THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Thomas A Russo, Circuit Judge

Case No.: 2017-CP-10-1648

Robert Lee Wright 358939.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Robert Lee Wright appeals the Honorable Thomas A Russo's Michael G Nettles' November 21, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on December 7, 2018. A copy of the order on appeal is attached hereto.

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December 18, 2018

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Benjamin Limbaugh Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Charleston County Clerk of Court. I further certify that all parties required by Rule to be served have been served this December 18, 2018.

James K Falk
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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Robert Lee Wright, SCDC #358939 Applicant, v. State of South Carolina, Respondent.	Case No.: 2017-CP-10-1648

ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed on March 31, 2017, by Robert Lee Wright (Applicant). Respondent served its return on July 19, 2017, requesting an evidentiary hearing. An evidentiary hearing was held on March 1, 2018, before this Court at the Charleston County Courthouse. Applicant was present and was represented by counsel James K. Falk. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson. At the hearing, testimony was taken from trial counsel Alicia Penn.

Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Charleston County Clerk of Court. During its September 2010 term, the Charleston County Grand Jury indicted Applicant for the murder of Christopher Jenkins (2010-GS-10-6153).

Assistant Public Defender Alicia Penn of the Charleston County Public Defender's office represented Applicant.[1] Assistant Solicitors Benjamin Chad Simpson and Jessica Baldwin of the Ninth Circuit Solicitor's Office represented the State. On February 24-25, 2014, Applicant proceeded to a jury trial before the Honorable Kristi L. Harrington, circuit court judge. The jury found Applicant guilty as indicted. Judge Harrington sentenced Applicant to imprisonment for forty years for murder.

On February 27, 2014, Applicant filed a motion for a new trial and a motion to reconsider the sentence. On March 25, 2014, Judge Harrington filed an order denying both motions. Applicant filed a notice of appeal with the Charleston County Clerk of Court on March 31, 2014. However, the appeal was not received by the South Carolina Court of Appeals until May 12, 2014. On May 20, 2014, Applicant filed a motion to allow for late filing of the notice to appeal. On June 16, 2014, the South Carolina Court of Appeals filed an order granting the motion. Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense-Office of Appellate Defense filed a brief pursuant to Anders v California, 386 U.S. 738 (1967) and petitioned to be relieved as counsel. On March 3, 2016, the Honorable Paul E. Short, Jr., of the South Carolina Court of Appeals, denied counsel's motion to be relieved and directed the parties to brief the following issue: Whether the trial court erred in ruling the defenses of accident and self-defense are mutually exclusive and whether the issue is preserved for appellate review. Following briefing, the Court of Appeals affirmed Applicant's conviction on January 11, 2017. State v. Wright, Op. No. 2017-UP-005 (S.C. Ct. App. filed January 11, 2017). The remittitur was returned to the circuit court on January 27, 2017.

[1] Counsel was assisted by Deputy Public Defender Lorelle Procter at trial.

SUMMARY OF FACTS ADDUCCED AT TRIAL

During the early evening hours of June 10, 2010, Applicant Robert Wright assaulted Christopher Jenkins, the victim, by repeatedly punching and stomping him while he lay on the ground. (R. pp. 80, pp. 81, pp. 110). Victim's two nephews and one of their friends witnessed the beating. (R. p. 77, lines 3-15; R. p. 107, lines 8-18; R. p. 121, lines 19-25). The next day, Victim died as a result of the attack. (R. p. 245, line 16). The pathologist concluded that cause of death was blunt force trauma and noted that the victim had ten broken ribs and numerous external injuries. (R. pp. 226, pp. 227).

Victim and Applicant's mother, Betty Scott, had dated each other on and off for several years.[2] (R. p. 163, lines 14-25; R. p. 278, lines 2-8). Betty ended the relationship but the two maintained contact with one another. (R. pp. 278-279). Thereafter, a series of events unfolded that ultimately led to the underlying incident. In March 2010, Applicant learned the Victim had recently attempted to strike Betty. (R. p. 319, lines 19-24). In April 2010, Applicant received a phone call that Victim had upset Betty and made her cry. (R. p. 323, lines 3-6). That same day, Applicant tracked down Victim and they engaged in a physical altercation. (R. p. 323, line 7-p. 324, line 20). On June 10, 2010, Applicant was told that Victim had been seen lingering around Betty's house. (R. p. 325, lines 16-20). Apparently, it was after hearing this information that Applicant decided to take action.

On June 10, 2010, Victim's two nephews, thirteen-year-old Robert and fourteen-year-old Jocqui, were playing with a friend, thirteen-year-old Maurice, at their home. (R. p. 72, line 10- R. p. 73, line 1). At that point in time, Victim and his two nephews lived with Mary Jenkins, Victim's mother. (R. p. 70, line 21-R. p. 71, line 25). While the children were playing, Tamika Jenkins, the mother of Robert and Jocqui and sister of Victim, asked the boys to go to the store

[2] Throughout the trial, Betty Scott was often referred to as "Ms. Winky".

for her. (R. p. 73, line 3). It was getting dark so Victim decided to walk with the boys. (R. p. 74, line 3). The three boys were walking a few feet in front of Victim down the sidewalk. (R. p. 76, lines 2-3). When Robert turned around to make sure Victim was still following them he saw a car pull up. (R. p. 76, lines 3-10). All three boys witnessed Applicant get out of the vehicle and walk towards Victim. (R. p. 77, lines 3-15; R. p. 107, lines 8-18; R. p. 121, lines 19-25). Before Victim could turn around completely, Applicant picked up Victim and "body slammed" him to the ground. (R. p. 79, lines 3-5). Applicant then began to punch Victim in the face, between five and ten times. (R. p. 80, lines 11-25). He then proceeded to forcefully stomp Victim's body with his feet, between five and ten times. (R. p. 81, lines 1-5). During the assault, Victim did not fight back but "was just laying there on the ground". (R. p. 110, line 5). Victim did not speak to or act violent towards Applicant leading up to or during the assault. (R. p. 83, lines 2-17; R. p. 113, line 25-R. p. 114, line 6). Robert yelled at Applicant to stop attacking his uncle. Applicant responded to Robert, "shut your retarded ass up and come do something about it". (R. p. 124, lines 5-7). Applicant then walked back to his car and drove away. (R. p. 110, lines 11-15).

After Applicant left, Victim stood up and attempted to walk with the boys the remainder of the way to the store. (R. p. 83, line 19-p. 84, line 5). Victim was unable to continue so the boys went on to the store without him. (R. p. 84, lines 6-19). Minutes later, both Victim and the boys returned home. (R. p. 85, lines 1-4). The family watched as a bleeding and bruised Victim walked upstairs, holding his side in pain, to rest. (R. p. 85, lines 7-21; R. p. 138, lines 21-24). Sounds of moaning could be heard by everyone downstairs. (R. p. 85, line 24; R. p. 140, lines 20-24). Robert explained to Mary that Applicant had just attacked Victim and had yelled at Robert. (R. p. 155, line 15). Mary, being a concerned mother and grandmother, went to Betty's house to talk about Applicant and the incident. (R. p. 166). Betty did not know about the incident and Applicant was not there when Mary arrived. (R. p. 168, line 21).

The next day, June 11, 2010, Victim was still in excruciating pain and spent the day lying in bed. (R. p. 141, lines 2-12). Applicant and Betty came over to Victim's house to speak with Mary, not about the assault but the statement to Robert. (R. p. 141, line 16). Timeka was present and felt that Applicant was not the least bit concerned about victim. (R. p. 142, line 4). Applicant told Timeka, "he was tired of Chris disrespecting his mother and he would have did it again if he had to." (R. p. 144, lines 15-17). Applicant and Betty left soon thereafter.

A couple of hours later, Timeka decided to call EMS after her other brother went upstairs to check on Victim and witnessed Victim having two seizures. (R. p. 143, lines 9-20). At approximately 3:00 p.m., an ambulance arrived at the home and transported Victim to the hospital. (R. p. 162, line 21). Victim died at 5:54 p.m. that same day. (R. p. 245, line 16).

On June 12, 2010, Detective Barry Goldstein of the Charleston Police Department responded to Mary's home to investigate Victim's death. (R. p. 173, line 2). He spoke with Robert and Maurice about the incident and asked if they could identify the man that had attacked their uncle. (R. p. 88, lines 4-22; R. p. 126, lines 10-25). They both positively identified Applicant out of a photo lineup. (R. p. 88, lines 4-22; R. p. 126, lines 10-25). After interviewing Robert and Maurice, the children took Detective Goldstein to the incident location. (R. p. 175, line 5). Detective Goldstein observed blood spatter and drops where Victim had been assaulted. (R. p. 175, line 20). Officer Randall Unterbrink, with the Charleston Police Department Crime Scene Unit, photographed and collected samples of the blood found on scene. (R. p. 199, lines 3-5; R. p. 201, line 10). He was able to determine that a total of forty-eight blood drops had been left at the incident location. (R. p. 208, line 21). The blood samples were positively identified as belonging to Victim. (R. p. 256, line 1). Later that day, Detective Goldstein obtained an arrest warrant for Applicant. (R. p. 176, line 23). Detective Goldstein observed Applicant did not have any bruising or injuries to his body. (R. p. 177, line 13).

On June 12, 2010, an autopsy was performed on Victim by Dr. Nicholas Batalis. (R. p. 226, line 3). Dr. Batalis observed multiple injuries when conducting an external examination of Victim's body. (R. p. 226, line 12). Victim had a laceration to his left eye, a scrape to the lower lip, two scrapes on the left knee, and a large bruise on the upper left side of his chest. (R. p. 226, lines 12-18). During the internal examination of Victim, Dr. Batalis noted that ten of the twelve ribs on Victim's back right side were fractured in a straight line, which could only have occurred by the use of a significant amount of force. (R. p. 227, lines 8-14; R. p. 229, line 15). The pathologist conceded that forceful stomping could cause fracturing similar to Victim's injuries. (R. p. 230, lines 15-20). This fracturing caused significant bleeding into the chest cavity and bruising to the right side of his back. (R. p. 227, lines 15-18). Dr. Batalis' ultimate finding was that Victim's cause of death was blunt force trauma to the chest. (R. p. 234, line 7).

At trial, Applicant testified to his version of the facts. (R. pp. 300-331). He claimed he followed Victim so they could talk about Betty. (R. p. 327, lines 14-24). Applicant got out of his car and called out to Victim. (R. p. 328, lines 7-10). Applicant testified that Victim turned around and put his hands up to fight. (R. p. 328, lines 10-13). According to Applicant, the two then locked shoulders and Applicant flipped Victim over onto the ground (R. p. 313, lines 22-24; R. p. 314, lines 2-15). Applicant admitted to intentionally punching Victim three to five times. (R. p. 330, lines 22-25). Applicant then walked to his car and left the scene. (R. p. 315, line 2).

ALLEGATIONS RAISED IN THE APPLICATION AND AT THE HEARING

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on various grounds of ineffective assistance of trial counsel, subject matter jurisdiction, and due process violations. The State made its return on July 19, 2017, and moved for dismissal of all grounds other than the claims of ineffective assistance of counsel.

On July 10, 2017, Applicant, through counsel James K. Falk, served an amended application with the following additional claims for relief

1. Ineffective assistance of counsel for failing to object to the State's improper opening statement
2. Ineffective assistance of counsel for failing to object to impermissible pitting of witnesses
3. Ineffective assistance of counsel for failing to object to the introduction of toxicology report in violation of Crawford
4. Ineffective assistance of counsel for failing to request a Biggers hearing
5. Ineffective assistance of counsel for failing to object to bolstering
6. Ineffective assistance of counsel for failing to object to hearsay utterance by State's witness Robert J.
7. Ineffective assistance of counsel for failing to preserve issue of whether Applicant was entitled to a jury instruction of the defense of accident
8. Ineffective assistance of counsel for failing to object misleading portions of the jury instruction

Applicant proceeded forward on these allegations as set forth in his amended application at the evidentiary hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant has alleged numerous instances of ineffective assistance of counsel against trial counsel, Alicia Penn (counsel). Each allegation is addressed fully below.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S.

668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this

presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "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. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of

the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Each allegation is addressed fully below:

Allegation: Failure to Object to the State's Improper Opening Statement

Applicant alleges trial counsel was ineffective for failing to object to a portion of the State's opening argument discussing the Victim's motivations in delaying medical treatment. The specific portion that Applicant asserts is improper is as follows:

> Finally, and here is one tragedy of this, you'll hear that he knew if he went to the hospital or called the police what would happen? Mr. Wright would get arrested. And if Mr. Wright got arrested he could never get back with Ms. Winky, this person that he loved. He knew if that happened it was over. So sadly, there was some delay in seeking medical attention.

(R. p. 58, lines 4-10).

At the evidentiary hearing, counsel testified she did not object to this portion of the State's opening argument because she did not think an objection was warranted or that the argument was improper based on the evidence she anticipated would be presented at trial. She testified she could have objected based on speculation, but she did not think this line of argument hurt Applicant's case. She elaborated this argument was potentially beneficial to Applicant's case because it argued the Victim's injuries may not have been fatal if he had received medical treatment in a timely manner and helped the defense theory that Applicant did not intend to kill the Victim. She testified she elicited similar testimony that the victim's injuries were not immediately fatal during the cross-examination of Dr. Nicholas Batalis, the forensic pathologist who performed the Victim's autopsy. See R p. 244.

During a criminal trial, "the opening statement serves to inform the jury of the general nature of the action and the issues involved so they can better understand the evidence presented." State v. Kornahrens, 290 S.C. 281, 284, 350 S.E.2d 180, 183 (1986). "The solicitor is permitted in opening statement to outline the facts the [S]tate intends to prove." Id. "As long as the State introduces evidence to reasonably support the stated facts, there is no error." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the

defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (quoting Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (quoting Humphries, 351 S.C. at 373, 570 S.E.2d at 166).

This Court finds counsel was not constitutionally ineffective for failing to object to this portion of the State's opening argument. Specifically, this Court finds Applicant has failed to establish deficiency of counsel or any resulting prejudice. Addressing deficiency first, this Court finds Counsel's performance was effective and in accordance with his constitutionally required duties to his client, as this portion of the opening argument was not objectionable. This portion of the State's opening argument was simply outlining the anticipated testimony of witnesses, like Dr. Batalis, who testified the Victim's injuries were not immediately life threatening and he may have survived if he had sought immediate medical attention. See e.g., R. p. 244, lines 18-25 ("It would certainly depend, on how much sooner between the time of the incident and time of death. Certainly the sooner that he presented during the course his chances would have been better. So if he would have presented two hours before he died it may have been too late at that time but if it was immediately after the incident then I'd say he would have had a pretty good chance of surviving."); p. 249, lines 7-16 (explaining the victim would have had a better chance of survival if he had immediately received medical attention). Because this portion of the State's opening statement was proper, counsel was not deficient for failing to object. This allegation is denied and dismissed with prejudice.

Allegation: Failure to Object to Witness Pitting

Applicant alleges trial counsel was ineffective for failing to object when the State impermissibly pitted witnesses. Specifically, Applicant argues the following portion of the State's cross-examination of him improperly pitted his testimony against the young boys who witnesses the altercation and testified as State's witnesses:

> Q. Okay. Can you think of some reason that three young boys would have to make up untruths about you?
>
> APPLICANT: I can't think of a reason, sir.
>
> Q. Having asked that question let me ask a follow-up question. You admit that a person facing what you are facing here this week might have quite a powerful reason to come up with things that are untrue?
>
> APPLICANT: Yes, sir.

(R. p. 329, lines 13-20). Counsel did not object to this line of questioning.

"No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper." Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (citing State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994); State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988)). "However, improper pitting constitutes reversible error only if the accused is unfairly prejudiced." Id. "To establish his claim of ineffective assistance of counsel, petitioner had to show a reasonable probability that the result of his trial would have been different if counsel had objected to the solicitor's improper questions." Id. (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of a trial. Id.

This Court finds that although the State's questioning of Applicant was improper because it asked him to "comment on the truthfulness or explain the testimony of an adverse witness," Applicant cannot establish any resulting prejudice, and thus, cannot meet his burden to show counsel was constitutionally ineffective. The uncontroverted testimony from both Applicant and the State's witnesses all confirmed that Applicant and the Victim were involved in a physical altercation and that Applicant admitted to flipping the Victim onto the ground and intentionally punching the Victim three to five times. Therefore, the State's attempt to bring up rather minor discrepancies between Applicant's version of events and that of the State's witnesses as "untruths" had no impact on the outcome of the trial. Therefore, Applicant cannot establish any constitutional ineffectiveness of counsel for failing to object. This allegation is denied and dismissed with prejudice.

Allegation: Failure to Object to the Introduction of the Toxicology Report

Applicant alleges trial counsel was ineffective for failing to object to the introduction of toxicology results from the victim's blood based on a purported Crawford[3] violation. During Applicant's trial, the State presented the Victim's toxicology results through Dr. Batalis, who testified he took samples during the Victim's autopsy which were then sent to a nationally accredited lab for analysis. He elaborated the results were then sent back to his lab, where the results were interpreted, analyzed, and incorporated into his autopsy report. (R. p. 225-26; 237-38). He testified as to the following results from the Victim's toxicology report:

> Q. And what were the results of that toxicology screen of Christopher Jenkins?
>
> A. So we tested blood that- we obtained at the autopsy and it was positive for only three substances. One is a drug called atropine, which is commonly used by EMS or physicians in the emergency

[3] Crawford v. Washington, 541 U.S. 36 (2001) (holding the admission of testimonial hearsay against an accused violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has had no prior opportunity to cross-examine the declarant).

room to revive the heart or resuscitate somebody. He also had caffeine in his system, and then the drug called Naprosyn, which is an anti-inflammatory drug. If you've ever taken Aleve, that's what Naprosyn is. Similar to ibuprofen.

Q. So present in his system was a drug commonly used by EMS in treating somebody?

A. EMS and physicians, yes.

Q. Caffeine?

A. Yes.

Q. And something you would get from Aleve?

A. Yes.

Q. Any alcohol in his blood at the time the toxicology report was done?

A. There was no alcohol whatsoever.

Q. Any narcotics such as cocaine, marijuana?

A. No.

Q. The three we discussed were the only results from the toxicology screen?

A. Yes, and just for an idea for the jury, our screen tests for three to 400 different drugs including all the different drugs of abuse such- as cocaine, heroin, alcohol, as well as numerous, numerous medications as well.

Q. And none present other than the things you've already testified to?

A. Correct.

(R. p. 237-38).

When questioned as to why she did not object to this line of questioning, trial counsel testified it was irrelevant to the defense theory of self-defense and/or accident and therefore there was no reason to object and highlight it to the jury when it was ultimately neutral for both the State and the defense. She testified she also was able to elicit favorable testimony from Dr.

Batalis on cross-examination that any alcohol that might have been in the Victim's body approximately twenty-four hours earlier during the altercation with Applicant would have fully metabolized out of his body by the time of the autopsy. See R. p. 245-46.

"The Sixth Amendment's Confrontation Clause guarantees that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' " State v. McCray, 413 S.C. 76, 90, 773 S.E.2d 914, 921–22 (Ct. App. 2015) (quoting U.S. Const. amend. VI.) "In Crawford v. Washington, the U.S. Supreme Court held the admission of testimonial hearsay against an accused violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has had no prior opportunity to cross-examine the declarant." McCray, 413 S.C. 90, 773 S.E.2d at 921-22 (citing Crawford, 541 U.S. 36, 59 (2004)). "The touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." McCray, 413 S.C. 90, 773 S.E.2d at 921-22 (internal quotations omitted). The issue hinges on whether the testifying expert merely served as a conduit for introducing the results of tests that were performed by an expert who did not testify. Id.

This Court finds counsel was not constitutionally ineffective for failing to object to this portion of questioning of Dr. Batalis Specifically, this Court finds Applicant has failed to establish deficiency of counsel or any resulting prejudice. Addressing deficiency first, this Court finds the testimony in question from Dr. Batalis was proper because he did not act as a mere conduit for the toxicology results, but instead, took the samples and interpreted the results when they arrived back from the laboratory for inclusion into his autopsy report. Because the testimony was not objectionable, this Court finds trial counsel was not deficient for failing to object based on Crawford when no such violation existed.

Additionally, this Court finds Applicant cannot establish any resulting prejudice from this purported error. Assuming arguendo that the toxicology testimony was admitted in violation Applicant's confrontation rights, it had no impact on the jury's verdict. See McCray, 413 S.C. at 91, 773 S.E.2d at 922 (quoting State v. Pradubsri, 403 S.C. 270, 280, 743 S.E.2d 98, 104 (Ct.App.2013) (internal citations omitted) ("A violation of [a] defendant's Sixth Amendment right to confront [a] witness is not per se reversible error if the error was harmless beyond a reasonable doubt."). This testimony was ultimately irrelevant and dispositive to the main issue at hand trial counsel was able to fully cross-examine Dr. Batalis on the toxicology results which resulted in favorable testimony for Applicant. Therefore, this Court is firmly convinced the toxicology results had no impact on the jury's verdict. Therefore, this allegation is denied and dismissed with prejudice.

Allegation: Failure to Request a Pre-Trial hearing on Identification

Applicant alleges trial counsel was ineffective for failing to request a pre-trial hearing to determine the admissibility of witness identification of Applicant pursuant to Neil v. Biggers, 409 U.S. 188 (1972). When questioned about this allegation, trial counsel testified Applicant admitted to being involved in the altercation with the victim and testified as to such at trial. She also testified the victim and witnesses all knew Applicant prior and Applicant's identity was never at issue.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged test to determine whether due process requires the suppression of an eyewitness identification. 409 U.S. 188, 198-200 (1972). "To ensure due process, Neil v. Biggers requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v.

Heyward, 422 S.C. 488, 494, 812 S.E.2d 432, 435 (Ct. App. 2018), reh'g denied (Apr. 26, 2018), cert. granted (Sept. 21, 2018) (citing State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation." Liverman, 398 S.C. at 138, 727 S.E.2d at 426. A pre-trial Biggers hearing is required once the defendant asserts an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused. Id. However, the failure to fully comport with the constitutional requirements of a Biggers hearing a subject to a harmless error analysis. Id.

This Court finds Applicant cannot meet his requisite burden of establishing that trial counsel was constitutionally ineffective in her handling of Applicant's identification or failing to request a pre-trial Biggers hearing because Applicant's identity was never at issue; Applicant testified at trial that he was involved in the physical altercation with the victim, thereby confirming the identification from the State's witnesses. Additionally, there is no reasonable likelihood the identifications would have been suppressed by the trial court conducted a Biggers hearing, as the witnesses were all familiar with Applicant. Therefore, this allegation is denied and dismissed with prejudice.

Allegation: Failure to Object to the State's Attempt to Bolster

Applicant alleges trial counsel was ineffective for failing to object when the State attempted to bolster the testimony of its own witnesses. Specifically, Applicant asserts the following questioning of Robert J. was improper:

Q. Okay. Robert, you said you recognized Mr. Wright from the neighborhood?

A. Yes, sir.

Q. Any bad blood between you?

A. No, sir.

Q. Until this incident did you have any problems with him whatsoever?

A. No, sir.

Q. Any reason for you to have made up this whole story that we need to know about, any bad blood?

A. No, sir.

(R. p. 90, lines 15-25). Applicant also asserts the following questioning of Maurice D. was improper:

Q. Any reason that you could think of, motive that you would have to want to get back at [Applicant] for anything whatsoever?
A. No, sir.
Q. Are you testifying honestly here today about what you observed that night?

(R. p. 125, lines 2-8). Counsel did not object to either line of questioning.

When questioned about why she did not object, trial counsel testified she did not find either objectionable and that neither were relevant to the ultimate issue in the case.

This Court agrees with trial counsel and finds Applicant cannot establish any constitutional ineffectiveness of trial counsel, as neither instance of questioning had any impact on the jury's verdict. The uncontroverted testimony from both Applicant and the State's witnesses all confirmed that Applicant and the victim were involved in a physical altercation and that Applicant admitted to flipping the Victim onto the ground and intentionally punching the Victim three to five times. Therefore, the State's questioning from these minor children as to whether they had any grudge with Applicant—a grown man they knew from the neighborhood

and whether they were telling the truth, had no impact on the outcome of the trial. Applicant cannot establish any constitutional ineffectiveness of counsel for failing to object. This allegation is denied and dismissed with prejudice.

Allegation: Failure to Object to Hearsay Statements

Applicant alleges trial counsel was ineffective for failing to object when the State elicited out-of-court statements made by Robert J., one of the minor children who witnessed the altercation between Applicant and the Victim, regarding Applicant being the man who assaulted the Victim. When questioned about these instances, trial counsel testified she did not object to these statements because Applicant's identity was not at issue and they were irrelevant to the defense of self-defense.

This Court agrees with trial counsel and finds Applicant cannot establish any constitutional ineffectiveness of trial counsel, as any purported hearsay statements from Robert J. regarding Applicant's identity had no impact on the jury's verdict. Again, the uncontroverted testimony from both Applicant and the State's witnesses all confirmed that Applicant and the Victim were involved in a physical altercation, to which Applicant himself testified at trial. Therefore, Applicant cannot establish any constitutional ineffectiveness of counsel for failing to object to this ultimately cumulative testimony. This allegation is denied and dismissed with prejudice.

Allegation: Failure to Object to Inaccurate Jury Instructions

Applicant alleges trial counsel was ineffective for failing to object to two different portions of the jury instruction that he asserts were confusing or misleading.

The first such portion of the charge was as follows:

> If, however, the death was caused not by the wound or the injury that the victim had but was caused by the gross, erroneous, willful, deliberate treatment the defendant would not be liable. In other words, negligence on the part of someone else would not relieve

> the defendant from liability if the injury was the proximate cause of the victim's death.

(R. p. 391, line 25 – p. 392 line 2).

This Court recognizes this portion of the charge is an incomplete sentence and could be confusing; however, when read in context with the rest of the charge, the meaning of the charge is apparent. Therefore, since this portion, when read in conjunction with the jury charge as a whole as required, was a proper and correct statement of law, trial counsel was not ineffective for failing to object. See Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) ("In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in [a] way that violates the Constitution."). Therefore, this allegation is denied and dismissed.

The second such portion of the jury instruction that Applicant asserts was as follows:

> The defendant has a duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase.

(R. p. 398, lines 10-12). This Court must assume the transcript accurately reflects the charge as it was given by the trial court, and the charge as it was given was, in fact, an incorrect statement of the law. However, despite that inaccuracy, this Court finds Applicant cannot establish any constitutional ineffectiveness of counsel because it is clear from the record that Applicant could not have met all four elements of self-defense (namely, fear of imminent danger of death or serious bodily harm). See State v. Jackson, 384 S.C. 29, 35–36, 681 S.E.2d 17, 20 (Ct. App. 2009) (internal citations omitted) ("To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or

sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.") Therefore, this allegation is denied and dismissed.

Allegation: Failure to Preserve the Request for a Jury Instruction on Accident

Applicant alleges trial counsel was ineffective for failing to properly preserve her initial request for a jury instruction on accident, thereby depriving the appellate courts from ruling on the propriety of the trial court's ruling.

During the charge conference, Applicant requested a charge on the defense of accident. (R. p. 336, line 22). Before hearing from Applicant, Judge Harrington asked the State to assert its position. The colloquy was as follows:

> **The Court**: Tell me what your position is to accident.
>
> **Mr. Simpson**: Your Honor, we would not be conceding to a charge on accident. The doctrine of accident under the law, I think, applies to the act itself and whether an act is done intentionally or not, and I just don't think there's any conceivable view or any evidence even under that standard that the charge of accident is proper in the case.
>
> The charge of accident is different than – an allegation of accident is different than an allegation that the acts were justified. In self-defense the defendant is simply saying that he is legally justified in doing an intentional act. The law of accident, it would have to be that he accidentally punched the victim, he accidentally took the victim to the ground, and I just don't see any conceivable –
>
> **The Court**: Ms. Penn, tell me from the facts that I have heard make fit this for me, because I'm having a difficult time making them fit under how I understand the theory of both the State's and the defense cases.

Ms. Penn: Simply, your honor, that Mr. Wright did not intend to cause Mr. Jenkin's death. From my reading of State v Burress I believe that we must show the killing was unintentional and the defendant was acting lawfully, and, of course, that part about the weapon, which there were no weapons in this case. And I think jury could find that he was acting lawfully in defending himself and that the killing was unintentional.

Mr. Simpson: May I respond?

The Court: Ms. Penn, maybe I'm having difficulty understanding your analysis. Tell me the difference between accident and self-defense in this particular case. I think that's where I'm having a hard time distinguishing the two because if he's claiming self-defense he's acting lawfully under the defense, correct?

Ms. Penn: Yes, ma'am.

The Court: I mean, that's your position?

Ms. Penn: It is.

The Court: And he intended to do that act of defending himself. If you want me to charge accident in my mind even if the facts did fit those are two appositive defenses, meaning you can't act in self-defense and it be an accident.

Ms. Penn: Yes ma'am.

The Court: Maybe you could reconcile that for me or have I –

Ms. Penn: I'm probably not that good, Your Honor, but if the court is telling me that it's one or the other in that case we would ask for self-defense.

The Court: I'm saying that's how I see it. I want to charge the accurate statement of law based upon the facts as presented. I don't know in this scenario how it could be both.

Ms. Penn: Yes, ma'am. In that case we would just ask for self-defense.

The Court: Do you need a moment to talk with Ms. Proctor?

Ms. Penn: No, ma'am.

The Court: I will not be charging accident. I will charge self-defense.

(R. p. 336, line 12-R. p. 339, line 15).

On appeal, Applicant raised a challenge to the trial court's denial of his request for an accident charge. The Court of Appeals determined trial counsel had abandoned the issue below. Applicant now contends trial counsel was ineffective in waiving this issue because it precluded the appellate court from determining the propriety of the trial court's refusal to charge accident.

This Court finds Applicant cannot establish any constitutional ineffectiveness of counsel for failing to properly preserve the request an accident charge, as Applicant was not entitled to such a jury instruction. A homicide will be excusable on the ground of accident when (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon. State v. Chatman, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999). The record establishes Applicant's actions do not meet these three requirements.

The first element, an unintentional killing, is not met, as the testimony from multiple witnesses and Applicant himself shows that Applicant intended to beat the Victim. (R. pp. 79-81, pp. 107-109, pp. 122-124, p. 314). Additionally, Applicant's knowledge of the difficulties between his mother and the victim leading up to the incident further show his desire to harm the Victim. (R. p. 369-p. 371). Therefore, the evidence establishes that Applicant intentionally attacked the Victim and does not satisfy the first element for an accident defense.

Additionally, the evidence presented at trial does not satisfy the second element of acting lawfully. Under both versions of the facts, Applicant was committing an assault and battery, a criminal act, at the time of the incident, and was not acting in self-defense because he initiated the contact with the victim and was not in imminent danger when he slammed the victim to the ground. (R. p. 77, lines 3-15; R. p. 107, lines 8-18; R. p. 121, lines 19-25). Therefore, Applicant was not acting lawfully in self-defense and does not meet the second element for accident.

As to the third element, exercising due care in the handling of the weapon, which here was his hands and feet, it is apparent from the trial record that Applicant used a substantial

amount of force to inflict the deadly blows to the victim. Dr. Batalis testified a significant amount of force would have had to been used to break the victim's ten ribs. (R. p. 229, line 15; R. p. 230, lines 9-20; R. p. 232, lines 12-14; R. p. 241, lines 19-21; R. p. 242, line 3; R. p. 247, lines 11-18; R. p. 249, lines 1-6). He explained, "The type of injuries to have in this location and this number of fractures is something we more typically see in motor vehicle accident or car accident." (R. p. 230, lines 9-12). The three minors that witnessed the attack testified that Applicant body slammed the victim to the ground, then began to forcefully punch and stomp the victim while he laid there helpless. (R. pp. 79-81, pp. 107-109, pp. 122-124). Based on the severity of the victim's injuries, the only reasonable conclusion was that Applicant's hands and feet were used as deadly weapons with which he did not exercise due care.

Accordingly, Applicant does not satisfy any of the three elements for an accident defense. "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). Therefore, this Court finds Applicant did not meet the requirements for a jury instruction on accident, and therefore, trial counsel was not constitutionally ineffective in her request for such an instruction. This allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See

Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 21st day of November, 2018.

THOMAS A. RUSSO
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina