

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-002206

TORREN M. EADY,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

Did the post-conviction relief court properly dismiss Petitioner's application where counsel was no ineffective for failing to object to the jury instruction that malice "may be inferred from the use of a deadly weapon" where there was no mitigating evidence presented at trial that Petitioner was merely present and where no mere presence charge was given?

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

The jury convicted Appellant of murder, three counts of attempted murder, and possession of a weapon during the commission of a violent crime. All charges stemmed from one incident that occurred at a residence in North Charleston on April 6, 2012. The evidence showed Appellant became upset over a former girlfriend's confrontation at his home earlier the same day, rounded up three individuals and at least two guns, went to the nearby home where the friends were and opened fire. One individual - who was not a part of the earlier confrontation - was killed on the porch. Three others individuals were also on the porch. One received a gunshot to the leg, while the other two escaped physical injury. The following facts support the instant summary:

Teresa Jenkins testified that she was dating Appellant at the time of the shooting. She went to Appellant's home on the afternoon of April 6, 2012. While there, Appellant's former girlfriend and "baby mama," Rochelle Grant, approached the house, banged on the door, and shouted. Jenkins testified she saw a text to Appellant from Grant that she was "coming to slap him." (R.p. 10, line 4-p. 11, line 9; p. 13, line 1-p. 14, line 8). She was not alone. Jenkins testified that Appellant confronted Grant and stated: "You bringing these n*****s to my mama house." (R.p. 15, lines 5-7). Grant slapped Appellant's phone from his hand then left. (R. p. 15, lines 12-17). Jenkins testified that after the incident, Appellant left for a period of time only to come back with his brother Da'Quan, TJ and Jigg. TJ referenced that "they" had been "messing with Tezo," another name for Appellant. TJ had a long gun at his side. (R. p. 18, line 5 - p. 19, line 24). The group left, and, shortly after, Jenkins heard gunshots. (R. p. 20, lines 14-15; p. 22, lines 16-24). Jenkins testified that Appellant came to the back door of his home and asked to be let in. (R. p. 23, lines 5-14). She would later take him and Da'Quan downtown at Appellant's request.

Da'Quan said to Jenkins: "I hope you don't think Torren did this, man." (R. p. 25, line 1 - p. 28, line 17).

In describing the precursor event to the shooting, attempted murder victim Gabrielle McCulley testified that several individuals left the house where the murder would later occur and walked the short distance to the Eady home along with Grant. She understood they were going to "retrieve a child," but they later dispersed after the yelling, and walked the short —less than two blocks - distance back to the home where the murder occurred. (R. p. 143, line 6 - p. 46, line 24). Later that same evening, while she was on the porch with others, she saw "[t]wo individuals" approach the house from around the corner. They were dressed in black and one wore "a black fisherman's hat." (R. p. 48, lines 13-24). McCulley testified that the one with the hat was in front and asked about being "ganged." (R. p. 49, line 6 - p. 50, line 3). They were then fired upon. (R. p. 49, line 8 - p. 50, line 7). McCulley, along with Antione Foster, and Martel Brown, went into the house. Brown had been shot in the leg. Adrian King was shot and believed dead on the porch. (R. p. 51, line 16 - p. 53, line 1). She could not identify Appellant from a photographic lineup, but recognized his voice when she attended a bond hearing. (R. p. 53, lines 7-11 ; p. 56, line 14 - p. 60, line 4).

Antione Foster, another attempted murder victim, also testified as to the prior confrontation by Grant at the Eady home. (R. p. 77, line 6 - p. 79, line 24). He was familiar with Appellant as he had previously kept Appellant's young son, being friends with Grant. (R. p. 71, lines 3-18). Foster testified that after his return from the Eady home, murder victim Adrian King had called and arranged to come over. (R. p. 80, lines 15-24). While on the porch with King and others, Foster saw Appellant approach with another individual. (R. p. 81, lines 3-19; p. 83, line 22 - p. 84, line 4). Appellant asked about the people who tried to "gang" him. (R. p. 81, lines 21 -

25). Martel Brown walked outside on the porch, after having gotten a haircut from Foster's mother, and asked who Appellant was, but Appellant stated, "It don't matter, and he started shooting." Foster testified Brown was shot in the leg and King was shot in the head. (R. p. 81, line 25 - p. 82, line 4). Foster identified the gun as a revolver. (R. p. 83, lines 7-8). Foster testified that he went directly to the police station and identified Appellant for the officers, having viewed a prepared six photograph array. (R. p. 86, line 10 - p. 89, line 24; p. 102, line 19 - p. 104, line 2). He testified that Appellant was the one who shot at him and the others on the porch. (R. p. 90, lines 13-21). Foster testified that he only saw Appellant with one gun, and that was the only gun that he witnessed being fired. (R. p. 95, lines 2-9).

Forensic pathologist Dr. Lee Marie Tormos testified King died from the gunshot wound to his head, the bullet having entered his left temple, went to the base of his skull, fractured the bones and bounced into his brain. (R. p. 127, lines 4-25).

Investigators retrieved 9mm rounds, a "projectile . . . not fired," and a shotgun from the Eady home. (R. p. 118, lines 4-25). The parties stipulated that "four complete bullets and one bullet fragment" were recovered from the scene. Three bullets and the fragment were fired by one gun, either a .38 special or a .357 Magnum. The remaining bullet was fired by a .38 special or a .357 Magnum, but not the same one. (R. p. 166, line 21 - p. 167, line 20).

After several interviews, officers prepared warrants for Appellant's arrest. (R. p. 133, lines 14-18). The arrest warrants were prepared the same night and were completed the next morning, on April 7, 2012; however, Appellant could not be located and arrested until April 17, 2012. (R. p. 140, lines 10-24). He was apprehended at an aunt's home. When officer initially arrived at the home the aunt denied that any males were present. Appellant was found attempting to hide behind a shower curtain. (R. p. 198, line 4 - p. 200, line 13).

Appellant spoke to officers the day after his arrest, but merely stated he had no involvement with the shooting; rather, he simply stated he went downtown with Jenkins after the Grant altercation. (R. p. 139, lines 1-7).

Appellant's cell phones were recovered after his arrest. (R. p. 139, line 23- p. 140, line 9; p. 206, line 14 - p. 208, line 21). Cell phone records to the phone Appellant admitted was his were consistent with the general location and times recounted by the witnesses rather than his statement to police. (R. p. 184, line 3 - p. 186, line 8). Appellant confirmed to officers that his cell phone was with him during the "activities of that night." (R. p. 139, lines 15-22). Another phone that was retrieved with his admitted cell phone at the aunt's residence showed not only an email addressed to him but also a search of interest made on April 16, 2012, after the shooting and prior to Appellant's arrest: "how long does gun powder stay on the skin." (R. p. 220, line 11 - p. 223, line 6). At the same time the phones were recovered, officers also found a black hat which was admitted as State's Exhibit 35. (R. p. 210, line 22 - p. 211, line 17). Attempted murder victim McCulley testified the hat was the one she saw on the individual in front who spoke before the shooting. (R. p. 149, lines 1-12).

ARGUMENT

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, 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*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an 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*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

The post-conviction relief court properly dismissed Petitioner's application where counsel was no ineffective for failing to object to the jury instruction that malice "may be inferred from the use of a deadly weapon" where there was no mitigating evidence presented at trial that Petitioner was merely present and where no mere presence charge was given

Petitioner alleges the post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to object to the jury instruction that malice "may be inferred from the use of a deadly weapon" in violation of this Court's holding in *State v. Belcher* when there was evidence presented at trial that Petitioner was merely present at the scene of the shooting but was not the actual shooter therefore strongly mitigating his involvement and exempting him from the "inference of malice" instruction under *Belcher*. However, the post-conviction relief court properly found counsel was not ineffective where the trial court rejected

trial counsel's request for a mere presence charge due to their being no evidence to support the charge in the record and where the trial court's decision not to charge was upheld on appeal.

Here, Petitioner argues that counsel was ineffective for failing to object to the inferred malice instruction because counsel's request for a mere presence jury instruction shows that there was evidence in the record that would reduce, mitigate, or excuse Petitioner's involvement. However, this argument ignores the fact that the trial court's rejection of counsel's request to charge mere presence was upheld on appeal as not an abuse of discretion:

As to whether the trial court erred in refusing to charge the jury on mere presence and mere association: *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) ("An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010))); *State v. James*, 386 S.C. 650, 653, 689 S.E.2d 643, 645 (Ct. App. 2010) ("The defendant is entitled to a mere presence charge if the evidence supports it."); *id.* at 653-54, 689 S.E.2d at 645 (stating a mere presence charge is applicable when "there is some doubt over whether a person is guilty of a crime by virtue of accomplice liability" (quoting *State v. Dennis*, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996))); *id.* At 653-54, 689 S.E.2d at 645 (holding a mere presence charge was not warranted when the State's theory did not involve accomplice liability). (ROA p. 425)

The Court of Appeals specifically referenced that a charge of mere presence is to be given if there is evidence to support it. Therefore, the trial court did not err in failing to give the instruction because there was no evidence to support it and counsel was not ineffective for failing to object to the inferred malice charge where there was no evidence in the record to reduce, mitigate, or excuse Petitioner's involvement.

"The purpose of a jury instruction is 'to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to' confuse or mislead the jury.'" *State v. Blurton*, 352 S.C. 203, 207-208, 573 S.E.2d 802, 804 (2002) (quoting *State v.*

Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)). Specifically, "[providing instructions to the jury which do not fit the facts of the case may tend to confuse the jury." *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834; 836 (1989), "It is error to give instructions which are calculated to confuse or mislead the jury." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).

A judge's refusal to give a requested charge will not be reversed unless appellant shows an abuse of discretion. *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." *State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). "If there is any evidence to support a charge, the trial court should grant the request." *State v. Brandt*, 393 S.C. 526, 549-550, 713 S.E.2d 591, 603 (2011) {quoting *State v. Williams*, 361 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005)}. Here, there was no abuse of discretion, and no error in rejecting the request to charge, as the request was not warranted on the facts.

Petitioner's argument rests solely on the foundation that counsel's request for a mere presence charge indicates that there was evidence in the record to support it and that if the jury found Petitioner was merely present this would have reduced, mitigated, or excused his involvement making the inferred malice instruction improper. However, the trial court properly refused to charge mere presence because there was no evidence in the record to support it being given and the instruction was not legally applicable. The trial court properly refused to charge mere presence where evidence did not exist in the record to support it and therefore the jury did not consider this in their deliberations. Again, the trial court's decision not to charge mere presence was upheld on appeal as not being an abuse of discretion. The Appellate court would have overturned the conviction had the trial court abused its discretion by failing to charge mere

presence if there was evidence to support such a charge. Further, counsel testified that there was no attempt by the defense to reduce, mitigate, or excuse the homicide, the defense strategy was to try to show that Petitioner was not there or not the shooter. Ultimately, there was no evidence in the record that would reduce, mitigate, or excuse Petitioner's involvement in the crime, therefore, counsel had no viable grounds for objecting to the trial court instructing the jury that malice could be inferred from the use of a deadly weapon. Therefore, the post-conviction relief court properly found counsel was not ineffective for failing to object to the trial judge's jury instruction on malice where no evidence was presented that would reduce, mitigate, excuse, or justify the homicide.

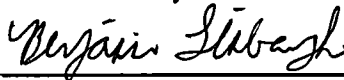
CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

BENJAMIN HUNTER LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

January 2, 2020

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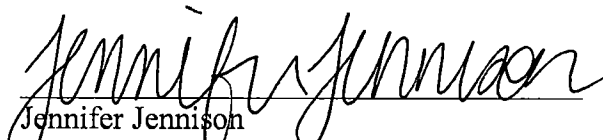
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies addressed to:

Adam S. Ruffin, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 2nd day of January, 2020.


Jennifer Jennison
Legal Assistant for Respondent