ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

DEC 16 2019

S.C. SUPREME COURT

Certiorari to Laurens County

Honorable Brian M. Gibbons, Circuit Court Judge

FRED MADDEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001000

PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR court err in finding trial counsel effective where trial counsel failed to object when Albert "Bruce" Brown testified that his initial thought was that Petitioner had murdered his sister, since this was an impermissible opinion by a lay witness that went to the ultimate issue before the jury?

STATEMENT OF THE CASE

On December 10, 2009, Kathy Dowdy went to leave her apartment in Laurens County and encountered about one to two hundred police officers outside of her apartment complex. She learned a federal fugitive was apparently hiding in the complex and that she could not leave. Kathy called her older sister, Ernestine "Tine" Brown, at about ten o'clock in the morning to tell her about what was happening outside of her apartment. App. 201, l. 21-App. 203, l. 6.

While on the phone Kathy allegedly heard someone knock on Tine's front door and Kathy asked who was at the door. Tine responded that she did not know and went to check. Kathy again asked her sister who was at her front door to which Tine responded "Fred." Kathy told Tine not to open her door. Kathy claimed that she could hear a male voice through the phone that she identified as Fred Madden, Petitioner. App. 203, l. 9-App. 204, l. 18.

Kathy sent a text message to their younger sister, Delores, asking her to get their brother, Albert "Bruce" Brown, to go check on Tine. Kathy stayed on the phone with Tine until the call inexplicably disconnected. Kathy stated she tried to call Tine back three times, but Tine did not answer the phone. That was the last time Kathy talked to Tine. App. 204, l. 21- App. 205, l. 16.

Delores called her brother and asked him to go check on Tine. Brown traveled along Highway 308 to his sister Tine's house. While driving to Tine's Brown passed Petitioner on his moped heading in the opposite direction. Brown arrived at Tine's house at around eleven o'clock in the morning, knocked on the door but did not get an answer. He entered Tine's home and called out to his sister, getting no response. Brown made his way to Tine's bedroom door, which was closed, and cracked it open. He observed Tine laying on the floor blocking the door from opening. App. 224, l. 18-App. 225, l. 25.

Brown squeezed into the room and checked Tine for a pulse. Unable to locate a pulse, Brown called 911. App. 226, l. 4-App. 227, l.1. Dale Mitchell, a volunteer firefighter and first responder, was dispatched to Tine's residence around eleven o'clock in the morning on a "heart attack call." App. 239, l.3-App. 241, l. 2. Mitchell, believing Tine had suffered a heart attack began CPR until EMS arrived on scene. App. 24, l. 9-App. 243, l. 1. Testimony from Mitchell, EMS personnel, and the forensic pathologist made it apparent that the gunshot wounds to the decedent were not readily visible. Once EMS was on scene, they administered IV medication in an attempt to restart Tine's heart. After twenty minutes on scene EMS called an on-call doctor who, after being advised of the situation, declared Tine dead at eleven thirty-two in the morning. App. 250, l. 4-App. 252, l. 17.

Later that day Petitioner was located at the home of Mack Irby, a friend he was staying with, and arrested by the Lauren's County Sheriff's Department. On December 15, 2009, Petitioner gave a statement to investigators with the Lauren's County Sheriff's Department about the events that occurred on December 10, 2009.

Petitioner stated that he had been evicted from the residence of the decedent as part of a plan to get Tine's daughter to move out of the home. The plan was that once Tine's daughter had moved out that Petitioner would move back in with Tine. Petitioner maintained that he had not killed Tine and that she was deceased when he arrived at her home that morning. Petitioner stated when he discovered the decedent, he could smell gunpowder in the air and thought that the gunpowder in the air would have gotten on his skin and clothes. App. 326-329.

Fearing he would be suspected in Tine's death, Petitioner left the scene and returned to Irby's home. As Petitioner was driving to Irby's he passed Brown on Highway 308 as Brown was going to check on his sister. Once at Irby's Petitioner took a shower and burned his

clothing. He then sat down and waited for law enforcement because he knew they would be looking for him. App. 326-329.

A Lauren's County grand jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime on February 19, 2010. On August 29, 2011, the state, represented by Jack Hammack and Yates Brown, called Petitioner's case to trial in front of the Honorable Frank Addy, Jr. and a jury. App. 1. Petitioner was represented by Claude Howe, III., and D. Kate Anderson. App. 1.

At trial Kathy testified that Petitioner had been evicted from the home he shared with the decedent. However, she admitted that Petitioner and decedent had purchased the land that the home was on together, and they had also jointly purchased a piece of land adjacent to that property. App. 206, l. 11-App. 207, l. 23. While Kathy testified that decedent "put out" Petitioner, she did admit that the only problems in the home were the problems between Petitioner and decedent's daughter. App. 208, ll. 10-22; App 213, ll. 12-20.

As Brown described the circumstances in which he found his sister he was asked what his initial thought was. He stated, "My initial thought was Fred had murdered her." App. 226, l. 16-17. Counsel Howe failed to object to this improper opinion testimony.

SLED agent Ila Simmons performed forensic analysis of two gunshot residue (GSR) test kits. One GSR test kit was from the decedent and the other was from Petitioner. GSR was found on the back of decedent's left hand. No GSR was found on Petitioner. Simmons also tested a vest belonging to Petitioner but did not find any GSR on it. Simmons offered that GSR was easily removed by washing one's hands or clothes. App. 269-276.

At trial Dr. Janice Ross, a forensic pathologist, testified that the cause of death was two gunshot wounds, one to the head and one to the chest. App. 255, ll. 7-9; App. 261, ll. 1-6. Dr.

Ross opined that either shot by itself would have been fatal, causing death within a few minutes. App. 262, l. 19-App. 263, l. 2. Both bullets were recovered from the decedent during the autopsy. App. 263, ll. 6-12.

SLED agent Melissa Wallace processed and photographed the scene. Wallace recalled that the television was on but could not recall how loud it was. App. 364, ll. 5-17; App. 374, ll. 12-22. Wallace also testified that she found items belonging to Petitioner, such as clothing and prescribed medication, in the home of the decedent. App. 364, ll. 18-22; She recovered two bullets from the home of the decedent. App. 348, ll. 3-6; App. 355, ll. 1-3. Those bullets, along with the bullets recovered during the autopsy, were sent to SLED for forensic comparison. App. 263, ll. 6-12; App. 384. The forensic testing was inconclusive.

SLED agent Ken Whitler stated that he was unable to say that all four bullets were fired by the same gun. Whitler could only say that the bullets were fired by a firearm or firearms with similar rifling characteristics. App. 385, ll. 8-18. A gun was never recovered in the case so Whitler was unable to compare the fire bullets to a weapon. Whitler testified that the best he could do was to produce a "list of possible firearms" that could have made the rifling marks on the bullets. One weapon on the inexhaustive list Whitler provided was a .38 caliber Rossi firearm. App. 385, l. 19-App. 387, l. 12.

A former co-worker and friend of Petitioner's, James Cooper, testified that he had purchased a .38 caliber Rossi firearm in 2004. Cooper stated the Rossi firearm was a .38 Special, revolver, with a plastic handle. Cooper said he sold the Rossi revolver to Petitioner in 2007. App. 329, l. 9-App. 394, l. 8.

The jury found Petitioner guilty of both charges. Judge Addy sentenced Petitioner to life in prison for the murder and five years concurrent on the weapon charge. App. 465, ll. 5-11.

Petitioner's direct appeal was perfected by Chief Appellate Defender Robert Dudek. On appeal Appellate Defender Dudek argued the trial court erred by refusing to instruct the jury on the State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), circumstantial evidence charge as requested since it was undisputed this was a purely circumstantial evidence case. The Court of Appeals affirmed Petitioner's conviction in State v. Madden, Op. No. 2014-UP-032 (S.C. Ct. App. filed Jan. 22, 2014).

Petitioner filed an application for post-conviction relief on March 3, 2014. App. 467-478. The state submitted a return on June 14, 2014. App. 478-483. PCR Counsel Carson Henderson filed an amended PCR application dated February 24, 2019. App. 484-493. In the amended application Petitioner, through Counsel Henderson, alleged, inter alia, that trial counsel was ineffective for failing to object to opinion testimony by the decedent's brother Bruce.

An evidentiary hearing was held on February 27, 2019 before the Honorable Brian M. Gibbons. App. 494. The state was represented by Janell Gregory. App. 494. Petitioner was represented by Carson Henderson. App. 494. Claude Howe, Katherine Kendall,[1] and Petitioner testified at the hearing.

Counsel Howe testified that he did not object when Bruce testified his first thought was that Petitioner had murdered his sister. He stated he did not object to the testimony by Bruce, or to the testimony by Kathy, because it "didn't ring a bell with me at that point in time, and perhaps it should have, but it didn't." Further, he wondered if the judge would have sustained any objection to the testimony. App. 551, l. 23-App. 552, l. 19.

[1]During the PCR hearing Counsel Kendall (previously Anderson) testified that Counsel Howe was lead trial counsel and he made the ultimate decisions during Petitioner's trial. She offered no substantive testimony regarding any of Petitioner's allegations.

In the order of dismissal, the PCR court found Counsel Howe's actions at trial were proper. The court ruled that Counsel Howe's failure to object to the testimony of Bruce Brown was not deficient performance. Further the court found that Petitioner had failed to show any prejudice from Counsel Howe's failure to object as any objection would not have changed the outcome of the trial "based on the strength of the evidence against" Petitioner. App. 611.

ARGUMENT

The PCR court erred in finding trial counsel effective where trial counsel failed to object when Albert "Bruce" Brown testified that his initial thought was that Petitioner had murdered his sister, since this was an impermissible opinion by a lay witness that went to the ultimate issue before the jury.

When Brown testified that his initial thought was that Fred had murdered his sister, he gave an opinion on the ultimate legal issue before the jury. The failure by Counsel Howe to object to this testimony, without a valid trial strategy to excuse the failure, was deficient performance that amounted to ineffective assistance of counsel. Counsel admitted that maybe he should have objected to the testimony. Due to the failure of Counsel Howe, Petitioner suffered prejudice that impacted the outcome of his trial.

Rule 701, SCRE set forth narrow circumstances in which lay opinion testimony is proper. A lay witness is permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are *rationally based on the witness's perception, will aid the jury in understanding testimony, and do not require special knowledge*. Rule 701, SCRE (emphasis added). This Court has clarified that "a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

Expert witness testimony differs from that of lay witness testimony. An expert opinion is required where a factual issue must be resolved with *scientific, technical, or any other specialized knowledge*. Id. at 445–46, 699 S.E.2d at 175 (emphasis added). Importantly, an expert witness, unlike a lay witness, is permitted to state an opinion based on facts not within his

firsthand knowledge. Id. However, even expert testimony on matters of law is generally inadmissible. See, Dawkins v. Fields, 354 S.C. 58, 66-67, 580 S.E.2d 433, 437 (2003) (finding the trial court properly declined to consider an expert affidavit that mainly offered legal arguments concerning the reasons petitioners were not entitled to summary judgment).

In this case Brown testified during direct examination that he thought Fred had murdered his sister. Murder is a legal term of art defined as the killing of a human being with malice aforethought. Murder, *Black's Law Dictionary* (11th ed. 2019). Inherent in the definition of murder is the necessary legal element of criminal intent. Therefore, Brown was opining Petitioner had killed the decedent with malice aforethought. By contrast, homicide is defined as the killing of one person by another. Homicide, *Black's Law Dictionary* (11th ed. 2019). There is no regard given to the criminality of a killing or the culpability of a person responsible for a killing within the definition of homicide. 23 S.C. Jur. Homicide § 2 (2011) (quoting *Black's Law Dictionary* 661 (5th ed. 1979)).

In State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011), this Court found that the testimony from the medical examiner asserting the victim's death was a homicide was properly admitted. The medical examiner had been qualified as an expert and when classifying the death as a homicide meant only that the victim died by the acts or omissions of another. Importantly, the classification of the death as a homicide *did not comment on the criminality of the death or the culpability of the defendant*. Id. at 265, 721 S.E.2d at 419 (emphasis added). However, this Court recognized that such testimony has the "potential to invade the providence of the jury." Id. at 268, 721 S.E.2d at 420. To avoid that scenario this Court adopted the rule that a properly qualified expert may testify regarding cause and manner of death "so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way

that the jury is not permitted to reach its own conclusions concerning the criminal defendant's guilt or innocence." Id. at 269, 721 S.E.2d at 421.

In State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (2017), this Court considered a similar issue to the one raised in Commander. There this Court found that the *lay witness* opinion testimony was improper. In Westmoreland, the coroner, *who was not qualified as an expert*, testified that the victim's death was a homicide. The coroner went a step further and defined homicide as an intentional act. Importantly, the ultimate issue in the case was whether the death of the victim was intentional or accidental. By defining homicide as an intentional act, the coroner was deemed to have given an opinion on the defendant's state of mind and accordingly, an opinion on his guilt. That opinion went to the ultimate issue before the jury. Thus, the coroner's testimony was found to violate the rule pronounced in Commander, where the coroner testified as a lay witness.

The opinion testimony by Brown was improper. In stating that he thought Petitioner *murdered* his sister Brown was testifying on a legal issue. As noted above murder is a legal term of art. In order to say that someone was murdered requires the knowledge of malice on the part of the killer. Further, Brown did not possess the requisite special knowledge, skill, experience, or training to be able to determine that his sister was murdered. He had no knowledge as to how his sister had died. In fact, when he called 911, he relayed the incident as a heart attack.

Additionally, the testimony of Brown violates the rule set forth in Commander. While the testimony challenged in Commander was from a qualified expert, the testimony challenged in Westmoreland was from a lay witness and the Commander rule still applied. Here, as there, a lay witness gave an improper opinion as to the state of the defendant's mind and thus, as to his guilt. Also similar to Westmoreland was the fact that the opinion went to the ultimate issue

before the jury and went to the heart of Petitioner's defense. Petitioner maintained that he discovered the decedent, panicked and fled. There was no evidence that he had a history of violence with the decedent. Further there was no evidence that Petitioner had any malice towards or motive to kill her. The jury had to decide not only whether Petitioner killed the decedent but if he had killed the decedent, whether he killed with malice. Brown, in opining that Petitioner had murdered his sister, invaded the province of the jury.

Counsel Howe's failure to object to Brown's lay witness opinion was deficient performance. This Court has held that the failure to object to the admission of improper evidence or testimony is ineffective assistance of counsel. In Holman v. State, 381 S.C. 491, 674 S.E.2d 171 (2009), the defendant was charged with multiple offenses related to a shooting incident. At trial the state submitted into evidence a handgun recovered from the defendant's home that was not associated with the charges the defendant faced at trial. This Court held that trial counsel's failure to object to the admission of a handgun that had no relevance to the charges that the defendant faced at trial was ineffective assistance of counsel.

In Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018), the state elicited testimony from a clinical psychologist and the case worker who handled a minor victim's criminal sexual conduct allegation. The testimony amounted to bolstering and inadmissible hearsay. This Court held trial counsel's failure to object to inadmissible hearsay testimony constituted deficient performance. See also, Smalls v. State. 422 S.C. 174, 810 S.E.2d 836 (2018) (finding, among other errors, counsel deficient for failing to object to officer's testimony that defendant had committed a prior burglary).

In denying Petitioner's PCR application, the PCR court stated that Petitioner could not show any prejudice from Counsel's failure to object as any objection would not have changed

the outcome of the trial based on the strength of the evidence against Petitioner. Essentially the PCR court precluded a finding of prejudice based on the allegedly overwhelming evidence of Petitioner's guilt. However, the court failed to consider the holding in Smalls v. State, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018) which *requires* PCR courts to take into account not only the strength of the state's case but also *the specific impact of counsel's errors and other relevant considerations* in determining whether an applicant has met his burden of proving prejudice.

In order for evidence to be so overwhelming that it "categorically precludes a finding of prejudice the evidence must include something *conclusive*, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of "a reasonable probability ... the factfinder would have had a reasonable doubt" cannot possibly be met." Id. at 191, 810 S.E.2d at 845 (emphasis added). No such conclusive evidence showing that Petitioner killed decedent with the requisite malice existed in the case at bar.

The case against Petitioner was purely circumstantial. No gun was ever found. The bullets recovered from the scene and autopsy could not be conclusively linked to each other or to a weapon. There was no DNA evidence, no GSR evidence, and no confession. The evidence presented by the state was meant to place Petitioner at the decedent's home the morning she died, a fact which Petitioner did not dispute. In light of the holding in Smalls, a finding of prejudice cannot be precluded in this case and the specific impact of trial counsel's error must be analyzed.

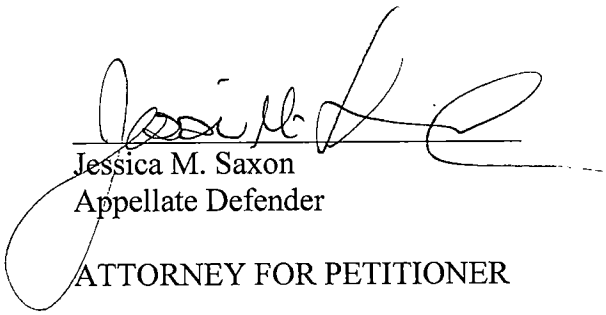
Considering the evidence present by the state, the lay opinion of the decedent's brother that Petitioner not only killed his sister, but *killed her with malice*, was very prejudicial. The opinion testimony went to the ultimate issue before the jury and to the heart of Petitioner's

defense that he did not kill the decedent. Even the forensic pathologist, who was a properly qualified expert, did not give an opinion as to the manner of death, merely the cause. Brown's testimony went beyond that of any expert, directly to the mindset of Petitioner, on a matter of which Brown had no actual knowledge.

Further, Brown could not have determined from his own observations and reasoning that his sister had been murdered when he discovered her. Yet, the Solicitor elicited Brown's opinion that his immediate reaction when he saw his sister's dead body was that Petitioner had murdered her because the Solicitor knew it had the spurious tendency to convey to the jury that Brown's intuition was somehow worthy of strong belief. Petitioner was prejudiced by trial counsel's failure to object to this impermissible opinion testimony. See, State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (2017); See also, Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of December, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable Brian M. Gibbons, Circuit Court Judge

FRED MADDEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Janell Gregory, 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 a copy of the Appendix have been served on Fred Lewis Madden, #171471, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 16th day of December, 2019.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of December, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.