STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Paul M. Burch, Circuit Court Judge

MICHAEL TOMPAI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001820

BRIEF OF PETITIONER

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ISSUE PRESENTED

By failing to object to a police officer's testimony regarding his opinions drawn from watching a surveillance video that was not produced at trial, including his opinion that Petitioner looked like the individual in the video, did trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT

On May 30, 2013, a Horry County grand jury indicted Petitioner for armed robbery. App. 229-230. The state, represented by Scott Hucks, called the case to trial before the Honorable Larry B. Hyman, Jr., and a jury on June 10-11, 2013. App. 1. W. Thomas Floyd represented Petitioner. App. 1. Petitioner filed a notice of appeal, which was perfected by Robert M. Pachak. App. 159-170. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 159-170. The issue raised on appeal – whether the trial court erred in permitting a detention center officer to testify regarding how he put together the photographic line-up because the testimony placed Petitioner's character into issue by suggesting there was a mugshot of Petitioner – was not preserved. App. 159-170. On June 30, 2014, the Court of Appeals dismissed the appeal. State v. Tompai, 2014-UP-276 (S.C. Ct. App. filed June 30, 2014); App. 171-172. Remittitur was issued on July 16, 2014. App. 173.

On May 11, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 174-183. On May 11, 2016, the matter proceeded to an evidentiary hearing before the Honorable Paul M. Burch. App. 190. Jessica E. Kinard represented the state, and James K. Falk represented Petitioner. App. 190. By an order dated August 11, 2016, Judge Burch denied Petitioner relief from his conviction and sentence. App. 221-228.

On August 31, 2016, Petitioner served his notice of appeal. Petitioner filed a petition for writ of certiorari on April 19, 2017. The state responded by way of a return filed on September 5, 2017. By an order issued on March 7, 2018, this Court granted certiorari and ordered briefing. This brief of petitioner follows.

STANDARD OF REVIEW

Recently, this Court clarified the standard of review an appellate court reviewing a PCR action must use when analyzing claims of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 688 (1984). Smalls v. State, 422 S.C. 174, ___, 810 S.E.2d 836, 839-840 (2018). This Court explained the "standard of review in PCR cases depends on the specific issue" raised on appeal. Id. at ___, 810 S.E.2d at 839. The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at ___, 810 S.E.2d at 839. However, the appellate court will "will review questions of law de novo, with no deference to trial courts." Id. In another recent case, this Court explained the appellate courts give "great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Id. See also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

ARGUMENT

By failing to object to a police officer's testimony regarding his opinions drawn from watching a surveillance video that was not produced at trial, including his opinion that Petitioner looked like the individual in the video, trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution.

Relevant facts

On September 9, 2012, Richard Corrado worked as an attendant at a Kangaroo gas station in Horry County. App. 71, ll. 3-7. While "preparing to start the cooler," he noticed a man enter the store and walk toward the restroom. App. 71, ll. 21-24. A minute later, the man walked out of the restroom and re-entered the store. App. 71, l. 25 – App. 72, l. 1; App. 76, ll. 19-25. The man was "toting" a gun. App. 72, l. 1. The man demanded money and cigarettes, which Corrado provided. App. 72, ll. 2-3; App. 73, ll. 21-23. After the man left, Corrado contacted the police. App. 73, ll. 16-17. When the police arrived, Corrado gave a description of the robber to the responding officer. App. 73, ll. 10-17.

Jodi Ridgeway was new to the Horry County Police Department in September 2012. App. 83, ll. 13-14. Ridgeway claimed that "[s]ix or seven weeks" prior to robbery of the Kangaroo, she responded to a residence at a mobile home park "in reference to a civil dispute." App. 84, ll. 8-13; App. 89, ll. 4-10. She claimed the dispute was between Petitioner and his roommate over rent money. App. 84, ll. 13-16. According to Ridgeway, Petitioner and his roommate were "very upset" and were "arguing over who owed who money." App. 84, ll. 18-20. Petitioner then "pretty much threw his roommate under the bus and started talking about

some armed robbery issues." App. 84, ll. 20-22.[1] When the solicitor asked for more information, Ridgeway stated Petitioner "mentioned armed robbery about his roommate of some sort." App. 84, ll. 23-25. This piqued her interest. App. 85, ll. 1-2.

Sometime after the call for the armed robbery of the gas station went out to law enforcement, Ridgeway "got to talking with some of the other guys about it and some other issues that [the police] had been having, and [Ridgeway] felt like [Petitioner] may be a good candidate to interview or talk to." App. 85, ll. 3-10. Ridgeway was so new to the police force at the time, she did not know whom to contact regarding her suspicions. App. 85, ll. 15-20. One of the officers with whom she discussed her hunch was Bradley Boggs. App. 85, ll. 21-23; App. 90, ll. 8-21. Boggs sent an email to the investigator handling the robbery case to inform him of Ridgeway's inklings. App. 85, ll. 21-23.

Seventeen days after the gas station robbery, on September 27, 2012, Brian Wilson showed a photographic line-up to Corrado, which included a photograph of Petitioner based solely upon Ridgeway's hunch. App. 74, ll. 2-9; App. 76, ll. 5-9; App. 92, l. 22 – App. 93, l. 11; App. 106, l. 13 – App. 107, l. 22. Corrado selected the person in position #6 as the person who robbed him. App. 74, ll. 10-15; App. 107, ll. 15-24. Corrado also identified Petitioner in court as the person who robbed him. App. 74, ll. 16-22.

Shortly after the line-up procedure, the police obtained and executed a search warrant on Petitioner's home. The search revealed *no* evidence connecting Petitioner to the gas station

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[1] There was no objection to Ridgeway's testimony regarding a prior armed robbery. During the PCR hearing, trial counsel stated he did not realize Ridgeway had testified about an unrelated armed robbery. App. 203, ll. 9-11. Trial counsel stated that if he had heard the testimony, he "would have objected to that, ... would have been standing up screaming." App. 203, ll. 13-14. Ridgeway's testimony was objectionable under Rule 404(b), SCRE, and Rule 403, SCRE. App. 203, ll. 7-19; see also App. 214, l. 24 – App. 215, l. 10. Although the order denying relief summarized trial counsel's testimony thusly, in ruling on the allegations of ineffective assistance of counsel, the order inexplicably omitted this ground for relief. App. 224-226.

robbery. App. 97, ll. 21-23. The police did not even find plaid shorts, a red hoodie, or blue shoes, which had been described by Corrado as the ensemble worn by the robber. App. 97, ll. 7-19. Further, the police did not find a gun or ammunition during their search of Petitioner's home. App. 97, ll. 7-19. In fact, *not one thing* was even seized pursuant to the search warrant. App. 97, ll. 19-20.

Trial

Opening statement

During his opening statement, the prosecutor repeatedly informed the jury of his personal belief that Petitioner committed the armed robbery for which he stood trial. The prosecutor promised "to put up some evidence, to show you some witnesses, have some witnesses come and tell you why *we* believe he committed the crime." App. 65, ll. 22-25 (emphasis added). After explaining the elements of armed robbery, the solicitor said, "That's what he's charged with and *that's what he did*, and that's what the evidence today is going to prove to you." App. 68, ll. 17-19 (emphasis added). Cf. Vaughn v. State, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004) (considering challenges to a solicitor's closing argument) (citing State v. Engel, 592 A.2d 572 (N.J. Super. Ct. App. Div. 1991)); State v. Mazique, 419 S.C. 282, 296, 797 S.E.2d 730, 737 (Ct. App. 2016) (evaluating a solicitor's closing argument where the solicitor told the jury he believed the defendant was guilty).

Joseph Cusick

Joseph Cusick with the Horry Police Department was the first officer on the scene of the gas station robbery. App. 79, ll. 16-17; App. 80, ll. 5-7. Cusick and other officers searched the area for a person fitting the description provided from dispatch, which was originally provided by Corrado – "white male, red hoodie, and blue plaid shorts." App. 80, ll. 15-17. The officers

were not able to locate anyone matching that description or anything suspicious. App. 80, ll. 17-18. After the failed search, Cusick went to the store to meet with Corrado. App. 80, ll. 18-19. While at the store, Cusick "observed a video of the incident." App. 80, l. 20; App. 81, ll. 5-8; App. 81, ll. 22-23. According to Cusick, the video showed a person matching the description he received – "a white male, could be short in stature, a very small frame, ... wearing a red hoodie." App. 81, ll. 11-14. He believed the person had on a hat and dark colored shoes. App. 81, ll. 15-17. While the color of the pants was hard to determine, he thought "the design of the pants did seem to indicate plaid." App. 81, ll. 16-17. Cusick told the jurors that the description he received of the suspect matched what he saw on the video. App. 82, ll. 17-21.

Then, Cusick told the jurors that as far as he could tell the description of the person on the video matched Petitioner. App. 82, ll. 22-23. Such testimony was remarkable in light of Cusick having watched the video only one time and approximately one year prior to Petitioner's trial. Cusick never shared with the jurors extremely important facts that *actually* would have been *within his knowledge* – the quality of the video, the size of the screen on which he watched the video, whether he had the ability to pause and rewind the video and whether he used such features, whether the video consisted of a continuous stream or was comprised of a series of clips, the resolution of the video, the length of the video, the number of cameras on which the individual was captured and the size of the individual images if multiple images were displayed at once, the number of cameras total in the store, and how the video system worked. Trial counsel did not object to Cusick's testimony and posed no questions on cross-examination. App. 82, l. 25.

The state did not present the video to the jury.[2] According to Cusick, the robbery happened on a Sunday and Cusick was off the following two days. App. 81, l. 24 – App. 82, l. 4. "[T]he arrangement was that the next shift would get the video from the manager in the morning or in the afternoon, whenever the video became available." App. 82, ll. 5-7. Essentially, according to Cusick, it was the responsibility of "the next shift" to pick up the video. App. 82, ll. 8-9. He did not know why the video was not picked up by law enforcement. App. 82, ll. 10-11. He later said, the video "could have been picked up," but that he did not know if law enforcement ever obtained the video from the gas station. App. 82, ll. 12-16.

Closing argument

According to the solicitor, the jury's duty was "to seek the truth, to find the truth, the truth meaning faithfully to try the issues at hand, to render a just verdict." App. 116, ll. 20-23.[3] The solicitor told the jurors that only one verdict would "speak the truth and that's to find him guilty." App. 124, ll. 3-5; see also, App. 125, ll. 10-11 (the solicitor told the jurors to "[g]o back in the jury room and speak the truth"). The solicitor's last remarks to the jury were as follows:

> Come back out with a verdict that's true, and that is just, and that is honest, and that's all I can ask you to do as a prosecutor, and that's all this cat over here

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[2] According to Corrado, the store was equipped with video surveillance cameras and a video recording was taken of the alleged armed robbery. App. 77, ll. 23-25. When asked about the whereabouts of the video, Corrado stated he was not in control of the video, but the manager was. App. 78, ll. 1-6. The store manager was not called as a witness by the state.

[3] It is error for a judge to instruct a jury or comment to a jury that its role is to search for the truth, or to find the true facts, or to render a just verdict. State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed April 25, 2018) (Shearouse Adv. Sh. No. 17 at 12). For years, this Court has warned trial judges against using ambiguous and burden-shifting language in jury instructions. In State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000), this Court made clear that "[j]ury 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.'" Id. (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-868 (1998)(alterations in original).

deserves is the truth, so come back and speak the truth and find him guilty because he did it.

App. 125, ll. 12-16. The state even vouched for its main witness – Corrado – when the state told the jurors that Corrado told the truth when he made an identification during the line-up procedure and when he testified. App. 125, ll. 8-10.

The solicitor also picked up on his theme from opening regarding the solicitor's personal belief in Petitioner's guilt. After explaining it was his job to prove Petitioner robbed the gas station, the solicitor asked if the jury knew why that was his job. App. 117, ll. 7-12. The solicitor then answered the question with his personal belief: "Because he did it." App. 117, l. 12. When describing Corrado's identification of Petitioner, the solicitor told the jurors, "He's the guy. There's no way around it." App. 121, ll. 10-16. After telling the jurors to think about the case "critically," the solicitor proclaimed, "He's the guy that did it, folks, did it. It's time for him to be accountable for this." App. 123, ll. 2-7. In describing what the solicitor called "circumstances that match," the solicitor was emphatic: "It's because he robbed him. He committed a robbery. He committed a crime." App. 123, l. 20 – App. 124, l. 1; see also App. 125, ll. 1-4 ("He did it").

Additionally, the solicitor relied heavily on Ridgeway's testimony regarding her conversation with Petitioner during which "armed robbery came up." App. 120, ll. 9-18. According to the solicitor, Ridgeway's interest was piqued by Petitioner's mention of an armed robbery such that she remembered the encounter weeks later when the robbery of the gas station was mentioned. App. 120, ll. 18-23. The solicitor used Ridgeway's account of her encounter to argue that Petitioner needed money, and therefore, had a motive to rob the store. App. 122, ll. 21-24.

Jury instructions

During the deliberations, the jury requested the judge "clarify reasonable doubt." App. 142, ll. 9-11. The judge then re-instructed the jury on reasonable doubt. After explaining the burden of proof in civil cases, the judge sought to distinguish the burden of proof in a criminal case. The judge instructed the jurors:

> The Plaintiff has proved by a preponderance of the evidence or he has proved that something is just slightly more likely true than not true, and that's all they have to do.
>
> But in the criminal courts, the degree of proof is much greater than that, much heavier, as I told you earlier. **The state has the burden of proving the Defendant is guilty by a preponderance of the evidence.** Again, that is a much stronger burden. It's much more that they have to prove.

App. 143, ll. 6-14 (emphasis added). The inaccuracies continued when the judge instructed the jury that "[a] reasonable doubt is a doubt that leaves you firmly convinced that you have reached the right conclusion, and the state must get you to that point, that point that you don't have any conviction at all that the Defendant is not guilty." App. 143, l. 23 – App. 144, l. 1. The judge also instructed the jurors "if you are firmly convinced in your mind, or if you are satisfied that you have reached a verdict that goes beyond any reasonable doubt that the Defendant may **not** be guilty, then you should return a verdict that says this Defendant is guilty." App. 144, ll. 5-9 (emphasis added).

Trial counsel noted the error in the instruction regarding a preponderance of the evidence. App. 146, ll. 3-8. However, trial counsel failed to notice the additional errors in the instruction regarding finding a defendant guilty even if the jury is convinced beyond a reasonable doubt that the defendant may not be guilty and defining a reasonable doubt as one that leaves a juror firmly convinced. App. 206, ll. 11-17. In response to trial counsel's objection, the judge instructed the jurors yet again. The judge stated he wanted to be "very, very clear" this was a criminal case and

the state was required to prove the offense beyond a reasonable doubt. App. 146, l. 24 – App. 147, l. 4.

The jury also asked what would happen if the jury could not reach a verdict. App. 145, ll. 3-4. The judge told the jury that if they reached an impasse:

> What would happen is this case would just be tried before twelve other people. They would hear the same witnesses. They would have the same lawyers. They might have me or some other Judge, but they would have someone presiding over it, and they would hear the same testimony, the same evidence that they've heard in this case, and twelve more people would have to go through this same thing again.

App. 145, ll. 13-20. Less than an hour after receiving this modified Allen v. United States, 164 U.S. 492 (1896) charge, the jury returned with its verdict. App. 145, l. 25; App. 147, ll. 14-15.

Verdict & sentencing

Ultimately, the jury found Petitioner guilty as charged. App. 147, l. 25 – App. 148, l. 6. Judge Hyman sentenced Petitioner to imprisonment for seventeen years. App. 157, ll. 11-13; App. 231.

Post-conviction relief proceedings

Error from Cusick's testimony

Trial counsel testified that he should have objected to Cusick's testimony regarding his interpretation of the video from the gas station, which included Cusick's opinion that Petitioner looked like the person in the video committing the armed robbery. App. 200, l. 4 – App. 202, l. 1. His failure to object was not a trial strategy. App. 200, ll. 20-21. Prior to trial, defense counsel was aware the video would not be offered into evidence. App. 200, ll. 14-16. Permitting Cusick to give his interpretation regarding what the video contained and his opinion regarding the resemblance between the person on the video and Petitioner was "in effect ... another eye witness identification." App. 200, ll. 22-24. In light of the state's failure to produce the best

evidence – the video, trial counsel had no opportunity to challenge Cusick's testimony. App. 200, l. 25 – App. 201, 6.

Cusick, unchallenged, was permitted to testify to his "impression of what the video" contained, and the state never provided proof that the video was lost to explain why Cusick's testimony was offered in lieu of the video. App. 201, ll. 7-23. Thus, the jury was permitted to hear testimony corroborating the eyewitness identification made by Corrado, who had provided the only evidence against Petitioner as no other evidence existed to connect him to the robbery. App. 201, l. 24 – App. 202, l. 5; App. 207, ll. 4-10. Defense counsel's understanding was the video was "supposed to be picked up and just got lost in the shuffle or something to that effect." App. 208, ll. 12-15.

Erroneous jury instructions

Additionally, trial counsel testified that he failed to object to the judge's instruction that if the jury determined Petitioner was not guilty, then the jury should return a verdict of guilty. App. 206, ll. 11-17. Trial counsel candidly admitted he "did not pick up" on this erroneous instruction during the trial. App. 210, l. 20 – App. 211, l. 2.

Argument

At the conclusion of the presentation of evidence, PCR counsel argued "the biggest problem" in the case was "the admission of Officer Cusick's testimony by what he saw in the video." App. 213, ll. 5-7. PCR counsel explained the state had failed to present the "best evidence" of what the video contained – the actual video. App. 213, ll. 7-11. Further, the state had not provided any testimony to establish the necessity of presenting the evidence in a form other than the original. App. 213, ll. 12-20. PCR counsel explained Cusick was permitted to give a lay opinion as to identity based, not upon his presence at the scene, but upon his watching

a video after the alleged incident, which was prohibited by law. App. 214, ll. 11-13; App. 218, l. 19 – App. 219, l. 4.[4] PCR counsel challenged Cusick's lay opinion, explaining that "some type of expert opinion" would be required to identify someone from a video when the person making the identification has no prior experience with the person allegedly identified. App. 214, ll. 11-16.

The absence of the video prevented trial counsel from challenging Cusick's ability to see what he claimed he saw as there was no evidence to the size of the picture, the color of the picture, or the clarity of the picture. App. 214, ll. 13-16. According to PCR counsel, "trial counsel ... would have had no opportunity to look at the video; see if it was grainy, see how good the images were, how - - whether Officer Cusick was reasonable in saying that, yeah, that was the person who identified." App. 214, ll. 5-10.

Cusick's testimony was "extremely prejudicial" because it placed the authority of the police department behind the identification. App. 214, ll. 17-23.

Order denying relief

The order noted that "[t]rial counsel admitted that he should have objected to testimony from Officer Cusick who viewed the surveillance video, as it effectively served as another eyewitness statement." App. 223. The order also acknowledged "trial counsel admitted to not hearing the trial judge get caught in a double negative during charges." App. 224.

After reciting the legal standard for the effective assistance of counsel, Judge Burch concluded Petitioner "failed to show [trial] counsel's performance fell below an objective standard of reasonableness." App. 225. Concerning Cusick's testimony, the PCR judge found

[4] During the PCR hearing, the state characterized Cusick's testimony as "a second eyewitness statement" because he "was able to view the video and see who was within it." App. 216, l. 20 – App. 217, l. 4.

"[t]hough the failure of trial counsel to object to Officer Cusick's testimony regarding the surveillance video could be interpreted as deficient performance as it allowed in some information that may not have been otherwise introduced," the PCR court did "not find this was ultimately prejudicial." App. 226. Concerning the jury instructions, according to Judge Burch, trial counsel "refuted the allegations" that Petitioner "made in his application, including" "any potential prejudice or confusion that arose out of the jury instructions." App. 225-226. Judge Burch concluded by finding that Petitioner "failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel's actions." App. 226. Therefore, he denied Petitioner relief. App. 226.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688.

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. (emphasis added). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court held that:

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

Deficient performance

Petitioner does not contest the PCR court's finding that trial counsel's failure to object to Cusick's testimony was deficient performance as "it allowed in some information that may not have been otherwise introduced." App. 226. Specifically, the PCR court concluded: "Though the failure of trial counsel to object to Officer Cusick's testimony regarding the surveillance video could be interpreted as deficient performance as it allowed in some information that may not have otherwise been introduced, this Court does not find that this was ultimately prejudicial." App. 226. Noteworthy, the state did not seek to alter or amend the order pertaining to the finding of deficient

performance. Nevertheless, and as noted by the state in its return, the PCR court appeared to contradict that finding by stating: "This Court finds that, through presentation of evidence at the post-conviction relief hearing, [Petitioner] has failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel's actions." App. 226; Ret. at 7. Thus, an analysis of trial counsel's deficient performance is necessary.

South Carolina permits lay witnesses to offer opinions; however, the opinion offered by Cusick exceeded the permissible bounds. Pursuant to the South Carolina Rules of Evidence, a non-expert witness may offer opinion testimony in very limited circumstances.

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training.

Rule 701, SCRE.

In State v. Fripp, 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012), the Court of Appeals examined the admissibility of lay witnesses offering opinions regarding whether an individual captured on a store's surveillance video was the defendant. Two of the store's employees testified at the trial. Id. at 437-438, 721 S.E.2d at 466. Specifically, the store manager stated, "she reviewed the videotape and, in her opinion, the suspect depicted on the tape was Fripp." Id. She noted that the person in the video was wearing a blue shirt, which she claimed Fripp frequently wore. Id. at 438, 721 S.E.2d at 466. The store manager "stated she knew Fripp 'very well' and 'saw him all the time.'" Id. Another employee "testified that Fripp was the man on the videotape" and that "the burglar was wearing the same clothes in the videotape as Fripp had worn when she saw him the previous day." Id. This employee knew Fripp "because she lived in the area and knew him through his family." Id.

Addressing Fripp's claim on appeal that the lay witnesses' opinion testimony exceeded that ordinarily permitted by the evidentiary rules, the Court of Appeals held "the record demonstrate[d] the criteria set forth in Rule 701 [were] met." Id. at 439, 721 S.E.2d at 467. Importantly, the Court explained the employees' testimonies "were based on their perceptions of Fripp, not only on the videotape, but during the time they had known and observed him in the store." Id. The store manager indicated she knew Fripp well and saw him all the time because he was a daily customer of the store. Id. She also stated the video showed a "'good shot of his face' 'on one of the angles of the tape.'" Id. Similarly, the other store employee said she knew Fripp through his family. Id. Accordingly, the Court of Appeals concluded "the witnesses' testimonies were rationally based on their perceptions of Fripp's appearance including his physical appearance, mannerisms, and clothing." Id.

Next, the Court determined the store employees' opinions were "helpful in determining a key fact in issue – whether Fripp was the person depicted on the videotape." Id. The Court turned to federal authority construing the corresponding rule. Id. The Court found instructive the Fourth Circuit's decision in United States v. Allen, 787 F.2d 933 (4th Cir. 1986). Fripp, 396 S.C. at 439-440, 721 S.E.2d at 467. According to the Court, the Fourth Circuit permitted identification testimony based on surveillance photographs, explaining that "testimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants." Id. (quoting Allen, 787 F.2d at 936). "Human features develop in the mind's eye over time" and the witnesses "had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance." Id. (quoting Allen, 787 F.2d at 936). The opinion testimony of the witnesses who knew the defendants well "provided the jury with the opinion of those whose

exposure was not limited to three days in a sterile courtroom setting." Id. (quoting Allen, 787 F.2d at 936). The testimony was "especially helpful" because the photographs used for identification were "less than clear." Id. at 440, 721 S.E.2d at 468 (quoting Allen, 787 F.2d at 936).

The Court of Appeals explained the "surveillance video" capturing the burglary "was not crystal clear" and the burglar "sought, in some measure, to obscure his identity by wearing the hood of his jacket up." Id. at 441, 721 S.E.2d at 468. Thus, the Court concluded the employees' "testimonies, based on their perceptions of him over time, aided the jury in making an ultimate determination as to the burglar's identity." Id.

Finally, the Court of Appeals concluded "the identification of a familiar person does not require any specialized knowledge, skill, experience, or training contemplated by subpart (3) of Rule 701." Id. Therefore, the Court affirmed the admission of the lay opinion testimony. Id. See also State v. Mitchell, 399 S.C. 410, 416-419, 731 S.E.2d 889, 893-895 (Ct. App. 2012)(allowing a police officer to testify to his opinion that the person in the photographs taken from a deer camera was Mitchell where the officer testified that he knew Mitchell "through his twenty years of living in the Newberry area").

In general, courts permit lay opinion testimony regarding the identity of an individual in videos or photographs *only* when the person offering the opinion has some prior knowledge of the individual in order to form the opinion. See e.g., United States v. Robinson, 804 F.2d 280, 281-282 (4th Cir. 1986)(permitting lay testimony of the defendant's brother that the person depicted in the bank surveillance photographs was the defendant where (1) the brother's testimony "was based upon his perceptions from viewing the photographs and from his perceptions of and close association with his brother over the years," and (2) the brother's testimony was helpful to the jury because the individual in the photograph was wearing a hat and dark glasses; thus, there was "some

basis for concluding the witness [was] more likely to correctly identify the defendant from the photograph than [was] the jury"); United States v. Farnsworth, 729 F.2d 1158, 1160 (8th Cir. 1984)(permitting a "witness's opinion concerning the identity of a person depicted in a surveillance photograph" "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury" and stating "[t]his criteria is fulfilled where the witness is familiar with the defendant's appearance around the time the surveillance photograph was taken and the defendant's appearance has changed prior to trial"); United States v. Barrett, 703 F.2d 1076, 1086 (9th Cir. 1983)(permitting the defendant's girlfriend to testify at trial as to her identification of the defendant as the person in the bank surveillance photograph where the defendant's appearance had changed); United States v. Borrelli, 621 F.2d 1092, 1095 (10th Cir. 1980)(permitting the defendant's stepfather to testify to his opinion that the defendant resembled the subject of the bank surveillance photograph because (1) the defendant lived with his stepfather for five years and had moved only a few days prior to the robbery giving the stepfather independent knowledge of the defendant's appearance both before and at the time of the robbery and (2) the defendant's appearance had changed significantly between the robbery and the trial).[5]

The Court of Appeals for the Ninth Circuit concluded a probation officer's identification of the defendant from a surveillance video of a bank robbery was admissible. United States v. Beck, 418 F.3d 1008, 1014-1015 (9th Cir. 2005). The court held lay opinion is admissible when

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[5] See also United States v. Kornegay, 410 F.3d 89, 95 (1st 2005)(permitting lay opinion identification testimony because the officer's contact with the defendant "on six occasions within a few months [was] within the zone that courts have found acceptable to show that the witness was sufficiently familiar with the defendant to provide a useful identification" and officer was familiar with the defendant and his twin brother where the defendant claim his twin brother was the one depicted in the photograph); United States v. Holmes, 229 F.3d 782, 788 (9th Cir. 2000)(explaining that a lay witness must have "sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful" in order to permit lay opinion of identification)(internal citation omitted).

it is based upon personal observations and recollection of concrete facts. Id. at 1015. Examining its own precedent and that of its sister circuits, the Ninth Circuit held lay opinion identification testimony is permissible where the witness had sufficient contact with the defendant to achieve a level of familiarity that renders the opinion helpful. Id. The court devised a test for determining when such an opinion is helpful. A judge must examine the totality of the circumstances including

> the witness's familiarity with the defendant's appearance at the time the crime was committed, the witness's familiarity with the defendant's customary manner of dress, insofar as such information related to the clothing of the person depicted in the surveillance photograph, whether the defendant disguised his or her appearance during the offense or altered his or her appearance before trial, and whether the witness knew the defendant over time and in a variety of circumstances, such that the witness's lay identification offered to the jury a perspective it could not acquire in its limited exposure to the defendant.

Id. (omitting internal citations and quotations).[6]

In Georgia, a lay witness, who is neither a witness to nor a victim of a crime, may opine on the identity of a person depicted on a videotape or photograph "'if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.'" Strickland v. State, 690 S.E.2d 638, 640 (Ga. Ct. App. 2010) (quoting Dawson v. State, 658 S.E.2d 755 (Ga. 2008)). "'This criterion is fulfilled where the witness is familiar

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[6] Similarly, Massachusetts set forth factors for a court to consider when confronted with lay opinion identification testimony: (1) the quality of the photographs or video; and (2) the level of familiarity of the witness with the person shown in the photograph or video. Com. v. Pearson, 928 N.E.2d 961, 969 (Mass. App. Ct. 2010). The court cautioned that "identification testimony from a police officer or other law enforcement official may create the risk of unfair prejudice." Id. at 970. North Carolina identified factors for consideration as well: (1) the level of familiarity of the witness with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant altered his appearance prior to trial. State v. Belk, 689 S.E.2d 439, 441 (N.C. 2009).

with the defendant's appearance around the time the surveillance photograph was taken and the defendant's appearance has changed prior to trial.'" Id.

Applying this test, the Georgia Court of Appeals found trial counsel ineffective for failing to object to witness testimony identifying the defendant as the man depicted in the photographs derived from the bank security videotapes of the robberies. Grimes v. State, 662 S.E.2d 346, 351 (Ga. Ct. App. 2008). The detective who investigated the case told the jury that when he saw Grimes in person, it was apparent that Grimes was the individual from the bank robbery based on the detective's observations of photographs from the security footage. Id. The court explained that such testimony was admissible only when there was some basis to conclude the witness was more likely to correctly identify the person in the photograph than the jury, such as when the witness is familiar with the person's appearance around the time of the photograph and the person's appearance changed prior to trial or when the witness knows of some distinctive characteristic of the person's appearance. Id. at 352. The state did not present evidence that Grimes' appearance had changed. Id. Although the perpetrator's head was covered in the photographs and the state argued the grainy photographs made it difficult to see the robber's features clearly, the Georgia Court of Appeals explained "a witness's familiarity with the defendant, in and of itself does not make his or her identification testimony based on a video or photograph admissible." Id. Permitting such testimony would "open floodgates of witnesses for both sides who would give their opinion as to the identity of the person in the video." Id. (omitting internal quotation).[7]

[7] United States v. Dixon, 413 F.3d 540, 545-546 (6th 2005)(affirming exclusion of lay opinion identification testimony because the government failed to prove the witnesses were familiar with the defendant's appearance at the time of the offense, the defendant had not altered his appearance prior to trial, and the surveillance photograph was not of particularly poor quality and fully depicted the suspect's body from the waist up).

Washington permits a lay witness to "give opinion testimony as to the identity of a person in a surveillance photograph as long as there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is a jury." State v. George, 206 P.3d 697, 701 (Wash. Ct. App. 2009) (internal quotation omitted). The Washington Court of Appeals acknowledged that "[o]pinion testimony identifying individuals in a surveillance photo runs the risk of invading the province of the jury and unfairly prejudicing [the defendant]" but held that such testimony "may be appropriate when the witness has had sufficient contacts with the person or when the person's appearance before the jury differs from his or her appearance in the photograph." Id. (internal quotation and citation omitted). The court concluded a trial court abused its discretion in allowing a police officer to identify two defendants in a surveillance video of an armed robbery. Id.

The officer observed the defendants at the time of and after arrest. Id. Specifically, the officer observed one defendant as he exited a van and ran from police. Id. The officer observed that same defendant again at the hospital later that evening. Id. The officer saw the second defendant exit a van and while the second defendant was in an interrogation room at the police station. Id. The officer "based his surveillance video identifications on each defendant's build, the way they carried themselves, the way they moved, what they were wearing, how they compared to each other, how they compared to the rest of the people in the van, and from speaking with them on the day of the crime." Id. at 701-702. According to the court, these contacts fell "far short" of the extensive contacts required to admit lay opinion identification testimony. Id. at 702. The contacts did "not support a finding that the officer knew enough about [the defendants] to express an opinion that they were the robbers shown on the very poor quality video." Id.

Cusick lacked any prior knowledge of or familiarity with Petitioner. He was not familiar with Petitioner's appearance at the time of the robbery – in fact, he was not familiar with Petitioner's appearance *at all*. His opinion testimony in June 2013 that the person depicted in the video was Petitioner was based purely upon his memory of watching the video on September 9, 2012, and comparing his memory with the person on trial. He had never met Petitioner or spent any time with Petitioner. The state presented no evidence that Petitioner's appearance changed between the time of the crime and trial. There was no basis for concluding he was more likely to correctly identify Petitioner than the jury. Thus, Cusick's opinion was not rationally based on his perceptions in light of his utter lack of prior connection with Petitioner. In light of the absence of the video, which will be discussed in greater detail infra, Cusick's opinion was not helpful to the jury in making a determination of the ultimate fact in issue. The state failed to produce the video so the jury was not faced with the possibility of a changed appearance and needing assistance from someone more knowledgeable of Petitioner's appearance.

Generally, it is accepted in the law that identification of a person with whom a witness is familiar does not require any special knowledge, skill, experience, or training. However, as has been expressed, Cusick had no familiarity with Petitioner when he made his identification; therefore, at a minimum, a witness testifying to an identification made by watching a video a single time and comparing the memory of watching the video with the person on trial over a year later would require some sort of special knowledge, skill, experience, or training. As the Sixth Circuit Court of Appeals explained, permitting a lay witness to testify to an opinion that a person depicted in a photograph or video, even when that witness had familiarity with the person allegedly depicted, "tease[d] the outer limits" of the lay witness opinion rule. United States v. Calhoun, 544 F.2d 291,

295 (6th Cir. 1976). Surely, permitting a witness with no familiarity with the individual identified exceeded the limits of the lay witness opinion rule.

Further complicating this matter was the state's inability to produce the video during the trial. In essence, the state used the opinion testimony of Cusick as a substitute for the "best evidence" – the video. "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required" unless a rule-based or statutory exception applies. Rule 1002, SCRE. "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if" "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith" or "[n]o original can be obtained by an available judicial process or procedure" or "[t]he writing, recording, or photograph is not closely related to a controlling issue." Rule 1004, SCRE.

Without question, the video was closely related to a controlling issue as it allegedly depicted the robbery of the store. Therefore, the state was required to present the original video unless one of the exceptions applied. During the trial, the state failed to prove the original video was lost or destroyed or that the original could not be obtained by judicial process or procedure. Cusick testified that he left instructions for the next shift to obtain the video. He was unaware if the police had obtained the video or if the matter had been neglected. Therefore, the state failed to prove the original had been lost or destroyed. Further, the state failed to present any evidence that the original video could not have been obtained through judicial process. Corrado, the store clerk, explained the store manager had control over the video. Nevertheless, the state failed to call the store manager as a witness or even proffer evidence to support any conclusion that the video was lost or destroyed.

The lack of the original video, or even a copy, eliminated trial counsel's ability to cross-examine Cusick regarding the reliability of his lay witness opinion – identification – because there

was no video to use for comparison. Trial counsel could not point to quality of the video as impacting the believability of Cusick's opinion.

As the PCR court determined, trial counsel's failure to object to Cusick's testimony was deficient performance. Not only was Cusick unfamiliar with Petitioner, and therefore, unable to give the lay identification opinion offered, but the state's failure to produce the video, the best evidence of what was contained on the video, and no foundation for why evidence in lieu of the video was permissible, inhibited trial counsel's ability to cross-examine Cusick on the reliability of his identification.

Prejudice

Trial counsel's deficient performance prejudiced Petitioner. The *only* evidence against Petitioner was the store clerk's identification – notoriously unreliable evidence.[8] The state produced *no* physical evidence linking Petitioner to the crime – no fingerprints, no DNA, no footprints, no recovered stolen items, and no articles of clothing in Petitioner's home matching those worn by the robber. The state produced no other witnesses linking Petitioner to the crime – no witnesses placing Petitioner in the vicinity of the crime scene around the time of the crime, no witnesses claiming Petitioner bragged about the robbery, no witnesses claiming Petitioner had a substantial sum of cash following the robbery, and no officers claiming Petitioner confessed to the robbery. Cusick's testimony vouched for the store clerk's identification and provided, what the counsel for the state at the PCR hearing aptly called, a "second eye witness" identification. See App. 216, l. 20 – App. 217, l. 4. Permitting Cusick to testify as a second eyewitness placed the imprimatur of law

[8] See Perry v. New Hampshire, 565 U.S. 228, 245 (2012)(expressing "no doubt" as to the "fallibility of eyewitness identifications"); Watkins v. Sowders, 449 U.S. 341, 351 (1981)(Brennan, J., dissenting)(calling "eyewitness identification" "notoriously unreliable"); United States v. Wade, 388 U.S. 218, 228 (1967)(explaining that the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification).

enforcement on the identification. As the Florida District Court of Appeal held, when an police officer provides improper improper lay opinion identification testimony, "[t]here is the danger that jurors will defer to what they perceive to be an officer's special training and access to background information not presented during trial." Charles v. State, 79 So.3d 233, 236 (Fla. Dist. Ct. App. 2012).

The jury struggled with the case as evidenced by their question for clarification regarding reasonable doubt. In providing the clarifying instruction, the judge provided erroneous and misleading instructions – telling the jury the burden of proof was a preponderance of the evidence, telling the jury that if the jurors determined Petitioner was not guilty, the jury must find him guilty, and telling the jury that a reasonable doubt is one that leaves the jury "firmly convinced" the defendant is not guilty. Trial counsel realized only one of the errors, of which he apprised the judge, requiring yet additional instructions. Confronted with the store clerk's identification of Petitioner as the robber, which was bolstered by Cusick's opinion testimony, the jury voted to convict. Had Cusick's testimony been excluded, there is a reasonable probability that the outcome of the trial would have been different in light of the state's weak case against Petitioner. See App. 206, l. 25 – App. 207, l. 10.

Permitting a law enforcement officer to identify a defendant these circumstances incentivizes the police to conduct inadequate and reckless investigations. Rather than collect video evidence from crime scenes and permit jurors to determine the identity of the individuals depicted therein, the government will allow innumerable officers to watch the video footage from crime scenes and then parade those officers in front of the jury to identify the defendant as the person purportedly on the video, and thus, guilty of the crimes charged. Essentially, law enforcement would usurp completely the role of the jury – just as Cusick did in this case.

CONCLUSION

Petitioner respectfully requests this Court reverse the PCR court's ruling, find trial counsel ineffective, and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Paul M. Burch, Circuit Court Judge

MICHAEL TOMPAI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Michael John Tompai, #355763, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 21st day of May, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of May, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022