STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Beaufort County
Honorable Diane Shafer Goodstein, Circuit Court Judge

ANDRE GREEN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2018-000002

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL

I.

Probative evidence supports the PCR court's finding that Petitioner was not prejudiced by counsel's failure to object to comments during the police interview by police that the codefendant said Petitioner was involved in the carjacking where Petitioner's admissions during the interview corroborated evidence that Victim identified Petitioner as one of the two carjackers and Petitioner admitted later admitted to Victim he was one of the two carjackers.

II.

Counsel was not ineffective for failing to object to evidence of threatening phone calls Victim received because the evidence was admissible to show Victim's bias in recanting his identification of Petitioner. The defense opened the door to the testimony by referencing Victim's affidavit asking for the charges against Petitioner to be dismissed. Further, the evidence was cumulative to evidence Petitioner intimidated Victim in person and there is not a reasonable probability of a different outcome but for the alleged deficiency of counsel.

STATEMENT OF THE CASE

Petitioner was indicted for kidnapping, armed robbery, carjacking, and unlawful carrying of a pistol. A jury found him guilty of carjacking and kidnapping, and acquitted him of armed robbery and unlawful carrying of a pistol following trial before the Honorable J. Derham Cole on April 23-25, 2012. Judge Cole sentenced Petitioner to thirty years' imprisonment suspended to eighteen years' imprisonment and five years' probation for kidnapping. Judge Cole sentenced Petitioner for a concurrent twelve year sentence for carjacking. Counsel's post-trial motions were denied and Petitioner's appeal was dismissed pursuant to Anders v. California, 386 U.S. 738 (1967).

Petitioner filed an application for post-conviction relief on February 17, 2014. Following an evidentiary hearing on June 5, 2017, the Honorable Diane S. Goodstein denied relief by order dated November 13, 2017.

STATEMENT OF FACTS

Monica Wiser was driving on the road when he saw a man roll out of a car trunk and onto the pavement. Two cars swerved around him. She came to a stop and called 911. App. p. 99. The man (Victim) had cuts on his hands and described them as open wounds. App. pp. 101-02. The Master Sergeant Communications Coordinator, Melanie Smith, authenticated a recording of a 911 call from Victim, who also called 911. When asked who put him in the trunk of this car, he said he did not want to get into that. App. p. 109.

The Victim testified he was at Spanish Trace Apartments when he saw Brad Parker, who asked for a ride in his car. A second black male also entered the vehicle, sitting in the back seat. Victim stopped by a basketball court to let Parker out, but he said he did not want to get out because he was in trouble. Parker made Victim drive to another, more secluded, location. Victim testified as he put the vehicle in reverse, the man in the back seat put a gun to the back of Victim's head and told Victim to run through his pockets. Victim only had $30. He was then made to get in the trunk of his vehicle. Victim pulled the latch inside the trunk and jumped out while the car was still moving. He was on the McTeer Bridge. A lady stopped and called 911 on his behalf. App. 111-16. He testified he saw that there were still two people in the car as it drove away, including Parker. App. p. 116.

The prosecutor asked Victim how he knew it was a gun placed in the back of his head at the time. Victim testified, "I mean, I felt of a gun. I'm not that -- I'm pretty smart to know what a gun is." App. p. 113, line 22 – p. 114, line 2. He agreed he "could feel" the object was a gun. App. p 114, lines 3-4. Perhaps this testimony, in which Victim admitted he did not see a gun during this initial robbery, might explain why Petitioner was acquitted of armed robbery, which requires the use

(or representation) of a weapon and the weapons charge. Indications from later cross-examination were that Victim had trouble describing the gun. App. p. 162, line 14 – p. 163, line 3.

Victim explained the second man told him to stand in front of his car and he complied while the man "went through the car." Victim walked to the left side of the car, then struggled with Parker. The other man ran over and pointed a gun at Victim and asked Victim if he wanted to die. Then he ran back over to the other side. The carjackers had some difficulty popping the car trunk open, but once they did, the man ordered Victim in the trunk. App. p. 114, lines 7-23.

Victim left the scene and went to an automotive parts store where he called 911 and met responding deputies. App. pp. 117-18. Victim agreed he picked a person out of the photographic lineup without hesitation. App. p. 119; p. 121, lines 1-13. Victim agree he picked out photograph Number 2, and when asked who the person was to this case, Victim answered, "To the case he is, I believe the – what you call it? Um, pros – you all prosecuting him, I believe, in the case." App. p. 119, lines 9-25. When asked if the picture resembles the person sitting at the table, Victim answered, "At this particular time, it looks like – it could be, very well." App. p. 121, lines 10-13.

He also agreed that he had contact with Petitioner since the incident when Petitioner visited him at Victim's fiancé's apartment. He also admitted he received a couple of phone calls since the incident. App. pp. 121-22. He admitted he received the phone calls from a number with an Atlanta area code although he vacillated as to whether they were threatening phone calls. App. pp. 124-25.

Victim agreed after the kidnapping, Petitioner came to his house with two people. Victim agreed he was worried about his family. App. p. 140. Victim contended he should have the right not to go through with the trial. App. p. 144. On cross-examination he admitted he was at trial only

because of the subpoena. He agreed he signed a notarized statement with the bondsman seeking to have the charges against Petitioner dismissed. App. pp. 143-44; p. 147. He admitted he went to the police station about his ability to identify Petitioner **and for his daughter's safety**. App. p. 151. He agreed Petitioner did not call him from the Atlanta numbers. He testified he erased them. App. pp. 151-52; pp. 153-54.

On redirect, Victim agreed that the two people in the car that day were the people that robbed him. App. p. 173. On cross-examination, Victim was asked if he told officers he felt intimidated about his meeting with Petitioner. Victim replied that he told officers, "I was more concerned about my kids if anything else, Sir." App. p. 153, lines 10-15.

Sergeant Andre Massey was the investigator on the case. While Victim knew Parker, Sergeant Massey explained Victim said he only knew the other perpetrator as "Arnie." Law enforcement was informed Petitioner was called "Arnie" and Sergeant Massey placed him in a photographic lineup. Victim immediately identified Petitioner from this photographic lineup. App. pp. 185-86.

On cross-examination, Sergeant Massey admitted the threats from the Atlanta phone numbers could have been from anybody. App. pp. 207-08.

Sergeant Massey's audio-recorded interview with Petitioner was published to the jury. State's Exhibit No. 4. Petitioner admitted he and Parker received a ride from Victim, but claimed Victim let him out by the basketball courts and he was not part of the subsequent crimes. He also admitted he was called "Arnie." 14:45-15:00. Additionally, he admitted he went to Victim's house and spoke with him. He claimed Victim did not even know who he was when he visited Victim.

9:30-10:45.

Sergeant Massey interviewed Victim shortly after his interview with Petitioner. This also was recorded. State's Exhibit No. 5. Victim initially claimed he was not sure if Petitioner was the other robber or not. He then complained the police would not really be able to protect him. He admitted people came to his house, and that got to the point he did not like. Then he said he did not know "the guy." Sergeant Massey then told Victim he interviewed Petitioner the day before and Petitioner said he visited Victim. Victim verified that he really was robbed and kidnapped by two people. He said at some point after he identified Petitioner as one of the carjackers, Petitioner and two other people came to the house and spoke with Victim outside while they circled around him. Victim's daughter and son were outside and Victim told them to go up the steps to safety, but the children were not listening.

During the interview, Victim recounted Petitioner asked him if he was sure it was Petitioner and Victim replied how he could ask that when "you did wrong." Victim told Petitioner he was trying to get away with something he did. Petitioner informed Victim he knew where Victim lived and Victim told Petitioner it was between him and the police. Petitioner apologized and said Parker put him up to the robbery and said Victim was a drug dealer. He found out later that Victim was a "good dude" and said he was sorry he did it.

Victim said during the interview that he received two phone calls about two weeks later saying he needed to drop the charges against Petitioner. In the second call, they threatened drive-by shootings. He got another call the day before saying he needed to drop the charges. He said he deleted the messages. He admitted Petitioner was picking at his patience.

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.

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 v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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." Id. 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 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 ineffective assistance claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

ARGUMENT

I.

Probative evidence supports the PCR court's finding that Petitioner was not prejudiced by counsel's failure to object to comments during the police interview by police that the codefendant said Petitioner was involved in the carjacking where Petitioner's admissions during the interview corroborated evidence that Victim identified Petitioner as one of the two carjackers and Petitioner admitted later admitted to Victim he was one of the two carjackers.

Petitioner contends the PCR court erred in finding Petitioner was not prejudiced by counsel's failure to object to Sergeant Massey's comments during his interview with Petitioner stating Petitioner's codefendant, Brad Parker, said Petitioner was involved in the carjacking.

In the direct appeal context, the denial of defendant's right to confrontation is subject to harmless error analysis. The factors set out to consider are: (1) the importance of the witness's testimony in the State's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness; (4) the extent of cross-examination otherwise permitted; (5) the overall strength of the State's case. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

In the instant case, the codefendant did not testify. The hearsay was cumulative to Victim's testimony that both passengers participated in the kidnapping and carjacking. Victim told Sergeant Massey he knew the person in the neighborhood as "Arnie." Petitioner admitted he is known as "Arnie" (he corrected the officer when he said the nickname was "Ernie"). Victim immediately picked Petitioner out of a photographic lineup. Petitioner admitted he received a ride from the Victim that day although he claimed he exited the vehicle before the carjacking took place. He also

admitted to visiting Victim at his house after the incident. Victim told Sergeant Massey that Petitioner visited his house with two associates who menacingly circled him. Petitioner admitted to Victim he was one of the carjackers, as Petitioner described in detail during his recorded interview with Sergeant Massey. Victim's subsequent refusal to identify Petitioner in court as the gunmen during the carjacking was so obviously the product of witness intimidation that it bolstered, rather than diminished, the State's case against Petitioner. The State's case was strong and the hearsay was cumulative to Petitioner's admissions and Victim's corroborated testimony. The supposed error would be harmless under the Van Arsdall factors.

The present case differs significantly from State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015), upon which Petitioner relies. First, evidence of Petitioner's identity is stronger in the instant case than the evidence against Brewer for the murder conviction that this Court reversed. Second, unlike Brewer, who denied involvement in the shootings, Petitioner made damaging admissions during his interview. Brewer was decided three years after Petitioner's trial.

Given the abundant evidence establishing Petitioner's involvement in the crime, redaction of the hearsay statement made in the course of the interview with Petitioner would not create a reasonable probability of a different result under Strickland. Far more damaging during the interview was Petitioner's admissions that established he was in the vehicle, corroborated Victim's statement to law enforcement that he went by "Arnie," and corroborated that he visited Victim to confront Victim on his identification of Petitioner. Accordingly, the PCR court's finding of no prejudice is supported by probative evidence.

II.

Counsel was not ineffective for failing to object to evidence of threatening phone calls Victim received because the evidence was admissible to show Victim's bias in recanting his identification of Petitioner. The defense opened the door to the testimony by referencing Victim's affidavit asking for the charges against Petitioner to be dismissed. Further, the evidence was cumulative to evidence Petitioner intimidated Victim in person and there is not a reasonable probability of a different outcome but for the alleged deficiency of counsel.

Petitioner claims the PCR court erred in denying relief because he contends counsel was ineffective for not objecting to testimony concerning threating phone calls Victim received from a number with an Atlanta area code. Petitioner argues the phone calls were inadmissible because there was no evidence indicating Petitioner was responsible for the phone calls and he was unfairly prejudiced.

Petitioner's argument falls short because the cases he cites contemplate situations where evidence of witness intimidation is admitted to show a defendant's consciousness of guilt without the necessary nexus to show the defendant was responsible for the intimidating conduct. Evidence of the phone calls in this case was admitted as evidence of why Victim was recanting his identification of Petitioner as a carjacker.

Evidence of the phone calls was relevant because the phone calls were evidence of motive or bias for Victim to recant his identification of Petitioner as one of the two carjackers. Rule 608(c), SCRE. This became especially relevant because Petitioner's counsel elicited testimony about Victim signing a notarized statement indicating he wanted Petitioner's case dismissed. App. pp. 146-47. Counsel opened the door to evidence showing why Victim was compelled to sign this notarized

statement. "When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012).

Additionally, the phone calls were cumulative to evidence that Petitioner attempted in person to intimidate Victim by visiting his house with two associates and menacingly circling Victim. Moreover, any potential danger of unfair prejudice was diminished by the admissions by Sergeant Massey and Victim that they did not know who made the phone calls. Finally, there simply is not a reasonable probability the outcome of the trial would have been different if counsel objected to the evidence. Petitioner's identity as one of the perpetrators was firmly established by his admission he rode in the car that day, his admission he went to Victim's house to confront him later, and his admission he goes by "Arnie." Therefore, Victim's statement to the officer that the perpetrator was someone who goes by the name Arnie is corroborated, and Victim's identification of Petitioner from the photographic lineup is bolstered by Petitioner's admission to being in the vehicle. Victim's interview with law enforcement is especially damaging to Petitioner's case because Victim recounts how Petitioner admits to participating in the crimes and Victim recounts how Petitioner intimidated him when he visited Victim's residence with two of his associates. Suppressing evidence of the phone calls would not have affected the outcome of the trial.

Accordingly, probative evidence supports the PCR court's findings and the petition for writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the PCR court's denial of the PCR application is supported by probative evidence and the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
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Certiorari from Beaufort County
The Honorable Diane Shafer Goodstein, Circuit Court Judge

Appellate Case No. 2018-000002

ANDRE GREEN, PETITIONER,

v.

THE 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:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29201

This 7th day of March, 2019

TAMIEKA RUSSELL-BROWN
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 07 2019
S.C. SUPREME COURT

March 7, 2019

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

Re: **Andre Green, #283773 v. State of South Carolina**
Appellate Case No. 2018-000002
Lower Court Case No. 2014-CP-07-0359

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 No. 68571

DS/trb
Enclosures

cc: Taylor D. Gilliam, Esquire (2 copies)