STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2017-001413

Ladorrean C. Collington,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

RESPONDENT'S ISSUES PRESENTED

Did the PCR court properly find trial counsel was not ineffective where counsel did not object to testimony about Petitioner's escalating abuse and threats that unfolded in the days prior to the Victim's robbery and murder, and which indicated her motive and reason for encouraging he home invasion?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the March 2010 term of the Horry County Grand Jury for accessory before the fact of a felony, burglary 1st (2010-GS-26-01626); and accessory before the fact of a felony, armed robbery (2010-GS-26-01627). M. Gregory McCollum, Esq., represented Petitioner at trial. Heather Tolar von Herrmann, Esq., and Martin D. Spratlin, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On June 6, 2011, Petitioner proceeded to trial before the Honorable Steven H. John and a jury. The jury found Petitioner guilty as indicted on June 10, 2011. Judge John sentenced Petitioner to imprisonment for concurrent terms of 22 years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Susan B. Hackett, Esq., who raised the following issues:

I. Did the trial judge err in admitting evidence of alleged prior bad acts by Appellant, including a twice broken window, a verbal confrontation between Appellant and the victim's girlfriend, a threatening note, a threatening text message, and a physical altercation between Appellant and the victim, where none of the exceptions for introduction of such evidence applied and the prosecution did not prove the prior bad acts by clear and convincing evidence?

II. Did the trial judge err in admitting evidence of threats allegedly made to the victim through Anthony Graham, a witness for the prosecution, where none of the exceptions for introduction of such evidence applied and the prosecution failed to prove the conduct by clear and convincing evidence?

III. Did the trial judge err in denying Appellant's motion to sever her trial from that of her co-defendant where the joint trial prevented the jury from making a reliable judgment in light of the different crimes charged, which necessitated the introduction of different evidence?

The parties proceeded to oral arguments on April 10, 2013. By opinion decided May 22, 2013, the South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Collington, Op.

No. 2013-UP-225 (S.C. Ct. App. filed May 22, 2013). The Remittitur was issued on June 14, 2013.

Petitioner filed his application for post-conviction relief on January 27, 2014 (2014-CP-26-00563). He alleged the following grounds for relief in his application:

1. "Ineffective Assistance of Counsel"
    a. "Counsel failed to object to trial court error. He also failed to call expert witnesses."
2. "Conflict of Interest"
    a. "Conflict of interest becomes a factor due to the parlor bad blood between the prosecuting attorney and defendant, back in 2006."
3. "Prosecutorial Misconduct"
    a. "There was a personal vendetta stemming from 2006. This same prosecutor tried defendants brother on a murder charge in August 2006. Messages had been related back and forth thru a mutual acquaintance."
4. "New Evidence"
    a. "Letters from co-defendant stating facts."

Respondent made its return on or about June 12, 2014, and an evidentiary hearing into the matter was convened on February 7, 2017, before the Honorable Michael G. Nettles. Petitioner was present at the hearing and represented by Jeremy A. Thompson, Esq. Valerie Giovanoli, Esq., of the South Carolina Attorney General's Office, represented Respondent. By written order dated May 15, 2017, and filed May 17, 2017, Judge Nettles denied and dismissed the application.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I. THE PCR COURT PROPERLY DENIED RELIEF BECAUSE COUNSEL'S NON-OBJECTION WAS OF NO CONSEQUENCE WHERE THE TESTIMONY AT ISSUE WAS RELEVANT AND ADMISSIBLE UNDER RULE 404(B), SCRE, FORMED PART OF THE RES GESTAE OF THE CRIMES COMMITTED, AND WAS OTHERWISE MERELY CUMULATIVE TO OTHER EVIDENCE TO SUPPORT THE SAME.

The PCR court properly denied relief and found Counsel was not ineffective because the unobjected evidence was admissible as part of the *res gestae* of the crimes for which Petitioner was charged and also demonstrated her motive in arranging the crimes to be committed. Petitioner offers five instances where Counsel allegedly should have objected, four of which occur during the testimony of witness Anthony Graham, and one of which occurs during the testimony of Officer Daniel Cradic.

First, Graham testified the victim lived with his girlfriend, but Petitioner believed the victim should be with her. Graham testified victim and Applicant got into a verbal altercation which turned into a physical one when Petitioner ripped the chain off of the victim's neck. (Appx. 512-16). Graham testified Petitioner threatened to go get her gun and so Graham and the victim headed back to the victim's home watching over their shoulder for Petitioner. (Appx. 515-17).

Second, Graham then testified after they arrived back at the victim's home, they heard a window break. Graham testified he saw Petitioner leaving the scene. (Appx. 518-20). Third, Graham testified the individual who made the report of the broken window was joking with the victim about the fact that Petitioner had previously broken his window. (Appx. 520-21).

Fourth, Graham testified he and the victim received calls and messages on their phones from an upset Petitioner. Graham testified the victim showed him a text message the victim

received from Petitioner which read "something about you and your mama could get it." (Appx. 527-28).

Fifth, Officer Cradic testified he responded to the victim's home after the report of a broken window. (Appx. 1200-01). He testified a note was found at the scene, which he read and copied into his report. (Appx. 1202-04). He testified the note read: "b---h, I will be back, n----r, f--k you. F.Y. b---h a--, AIDS infected b---h. Yeah, we all got it. D-baby." (Appx. 1204, ll. 4-6).

Petitioner was charged as an accessory before the fact of burglary and armed robbery. In order to convict Petitioner, the State was required to show: "(1) that the defendant advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) that the defendant was not present when the offense was committed; and (3) that the principal committed the crime." State v. Bixby, 373 S.C. 74, 75 n.2, 644 S.E.2d 54, 55 n.2 (2007).

The State asserted the evidence was admissible as part of the *res gestae* of the crime and because it met several exceptions delineated in Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (evidence of other crimes may be admissible when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime).

a. The testimony was admissible under the *res gestae* theory.

Evidence of prior bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Fletcher, 363 S.C. 221, 246, 609 S.E.2d 572, 585 (Ct. App. 2005). "The *res*

gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." Fletcher, 363 S.C. at 246, 609 S.E.2d at 585 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004).

This evidence of other crimes is admissible:

> When such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . and is thus part of the res gestae of the crime charged. And where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.

Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) (quotation marks omitted)). Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001).

The evidence presented all occurred in the week leading up to the home invasion, burglary, and murder. The testimony and other evidence such as the messages indicated Petitioner intended to "get back" at the victim for living with the other woman. Further, Graham testified his initial reaction was Petitioner "sent them boys over here because - - because of so much stuff was going on." (Appx. 536). Additionally, the prior difficulties were clearly intertwined with the actual planning and arranging of the crimes by Petitioner and the commission of the crimes by her co-defendants. A complete story could not have been

represented to the jury without establishing background for the actual home invasion, burglary, armed robbery, and murder. As a result, the trial court properly concluded the testimony was admissible as part of the *res gestae* of the case, and Counsel's non-objections were of no consequence because there was no basis for the objections Petitioner contends should have been made.

b. The testimony was admissible as evidence under Lyle or Rule 404(b)

Additionally, the evidence clearly satisfied the requirements of Lyle and Rule 404(b).[1] Evidence of a prior bad act is admissible if it tends to demonstrate the motive of the individual or establish a common scheme or plan. A common scheme or plan can be shown through "a pattern of continuous misconduct." State v. Tutton, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003). Petitioner only argues regarding the similarities test as enunciated in State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). However, the Court also upheld continuous conduct basis for finding a common scheme or plan in State v. Clasby, 385 S.C. 148, 159, 682 S.E.2d 892, 898 (2009) (concluding evidence of the defendant's continued illicit sexual abuse "prior to the indicted offenses constitutes the archetypal 'common scheme or plan' evidence").

The evidence clearly shows an escalating pattern of continuous misconduct by Petitioner. She breaks the windows of the home where the victim is residing, leaves threatening messages in which she threatens the victim, and ultimately sends individuals to get even with the victim by breaking into his home and robbing him. As a result, the trial court properly concluded the evidence established a common scheme or plan whereby Petitioner was upset with the victim and planned to get even.

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[1] To the extent Petitioner argues the prior bad act evidence was not established by clear and convincing evidence, multiple individuals testified to the bad blood between Petitioner and the victim and so the prior bad acts were established by clear and convincing evidence.

Additionally, the evidence clearly establishes Petitioner's motive for arranging, planning, and encouraging her co-defendants to commit the home invasion. Petitioner was upset with the victim for leaving her and moving in with his girlfriend. She made numerous threats to the victim and subsequently carried out the threats by arranging and encouraging the home invasion.

The State had to demonstrate Petitioner orchestrated the home invasion even though she did not participate. "Accessory before the fact . . . requires a showing that the accused: (1) either advised and agreed, urged, or in some way aided some other person to commit the offense; (2) was not present when the offense was committed; and (3) that some principal committed the crime. The State need only prove that some principal committed the crime at the behest of the accessory." State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993)(citations omitted). The State had to demonstrate Petitioner had some motive to solicit the home invasion, especially in light of Petitioner's argument she received nothing by having the burglary and armed robbery committed.

This case is very similar to the case of State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), in which the State sought to admit a prior domestic violence against the appellant to demonstrate his motive for breaking into the home where his former live in girlfriend now resided. The Court of Appeals found the incident of domestic violence demonstrated Sweat's motive because it showed the break-in was "driven by anger over [the former girlfriend] causing him to go to jail and terminating their relationship, and that he intended to "get his property." Id., 362 S.C. at 126, 606 S.E.2d at 513. As the Court explained: "Evidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some

connection of cause and effect between the evidence and the crime." Id. (citing State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980); 40 C.J.S., Homicide, Section 228).

Here the prior difficulties clearly establish the motive for Petitioner to plan, arrange, and encourage the home invasion which lead to her being charged with accessory before the fact of burglary and armed robbery. She clearly intended to get even with the victim because he had broken off any relationship with her and was living with his new girlfriend. The prior difficulties, as was established in Sweat, indicate she arranged the home invasion out of jealousy and anger.

Further, during the cross-examination of one of the co-defendants, Petitioner's counsel directly asserted she had no motive to arrange the home invasion:

Q. She set it up, did the whole thing. What was she going to get out of it?

A. I don't know. I didn't talk to her. She talked to [another co-defendant].

Q. What was she going to get out of it? Nothing.

(Appx. 993, ll. 21-25). The State answered this question by presenting the evidence of the prior difficulties and the threats made by Petitioner against the victim. The answer presented was her motivation for setting it up: revenge.

c. Even if the testimony was objectionable, Counsel's failure to object was of no consequence in light of the other evidence validly admitted to show prior difficulties and in light of the overwhelming strength of the evidence against Petitioner.

Additionally, the admission of the evidence was entirely harmless in light of the overwhelming evidence of Petitioner's guilt and the fact its admission was cumulative to other evidence including evidence solicited by Petitioner's counsel, such that Petitioner could not possibly meet her burden of showing prejudice under Strickland. "An error is harmless if the defendant's guilt has been conclusively proven by competent evidence, such that no other result

could have been reached." State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). Further, the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003); see also State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

The testimony of Anthony Graham and Officer Cradic was cumulative to testimony by Tiffany James, a friend of Petitioner. (Appx. 1064; 1068). The testimony was additionally cumulative to the testimony of the victim's live-in girlfriend, Frankie Davis, and the voicemail message Petitioner left on the phone of the victim's friend during the week of the home invasion, both of which were affirmed on direct appeal as relevant under Rule 404(b), SCRE, and the *res gestae* theory. (State's Exhibit 72; Appx. 543-44; 635-38). Further, several co-defendants testified regarding their roles in the home invasion—they each testified Petitioner planned and urged them to commit the burglary and robbery. (Appx. 678-79; 818-20; 845-46; 948-49; 955; 993-94; 1071-74; 1085). As a result of the significant other evidence in the record, any error is entirely harmless.

Accordingly, the trial court properly found the testimony and evidence admissible under Rul404(b), Lyle, and as part of the *res gestae* of the case. The PCR court properly reached the same conclusions. Further, the probative value of the evidence clearly outweighed the prejudicial nature of the testimony and evidence and so was admissible under Rule 403, SCRE. Therefore, this Court should affirm the PCR court's denial of post-conviction relief.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

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STATE OF SOUTH CAROLINA
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LADORREAN COLLINGTON,

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CERTIFICATE OF SERVICE

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

Kathrine H. Hudgins, Esquire
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201

This 15th day of October, 2018.

MALLORY MORRIS
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

October 15, 2018

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

RE: **Ladorrean Collington v. State of South Carolina**
Appellate Case No. 2017-001413
Lower Court Case No. 2014-CP-26-0563

Dear Mr. Shearouse:

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

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Kathrine H. Hudgins, Esquire