STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable R. Keith Kelly, PCR Judge

Appellate Case No. 2019–000695

WILLIAM BROCKMEYER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

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

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

The PCR court correctly found trial counsel was not constitutionally ineffective for failing to object to a witness's testimony that she told Petitioner "people had seen [him] shoot [the victim]" where the statement was not offered for its truth, but instead was offered to provide context to Petitioner's response to the statement regarding his involvement in the shooting which was relevant to the defense's argument that the shooting was accidental; where the jury was aware the witness had no actual first-hand knowledge of the accuracy or truthfulness of the statement made by "people;" and where the statement was so limited in scope or duration that it likely had no effect on the outcome considering the totality of the evidence presented at trial.

STATEMENT OF THE CASE

In the early morning hours of July 11, 2010, William Brockmeyer (Petitioner) shot and killed his friend Nicholas Rae outside a bar in Lexington. In May 2011, the Lexington County Grand Jury indicted Petitioner for murder (2011-GS-32-1255) and possession of a weapon during the commission of a violent crime (2011-GS-32-1257). (Supp. App. 2–5). Assistant Public Defenders David M. Mauldin (Counsel) and Robert M. Madsen represented Petitioner. Deputy Solicitors Samuel R. Hubbard, III, and David Shawn Graham prosecuted the case. On August 22, 2011, Petitioner proceeded to a jury trial before the Honorable Edward B. Cottingham.

A. Summary of Evidence Adduced at Trial

Petitioner and the victim had known each other for seven or eight years prior to the shooting. They met while working together at a tree service company, and thereafter served time in the same prison facility in Florida.[1] (App. 740–42). On the night of the shooting, Petitioner, the victim, and several mutual friends attended a house party. (App. 81–83; 745–51). Around 1:00 A.M., most of the partygoers migrated to a private bar known as Jager's located in the Red Bank area of Lexington County. (App. 86, 92). Because Jager's had status as a private club, every patron had to sign in. (App. 297). Among the group of friends was Gina Brakefield, who noticed both Petitioner and the victim carrying guns. (App. 87–88). The victim had a large pellet gun and Petitioner carried a .38 caliber pistol. (App. 87–88). According to several witnesses at Jager's, Petitioner's demeanor at Jager's was agitated and aloof. (App. 781).

Upon arriving at Jager's, the group bought drinks, sat down at a table near the dance floor, and began talking, dancing, and hanging out. (App. 88–90). The victim then separated from the

[1] About three weeks before the shooting, the victim moved to Lexington County from Florida to live with Petitioner. (App. 743–44). At the time of the shooting, Petitioner and the victim were living together in a hotel. (App 744–45).

group and headed across the bar to challenge another patron, Amera Kabar, to a game of pool. (App. 163–64). The victim played and lost four consecutive games of pool and a total of three hundred dollars in wagers to Amera. (App. 164–75).

Amera recalled noticing a gun in the small of the victim's back during the first game because the gun was not concealed. (App. 166). She stated that when the victim passed a knife that fell earlier, he showed her the gun, although she had noticed it before. (App. 166–68). Amera thought he was sweet and stated she did not at all feel threatened by the victim or his gun. (Ap. 168). Amera's boyfriend, Jamie Spencer, and brother, Bassam Kabar (Keith) similarly described seeing the big gun in the back of the victim's pants, which looked like a .40 or. 45. (App. 205). However, even knowing the victim was armed, neither Jamie nor Keith felt threatened by his behavior. (App. 205, 236).

Amera, Jamie, and Keith all testified that Petitioner's demeanor was completely different from the victim's, and that they felt threatened by his behavior. (App. 172, 208, 238). Amera stated Petitioner was acting hostile the entire night, like he was the "big man in the bar." (App. 172). Jamie described Petitioner as acting like a "hot head" with "something to prove." (App. 208). Amera stated Petitioner and the victim were not discreet about showing they were carrying guns, and recalled Petitioner bickering with the victim several times while they were playing pool. (App. 173).

Justin Ainsworth, another partygoer who went to Jager's with the rest of the group, also noticed Petitioner and the victim were carrying guns. (App. 256–58). Like Amera, Keith, and Jamie, Justin stated the victim had a laid back demeanor, but that Petitioner seemed more "high strung" and "antsy." (App. 258). Justin stated he was keeping his eye on Petitioner because he and his wife felt threatened knowing Petitioner had a gun on him. (App. 258).

Amera testified the victim left the pool table area to have a discussion with Petitioner before agreeing to the stakes for each game. (App. 171). During the fourth game, Petitioner approached the pool table, lifted his shirt to reveal the gun tucked into his waistband, pulled it out, cocked it, and yelled, “This is how we do it!” (App. 174, 209). She felt as though Petitioner was trying to scare her out of winning the game. (App. 174). Jamie also witnessed this exchange, and felt like Petitioner was trying to intimidate Amera. (App. 209). However, instead of becoming frightened, Amera dropped all pretense of unskillfulness and “ran the table,” sinking all the remaining balls without giving the victim another turn. (App. 175). Amera testified that by the last game of pool, the victim was intoxicated, and although he appeared disappointed, he remained polite, thanking her and congratulating her on a “great game.” (App. 175).

After he finished playing pool, the victim, clearly intoxicated, rejoined his friends at their table. (App. 95). Mariko Clack, who had been with the group at the party, asked Petitioner to take the victim outside because they would get kicked out if anyone got sick at the table. (App. 139). Petitioner then told Gina to take the victim outside and “take care of him.” (App. 95–96). Gina refused. (App. 96).

The victim then ran outside “like he was about to be sick,” and Jennifer McFarland followed him. (App. 96, 139). Shortly thereafter, Petitioner walked outside with Gina’s friend Brittany. (App. 96, 140). While Mariko stayed inside, Gina followed Brittany out to the front porch. (App. 97, 140). Gina saw the victim vomiting, and Jennifer standing behind him. (App. 97). Gina also noticed Amera and Keith sitting outside on the porch next to the victim. (App. 98). When Gina turned around to go back inside, she saw Petitioner and Brittany kissing in the foyer area. (App. 98). Gina called them both “whores,” and Petitioner laughed and walked back outside. (App. 99).

After briefly chatting with Brittany in the foyer, Gina walked outside to check on the victim and ask Petitioner if they were ready to leave. (App. 120). She saw the victim "slumped over" in the chair and Petitioner crouched down in front of him, whispering into his ear. (App. 99–100). Petitioner had his "hands up in a trigger-like position" with the trigger finger on the left side of the victim's neck. (App. 100–02). Gina then heard a loud pop, saw a yellow-flash, and then a gold casing flying through the air. (App. 103). A few seconds later, Gina saw Petitioner stand up, grab the victim's shoulder, and shove him "like he was shaking him awake." (App. 103). Petitioner then walked away toward the nearby woods. (App. 103).

Jamie also observed the victim run outside with Jennifer and noticed Petitioner in the foyer with Brittany. (App. 212–14). Jamie stated Petitioner looked angry. (App. 212–14). Given Petitioner's hostile behavior earlier that night, Jamie went out to the porch to check on Amera. (App. 214). He tried to convince her and Keith to come back inside, but they refused. (App. 214). Jamie then headed back toward the front door. (App. 214). Petitioner and Brittany were still in the foyer. (App. 215). Jamie stated Petitioner was trying to pull his gun out, and it appeared as though Brittany was trying to stop him. (App. 215–16). Almost immediately after Jamie walked back inside the bar, he heard a "pop," and ran back outside to get Amera and Keith. (App. 217).

Justin was also outside smoking a cigarette when the victim came outside and Jennifer helped him into the chair. (App. 259). Justin remained outside until he heard "a real loud pop" that "sounded like a firework." (App. 260). He immediately turned around to face the front door and heard Petitioner say, "He shot his self," as Petitioner walked away toward the wooded area. (App. 260). Justin then turned and looked at the victim who was "kind of slouched over, making a gurgling noise, like he was throwing up." (App. 260). Because he did not initially see any blood, Justin did not realize the victim had been shot until he fell out of the chair and onto the ground.

(App. 261). Justin immediately ran back inside to get his wife. (App. 261). As they were leaving, Petitioner walked back up asking who shot his friend. (App. 261–62).

Amera also noticed Petitioner and the victim walk outside to the front porch. (App. 177). She went outside to find Keith because she felt uneasy given Petitioner's hostile behavior and knowing he was armed. (App. 177–78). She also noticed Brittany and Petitioner kissing in the foyer area. (App. 180–81). She then found Keith outside, who told her he was not ready to leave yet. (App. 178). As she went to sit down next to Keith, Jennifer was helping the victim into a chair next to Amera. (App. 180). Amera then looked back toward the foyer and saw Petitioner and Brittany in a "heated discussion." (App. 181). Shortly thereafter, Amera was facing Keith when she heard a loud noise "like a car backfired." (App. 182).

Keith was already outside when Jennifer helped the victim into a chair. (App. 245). Like Gina, Keith described the victim as being "slumped over" in his chair. (App. 245). Keith observed Petitioner exit the bar and kneel down in front of the victim and with his hands on the victim's shoulder. (App. 240, 245). Shortly thereafter, Keith heard a "loud pop." (App. 241, 246).

Amera and Keith looked over as Petitioner was walking toward the woods. (App. 103, 183, 241). Like Justin, Amera did not realize at first that the loud noise she heard was a gunshot. (App. 183). She turned around to face the victim, thinking at first that he was vomiting on her. (App. 183). She then realized it was not vomit but blood. (App. 183–84). As Amera and Keith were standing up, the victim fell out of the chair and onto the ground. (App. 184, 247). The victim had blood coming out of his mouth and neck. (App. 248). Jamie, Amera and Keith then fled through the bar and out the back exit. (App. 184–85; 217–18; 246–48). They left before the police arrived. (App. 185, 248).

After Petitioner walked from the victim toward the wooded area, Gina ran back in the bar

and yelled that someone had been shot and to call 9-1-1. (App. 106). Mariko walked toward the door, where she ran into Gina, who's "eyes were as big as quarters." (App. 140). Gina told Mariko the victim had been shot, and Mariko ran outside and found him on the ground bleeding. (App. 106, 140). Shortly thereafter, Petitioner returned to the front porch, yelling and asking Mariko what happened. (App. 140, 142). Petitioner told Mariko the victim asked for the gun back so he "could rob somebody or do a lick or something like that." (App. 143). When Mariko asked him what he meant, Petitioner started acting "shaky and frantic" and began "shouting and pacing around." (App. 108, 143). He then took his shirt off and tossed it at Mariko. (App. 144).

Gina came back outside as people were trying to help the victim. (App. 106). Petitioner returned to the porch, acting hysterical, and claiming the victim "shot himself and that he said he was going to do it." (App. 107). Somebody asked Petitioner where the gun was and Petitioner immediately changed his story, stating "the black guys did it." (App. 107–08). He claimed they had shot the victim and then left. (App. 108).

Once law enforcement arrived, Petitioner became less frantic and stood by Mariko's car. (App. 147). Before Petitioner left with law enforcement, he told Mariko to "come get [him]." (App. 147). Mariko received a call from Petitioner an hour or two later, asking her again to come get him. (App. 147). Mariko testified she "told him that he wasn't leaving and that people had seen him shoot Nick." (App. 147). Petitioner continued to ask Mariko what everybody was saying, and repeatedly told her "did not do it" and that "he couldn't have done it because he was inside dancing." (App. 148–49, 157).

The autopsy revealed the victim died as a result of a .380 caliber gunshot wound to the neck. (App. 679–80). The pathologist testified the gunshot wound was a "hard contact" wound, meaning the weapon was pushed firmly against the skin at the time the shot was fired—so firmly

as to leave a visible a muzzle imprint. (App. 680).

B. Petitioner's Testimony

Petitioner testified that on the night of the incident, he saw the victim with the .38 pistol at the house party, which he did not think was a big deal because it was for protection. (App. 753). When they arrived at the bar, the victim allegedly asked Petitioner to hold the gun while he played pool with Amera. (App. 753). Petitioner claimed the victim had come to him twice for money that night. (App. 754). After the victim finished playing pool, he told Petitioner he lost the money and asked for his gun back. (App. 754–55). Petitioner speculated that the victim wanted the gun to try and get his money back that he lost to Amera. (App. 756). After Petitioner gave the gun back, the victim walked back by the pool tables and into the bathroom. (App. 757). He then returned and sat back down at the table. (App. 757). Petitioner described the victim as looking "like he was about to pass out." (App. 757). Shortly after returning to the table, the victim quickly walked outside as the DJ announced last call. (App. 757–58).

Petitioner and Brittany then went outside where he stumbled on the ledge, catching himself on a pole. (App. 758–59). Petitioner claimed he heard someone say "gun" and saw the victim leaning over in the chair with his head down. (App. 759). Petitioner stated he did not see a gun at first, but when the victim put his head up, Petitioner realized the victim had a gun in his lap. (App. 759). Petitioner stated the victim "looked like he was trying to brace himself" between the wall and the chair. (App. 759). Petitioner claimed he then approached the victim, leaned in, and tried to grab the gun. (App. 759). Petitioner testified that he was not sure if he touched the victim's hand or the end of the gun, but that the gun went off, dropped, and the clip fell out. (App. 759). Petitioner stated he then picked the gun up, ran out into the parking lot and threw the gun into the woods. (App. 759–60). When asked why he disposed of the gun, Petitioner claimed he and the victim

would go to jail if they were caught with a gun since they were both convicted felons. (App. 760).

Petitioner claimed he did not know the victim had been shot at that point. (App. 761). When he returned to the front of the bar, he saw people crowded by the front door. (App. 761). Petitioner ran into Mariko and asked her what happened." (App. 761). Mariko replied, "What are you talking about? You were out here. You know what happened." (App. 761). Petitioner then looked over and saw the victim laying on the ground. (App. 761). He claimed he saw "a little bit of blood" but that he thought it was just "a flesh wound or a graze or something" because the victim did not move when the gun went off. (App. 762).

When asked why Petitioner did not tell anyone what happened at that time, Petitioner stated he was scared. (App. 762). He said he "could not wrap [his] mind about what had happened" and that there was a lot of commotion at that point. (App. 762). Shortly after Petitioner learned the victim was dead, law enforcement showed up. (App. 763). He recalled someone testing his hands for gunshot residue, and that he possibly had blood on his hand. (App. 763). Petitioner claimed he did not tell the person collecting gunshot residue that he was next to the victim when the gun went off again because he was scared. (App. 764).

Petitioner later went with law enforcement to the station for further questioning. (App. 764). Petitioner initially told law enforcement that "the black guys [the victim] was playing pool with" did it. (App. 765). Petitioner testified he believed it was "the black guys'" fault because "that's the reason [the victim] came back and got the gun" from him. (App. 765). Petitioner claimed he did not tell law enforcement what really happened because at that point he was still scared and stated he "made a really poor decision." (App. 765). Petitioner then stopped talking to law enforcement altogether, claiming that one of the detectives had tried to intimidate him. (App. 765–66).

On cross-examination, Petitioner admitted he had purchased the 0.38 and brought with him that night "for protection." (App. 783). He claimed he did not bring it to the birthday party, but admitted that once there, he had put it in his waistline. (App. 783–84). Petitioner denied flashing the gun around in the bar. (App. 784). He also denied ever saying "this is how we do it," pulling up his shirt, or showing the gun to the people who were beating the victim out of money in pool. (App. 785).

On cross-examination, Petitioner was asked about the phone call with Mariko. (App. 798). He admitted he did not ask her about the victim's well-being, and claimed he could not recall asking her what people were saying about the incident. (App. 798). Petitioner also admitted he had not told anyone else he was involved in the shooting until that day in court. (App. 799).

On reply, the State called Petitioner's former girlfriend's brother, Grady Howell. Petitioner initially told Grady that he was unaware of what happed, and claimed he was inside the bar at the time the victim was shot. (App. 817–18). However, on another occasion, Petitioner told Grady that the victim initially had the gun, turned it around, and handed it to Petitioner while holding it by the barrel. (App. 818). Petitioner claimed that while the victim was handing him the gun, the trigger discharged and hit the victim in the neck. (App. 819–20).

C. Verdict & Subsequent Proceedings

On August 26, 2011, the jury convicted Petitioner as indicted. (Supp. App. 1). Judge Cottingham sentenced Petitioner to consecutive terms of thirty-five years' imprisonment for murder and five years' imprisonment for possession of a weapon during the commission of a violent crime.

Petitioner filed a timely notice of appeal. Miles E. Coleman and A. Mattison Bogan, of Nelson Mullins Riley & Scarborough, LLP, and Chief Appellate Defender Robert M. Dudek

represented Petitioner on appeal. On February 28, 2013, the case was transferred to this Court pursuant to Rule 204(b), SCACR. Following briefing and oral argument, this Court affirmed Petitioner's convictions and sentences in a published opinion issued November 27, 2013. *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013). The case was returned to the circuit court on December 13, 2013.

Petitioner commenced the underlying PCR action on February 25, 2014, and filed an amended application on September 29, 2016. (App. 1039–45; 1046–54). An evidentiary hearing into the matter convened before the Honorable R. Keith Kelly on November 9, 2016. (App. 1063–1119). Petitioner was present at the hearing and represented by Kristy G. Goldberg, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented the State.

On October 25, 2018, after reviewing the entire record and testimony presented, the PCR court issued an order denying relief and dismissing the action with prejudice. (App. 1120–55). Petitioner thereafter filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, and the State filed a return. (App. 1156–58; 1159–64). The PCR court denied the Rule 59(e) motion by order dated April 22, 2019. (App. 1165–68). This appeal follows.

<u>STANDARD OF REVIEW</u>

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989); *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove 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 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

<u>ARGUMENT</u>

The PCR court correctly found trial counsel was not constitutionally ineffective for failing to object to a witness's testimony that she told Petitioner "people had seen [him] shoot [the victim]" where the statement was not offered for its truth, but instead was offered to provide context to Petitioner's response to the statement regarding his involvement in the shooting which was relevant to the defense's argument that the shooting was accidental; where the jury was aware the witness had no actual first-hand knowledge of the accuracy or truthfulness of the statement made by "people;" and where the statement was so limited in scope that it likely had no effect on the outcome considering the totality of the evidence presented at trial.

Petitioner contends Counsel was ineffective for failing to object to Mariko's statement that "people had seen [petitioner] shoot [the victim]" because the statement constituted inadmissible hearsay. The PCR court rejected this claim, finding Counsel was not constitutionally ineffective in this regard because the statement was not offered for the truth of the matter asserted. Instead, the statement was offered to provide context to Petitioner's response to initial allegations regarding his involvement in the shooting, was both relevant to Petitioner's defense and an admissible, non-hearsay statement by a party opponent. Even if the statement did constitute inadmissible hearsay, however, the PCR court properly found that Petitioner could not have been prejudiced within the meaning of *Strickland* because the statement was not probative on the only genuinely contested issue at trial—whether the shooting was an accident.[2] Moreover, considering the challenged statement in relation to the totality of the evidence presented at trial coupled with the jury's awareness that Mariko had no actual first-hand knowledge of the truthfulness of the statement made by "people," Counsel's failure to object was hardly sufficient to undermine confidence in the outcome. As these findings are supported by probative evidence and do not constitute an error

[2] Judge Cottingham charged the jury that, "An act may be excused on the grounds of accident if it is shown that the act was unintentional, that the defendant was acting lawfully, and that reasonable care was used by the defendant in the handling of the weapon. (App. 842); *See, e.g., State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994).

of law, certiorari should be denied.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Id.*; *see Miller v. Keeney,* 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

I. Ample probative evidence supports the PCR court's conclusion that counsel's failure to object to the alleged hearsay statement was not deficient performance because the statement was not offered to prove people saw Petitioner shoot the victim, but instead provided context to subsequent testimony regarding Petitioner's response to initial allegations pertaining to his involvement in the shooting, which supported Petitioner's version of events and testimony that the shooting was accidental.

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly

deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. *Strickland*, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Accordingly, representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id*. at 686.

Rule 801(c) of the South Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE. A court may admit evidence, however, including statements made by someone other than the declarant if it is not offered for the truth of the matter asserted and is otherwise relevant. *See, e.g., Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 173 n.18 (1988); *cf. State v. Alexander,* 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.").

Here, the challenged statement occurred during the following portion of the State's direct examination of Mariko:

> Q: At some point later did you get a phone call from Will Brockmeyer?
>
> A: Yes, I did.
>
> Q: How much longer after he left was it when he called you?
>
> A: Maybe an hour, maybe more, a couple of hours.

Q: What, if anything, did he tell you on the phone about what happened with Nick?

A: He called me and told me to come get him, and I told him that he wasn't leaving **and that people had seen him shoot Nick**.

Q: **People said what?**

A: **That they had seen him shoot Nick. There was witnesses that had seen him shoot Nick.**

Q: What did he say?

A: He said he didn't do it.

(App. 147–48) (emphasis added).

At the PCR hearing, Counsel Mauldin testified he developed a trial strategy based on Petitioner's version of events—that the shooting was an accident. Regarding Mariko's statement, Counsel Mauldin could not recall a specific reason why he did not object, but admitted it was probably a missed objection. (App. 1092). On cross-examination, Counsel surmised that the exchange involving the alleged hearsay statement may have been quick because the solicitor next asked Mariko what Petitioner said in response. (App. 1108). Counsel explained that Mariko's testimony that Petitioner told her he "did not do this," was both important to the defense's theory that the shooting was accidental and consistent with Petitioner's testimony that he initially denied involvement in the shooting because he was scared and in shock. (App. 762–66; 1108).

In finding Petitioner failed to meet his burden of proof as to this allegation, the PCR court found Mariko's statement was non-hearsay. The PCR court explained that the challenged statement was not offered to prove the truth of the matter asserted—i.e. that multiple people saw Petitioner shoot the victim. Rather, because Mariko's statement prompted Petitioner's response to initial allegations regarding his involvement in the shooting, the statement was admissible for the

limited purpose of placing Petitioner's response into context. *See Atkins v. Commonwealth*, 13 Va. App. 365, 368, 412 S.E.2d 194, 196 (1991) ("Whether statements which draw responses are inadmissible hearsay depends upon the nature of the statements . . . ; [w]ords which constitute a question or accusation that result in a party admission are not barred by the hearsay evidence rule."); *Tellis v. Traynham,* 195 Va. 447, 453, 78 S.E.2d 581, 584 (1953) ("It is only when the prompting statements have the quality of evidence (offered for the truth of the matter asserted) that they become inadmissible hearsay.").

The PCR court cited this Court's opinion in *Rhodes v. State*, in support of its conclusion that Mariko's statement was non-hearsay because it was not offered for its truth. 349 S.C. 25, 561 S.E.2d 606 (2002). The victim in *Rhodes* was robbed at gunpoint by an unknown assailant, but was later able to identify the defendant in a friend's yearbook. *Id.* at 29, 561 S.E.2d at 608. The friend, who attended middle school with the defendant, showed the victim the defendant's picture in his yearbook with after hearing rumors regarding the defendant's recent involvement in a shooting. *Id.* This in turn led to the defendant's apprehension and subsequent identification via photographic line-up. *Id.*

On appeal, the defendant claimed the friend's testimony about rumors of the defendant's involvement in shooting "a guy and a girl" was inadmissible hearsay, and trial counsel was ineffective for failing to object to these statements. *Id.* at 30, 561 S.E.2d at 608–09. In finding trial counsel was not ineffective, this Court explained that the challenged portion of the friend's testimony "was not offered to prove [the defendant] had committed the crimes, but rather to explain [the victim's] identification of [the defendant] in the yearbook." *Id.* at 31, 561 S.E.2d at 609.

Petitioner contends this Court's opinion in *Rhodes* "fails to support the PCR court's conclusion but instead further illustrates that the testimony in [P]etitioner's case was hearsay."

(Pet. 10). Specifically, Petitioner asserts that Mariko's statement is distinguishable from the challenged statement in *Rhodes* because Mariko "did not equivocate" in her statement that "people had seen [petitioner] shoot [the decedent]." (Pet. 10). Petitioner misconstrues this Court's reasoning as to why the challenged statement in *Rhodes* was non-hearsay, which was not based on the challenged statement being unequivocal. Rather, it was based on the fact that the statement was offered for a reason other than its truth. Mariko's statement was similarly not offered to prove Petitioner shot the victim, but instead was offered to establish the effect of the statement on Petitioner and lay the foundation for Petitioner's admissible statement denying involvement in the shooting.

Petitioner's next compares his case to *State v. Brewer* in support of his contention that Counsel's failure to object constituted deficient performance because the statement could not have been offered to prove the effect on the listener or to establish context. 411 S.C. 401, 768 S.E.2d 656 (2015). *Brewer* involved the erroneous admission of the defendant's interview with law enforcement, where investigators frequently referenced and quoted many purported eyewitnesses to Brewer the victim. *Id.* at 406, 768 S.E.2d at 659. Investigators told Brewer multiple times that he had to "prove his innocence." *Id.* at 405, 768 S.E.2d at 658. The entire recording of the interview, including the investigators' hearsay-laden questions and comments, was played for the jury. *Id.* at 405, 768 S.E.2d at 658. Brewer was subsequently convicted of murder. *Id.* at 403, 768 S.E.2d at 657.

This Court reversed Brewer's murder conviction on appeal and remanded for a new trial, rejecting the State's contention that the investigators' statements purported regarding eyewitnesses were admissible for purposes of context or for the effect the statements had on Brewer. Specifically, this Court found "the only effect these statements had on Brewer was to make him

repeatedly deny shooting anyone" and that "the meaning of these denials is obvious and requires no explanatory context." *Id.* at 407, 768 S.E.2d at 659. Particularly concerned about the *burden-shifting* statements made by *law enforcement*, this Court found law enforcement's insistence that Brewer prove his innocence "has *no* place before the jury. *Id.* at 408, 768 S.E.2d at 659 (emphasis in original).

Petitioner attempts to equate the burden-shifting statements made by law enforcement to Mariko's non-burden-shifting statement by inexplicably concluding that "*Brewer* firmly rejects the notion that such hearsay can be offered to prove the effect on the listener or establish context." (Pet. 11). However, nothing in the *Brewer* opinion suggests this Court intended to impose a blanket rejection of *all* out-of-court statements for the purpose of establishing context. None of this Court's concerns in *Brewer* are applicable to Petitioner's case, as Mariko's statement did not involve an interrogation by law enforcement nor did anyone suggest Petitioner had to prove his innocence. Mariko merely testified about the conversation she had with Petitioner on the night of the shooting. (App. 148–49).

Petitioner nonetheless maintains that his response to Mariko's statement could have been easily elicited without introducing the statement which prompted his response. As an initial matter, Mariko's testimony that she told Petitioner "people saw you shoot [the victim]" was particularly relevant to illustrate why Mariko refused to pick up Petitioner from the police station. *See* 31A C.J.S. Evidence § 365 ("[T]estimony is not hearsay where it relates to what the witness himself did in reliance on, or in response to, a statement, facts upon which action was taken, personal observations, explanation of conduct, the effect of statements on the listener, the fact that something was said, or identifying what was said.") (cited with approval in *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 30–31, 609 S.E.2d 506, 512 (2005). Additionally, because

Petitioner repeatedly asked Mariko "what everybody was saying," her statement was necessary to lay the foundation for Petitioner's non-hearsay response. *See United States v. Wills*, 346 F.3d 476, 489–90 (4th Cir. 2003) (finding that statements made by defendant's incarcerated brother during recorded telephone conversations, in response to defendant's own statements, were reasonably required to place defendant's responses into context); *United States v. Tolliver,* 454 F.3d 660, 666 (7th Cir.2006) (explaining that "[s]tatements providing context for other admissible statements are not hearsay because they are not offered for their truth).

II. Even if the challenged statement constituted inadmissible hearsay and trial counsel deficiently failed to object, the PCR court correctly determined Petitioner failed to establish any resulting prejudice because Petitioner's identification had no bearing on the defense's accident theory; where the challenged statement was only mentioned a single time during trial; where the State presented extensive testimony from other witnesses about the shooting and surrounding circumstances; and it was clearly conveyed to the jury that Mariko had no actual first-hand knowledge of the accuracy or truthfulness of the statement made by "people."

Under the second, or "prejudice" prong of *Strickland*, the applicant must prove "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. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. When evaluating this probability, a reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . . the [totality of the] evidence presented to the jury." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; *accord. Strickland*, 466 U.S. at 695–96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial*." *Id*. at 687 (emphasis added).

Petitioner again cites *Brewer* in support of his prejudice argument, alleging that "[j]ust like in *Brewer*, hearsay statements about unknown eyewitnesses identifying petitioner as the shooter were improperly admitted." (Pet. 11). The crucial distinguishing factor, however, is that in both *Rhodes* and *Brewer* the central factual issue was the identity of the shooter. Petitioner admitted he was the shooter, but stated the shooting was accidental and that he touched either the victim's hand or the gun, and the gun went off. (App. 759). Petitioner therefore incorrectly characterizes Mariko's statement that "people had seen [Petitioner] shoot [the victim]" as bearing "directly on the factual issue—whether the shooting was accidental." (Pet. 11). There was no question at trial that Petitioner was involved in shooting the victim, and Mariko's testimony did not contradict Petitioner's claim that the shooting was accidental. Therefore, Mariko's statement merely provided context to Petitioner's admissible statement denying involvement, which was consistent with the defense's theory and corroborated Petitioner's own testimony.

Similarly, even if Mariko's statement constituted inadmissible hearsay and Counsel was deficient for failing to object, the PCR court correctly found the statement was "so limited in nature" that the testimony had "a very limited impact" on the outcome of Petitioner's trial. The record supports the PCR court's conclusion, as the solicitor's questions immediately following the alleged hearsay statement—about Petitioner's reaction to allegations he was involved in the shooting—properly limited Mariko's testimony to her conversation with Petitioner that night. *Cf. State v. Chisholm*, 395 S.C. 259, 274, 717 S.E.2d 614, 622 (Ct. App. 2011) (considering the fleeting nature of a hearsay statement in concluding the statement was harmless). The solicitor did

not emphasize, explain, or even comment on the statement, but merely asked Mariko to repeat her answer. Nor did the solicitor attempt to use Mariko's mention of other witnesses as evidence of Petitioner's guilt at any point throughout the rest of the trial nor did he refer to any of the challenged statement in his closing argument. *See Hinesley v. Knight*, 837 F.3d 721, 735 (7th Cir. 2016) (finding the defendant was not prejudiced by trial counsel's failure to object to alleged vouching statements "because the statements were isolated, were not belabored, were not cited by the State in its closing argument, and were highly unlikely to have influenced the judge's assessment of guilt"). Therefore, the PCR court correctly concluded that the testimony was so limited in nature that any alleged error on Counsel's part for failing to object had very limited impact on the outcome of Petitioner's trial

Moreover, even if that one little portion of Mariko's testimony was inadmissible, it could hardly be prejudicial in the context of the entire case. Crucially, the jury was made fully aware that Mariko had no first-hand knowledge of who committed the shooting, which minimized any prejudice that could have resulted from the statement. *Cf. State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (finding the improper admission of hearsay evidence to be harmless where the hearsay evidence was impeached by the jury's exposure to the fact the evidence was not based on any first-hand knowledge). By the time the jury heard Mariko's testimony about her phone conversation with Petitioner, it had been established Mariko did not actually witness the shooting.

Petitioner further contends the PCR court erred in finding Petitioner was not prejudiced due to the "overwhelming evidence of [Petitioner's] guilt outside this one statement made by [Mariko]." Petitioner cites this Court's opinion in *Smalls*, implying that the *Smalls* court eliminated the ability for reviewing courts to consider the strength of the State's evidence in assessing prejudice. While *Smalls* did instruct reviewing courts to consider the "specific impact counsel's

error had on the outcome of the trial," this Court also instructed the PCR court to "consider the strength of the State's case in light of all the evidence presented to the jury." 422 S.C. at 188, 810 S.E.2d at 843. "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* (citing *Strickland*, 466 U.S. at 696, 104) (stating "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *cf. Thompson v. State,* 423 S.C. 235, 246, 814 S.E.2d 487, 492–93 (2018) (explaining that the reviewing court must consider the strength of the State's case apart from the inadmissible evidence in order to gauge prejudice).

Therefore, since the out-of-court statement covered the same facts that other witnesses had already testified to in admissible form, there is no "reasonable probability that . . . the result of the proceeding would have been different," even if the statement had been excluded. *Strickland*, 466 U.S. at 694; *cf. State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (noting that "[i]mproperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless"). *Compare Chisholm*, 395 S.C. at 274, 717 at 621 (finding the admission of hearsay to be harmless where the defendant was identified as the perpetrator of the crime by two other witnesses) with *Brewer*, 411 S.C. at 409, 768 S.E.2d at 660 (finding the admission of hearsay statements were not harmless because the State's evidence against the defendant provided "at best only a thin, circumstantial case").

Accordingly, Petitioner has failed to demonstrate how trial counsel's failure to object to Mariko's statement "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686. While in some instances "even an isolated error" can support an ineffective-assistance claim if it is "sufficiently egregious and prejudicial," it is difficult to establish ineffective assistance when counsel's overall

performance indicates active and capable advocacy. *Murray v. Carrier,* 477 U.S. 478, 496 (1986) (citing *Harrington v. Richter*, 562 U.S. 86, 105 (2011)). Counsel Mauldin implemented a trial strategy based on Petitioner's version of events and position that the shooting was an accident. *See Strickland,* 466 U.S. at 691 ("[T]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").[3]

[3] Petitioner's reliance on *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018), in support of his claim Counsel was deficient is misplaced. *Thompson* involved trial counsel's failure to object to hearsay statements under Rule 801(d)(1)(D), SCRE, the hearsay exception which applies exclusively to criminal sexual conduct cases and allows limited corroborative testimony where the declarant is the alleged victim.

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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