

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

STEPHEN SMALLS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212553

BRIEF OF PETITIONER

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object and ask for a mistrial when the prosecutor, through questioning of an investigator, told the jury that Petitioner burglarized somebody else's house and stole the gun alleged to have been used in the armed robbery for which Petitioner was being tried?

2. Did the PCR judge err in refusing to find trial counsel ineffective in failing to object when the State, in opening statements, told the jury that police saw Petitioner leaving the scene of the armed robbery when there was no evidence that any officer ever saw Petitioner at the scene of the robbery?

3. Did the PCR judge err in refusing to find trial counsel ineffective for not preserving for appellate review the trial judge's refusal to allow cross examination of a State's witness about a carjacking charge that was dismissed by the State on the same day the State called Petitioner's case for trial?

STATEMENT

In July of 2000, the Richland County Grand Jury indicted Petitioner Smalls for armed robbery, indictment #2000-GS-40-52623. On May 1, 2002, Smalls proceeded to jury trial before the Honorable Henry Floyd. Attorneys Sheila Dukes-Mims and LaNelle Durant represented Smalls at trial. Attorneys David Pascoe and Don Sorenson prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge Floyd sentenced Smalls to 25 years. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals dismissed the appeal. State v. Smalls, Op. No. 2004-UP-315 (S.C.Ct.App. filed May 13, 2004). The remittitur was issued on June 21, 2004.

On May 18, 2005, Smalls filed an application for post conviction relief. The State filed a return on January 10, 2006. On July 31, 2007, an evidentiary hearing was held before the Honorable James C. Williams, Jr. Attorney Tara Dawn Shurling represented Smalls at the PCR hearing. Attorney Robert L. Brown was present for the State. At the close of the hearing the State asked to hold the record open so that the testimony of Robert Hood, the assistant solicitor who was assigned to prosecute a carjacking case against Eugene Green, one of the witnesses called by the State in Petitioner's trial, could be taken at a later date after Mr. Hood reviewed his old prosecution file. (App. p. 530, line 19 – p. 531, lines 1-3). On May 19, 2008, Judge Williams signed an order requiring the Fifth Circuit Solicitor's office to provide Mr. Hood with the entire prosecution file for both Petitioner and Eugene Green. (App. pp. 537-538).

On April 25, 2011, Petitioner Smalls filed a motion for a *de novo* PCR hearing based on the fact that the solicitor's office claimed to not have a prosecution file for Eugene Green. (App. pp. 539-540). On October 18, 2011 a consent order was signed by the Honorable Alison Renee Lee, Chief Administrative Judge for the Fifth Judicial Circuit, Tara Dawn Shurling, attorney for

Petitioner Smalls and Brian T. Petrano, Assistant Attorney General for a hearing to receive additional testimony. (App. pp. 544-545). The order states:

Given the fact that the Solicitor's Office was unable to produce adequate records concerning what if any preferential treatment a witness was given in exchange for his cooperation, the applicant asserts the ends of justice would be best served by the court holding another hearing at which he will have the opportunity to be fully heard on the merits.

Since the Solicitor's office had no file concerning the witness in question, the applicant submits that he should be permitted to present testimony from individuals involved in the prosecution and defense of that witness in order to fairly resolve the question of whether he was denied access to impeachment evidence clearly discoverable pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). Counsel for Respondent has agreed that the record is incomplete, and that the Applicant is entitled to pursue the issue at hand.

(App. p. 544).

On January 13, 2012, a second evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. In a written order signed March 2, 2012, Judge Kinard denied relief and dismissed the application. On April 13, 2012, Petitioner Smalls filed a Rule 59(e) motion to alter or amend. On April 19, 2012, the State filed a return. On May 8, 2012, Judge Kinard denied the motion to alter or amend. A timely notice of intent to appeal was filed on July 10, 2012. A petition for writ of certiorari was filed on April 1, 2013. The State filed a return on June 14, 2013. On August 20, 2014, this Court granted the petition for writ of certiorari. this brief of petitioner follows.

ARGUMENTS

1. The PCR judge erred in refusing to find trial counsel ineffective for failing to object and ask for a mistrial when the prosecutor, through questioning of an investigator, told the jury that Petitioner burglarized somebody else's house and stole the gun alleged to have been used in the armed robbery for which Petitioner was being tried.

During the re-direct examination of Investigator Paul Mead with the City of Columbia

Police Department the following took place:

Q. Investigator Mead, first with regards to the shotgun, you were asked where it originally came from?

A. Yes, sir.

Q. To make it perfectly clear, State's Exhibit Eight wasn't stolen from the defendant's house in 1999?

A. No, it was not.

Q. He burglarized somebody else's house?

A. That's correct.

Q. So is there any reason why his fingerprint would be on this weapon –

A. None that I know of, sir.

Q. -- other than he robbed the Bojangles?

A. That's correct.

(App. p. 341, lines 1-13). Trial counsel failed to object and failed to move for a mistrial when the prosecutor told the jury that Petitioner burglarized somebody else's house and stole the gun later alleged to have been used in the robbery of the Bojangles.

At the PCR hearing when asked why she did not object and move for a mistrial, trial counsel stated, "I have no idea. That's a huge problem. I have no idea why that didn't happen." (App. p. 493, lines 16-24). The prosecutor did not move to admit evidence of a prior burglary by Petitioner.

Instead, he just blurted this information out in front of the jury. If he had moved to introduce evidence of a prior burglary, the judge would have denied the request.

Evidence of other crimes, wrongs, or acts is inadmissible 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.” Rule 404(b), SCRE. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct.App.2000). Other than the prosecutor’s unsubstantiated comment, there is no evidence in the record to indicate that Petitioner was involved in the burglary of a house and stealing of a gun that was later alleged to have been used in the Bojangles robbery. If the prosecutor’s point was to show that Petitioner’s fingerprint was on the gun because he used the gun in the robbery of the Bojangles, he could have simply asked the officer if the gun was registered to petitioner. The reference to the prior burglary was irrelevant and highly prejudicial.

In the order of dismissal the PCR judge wrote:

It is clear, considering the context of the direct and cross examination of that witness, that on re-direct the attempt was to explain that the weapon came from a burglary from someone other than the defendant’s house. The argument was to simply show that the weapon would only have the applicant’s fingerprint because he used it in the robbery – that it is not as though it was his lawfully owned weapon. There is no suggestion that the testimony was an attempt to prejudice the applicant and suggest that he should be convicted of the armed robbery because he had supposedly committed a burglary. An isolated sectioning of the cold record does suggest an implication that “he” was referring to the defendant and that he had committed an unrelated burglary; however, the flow of the examination of that witness makes it clear that the burglary being referred to was “unsolved.” *See full testimony of Investigator Mead.* Trial transcript, p. 301-346.

Considering the other overwhelming evidence in this case, i.e. victim identification, fingerprint, flight etc, there is no prejudice relating to this allegation. “The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the grounds of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

(App. pp. 543-544). The PCR judge erred. The prosecutor was clearly referring to Petitioner when he stated, “He burglarized somebody else’s house?” (App. p. 341, line 7) (emphasis added). The prosecutor’s statement to the jury that Petitioner burglarized somebody else’s house and stole the gun later alleged to have been used in the robbery of the Bojangles for which petitioner was on trial, when there was no evidence presented by the State linking Petitioner to a burglary, was improper and highly prejudicial. Counsel was ineffective in failing to object and then ask for a mistrial based on the improper comment.

The State’s evidence was not overwhelming. While one witness, Eugene Green, identified Petitioner from a six person photo line-up, another witness, Jim Lightner, could not be sure between two of the six photos. (App. p. 119, line 9 – p. 120, lines 1-7). Petitioner was not seen at the Bojangles, as incorrectly alleged by the State in opening statement, without objection.¹ The remaining evidence presented by the State was the fingerprint found on the gun that was recovered behind the Bojangles with a bag of money and Investigator Gray’s testimony that Petitioner fled when Investigator Gray pulled up in his car, opened his door with his handcuffs in hand and told Petitioner to stop. (App. p. 290, lines 1-10). This evidence does not amount to overwhelming evidence of guilt such that the prosecutor’s improper comments could somehow not result in prejudice. Petitioner was prejudiced by counsel’s failure to object and move for a mistrial based on the prosecutor’s improper comments.

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id.

Trial counsel admitted that the failure to object when the prosecutor told the jury that Petitioner burglarized somebody else's house and stole the gun later alleged to have been used in the robbery of the Bojangles was a "huge problem" and she did not know why she did object. (App. p. 493, lines 16-24). Counsel was deficient for failing to object and then failing to move for a mistrial. There is a reasonable probability that the outcome of the trial would have been different if counsel had objected and moved for mistrial. While the decision to grant a mistrial is within the sound discretion of the trial judge, the unsubstantiated statement by the prosecutor that Petitioner was involved in burglarizing a home and stealing a gun is so improper and prejudicial that there is a substantial likelihood that the trial judge would have granted a mistrial motion, if one had been made. At the least, trial counsel should have objected to the improper comment and asked the judge to give a curative instruction.

Respondent argued in the return to the petition for writ of certiorari that trial counsel, through the cross examination of Investigator Mead, opened the door to allowing additional evidence regarding petitioner's connection to and history with the gun. Petitioner submits that the questioning on cross examination about the gun did not open the door to allow the prosecutor to tell the jury that Petitioner burglarized somebody else's home and stole the gun used in the

¹ The failure to object to the incorrect opening statement is addressed in issue two.

Bojangles robbery. If, however, the Court finds that the prosecutor's questioning was proper, then trial counsel was ineffective for opening the door to allow the otherwise improper testimony.

2. The PCR judge erred in refusing to find trial counsel ineffective in failing to object when the State, in opening statements, told the jury that police saw Petitioner leaving the scene of the armed robbery when there was no evidence that any officer ever saw Petitioner at the scene of the robbery.

In opening statement the prosecution told the jury, "The Columbia Police Department responded. Mr. Smalls [Petitioner] ultimately took off out of the store with over \$1,900 in a plastic bag with the shotgun. **The police saw him as he was leaving the store.** He ended up getting away that night, but he ended up leaving some very important pieces of evidence. He left behind the shotgun, he also left behind the money, in his quest to get away." (App. p. 54, lines 18-25) (emphasis added).

During the PCR hearing trial counsel confirmed that the when the police arrived at the Bojangles, the perpetrator of the armed robbery was long gone. (App. p. 488, line 8 – p. 489, lines 1-5). Contrary to what the prosecutor said in opening statement, no officers ever saw Petitioner at the scene of the armed robbery of the Bojangles. When asked why she did not object to the opening statement trial counsel responded, "I don't even recall that, but I don't remember any officer seeing him, and if I didn't object, I should've at that point." (App. p. 489, lines 6-14). Later, trial counsel agreed that the prosecutor's statement that officers saw petitioner at the scene of the armed robbery was damaging. (App. p. 490, lines 13-23). When asked if she had a reason for not objecting, trial counsel testified, "No, it's obviously something I missed." (App. p. 490, line 24 – p. 491, line1).

In the order of dismissal the PCR judge, addressing the false comment made to the jury by the prosecutor in opening statement, wrote: “There is no merit to this claim, opening statements are not evidence, and the jury was told several times to base their verdict on the evidence only. (Trial transcript, p. 359, 387). There is no prejudice considering the overwhelming evidence in this case, i.e. the identification of the applicant, his fingerprint on the weapon, his flight, etc.” (App. pp. 584-585). The PCR judge erred.

The fact that opening statements are not evidence does not render an improper statement harmless. In Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002) the South Carolina Supreme Court found that trial counsel was deficient for failing to object to the State vouching for the credibility of a witness in opening statement. In Gilchrist the Court found prejudice although the judge instructed the jury that opening statements were not evidence. Id. at fn 1. The statement made by the prosecutor in the present case was unsubstantiated by the evidence and trial counsel was deficient in failing to object to the statement. The problem was made worse by the fact that trial counsel failed to capitalize on the State’s failure of proof in closing argument. Trial counsel confirmed that if she had been aware of the statement, she would have capitalized on the lack of proof in closing argument. (App. p. 506, line 10 – p. 507, lines 1-5).

The present case is distinguished from State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct.App. 2010). In Wiley the State, in opening statement, made reference to an outstanding warrant. Wiley objected and the judge sustained the objection and immediately instructed the jury that opening statements were not evidence. At the close of State’s opening, Wiley moved for a mistrial. The trial judge denied the motion for a mistrial. The Court of Appeals affirmed the trial judge’s denial of the mistrial motion. First, as there was no objection during the opening statement in the present case, the judge was not asked to give a curative instruction. Second, there is no indication

that the information about the outstanding warrant in Wiley was false. The statement made by the prosecutor in opening in the present case was simply not true.

Trial counsel admitted that she should have objected to the statement made by the prosecutor in opening that an officer saw Petitioner at the scene of the armed robbery. (App. p. 489, lines 6-14). Counsel was deficient for failing to object. There is a reasonable probability that the outcome of the trial would have been different if counsel had objected and a curative instruction immediately given. Counsel also could have capitalized on the lack of proof in her closing argument.

3. The PCR judge erred in refusing to find trial counsel ineffective for not preserving for appellate review the trial judge's refusal to allow cross examination of a State's witness about a carjacking charge that was dismissed by the State on the same day the State called Petitioner's case for trial.

Eugene Green was the only witness who positively identified Petitioner. Green was called as a witness by the State to testify against Petitioner. (App. pp. 61 – 101). Records from the Richland County Clerk of Court show that on May 1, 2002, the Fifth Circuit Solicitor's Office dismissed a carjacking charge that was pending against Eugene Green. (App. p. 587). Petitioner's case was called for trial on May 1, 2002, the same day the charges were dismissed against Green. (App. p. 1).

During pre-trial hearings trial counsel asked about the pending carjacking charge against Eugene Green. (App. p. 35, lines 11 – 15). The prosecutor advised that the charges had been dismissed. (App. p. 35, lines 16-21). No further inquiry was made by trial counsel about the

existence of any type of agreement between Green and the Fifth Circuit Solicitor's office in regard to dropping the charge in exchange for cooperation at Petitioner's trial.

During the PCR hearing trial counsel testified that she argued to the trial judge that she should be able to question Green about the dismissal of the carjacking charges because it went to bias. (App. p. 494, line 11 – p. 495, lines 1-24). Trial counsel testified that the trial judge would not allow the questioning. (App. p. 495, lines 11-24). The argument and ruling do not appear in the record. When asked why trial counsel did not place on the record the argument in regard to cross examination of Green about the dismissed carjacking charge, trial counsel testified that it was due to "inexperience, not knowing exactly what I should be doing at that point." (App. p. 498, lines 13 – 23). PCR counsel then asked trial counsel, "Had you known that the charge was dismissed the very day of this trial, would you have insisted that Judge Floyd examine Mr. Green on the record to determine whether or not he knew that the charge had already been dismissed at the time you testified?" (App. p. 499, lines 9-13). Trial counsel responded, "Absolutley. Absolutely. That's huge. We were already hanging our hat on Eugene Green, coming in hanging our hat on Eugene Green, so that information would've been vital. We were just completely deflated." (Tr. p. 499, lines 14-17).

In the order of dismissal the PCR judge wrote, "Accordingly, there is no merit whatsoever to the Applicant's claim that the victim's carjacking charge was not dismissed prior to his testimony at trial; the victim did not dispute the legitimacy of his testimony at the Applicant's trial." (App. p. 588). The PCR judge erred. Trial counsel was either ineffective in failing to question Green about the dismissed carjacking charge or ineffective in failing to preserve for appellate review the trial judge's refusal to allow her to question Green about the dismissed carjacking charge.

In State v. Hinson, 293 S.C. 406, 407-408, 361 S.E.2d 120, 120-121 (1987), the South

Carolina Supreme Court wrote:

Due process requires disclosure by the prosecution, upon motion of the defendant, of evidence which would be favorable to the accused and which is material to guilt or punishment. Brady v. Maryland, *supra*. Evidence which may be used to impeach a witness's credibility is favorable to an accused under Brady. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

“When the reliability of a given witness may well be determinative of guilt or innocence,” nondisclosure of a promise of immunity made to that witness is a violation of due process. Giglio v. United States, 92 S.Ct. at 154, citing Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). A new trial will be required when the nondisclosed evidence is material. Brady v. Maryland, *supra*. Evidence is material when there is a reasonable probability that the result of trial would have been different had the evidence been disclosed to the defense. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Eugene Green testified at the PCR hearing:

So they brought me back up here again the next day, and I talked to that man over there, Pascoe, back there in the back, and he was like if I – you know what I’m saying? They were going to subpoena me to come to court, so I didn’t come – you know, if I didn’t come, you know, to participate in the trial that my charge wasn’t going anywhere. I didn’t want anything to do with it.

(App. p. 555, line 20 – p. 556, lines 1-2).

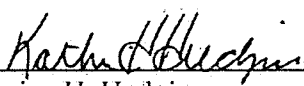
Trial counsel admitted that she did not preserve the issue of cross examining Green in regard to the carjacking charge that was dismissed on the day he testified against Petitioner because of inexperience and not knowing what she was doing. Trial counsel was deficient in failing to preserve the issue for appellate review. There is a reasonable probability that if

counsel had preserved the issue for appeal, the appellate court would have reversed the trial judge's decision to limit cross examination of Green.

CONCLUSION

Petitioner is entitled to relief on each of the three issues. Additionally, the cumulative effect of the three errors also establishes prejudice requiring a new trial. See Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002). Based on the above arguments, the decision of the PCR judge should be reversed, the convictions overturned and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of December, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

STEPHEN SMALLS,

PETITIONER,

v.

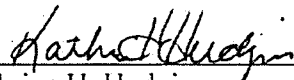
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212553

CERTIFICATE OF SERVICE

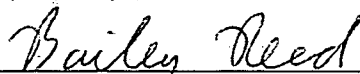
I certify that a true copy of the brief of petitioner, in this case has been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of December, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021



ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

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APR 22 2015

The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

SC Court of Appeals

Case No. 2005-CP-40-2393
Appellate Case No. 2012-21553

Stephen Smalls,.....Petitioner,

v.

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

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ISSUES ON APPEAL

- I. Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to object and ask for a mistrial when the Solicitor referred to the weapon used in the robbery as stolen, where Counsel on cross examination referenced the weapon being stolen.

- II. Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to object to Solicitor's comments in opening statement, where the Judge informed the Jury that opening statements were not evidence.

- III. Probative evidence supports the PCR courts finding that Counsel was not ineffective for failing place on the record an objection regarding trial judge's refusal to allow cross examination of a State's witness about a carjacking charge, where Solicitor informed both Counsel and Judge that the charge had been dismissed, records indicate the charge was dismissed, and Witness did not dispute his testimony at PCR hearing.

STATEMENT OF THE CASE

Petitioner was indicted at the July 2000 term of the Court of General Sessions for Richland County for armed robbery (2000-GS-40-52623). Petitioner was represented by Sheila Mims, Esquire and LaNelle Durant, Esquire. On May 2, 2002, Petitioner proceeded to trial after which he was found guilty of armed robbery. The Honorable Henry F. Floyd sentenced Petitioner to a period of twenty-five years imprisonment.

Petitioner filed a timely Notice of Appeal and an appeal was perfected. Petitioner's conviction and sentence were affirmed. State v. Smalls, Op. No. 2004-UP-315 (S.C. Ct. App. filed May 13, 2004). The remitter was issued on June 21, 2004.

Petitioner filed an application for PCR on May 18, 2005. Respondent made its Return on January 10, 2006. An evidentiary hearing was convened on July 31, 2007, before the Honorable James C. Williams. At the close of the hearing the record was left open to gather additional testimony. On January 13, 2012, a second evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. Tara Dawn Shurling, Esquire represented Petitioner. By Order dated March 2, 2012, Judge Kinard denied and dismissed the application with prejudice. On April 13, 2012, Petitioner filed a Rule 59(e) motion to alter or amend the order. On May 8, 2012, Judge Kinard denied the motion.

Subsequently, Petitioner filed a Petition for Writ of Certiorari on April 1, 2013. The State filed its return on June 14, 2013. The Court of Appeals granted certiorari on August 20, 2014. Petitioner filed for its Brief of Petitioner on December 18, 2014. The State's Brief of Respondent 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 PCR judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, 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). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner 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. Second, counsel's deficient performance must have prejudiced the Petitioner 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.

ARGUMENT

- I. **Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to object and ask for a mistrial when the Solicitor referred to the weapon used in the robbery as stolen, where Counsel on cross examination referenced the weapon being stolen.**

Petitioner argues the post-conviction relief (PCR) court erred in finding Counsel was not ineffective for failing to object and ask for a mistrial, when the Solicitor elicited further testimony regarding the weapon used in the armed robbery. Specifically, Petitioner asserts Solicitor told the jury Petitioner burglarized somebody else's house and stole the weapon. However, this argument is without merit, as the record provides ample evidence to support the PCR court's finding that Counsel was not ineffective in regards to this allegation.

At trial, Counsel cross-examined Paul Mead (Mead), Investigator with the Columbia Police Department, about the history of the weapon used in the armed robbery. The following took place during the cross-examination by Counsel of Mead:

Q. They were right there, okay. This gun that was found, did you later look into the gun? Did you kind of research the history of the gun?

A. Yes, ma'am

Q. Was the gun stolen? Had it been stolen?

A. It was.

Q. It was. Had it been registered to someone?

A. It was.

Q. Did you talk to the person the gun was registered to?

A. I did.

Q. How long before had that gun been stolen?

A. It was taken in a burglary of the individual's residence. The gun was reported stolen on August 28, 1999

....

Q. Do you know if that case was ever solved?

A. To my knowledge, no.

(App. p. 327 line 5—p. 328 line 1). On re-direct examination, Solicitor asked the following:

Q. Investigator Mead, first with regards to the shotgun, you were asked where it originally came from?

A. Yes sir.

Q. To make it perfectly clear, State's Exhibit Eight wasn't stolen from the defendant's house in 1999?

A. No, it was not.

Q. He burglarized somebody else's house?

A. That's correct.

Q. So is there any reason why his fingerprint would be on this weapon –

A. None that I know of, sir.

Q. -- other than he robbed the Bojangles?

A. That's correct.

(App p. 341 lines 4-13).

In the instant case, Counsel opened the door, through the cross-examination of Mead, to any additional evidence regarding Petitioner's connection to and history of the weapon. When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003). An appellant cannot complain of

prejudice from evidence he has brought before the jury. State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991); State v. Dunlap, 353 S.C. 539, 579 S.E.2d. 318 (2003) (finding defendant opened the door to evidence rebutting contention that defendant was merely an addict, and thus, evidence of defendant's prior drug record was admissible in drug prosecution). Here, Solicitor's re-direct examination of Mead regarding the defendant's connection to and history of the weapon was proper because of Counsel's prior cross examination. As evidenced by the record, Solicitor was attempting to elicit further testimony in order to help clarify the history of the weapon.

Additionally, the PCR court found in its Order,

It is clear, considering the context of the direct and cross examination of the witness, that on redirect the attempt was to explain that the weapon came from a burglary from someone other than the defendant's house. The argument was to simply show that the weapon would only have the [Petitioner's] fingerprint because he used it in the robbery – that it is not as though it was his lawfully owned weapon. There is no suggestion that the testimony was an attempt to prejudice the [Petitioner] and suggest that he should be convicted of the armed robbery because he had also supposedly committed a burglary.

(App. p. 543). Petitioner now argues Counsel was ineffective for failing to object and move for a mistrial. However, as evidenced by the record, Solicitor's re-direct examination of Mead was proper. Further, Petitioner cannot show any prejudice as a result of Counsel's failure to object to Solicitor's re-direct examination, as Counsel opened the door to such evidence. Id.

In addition, Petitioner was not prejudiced by any alleged deficient representation because the record provides overwhelming evidence of Petitioner's guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). As evidenced by the record, Petitioner was identified by

Eugene Green (Victim) in a photo line-up conducted by Investigator Gray. (App. p. 78 lines 15-24). Victim further identified Petitioner as the person who “held that shotgun...and robbed the Bojangles.” (App. p. 82 lines 3-7). Petitioner was further identified in the court room by Victim. (App. p. 80 lines 5-17). Jim Lightner (Lightner), the manager for Bojangles the night of the robbery, narrowed the six photo-line up to Petitioner’s photograph and one other. However, Lightner was unable to be certain which photo more accurately represented the person who robbed the store that night. (App. p. 319 lines 6-16). Further, when approached by police, Petitioner fled, dropping a two year old child from his arms. (App. p. 289 lines 12-22). Additionally, Petitioner’s fingerprint was found on the weapon used the night of the robbery. (App. p. 265 line 265—p. 266 line 3). Therefore, Petitioner cannot show any prejudice as a result of Counsel’s alleged deficiency as there is overwhelming evidence to support Petitioner’s guilt.

There was clear evidence of probative value in the record to support the PCR court’s findings. Petitioner has failed to meet his burden of proof as to this argument. Therefore, the PCR court’s Order of Dismissal should be affirmed.

II. Probative evidence supports the PCR court’s finding that Counsel was not ineffective for failing to object to Solicitor’s comments in opening statement, where the Judge informed the Jury that opening statements were not evidence.

Petitioner argues Counsel was ineffective for failing to object to a comment made by Solicitor during opening statements. However, this argument is without merit, as the record provides ample evidence to support the PCR court’s finding that Counsel was not ineffective in regards to this allegation.

In support of his allegation, Petitioner cites to Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002). In Gilchrist, the South Carolina Supreme Court found trial counsel was deficient for failing to object to the Solicitor's vouching for a key witness's (Ethridge) credibility during his opening statement. Id at 285. Specifically, the court found that "Ethridge was the State's key witness, and therefore his credibility was crucial to the government's case." Id at 228. The Court further found, "because Gilchrist essentially presented a 'mere presence' defense, believing Ethridge was the only way the jury could convict Gilchrist." Id.

However, the instant case is distinguishable from Gilchrist. Here, the Solicitor was not vouching for the credibility of any witness. The Solicitor argued in opening statements, "Mr. Green (Victim) ran out of the store when he was left alone up front, across the street, and called 911. The Columbia Police Department responded. Mr. Smalls (Petitioner) ultimately took off out of the store with over \$1,900 in a plastic bag with the shotgun. The police saw him as he was leaving the store." (App. p. 54 lines 16-21). As evidenced by the record, Solicitor was merely outlining the facts the State intended to prove. State v. Kornahrens, 290 S.C. 281, 284, 350 S.E.2d 180, 183 (1986). (Finding evidence presented at trial supported Solicitor's comment during opening statement that defendant had "pre dug" the grave). In the instant case, Solicitor's comments were supported by Victim's testimony at trial. Victim testified,

when I see the police car and I see him (Petitioner), he's coming out the back door. And he ain't running, he's walking you know. So I'm telling them, you know, like 'He's right there, he's right there'....So when he went through the gate, I said, 'make a left at the Lizard's Thicket.' When they made the left I said, 'You got him.' I said, 'You got him.'

(App. p. 74 lines 2-13). Therefore, it can be inferred from Victim's statement at trial that Police did see Petitioner fleeing the store. As long as the Solicitor introduces evidence which reasonably supports the stated facts, there is no error. Id.

Additionally, the trial court instructed the jury that arguments made by the State and Defense Counsel are “merely their opinion of the evidence” and should not be considered as evidence. (App p. 352 lines 20-24). The court further instructed the jury that if their “version of the facts disagree with [the State or Defense] position, then obviously [the juror’s opinion] counts. (App. p. 352 lines 22-24). Additionally, the Judge and the State continually instructed the jury to make their decision based off of the evidence presented. (App .p. 361 lines 22-25; 389 line 23—p. 390 line 2). As such, Petitioner can show no prejudice as the court instructed the jury that arguments made by counsel for the State and Defense were not evidence.

Furthermore, Petitioner was not prejudiced by Counsel’s alleged deficiency because there was overwhelming evidence of Petitioner’s guilt. Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). As evidenced by the record, Petitioner was identified by Eugene Green (Victim) in a photo line-up conducted by Investigator Gray. (App. p. 78 lines 15-24). Victim further identified Petitioner as the person who “held that shotgun...and robbed the Bojangles.” (App. p. 82 lines 3-7). Petitioner was identified in the court room by Victim. (App. p. 80 lines 5-17). Jim Lightner (Lightner), the manager for Bojangles the night of the robbery, narrowed the six photo-line up to Petitioner’s photograph and one other. However, Lightner was unable to say with exact certainty, which photo more accurately represented the person who robbed the store that night. (App. p. 319 lines 6-16). Further, when approached by police, Petitioner fled, dropping a two year old child from his arms. (App. p. 289 lines 12-22). In addition, Petitioner’s fingerprint was found on the weapon used the night of the robbery. (App. p. 265 line 265—p. 266 line 3). Therefore, Petitioner cannot show any prejudice as a result of Counsel’s alleged deficiency as there is overwhelming evidence to support Petitioner’s guilt.

There was clear evidence of probative value in the record to support the PCR court's findings. Petitioner has failed to meet his burden of proof as to this argument. Therefore, the PCR court's Order of Dismissal should be affirmed.

III. Probative evidence supports the PCR courts finding that Counsel was not ineffective for failing to place on the record an objection regarding the trial judge's refusal to allow cross examination of a State's witness about a carjacking charge, where Solicitor informed both Counsel and Judge that the charge had been dismissed, records indicate the charge was dismissed, and Witness did not dispute his testimony at PCR hearing.

Petitioner argues PCR court erred in finding that Counsel was not ineffective for failing to place on the record an objection regarding the trial judge's refusal to allow cross examination of a State's witness. However, this argument is without merit as there is probative evidence in the record to support the PCR court's finding.

Petitioner argues Counsel was ineffective for failing to object on the record regarding the trial judge's refusal to allow cross examination of a State's witness, Eugene Green (Victim), regarding a previously dismissed charge for car-jacking. At the post-conviction relief hearing, Lanelle Durant (Durant), Counsel's second chair, testified she was neither aware nor told that Victim's car-jacking charge was dropped in exchange for his testimony. (App. p. 478 line 25—p. 479 line 14). Durant further testified they had no evidence that Victim's charge was dismissed in exchange for his testimony (App. p. 479 lines 16-14). Durant agreed that since they could not show that the charge was dismissed in exchange for his testimony, there was no basis for a challenge and therefore there would be no issue to preserve for Appellate review. (App. p. lines 15-23).

Additionally, Victim testified at the PCR hearing that Solicitor Pascoe told him if he did

not testify in Petitioner's trial then his "charge wasn't going anywhere." (App. p. 514 line 10). However, Solicitor Pascoe was not the Solicitor for the carjacking charge against Victim. (App. p. 542). The Solicitor for Victim's car-jacking charge was Robert Hood (Hood), who was subpoenaed by the Petitioner, but was not called to testify at the PCR hearing. (App. p. 542). Further, Victim did not dispute his testimony at the PCR hearing. Victim testified he identified the Petitioner in a photo line-up and in court. (App. p. 521 lines 10-16).

Furthermore, the available records for the Richland County Clerk of Court show that Green's car-jacking charge was dismissed on May 1, 2002. There were two additional comments entered May 2, 2002, at midnight stating "leave to restore-victim does not wish to pursue prosecution" and "will not testify if the case goes to trial." The PCR court found "it is highly unlikely that anyone made an entry exactly at midnight on May 2, 2002." The PCR court further found "there is no merit whatsoever to the Applicant's claim that the Victim's carjacking charge was not dismissed prior to his testimony at trial; the victim did not dispute the legitimacy of his testimony at the Applicant's trial."

In addition, Petitioner was not prejudiced by Counsel's alleged deficiency because there was overwhelming evidence of Petitioner's guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). As evidenced by the record, Petitioner was identified by Eugene Green (Victim) in a photo line-up conducted by Investigator Gray. (App. p. 78 lines 15-24). Victim further identified Petitioner as the person who "held that shotgun...and robbed the Bojangles." (App. p. 82 lines 3-7). Petitioner was identified in the court room by Victim. (App. p. 80 lines 5-17). Jim Lightner (Lightner), the manager for Bojangles the night of the robbery, narrowed the six photo-line up to Petitioner's photograph and one other. However, Lightner was

unable to say with exact certainty which photo more accurately represented the person who robbed the store that night. (App. p. 319 lines 6-16). Further, when approached by police, Petitioner fled, dropping a two year old child from his arms. (App. p. 289 lines 12-22). In addition, Petitioner's fingerprint was found on the weapon used the night of the robbery. (App. p. 265 line 265—p. 266 line 3). Therefore, Petitioner cannot show any prejudice as a result of Counsel's alleged deficiency as there is overwhelming evidence to support Petitioner's guilt.

There was clear evidence of probative value in the record to support the PCR court's findings. Petitioner has failed to meet his burden of proof as to this argument. Therefore, the PCR court's Order of Dismissal should be affirmed.

CONCLUSION

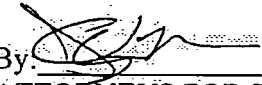
For the reasons stated above, this Court should affirm the post-conviction relief court's denial of post-conviction relief.

Respectfully submitted,

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April 22, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2012-21553

STEPHEN SMALLS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 22nd day of April, 2015


CAROLINE COLLINS
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