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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2014-002690
Lower Court Case No. 2012-CP-40-3816

Christopher Commander, #318173,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTIONS PRESENTED

I. Was trial counsel ineffective in failing to object when witness John Presley introduced evidence of petitioner's prior domestic violence against the victim?

II. Was trial counsel ineffective in failing to object when witness John Presley offered testimony as to his opinion regarding the truth of petitioner's statements describing the manner of the victim's death?

III. Was trial counsel ineffective in failing to sufficiently challenge the forensic pathologist's finding of homicide as a manner of death?

IV. Was trial counsel ineffective in failing to effectively communicate with petitioner regarding the decision not to present the evidence that petitioner's DNA was absent from the scene of the crime during closing arguments?

V. Was trial counsel ineffective in failing to request a mistrial when the solicitor advised the jurors that they could consider events occurring after the victim's death in determining whether malice was present to support a charge of murder?

VI. Was trial counsel ineffective in failing to object to the court's instruction that "inferred malice may also rise where a deed is done with a deadly weapon?"

VII. Was petitioner prejudiced by trial counsel's cumulative errors?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was true bill indicted at the April 2005 term of the Richland County Grand Jury for Murder (2005-GS-40-3186). He was represented by Doug Strickler, Esquire, (hereinafter "Counsel") and Lauren Mobley, Esquire, on the charge(s). Petitioner proceeded to jury trial before the Honorable James W. Johnson, Jr., on October 10, 2006. After a six day trial, Petitioner was found guilty as indicted and sentenced to life imprisonment without the possibility of parole.

A timely Notice of Appeal was filed and an appeal perfected on Petitioner's behalf by LaNelle DuRant, Esquire, of the South Carolina Commission on Indigent Defense, Appellate Defense Division. After the submission of briefs, the matter proceeded to oral argument on March 18, 2009. By order on or about June 11, 2009, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Commander, Op. No. 4560 (S.C. Ct. App. filed June 11, 2009).

A Petition for Writ of Certiorari was then filed in the South Carolina Supreme Court on Petitioner's behalf. After the submission of briefs, the matter proceeded to oral argument on June 21, 2011. The Supreme Court affirmed the convictions and sentences as modified in an order filed October 21, 2011. State v. Commander, Op. No. 27062 (S.C. filed October 31, 2011). The Remittitur was issued November 17, 2011.

Petitioner then filed an application for post-conviction relief (PCR) on June 1, 2012. Amendments were filed on July 2, 2014, and August 20, 2014. Respondent made its Return on or about August 28, 2013. Petitioner was represented by Kristy G. Goldberg, Esquire. The Honorable Robert E. Hood issued an Order of Dismissal that was filed December 5, 2014.

Petitioner filed a notice of appeal and a Johnson brief was submitted to this Court. By order dated April 30, 2015. This Court denied Counsel Pachak's motion to be relieved as counsel. This Court then ordered the parties to address all seven (7) issues submitted by Petitioner in his *pro se* response to the Johnson petition. An Amended Petition for Writ of Certiorari was filed on October 1, 2015. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. Certiorari is not warranted where Counsel did not object to a brief reference to Petitioner's prior arrest for domestic violence because there is overwhelming evidence of Petitioner's guilt.

First, Petitioner argues the PCR Court erred in failing to find Counsel ineffective when witness John Presley briefly testified that Petitioner told him he had been arrested one time for domestic violence after hitting the victim. Respondent submits Counsel did not wish to emphasize the statement. Further, Counsel thoroughly impeached Presley by getting him to admit several times that he had lied to commit a number of crimes.

How The Issue Was Raised

John Presley testified to statements made by Petitioner after being incarcerated together at the Alvin S. Glenn Detention Center. Presley was acting as a jailhouse lawyer for Petitioner. (App. p. 597-607, lines 23-4). Presley testified that a conversation with Petitioner included a discussion of potential sentences for manslaughter. (App. p. 607, lines 15-16). The State asked Presley if Petitioner shared any other history between Petitioner and the victim. (App. p. 607, lines 21-25). Presley replied Petitioner and the victim had fights and that he was arrested for domestic violence when he hit her but was released when the victim dropped the charges. (App. p. 608, 2-7). The allegation of domestic violence was not addressed any further by the State or the Petitioner.

Analysis

The PCR Court's determination that a brief mention of a possible domestic violence incident had little, if any, effect on the jury's decision is supported by the evidence because there exists overwhelming evidence of Petitioner's guilt. As a rule, evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged is inadmissible. State

v. Mathis, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct. App. 2004). While the Court did find Counsel was deficient for failing to object to Presley's introduction of the possible domestic violence charge, there was no prejudicial effect. Petitioner was unable to prove prejudice because there is overwhelming evidence of his guilt. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Smith v. State, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010). "Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

After the victim was found dead in her home, Petitioner was found in New Orleans, Louisiana, after traveling through three states and using one of the victim's credit cards to secure a hotel room for several nights in each state. (App. p. 652). Petitioner was arrested at a hotel by the New Orleans Police Department. At the time of his arrest, Petitioner was in possession of the victim's vehicle, victim's birth certificate, ID card of victim's ex-husband, ultrasound photo, victim's checkbook, victim's eight credit cards, and victim's driver's license. (App. p. 669-671; 703-4). Police also found the keys to the victim's vehicle in Petitioner's hotel room. (App. p. 676). Detective Dejean testified that he inspected items found in the victim's vehicle, which included a purse containing a medical appointment card for Midlands OB-GYN, checks, medical slip for Pastoral Counseling Services with the victim's name as a client, and a receipt for a Cracker Barrel in Columbia, SC, for November 29, 2004, at 9:55 am. (App. p. 736-8).

At trial, Captain Laviolette testified that when the police entered the hotel room, Petitioner held a gun to his head and made the statement, "Get out of the room; I'm going to kill myself like I killed Vonnie." (App. p. 656). Sgt. Pari testified that he saw Petitioner hold a gun to

his head and state, "Get out, I'm going to kill myself like I killed Vonnie." (App. p. 699). Pari also testified to three room service receipts found in the hotel room, each signed with the name of Gervonya Goodwin. (App. p. 705-6). Sgt. Crayton testified that he assisted in locating the victim's vehicle in the hotel parking garage (App. p. 719). Crayton also testified that he saw Petitioner holding a gun towards his head and heard Petitioner say, "Get out, I'm going to kill myself like I killed Vonnie." (App. p. 721).

Officer Buzali testified that he assisted in the arrest of Petitioner and transport of Petitioner to the police station. Buzali testified that while he was transporting Petitioner, Petitioner stated spontaneously, "I just did what I had to do." (App. p. 754).

Following the jury instructions, the jury took less than 45 minutes to return with a verdict of guilty on the charge of murder. Exhibits and verdict form was sent to jury at 3:24 pm and the jury returned to open court with their verdict at 4:10 pm. (App. p. 916).

The South Carolina Supreme Court, referencing disputed testimony of Dr. Nichols during the trial, found that the admission of the testimony was harmless in light of the overwhelming evidence of Commander's guilt. State v. Commander, 384 S.C. 66, 75, 681 S.E.2d 31, 35-36 (Ct. App. 2009) aff'd as modified, 396 S.C. 254, 721 S.E.2d 413 (2011) (citing State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (holding that whether error is harmless depends on the facts of each case, including the importance of challenged testimony in prosecution's case, whether the testimony was cumulative, presence or absence of evidence corroborating or contradicting testimony on material points, extent of cross-examination otherwise permitted, and overall strength of prosecution's case)).

Therefore, the Court's conclusion that whatever inferences of Petitioner's character the jury might have drawn from hearing a possible domestic violence incident had minimal effect on the jury's verdict and would not have reasonably affected the outcome of the trial.

II. Certiorari is not warranted where witness John Presley gave his opinion on whether he believed Petitioner's version of events because Presley was thoroughly impeached by his prior convictions.

Next, Petitioner argues the PCR Court erred in failing to find Counsel ineffective in failing to object when Presley stated that he did not believe Petitioner's version of events. Respondent submits there is probative evidence to support the court's finding that these statements did not reasonable affect the outcome of the trial.

How The Issue Was Raised

John Presley testified at trial that Petitioner told him the cause of the victim's death was suffocation. (App. p. 605, line 23). Petitioner told Presley there was an argument, the victim hit Petitioner with a stick, it made him angry, so he fell on her and suffocated her. (App. p. 603, lines 22-24). Presley testified he did not believe that the victim actually hit Petitioner with a stick. (App. p. 604-6). The State asked Presley to describe Petitioner's demeanor as he described the victim's cause of death. (App. p. 605-606, lines 24; 3-14). Presley answered he believed Petitioner was truthful when Petitioner told him that he suffocated the victim. (App. p. 606, lines 3-14).

Analysis

The PCR Court correctly found that the failure to object, in light of the overwhelming circumstantial evidence, did not affect the outcome of this trial. "[A] witness permitted to give an opinion under Rule 608(a) must restrict the opinion to 'character for truthfulness,' and may not testify whether the witness believes a specific statement or account given by another witness." State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 141 (Ct. App. 2012), reh'g denied (May

21, 2012). While it was determined Counsel should have objected to Presley's truthfulness, the Court found there was no prejudice from the failure to object because the jury was given the option of believing any or all of Presley's testimony. Notably, Presley's credibility was impeached via cross-examination by Counsel.. (App. p. 615-18; 620-21). Also, as noted above, Petitioner can show no prejudice as there is clear overwhelming evidence of Petitioner's guilt.

III. Certiorari is not warranted where Counsel vigorously cross examined forensic pathologist, Dr. Clay Nichols, and thoroughly challenged the evidence he presented.

Petitioner argues the PCR Court erred in failing to grant relief to Petitioner where Counsel failed to sufficiently challenge the forensic pathologist's manner of death finding. Respondent submits Counsel consulted with a forensic toxicologist and determined not to call the expert because her conclusions were not favorable to Petitioner's case. Further, Counsel vigorously cross examined the State's forensic pathologist, Dr. Clay Nichols and thoroughly challenged the evidence he presented.

How The Issue Was Raised

Dr. Nichols, a board certified forensic and anatomical pathologist and Chief Medical Examiner for Richland County, was called to testify to the victim's cause of death. (T. p. 531). Dr. Nichols explained his determination of homicide based on the combination of the autopsy, the scene he examined, and the facts surrounding the victim's disappearance. (App. p. 539-540). Counsel objected to Dr. Nichols expert opinion that the death was a homicide. (App. p. 540, lines 3-4). The Court overruled the objection and instructed the Solicitor to question Dr. Nichols on his definition of homicide. (App. p. 557-558). Counsel cross-examined Dr. Nichols on time of death, cause of death, and how he received information regarding the circumstances. (App. p. 562-577).

Analysis

The Court correctly found Counsel was not deficient in failing to sufficiently challenge the forensic pathologist's finding of homicide as manner of death. The standard as to whether counsel is ineffective for failing to retain and present an expert at trial is that counsel is *not* ineffective when he vigorously cross-examines the State's witnesses and attacks the accuracy of the evidence. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991)(holding trial counsel's failure to present an expert witness was not unreasonable under prevailing professional norms where counsel vigorously cross-examined and attacked the accuracy of the evidence). See also Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (holding the same). The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995).

The PCR Court's ruling that Counsel was not ineffective is supported by the fact that Counsel did consult an expert and made the strategic decision not to call her to testify because her conclusions were adverse to Petitioner's defense. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choices of tactics will not be deemed ineffective assistance.). This decision was reasonable. Counsel cannot be required to seek an expert until one is found that will provide favorable testimony. See Harrington v. Richter, 562 U.S. 86, 109 (2011)("Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert

an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation."

In addition, Counsel challenged Dr. Nichols's finding through cross examination where he attempted to question his medical conclusion that the victim died as a result of a homicide. Counsel objected when Dr. Nichols gave his opinion and was able to elicit testimony that he was not testifying as to Petitioner's intent, just that he believed the victim was murdered. (App. p. 576). Also, in closing arguments, Counsel highlighted the fact that Dr. Nichols said he was not claiming Petitioner intended to kill the victim, but only asserting that the victim's death was a result of someone else's action. (App. p. 873). Further, as noted previously, Petitioner can show no prejudice due to the overwhelming evidence against Petitioner.

IV. Certiorari is not warranted where Counsel made the strategic decision not to introduce a DNA report that showed Petitioner's DNA was not found in a pair of gloves found at the victim's house because he did not wish to lose last closing argument.

Petitioner then argues the PCR Court erred in failing to grant relief when Counsel strategically decided not to introduce a DNA report which showed Petitioner was not a match to a pair of gloves found in the victim's house. Respondent submits Counsel articulated a clear strategy in not losing last argument.

How The Issue Was Raised

Petitioner testified he consented to his DNA being taken. (App. p. 978, line 22). Petitioner testified that he was told by Counsel that the DNA report was exculpatory, but Petitioner did not receive a copy of the results until after trial. (App. p. 980, lines 1-9). Petitioner testified that he spoke with Counsel regarding the DNA and the fact that the DNA found inside the gloves from the victim's home did not match Petitioner. (App. p. 980, lines 14-16). However, Petitioner testified that Counsel informed him that if Counsel introduced the report,

they would lose last argument and Counsel thought that it was in Petitioner's best interest to have last argument. (App. p. 981-982). Petitioner argued Counsel was ineffective in failing to introduce the report at trial. (App. p. 982, lines 6-9).

Analysis

The PCR Court did not err in finding that Counsel articulated a valid trial strategy in deciding not to introduce the DNA report. The PCR Court relied on Counsel's testimony that he did not believe entering the DNA report outweighed his concerns for losing last argument. See Whitehead, 308 S.C. 119. The strategy was particularly reasonable in that Counsel was able to argue in closing that the State failed to present any DNA findings that implicated Petitioner in the murder. (App. p. 806; p. 879-880). Counsel also noted in closing that if Petitioner were a match to any DNA tests, that the State surely would have introduced that evidence. (App. p. 880). The PCR Court did not erred in finding that the DNA report would not have changed the result of the trial.

V. Certiorari is not warranted where the prosecuting solicitor told the jury in closing arguments that they could consider events that took place after the incident when determining malice because the trial court's instructions cured any improper comments by the solicitor.

Next, Petitioner argues the PCR Court erred in failing to grant relief when Counsel failed to move for a mistrial when the prosecuting solicitor stated, during closing, that the jury could consider events occurring after the death to infer the requisite level of malice. Respondent submits the PCR Court did not err in finding that the comment was cured by the trial court's proper jury instructions.

How The Issue Was Raised

Counsel objected to the Solicitor's statement regarding malice and the use of events following the act to infer malice. (App. p. 842-843). After a bench conference, the objection was

overruled and the Solicitor was allowed to inform the jury that statements and actions after the events infer malice existed at the time of the event. (App. p. 843). The trial judge instructed the jury that "malice must exist in the mind of the Defendant just before and at the time that the act is committed. Therefore, there must be a combination of the previous evil intent and the act." (App. p. 903-04).

Analysis

The PCR Court did not erred in finding Petitioner failed to meet his burden of proof in proving Counsel was ineffective in failing to move for a mistrial. Counsel acknowledged he did not request mistrial based on the solicitor's closing argument because he believed any incorrect comment would be cured by jury instructions. "A solicitor's closing argument . . . should stay within the record and reasonable inferences to it." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). First, this is reasonable trial strategy. Second, the trial court's instructions on the issue cured any incorrect statement of law made by the prosecuting solicitor.

VI. Certiorari is not warranted where the trial court gave a proper instruction that the jury could infer malice from the use of a deadly weapon.

Petitioner argues the PCR Court erred in not finding Counsel was ineffective in failing to object to the trial court's specific instruction that "malice may also arise where a deed is done with a deadly weapon." (App. p. 905). Respondent submits there was no legal basis on which Counsel could have presented a meritorious objection.

The PCR Court correctly denied and dismissed this claim when it found Petitioner failed to meet his burden of proof. Petitioner argued that because there was no evidence of a deadly weapon the Court's jury instruction on malice was improper based on circumstances after the fact. [App. p. 810-811, lines 23-25; 1-5) The standard of review for appellate purposes is to consider jury instructions as a whole, and "if as a whole they are free from error, any isolated

portions which may be misleading do not constitute reversible error." State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). Further, "[a]n erroneous malice instruction is harmless if, based on all of the evidence presented to the jury, it did not contribute to the verdict." Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002).

Moreover, the Court found Petitioner's lack of a deadly weapon did not result in confusion or misleading of the jury and the South Carolina Supreme Court has held that the South Carolina doctrine of implied malice does not shift the burden of persuasion to the defendant. State v. Crocker, 272 S.C. 344, 346, 251 S.E.2d 764, 766 (1979). Also the instruction was a correct statement of law.

VII. South Carolina has not recognized a cumulative error analysis

Finally, Petitioner argues the PCR Court erred in not adopting a cumulative error analysis under which he should be granted relief. Respondent submits that the doctrine of cumulative error contradicts the use of the Strickland two prong standard, requiring both deficiency and prejudice for a finding of ineffective assistance of counsel. The Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively" and does not recognize a cumulative error analysis. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998). The PCR Court did not err in failing to conduct a cumulative error analysis. Respondent submits that the PCR Court applied the applicable law and was correct in not adopting a new standard of review on collateral challenges.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 4, 2016

STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2015-002690

Christopher Commander, #318173,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

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

Robert M. Pachak, Esquire
S.C. Commission of Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 4th day of February, 2016

JENNA C. BROWN
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

February 4, 2016

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

Re: Christopher Commander, #318173 v. The State of South Carolina
Appellate Case No. 2015-002690
Lower Court Case No. 2012-CP-40-03816

Dear Mr. Shearouse:

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

Sincerely,

For J. Clayton Mitchell
Assistant Attorney General
S.C. Bar No. 101443

JCM/jcb
Enclosures

cc: Robert M. Pachak, Esquire