

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO LAURENS COUNTY
Court of Common Pleas
Brian M. Gibbons, Post-Conviction Relief Judge
Frank R. Addy, Jr., Trial Judge

Appellate Case No. 2019-001000

FRED MADDEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTD ON CERTIORARI

PETITIONER'S ISSUE PRESENTED ON CERTIORARI

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 has murdered his sister, since this was an impermissible opinion by a lay witness that went to the ultimate issue before the jury?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED ON CERTIORARI

Did the post-conviction relief court properly find Petitioner failed to meet his burden of establishing Counsel constitutionally ineffective for failing to object to Albert Brown's testimony that his initial thought was Petitioner murdered Victim where Brown's testimony was insignificant to the State's case because Kathy Dowdy's testimony firmly established Petitioner was at Victim's residence at the time of the murder, and Brown's testimony was proper lay witness testimony and, therefore, not objectionable?

STATEMENT OF THE CASE

Fred Madden (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Laurens County Clerk of Court. During its February 2010 term, the Laurens County Grand Jury indicted Petitioner for murder (2010-GS-30-0288) and possession of a weapon during the commission of a violent crime (2010-GS-30-0289). Claude H. Howe, III (Counsel) and Donna Katherine Kendall (Kendall)¹ represented Petitioner. Assistant Solicitors Jack W. Hammack, Jr., and Yates Brown of the Eighth Circuit Solicitor's Office prosecuted the case.

On August 29 – September 1, 2011, Petitioner proceed to a jury trial before the Honorable Frank R. Addy. Petitioner was found guilty as indicted by the jury. Judge Addy sentenced Applicant to life imprisonment and five concurrent years for possession of a weapon during the commission of a violent crime.

Petitioner timely filed a notice of appeal and Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense perfected the appeal. In his brief to the South Carolina Court of Appeals, Applicant raised the following issue:

- I. The court erred by refusing to instruct the jury on State v. Edwards, 298 S.C. 275, 379 S.E.2d 888 (1989), circumstantial evidence charge as requested since it was undisputed this was a purely circumstantial evidence case and the State v. Edwards traditional instruction rather than the generic State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) instruction should have been charged to explain how to analyze circumstantial evidence.

Following briefing, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Madden, Op. No. 2014-UP-032 (S.C. Ct. App. filed January 22, 2014). The Remittitur was issued February 7, 2014.

¹ During the PCR hearing, Kendall testified Counsel was lead trial counsel and she was second chair. Kendall testified Counsel was the ultimate decision maker during Applicant's trial. Kendall did not provide substantive testimony regarding any of Applicant's allegations.

Petitioner filed a timely application for post-conviction relief on March 11, 2014, alleging he was being held in custody unlawfully for the following reasons:

1. Ineffective Counsel of my lawyers”
2. “My lawyers failed to do their job to the fulless(sic)”
3. “14th Amendment violated the Defendant’s Sixth Amendment”
4. “Due Process rights was(sic) violated”
5. “Mere Presence is my case”
6. “I was at the crime scene, no knowledge what happen(sic)”

On February 24, 2019, Petitioner amended his application through counsel alleging:

1. Counsels were ineffective for failing to object to the testimony of Kathy Dowdy when she testified, “He and my sister were in a relationship until she evicted him.”
2. Counsels were ineffective for failing to ask the court to strike the testimony of Kathy Dowdy after the court sustained the objection.
3. Counsels were ineffective because they asked witness Dowdy about Applicant being evicted from Victim’s residence.
4. Counsels were ineffective because they asked a question of Kathy Dowdy which elicited a response about the Victim “putting him out.”
5. Counsels were ineffective because they failed to object when Kathy Dowdy testified as follows: “(Q) Ms. Dowdy, is there any reason why you would make this up? (A) No.”
6. Counsels were ineffective for failing to object when Albert Brown testified, “My initial thought was Fred had murdered her.”
7. Counsels were ineffective because they failed to ask the Court to strike the following statement from witness Mack Irby: “When Fred got out of the shower.”
8. Counsels were ineffective for failing to follow up on the subpoena to Laurens County Sheriff Rick Chastain for the production of “all training records” for the deputies who investigated this and “all training manuals, police procedure manuals for questioning suspects.”
9. Counsel was ineffective for failing to thoroughly investigate Victim’s daughter Keila Brown’s potential involvement in Victim’s death.
10. Counsels were ineffective for failing to introduce into evidence the telephone calls between Applicant and Victim on December 9-10, 2009.
11. Counsels were ineffective because they discouraged Applicant from testifying because the defense was “winning” at trial.

On February 27, 2019, an evidentiary hearing was held on Petitioner's allegations before the Honorable Brian M. Gibbons, circuit court judge. Carson Henderson, Esquire represented Petitioner. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office represented the Respondent. At the evidentiary hearing, Petitioner proceeded on the allegations set forth in his amended application. At the hearing, Petitioner testified on his own behalf. Counsel and Kendall also testified.

On May 26, 2019, Judge Gibbons issued an order of dismissal denying and dismissing Petitioner's application for post-conviction relief and finding Petitioner failed to prove Counsel was ineffective in any regard. As to the issue raised on appeal here, Judge Gibbons found Counsel's testimony credible and found Petitioner failed to show any resulting prejudice as any potential objection would not have changed the outcome of Petitioner's trial because of the strength of the State's case. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

STATEMENT OF FACTS

On December 10, 2009, Ernestine "Tine" Brown (Victim) was at her home alone on Highway 308 in Laurens County. Victim received a call from her sister, Kathy Dowdy (Dowdy) that morning. As the sisters were chatting, Victim heard a knock at her door. Victim told her sister Applicant was at her door. Dowdy felt the need to text their other sister, Delores Yelverton, to have her send their brother, Albert "Bruce" Brown (Bruce) to check on Victim. Shortly after Dowdy sent the text, the phone call with Victim dropped and she could not get Victim back on the phone. (App. 189, 205.)

Bruce testified he received the message and headed out to Victim's home. Bruce testified on the way to the home, he passed Petitioner on his moped. Bruce saw Petitioner look back toward him. When Bruce saw Petitioner on the moped, Petitioner was approximately three to four miles from Victim's home. Bruce continued to his sister's home. He knocked on the door and called on the phone. He received no answer. He went in the home and called his sister's name, but, again, received no answer. He then went to the bedroom door, which was partially closed and found his sister lying behind the door. Bruce called 911. He checked but could not find a pulse. Bruce testified this occurred "around 11:00 or a little before." (App. 224-226.)

Emergency personnel confirmed they were called to the scene at approximately 11:00 a.m., with the actual dispatch time being 10:59 a.m. Though they attempted to revive Victim, she was eventually pronounced dead at the scene. (App. 248-252.)

Forensic pathologist Dr. Janice Ross testified the cause of death was "two gunshot wounds of the head and chest." The chest shot went through Victim's left arm into the chest, through the left lung, severed the spinal cord and lodged in the spinal canal. The head shot entered the top of the head and traveled down into the brain. According to Dr. Ross, "[e]ach one, by themselves,

would be fatal.” Death would have occurred within “a few minutes, maybe up to five or six.” (App. 261-262.)

In his statement to investigating officers, Petitioner admitted being in the home, but asserted Victim was already shot when he arrived. He also asserted that there was gunpowder still in the air, so he went to Mack Irby’s house, where he had been staying since the eviction from Victim’s home, and took a shower. He was aware that Bruce had seen him on the moped near the home. He was also aware he would be a suspect. So, in addition to taking a bath, he also burned his clothes. (App. 120-123.)

Mack Irby testified and confirmed that Petitioner had been at Irby’s home that morning but left for approximately 30 to 45 minutes. Upon his return, Petitioner went to his room. Petitioner later came back out, asked whether Mr. Irby was hungry, and Mr. Irby began preparing breakfast. (App. 232-233.)

Investigation of the home revealed no signs of forced entry, but two other bullets were recovered in the linen closet and the bathroom wall. A cell phone was recovered from the master bedroom near the victim’s body, which showed 911 on the screen. (App. 356 – 360.)

Though a gun was not recovered, the bullets recovered from autopsy and the bullets recovered from the home were compared. SLED firearms identification expert Kenneth Whittler testified that, though he could not confirm the bullets were fired by the same gun, “the class characteristics, mainly the rifling characteristics on these bullets were similar and while [he] couldn’t say they were fired by the same firearm, they could have been fired by the same firearm or by separate firearms with similar rifling characteristics.” (App. 385.) The bullets were “most consistent” with .38 caliber and .357 caliber. (App. 386.) Specifically, a .38 caliber *Rossi* firearm

could have fired the four bullets. (App. 387.) James Brent Cooper, Petitioner's friend and former co-worker, testified that he sold a .38 caliber *Rossi* firearm to Petitioner in 2007. (App. 392-393.)

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. Id. at 179, 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); 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. Smalls, 422 S.C. at 179, 810 S.E.2d at 840. 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), SCRPC; Caprood, 338 S.C. at 109, 525 S.E.2d at 517; 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 [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. 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, 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 standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 670.

ARGUMENT

The post-conviction relief court properly found Petitioner failed to meet his burden of establishing Counsel was constitutionally ineffective for failing to object to Albert Brown's testimony that his initial thought was Petitioner murdered Victim where Brown's testimony was insignificant to the State's case because Kathy Dowdy's testimony firmly established Petitioner was at Victim's residence at the time of the murder, and Brown's testimony was proper lay witness testimony and, therefore, not objectionable.

Petitioner asserts the post-conviction relief court erred in finding Counsel was not constitutionally ineffective for failing to object to Albert "Bruce" Brown's (Brown) testimony that his initial thought was Petitioner had murdered his sister, Victim. However, the post-conviction relief court properly denied and dismissed this allegation as the statement made by Brown was proper lay witness testimony under Rule 701 of the South Carolina Rules of Evidence (SCRE). Further, the post-conviction relief court properly found Petitioner failed to prove any resulting prejudice as Brown's statement was cumulative to the testimony of Victim's sister, Kathy Dowdy (Dowdy), who was on the phone with Victim at the time Petitioner came to Victim's house on the morning of her murder, and remained on the phone with Victim until the call unexpectedly disconnected. Further, Petitioner's own statement to law enforcement admitted he was at Victim's residence on the morning of her murder and observed Victim deceased, smelled gun powder in the residence, and then fled the residence because he believed he would be a suspect. Petitioner then admitted to taking a shower and burning his clothes. The post-conviction relief court properly found Brown's singular statement was not objectionable testimony, and further, an objection to Brown's statement, even if sustained, would not have changed the outcome of Petitioner's trial in light of the strong evidence presented by the State at trial. As such, this Court should deny certiorari.

In Strickland, the United States Supreme Court held, "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the

defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.” 466 U.S. at 670. Here, Petitioner’s ineffective of assistance claim can be dismissed on a prejudice analysis alone.

At trial, the State was able to present the testimony of Dowdy who was on the phone with Victim at the time Petitioner came to her residence on the morning of the murder. (App. 203.) Dowdy testified she told Victim not to answer the door, however, Victim answered the door, and Dowdy could hear Petitioner’s voice over the phone. (App. 203-204.) Dowdy testified she heard a conversation between Victim and Petitioner and then the call dropped. (App. 205.) Dowdy texted her other sister, Delores Yelverton (Yelverton), to have Brown go by Victim’s residence to check on Victim. (App. 204.) Brown also testified at trial and stated, on his way to check on Victim, he passed Petitioner on his moped coming from the direction of Victim’s residence. (App. 225.) The State also presented Petitioner’s own statement he provided to law enforcement on December 15, 2010. In his statement, Petitioner stated he went to Victim’s residence by moped and when he arrived the front door was open, but the storm door was locked. (App. 308.) Petitioner stated he opened the door, called out for Victim, but she did not answer. (App. 308.) Petitioner stated he went into Victim’s bedroom and noticed she was laying on the floor with her eyes open and blood coming from her head. (App. 309.) Petitioner said he could smell gunpowder, and he left the residence because he felt he would be a suspect. (App. 309.) Petitioner told law enforcement he left on his moped and passed Brown on his way out of the area. (App. 309.) Petitioner stated, after leaving Victim’s residence, he went to the Exxon station and bought cigarettes and gas. (App. 309.) Petitioner then went to his residence on Easy Road and took a shower. (App. 309.)

Petitioner stated he believed his clothes would have gunpowder on them, so he burned his clothes as he believed he would be a suspect in Victim's death. (App. 309.)

Additionally, the State provided expert witness testimony from Kenneth Whitler (Whitler), a firearm examiner with the South Carolina Law Enforcement Division (SLED). Whitler testified the bullets recovered were possibly fired from a .38 caliber Rossi firearm. (App. 387.) Petitioner's former co-worker, James Cooper (Cooper), also testified at the trial. Cooper testified he sold a Rossi firearm to Petitioner in 2007. (App. 393 - 394.)

Despite the strength of the State's evidence, Petitioner alleges the outcome of his trial would have been different had Counsel objected when Brown testified, "My initial thought was [Petitioner] murdered her." (App. 226.) "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." Strickland, 466 at 188. Here, Petitioner's contention ignores that the State was able to show Victim was alive when Petitioner showed up at her residence on the morning of her murder and, based on Petitioner's own statement, Victim was not alive when Petitioner left her residence. It is unreasonable to believe the solitary statement by Brown made a more significant impact on the jury than Dowdy's testimony or Petitioner's own statement. Counsel even testified at the evidentiary hearing that Dowdy's testimony, "was very damaging because that testimony could put [Petitioner] there at the house while [Victim] was still alive." (App. 542-543.)

Further, Petitioner misstates the post-conviction relief court's finding in its order of dismissal. Petitioner equates the post-conviction relief's court finding of strong evidence to "essentially" a finding of "overwhelming evidence." However, the post-conviction relief court found, "Applicant has also failed to show any resulting prejudice from Counsel's failure to object as any potential objection would not have changed the outcome of Applicant's trial based on the

strength of the evidence against him, which included Dowdy's testimony and Applicant's own statement to law enforcement on December 15th." (App. 611.) The post-conviction relief court did not make a finding that classified the State's evidence as overwhelming, however, it properly assessed the evidence against Petitioner as strong and, therefore, found an objection by Counsel to a singular statement during Brown's testimony would not have changed the outcome of his trial. The post-conviction relief court's finding is supported by this Court's holding in Smalls v. State, which held, "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case . . . ,", and "we must consider the totality of the evidence before the jury.")).

Notwithstanding Petitioner's failure to prove prejudice, Petitioner's claim that Counsel was deficient for failing to object to Brown's statement is meritless as Brown's statement was proper lay witness testimony under Rule 701, SCRE, and, therefore, not objectionable. During the State's case-in-chief, Brown testified as follows:

State: Okay. What did you do when you went inside the room?

Brown: I checked her pulse, didn't get a pulse, and so I got my phone out and called 911, my cell phone.

State: Okay. What was your initial thought?

Brown: My initial thought was [Petitioner] had murdered her.

(App. 226.) Rule 701, SCRE, states, "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge,

skill, experience, or training.” Here, Brown’s testimony fits squarely within Rule 701, SCRE, as his statement was based on the perception he developed after observing Petitioner coming from the direction of Victim’s residence while he was en route to conduct a welfare check on Victim. Further, Brown’s perception does not require any special knowledge, skill, experience, or training to develop, and is ultimately helpful to the jury in determining a fact at issue.

Further, Counsel testified at the post-conviction relief hearing that he did not see a reason to object at the time Brown made his statement. (App. 552.) Counsel went on to testify, “I’m honestly still sitting here today questioning whether or not the trial judge would have sustained that objection, because [Brown] was also testifying that he saw [Petitioner] leaving. (App. 552.) Counsel also cross-examined Petitioner during the trial and questioned Brown about the family’s disapproval of Petitioner, and the fact that Brown did not see Petitioner discard a weapon. (App. 230.) Brown also stated on cross-examination that Petitioner was over a mile away from Victim’s residence at the time Brown observed him on the moped. (App. 230-231.)

Finally, Petitioner’s argument that Brown’s initial thought was Petitioner “murdered” Victim was somehow Brown interjecting a legal argument is meritless. In support of this allegation, Petitioner cites the rule issued by this Court in State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011), which allows properly qualified experts to 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 conclusion concerning the criminal defendant’s guilt or innocence.” Petitioner further cites to State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (2017), which applied the Commander rule to lay witness testimony. However, in Westmoreland, the lay witness was the coroner for Spartanburg County and was familiar with the legal implications of using the term homicide versus murder.

Here, Brown, a non-lawyer, used the term murder, which, although it is a legal term of art, it is also a word commonly used interchangeably with "homicide" by non-lawyers who do not appreciate the different legal implications of the two terms. For Petitioner to assert that Brown was attempting to interject a legal argument in his testimony is completely unfounded. Brown provided a brief, simple statement expressing his belief that Petitioner murdered Victim, and the logical implication of Brown's statement is he believed Petitioner killed his sister. Petitioner's assertion that his statement was a comment on the existence of malice is unreasonable.

Ultimately, the post-conviction relief court properly found Petitioner failed to meet his burden to show any deficiency on behalf of counsel or any resulting prejudice as set forth in Strickland. As stated above, Brown's statement was proper lay witness testimony under Rule 701, SCRE, and Counsel even testified, he is not sure the trial court would have sustained an objection to Brown's statement had he raised one. Further, Petitioner has failed to show how the outcome of the trial would have been different had Counsel objected to Brown's statement as the State was able to present strong evidence that Petitioner was at Victim's residence while she was still alive and Petitioner's statement places him in the residence after her death. As Counsel testified, Dowdy's testimony was "damaging" and it is unreasonable to believe an objection to Brown's statement, which was proper lay witness testimony, would have changed the outcome of Petitioner's trial when viewed in light of the State's case against Petitioner. Therefore, this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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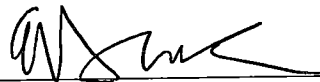
Respondent.

CERTIFICATE OF SERVICE

Pursuant to this Court's Order regarding the Operation of the Appellate Courts during the Coronavirus Emergency, dated March 20, 2020, the undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by email addressed to:

Jessica M. Saxon, Esquire
jsaxon@sccid.sc.gov

This 30th Day of March, 2020.



Eva D. Cook
Legal Assistant for Respondent