STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Frank F. Addy, Jr., Circuit Court Judge

Appellate Case No. 2016-001363

Hubert Brown, #161888,.....Respondent,

v.

State of South Carolina, ...Petitioner.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Did the PCR court err in finding trial counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), had not been decided at the time of trial, and trial counsel cannot be clairvoyant in predicting changes in the law?

II. Did the PCR court err in finding trial counsel was ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation report without her being called to testify at where the report was cumulative and Brown's own expert effectively testified as to Brown's mental state at the time of the crime?

III. Did the PCR court err in finding trial counsel was ineffective for failing to object to Dr. Richard Frierson's testimony concerning the contents of Dr. Hansen's report because Dr. Frierson helped develop the opinions contained in the report and was independently qualified to testify as an expert in psychiatry?

IV. Did the PCR court err as a matter of law in granting a new trial on the ground that the Assistant Solicitor's reference to Brown's expert as a "lady doctor" was objectionable when that issue was not raised by either party at the hearing?

STATEMENT OF THE CASE

Hubert Brown (Brown) is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. App. pp. 550, 553. Respondent was indicted at the September 2013 term of the York County Grand Jury for first-degree burglary (2012-GS-46-3185) and attempted murder (2012-GS-46-3187. App. pp. 551-52, 554-55. David C. Cook, Esquire, represented him. App. p. 1.

On July 9-11, 2013, Brown was tried before the Honorable John C. Hayes, III, and a jury. App. p. 1. Pursuant to S.C. Code Ann. § 17-25-45, the State served notice of its intention to seek life imprisonment without the possibility of parole upon conviction. App. pp. 378-79. At the conclusion of the trial, Petitioner was found guilty as charged, and Judge Hayes sentenced him to imprisonment for a term of life without the possibility of parole on each charge. App. pp. 375-76, 382-83.

Brown filed a notice of appeal and a direct appeal was perfected by Appellate Defender Carmen V. Ganjehsani, Esquire, of the South Carolina Commission on Indigent Defense – Division of Appellate Defense. App. pp. 388-405. After both parties briefed the issues, the South Carolina Court of Appeals affirmed Petitioner's convictions by unpublished opinion filed. State v. Brown, Op. No. 2014-UP-425 (S.C. Ct. App. filed November 26, 2014). App. pp. 426-27. The Remittitur was returned on December 12, 2014. App. p. 428.

Brown filed a timely application for post-conviction relief on December 31, 2014. Petitioner filed a return on July 8, 2015. App. pp. 442-47. Through counsel, Brown filed an amendments to his application on January 25, 2016. App. pp. 437-41. An evidentiary hearing on the application was convened at the Moss Justice Center in York, South Carolina, on April 19, 2016. App. p. 448. The Honorable Frank R. Addy, Jr., presided over the hearing. App. p. 448.

Brown was present and represented by Tommy Thomas, Esquire. App. p. 448. Petitioner was represented by Assistant Attorney General Justin J. Hunter, Esquire. App. p. 448. By an Order signed June 16, 2016, and filed June 20, 2016, the PCR court granted relief on multiple grounds, as discussed below. App. pp. 541-49.

Petitioner filed a notice of appeal, and a petition for writ of certiorari on May 9, 2018. Respondent, through counsel, filed a return to the petition on September 28, 2018. Petitioner then filed a reply on October 18, 2018. By Order dated October 19, 2018, the Supreme Court transferred this case to the Court of Appeals. The Court of Appeals granted certiorari and ordered the parties to brief the issues by Order dated June 28, 2019. This Brief of Petitioner follows.

STATEMENT OF THE FACTS

On June 8, 2012, Brown went to the home of his friend and former coworker, Michael Mahoney (Mahoney). App. pp. 61-62, 69-70. An argument ensued, during which Brown punched Mahoney, and they ended up wrestling on the ground. App. pp. 71-73, 75. Chris Calvert (Calvert), who was living with Mahoney at the time, came up behind Brown and hit him in the head with a gear shift to stop his attack on Mahoney. App. pp. 107, 111-12. The blow dazed Brown and caused him to lose consciousness for a short period of time. App. pp. 75-76, 113. Brown then grabbed a hatchet from the trunk of his vehicle and began chasing Calvert, saying he was going to kill him. App. pp. 77-78, 113-14. Brown was bleeding profusely at this point, and Mahoney tried to convince him to go to the hospital. App. pp. 77, 116. Instead, Brown put down the hatchet, got a machete out of his trunk instead, and began to chase Calvert with it. App. pp. 78-79. After threatening to kill both Mahoney and Calvert, Brown got in his car and the car drove up out of the driveway. App. p. 82, 116.

Mahoney and Calvert went inside Mahoney's house and began to clean themselves up in the bathroom, while Mahoney's wife called 911. App. pp. 82, 85, 132-33. Suddenly, Mahoney's wife started screaming. App. p. 85, 133. Brown had returned to the house with the machete. App. pp. 116-17, 133. He swung it toward Calvert's head, and Calvert threw his hand up to protect himself. App. pp. 117-18. The machete hit Calvert's hand, cutting his thumb off most of the way so that it was hanging by the skin. App. pp. 57, 85, 118, 133. When Deputy Mark Whitesides arrived on the scene in response to the 911 call, he talked to the witnesses and developed Brown as a suspect. App. pp. 56-59. Police eventually arrested Brown in Walterboro, and he was charged with attempted murder and first-degree burglary. App. pp. 140, 161-65.

Brown presented an insanity defense at trial and was evaluated by experts for both the State and the defense. App. pp. 6-9, 208, 215; Supp. App. 1-5. At trial, Brown called an expert, Dr. Carol Walser, a neuropsychologist, who testified that although she agreed with the State that Brown was competent to stand trial, she did not find him to be criminally responsible for his actions at the time of the incident, as he was suffering from a mental defect due to a traumatic brain injury. App. pp. 208, 215, 229-30, 249, 254-55. Dr. Walser testified she met with Brown multiple times, over the course of thirteen hours in total, and administered a battery of neuropsychological tests. App. pp. 215-18, 234-35. Dr. Walser concluded Brown showed several signs of traumatic brain injury, including balance issues, amnesia, speech issues (aphasia), paranoia, and episodes in which he would "blank out" in the middle of a conversation. App. pp. 222, 233-34, 241-44. According to Dr. Walser, at the time of the incident, Brown lacked the capacity to reason and was behaving "chaotically." App. pp. 254-55. Dr. Walser also testified she found no evidence of malingering. App. pp. 222-25, 236, 247-48.

The State's evaluator found Brown to be both competent to stand trial and criminally responsible for his actions as the time of the crime. App. 226-27; Supp. App. 1-5. However, the doctor who performed Brown's evaluation at the Department of Mental Health (DMH) had left the state was and not available for trial. App. p. 301. Instead, in reply, the State called Dr. Richard Frierson, a medical doctor and psychiatrist with DMH. App. pp. 287-88. Dr. Frierson supervised the doctor who evaluated Brown and discussed Brown's case with her, but never met with Brown himself. App. pp. 288-89, 295-98. Without objection, the State introduced the report of the DMH evaluation through Dr. Frierson. App. p. 290. According to that report, Brown was criminally responsible for his actions at the time of the crime. App. 226-27; Supp. App. 1-5.

At trial, Judge Hayes gave the standard charges on reasonable doubt, burden of proof, and presumption of innocence, as well as a charge on Brown's insanity defense. App. pp. 337-45, 355-57. When the trial judge instructed the jury regarding the attempted murder charge, he stated:

> A specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily injury. Intent means intending the result which actually occurs, it means something which – acts which is [sic] not accidental or involuntary. Intent may be shown by acts and conduct[] of the defendant and other circumstances from which you may naturally and reasonably infer intent.
>
> Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injury may be considered in determining the intent with which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully committed an act a natural tendency of which is to destroy another's life.

App. pp. 350-51. At the completion of the jury charges, defense counsel asked the trial judge to cure his charges regarding the defense of guilty but mentally ill, which Brown did not raise. App. p. 363. The trial judge agreed and brought the jury back in for a curative instruction. App. pp. 363-65. The trial judge asked trial counsel, "And that's all you have?" to which he replied, "That's it, Your Honor." App. p. 365.

Later, the jury sent a note requesting to be recharged on attempted murder. App. p. 366. The trial judge recharged attempted murder, again stating, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit the serious bodily injury." App. pp. 367-72. When the trial judge asked whether there was anything from the State on the recharge, the following exchange took place:

> [The State]: The first time you charged this morning I was daydreaming and I wasn't daydreaming this time and I heard you say that only a general and not a specific intent for attempted murder

is required. I think all attempts require[] a specific intent and I don't think the legislature has given us any leeway on that.

The Court: Well that's what I've got in my charge and – A specific intent to kill is not an element of attempted murder. There must be a general intent to commit serious bodily injury.

[The State]: I know it was general when we had ABWIK but when we went to attempted - -

The Court: That's what I charged them earlier. If you find some law that says that that's not right, that's in my charge and it's in my charge under the heading of Attempted Murder under 16-3-29. I don't see a case cited. But you take exception to that part of the charge?

[The State]: I'm just concerned because the way I was taught all attempts are specific intent. And so when we went from ABWIK which is a general intent to attempted murder I'm afraid maybe we kicked in a specific intent.

The Court: You mean if I have a general intent to harm you and I harm Chris instead, or have a general intent to hurt everybody in here and the only person except Chris and he's the one I hurt and - -

[The State]: Well that can be transferred intent.

The Court: Well you're on the record for that.

[The State]: All right.

The Court: Anything?

[Defense counsel]: Nothing from the defense, Your Honor.

App. pp. 372-74.

Ultimately, the jury found Brown guilty on both charges, and Judge Hayes sentenced him to concurrent sentences of life without parole pursuant to § 17-25-45. App. pp. 375-76, 382-83.

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 defer 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. Id. at 180, 810 S.E.2d at 839 (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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. 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).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). 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 counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Petitioner 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. The PCR court erred in finding trial counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), had not been decided at the time of time, and trial counsel cannot be clairvoyant in predicting changes in the law.

The PCR court erred in finding Counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because under the law at the time of Brown's trial, Counsel had no reason to object. The PCR court's order focuses primarily on the prejudice prong, finding Brown's mental state "was the key issue in the case" and noting the charge likely influenced the jury's decision since they asked for a recharge on the elements of attempted murder. App. p. 545. The PCR court erred, however, because prejudice is irrelevant in the absence of a deficiency in Counsel's performance, and the finding Counsel was deficient was error given the state of the law at the time of Brown's trial.

The PCR court exclusively relied on King to find Counsel was deficient. App. p. 545. The State agrees the trial court's instruction that "[a] specific intent to kill is not an element of attempted murder but [there] must be a general intent to commit serious bodily injury" is no longer valid after the Supreme Court's decision in State v. King. 422 S.C. 47, 56-57, 810 S.E.2d 18, 23 (2017) aff'g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) ("We agree with the Court of Appeals that 'the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.'") (citations omitted). However, this Court's decision was delivered in June 2015 and the Supreme Court decision in October 2017; this case was tried in July 2013, well before King was decided. See id.

Importantly, the relevant lens for analysis is "counsel's perspective at the time" of trial. Strickland, 466 U.S. at 689; Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). Attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765. At the time of trial, South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute, as noted by the Supreme Court in its analysis in King. 422 S.C. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . .").

Further, existing authority supported the attempted murder instruction given at Brown's trial, as evidenced by both the majority opinion and by Justice Kittredge's concurring opinion in King. 422 S.C. at 74-74, 810 S.E.2d at 32 (Kittredge, J., concurring in result only) (discussing the shared history of attempted murder and ABWIK in South Carolina); see also State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) ("malice aforethought encompasses both the specific and general intent to commit murder"); State v. Foust, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) (for ABWIK, the required finding of "malice aforethought, either express or implied," encompasses a requirement of general intent). Justice Kittridge, writing separately, noted, "The majority and I agree that the statutory language creates an ambiguity – 'with intent to kill' speaks to a specific intent crime while 'malice aforethought, either expressed or implied' points to a general intent crime." Id. at 72, 810 S.E.2d at 31. Given the legislative history of the attempted

murder statute,[1] it was not unreasonable for Counsel to interpret the elements of attempted murder as requiring only general intent. See id. at 73, 810 S.E.2d at 32 ("If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime?") Justice Kittridge concluded he would "affirm the trial court's finding and related jury instruction that '[a] specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm.'" Id. at 75, 810 S.E.2d at 32.

Counsel, therefore, cannot be deficient based on King, because it was not the law at the time of Brown's trial, so Counsel was not on notice that he needed to object. See, e.g., Frierson v. State, 417 S.C. 287, 297-98, 789 S.E.2d 762, 767-68 (Ct. App. 2016) (finding counsel was not deficient for failing to advise defendant of potential violation of statutory warrant requirement where law at the time of trial was unsettled on the issue); see also Hill v. State, 350 S.C. 465, 567 S.E.2d 857 (2002) (holding failure of trial counsel to object to erroneous jury instruction was ineffective where appellate decision announcing change in law had already become final by the time of defendant's trial). As evidenced by Justice Kittridge's concurrence, even five justices of our state's Supreme Court could not agree on the appropriate level of intent, and therefore, Counsel's argument was not unreasonable. Counsel testified the parties discussed the issue in chambers, and the trial judge told them he was going to give the charge as written in his bench book. App. pp. 489-90. Counsel also testified if he had any reason to think the instruction was erroneous, he would have objected, but he did not see a reason at that time. App. 490.

[1] In 2010, the General Assembly replaced the offense of assault and battery with intent to kill (ABWIK)[1] with the offense of attempted murder and codified ABHAN, along with three other lesser degrees of assault and battery, as a lesser-included offense. S.C. Code Ann. §§ 16-3-29, 16-3-600; see State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014).

The PCR court's order granting relief on this issue is based on a change in the law that occurred two years after Brown's trial. Counsel should not be found constitutionally ineffective for failing to predict what even the Judicial Department could not, as the general-intent charge apparently came directly from the judge's bench book. This Court should therefore reverse the PCR court's grant of relief on this ground.

II. The PCR court erred in finding trial counsel was constitutionally ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation report without her being called to testify where the report was cumulative, and Brown's own expert effectively testified as to Brown's mental state at the time of the crime.

The PCR court incorrectly found Counsel was constitutionally ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation because she was not called to testify as a witness at trial. App. p. 546. This finding is unsupported by any probative evidence in the record. Counsel was not deficient, nor was Brown prejudiced, where the contents of the report were cumulative to other evidence and testimony presented, and Brown's own expert credibly and effectively testified to his mental state at the time of the crime.

Importantly, Brown's expert, Dr. Walser, herself injected the contents of the State's report into the trial, making the report itself and Dr. Frierson's testimony about it cumulative. App. pp. 226-27. Brown had already been evaluated by DMH at the time Dr. Walser began her testing, and Dr. Walser reviewed the DMH report, among other records, in preparation for making her own report. App. pp. 216-17; Supp. App. 1. Dr. Walser gave detailed testimony about the tests she performed, what each test was designed to measure, Brown's performance on each test, and why the tests were necessary in order to reach a proper conclusion as to Brown's mental state. App. pp. 215-18, 227-29, 234-35. Dr. Walser concluded Brown suffered a traumatic brain injury when he was struck with the gear shift, rendering him temporarily unable distinguish moral or legal right

from wrong and to be unable to "think clearly, speak clearly, [or] act in a rational way." App. pp. 229, 252-55.

Further, Dr. Walser specifically referred to the State's report and its conclusion that Brown was criminally responsible in her testimony. App. pp. 226-27. In doing so, Dr. Walser was able to explain not only why her conclusion that Brown was not criminally responsible due to the temporary effects of a traumatic brain injury was credible, but also why the State's conclusion was not – because that doctor did not perform any of the necessary tests or even consider the possibility of a traumatic brain injury as the cause of the behavior. App. pp. 227-29. Dr. Walser was therefore able to explain away the State's finding on the basis of an insufficient examination, rather than merely offering her own conclusion.

The State then called Dr. Frierson in rebuttal and introduced Dr. Hansen's report through him, without objection. App. 290. The PCR court found it was error for Counsel to fail to object to the admission of the report. App. 546. However, the information contained in the report was merely cumulative to other testimony at trial,[2] and, as the PCR court pointed out, much of the information corroborated Dr. Walser's findings. App. 547. For example, the State's report indicates Brown was indeed suffering from paranoia and amnesia, just as Dr. Walser concluded. App. pp. 221-22, 233-34; Supp. App. 4-5. Dr. Hansen's report also concluded Brown was making a true effort to respond during her examination, supporting Dr. Walser's finding Brown was not malingering. App. pp. 247-48; Supp. App. p. 4.

Additionally, the PCR court finds fault with the admission of Dr. Hansen's report because of the nature of Brown's defense – namely that the head injury caused "temporary insanity." App.

[2] The actual exhibit given to the jury at trial was redacted to remove Brown's criminal history. App. pp. 289-90.

pp. 546-47. The PCR court found it significant that "nowhere in her report did Dr. Hansen indicate that she had considered and excluded temporary insanity due to head trauma as a potential diagnosis, and trial counsel could have potentially brought this to the attention of the jury had the report's author been required to testify." App. p. 457. Notably, however, Dr. Frierson addressed this issue in his testimony, stating he directed Dr. Hansen to consider head trauma as a potential explanation for Brown's behavior and asked her to collect more information in order to make that assessment. App. pp. 297-98.

Finally, the PCR court found Brown was prejudiced by the admission of Dr. Hansen's report "particularly. . . in light of the erroneous general-intent instruction and in light of the Assistant Solicitor emphasizing Dr. Hansen's report in his closing." App. p. 548. However, as discussed above, the general-intent instruction was proper at the time. Because the report was cumulative to other evidence and because Brown's expert effectively testified to her finding that Brown lacked the mental capacity for criminal responsibility at the time of the crime, Counsel was not deficient for failing to object to the admission of the report, nor was Brown prejudiced by the lack of objection. This Court should therefore reverse the PCR court's grant of relief on this ground.

III. The PCR court erred in finding trial counsel was constitutionally ineffective for failing to object to Dr. Richard Frierson's testimony concerning the contents of Dr. Hansen's report because Dr. Frierson helped develop the opinions contained in the report and was independently qualified to testify as an expert in psychiatry.

Additionally, the PCR court found Counsel should have objected to Dr. Frierson's testimony since he had never examined Brown and could not give a diagnosis, and his testimony was merely "bolstering an unchallenged witness." App. pp. 548. This finding is not supported by the record because Dr. Frierson participated in the development of the DMH opinion by reviewing medical records and witness statements and directing the collection of additional information to

support the report's conclusions. App. pp. 297-98. He was also independently qualified as an expert in psychiatry, and therefore, he could give his own opinion as to Brown's criminal responsibility. App. pp. 292-93.

Dr. Frierson was independently qualified as an expert in psychiatry, and Brown has not alleged that qualification was in error or that Counsel was deficient for failing to object on that basis. App. pp. 292-93. Dr. Frierson's testimony consisted mostly of opinions regarding hypothetical situations suggested by the evidence introduced at trial, which he was qualified to give as an expert in psychiatry, and Counsel's objections to hypotheticals outside the evidence were sustained. See Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 604 S.E.2d 385 (2004) (noting it is well settled that opinion testimony of an expert may be based on hypothetical questions, provided the question is based on facts supported by the evidence); App. pp. 293-95, 299-301. Further, an expert witness "may state an opinion based on facts not within his firsthand knowledge" and "may base his opinion on information, whether admissible or not, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions." Hundley ex rel Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000). An expert may also testify to matters of hearsay for the purpose of showing what information he relied on in reaching his opinion. Id.

Here, although Dr. Frierson testified he only reviewed and approved Dr. Hansen's report rather than drafting it himself, he also testified he had personally reviewed Brown's medical records, the witness statements from law enforcement, and the social history obtained by a DMH social worker prior to Dr. Hansen's examination. App. pp. 295-298. Additionally, he testified he raised the possibility Brown's head injury could have been the cause of his actions and directed Dr. Hansen to obtain more information from Brown's wife as to what happened at the scene

immediately after Brown was struck on the head. App. pp. 297-98. Dr. Frierson then opined, based on his review of the police reports and the information gathered by Dr. Hansen, he felt there was significant evidence to find Brown "knew what he was doing" and could distinguish right from wrong. App. pp. 297-98. Further, he testified he and Dr. Hansen jointly decided what opinion DMH would issue, as part of his role as her supervisor. App. pp. 297-98. Thus, Dr. Frierson was not merely bolstering a non-testifying witnesses; rather, he was testifying as to the conclusion he helped develop. See State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) ("Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth. . . .").

Dr. Frierson's testimony in this case was not a comment on the veracity of any other witness, testifying or not. In fact, based on Dr. Hansen's report, it appears both he and Dr. Hansen generally believed Brown's version of events, but disagreed with Dr. Walser that the brain injury alone was sufficient to meet the legal requirements of criminal insanity. Supp. App. p. 5 ("Although [Brown] received treatment for head trauma around the time of his charges. . . he did not report a compulsion, delusion, command auditory hallucination, or other symptoms of mental illness that would have impaired his ability to conform his conduct to the requirements of the law.").

The fact that Dr. Frierson never examined Brown himself does not preclude him from offering an opinion, but goes to the weight of the evidence. See, e.g., Petersen v. National R.R. Passenger Corp., 365 S.C. 391, 400, 618 S.E.2d 903, 908 (2005) ("The experts' lack of first-hand knowledge, which could have been obtained by an on-site investigation, goes to the weight of the testimony, not its admissibility."). Counsel testified, although he could not say it was a trial strategy not to object to Dr. Frierson's testimony on rebuttal, because Dr. Frierson had never

evaluated Brown, he was able to use that to Brown's advantage on cross-examination and during closing arguments. App. pp. 465-66. The defense expert, Dr. Walser, emphasized in her testimony a proper diagnosis could not be made using the methodology reflected in DMH's report because none of the necessary testing had been done, but instead the evaluation was based solely on a short interview with Brown. App. pp. 227-29. Additionally, Dr. Frierson conceded on cross-examination that a person could exhibit reasoning and processing functions and still not be criminally responsible. App. p. 301.

For the foregoing reasons, Counsel was not deficient, nor was Brown prejudiced by Counsel's failure to object to Dr. Frierson's testimony, and the PCR court's grant of relief on this basis should be reversed.

IV. The PCR court erred as a matter of law in granting a new trial on the ground that the Assistant Solicitor's reference to Brown's expert as a "lady doctor" was objectionable because that issue was not raised by either party at the hearing, and therefore, Brown has waived his right to relief on that ground.

Finally, the PCR court also found the Assistant Solicitor's reference to Dr. Walser, the defense expert, as a "lady doctor" was objectionable. App. p. 510. It is unclear from the PCR court's order whether or not this finding is a basis for relief on which the PCR court granted a new trial. App. p. 510. However, because the State contends the PCR court's finding was an error of law, out of an abundance of caution, Respondent addressed the issue in its petition.

The PCR court's order clearly acknowledges this ground was not pleaded by Brown, and a review of the transcript shows it was not raised during Brown's case at the evidentiary hearing. App. 510. The South Carolina Supreme Court has previously held a *sua sponte* order of a new trial on grounds not raised by either party is improper in both the civil and criminal context. State v. Dicapua, 383 S.C. 394, 398, 680 S.E.2d 292, 294 (2009) ("[M]ay a trial court in a criminal case *sua sponte* order a new trial on a ground not raised by a party? We answered this question 'no' in

the context of a civil proceeding. . . . We hold the same result must follow in a criminal case."); Southern Railway Co. v. Coltex, Inc., 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) ("The sole issue is whether a trial judge *ex meru moto* can grant a new trial on a ground not raised by a party. We hold he cannot."). In both Dicapua and Southern Railway, the Supreme Court found that by failing to raise the ground on which the new trial was granted, it had been waived. 383 S.C. at 399, 680 S.E.2d at 294; 285 S.C. at 215-16, 329 S.E.2d at 737.

Similarly, here, Brown failed to plead this ground in his original application, or, after obtaining counsel, via amendment or through his testimony at the evidentiary hearing. App. pp. 429-41, 454-537. Accordingly, Brown has waived his right to a new trial on this ground, and the PCR court erred as a matter of law in granting a new trial *sua sponte*. This Court should therefore reverse the PCR court's grant of relief on this ground.

CONCLUSION

For all the foregoing reasons, the State requests this Court reverse the post-conviction relief court's grant of a new trial on all grounds.

Respectfully submitted,

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