

STATE OF SOUTH CAROLINA
In the Supreme Court

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Certiorari to Barnwell County
Robert E. Hood, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-000070

ERIC VANCLEAVE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

- I. Did the PCR Court properly find Petitioner failed to meet his burden of proving Trial Counsel was ineffective for failing to present alibi evidence?
- II. Did the PCR Court properly find Trial Counsel was not deficient for failing to object to the court's "seek the truth" language and that Petitioner was not prejudiced by this failure to object?
- III. Did the PCR Court properly find the issue of the admission of prior bad acts was properly preserved for appeal and Trial Counsel was not ineffective for improperly objecting to their admission?
- IV. Did the PCR Court properly find there was no prejudice resulting from any of Trial Counsel's actions or inactions?

STATEMENT OF THE CASE

Procedural History

Eric VanCleave (“Petitioner”) presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. During the February 2013 term, the Barnwell County Grand Jury indicted Petitioner for second degree criminal sexual conduct with a minor (2013-GS-06-00076), third degree criminal sexual conduct with a minor (2013-GS-02-00079), lewd act upon a child (2013-GS-02-00077), and assault and battery of a high and aggravated nature (2013-GS-06-00078). Robert Theo Williams, Esquire, represented Petitioner. On February 25, 2013, Petitioner proceeded to a jury trial before the Honorable Doyet A. Early, III. The jury convicted Petitioner as indicted and Judge Early sentenced Petitioner to a twenty year term of imprisonment for second degree criminal sexual conduct with a minor, a fifteen year term of imprisonment for lewd act upon a child under 16, a ten year term of imprisonment for assault and battery of a high and aggravated nature, and a ten year term of imprisonment for third degree criminal sexual conduct, with all sentences to be served concurrently.

A timely Notice of Appeal was filed on Petitioner’s behalf. Benjamin Stitley, Esquire, represented Petitioner on appeal. The South Carolina Court of Appeals affirmed Petitioner’s conviction and sentence. State v. VanCleave, 2014-UP-444 (S.Ct. App. filed December 10, 2014). Following the denial of his petition for rehearing, Petitioner petitioned for certiorari review by the South Carolina Supreme Court. On June 18, 2015, the Supreme Court denied certiorari. The Remittitur was issued on June 24, 2015.

Petitioner filed a timely application for post-conviction relief on September 17, 2015, alleging the following grounds for relief:

1. Trial Counsel was not effective in preserving for review the admission of other alleged bad act which were admitted under Rule 404(b) of S.C. Rules of Evidence.
 - a. Trial counsel failed to object when the testimony that was present in a pre-trial motion was admitted during the trial. This error prevent an effective review of the admissibility of the evidence.
2. Trial counsel was not effective in arguing against the admissibility of the other bad act which were admitted under Rule 404(b) of the South Carolina Rules of Evidence.
 - a. Trial counsel failed to argue that the other alleged bad acts were not admissible under Rule 404(b) because mere similarity is not a basis for admitting other bad acts when identity is not an issue, trial counsel failed to not that one of the other alleged bad acts was not committed on a minor, and trial counsel failed to read the law in this area to make an effective argument.
3. Trial Counsel was not effective in providing the state with his alibi and other evidence required to be submitted under Rule 5 of the South Carolina Rules of Criminal Procedure.
 - a. The Applicant had several documents that would have supported the fact that he was not at the camp at the date and time as alleged by the state. Trial counsel failed to provide these documents to the state pursuant to Rule 5 and therefore he was not able to use them at trial.
4. Trial Counsel was not effective in crossing examining the witness against the applicant.
 - a. Trial counsel failed to cross-examine the complaining witness about several of the alleged incidents. The failure to cross-examine the complaining witness gave the jury the impression that those incidents were true from which the jury could conclude that the other allegations were true.

The State made its Return on January 28, 2016, requesting an evidentiary hearing be held. An evidentiary hearing was held at the Aiken County Courthouse on September 19, 2016 before the Honorable Robert E. Hood. Petitioner was present and represented by C. Rauch Wise, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office represented Respondent. At the evidentiary hearing, Petitioner orally amended his application to include an additional allegation of ineffective assistance of counsel for failing to object to the trial judge's jury instructions to seek the truth, which shifted the burden of proof from the State to the defendant. Judge Hood denied and dismissed the application in written order filed November

29, 2016. Petitioner filed a Motion to Alter or Amend Judgment on December 9, 2016. An Order denying the motion was filed on January 5, 2017.

Petitioner filed a timely Notice of Appeal on January 9, 2017. Petitioner's Appendix and Petition for Writ of Certiorari were filed on April 24, 2017. This Return to the Petition for Writ of Certiorari follows.

Factual History

Petitioner became a member of the church run by the victim's father in 2000 or 2001. Petitioner developed a close relationship with the victim's family including multiple brothers of the victim. According to the victim, Petitioner was always touching him, giving back rubs or hugs. (App. 157). In 2001 or 2002, the victim began spending the night occasionally over at Petitioner's home. Petitioner made certain the victim would sleep in the same bed with him. The victim awoke during the night to Petitioner "messing with [the victim's] penis." (App. 158). Petitioner's hand was inside the victim's pants moving in a motion trying to cause the victim to ejaculate. Eventually, Petitioner caused the victim to ejaculate and then used the victim's hand on Petitioner's penis to cause him to ejaculate. (App.158-159).

The victim did not tell anyone about the incident because he was afraid to say anything. (App. 160). The abuse occurred frequently at his house, often once a month. Much of the abuse was similar to the first incident with touching and masturbating. However, the abuse progressed and Petitioner began performing oral sex on the victim until the victim ejaculated. Petitioner also began putting his finger into the victim's anus. Finally, Petitioner sodomized the victim during the abuse. (App.160).

The victim and members of the victim's family went on camping trips with Petitioner. They went camping in Barnwell County at Barnwell State Park Campground. On their second trip to Barnwell, the victim, several of the victim's brothers, Petitioner, and Mike Sanders all

stayed in Petitioner's pop-up camper. (App.166). The camping trip happened in 2005, though the victim could not remember exactly when it occurred. He did indicate he believed he was either 14 or 15 years old. (App.167). Petitioner made certain the victim was sleeping in the same bed with him in the camper and everyone else was in different beds. The curtain to the bed was closed, blocking any view from the remainder of the camper. During the night, the victim awoke to Petitioner performing oral sex on him. Petitioner then had the victim use his hand to touch and masturbate Petitioner. Then the abuse escalated and Petitioner put his finger into the victim's anus and, eventually anally raped the victim. (App.168). While abusing the victim, Petitioner whispered to him asking if he liked it or if he would smile. Petitioner also whispered that he was sorry for what he was doing. (App.169). Approximately two weeks after the victim turned 16 on May 18, 2006, he went on another camping trip with Petitioner to Barnwell State Park. Again, they stayed in Petitioner's pop-up camper, with Petitioner and the victim sleeping in the same bed. (App. 171-172). Petitioner again fondled the victim and performed oral sex on the victim until he ejaculated. Petitioner again had the victim touch Petitioner's penis. Petitioner then anally raped the victim again. (App. 172).

The abuse was not revealed until 2010 when the victim finally told his parents. He attended a conference in which the speaker discussed forgiveness and how holding onto something could keep someone from getting closer to God. The victim knew Petitioner worked for an elementary school and taught Vacation Bible School and so he felt he had to disclose the abuse. (App.180-181).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during 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 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 his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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, 686 (1984); Butler 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether the 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. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

ARGUMENT

I. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to present documentary evidence in furtherance of his purported alibi.

Petitioner argues the PCR Court erred in finding that Trial Counsel was not ineffective for failing to introduce documentary evidence to support his alibi defense. In its Order of Dismissal, the PCR Court rejected this claim, finding Trial Counsel was not ineffective for choosing not to present this evidence and instead pursue a different theory of defense.

Petitioner contends Trial Counsel should have introduced various pieces of documentary evidence in order to help establish an alibi, including Petitioner's bank records of his credit card transactions, which allegedly support his testimony that he was elsewhere on the weekends in question, and a ticket that was purchased on a trip to Maggie Valley in 2007, which he argues would impeach the credibility of one of the victim's brothers who testified at trial. However, the record reveals Trial Counsel made strategic decisions to refrain from introducing this evidence and these decisions were reasonable. After observing the witnesses presented at the hearing, closely passing on their credibility, and weighing their testimony accordingly, the PCR Court correctly held that Petitioner failed to satisfy either prong of the standard set forth in Strickland regarding this allegation.

First, Trial Counsel was not deficient for failing to introduce this documentary alibi evidence because the evidence he could have presented do not create a valid alibi defense, and he chose to pursue a different theory of the case rather than focusing on an alibi. The PCR Court noted: "Trial Counsel testified that his strategy was to point out inconsistencies in the State's witnesses to cause the jury to question their credibility." (App. 627).

Petitioner argues that Trial Counsel should have introduced bank statements with receipts from BiLo in Cayce and Rush's in West Columbia dated October 28th and 29th to prove that Petitioner was not in Barnwell that weekend. However, these receipts would not have given rise to a valid alibi defense, as evidence that Petitioner's credit card was used in Cayce and West Columbia that weekend does not prove that it was impossible for Petitioner to also be in Barnwell that weekend. The PCR Court found Trial Counsel was not deficient in failing to introduce Petitioner's bank records, but rather made a conscious and reasonable decision not to introduce them. "Trial Counsel was given all of Applicant's bank records to support his alibi, but he made a conscious decision not to use them at trial." (App. 627). "Trial Counsel made the strategic decision to focus on other defenses rather than his alibi because he did not think these bank records were very strong support of what Applicant had already testified to at trial." (App. 627). Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland v. Washington, 466 U.S. 668, 691 (1984). A high degree of deference is granted to a defense attorney, and Trial Counsel's decisions should not be questioned in hindsight.

Petitioner likewise argues Trial Counsel should have introduced evidence that Petitioner's credit card was used in North Carolina on a weekend that had been identified as a possible date of abuse. As the PCR Court recognized, these records did not provide conclusive evidence that Petitioner could not have been committed the charged crimes on those weekends. (App. 628). Moreover, the PCR Court acknowledged that bank statements often do not accurately reflect the date of a transaction, and Applicant had agreed that not all bank statements are completely reliable (App. 628).

The PCR Court also noted that the statistics from the 2005 South Carolina football game Petitioner claims to have been watching or listening to at home one Saturday would not have been proper alibi evidence. (App. 628). “To establish an alibi defense ... a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime.” State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984), quoting State v. Robbins, 275 S.C. 273, 271 S.E.2d 319 (1980). The fact that Petitioner can accurately recount a specific football game does not prove that Petitioner was in fact in any particular place when the game was played. Since this evidence does not fit the legal definition of alibi, it was reasonable for Trial Counsel to refrain from introducing these statistics from the football game into evidence.

Finally, the PCR Court found Trial Counsel actually did introduce the Bill of Sale for Petitioner’s camper into evidence and therefore did not fail to introduce it in the first place. (App. 311; 628). Trial Counsel also did not act unreasonably in not presenting the Maggie Valley ticket from Ms. Wich because Trial Counsel was not informed of this evidence at the time of trial, nor could he have been expected to discover it. (App. 628). As Trial Counsel testified at the PCR hearing, even if he had the Maggie Valley ticket at the time of trial, it fails to show who bought the ticket. (App. 589).

In light of the minimal value of the aforementioned evidence and its failure to establish an alibi, the PCR Court correctly found Trial Counsel acted reasonably in choosing not to introduce the evidence. Where the evidence does not create a valid alibi, Trial Counsel cannot be deficient for failing to introduce it for an alibi defense. For these reasons, probative evidence supports the PCR Court’s holding that Trial Counsel was not deficient.

Secondly, notwithstanding the fact Trial Counsel's representation was not deficient in this case, Petitioner also fails to satisfy the prejudice prong of the Strickland standard. Trial Counsel testified at the evidentiary hearing that the introduction of this documentary alibi evidence would not have made a difference in regard to the jury's verdict. (App. 585). The PCR Court agreed that this evidence did not create a valid alibi defense, and the introduction of this evidence would not have changed the jury's verdict. The Order noted: "the jury heard testimony of Applicant's alibi from him and from Ms. Wich, including his recollection of being home watching the football game and going to Maggie Valley in 2007 rather than in 2005 or 2006." (App. 628). "Having a couple of credit card transactions from a South Carolina football game is not proper alibi evidence to prove that Applicant absolutely could not have been in Barnwell County on that day, or at any point in the indictment period." (App. 628).

As the PCR Court observed, "[B]y an alibi the accused attempts to prove that he was at a place so distant that his participation in the crime was *impossible* ... And since an alibi derives its potency as a defense from the fact that it involves the physical *impossibility* of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is not an alibi at all." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (emphasis added). (App. P. 628). Here, the evidence at issue does not establish it was physically impossible for Petitioner to have committed the crimes, and therefore do not establish an alibi. The PCR Court correctly reasoned, "[t]he alibi documents here cannot prove that it was impossible for Applicant to have been present at the scene of the crime." (App. 629). For these reasons, probative evidence supports the PCR Court's finding that Petitioner failed to show that he was prejudiced by the alleged deficiencies. Because neither prong of the Strickland test is met, Trial Counsel was not ineffective in this regard.

II. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to the trial court's jury instructions to "seek the truth" and for making a similar statement to the jury where the jury instructions as a whole were free from error.

Petitioner argues the PCR Court erred in failing to find Trial Counsel ineffective for failing to object to the trial court's jury instructions to seek the truth. At trial, the trial court instructed the jury "[If] you search for the truth and if you come back with the truth, that's all we ask for." (App. 144.) The trial court also told the jury that their function was to figure out what they "determine the truth to be." (App. 144). The PCR Court found this language, when in the context of the entire jury instruction, "do not shift the burden of proof to the defendant, but clearly explain how the State was required to prove the charges." (App. 631). The Order went on to rule that the instructions were not objectionable, so Trial Counsel could not be deficient for failing to object. (App. 631). This ruling was correct based on South Carolina law and the record before the Court.

As the PCR Court held, Petitioner's allegation does not satisfy the first prong of Strickland because Trial Counsel was not deficient for not objecting to the jury instruction, nor was Trial Counsel deficient for his own statement to the jury that they are to issue a true verdict.

"Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" State v. Aleksey, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000) (citing State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)). "However, jury instructions should be considered 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." Id. (citing State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)). "The standard for review of an ambiguous jury instruction is whether

there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." Id. (citing Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991); Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990)). Chief Justice Toal, concurring and writing for a majority of the court in State v. Daniels, a case in which the jury was instructed that their verdict was to represent "truth and justice for all parties involved," reasoned that the adequacy of the trial court's overall instruction, which included explanations of reasonable doubt and burden of proof, cured any possible constitutional deprivation. State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012).

In Petitioner's case, the trial judge merely instructed the jury to listen carefully and determine what facts they deem to be the truth. (App. 110). He then instructed, "[T]ake those facts and apply them to the law as I give it to you at the conclusion of the case dealing with all of these indictments and that's how you make your decision." (App. 110). At the conclusion of the case, the trial judge thoroughly instructed the jury that the State of South Carolina bore the burden of proving Petitioner's guilt and that Petitioner was to be presumed innocent until proven guilty beyond a reasonable doubt. (App. 366). He explicitly told the jury that Petitioner did not have to prove his innocence. (App. 366). Furthermore, the trial judge emphasized the importance of the constitutional principle that defendants are presumed innocent until proven guilty. The trial judge then proceeded to thoroughly define "proof beyond a reasonable doubt." (App. 367). The instruction for the jury to determine the "true facts" of the case merely appears within the context of instructing the jury on their role of determining witness credibility. The statement with which Petitioner takes issue is a relatively insignificant comment within a thorough instruction which adequately describes the concepts of burden of proof and reasonable doubt. Given the overall adequacy of this jury instruction, probative evidence supports the PCR

Court's finding that Trial Counsel was not deficient for failing to object to the judge's jury instruction because it was not objectionable.

Trial Counsel was also not deficient when he instructed the jury using similar language to that of the trial judge. Trial Counsel stated to the jury, "What we're looking for is a true verdict. If you issue a true verdict, we have no qualms with you." (App. 155). Trial Counsel also instructed the jury, "If I ask questions [to the victim] and appear to be a little harsh, just remember we are all in search of the truth, and if you search for the truth and come back with the truth, that's all we ask for." (App. 155). This statement was clearly not made to instruct the jury on the relevant burden of proof, but rather to prevent the jury from making negative inferences about Trial Counsel or Petitioner based on the difficult questions that would have to be asked of witnesses. Furthermore, like the trial judge's instruction, Trial Counsel's instruction otherwise adequately and correctly instructed the jury on their role. Trial Counsel also explicitly instructed the jury that it was not up to Petitioner to prove his innocence. (App. 154). Analyzing Trial Counsel's statements to the jury in their totality, the instructions accurately described the jury's role while in no way shifting or altering the appropriate burden of proof. Therefore, probative evidence supports the PCR Court's finding that Trial Counsel was not deficient for his statements to the jury.

Furthermore, Petitioner also fails to satisfy the second prong of the Strickland standard. The standard of review for an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991); Boyde v. California, 494 U.S. 370 (1990). Such a constitutional violation would occur if the erroneous jury instruction shifts the burden of proof to something other than the State proving guilt beyond a reasonable doubt. See

Aleksey, 343 S.C. at 27, 538 S.E.2d at 251. Of course, this evaluation must consider the jury instruction as a whole, rather than isolated portions. Id. at 28, 538 S.E.2d at 252. “In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed ‘in its entirety and not in isolation.’” Gibbs v. State, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013) (citing Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009)).

In this case, the PCR Court found the trial court’s jury charge clearly explained the State’s burden of proof and defendant’s presumption of innocence. (App. 631). Furthermore, the PCR Court correctly held, “[w]hen taken as a whole, it is clear that the jury instructions do not shift the burden of proof to the defendant, but clearly explain how the State was required to prove the charges.” (App. 631).

Both challenged jury instructions and Trial Counsel’s statement to the jury, when taken as a whole, accurately explain to the jury that the State had the burden of proof in this case. The overall instructions went to great lengths to explain the importance of the presumption of innocence. Moreover, as the PCR Court noted, even if the burden of proof had been lowered, it is unlikely that the jury would have reached a different verdict. (App. 631). The jury in this case was able to hear from various witnesses, including three victims, and judge for themselves the credibility of their testimony. For these reasons, probative evidence supports the PCR Court’s finding that Petitioner was not prejudiced by the jury instructions.

III. Probative evidence supports the PCR court’s finding that neither Trial Counsel nor Appellate Counsel were ineffective for failing to argue the admissibility of prior bad acts.

Petitioner argues the PCR court erred in failing to find Trial Counsel and Appellate Counsel ineffective for failing to properly argue and preserve for appeal the admission of prior bad act testimony. The PCR court ruled Trial Counsel was not ineffective in his arguments

because he argued effectively in furtherance of his trial strategy. The PCR Court correctly relied on probative evidence and current law in making its decision, and this Court should affirm its findings.

Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Proof of prior bad acts must be clear and convincing if they are not the subject of a conviction. State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997); State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999). Even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278-279 (2009).

Prior to trial, the State moved *in limine* to admit the testimony of the victim's two brothers as well as the victim's testimony about the continuous abuse by Petitioner. The victim testified first regarding the abuse by Petitioner. He testified Petitioner became a friend of the family. Sometime in 2000-2001, when the victim was either 10 or 11, Petitioner began having the victim over to his house for the night. The victim stated he would wake up to Petitioner fondling him and Petitioner trying to ejaculate the victim. The victim testified Petitioner also used the victim's hand to try and do the same to Petitioner. The victim testified similar abuse occurred numerous times at Petitioner's house. (App. 75-76). The victim testified the abuse progressed into oral sex and anal rape. (App. 76). The victim testified the abuse would occur in other locations as well, such as on camping trips, at the flea market, and on trips to football games. He said the abuse on the trips would occur in the bed of Petitioner's pop-up camper.

(App. 78). On the trips to Barnwell Petitioner committed the abuse for which he was charged and forms the basis of this post-conviction relief action. The victim testified he would be in the bed of the pop-up camper with Petitioner. He stated the abuse began similar to the other abuse; the victim would wake up to Petitioner fondling, kissing, or rubbing him. He testified Petitioner would put the victim's penis in Petitioner's mouth and Petitioner would ejaculate the victim. Petitioner then would anally rape him. (App. 78).

The victim's older brother testified Petitioner became a friend of the family and spent time with the victim's family, including going on a lot of trips. He specifically testified to a camping trip to Maggie Valley. (App. 86). The victim's older brother testified he fell asleep in the camper with Petitioner. He stated he woke up to his pants pulled down and Petitioner attempting to ejaculate him. The victim's older brother testified Petitioner appeared to be sleeping so he moved his hand off, pulled up his pants and went back to sleep. The abuse occurred when the victim's older brother was about 17. (App. 87).

The victim's younger brother testified Petitioner was a friend of the family. He testified they would go to football games, on trips, and camping with Petitioner. (App. 90-91). He testified on a trip to Cherokee, North Carolina Petitioner when he was about 12 or 13, Petitioner made arrangements for him to sleep in the same bed with Petitioner in Petitioner's camper. He testified he woke up to Petitioner grasping his penis and trying to ejaculate him. Petitioner was doing this to the boy through the outside of his clothes. The victim's younger brother testified he looked over and Petitioner appeared to be asleep. He assumed it was a mistake. However, the following night the same thing happened so the victim's younger brother got out of the bed and slept the rest of the night on the floor. (App. 91-92).

Petitioner now argues Trial Counsel was ineffective for failing to properly argue against the admission of this prior bad act testimony because he did not specifically present evidence available to him to rebut the witnesses' claims and argue their testimony was not proven by clear and convincing evidence. He further argues Trial Counsel did not fully preserve the issue for appeal, and Appellate Counsel was ineffective for failing to fully and properly argue the issue of clear and convincing evidence on appeal. However, the PCR court properly found (a) Trial Counsel was not ineffective for failing to preserve the issue for appeal; and (b) Trial Counsel was not ineffective for failing to properly argue against the admission of this evidence. Finally, (c) even though the record clearly shows Appellate Counsel was effective in his representation, the issue of ineffective assistance of Appellate Counsel is not preserved for appeal.

a. Trial Counsel was not ineffective for failing to preserve the issue for appeal.

In its Order, the PCR court found the following:

Trial Counsel credibly testified at the PCR hearing that he vigorously argued against the admission of this evidence at the Lyle hearing. He submitted a memorandum in opposition to the admission of the evidence for the trial court to consider, and he simply was unsuccessful in his argument. The trial judge told Trial Counsel on the record that his objection was fully protected. Tr. Transcript 70, ll. 15-16. The trial judge listed all of the reasons why he allowed this testimony in on page 70 of the trial transcript. Further, the issue was preserved for appellate review, and was argued by Mr. Stitely in Applicant's Brief to the Court of Appeals and on Petition for Writ of Certiorari to the Supreme Court. The Court of Appeals fully addressed this issue when they affirmed Applicant's convictions. Applicant has failed to prove that Trial Counsel was ineffective in any regard to preserving this issue for appeal, and this allegation is denied and dismissed with prejudice.

(App. 625-626). The trial transcript, the credible testimony presented at the evidentiary hearing, and the fact that the issue was raised by Appellate Counsel and ruled upon by the Court of Appeals clearly show that the issue of admissibility of prior bad act evidence was preserved for appeal. Trial Counsel cannot be deficient for failing to preserve an issue that he did, in fact,

preserve for appeal. The citations to the record before the PCR court demonstrate that this ruling was based on probative evidence, and this finding should be affirmed.

Furthermore, Petitioner concedes in his Petition for Writ of Certiorari that the issue of “clear and convincing evidence” *was* preserved for appeal. Petitioner argues in his fourth issue on appeal:

As the Court of Appeals considered the clear and convincing issue, this Court must concluded [sic] it was preserved. (footnote 10: The State in its brief in footnote 1 raised the question as to whether the issue is properly preserved for review.) The Court of Appeals in the unpublished opinion did not specifically discuss the clear and convincing issue, but did discuss other bad acts as a general concept. Included in the concept would be the clear and convincing issue.

PWC 19 (emphasis added). Petitioner himself notes that the issue was preserved for appeal, so the argument that Trial Counsel was ineffective for failing to preserve the issue for appeal is meritless.

b. Trial Counsel was not ineffective for failing to properly argue against the admission of the evidence of prior bad acts.

The PCR court held in its Order that Trial Counsel was not ineffective in his presentation of the argument against admission of evidence of prior bad acts. It based this ruling on Trial Counsel’s credible testimony at the evidentiary hearing that he chose to argue against the admission of this evidence “by insisting that it was highly prejudicial and was used only to buttress the State’s allegations.” (App. 626). Trial Counsel testified his strategy was to point out all the discrepancies between the two victim’s stories, and he submitted a memorandum in support of his argument. The trial court rejected Trial Counsel’s argument and explained its reasoning on the record, finding the testimony was admissible because it was relevant to the charges in question and it fit within the exception of Rule 404(b). (App. 137-138). The trial court explained the victim’s description of Petitioner making arrangements for them to sleep together,

fondling, masturbating, and attempting to engage in masturbation and other sexual activities was similar enough to the charge in question to fit the 404(b) exception. (App. 138). The trial court then found the testimony was not more prejudicial than probative under Rule 403(b), and it should be allowed into evidence. (App. 139).

The PCR court properly held Trial Counsel's argument against the admission of this evidence based on its extremely prejudicial nature was a strategical decision within his discretion. As noted by the PCR court, Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland at 689.

Because Trial Counsel presented a valid argument to the trial court against the admissibility of this evidence that was within his trial strategy, and because the PCR court relied

on the probative evidence of Trial Counsel's testimony, the ruling that Trial Counsel was not ineffective in this regard should be affirmed.

c. Although the record clearly shows Appellate Counsel was not ineffective, this issue is not preserve for appeal.

Petitioner argues in his Petition that Appellate Counsel was ineffective in "his failure to use all the facts in the case to illustrate that the State either failed to prove the 'other bad acts' by clear and convincing evidence or to demonstrate through compelling evidence in the record that the 'other bad acts' were not similar." PWC 15. However, this issue was not raised or ruled upon by the PCR court, so it is not preserved for appeal. Accordingly, it would be improper for this Court to address this issue.

The allegation of ineffective assistance of appellate counsel was not raised in Petitioner's original application. App. 488-494. While Petitioner orally amended his application on the record before the evidentiary hearing to include an additional allegation of ineffective assistance of trial counsel for failure to object to "seek the truth" jury instructions, Petitioner did not amend to add an allegation of ineffective assistance of appellate counsel. App. 506-507. Because the issue was not raised as an allegation, it was not addressed or ruled upon by the PCR court in its Order. App. 615-632. In Petitioner's Motion to Alter or Amend filed December 12, 2016, Petitioner states "The Court erred in failing to find that [Appellate Counsel] was ineffective... In the Order, the Court failed to address the failure to argue effectively the clear and convincing issue in the brief and the failure to even file a reply brief." App. 634-635. The PCR court denied Petitioner's motion to alter or amend without making a specific finding on that issue. App. 638.

An issue is not preserved for appellate review where it is not raised during the trial of the action. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue must be "*raised to* and ruled upon by the trial judge to be preserved for appellate review").

(emphasis added). This Court has specifically held an issue not raised until a post-trial motion is unpreserved for appeal. State v. Taylor, 399 S.C. 51, 64, 731 S.E.2d 596, 603 (Ct. App. 2012) (“Taylor appears to approach the issue at the post-trial motion hearing. Even so, this is insufficient to preserve the issue for our review because it was not raised at trial.”) (citing to Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); Wilder, 330 S.C. at 77, 497 S.E.2d at 734 (holding post-trial motions are not necessary to preserve issues that have already been ruled on; they are used to preserve those that have been raised to the trial court but not yet ruled on by it). Because Petitioner did not raise this allegation until he filed his Motion to Alter or Amend, this allegation is unpreserved for appellate review.

However, even if this Court were to find this issue preserved for review, the record before the Court clearly shows that Appellate Counsel was not ineffective in his representation. Appellate Counsel did argue the State had not met its burden of “clear and convincing evidence” in its presentation of evidence of prior bad acts. App. 437. While Petitioner contends Appellate Counsel did not fully and properly address the issue of clear of convincing evidence in his direct appeal brief, the record before the Court shows Appellate Counsel did address the issue in his brief, and the Court of Appeals affirmed Petitioner’s conviction despite this argument. App. 478. The Court of Appeals cited to cases explaining that they are bound by the trial court’s factual findings when considering whether there is clear and convincing evidence of other bad acts unless such findings are clearly erroneous. App. 478. Obviously, the direct appeal court found there was no clear error entitling Petitioner to a relief when it affirmed his conviction. Petitioner’s argument presents nothing that could have changed the outcome of the appeal, resulting in prejudice to Petitioner. Appellate Counsel did fully present the issue on direct appeal

and it was considered by the direct appeal court, so there is clearly no prejudice. Petitioner has failed to prove either deficiency or prejudice, and Appellate Counsel should not be found ineffective. Therefore, because neither Trial Counsel nor Appellate Counsel were ineffective in their representation on this issue, this Court should deny the Petition for Writ of Certiorari.

IV. Probative evidence supports the PCR court's finding that none of Trial Counsel or Appellate Counsel's actions or inactions were prejudicial to Petitioner.

Petitioner argues the PCR court erred in failing to find prejudice in the alleged errors of Trial Counsel and Appellate Counsel. Respondent notes that while Petitioner has chosen to separate this analysis into a separate issue on appeal, the issue is part of the standard Strickland test, and has already been analyzed and addressed in each of the issues above.

Petitioner's contention that there is cumulative error in this case resulting in prejudice is improper under South Carolina law. Petitioner argues "[E]ven if one individual error is not sufficient to grant Mr. VanCleave a new trial, collectively the Court considers them prejudicial to his right to a fair trial and appeal with competent counsel." PWC 20. This is incorrect. South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. See e.g., Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (finding PCR court did not err in failing to conduct a cumulative error analysis where only one allegation had merit and the "record simply did not contain 'several errors' for the judge to cumulatively assess"). In addition, a number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163

F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

Because South Carolina Courts do not recognize a cumulative error analysis, a finding of ineffective assistance of counsel based on a combination of several different allegations is inappropriate. Unless Petitioner can prove that any one of these allegations on its own would have single-handedly changed the outcome of the trial, he cannot meet his burden of proof, and post-conviction relief must be denied. The PCR court properly held none of these allegations alone would have changed the outcome of the trial. Therefore, the Petition for Writ of Certiorari should be denied, as Certiorari is not warranted in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. 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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August 25, 2017

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AUG 25 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Barnwell County

S.C. SUPREME COURT

The Honorable Robert E. Hood, Circuit Court Judge

ERIC VANCLEAVE, #354843

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

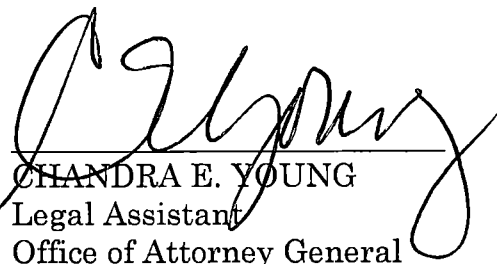
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, SC 29646

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

This 25th day of August 2017.



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