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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County
The Honorable R. Keith Kelly, Circuit Court Judge

Michael Duran Watson,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appellate Case No. 2018-000486

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Evidence sufficiently established that Warren Chandler discharged his weapon during a prior threatening encounter with Petitioner at a ballpark, and other evidence established Petitioner's prior difficulties with the group of young men gathered on the day of the homicide. Therefore the absence of Petitioner's testimony that Warren Chandler discharged the weapon at Petitioner did not render counsel's performance deficient nor was Petitioner prejudiced by the alleged deficiency.

II.

Reference to the three foot long firearm Petitioner admitted using in the homicide as a sawed-off shotgun was not prejudicial and was admissible evidence, and counsel's performance was not deficient for not objecting to testimony that the weapon was a sawed-off shotgun nor was Petitioner prejudiced by the testimony under Strickland.

STATEMENT OF THE CASE

The Saluda County Grand jury indicted Petitioner Watson for murder, possession of a weapon during a violent crime, and pointing and presenting a firearm. Watson was found guilty of both weapons charges and voluntary manslaughter following jury trial on July 26-29, 2010. The Honorable William P. Keesley sentenced Watson to thirty years imprisonment for voluntary manslaughter and concurrent sentences for the weapons charges.

Watson appealed and was represented on appeal by an appellate defender. The South Carolina Court of Appeals affirmed the convictions and sentences on June 26, 2013. State v. Watson, Op. No. 2013-UP-276 (Ct. App. filed June 26, 2013).

Watson filed an application for post-conviction relief and following the State's return, a hearing was held on November 8, 2016, before the Honorable R. Keith Kelly. Judge Kelly denied the PCR application by order dated March 7, 2018. Watson appealed the denial of the application and filed a petition for writ of certiorari. This return follows.

STATEMENT OF FACTS

Petitioner Watson admitted he shot the victim with a shotgun. Watson claimed he killed in self-defense. Five individuals were gathered together, some of them were smoking marijuana, outside Saluda Terrace Apartments when Watson drove by and fired his shotgun through the car window, killing the victim, Andrew Chandler.

Corddaryl Ouzts was the State's first witness and he was one of the bystanders at the gathering by the apartments. He testified that he was hanging out with Octavious Thomas, Raymond Kirkland, Andrew Chandler, Warren Chandler, and Jeremy Butler, smoking marijuana around 10:30 p.m. on August 5, 2007. Ouzts heard some music and saw "Rand" (Watson) riding down the road,

turn around, and fire a sawed-off shotgun out the car window. Andrew fell. Ouzts testified no one in the group had a gun. Watson drove away. They left and tried to find Watson. Ouzts admitted that afterwards, if they found Watson and also found a gun to use, they would have shot Watson, but they found neither. App. pp. 155-56; p. 164; pp. 170-171; pp. 178-179.

Willie Warren Chandler, Andrew's twin brother, also testified. He corroborated Ouzts version of events. He testified he does not smoke marijuana and did not smoke marijuana that night. When Watson drove by, Warren heard Duke (Octavious Thomas) say, "If you're going to shoot me, then shoot me." Watson fired. Warren testified he did not have a gun that night, nor did anyone else in the group. Watson was the only person in the car. Warren admitted he was tried for discharging a firearm for an incident the week before the killing and he was found guilty, but Warren denied he committed the crime. Warren said the reason he was looking for Watson after the shooting was to try and find out what happened, exclaiming: "I'm still clueless now today why it happened. I don't know anything." App. pp. 183-184; pp. 197-200 (direct quote, p. 200, lines 16-18).

Octavious Thomas also testified. He is referred to by other witnesses as "Duke". Thomas likewise testified that Watson drove up in a black car, and shot Andrew even though no one was acting in a threatening manner and no one in the group had a gun. Watson pulled a sawed-off shotgun on Thomas's cousin a week before the shooting. App. pp. 202-208; p. 217.

Raymond Dale Kirkland testified he saw Watson pull up in a black car and shoot Andrew with a sawed-off shotgun. He testified he heard Duke say something to the effect of "shoot now," but admitted those may not have been the exact words. He did not have a gun, and no one else in the group did either. App. pp. 224-236; pp. 240-241.

Jeremy Butler testified that while the group was hanging out, he saw a car turn around. It was

Watson's car. Butler admitted he was high from marijuana. He heard someone say "shoot some now." Andrew was shot. Butler testified Watson was driving the car, he did not know if anyone else was in the car. After the shot was fired, the car quickly drove away. No one in the group had a gun. App. pp. 398-406. Jarrod Coleman testified he saw Watson in his car with a "short" shotgun on July 30. App. pp. 282-83.

Officer William Brett Long arrived at the scene of the homicide about 10:25 pm. He secured the scene. He found the plastic wadding of a shotgun shell within a few feet of the body. App. pp. 241-251. Commander Chris Holloway interviewed Watson at about 2:30 a.m. Commander Holloway went through an advice of rights form with Watson. App. pp. 289-293. Commander Holloway then asked Watson what happened and Watson replied, "Self-defense." Commander Holloway asked, "How was it self-defense?" He just replied, "Because it was self-defense." App. p. 293, lines 20-25.

Law enforcement went to Watson's residence and found an empty ammunition box of Winchester Super X 20-gauge shot inside the home and also found discharged shells outside the home. App. pp. 345-349. Kenneth Whitler, a SLED firearms expert, testified the plastic wad was consistent with 20-gauge ammunition. App. p. 387.

Cody Cockrell transported Watson from the Saluda County jail to the Greenwood County jail in the afternoon on August 7, 2007. He observed Watson shifting in the back seat and thought perhaps he was uncomfortable – maybe Watson's handcuffs or shackles were too tight or maybe Watson was too hot or cold – and with that in mind, Cockrell asked "what's on your mind?" Watson asked a question in reply: where did Watson hit "him?" Cockrell asked Watson what he meant and Watson asked where he hit the victim. Cockrell answered the question as best he could, answering

in the upper body. App. pp. 415-416. Watson expressed remorse or regret, apparently because Andrew was his cousin. Cockrell testified the conversation continued: "Mr. Watson then went on to say something about he had witnesses. I told him like I tell everyone else that his day will come in court and he could have his witnesses just like everybody else." App. p. 417, lines 6-9.

Then Watson told Cockrell his version of what happened, as follows:

> He said he was dropping his young child off, I believe it was his little girl, and he was circling through the Terrace Apartments like most young kids do. He got to the back, made the turn to come back out. He said he'd then seen someone trying – looked like they were trying to flag him down to stop. He said he then stopped. And when he stopped, he seen four or five guys coming towards his car and that's when he threw up the gun and shot.

App. p. 417, lines 15-24.

Counsel presented three witnesses to establish Watson's prior difficulties with the group of young men before he called Watson to the stand. Watson testified it was just like he told law enforcement – he shot in self-defense. He also testified that Duke had been harassing him and that one time, Warren pulled a gun on Watson and some friends. Watson claims that was why Watson was driving around with a loaded shotgun in his car. He testified he drove to Saluda Terrace Apartments to bring a friend some money. As he drove around the loop, he rolled down the window to inquire about the whereabouts of this friend only to see two guys rush the car. Duke said "shoot now" and Watson, according to his testimony, struggled to get the gun out of the car and fired with no particular target in mind. He drove away and gave the gun to an individual named Lewis. He claims neither he or his attorney were ever able to get the gun back from Lewis. App. pp. 461-472.

Watson verified he used a single shot 20 gauge rifle, kept it loaded, and practiced shooting it in his backyard. He knew all the young men in the group from school. ROA. p. 434.

STANDARD OF REVIEW

Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Because the issues presented by Petitioner in the instant case are questions of fact, they should be affirmed if supported by probative evidence.

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 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).

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.

ARGUMENT

I.

Evidence sufficiently established that Warren Chandler discharged his weapon during a prior threatening encounter with Petitioner at a ballpark, and other evidence established Petitioner's prior difficulties with the group of young men gathered on the day of the homicide. Therefore the absence of Petitioner's testimony that Warren Chandler discharged the weapon at Petitioner did not render counsel's performance deficient nor was Petitioner prejudiced by the alleged deficiency.

Watson complains counsel was ineffective for failing to present Watson's testimony that Warren Chandler discharged a weapon **at** Watson two weeks before the homicide at a ballpark. However, evidence established Warren discharged the weapon, albeit in the air, after a rock was thrown at the car Watson rode in. Further, other evidence established Watson was antagonized by the group and Watson was in fear of the group before the day of the homicide. Therefore, the PCR court's findings that counsel was not ineffective are supported by probative evidence.

When Watson testified at trial, he said two weeks prior, an incident happened at the ballpark that made him afraid. App. pp. 462-63. Counsel asked Watson what happened, Watson replied, "We [were] fixing to leave the ballpark and I was in the car with my cousin, Marvin and Reggie Martin, and we [were] leaving and someone threw a rock at his car. So when we got out and that's when Warren Chandler pulled a gun." App. p. 643, line 22 – p. 464, line 8. Watson testified the

incident put him in fear and led him to start riding around with a shotgun for his safety. App. p. 464-65. Watson explained he did not have a handgun because he was underage. App. p. 465.

Watson explained at trial that when he went to the apartments the night of the homicide, two of the guys rushed the car and one of them, Duke, said "shoot now." Watson picked up the gun and fired out the window. App. pp. 466-67. He explained the gun "was in the floor at a slope with the butt on the seat." App. p. 467, lines 6-7. Watson testified he shot the gun because he felt threatened. He claimed he did not want to hurt anyone, but fired to buy some time to leave. App. p. 475, lines 2-4.

During the State's case, Counsel elicited testimony on cross-examination from Chandler about the incident. Chandler admitted he discharged a gun at the ballpark. When counsel asked him if he discharged it Watson's direction, he said he was found guilty but claimed he did not do anything. He then claimed he did not have a gun at all. On redirect, he agreed with the prosecutor he was alleged to have discharged the gun in the air. App. p. 197; p. 201. Counsel called Obie Combs during the defendant's case. Combs verified that he saw Chandler at the park with a gun. App. p. 434.

Counsel also presented testimony from Watson's sister, Trish Watson. Trish testified in the days leading to the homicide, Watson said he was having a hard time with a group of guys. He was scared because they were messing with him, bothering him, and picking on him. App. pp. 439-41. Counsel also called Jarvis Stevens, Watson's first cousin, who testified that while Watson visited his house, a group of men about Watson's age walked up and down the street antagonizing Watson and trying to induce him to fight. App. p. 447. He testified, "They were saying, you know, come on out in the road, I'll – I'll F you up and I'm going to do all kind of things to you." App. p. 449, lines 2-4.

They stayed on the street mostly, but one of them sat on Watson's car in the drive way. App. p. 451. They eventually left. App. p. 441.

Additionally Counsel noted at the PCR hearing that he elicited testimony that the victim's pocket was turned inside out, and that also the victim was found holding a lighter in an odd manner suggesting he might have had a gun when he was shot and it was taken away and replaced with the lighter. App. p. 686, lines 7-19.

At the PCR hearing, Watson claimed that at the ballpark Chandler shot towards him. He claimed counsel was ineffective for not asking a follow-up question to elicit this testimony. App. pp. 644-45. The PCR court found counsel's performance was not deficient because counsel "thoroughly and ably presented the theory of self-defense." App. p. 711. The PCR court explained, "Not only did Applicant testify, but counsel examined witnesses to present information to the jury to support the theory that the group of young men that included the victim antagonized Applicant to [the] point that he felt he was in danger." App. p. 711. The PCR court further found Applicant was not prejudiced based on the evidence of guilt presented at trial. Counsel testified that in his view it was a weak self-defense case because no evidence was presented showing any of the young men actually had a gun. App. p. 656, lines 4-9.

The PCR court's ruling is supported by probative evidence. First, counsel's performance in presenting Watson's self-defense claim did not fall below professional norms. He elicited testimony from Watson explaining how Watson heard someone say "shoot now." He did the best with the physical evidence from the scene of the homicide, particularly the photographs, to suggest corroboration with Watson's claims and present a possibility the victim actually had a gun.

More importantly, counsel presented abundant evidence to show the group of men at the

apartments engaged in antagonizing conduct prior to the day of the homicide to put Watson in fear of them. Even without Watson's testimony that Chandler shot in his direction at the ballpark, Watson established a rock was thrown at the car he rode in and Chandler brandished a gun. Chandler admitted he was convicted for discharging a weapon during the incident. In conjunction with this testimony, Watson's sister and his cousin established further evidence that Watson was being antagonized and put in fear by the group. Therefore, counsel's presentation of this evidence was not deficient. Further, the absence of Watson's testimony was not prejudicial since an abundance of other testimony was presented establishing a prior relationship with the group of young men that reasonably put Watson in fear of the group. Because probative evidence establishes counsel was not ineffective, the PCR court's findings should be affirmed and the petition should be denied.

II.

Reference to the three foot long firearm Petitioner admitted using in the homicide as a sawed-off shotgun was not prejudicial and was admissible evidence, and counsel's performance was not deficient for not objecting to testimony that the weapon was a sawed-off shotgun nor was Petitioner prejudiced by the testimony under Strickland.

Watson claims counsel was ineffective for failing to object to testimony that the shotgun Watson used was a sawed off shotgun. At trial, Watson admitted he used a shotgun of about three feet in length, it was a 20-gauge single-shot gun that was not heavy. App. p. 469; p. 476. He kept it on the floor of the car with the butt on the car seat. App. p. 467. Law enforcement was unable to recover the weapon. Watson claimed he gave it to a friend and then was unable to subsequently recover it from the friend. App. p. 472.

Watson premises his argument on appeal on the claim that counsel moved in limine to keep

the State from mentioning the three-foot long shotgun was a sawed-off shotgun. Counsel's argument on the motion was as follows:

> Judge, number two in my motion is the state has put Jarrod Coleman and Tobias Daniels on the witness list. They're numbers five and six. Those are two juveniles who alleged about a week before this incident that my client pointed a gun at them. . . . [O]ne of the boys said it was a sawed-off shotgun, the other boy just said shotgun.
>
> I assume they're going to call those witnesses to try to bolster the fat that my client had a shotgun whether or not it'd be sawed off or regular. And our position on that is that that would be unduly prejudicial and not probative of anything, so we'd ask that be excluded, not allowed.

App. p. 71, line 22 – p. 72, line 12. Therefore, the motion was to exclude the entire incident, not the description of the weapon.

The prosecutor responded it was a short shotgun, not necessarily a sawed-off shotgun. But the same shotgun was presented as was used in the homicide and it was in the same car Watson drove during the subsequent homicide. The prosecutor indicated he did not intend to present evidence the firearm was a sawed-off shotgun. App. pp. 72-73. The prosecutor also noted he was not going to present evidence that Watson pointed the firearm during the prior act. App. p. 74. The trial court excluded evidence that Watson pointed the weapon at the witnesses, but noted that otherwise testimony about the prior incident seemed "relevant to put in evidence that two people can tie this man to a shotgun and it's relevant that it was in a vehicle." App. pp. 75-76 (direct quote, p. 76, lines 17-20). The trial court made no ruling as to testimony describing the weapon as a sawed-off shotgun.

At trial, Corddaryl Ouzts testified as follows on direct examination:

> Q: [D]id you observe this car drive through the parking lot?

A: Yes, sir.

Q: Okay. What did you see happen inside his car as he was driving through if anything?

A: The turning of the wheel and raising a gun and shooting out the window.

Q: Did you see a gun?

A: A sawed-off shotgun.

Q: You saw a shotgun?

A: Yes, sir.

App. p. 164, lines 4-15. As seen above, the prosecutor does not seem to have intentionally elicited that the gun was a sawed-off shotgun and attempted to move off the answer quickly. Counsel did not object.

Later in the trial, counsel cross-examined Octavious "Duke" Thomas and attempted to elicit testimony about the incident at Watson's cousin's house when the group was harassing Watson while he was inside his cousin's house. Duke answered that the visit was in response to Watson pulling a sawed-off shotgun on Duke's cousin a week before. As he began to further elaborate, counsel interjected, "Your Honor." After the trial court stopped Duke's testimony, counsel said, "Never mind. That's fine" and continued the cross-examination. App. pp. 217-18. At the PCR hearing, counsel agreed he probably decided against objecting and calling more attention to testimony he reasonably did not anticipate eliciting. App. p. 679.

Raymond Kirkland testified he was present when the victim was killed. App. p. 224-25. The prosecutor asked what he saw and Kirkland replied, "I saw a man – I saw Michael Watson in a black Toyota pull out a sawed-off shotgun out the window and shot and [Victim] fell." App. p. 226, lines

1-3.

Counsel later established through cross-examination of Officer Holloway that none of the young men gathered at the time of the homicide told law enforcement that the firearm was a sawed-off shotgun. App. p. 318, lines 8-12. At the PCR hearing, counsel suggested in hindsight he could have objected, it would not have done any harm to do so. App. p. 659. In his mind, the weapon was more along the lines of a small gun, not a sawed-off shotgun. App. p. 659. The PCR court found counsel's performance was not deficient nor was Watson prejudiced by the alleged deficiency. App. pp. 706-07.

Probative evidence supports the PCR court's determination. Watson confirmed at trial that the shotgun was a mere three-foot-long shotgun, which understandably might appear to be a sawed-off shotgun. The first time a sawed-off shotgun was referenced, it is clear the prosecutor did not intend to elicit the testimony and counsel's objection would only call attention to the description of the weapon. The second time was by trial counsel and he could not have reasonably anticipated the answer he received from Duke. Further, the witness's description of the weapon was obviously relevant and to the extent the jurors might have realized it was illegal to have a sawed-off shotgun, the testimony was relevant res gestae testimony. See State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997) (in strong arm robbery prosecution, evidence that defendant offered his civilian captors dope to let him go was admissible as *res gestae* of crime). The testimony was probative because it was corroborated by Watson's own description of the weapon and evidence that Watson was in possession of the same firearm in the weeks before the homicide. Therefore, the testimony was actually admissible, notwithstanding the prosecutor's statements before the trial began. Note counsel did not actually object to reference to the weapon as a sawed-off shotgun, but instead

counsel was trying to suppress the entire prior incident when Watson pointed his gun at the two witnesses. Additionally, the prosecutor did not draw further attention to the potential illegal nature of the firearm with additional questions or argument. In light of the evidence establishing guilt and the minimal danger of unfair prejudice, the PCR court's determination that Watson was not prejudiced by the alleged deficiency is supported by the record. Accordingly, this petition should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court decide to grant the petition, the State respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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Senior Assistant Attorney General

BY: _____
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

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The Honorable R. Keith Kelly, Circuit Court Judge

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MICHAEL DURAN WATSON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **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:

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
PO Box 11433
Columbia, SC 29211-1433

This 8th day of January, 2019

Camille Henry
CAMILLE HENRY
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JAN 08 2019
S.C. SUPREME COURT

January 8, 2019

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

Re: **Michael D. Watson v. State of South Carolina**
Appellate Case No. 2018-000486
Lower Court Case No. 2014-CP-41-00144

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

David Spencer
Senior Assistant Attorney General
SC Bar #68571

DS/ch

cc: LaNelle C. DuRant, Esquire