

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CALHOUN COUNTY
Court of Common Pleas
Maité Murphy, Circuit Court Judge

Appellate Case No. 2014-002096

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S.C. Supreme Court

PHILLIP L. SPEARS, JR., SCDC No. 297965,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Is there evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective for failing to contemporaneously object to James Bourgeois' in-court identification of Petitioner, where the trial court found that Bourgeois' identification was not unduly suggestive and there is no reasonable likelihood that but for trial counsel's alleged error the result of the proceeding would have been different?
- II. Is there evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective for failing to object to alleged misattributions of identification testimony during the co-defendant's closing argument, where the argument in question was not improper and there is there is no reasonable likelihood that but for trial counsel's alleged error the result of the proceeding would have been different?
- III. Is there evidence of probative value to support the post-conviction relief court's finding that appellate counsel was not ineffective for failing to cite to any legal authority in support of the argument that the trial judge erred by refusing to declare a mistrial based on extraneous comments overheard by a juror on an unrelated case, where there is no reasonable likelihood that Petitioner would have been successful on appeal and there was overwhelming evidence of Petitioner's guilt?

STATEMENT OF THE CASE

The Calhoun County Grand Jury indicted Petitioner during the June 2007 term for armed robbery (2007-GS-09-0148) and during the August 2007 term for possession of a firearm or knife during the commission of a violent crime (2007-GS-09-0219) and kidnapping (2007-GS-09-0221). All charges stemmed from the November 6, 2006, robbery of the Bell's Bait and Tackle Shop (also known as and hereinafter the Wagon Wheel) in Ellore, South Carolina. Charlie J. Johnson, Jr., Esquire, represented Petitioner. Petitioner proceeded to a jury trial before the Honorable Diane S. Goodstein alongside co-defendant Titus Bantan. The jury convicted Petitioner as indicted on all charges. Judge Goodstein sentenced Petitioner to thirty years imprisonment for both armed robbery and kidnapping and five years imprisonment for possession of a firearm or knife during the commission of a violent crime, with all sentences to be served concurrently.

Petitioner filed a notice of appeal and an appeal was perfected on his behalf by Appellate Defenders M. Celia Robinson, Esquire, and Breen R. Stevens, Esquire. Following briefing and argument, the South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Phillip Lee Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The Court of Appeals issued the Remittitur on July 1, 2011.

Thereafter, Petitioner filed an application for post-conviction relief on October 6, 2011, alleging numerous grounds for relief, including ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, and other constitutional deprivations. Respondent made its Return on April 12, 2012, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened May 28, 2014, at the Dorchester County Courthouse before the Honorable Maité Murphy. Petitioner was present at the hearing and was

represented by counsel Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Petitioner testified on his own behalf and presented testimony from trial counsel Johnson and appellate counsel Robinson. After a review of all materials and testimony presented, the post-conviction relief court denied and dismissed Petitioner's application by written order signed September 9, 2014, and filed on September 23, 2014.

Petitioner filed a Notice of Appeal on September 30, 2014. Petitioner filed a Petition for Writ of Certiorari, Appendix, and Supplemental Appendix on June 8, 2015. Thereafter, Petitioner filed a Second Supplemental Appendix on July 16, 2015.¹ This Return follows.

¹ Petitioner labeled this second Supplemental Appendix as "Supplemental Appendix." However, as a Supplemental Appendix was already filed with the original Appendix and included different documents, Respondent will refer to this second Supplemental Appendix, filed on July 16, 2015, as the "Second Supplemental Appendix."

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law are afforded great deference on appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether “*any* evidence of probative value” exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's findings. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). The reviewing court will reverse the post-conviction relief court's finding if controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

An applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, he or she 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 v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

Reviewing courts apply a two-pronged test in evaluating allegations of ineffective assistance of counsel and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was

deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. 668. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

"[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)).

Additionally, a defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he or she would have been successful on appeal, he or she is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836.

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has

reiterated that it is ‘difficult to demonstrate that counsel was incompetent.’” United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” Jones, 463 U.S. at 754. Additionally, this Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

“To establish prejudice relating to the actions of appellate counsel, a defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86; 120 S. Ct. at 764).

ARGUMENT

- I. **Is there evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective for failing to contemporaneously object to James Bourgeois' in-court identification of Petitioner, where the trial court found that Bourgeois' identification was not unduly suggestive and there is no reasonable likelihood that but for trial counsel's alleged error the result of the proceeding would have been different?**

On the morning of November 6, 2006, a man later identified as Petitioner entered the Wagon Wheel, looked around the store, and then exited. (App. 337, 364, 428, 512-14, 520-21, 596, 623). He immediately reentered the store with masked man later identified as co-defendant Bantan both men had guns. (App. 520-21, 528). Petitioner and Bantan held store owner James Bourgeois and several others, including employee Natasha Rivers and her two infant children and employees Cleveland Williams and Iskier Prezzie, on the floor at gunpoint while they robbed the store. (App. p. 521-532). During the robbery, Bantan removed his mask, revealing his face. (App. 530, 573-74). Petitioner and Bantan assaulted Bourgeois and demanded to know where the safe and money were located. (App. 529-34, 570-71, 605-06). Petitioner and Bantan eventually fled with over \$200 in cash, approximately \$580 in rolled coins, and numerous packs of Newport cigarettes. (App. 534-38, 543, 606-10).

Bourgeois called 911 and law enforcement arrived within ten minutes. (App. 608). Rivers was able to provide law enforcement with a thorough description of Petitioner and Bantan, including race, facial features, build, and the clothing each wore. (App. 526-35, 544-46, 590-92). Rivers testified that she was able to closely examine Petitioner's face, noting his complexion and facial hair, and that she recognized him from the neighborhood. (App. 526-29, 544-48, 575-76, 590-92). Based on Rivers' description, law enforcement developed Petitioner as a suspect. Rivers emphatically identified Petitioner as the first man who entered the store when shown a

photo lineup by officers approximately four hours after the robbery. (App. 548-53). Law enforcement showed Rivers another lineup a few hours later and she positively identified Bantan as the second man, although she noted his hair was different than it had been that morning. (App. p. 553-55, 577-79). None of the other witnesses were shown a photo lineup.

Law enforcement next went to the home of Petitioner's girlfriend, Tanesha Adams. (App. 690-94). Adams informed officers Petitioner had contacted her at 5 a.m. and again at 7 a.m. on the morning of the robbery inquiring if the Wagon Wheel had surveillance cameras; she replied she did not know. (App. 690-94). While law enforcement was still at Adams' home, Petitioner called and told Adams he had robbed the Wagon Wheel that morning. (App. 697-98). He later informed Adams that he was fleeing to North Carolina. (App. 699-702). Also present at Adams' home was her brother, who told police of a trailer where Petitioner occasionally stayed in Orangeburg and offered to take them to the trailer. (App. 725, 734-35).

Law enforcement arrived at the trailer in Orangeburg with an arrest warrant for Petitioner. (App. 735-40). After entering the trailer with weapons drawn, police placed the unknown male occupant in handcuffs, who they later determined was Bantan. (App. 738-40). Police removed Bantan's handcuffs once he indicated he would consent to a search of the trailer. (App. 740-43). However, Bantan revoked his consent once officers discovered items linked to the robbery. (App. 742-44). Once Bantan withdrew consent, officers left the trailer, obtained a search warrant, and returned to continue the search. (App. 742-46). Law enforcement found boots and pants consistent with Rivers' description of the clothing worn by the suspects, as well as multiple packs of Newport cigarettes, \$260 in twenty dollar bills, and a "Coinstar" receipt

showing \$300 in coins had been exchanged for bills at a nearby Bi-Lo grocery store shortly after the robbery. (App. 746-47).²

Petitioner was arrested three days later at a residence in Charlotte, North Carolina. (Supp. App. 132-35). During Petitioner's arrest, law enforcement found a gun hidden under Petitioner's mattress that was similar to the gun described by the witnesses. (App. 136-38).

Prior to Petitioner's trial, Bourgeois testified during a Neil v. Biggers³ hearing challenging Bourgeois' identification. (App. 425-47). During his testimony, Bourgeois "point[ed] at the gentleman sitting in the courtroom with [a] white shirt on," and identified Petitioner as the first man who entered the Wagon Wheel on November 6, 2006 and walked around the store as if he were looking for something in particular. (App. 426-28). Bourgeois testified that he then exited the store through a rear door to help other employees unload trash and was interrupted by Petitioner, armed, who aggressively came behind him and instructed him to go back inside the store and lay down on the floor. (App. 428-29). Bourgeois testified that when he turned around, he was able to observe Petitioner's face closely and saw that Petitioner had a gun pointed at him. (App. 429). Bourgeois further testified that Petitioner had his hat pulled down "at eyebrow level." (App. 429-30). He further described Petitioner as being about five-ten or five-eleven with a slender build, specifically that he was about 150 or 160 pounds. (App. 430). When asked to describe Petitioner's face, Bourgeois testified that Petitioner had acne bumps all over his face and had a "scruffy looking mustache." (App. 430). He testified that he had another good opportunity to look at Petitioner's face when Petitioner went to check the doors of the bathroom and the storage area in the store. (App. 435). Bourgeois further testified that he

² The trial court found Batan's original consent was invalid, but ruled the evidence was nonetheless admissible under the doctrine of inevitable discovery.

³ 409 U.S. 188 (1972).

described the men to law enforcement and that he informed law enforcement that he could identify both of the men. (App. 436, 442, 444). Bourgeois testified that he did not see Petitioner again before a bond hearing held at the magistrate's office. (App. 439). Bourgeois testified that while he was waiting for the hearing, he saw Petitioner walk through the door and he immediately recognized him as one of the assailants who had robbed him. (App. 440-41). He testified that Petitioner was the only defendant who walked into the magistrate's office; but at the time, Bourgeois did not know he was there for a hearing specifically for Petitioner and did not know whether or not the magistrate was hearing other matters that day. (App. 440).

Trial counsel argued that Bourgeois' identification was unduly suggestive and should be suppressed, asserting that Bourgeois never identified Petitioner in a photo lineup—nor was he given a lineup—and that he identification was impermissibly suggestive and unreliable because it was made before a court appearance while Petitioner was in custody. (App. 452-55). After hearing arguments from all parties, the trial court ruled Bourgeois' identification was admissible, finding that the State had met its burden of proof under State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 91992). (App. 456-58).

During trial, Bourgeois testified that he recalled Petitioner entering the Wagon Wheel on the morning of November 6, 2006. (App. 596). He testified that he “noticed [Petitioner] walk by [him] like, just like another customer but something seemed strange about [Petitioner],” because “he didn't act like an ordinary customer.” (App. 596). He testified that he was able to view Petitioner's face well during Petitioner's initial time in the store. (App. 597). Bourgeois testified that as he exited the store to assist with the trash, Petitioner approached him from behind and yelled for him to “get back inside and lay down on your face.” (App. 598). He described Petitioner, as having a dark hat pulled down to his eyebrows and wearing a gray hoodie and

faded blue jeans, and noted that Petitioner had a gun in his hand. (App. 598-99). Bourgeois testified that he provided a full description of Petitioner to law enforcement and also told law enforcement that Petitioner had braids sticking out of his hat, a rough face full of acne marks, and a rough facial hair. (App. 611-12). He testified that he told law enforcement officers he could identify the two suspects but acknowledged that he was never shown a lineup. (App. 626). Bourgeois testified that he next saw Petitioner while he was waiting for a hearing at the magistrate's office and that he recognized Petitioner instantaneously. (App. 620-21). He elaborated that he was unequivocal in his identification of Petitioner as the first suspect who entered his store. (App. 620). Bourgeois testified that he was not informed whether Petitioner would be present at the hearing or how many inmates would be at the magistrate's office. (App. 640-41). Trial counsel did not contemporaneously object to Bourgeois' identification during trial. However, trial counsel did vigorously cross-examine Bourgeois as to all aspects surrounding his identification of Petitioner as the first suspect.

In this post-conviction relief action, Petitioner asserts trial counsel was ineffective for failing to contemporaneously object to Bourgeois' in-court identification. Petitioner argues that because trial counsel failed to contemporaneously object, the issue was not preserved for appellate review. In its Order of Dismissal, the post-conviction relief court held Petitioner failed to establish any requisite prejudice from trial counsel's alleged failure to contemporaneously object to Bourgeois' in-court identification of Petitioner. (App. 1221). The post-conviction relief court noted that a pre-trial hearing was held on Bourgeois' identification, after which the trial court ruled the identification was admissible. (App. 1221). Furthermore, the court cited to the South Carolina Court of Appeals' opinion finding that there was no substantial likelihood of misidentification of Petitioner as the first suspect. (App. 1221 (citing Spears, 393 S.C. 466, 713

S.E.2d 324 (Ct. App. 2011)). Additionally, the post-conviction relief court found that even had trial counsel contemporaneously objected and the issues were preserved for appellate review, the result would still have been the same—the convictions and sentences would be affirmed. (App. 1221). These findings are supported by ample evidence in the record and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

Petitioner's case is akin to Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013) (reh'g denied). In Gibbs, this Court held while trial counsel was deficient for failing to contemporaneously object to an in-court identification of the petitioner, the petitioner did not suffer any prejudice, as "the identifications were not so unduly suggestive as to create a likelihood of misidentification. Id. at 495, 744 S.E.2d at 175-76. After the robbery of a grocery store in Georgetown, South Carolina, law enforcement interviewed three different witnesses about the incident, during which a description of the perpetrator was given. Id. at 487-88, 744 S.E.2d at 172. Ten days later, law enforcement presented the witnesses with two photographic lineups, one of which contained a picture of the petitioner. Id. at 488, 744 S.E.2d at 172. Two of the witnesses identified the petitioner as the robber, but one witness was unable to identify the petitioner. Id. Prior to trial, the petitioner moved to suppress the evidence related to the photographic lineup, show-up, and any potential in-court identifications. Id. at 489, 744 S.E.2d at 172. Following a pre-trial hearing, the trial court denied the petitioner's motion to suppress, finding neither the photographic lineup nor the show-up identifications were unduly suggestive and permitting the witnesses to make in-court identifications at trial. Id. At trial, two witnesses identified the petitioner as the robber. Id. One witness' photographic lineup identification, show-up identification, and in-court identification were admitted into evidence without contemporaneous objection by the defense, as well as the other witness' show-up identification

and in-court identification. Id. at 489, 744 S.E.2d at 172-73. Subsequently, the petitioner filed an application for post-conviction relief, alleging defense counsel was ineffective for failing to contemporaneously object to the introduction of the photographic lineup, show-up, and in-court identifications. Id. at 490, 744 S.E.2d at 173. The post-conviction relief court found that defense counsel was deficient for failing to contemporaneously object because counsel's mistake foreclosed review of the issue on appeal but that the petitioner was not prejudiced by the deficiency because the trial court admitted the identifications after conducting a thorough Neil v. Biggers hearing. In affirming the post-conviction relief court, this Court noted that "the subsequent show-up may be characterized as merely confirmatory and therefore reliable, despite the suggestive procedure." Id. at 494, 744 S.E.2d at 175.

In the present case, similar to Gibbs, the trial court conducted an extensive and thorough Neil v. Biggers hearing to determine if Bourgeois' in-court identification of Petitioner was admissible. After hearing the testimony, the trial court ruled that Bourgeois' identification of Petitioner was reliable, not unduly suggestive, and therefore, admissible. The trial court's ruling was supported by the record and would not have been reversed on appeal. Furthermore, any alleged error in the admission of Bourgeois' in-court identification of Petitioner was harmless in light of the overwhelming evidence of guilt—including Rivers' properly admitted identification of Petitioner and his co-defendant—and therefore would have been deemed harmless during appellate review. See State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) ("We note that, under certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable."); State v. Singleton, 395 S.C. 6,14-15, 716 S.E.2d 332, 336 (finding harmless error in the admission of identification testimony

where two co-conspirators testified against Singleton and identified him as a participant in the robbery).

Additionally, the post-conviction relief court's finding that Petitioner was unable to show any resulting prejudice from trial counsel's failure to contemporaneously object to Bourgeois' identification is supported by ample evidence overwhelmingly showing Petitioner's guilt. See Spears, 393 S.C. 466, 486, 713 S.E.2d 324, 334 (Ct. App. 2011) ("We affirm the trial court's denial of Spears's first mistrial motion as the testimony was harmless in light of the overwhelming evidence of guilt presented at trial."). In its opinion affirming his convictions, the Court of Appeals discussing the overwhelming evidence presented implicating Petitioner's guilt, including Rivers' testimony that she was one hundred percent certain that Petitioner was the first gunman to enter the Wagon Wheel and Petitioner's confession to Adams shortly after the robbery. There is no reasonable likelihood that the result of the proceeding would have been different—that Petitioner would have been acquitted or that his conviction would have been reversed on appeal—absent trial counsel's failure to contemporaneously object to Bourgeois' identification.

Furthermore, Petitioner's argument that Bourgeois' identification of Petitioner was "severely tainted" because he not give law enforcement a detailed description of Petitioner is a mischaracterization of the record. Bourgeois repeatedly and consistently testified that he described Petitioner in detail to law enforcement and that he would be able to identify him. (App. 436, 442, 444, 626). He specifically identified Petitioner as wearing a gray hoodie, faded blue jeans, and a dark hat that was pulled down to his eyebrows. (App. 429-30, 598-99). He described Petitioner as being between five-ten and five-eleven and between 150 and 160 pounds. (App. 430). He further described Petitioner as having acne all over his face, braids, and a scruffy

looking beard and mustache. (App. 430, 611-12). Bourgeois was never shown a photo lineup by law enforcement, and therefore, his first opportunity to observe Petitioner after the robbery was at the magistrate's office while awaiting a hearing that he was unsure if Petitioner would be attending. Bourgeois was "one hundred percent" certain that the man he identified was the first suspect who entered the store. There is no substantial likelihood that Bourgeois' identification was incorrect, particularly in light of the accuracy of his description to law enforcement, the time he observed

Based on the foregoing, the post-conviction relief court properly determined that Petitioner failed carry his burden of proof, as he did not establish the requisite deficiency or counsel or prejudice entitling him to relief. These findings are supported by ample evidence of probative value and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

II. Is there evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective for failing to object to alleged misattributions of identification testimony during the co-defendant's closing argument, where the argument in question was not improper and there is there is no reasonable likelihood that but for trial counsel's alleged error the result of the proceeding would have been different?

Petitioner avers that trial counsel should have objected to comments made by Bantan's counsel during her closing argument that she did not think the State's witnesses were untruthful. See App. 982 line 6-7 ("I don't think Mr. Bourgeois would tell an untruth to y'all."); lines 18-20 ("All I'm saying is I don't think anybody's been untruthful in this proceeding, but there was so much happening."). Petitioner asserts that these comments amount to Bantan's counsel vouching for the credibility of the State's witnesses and thereby prejudiced Petitioner. Petitioner argues that the post-conviction relief erred in refusing to grant Petitioner relief, as the comments were objectionable and counsel's decision to stay silent prejudiced him. However, this argument is without merit, as the post-conviction relief court properly determined that the comments in question were not objectionable and that Petitioner could not establish any resulting prejudice from these allegedly improper comments—particularly in light of the overwhelming evidence establishing Petitioner's guilt. There is ample evidence in the record to support the post-conviction relief court's findings.

During her closing argument, Bantan's counsel stressed that Bantan was not a participant in the Wagon Wheel robbery and that any evidence linking Petitioner to the trial should not automatically be used by the jury to convict Bantan merely because he and Petitioner were acquaintances. Counsel iterated that Petitioner's co-defendant was "not attached to [Petitioner's] coattails. If you find credible evidence against [Petitioner], hold it against [Petitioner] but don't

use evidence just because you think [Petitioner] is guilty. That does not necessarily mean that Mr. Bantan is guilty.” (App. 970). Bantan’s counsel further stated that she:

Had no doubt that [the] witnesses have tried to the best of their ability to tell y’all what happened and to try to do it with as much clarity as they could.

But the fact is they were taken by surprise; they weren’t expecting this to happen that morning. By their own testimony, everything was happening fast. There’s two robbers jumping around asking questions about a safe, asking questions about a gun, asking questions about a video.

(App. p. 970-71). Regarding Bourgeois’ testimony, Bantan’s counsel stated:

I submit to you in between the day of the robbery and the day he went to that bond hearing, there had been a picture in the paper, front page of the paper listing Mr. Bantan as a suspect and clearly showing his picture. I don’t think Mr. Bourgeois would tell an untruth to y’all. But I submit that that may have influenced the way he recognized Mr. Bantan at the bond hearing.

In addition to that, he, he was there because he had been notified that there was going to be a court proceeding. He knew that Mr. Bantan was going to be there. Did he really recognize him independently from his own memory, or was he influenced by the things that he read?

(App. 982). Regarding witnesses’ testimony, Bantan’s counsel further stated:

All I’m saying is I don’t think anybody’s been untruthful in this proceeding, but there was so much happening. There was so much going on. It is hard to get everything right, but it’s important to get things like a description and the things that are going to matter right.

(App. 982).

When viewing her closing argument as a whole, it is clear that counsel for Bantan was urging the jury to consider all evidence presented by the State, consider the circumstances and surroundings of each witness that shaped his or her testimony or ability to accurately perceive

events, and not to automatically use any evidence tending to establish Petitioner's guilt against Bantan. The closing argument given by Bantan's counsel was proper and did unduly harm Petitioner's case. Furthermore, Petitioner's counsel gave his closing argument *after* Bantan's counsel, affording him an opportunity to respond to any argument made by Bantan's counsel that may have been inconsistent with Petitioner's case theory or defense.

When questioned as to why he did not object to the closing argument of Bantan's counsel, trial counsel responded that he did not feel any portion of it was objectionable. Furthermore, he testified that as a matter of trial strategy, he avoids objecting during closing arguments unless the comment is particularly egregious because he does not want to highlight the objectionable comment to the jury or lose credibility with the jury. This is a reasonable trial strategy, as properly noted by the post-conviction relief court. Lounds, 380 S.C. at 462, 670 S.E.2d at 650 (“[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an ‘objective standard of reasonableness.’”).

Additionally, the post-conviction relief court properly concluded that Petitioner could not establish the requisite prejudice for relief, as there was no likelihood that he would have been acquitted absent trial counsel's failure to object. As discussed by the post-conviction relief court and the Court of Appeals, there was overwhelming evidence of Petitioner's guilt. Furthermore, Petitioner's argument that he was prejudiced by Bantan's closing argument because “Rivers . . . identified Petitioner as one of the robbers during trial” is completely illogical when considering that Rivers also identified Bantan as the other suspect and positively identified him from a photo lineup. There was more than ample evidence in the record overwhelming establishing

Petitioner's guilt absent these two comments during Bantan's closing, and therefore, there is no reasonable likelihood that Petitioner would have been acquitted absent this alleged deficiency.

Based on the foregoing, the post-conviction relief court properly determined that Petitioner failed carry his burden of proof, as he did not establish the requisite deficiency or counsel or prejudice entitling him to relief. These findings are supported by ample evidence of probative value and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

III. Is there evidence of probative value to support the post-conviction relief court's finding that appellate counsel was not ineffective for failing to cite to any legal authority in support of the argument that the trial judge erred by refusing to declare a mistrial based on extraneous comments overheard by a juror on an unrelated case, where there is no reasonable likelihood that Petitioner would have been successful on appeal and there was overwhelming evidence of Petitioner's guilt?

Petitioner alleges that appellate counsel was ineffective for failing to cite any legal authority in support of the argument that the trial court erred in refusing to grant a mistrial after it was revealed that a juror had heard extraneous comments about Petitioner's possible involvement in another robbery. Petitioner contends that trial counsel properly moved for a mistrial, thereby preserving the issue for appellate review, but that that appellate counsel abandoned the issue by failing to cite to any legal authority to support the argument. See Spears, 393 S.C. at 486, 713 S.E.2d at 334 ("Spears argues the trial court erred in denying his second mistrial motion based on extraneous information published to the jury concerning an unrelated bank robbery. However, Spears's appellate brief fails to cite any legal authority in support of this argument. Therefore, this argument has been abandoned on appeal.") Petitioner asserts that because the Court of Appeals deemed the argument abandoned, he was prejudiced by appellate counsel's failure because "[t]here is a strong possibility that the Court would have agreed with appellate counsel's contention, reversed Petitioner's conviction and sentence, and remanded the case for a new trial." However, this argument is unpersuasive, as there is no reasonable likelihood that Petitioner would have prevailed on his appeal. The post-conviction relief court properly denied relief as to this issue.

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion." State v. Kelly, 372 S.C. 167, 170, 641 S.E.2d 468, 470 (Ct.App.2007) (citation and quotation marks

omitted). “A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct.App.2005) (citation and quotation marks omitted).

3132 “The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.” State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct.App.2009) (citation and quotation marks omitted). “An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless ... it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced.” State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996). “Error is harmless when it could not reasonably have affected the result of the trial.” State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

In her brief, appellate counsel raised two issues involving the trial court’s failure to grant a mistrial—first, when Officer Golden improperly introduced testimony concerning .40 caliber bullets, drugs, and a shotgun recovered from the trailer in Orangeburg, and second, when the jury was allegedly improperly influenced by extraneous information regarding another robbery involving Petitioner and Bantan. The Court of Appeals deemed that the second issue regarding the possible improper jury influence was abandoned, but reached a decision on the merits of the first mistrial issue. See Spears, 393 S.C. at 484-86, 713 S.E.2d at 333-34. The Court concluded that any error stemming from the trial court’s denial of the mistrial motion was “harmless in light of the overwhelming evidence of guilt presented at trial.” Id. The Court elaborated, “[s]pecifically, Rivers and Bourgeois testified at trial that they were both one hundred percent certain that Spears was the first gunman who entered the Wagon Wheel. In addition, the State

presented evidence that Spears confessed to committing the robbery over the phone to Adams.”

Id.

Based on the Court of Appeals ruling, it is highly unlikely—not a “strong possibility” as Petitioner contends—that the Court would have reversed the trial court on this second mistrial motion. See Reeves, 301 S.C. at 194, 391 S.E.2d at 243 (“Error is harmless when it could not reasonably have affected the result of the trial.”). There was overwhelming evidence establishing that Petitioner was the first suspect who entered the Wagon Wheel and violently robbed Bourgeois and the other employees, including two infant children. There is no reasonable likelihood that the Court of Appeals would have reversed and remanded for a new trial in light of this overwhelming evidence of guilt. The post-conviction relief court properly denied relief in light of this overwhelming evidence of guilt. There is evidence to support this finding and therefore, this Court should affirm the lower court. See Moore v. State, 399 S.C. at 646, 732 S.E.2d at 873 (finding the reviewing court will affirm if there is any evidence to support the post-conviction relief court’s findings).

CONCLUSION

For the foregoing reasons, this Court should deny this Petition. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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October 22, 2015

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CALHOUN COUNTY
Court of Common Pleas
Maité Murphy, Circuit Court Judge

Appellate Case No. 2014-002096

PHILLIP L. SPEARS, JR., SCDC No. 297965,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

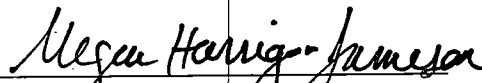
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tiffany L. Butler, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 22nd day of October, 2015.


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RECEIVED

OCT 22 2015

S.C. Supreme Court

Petitioner,