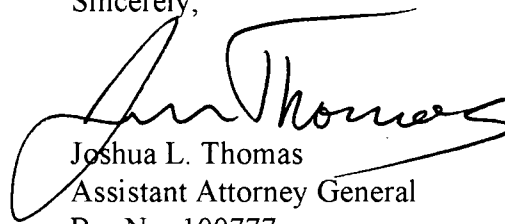
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Tommy Toomer v. State of South Carolina
Appellate Case No: 2014-000649

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Robert M. Dudek, Esquire (2 copies)

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 25 2015

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge **S.C. Supreme Court**

Appellate Case No. 2014-000649

Tommy Toomer, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....3

 I. Standard of review.....3

 II. Probative evidence supports the post-conviction relief judge’s finding
 trial counsel was not ineffective in failing to object to the introduction of
 Petitioner’s prior bad acts4

 III. Probative evidence supports the post-conviction relief judge’s finding
 trial counsel was not ineffective in failing to request a jury charge on the
 lesser-included offense of voluntary manslaughter8

CONCLUSION.....11

QUESTIONS PRESENTED

1. Did the post-conviction relief judge properly find trial counsel was not ineffective in failing to object to evidence of Petitioner's prior bad acts where such evidence was otherwise admissible?
2. Did the post-conviction relief judge properly find trial counsel was not ineffective in failing to requests a jury instruction on the lesser-included offense of voluntary manslaughter where trial counsel articulated an objectively valid strategic reason for not requesting the instruction?

STATEMENT OF THE CASE

In July 2005, the Horry County Grand Jury indicted Petitioner for murder. (App. pp. 286-87). James C. Galmore, III, Esquire (“trial counsel”), represented Petitioner. (App. p. 1). On May 18, 2009, Petitioner proceeded to trial before the Honorable Edward B. Cottingham and a jury. (App. p. 1). On May 19, 2009, the jury found Petitioner guilty as indicted. (App. p. 179, lines 20-23). Judge Cottingham sentenced Petitioner to thirty years imprisonment. (App. p. 288).

Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected Petitioner’s appeal, and the South Carolina Court of Appeals affirmed Petitioner’s conviction on July 18, 2012. State v. Toomer, 2012-UP-439 (S.C. Ct. App. filed July 18, 2012).

Petitioner filed an application for post-conviction relief on August 28, 2012. (App. p. 188). Randall K. Mullins, Esquire, and Jarrod E. Owenby, Esquire, represented Petitioner. (App. p. 200). The Honorable Steven H. John (“the post-conviction relief judge”) convened a hearing on the application at the Horry County Courthouse on December 18, 2013. (App. p. 200). The post-conviction relief judge denied relief in an order dated January 10, 2014. (App. p. 264). The post-conviction relief judge denied Petitioner’s motion for reconsideration by order dated March 5, 2014. (App. p. 281).

ARGUMENT

I. Standard of Review

In this post-conviction relief action, Petitioner bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Petitioner must prove trial 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.” Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove trial counsel’s performance was deficient. Id. Under this prong, the Court measures trial counsel’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different.”
Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the post-conviction relief judge’s denial of relief when there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

II. Probative evidence supports the post-conviction relief judge’s finding trial counsel was not ineffective in failing to object to the introduction of Petitioner’s prior bad acts.

Petitioner argues the post-conviction relief judge erred in finding trial counsel ineffective for failing to object to the admission of evidence of Petitioner’s prior bad acts. Specifically, Petitioner argues the post-conviction relief judge erred in finding trial counsel was not deficient where the court of appeals ruled the objection was not preserved for appellate review. He also argues the post-conviction relief judge erred in also finding Petitioner failed to demonstrate the lack of an objection prejudiced Petitioner. Respondent concedes trial counsel’s failure to preserve the objection to the prior bad act evidence may have constituted deficient performance. See McHam v. State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (counsel deficient for failing to place objection on record and preserve issue for appeal); Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (same). However, Petitioner must still prove he was prejudiced by trial counsel’s actions. McHam, 404 S.C. at 481-82, 746 S.E.2d at 50 (citing Foye, supra). Because the prior bad act evidence was admissible for a number of reasons, the

post-conviction relief judge did not err in finding Petitioner failed to demonstrate prejudice from trial counsel's actions.¹

The State's case against Petitioner was based largely on the eyewitness testimony of Wanda Garrett. Garrett testified Petitioner struck the victim with a large stick. (App. p. 81, line 14-p. 83, line 16). Garrett testified she had seen the stick before because Petitioner had "took it out on [her]." (App. p. 80, line 25-p. 81, line 2). Trial counsel objected based on Rule 404(b), SCRE, and Judge Cottingham overruled the objection after a bench conference. (App. p. 81, lines 3-8). The State did not further explore Petitioner's use of the stick as a weapon. Instead, the State merely elicited testimony from Garrett that she had seen the stick "on a number of occasions." (App. p. 81, lines 10-12).

Trial counsel did not require the State or Judge Cottingham to articulate exactly which Rule 404(b) exception made the testimony admissible. However, "evidence which is 'logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime.'" State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 200 S.E.2d 74 (1973); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). Based on the facts of this case, Respondent contends the State could have intended its questions to lay a foundation for Garrett's identification of the murder

¹ Respondent notes Petitioner only devotes a single paragraph to the post-conviction relief judge's ruling that Petitioner was not prejudiced by the form of trial counsel's objection, and that paragraph contains no discussion of why the judge erred in this regard. (Pet. for Writ of Cert. p. 10). Accordingly, Respondent submits Petitioner has abandoned his challenge to the post-conviction relief judge's finding of no prejudice. State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (conclusory arguments deemed abandoned (citing Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999))).

weapon. Because authorities never recovered the murder weapon, this testimony about Garrett's knowledge of the stick was important to establish her credibility and to identify the murder weapon, not to impugn Petitioner's character. The fact Garrett's statement inadvertently revealed Petitioner may have committed acts of violence in the past does not make her testimony inadmissible.

Admittedly, Garrett's testimony can fairly be interpreted to show Petitioner previously committed a violent act with the stick. However, her testimony was admissible under any of the exceptions contained in Rule 404(b). "Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible 'to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.'" State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (citing Rule 404(b), SCRE). Initially, Respondent notes the post-conviction relief judge found in his order denying Petitioner's motion for reconsideration that Garrett's testimony could be admissible to show motive, intent, common scheme or plan, absence of mistake, and as part of the *res gestae* of the crime. (App. p. 282-283). However, on appeal, Petitioner only argues, in a conclusory fashion, that the post-conviction relief judge erred because Garrett's "testimony was not admissible as part of a common scheme or plan or to show lack of accident or lack of mistake." (Pet. for Writ of Cert. p. 10). Petitioner raises no challenge to the post-conviction relief judge's findings regarding motive, intent, or *res gestae*. Accordingly, Respondent submits this Court should affirm the post-conviction relief judge based on Petitioner's failure to challenge these findings. S.C. Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 170, 447 S.E.2d 843,

847 (1994) (“This Court will affirm where an appellant fails to appeal the alternative ground of a trial judge's ruling.” (citing Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993))).

Regardless, the post-conviction relief judge’s findings in this regard were proper. The State’s theory was that Petitioner struck the victim after overhearing a conversation between the victim and Garrett about moving in together. Garrett’s testimony Petitioner previously hit her with the stick shows motive and intent to use the stick to kill the victim where he was planning to remove Garrett from Petitioner’s house. Garrett’s testimony also establishes Petitioner commonly used the stick as a weapon, indicating his scheme or plan at the time of the murder was to use it to strike the victim. Likewise, Petitioner’s previous use of the stick to strike Garrett indicates an absence of mistake in swinging the stick at the victim. Finally, the fact Petitioner previously used the stick as a weapon identifies him as the person who could have used the stick to strike the victim. Therefore, Garrett’s testimony is admissible under Rule 404(b) because it implicates Petitioner’s “motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Rule 404(b), SCRE.

Furthermore, Garrett’s testimony was ultimately admissible as part of the *res gestae* of the crime. Evidence of other bad acts is admissible where it provides context for the charged crime or is necessary to a full presentation of the State’s case. See State v. Wood, 362 S.C. 520, 527-28, 608 S.E.2d 435, 439 (Ct. App. 2004) (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). Here, evidence of Petitioner’s prior use of the stick as a weapon is relevant and probative of his use of the stick to murder the victim. As noted above, Garret’s testimony was important to identify the murder weapon

in this case. Furthermore, evidence of Petitioner's previous use of the stick as a weapon demonstrates his willingness to use the stick in the scenario Garrett described. Therefore, Garrett's testimony provided context for Petitioner's actions and was necessary for the State to prove its case.

Garrett's testimony was ultimately admissible under Rule 404(b) or as part of the *res gestae* of the crime. Because the testimony was admissible, Petitioner failed to demonstrate trial counsel's lack of a proper objection prejudiced him. Therefore, the post-conviction relief judge properly denied relief on this ground.

III. Probative evidence supports the post-conviction relief judge's finding trial counsel was not ineffective in failing to request a jury charge on the lesser-included offense of voluntary manslaughter.

Petitioner contends the post-conviction relief judge erred in finding trial counsel was not ineffective in not requesting a voluntary manslaughter instruction because "[t]here is no evidence to support the [post-conviction relief judge's] ruling that [trial] counsel discussed requesting a voluntary manslaughter instruction with Petitioner[.]" However, Respondent submits the decision not to request a voluntary manslaughter instruction was a strategic decision left to trial counsel's discretion. See *Abney v. State*, 408 S.C. 41, 50-51, 757 S.E.2d 544, 548-49 (Ct. App. 2014) (Piepher, J., concurring) (discussing the overwhelming number of "authorities that the decision to request a lesser included offense instruction is a tactical decision to be made by defense counsel, not the defendant"), cert. denied (Jan. 15, 2015). Thus, the proper question is whether any probative evidence supports the post-conviction relief judge's finding trial counsel articulated a reasonable trial strategy for this decision.

Trial counsel testified he believed this was a credibility case, and the jury either believed Garrett's version of events or Petitioner's. (App. p. 235, lines 11-13). He reiterated that his defense was not that Petitioner struck the victim in a heat of passion, but that Petitioner did not hit the victim and was asleep at the time. (App. p. 235, lines 14-19; p. 244, lines 1-5). Under the scenario Petitioner relayed to trial counsel and to the jury, trial counsel did not consider voluntary manslaughter as an alternative. (App. p. 244, lines 5-6). Instead of asking the jury convict Petitioner of a lesser-included offense, trial counsel wanted them to acquit him of the murder charge. (App. p. 244, lines 15-18).

Trial counsel's actions were reasonable under the circumstances. His trial strategy was to discredit Garrett and convince the jury she was lying about Petitioner striking the victim with the stick.² Had this strategy been successful, the jury would have found Petitioner innocent. The fact the jury did not accept Petitioner's version of events does not invalidate trial counsel's strategic decision. See State v. Walker, 605 S.E.2d 647, 654 (N.C. Ct. App. 2004), overruled on other grounds, 695 S.E.2d 750 (N.C. 2006) ("The record indicates defendants' counsel were employing an 'all or nothing' strategy[.] ... The fact that it failed does not mean that defendants were deprived of effective assistance of counsel."). Thus, trial counsel articulated an objectively reasonable strategy of not requesting an instruction on voluntary manslaughter. See Abney, 408 S.C. at 47, 757 S.E.2d at 547 (valid strategy to not request lesser included where counsel believes

² This Court should give no credit to trial counsel's testimony that he "should have asked for a voluntary manslaughter charge[.]" (App. p. 236, lines 17-18), because that testimony is based on the post hoc realization that the jury found Garrett credible. Harrington v. Richter, 562 U.S. 86, 109 (2011) ("After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome.").

jury will acquit of greater offense). Therefore, the post-conviction relief judge properly found trial counsel was not ineffective in this regard.

In the alternative, Respondent also submits the record contains no evidence to support a voluntary manslaughter instruction. Garrett's testimony merely indicates Petitioner struck the victim when he overheard a conversation about Garrett and the victim moving in together. Overhearing this conversation does not constitute adequate legal provocation to send Petitioner into a heat of passion. See State v. Holland, 385 S.C. 159, 166, 682 S.E.2d 898, 902 (Ct. App. 2009) (“[M]ere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon.” (quoting State v. Rogers, 320 S.C. 520, 466 S.E.2d 360 (1996))). Therefore, this Court can uphold the post-conviction relief judge's denial of relief on the alternate ground that Petitioner would not have been entitled to an instruction on voluntary manslaughter even if trial counsel requested one. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000) (noting that Rule 220(c), SCACR, allows the Court to “affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.”).

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

March 25, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable Steven H. John, Circuit Court Judge

TOMMY TOOMER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Chief Appellate Defender Robert M. Dudek
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 25th day of March, 2015


NORMA BIGBEE
LEGAL ASSISTANT