

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-001173

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MAR 29 2018

S.C. SUPREME COURT

ANTRELL RASHAWN FELDER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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PETITIONER'S ISSUE PRESENTED

- I. Whether petitioner's Sixth Amendment right to the effective assistance of counsel was violated when counsel agreed to the introduction of an unredacted summary of petitioner's oral statement to police which included the inadmissible information that petitioner was on bond for a lynching charge at the time of the alleged murder, which allowed the jury to infer that petitioner was a violent person in this close, wholly circumstantial case?

RESPONDENT'S COUNTER-ISSUE PRESENTED

Whether probative evidence supports the PCR court's finding that counsel was not ineffective under Strickland v Washington for stipulating to the introduction of the summary of Petitioner's unredacted oral statement to law enforcement where it included a phrase that "he was currently on bond for a lynching charge" because there is no Sixth Amendment prejudice because the comment in the statement was brief, never repeated to the jury in any manner throughout the trial or arguments and the state's evidence was strong which showed the comment in Petitioner's statement did not affect undermine confidence in the outcome under Strickland v. Washington.

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Petitioner was true bill indicted at the January 2009 term of the Sumter County Grand Jury for murder and possession of firearm or knife during the commission of a violent crime (2009-GS-43-0059). Shaun Kent, Esquire, and Ray Chandler, Esquire, represented Petitioner. On November 18, 2011, Petitioner was convicted as indicted. The Honorable Howard P. King sentenced Petitioner to a forty-two year term of imprisonment for murder and a five year term of imprisonment for possession of a weapon during commission of a violent crime with all sentences running concurrently.

Direct Appeal

A timely Notice of Appeal was filed on Petitioner's behalf. On appeal, Petitioner challenged the trial court's refusal to allow cross examination of the investigator about the scope of his investigation and the victim's pending burglary charges, as well as the trial court's denied of his directed verdict motion where the State allegedly failed to place him at the scene of the crime. App. 586. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Antrell Felder, Op. No. 2013-UP-437 (Ct. App. filed November 27, 2013). The Remittitur was issued on December 13, 2013.

Post-conviction Proceedings

Petitioner filed his application for post-conviction relief on July 23, 2014, alleging he was being held in custody unlawfully based on the following grounds:

1. Ineffective Assistance of Counsel
 - a. "failing to articulate and argue dismissal of the criminal case at the pretrial hearing on the grounds of speedy trial rights violation."

- b. "failing to articulate and argue dismissal of the criminal case on the grounds of prosecutorial misconduct and the resulting prejudice as the result of solicitor Catherine Fant controlling and manipulating the trial docket of this case to gain an unconstitutional advantage."
- c. "failing to compel the attendance of solicitor Catherine Fant at the pretrial evidentiary motions hearing where solicitor's Fant actions and inactions were the core of the prosecutorial misconduct allegations and where solicitor Fant is the only individual privy to the information that will answer her actions and inactions and which will justify the trial court granting dismissal of the case based on prosecutorial misconduct."
- d. "failing to move for disqualification of recusal of the Third Circuit Solicitor's office for repeated actions of prosecutorial misconduct committed by Solicitor Catherine Fant which has prejudice the trial preparation and discovery defense development strategies of the Applicant."
- e. "failing to conduct a reasonable investigation and interview Tavares Felder, while Tavares Felder's pretrial hearing testimony and trial testimony would have established grounds for suppression for the motion in limine and would have established a viable defense and rebuttal evidence against the law enforcement officers at trial who made an in-court identification of the defendant faked his identity to elude law enforcement which in turn alluded to defendant's guilty of this crime and the correctness of the law enforcement officers' identification of defendant."
- f. "Trial Counsel Ineffective for stipulating to unredacted introduction of defendant's oral statement into trial evidence via detective Potteiger's report and trial testimony which emphasizes that the defendant was currently out on bond for a lynching charge," resulting in the unobjectionable introduction of inadmissible 'prior bad acts' and 'other crimes' to demonstrate defendant's propensity to violent and to chill defendant's willingness to exercise his right to testify in his defense."
- g. "failing to conduct a reasonable investigation and interview of Stacey Caughman and Ida Mae Felder, where their pretrial hearing testimony and trial testimony will have established grounds for suppression for the pretrial motions and will have established a viable defense and rebuttal evidence against the law enforcement officers at trial who made in-court identification of Mrs. Ida Mae Felder's white automobile as being with tinted windows on the night of the crime, and who additionally testified that the tint on the windows were subsequently removed to obstruct and conceal from law

enforcement that Mrs. Felder's white car is the 'tinted window' white car the eyewitness saw at the crime scene which in turn alluded to the defendant's guilt of this crime and to the integrity of law enforcement investigation of this case."

2. Due process violation
 - a. "for the repeated actions of prosecutorial misconduct committed by solicitor Catherine Fant which was prejudiced the trial preparation and discovery and defense development strategies of the Applicant."
 - b. "for prosecutorial misconduct and the resulting prejudice as the result of solicitor Catherine Fant controlling and manipulating the trial docket of this case to gain an unconstitutional advantage."
3. Ineffective Assistance of Appellate Counsel

"failing to evaluate and brief suppression of the phone records, the victim's pending burglaries, 'third party guilt' principles to impeach the investigation, and the trial judge's denial to dismiss the case on prosecutorial misconduct."

Respondent submitted its Return on September 29, 2014. An evidentiary hearing was convened on March 28, 2017, at the Sumter County Courthouse before the Honorable D. Craig Brown. Petitioner was present at the hearing and was represented by Timothy Griffith, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Petitioner testified on his own behalf at the evidentiary hearing. Petitioner's trial attorneys, Shaun Kent, Esquire, and Ray Chandler, Esquire, also testified. The PCR court had before it a copy of the trial transcript, the records of the Sumter County Clerk of Court regarding the subject convictions, Petitioner's records from the South Carolina Department of Corrections, and the pleadings. Judge Brown issued an Order of Dismissal signed May 2, 2017, and filed May 18, 2017, denying and dismissing the application with prejudice.

PCR APPEAL

Petitioner filed a timely Notice of Appeal on May 8, 2017. Petitioner's Appendix and Petition for Writ of Certiorari were filed on December 4, 2017. In the petition, Felder, through

David Alexander of the South Carolina Office of Appellate Defense raised the following issue presented:

I. Whether petitioner's Sixth Amendment right to the effective assistance of counsel was violated when trial counsel agreed to the introduction of an unredacted summary of petitioner's oral statement to police which included the inadmissible information that petitioner was on bond for a lynching charge at the time of the alleged murder, which allowed the jury to infer that petitioner was a violent person in this close, wholly circumstantial case?

The Respondent, through Assistant Attorney General Julie Coleman made a Return to the Petition on April 23, 2018. On June 27, 2018, the Supreme Court of South Carolina entered its order granting the petition. The Brief of Petitioner was filed on October 24, 2018. The Brief of Respondent follows.

Statement of Facts of the Crime

Evidence revealed the circumstances that led to the death of Willie McKenzie began in the late evening of July 17, 2008 with the telephone call from David around 11:59 that advised Petitioner that four guys were breaking into the Petitioner's house. App. 351-352. (Petitioner's Statement). At that point, Petitioner left the party on Broad Street and returned to his home on Harry Avenue. Petitioner reported to the police in his statement that when he left to go to Harry Street he was driving his car, a white vehicle titled to his mother, and his mother was following in a green car. App. 352, ll. 1-7. He identified his car as a white Buick. App. 353, ll. 1-14, p. 355, l. 16 - p. 333, l. 2. (State Exhibits 12, 13).

According to Felder, when he entered his home on Harry Street, he noticed matters missing. App. 352, ll. 8-12. He stated that his girlfriend, Stacey Caughman, advised him to leave if he had something on him. Felder claimed he had marijuana on him "so he promptly left

by himself driving his white four-door Buick.” App. 352 p. 326, ll. 14-15.¹ This was prior to the police arriving at Harry Street.

The Defendant’s Clothes

The Petitioner also claimed in his statement that he had been wearing black shorts and a black shirt the morning of the 18th, but admitted that he had changed earlier from a white shirt. App. ROA p. 327, ll. 10-13. [The eyewitness identified the shooter as wearing a white shirt and dark pants. App. 183, 195-96, 210-12, 228-229].

The 911 Calls

On July 18, there was a 911 call about the burglary at [] Harry Street. App. 258, ll. 18-24. Two minutes later, there was a second 911 call concerning the shooting on Highland Street. App. 258, ll. 22-23, p. 259, ll. 5-9. Then, fifteen minutes later, there was a second call about the break-in at [] Harry Street. In response to the 911 call to the burglary at Harry Street, Officer Gabriel Blackwell arrived at 1 a.m. after a call went out at 12:37. App. 456-57, 459, ll. 17-24. The Petitioner’s girlfriend, Stacey Caughman, was present at the time and stated that she had made the 911 call. App. 457. According to the incident report, the call to Harry Street was at 00:37 and the call on the murder was 00:39. App. 299.

The initial Harry Street burglary 911 call was made at 12:37 and 14 seconds a.m. App. 441, l. 18 - p. 442, l. 8. The 911 call related to the Highland Street shooting was received at 12:39 and 51 seconds am. App. 442, ll. 12-19. State Exhibits 51, 52.

¹ In his statement, Felder claimed he went “the back way” to Sada’s apartment after he left Harry Street. However, he could not name any of the streets and claimed he then left. It is apparent that this claimed route was an out of the way route that avoided Broad and Highland Street. Further, Felder claimed to leaving his Buick at Sada’s house with the keys on the floorboard. App. 353. He claimed he went with Boo to the Red Bay area until 3 a.m.. Id. However, he did not know Boo’s real name or where he lived.

The Eyewitnesses

Kayla McFadden testified that she and her cousin, Antrell McFadden, were walking to a convenience store and came upon a man, who requested a cigarette. After they gave him the cigarette, they walked away from him. She described a car pulling up, a white car with tinted windows pulled up and someone got out and fired shots and kicked the victim. App. 182-183. Kayla described the shooter as wearing a “hat, white shirt, and some dark pants.” App. 183, ll. 24-25. Kayla identified the red hat (State Exhibit 17) as possibly the hat and confirmed that this was the hat on the ground in State Exhibit 1 at the crime scene. App. 184.

Kayla confirmed that the man who got out of the car initially shot the other man over the car. She confirmed that she saw the shooter go around the car and then kick the victim. App. 198-200.² She stated that the white car had come off Broad Street.

Kayla’s cousin, Antrell McFadden, testified that he gave the victim a cigarette that night and the victim was not wearing a hat. App. 209, 212. After they walked away, he stated a white car with tinted windows pulled up and a man got out of the car wearing a red and black hat, white shirt and blue jeans, about 5’7”. App. 210-212. He stated he heard one shot, but did not see the shooter’s face. App. 212. He said he then saw the hat on the ground and pointed it out to the police. App. 215-217. He identified State Exhibit 1 showing the hat as the hat he saw on the person who got out of the car. App. 216-217.³ (State Exhibit 17). He stated the shooting occurred after 12:30 that night. App. 220. McFadden testified that he heard the person who shot

² Dr. Janice Ross, the pathologist, testified that it would have been difficult to identify bruising on McKenzie’s body after the death. App. 330.

³ On cross-examination, McFadden stated he was sure the person was wearing a red hat. App. 233, ll. 16-20.

the victim say “I got you now.” App. 255, ll. 17-18.⁴

During the trial, Antrell McFadden’s statement to the police on July 18, 2008 was also introduced. App. 241 (State Exhibit 19) (**ROA State v. Felder, p 557**). In the statement, McFadden stated that the car had pulled up on the shoulder on the side the guy was walking. He described the car as an all-white four-door Buick with light tint on the windows. He described seeing the driver get out with a low fade and wearing a red and white Phillies hat (although the hat recovered was actually a red St. Louis hat). He described him wearing a white “wife beater” tee shirt and blue jeans. This was at 12:49, less than ten minutes after the shooting. State Exhibit 19 (Statement of Antrell McFadden). **ROA State v. Felder , p.557**.

The police confirmed that McFadden had pointed out the red hat to them. App. 253. Also, App. 247-48, 252.

The White Buick Identified

The evidence also reveals that later that morning, McFadden identified the Petitioner’s white Buick as consistent with the vehicle they had seen at the shooting. Kayla described that on their way home from the police station she saw a car that looked similar to the car that did the shooting. App. 191. She stated she was in the police car with her cousin as they were being brought home. App. 191, ll. 3-23. They were with Detective Lyons and Detective Potteiger. App. 201-202. She stated that “I think it was the same car. It had tinted windows in it, it was white.” App. 202, ll. 11-12. McFadden testified that he thought it was the same car, but was not positive. App. 221-22, 238.

Detective Lyons confirmed that while he and Detective Potteiger gave the McFaddens a

⁴Although McFadden testified that he did not see the perpetrator’s face, he did claim at one point that he could identify the shooter. App. 212, 219, 237. However, he was not able to pick out the shooter from a line-up that included the Petitioner. App. 219, 237-38, 261-62.

ride home from the police station a white car passed them at Willow Morand Apartments. The car was a white four-door with tinted windows. App 257. At that point the McFaddens stated that it looked like the car they had seen earlier, commenting that “it looks like the vehicle, that can be the vehicle, I’m not sure.” App. 257, ll. 6-11. Because they had passengers, Det. Lyons stated they could not stop the vehicle so they called it in and had other officers go to the complex and identify the vehicle. App. 257. They were able to identify the vehicle as belonging to Ida Mae Felder, the Petitioner’s mother and driven by Stacey Caughman, the Petitioner’s girlfriend. App. 257, l. 12 - p. 258, l. 12. Det. Lyons stated after they returned, they learned that a burglary had occurred at Harry Street and called in 2 minutes prior to the 911 call on the shooting. App. 258.

The distance between Willow Morand Apartments and Harry Street was less than one mile and between Harry Street and the crime scene was less than ½ to ¾ mile. App. 260. Det. Lyons opined it would take less than a minute to get between Harry St. and Highland St. App. 300. The distance between Harry and Highland was measured as .3 miles. App. 468.

Det. Potteiger testified similarly about the ride with the McFaddens when they identified the white car and observed it turning into Willow Morand Apartments. App. 341-42, 359. He stated it was one of the few vehicles seen on the roadway that morning. App. 342, ll. 2-4.

The False Identity by Petitioner

While the police were investigating the case, Detective Lyons went to Spanish Garden Apartments on the afternoon of the 18th to seek to locate the Petitioner. When they asked for Petitioner, the Petitioner introduced himself as Tavaras, the Petitioner’s brother. App. 264, ll. 11-22. They were told that Petitioner was not there. App. 264, ll. 20-22. Detective Potteiger testified about the false identity event. App. 344. He declared that when Felder turned himself

in on the 19th, that he was the same man they saw on the 18th. App. 344, 361.

The Tint Removal

As noted above, the vehicle the McFaddens saw the shooter driving was a white car with tinted windows. ROA 157, 184-85, 204-05. In addition, the car that was seen that morning and registered to the Petitioner's mother was a white car with tinted windows after 1:30 a.m. App. 191, 222, 257, 342.

However, the white Buick was later impounded. At that time, there was a tacky film-like substance on the windows. Detective Lyons testified that this was consistent with the tint being removed from the car windows. App. 269. He stated that the vehicle was seized late on the 18th. App. 269. He stated that the car in the impound did not presently have tinted windows. App. 311, ll. 15-16. He stated this was 12 to 14 hours after the shooting. App. 311. Detective Potteiger also stated that the lines on the vehicle were indicative of tint being removed. App. 356-57. Similarly, Lt. Duggin opined that the marks left on the car at the time he took the photographs suggested the removal of tint. App. 446-447.

Therefore, there was evidence that the particular car had tinted windows when first seen by Detective Lyons and Potteiger with the McFaddens, but later it was removed that day, prior to the seizure and impoundment.

The Petitioner's Red Hat at the Scene - Fingerprint and DNA

The shooter was seen wearing the red hat left at the shooting scene. After recovery of the hat, evidence from the hat was directly connected to Antrell Felder. First, there was a fingerprint from Felder's right middle finger located on the label of the hat. App 398-401.⁵

In addition, the Petitioner's DNA was determined to be a major contributor to a swab

⁵ The Petitioner's print was also located from the white Buick on a lottery ticket recovered from the car. App. 403-404. Felder's DNA was also present in the car. App. 440-41.

from the baseball cap (State Exhibit 17) and the victim was excluded from the mixture. App.

452, l. 11- p. 453, l. 17.

THE PETITIONER'S STATEMENT:

Relevant to this appeal, the Petitioner's statement was introduced without objection by Detective Potteiger. As presented, the statement read as follows:

Antrell Felder began by stating he was 26 years old, that his date of birth was July 15, 1982, and that he lived at _____ Street. **He related that he was currently on bond for a lynching charge.** Regarding the burglary of the house at _____, Felder said he was hanging out at his sister-in-law Sada's apartment on _____ along with Sada, Stephen, Tavaras, James Singleton, Kim, his brother Roy, and his mother, sister, and nieces. He stated that he had been at Sada's since first dark, around 8:00 or 8:30 p.m. Felder said that prior to this, everyone was over at his house on _____ Avenue when he suggested that they go to his bro's house.

Felder. continued by saying he was outside drinking with Kim and his brother when he heard a commotion inside. He then told the officers that someone he knew named David had called his cell phone at 11:59 p.m., Thursday, July 17, and said 4 guys were in the process of breaking into his [App. 351, ll. 9 - 25]. house at _____. Felder said he did not know David's last name or where he lived. He said that he, Kim, and his girl friend Stacey left and went to — went to the house. According to Felder, he, Stacey, and Kim rode in his car, while his mother Ida, Sada, the kids and James came later in Ida's green car. He said Stephan and Tony came in Tony's car.

Felder stated he went inside the house to make sure everything was okay. When asked what was missing from the house, he mentioned shoes, a pair of new, black Air Force Ones and a pair of white and red Air Jordan's, hats, and some his and hers clothes. He disclosed that Stacey then told him to make sure you don't have anything on you. Because he had a bag of weed with him, Felder said he promptly left by himself driving his white 4-door Buick. Felder said Stacey, Sada, and Kim remained at the residence. He further related that he went back to Sada's apartment, and then when he arrived. Boo, Stephen's cousin, was there. When asked which direction he drove when he left _____, Felder told the officers he took the back way to Sada' s, but could not name any of the streets he took. He then said that when he arrived, he smoked a cigarette because no one was home.

When confronted with his previous remark about Boo, Felder replied that Boo was indeed there and that Boo took him over to Red Bay to visit a girl named Shanda. Felder remarked that Shanda lived on Belmont Drive near Jelly's people, and that he left the white Buick at Sada's house with the keys in the front floorboard. Felder stated he and Boo arrived over on Red Bay between 12:25 a.m. and 12:35 a.m., and that he didn't leave the Red Bay area until 3:00 a.m. When

asked to provide more information about Boo, Felder said he did not know his real name or where he lived.

When asked what he had been wearing the morning of the 18th, Felder replied that he had on black shorts and a black shirt, although he stated he changed earlier from a white shirt. He volunteered that he frequently visits his mother's place in Wedgefield and that he stays with her on that Thursday and Friday, the 17th and 18th. Felder gave his telephone number as [] and offered the following numbers in addition: [] . (Stacey), [] (Kia), [] and [] .

As the interview wound down, Felder reiterated that the items allegedly taken from the house on [] were clothes, shoes, hats.

App. 351-353. (emphasis added).

Later Discussion about Lynching Charge as Not Admissible

Near the end of the trial, as Judge King prepared to advise Felder on his right to testify, a resolution of the Petitioner's prior criminal record was necessary. App. 469, 1. 5 - 470, 1. 13. Trial counsel Kent requested "for clarity purposes, my understanding of Mr. Felder's prior criminal record that may or may not be useable against him would be a lynching" and a prior possession with intent to distribute crack cocaine. App. 469, 11. 12- 18. Judge King clarified, "So the 2 things are a lynching conviction and a—" App. 469, 11. 19 - 22. Counsel Kent replied, "A lynching conviction, Judge—no, **a pending lynching charge**. I apologize." App. 469, 11. 23 - 24. The Court responded: " a pending lynching charge." App. 469, 1. 25. Solicitor Meadors confirmed Felder had not been convicted of lynching. App. 470, 11. 4-6.

Judge King stated, "I don't think the lynching is admissible under 608, 609, let me see. 609. Prior convictions. **And a pending charge would not be admissible. So the one charge that could be used against him would be the—not the lynching, but the other.**" App. 470, 11. 8- 12.

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 810 S.E.2d 836, 839 (2018) (S.C. case cite not yet available), reh'g denied (Mar. 29, 2018). Pure questions of law are reviewed de novo without deference to the lower court. Id. The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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 (1984); Butler, at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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. Probative evidence supports the PCR court's finding that Counsel was not ineffective for stipulating to the introduction of a summary of Petitioner's unredacted oral statement to law enforcement where it included a phrase at the outset that he stated that "he was currently on bond for a lynching charge" because there is no Sixth Amendment prejudice. The comment in the statement's summary was brief. The testimony about that specific portion was one sentence. There was no additional comment about lynching or being on bond repeated to the jury in any manner throughout the trial or arguments. The state's evidence on guilt was strong. This showed probative evidence to support the PCR Court's conclusion of no prejudice under Strickland. The comment in the summary of the Petitioner's statement did not affect undermine confidence in the outcome under Strickland v. Washington.

The issue before this Court is not whether the admission of evidence that Petitioner was on bond for an unrelated lynching charge at the time he gave the statement. Respondent concedes that the evidence should not have been admitted. Had it been specifically brought to the Court's attention prior to its introduction and testimony it would have been removed. See App. 470, ll. 8-12 (Judge King announcing that a lynching charge could not be used to impeach the Petitioner if he testifies). The issue is whether counsel's omission in failing to have the lynching bond portion redacted to a reasonable probability undermined confidence in the outcome of the verdict. The PCR Court concluded that there was no prejudice from the introduction of this statement and that the Applicant's comment that he was out of bond for another crime when he gave his statement did not change the verdict. App. 766-767. There is sufficient evidence in the record to support that conclusion. Under the standard of review, the appeal should be denied.

Petitioner argues the PCR court erred in finding Counsel was not ineffective for stipulating to the admission of Petitioner's unredacted oral statement to law enforcement which admitted he was on bond for a pending lynching charge.

However, probative evidence supports the PCR court's ruling that the evidence likely did not change the result of the trial. First, because there is no Sixth Amendment prejudice because the lynching comment in the statement was brief and unrelated to the remainder of the statement. App. 351, l. 12. Second, the terms lynching or bond were never repeated to the jury in any manner throughout the trial or arguments. Third, the state's evidence was strong which showed the comment in Petitioner's statement did not affect undermine confidence in the outcome under Strickland v. Washington. Petitioner failed to meet the prejudice prong of the Strickland test, and this Court should affirm the PCR court's denial of post-conviction relief.

HOW THE ISSUE WAS RAISED

Petitioner gave an oral statement to law enforcement on July 19, 2008. See App. 113. App. 351-353 (statement). In the beginning of his statement, he admitted to the officer that he was out on bond for a lynching charge. App. 351, l. 11-12. A Jackson v. Denno hearing was held on the admissibility of the statement. App. 110-128. After discussing the evidence and potential stipulation with Petitioner, Counsel stipulated to the admission of the entire statement at trial. There was no discussion about the pending lynching charge in the discussion before the trial court at that time by the prosecution or defense. Counsel Kent did not request the comment about Petitioner's bond or pending lynching charge be redacted at any time. App. 126-128. There was no other mention of the lynching charge before the jury at trial.

Later Discussion about Lynching Charge as Not Admissible

Near the end of the trial, as Judge King prepared to advise Felder on his right to testify, a resolution of the Petitioner's prior criminal record was necessary. App. 469, l. 5 - 470, l. 13. Trial counsel Kent requested "for clarity purposes, my understanding of Mr. Felder's prior

criminal record that may or may not be useable against him would be a lynching" and a prior possession with intent to distribute crack cocaine. App. 469, 11. 12- 18. Judge King clarified, "So the 2 things are a lynching conviction and a—" App. 469, 11. 19 - 22. Counsel Kent replied, "A lynching conviction, Judge—no, **a pending lynching charge**. I apologize." App. 469, 11. 23 - 24. The Court responded: " a pending lynching charge."App. 469, l. 25. Solicitor Meadors confirmed Felder had not been convicted of lynching. App. 470, 11. 4-6.

Judge King stated, "I don't think the lynching is admissible under 608, 609, let me see. 609. Prior convictions. **And a pending charge would not be admissible. So the one charge that could be used against him would be the—not the lynching, but the other.**" App. 470, 11. 8- 12. The Petitioner did not testify.

PCR Testimony of Counsel.

At the PCR hearing, counsel Shaun Kent testified he could not recall the contents of the statement because of the length of time that had passed since the trial, but he very clearly recalled discussing their decision to stipulate to all the stipulations they made with Petitioner and Mr. Chandler before the trial. App. 691, line 23- 692, line 18. He testified that, based on common practice, he would be "shocked" if he had not reviewed the statement before stipulating to its admission at trial. App. 702, lines 1-6. Although he could not recall failing to object to the entrance of the unredacted statement, Counsel admitted in hindsight that if he did not object, "that would be a mistake." App. 702, line 7-15. However, Counsel explained that he did not think excluding the statement's reference to Petitioner being out on bond for lynching would have changed the outcome of the trial. App. 702, line 22 – 703, line 2. He explained, "I mean, there was so many other things that I wish would have gone different; but I don't think that statement in and of itself would have been the difference, no, ma'am." App. 703, line 2-5.

Counsel Ray Chandler, who also represented Petitioner on the charges and assisted Counsel in his defense, testified at the evidentiary hearing that he recalled the oral statement and its mention of being on bond for lynching. App. 735, line 8-18. He testified that he, Counsel Kent, and “Flew,” who also helped them prepare the case, all discussed the statement and exactly what impact it would have on the case before the trial. App. 735, line 10-14. Chandler testified that one could argue in retrospect that the mention of Petitioner’s pending lynching charge in the statement changed the outcome of the case, but he noted that there were three very “compelling things” in this case which affected the outcome. App. 735, line 19 – 736, line 1. These three factors, in his opinion, were the red hat that allegedly belonged to Petitioner was in the road near the dead body, the white car with tinted windows which called into question whether the witnesses could see Petitioner inside the car, and the fact that Petitioner placed a phone call to law enforcement from the other side of town as the murder within minutes of the crime.

ORDER OF DISMISSAL ON ISSUE

In its Order of Dismissal, the PCR court found Counsel was not ineffective for stipulating to the unredacted oral statement to law enforcement at trial. App. 766-767. The PCR court explained that the oral statement was a voluntary statement given to law enforcement and likely would have come into evidence even over a potential objection. App.766. Although the statement about the pending lynching charge could have been redacted, the PCR court found there was no prejudice from the introduction of this evidence and that this particular mention of Petitioner’s bond did not change the jury’s verdict in his trial. App. 766-767.

ANALYSIS

Because the PCR court’s finding that there was no resulting 6th Amendment prejudice from the introduction of this evidence is supported by probative evidence in the record, its

conclusion should be affirmed. Strickland provides: “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela–Bernal, 458 U.S. 858, 866–867, (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” Strickland, 466 U.S. at 693 (1984). “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.

To satisfy the prejudice prong, an applicant must demonstrate “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693). As the Supreme Court of the United States explained in Strickland, “the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” 466 U.S. at 695, 104 S.Ct. at 2068-69, 80 L.Ed.2d at 698. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698).

In determining whether the applicant has proven prejudice, the PCR court should consider the *specific impact counsel’s error* had on the outcome of the trial. See Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury. See generally Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822,

824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government’s case ...,” and “we must consider the totality of the evidence before the jury.”). In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. See Strickland, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 (stating “a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”).

Respondent does not argue that counsel was not deficient in their failure to seek redaction of the reference to the pending lynching charge. However, the record also reveals the minimal impact the brief comment had upon all the parties at trial. This solitary reference to lynching in the summary was apparently neglected by the defense, as well as the solicitor and trial court. This inference is supported by the fact that when the judge was completing the *in camera* discussion about the pending lynching charge before inquiring about the Petitioner’s decision to testify, counsel Kent revealed that he was aware of the lynching charge itself, but asserted it may or may not be inadmissible. App. 469, 12-15. It is obvious that if counsel realized that the lynching had already been admitted, the objection would not have been necessary. It is clear, though the trial court and counsel had both reviewed State Exhibit 35 (App. 349-350) earlier, a conclusion that the lynching charge was not admissible would have been unnecessary. Simply put, in light of the rest of the record, the brief lynching charge comment in the summary that had already been admitted had minimal impact on the parties. Similarly, it cannot be questioned that had an objection been made prior to the publishing of the statement, the lynching comment would have been redacted. Was it neglect on the part of counsel? Yes. Was it prejudicial under Strickland when none of the participants apparently realized similar information had gone before the jury in passing? No.

The Petitioner is correct that trial counsel's post-hoc assessment does not control whether an omission on his part was prejudicial. Brief of Petitioner, p. 8. The determination of prejudice is resolved by the hearing court, and ultimately this Court by a review of the entirety of the trial record and the PCR record. Although that determination does not require the Court to ignore an assessment by counsel of its impact, the Court is not bound by it nor is automatically entitled to any presumption, as with the Strickland presumption of competent performance in assessing the deficient performance prong.

Counsel Kent testified at the evidentiary hearing that he did not believe that lynching comment statement alone would have made the difference in the trial, although he admitted in hindsight it was probably a mistake not to redact it. App. 703, line 2-5. Chandler opined that the statement "*could* have" changed the outcome of the case, but explained that there were three "very compelling things in this case" that decided the question of Petitioner's guilt, none of which were the statement about Petitioner's bond. App. 735 (emphasis added).

Although Petitioner now stresses the testimony of counsel Chandler that one could argue the admission of this unredacted statement changed the outcome of the trial "in retrospect," this Court should reject any assertion that a retrospective analysis should apply to the decision to stipulate. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6 (2003). Chandler's testimony makes it clear that, while one might pick apart their strategic decisions years later with the benefit of knowledge of every detail of the case and what occurred at trial, at the time of his representation, he and counsel Kent did not believe this harmed their client's chances of acquittal.

Although counsel Kent would not say the prosecution's case was strong, he clarified that it was his opinion that it was a "strong circumstantial case." App. 686, ll. 7-10. The defense was to discredit the State's version and prove that Petitioner was not there. However, the problem was the DNA found on the hat. App. 688. Counsel Chandler opined the he did not think the statement would have made a difference in the result. App. 702.

This case was more than merely about the hat located at the scene. The particular baseball hat found at the this scene was viewed on the shooter - not the victim - and was directly connected to the crime. Further, the red hat was directly connected to Petitioner through both the fingerprint on the label and the mixed DNA from the hat's swab. A similar white 4 door vehicle to the shooter's car was directly connected to the Petitioner who admitted driving the vehicle at a similar time that evening, an evening when few vehicles were seen on the roadways. That particular vehicle registered to the Petitioner's mother was also connected to the Petitioner through his DNA and a fingerprint on an item within the vehicle.⁶ That particular vehicle was left by Petitioner according to his statement at Sada's house with the keys on the floorboard while Petitioner claimed he went to Red Bay between 12:25 and 12:35 and remained at Red Bay until 3 am. Tr.p. 353. That particular vehicle was seen after 1:30 am being driven back to the Willow Morand apartment by Petitioner's girlfriend - who had earlier remained at Harry Street when the police responded to the break-in call.

The giving of a false identity when the police were seeking to question him speaks of guilty knowledge. The Petitioner's odd claim in his statement of taking an unusual "back way" route which avoided the crime scene in his statement and an alibi claim with an unknown person questions his credibility about the crime. (App. 352-53). The Petitioner acknowledged wearing

⁶ The Petitioner's print was also located from the white Buick on a lottery ticket recovered from the car. App. 403-404. Felder's DNA was also present in the car. App. 440-41.

similar clothes that day as the shooter wore - white shirt and dark pants, but then claimed to have changed clothes into all black that morning. App. 353.

The inferences drawn by the affirmative acts in changing matters from the time of the crime also suggest guilty knowledge. The timeliness of the removal of the window tint on the day of the crime, his false identification to police as Tavaras, his change of clothes and his claimed leaving the car away from his home with the keys suggested guilt. See State v. Thompson, 278 S.C. 1, 10, 292 S.E.2d 581, 587 (False and conflicting statements are evidence of guilty knowledge and intent). Finally, his claimed alibi in being with the unknown "Boo", whose real name he did not know nor his address was also more than merely suspicious under these circumstances.

Evidence was also presented that this was not the first break-in at Petitioner's home. App. 365. Further, there was evidence presented that Petitioner knew the victim and that McKenzie had purchased "items" from Felder on occasion. App. 365, l. 15-20.

Against this backdrop was the contemporaneous break-in of the Petitioner's home and the oddly reported only thefts of shoes by his girlfriend [prior to her apparent knowledge of the shooting], while Petitioner later reported clothes, shoes and hats after he turned himself in concerning the crime. Compare App. 458 - 459 with App. 352 - 353. As the state cogently pointed out in their closing, who breaks into a home to steal a baseball hat! App. 511.

Against the backdrop was the presence on the victim at the crime scene of a camera which had recorded the Petitioner's girlfriend's birthday party, implicitly suggesting the camera was a product of the break-in-albeit unreported. App. 418-420. This was a strong circumstantial evidence case.

Critical to the prejudice assessment is the specific impact counsel's error had on the outcome of the trial. See Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99. The Petitioner relies on Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) where improper admission of evidence of a crime. This Court concluded counsel was deficient for failing to object to an officer's testimony that robbery defendant had committed a prior burglary. The officer's testimony was in response to an improper attempt to introduce evidence that defendant committed another crime, the State did not present clear and convincing evidence that defendant had committed a prior burglary, and the investigator admitted that the prior burglary had never been solved. Petitioner is correct that 6th Amendment prejudice was found, but ignores that there were multiple other findings of deficient unrelated the burglary comment. Importantly, those other findings of deficient performance included a failure to cross-examine a witness about a carjacking charge and the improper evidence about a burglary, weighed against its assessment of the strength of the State's case, the Court found the errors significantly undermine confidence in the outcome. Here, it was only a passing reference to the pending charge that was even overlooked by the court as well as counsel when presented and not emphasized, unlike the attempt in Smalls by the State to connect the burglary and theft with the crime on trial. There was no use of the bond comment by the State in Petitioner's case. The Petitioner claims that the only evidence linking Petitioner to the crime scene is the red baseball hat. Respondent submits that there was sufficient evidence that Felder was at the scene of Willie McKenzie's shooting. This was supported not only by the presence of the hat worn by the shooter at the crime scene with his fingerprint and DNA present, but also by the identity of the vehicle driven by the perpetrator consistent with the vehicle owned by Petitioner's mother that he was seen driving moments before the incident .3 miles away and his attempt to evade questioning by his attempt

to falsely identify himself to law enforcement. Contrary to Smalls, minimal impact of the inadvertent admission of the comment did not undermine confidence in the verdict.

The Petitioner also relies upon Green v. State, 338 S.C. 428, 527 S.E.2d. 98 (2000). In Green, the State was found to have improperly impeached the defendant with two prior drug charges without counsel's objection. Unlike Felder's case, the improper use of the of the convictions went to the heart of Green's defense by improperly challenging his credibility. Here, the passing reference did not have a similar impact. There was emphasis and use of the error in Green's case which affected the trial. In the instant case, although lynching was mentioned, it was lost upon the participants as having any impact and never mentioned.

Reliance on German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) is also misplaced. In German, the state affirmatively and improperly presented evidence that Green was selling crack prior to the crime he was on trial. This was emphasized in the prosecutor's opening statement, as well as in the evidence at trial. This is not comparable to the limited reference in the instant case.

The improper admission of firearm convictions resulted in a reversal of the murder conviction in State v. Bryant, 369 S.C. 511, 633 S.E.2d. 152 (2006). Like Green, the improper admission was tied to a challenge to the defendant's credibility. Here, Felder did not testify and the specific impact was negated by the lack of its use in any manner by the prosecution. The specific harm by its passing introduction did not have the impact that Petitioner claims that the jury would infer from it that he was dangerous and predisposed to violence. The state never sought to create such an impression.

Evidence of a defendant's prior bad act is not admissible to show that the defendant has a disposition or propensity toward the commission of a crime. However, any error was harmless, because evidence of defendant's guilt was overwhelming, and there was no significant

probability that the arrest for the offense affected the outcome of the trial. See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony that he compared defendant's fingerprints with fingerprint card agency had on record was not so prejudicial to defendant as to warrant mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (recognizing appellant's possible drug dealing was merely suggested and no testimony was presented concerning such behavior); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (noting that references to defendant's prior crimes in arresting officer's testimony that he told defendant that he was under arrest for escape and murder and that he asked defendant where correctional truck was were extremely vague); State v. Robinson, 238 S.C. 140, 119 S.E.2d 671 (1961), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Court emphasizing that, even if the testimony created the inference in the jury's mind that the accused had committed another crime, the State never attempted to prove the accused had been convicted of some other crime).

The evidence in the record of Petitioner's guilt is probative evidence that supports the PCR court's ruling that the admission of this brief reference that Felder was out on bond for lynching did not change the outcome of the trial. There was both direct evidence and substantial circumstantial evidence establishing Petitioner was at the scene when the murder occurred. As noted at the evidentiary hearing by Mr. Chandler, the biggest evidence of Petitioner's guilt was the red hat found at the scene of the crime near the deceased victim's body containing Petitioner's DNA and fingerprints. See App. 184; App. 218. There was also evidence that Petitioner had recently had the tint removed from his car windows, and that his vehicle otherwise

matched the description of the car the shooter drove. Petitioner admitted to wearing a white shirt earlier that day, which matched the description of the clothing worn by the shooter.

All the evidence of Petitioner's guilt presented at trial is probative evidence supporting the PCR court's finding that the statement of Petitioner's bond for a pending lynching charge did not change the outcome of the trial. The record indicates there is clearly enough evidence to allow the jury to convict Petitioner of the charges regardless of any indication of unrelated pending charges. Therefore, Petitioner can show no prejudice under Strickland, and the PCR court's finding that Trial Counsel was not ineffective should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should deny the appeal and affirm the denial of state post-conviction relief.

Respectfully submitted,

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March 29, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-001173

ANTRELL RASHAWN FELDER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,


Respondent.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Brief of Respondent on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to: David Alexander, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 29th day of March, 2019.



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