STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable R. Keith Kelly, Circuit Court Judge

ORIGINAL

WILLIAM BROCKMEYER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-000695

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether trial counsel's admitted failure to object to hearsay that "people had seen [petitioner] shoot [the decedent]" in a shooting outside of a crowded bar that petitioner testified was accidental constitutes ineffective assistance of counsel depriving petitioner of his Sixth Amendment right to counsel and requiring a new trial?

STATEMENT

In August 2011, petitioner was tried for murder and a weapons charge in Lexington County before the Honorable Edward B. Cottingham and a jury. App. 1. Samuel R. Hubbard, III, and David Shawn Graham represented the State. App. 1. David M. Mauldin and Robert M. Madsen represented petitioner. App. 1. The jury convicted petitioner and his direct appeal was affirmed by this Court. State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013).

On February 25, 2014, petitioner filed a PCR application. App. 1039. On November 9, 2016, a hearing was held before the Honorable R. Keith Kelly. App. 1063. Kristy G. Goldberg represented petitioner and Johanna C. Valenzuela represented the State. App. 1063. Judge Kelly denied petitioner's PCR application and also denied his Rule 59(e), SCRCP, motion. App. 1120. App. 1165. This petition follows.

STANDARD OF REVIEW

The appellate court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)).

ARGUMENT

Trial counsel's admitted failure to object to hearsay that "people had seen [petitioner] shoot [the decedent]" in a shooting outside of a crowded bar that petitioner testified was accidental constitutes ineffective assistance of counsel depriving petitioner of his Sixth Amendment right to counsel and requiring a new trial.

The central factual issue the jury needed to resolve in this case was whether the death at a bar of petitioner's good friend, Nick Rae ("Rae"), was an intentional or accidental shooting. App. 878, ll. 1 – 5. The solicitor, in his opening statement, made a point of telling the jury that motive was not an element of murder. App. 65, ll. 5 – 12. He said, "You need to know in the real world in a courtroom the State never, ever has to prove motive. It's not a requirement." App. 65, ll. 5 – 12. He then alleged appellant was upset over a girl and having to foot the bill when Rae was swindled in pool. App. 65, l. 19 – 69, l. 9. Near the end of his closing argument, after describing Rae's gunshot wound and trying to dispute appellant's testimony that the shooting was an accident, the solicitor told the jury, "If you think that came from an accident, give it what weight you think it is. If you think it's enough, turn him loose." Tr. 878, ll. 1 – 5.

Rae died from a gunshot wound sustained while he was heavily intoxicated and sitting in a chair, slumped over, outside of a bar.[1] App. 96, l. 3 – 103, l. 9. Approximately 25-30 people were at the bar that night. App. 90, ll. 13 – 16. Gina Brakefield, the State's first and primary witness, said that before the shooting, Jennifer McFarland and Brakefield's friend Brittany followed the soon-to-be-sick Rae out of the bar. App. 96, ll. 13 – 23. Amera Kabar, Bassam Kabar, and Jordan Allen were outside when Rae suffered the gunshot. App. 148, l. 3 – 151, l. 3.

[1] The toxicologist testified that Rae's blood alcohol level measured from ocular fluid was 0.227. App. 573, l. 10 – 19. At that level, the toxicologist said most people would be in a "stupor." App. 574, ll. 18 – 25.

App. 245, l. 5 – 248, l. 4. Brakefield testified that after the shooting, "Floods of people came outside. Some left; some stayed." App. 106, ll. 3 – 5.

Amera Kabar did not see the shooting. App. 182, ll. 9 – 24. She heard a noise that "sounded like a car backfired." App. 182, ll. 21 – 24. Bassam Kabar saw appellant with Rae, but "couldn't see if he had the gun in his hands or not." App. 245, ll. 19 – 23. He "heard a loud pop." App. 246, l. 1. Bassam Kabar told the police that night that he thought Rae might have shot himself. App. 249, ll. 20 – 25. Jamie Spencer, Amera Kabar's boyfriend, testified he went back inside the bar right before the shooting. App. 216, l. 20 – 217, l. 12.

Justin Ainsworth was outside, but did not see the shooting. App. 260, ll. 2 – 11. He heard a "loud pop" that "sounded like a firework." App. 260, ll. 2 – 11. Ainsworth saw appellant walk away and claimed he heard appellant say that Rae shot himself. App. 260, l. 12 – 261, l. 7. Ainsworth went inside the bar, got his wife, and "took off." App. 261, ll. 18 – 22. Leslie Lawson, who ran the bar, described the crowd after the shooting as a "wave" and a "panic." App. 301, ll. 2 – 14.

Shawn Grant, a police investigator, described people "sporadically scattered about the grounds" when he arrived. App. 335, ll. 4 – 10. The CSI tech agreed there were "quite a few people" at the scene when he arrived. App. 395, l.23 – 396, l. 9.

Jordan Allen did not testify. App. 3 - 8. Brittany did not testify. App. 3 - 8. Jennifer McFarland did not testify. App. 3 – 8. The primary issue this Court addressed on petitioner's direct appeal was petitioner's attempts to obtain the identity of an anonymous commenter on a news website who claimed to see petitioner's reaction to his friend being shot. State v. Brockmeyer, 406 S.C. 324, 334-40, 751 S.E.2d 645, 650-53 (2013). This Court ruled the issue was unpreserved, in part based on the defense's lack of renewing any motion after the trial

judge initially ordered the State to help the defense identify the people present at the bar from its sign-in sheet (the bar was a private club), but many of the names were illegible. Id.

Petitioner testified in his own defense that the shooting of his good friend was a tragic accident. App. 758, l. 5 – 763, l. 10. The heavily intoxicated Rae walked "real fast outside." App. 758, ll. 2 – 4. The DJ announced last call and petitioner went outside. App. 758, ll. 5 – 10. Other people from their table were leaving. App. 758, ll. 5 – 10.

When petitioner got outside, he heard somebody say, "Gun." App. 759, ll. 4 – 5. Rae was leaning in a chair with his head down and his hand in his lap. App. 759, ll. 4 – 9. When Rae held his head up, petitioner saw that Rae was "holding a gun." App. 759, ll. 4 – 9. Petitioner leaned in and "tried to grab the gun." App. 759, ll. 11 – 17.

Petitioner was unsure if he ever managed to grab the gun, but knew that he touched either Rae's hand or the end of the gun. App. 759, ll. 10 – 23. When he touched it, "the gun went off." App. 759, ll. 10 – 23. Petitioner's ears were ringing from the noise. App. 759, ll. 19 – 23. Petitioner took the gun and threw it in the woods because both he and Rae had spent time in prison and were not allowed to have guns. App. 760, ll. 1 – 8. He did not know anything was wrong with Rae when he threw the gun away. App. 761, ll. 5 – 14.

The State's best witness who claimed to see the shooting was Brakefield. The night of Rae's death, Brakefield consumed three drinks and a shot. App. 91, ll. 14 – 22. Near the end of the evening at the bar, Brakefield noticed Rae was so drunk that he was passing out at their table. App. 95, ll. 11 – 19. Rae suddenly awakened and ran out of the bar "like he was about to be sick." App. 96, ll. 3 – 6.

Brakefield went outside and soon saw petitioner "making out" with Brittany. App. 98, ll. 16 – 17. Brakefield called them both "whores." App. 99, ll. 1 – 3. Once she got onto the

bar's front porch, she "saw [Rae] in the chair slumped over and [petitioner] crouching in front of him." App. 99, ll. 17 – 20. She specifically testified that Rae's hands were by his side and his head was in his lap." App. 99, ll. 21 – 22. Brakefield claimed to see petitioner whispering in Rae's ear "with his hands up in a "trigger-like position." App. 100, ll. 10 – 12. She said Rae was asleep. App. 100, ll. 16 – 17. Brakefield then did a demonstration of what she saw for the jury. App. 100, l. 21 – 102, l. 21. She claimed she then heard a "loud pop" and saw "a brass casing fly out." App. 103, ll. 1 – 2. Petitioner then shook Rae, shoved him, then walked toward the woods. App. 103, ll. 16 – 23.

The solicitor relied heavily on Brakefield's testimony during his closing argument. App. 871, l. 22 – 872, l. 16. The solicitor told the jury, "She sees [petitioner] crouched down with his hand up towards [Rae's] neck in a shooting position. She said [Rae] is passed out with his hands by his side. You can find him guilty on that and nothing else." App. 871, l. 23 – 872, l. 2. The solicitor cited Brakefield as saying Rae's hand never came up and she never saw a gun in Rae's hand. App. 872, ll. 5 – 16. He told the jury that Brakefield had "no reason to lie." App. 872, ll. 14 – 16.

Despite the crowded bar and the number of potential witnesses, Brakefield and petitioner were the only two witnesses who gave specific testimony about the positions of Rae's hands and the gun. Unfortunately for petitioner, trial counsel missed a crucial hearsay objection during the testimony of a member of the group at the bar, Mariko Clack. App. 147, l. 20 – 148, l. 4. Clack met petitioner at a party and claimed petitioner gave her a fake name. App. 128, l. 8 – 129, l. 24. She and petitioner had a brief romantic relationship until Rae told Clack petitioner's real name and that petitioner was engaged. App. 129, l. 20 – 130, l. 18. App. 150, ll. 2 – 15.

Clack was at the bar the night of the shooting, but was not outside when it happened. App. 139, l. 12 – 140, l. 20. Brakefield told her Rae had been shot and Clack "ran outside." App. 140, ll. 12 – 20. Clack claimed petitioner told her that Rae asked for the gun so he could commit a robbery, then began acting shaky and frantic, screaming, "My brother." App. 143, ll. 19 – 20. Petitioner walked around weeping and screaming. App. 146, ll. 17 – 22. Petitioner left with the police and told Clack to come get him as he departed. App. 147, ll. 8 – 13.

Later that night, Clack got a phone call from petitioner. App, 147, ll. 14 – 19. The solicitor asked what petitioner said about Rae during the phone call. App. 147, ll. 20 – 21. Clack replied, "He called me and told him to come get him, and I told him that he wasn't leaving **and that people had seen him shoot [Rae].**" App. 147, ll. 22 – 24 (emphasis added). Trial counsel did not object to the hearsay. App. 147, ll. 19 – 25.

The solicitor immediately asked Clack, **"People said what?"** App. 147, l. 25 (emphasis added). Trial counsel did not object to this question that could do nothing but elicit hearsay. App. 147, l. 25 – 148, l. 2. Clack responded, "That they had seen him shoot [Rae]. **There was witnesses that had seen him shoot [Rae].**" App. 148, ll. 1 – 2 (emphasis added). Again, trial counsel failed to object. App. 147, l. 25 – 148, l. 2.

At the PCR hearing, when confronted with these lines from the transcript, trial counsel agreed that these statements were hearsay. App. 1091, ll. 3 – 25. Trial counsel could not recall why he did not object, but guessed, "It might have gone by so quick because they were talking about like immediately after him denying doing it." App. 1092, ll. 1 – 5. Trial counsel then said that it "probably went by very quickly and I didn't catch it to object to it" and ultimately admitted that it was "[p]robably" a missed objection. App. 1092, ll. 6 – 20.

The PCR court held that petitioner could not prove Sixth Amendment prejudice. App. 1134-36. A footnote seems to indicate that the PCR court believed it possible that trial counsel was not deficient because "a strong argument could be made that the testimony at issue was hearsay [sic] under Rule 801(c), SCRE" and then states that the court found that the testimony was offered to establish petitioner's response to the initial allegations about the shooting. App. 1135-36. The court then held that petitioner could not show prejudice because his defense was accident and therefore he admitted he was involved in the shooting and also because petitioner was overwhelmingly guilty. App. 1135-36.

The PCR court erred on both the deficient performance prong and the prejudice prong of the Sixth Amendment analysis. Strickland v. Washington, 466 U.S. 668 (1984). First, trial counsel admitted the deficiency and that the statement was hearsay. The statement was offered for the truth of the matter asserted. Rule 801(c), SCRE. The solicitor's question was, "People said what?" App. 147, l. 25. This question calls for the worst kind of hearsay—factual assertions about the shooting from unidentified "people." The response was phrased in an active voice—that people saw petitioner shoot Rae. Not that people saw Rae get shot, or that people saw a shooting, but actively stating that petitioner shot Rae. Petitioner's denial of shooting Rae could have easily been elicited without this rank, inadmissible hearsay.

The case cited by the PCR court does not support any argument that the hearsay in this case was admissible. App. 1135. In Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002), the witness testified on direct about why he brought a yearbook to the police to help identify the defendant and expressly stated that he had heard "stuff," that some was true, some was not, and then admitted on cross, these were just rumors that the defendant "may have been involved" in a shooting. Id. at 28-32, 561 S.E.2d at 608-10. Here, the witness did not equivocate and said

witnesses saw petitioner shoot Rae. Rhodes not only fails to support the PCR court's conclusion but instead further illustrates that the testimony in petitioner's case was hearsay.

The analytically very similar recent case of State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) further shows that the statements in petitioner's case were inadmissible hearsay. In Brewer, the defendant was arrested following two separate shootings at a night club in Beaufort. 411 S.C. at 403-404, 768 S.E. at 657. The first shooting occurred when the night club owner confronted Brewer over the gun he was carrying. Id. Brewer responded by pulling out his pistol and pointing it at the owner's head. Id. Brewer then fired a shot inside the night club, hitting a nearby bystander. Id.

The second shooting occurred while Brewer and his friends fled the night club. Shots were fired by at least two individuals, including Brewer and one other identified person. Id. Another bystander was struck during the second shooting and killed. For unknown reasons, police only pursued Brewer for the second shooting. Id. at 405, 768 S.E.2d at 658.

Beaufort County Sheriff's Deputies Interrogated Brewer. He waived his Miranda rights and denied any involvement in the shootings. Id. Investigators repeatedly told Brewer that numerous witnesses had identified him as the shooter in what the Court described as "hearsay-laden questions and comments." Id. Brewer attempted to stop the interrogation on several occasions, but the police persisted. During the interrogation, investigators repeatedly urged Brewer to "prove his innocence" and to produce his gun so that they could clear him from suspicion. Id.

The Court reversed Brewer's conviction for the fatal, second shooting holding that the investigators repeated references to eyewitness identifying Brewer as the shooter constituted inadmissible hearsay. Id. at 406-407, 768 S.E.2d at 659. "During the interrogation, investigators

frequently referenced and quoted many purported eyewitnesses . . . . This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." Id.

The Court specifically rejected the State's argument that the investigators' questions were necessary to understand the context of the interrogation. Id. While not creating a categorical rule against allowing investigators' questions to be played before the jury, the Court stressed that "caution must be exercised in the admission of such evidence to ensure that all out of court statements" are properly admissible. Id.

Just like in Brewer, hearsay statements about unknown eyewitnesses identifying petitioner as the shooter were improperly admitted. Brewer firmly rejects the notion that such hearsay can be offered to prove the effect on the listener or to establish context. The failure to object to the question, "People said what?" was deficient performance. See Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018) (holding trial counsel deficient for failing to object to hearsay in a child sex case).

The prejudice from the hearsay goes straight to the central factual question at issue. See Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). In Smalls, this Court refined the prejudice analysis in PCR cases. Id. No longer allowing for sloppy conclusory statements about lack of prejudice or overwhelming evidence of guilt, the Smalls Court stated, "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." Id.

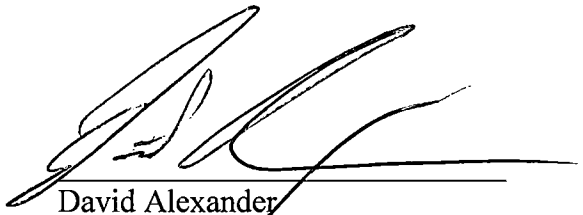
Here, the specific impact of the hearsay bore directly on the factual issue—whether the shooting was an accident. Without the hearsay, the jury was faced with a choice between petitioner's version and Brakefield's version. The jury needed to make a credibility choice.

But also easily apparent to the jury was that witnesses were missing. The jury heard testimony about three identifiable witnesses who did not testify: Brittany, Jordan Allen, and Jennifer McFarland. The jury also heard that the bar was crowded and knew that many witnesses (like Justin Ainsworth) left before the police arrived. That left the jury to speculate about who else might have witnessed the shooting and who might be the "people" who "said" they saw petitioner shoot Rae.

The evidence of petitioner's guilt was not overwhelming and any such finding requires an improper weighing of credibility because petitioner testified that the shooting was an accident. The weighing of credibility is a jury function. The State admitted in its opening that its evidence of motive was weak. The theory of the case was that petitioner may have been upset that his good friend interfered with his relationship with Clack. However, as even Clack pointed out, minutes before the shooting petitioner was "making out" with another girl at the bar. Ultimately, the State only had Brakefield's description of the shooting which was improperly buttressed by Clack's assertion that other witnesses saw petitioner shoot his friend. This Court should grant certiorari in this tragic case and reverse petitioner's convictions.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, order further briefing, and ultimately reverse petitioner's convictions and grant him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of November, 2019.

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Honorable R. Keith Kelly, Circuit Court Judge

WILLIAM BROCKMEYER,

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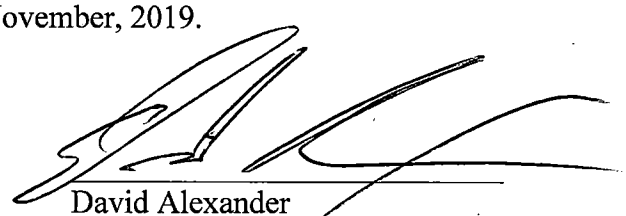
CERTIFICATE OF SERVICE

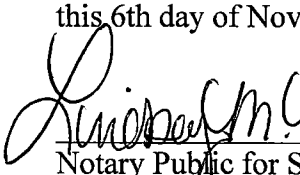
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and Appendix have been served on William Mark Brockmeyer, #347527, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 6th day of November, 2019.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of November, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.