

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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ON PETITION FOR A WRIT OF CERTIORARI TO RICHLAND COUNTY  
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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Appellate Case No. 2016-001363

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**RECEIVED**

**Oct 27 2020**

**SC Court of Appeals**

Stewart Randall Ard,.....Respondent,

v.

State of South Carolina, .....Petitioner.

**REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR PETITIONER

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## **ISSUES PRESENTED**

- I. Ard's "additional sustaining grounds" are not preserved for appellate review because relief was granted below only as to the specific-intent jury instruction issue. Therefore, Ard should have raised these issues as a cross-appeal.
  - A. The PCR court correctly found Counsel was not constitutionally ineffective for failing to preserve for appellate review his objection to testimony regarding Ard's previous incarceration or the curative instruction because the instruction was sufficient to cure any potential prejudice.
  - B. The PCR court correctly found Counsel was not constitutionally ineffective for failing to object to the trial judge entering the jury room.

## STATEMENT OF THE CASE

Stewart Randall Ard (Ard) is presently incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment by the Richland County Clerk of Court. During its April 2014 term, the Richland County Grand Jury indicted Ard for one count of attempted murder (2014-GS-40-1777), three counts of second-degree assault and battery (2014-GS-40-1756, -1766, -1767), and carrying a concealed weapon (2014-GS-40-1771). Aimee J. Zmroczek and M. Wade Dowtin, Esquires, represented Ard on these charges. Assistant Solicitors Kathryn “Luck” Campbell Hubbard, Dolly Justice Garfield, and Ramie Shalabi prosecuted the case.

Ard proceeded to a jury trial with the Honorable James R. Barber, III, presiding on June 23 - 25, 2014, at the Richland County Courthouse. The jury returned a verdict of guilty as indicted for attempted murder, two counts of second-degree assault and battery, and carrying a concealed weapon. On the final charge for second-degree assault and battery the jury convicted Ard of a lesser-included charge of third-degree assault and battery.

Judge Barber sentenced Ard to life without parole (LWOP) for attempted murder; three years for each count of second-degree assault and battery, thirty days for third-degree assault and battery (a time-served sentence), and ninety days for carrying a concealed weapon (a time-served sentence). Judge Barber issued each sentence concurrent except for the sentence issued for one count of second-degree assault and battery (2014-GS-40-1766). Judge Barber set the sentence on that charge to run consecutively to the life sentence for attempted murder.

Ard filed a timely notice of appeal. David Alexander, Esquire, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Ard’s appeal after consideration of his *pro se* brief and a review as required by Anders, supra. State v.

Ard, Op. No. 2016-UP-243 (S.C. Ct. App. filed June 1, 2016). That court returned the Remittitur on June 17, 2016.

Ard filed an application for post-conviction relief on October 19, 2016. The State made its Return on July 12, 2017. An evidentiary hearing into the matter was convened on December 13, 2017, at the Richland County Courthouse before the Honorable Clifton Newman. E. Charles Grose, Jr., Esquire, represented Ard. Jessica E. Kinard then of the South Carolina Attorney General's Office represented the State. Trial counsel Aimee Zmrocek and appellate counsel David Alexander testified at the evidentiary hearing. At the conclusion of the hearing, the PCR court took the matter under advisement and requested proposed orders from each party. By written order filed February 19, 2019, the PCR court issued an order granting PCR on the ground trial counsel rendered ineffective assistance for failing to object to the general intent jury charge on attempted murder. The PCR court denied relief on all other grounds.

The State filed a timely motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC. Through counsel, Ard filed a response to the motion on August 22, 2019. The PCR court convened a hearing on the State's motion on September 20, 2019. On November 5, 2019, the PCR court issued an order denying the State's motion. The State then filed a timely notice of appeal of the grant of post-conviction relief, and a petition for writ of certiorari on July 22, 2020. Ard filed a return to the petition on October 14, 2020.

## STATEMENT OF THE FACTS

This case arises from a bar fight in the Five Points area of Columbia. Ard and three friends were patrons at the bar Group Therapy. One of the patrons (not Ard) punched a wall, causing a bouncer to ask the group of four to leave. App. pp. 90-91. After a cross exchange, the bouncers escorted Ard's group out of the bar. App. p. 91. Jesse Patterson was the bouncer working the door at Group Therapy that night. App. p. 213. Sometime after the four patrons were escorted away, Patterson was outside the door talking to the bar's owner, Scott Flemming, when he heard screaming behind him, turned, and saw Ard's co-defendant Benjamin Geno walking towards him and throwing punches. App. pp. 219-20. Ard came from behind Geno and stabbed both Patterson and Flemming with a knife. App. pp. 220, 260-61. Then Ard ran back toward his parked car at the Post Office across the street. Two bouncers at the neighboring bar, Gabe McDaniel and Joe Molino, chased Ard. App. pp. 273, 279, 284-85, Ard attempted to stab these men as well, but was unsuccessful, as McDaniel and Molino both turned and ran away when Ard came at them. App. pp. 275-77, 280-81, 286-87. Ard then fled the scene in his vehicle with the three other men who were originally kicked out of Group Therapy. App. pp. 74, 286. The altercation was captured on video by cameras in and around the bar, including outside on the sidewalk. App. pp. 224-35.

The Fifth Circuit Solicitor's Office charged Ard with attempted murder for the stabbing of Patterson and three counts of assault related to Flemming and the two other bouncers who received no injuries. App. pp. 16-17. In her opening statement, trial counsel conceded Ard was guilty of second-degree assault and battery with respect to Patterson, but denied Ard was guilty of attempted murder. App. p. 71. Trial counsel also conceded guilt as to second-degree assault and battery as to Flemming and to third-degree assault and battery as to the other two bouncers, McDaniel and

Molino. App. p. 71. In closing, trial counsel argued Ard lacked malice or intent to kill Patterson. App. p. 402.

Judge Barber gave the standard charges on reasonable doubt, burden of proof, and presumption of innocence. 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. Trial counsel did not object to the general-intent charge. App. p. 429.

Later, the jury sent a note requesting to be recharged on attempted murder. App. p. 366. The trial judge replayed the portion of the instructions regarding ABHAN and attempted murder, App. p. 440. When the trial judge asked whether there was anything from the defendant on the recharge, trial counsel said no. App. p. 441. Shortly thereafter, the jury reached a verdict and convicted Ard of attempted murder. App. pp. 441-42.

## ARGUMENT

### **I. Ard’s “additional sustaining grounds” are not preserved for appellate review because relief was granted below only as to the specific-intent jury instruction issue. Therefore, Ard should have raised these issues as a cross-appeal.**

Ard raises two additional issues, discussed below, as “additional sustaining grounds.” However, because Ard was denied relief on these claims below, they are not additional sustaining grounds, and if Ard wished to raise them for appellate review, he should have done so by filing a cross-appeal. Ard is not seeking affirmance of the lower court’s decision based on these two additional grounds, but rather, is asking this Court to **overrule** the lower court’s findings as to these issues. See App. pp. 693-94, 695-700 (denying relief as to these grounds).

Pursuant to our appellate court rules, “[t]he appellate court may **affirm** any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR. Similarly, in post-conviction relief, a respondent may “offer additional sustaining grounds” on which this Court may affirm the post-conviction relief court. Rule 243(g), SCACR. “In raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court’s ruling for a reason other than one primarily relied upon by the lower court.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000). Additional sustaining grounds allow a prevailing party to raise on appeal any additional reasons why the appellate court should affirm the lower court’s ruling regardless of whether those reasons have been presented to or ruled on by the lower court. See id. at 419, 526 S.E.2d at 723 (“[A] respondent—the “winner” in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.”); Rule 220(c), SCACR (“The

appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”)

However, while an appellate court may affirm on any ground appearing in the record, it may not affirm the lower court on a ground the lower court previously considered and denied. A party who was unsuccessful at the circuit court level may not later raise subsequent issues as “additional sustaining grounds,” particularly when the lower court determined those issues to be without merit. While an appellate court may affirm based on any ground appearing in the record, it cannot affirm by **reversing** the lower court’s rulings on these issues. Law, 368 S.C. 424, 629 E.E.2d 642; I’On, L.L.C., 338 S.C. at 417, 526 S.E.2d at 722; Rule 220(c), SCACR (appellate court may affirm for any reason appearing in the record).

Accordingly, these issues are not preserved for appellate review. However, out of an abundance of caution, Petitioner addresses each issue on the merits below.

**A. The PCR court correctly found Counsel was not constitutionally ineffective for failing to preserve for appellate review his objection to testimony regarding Ard’s previous incarceration or the curative instruction because the instruction was sufficient to cure any potential prejudice.**

The PCR court correctly found Counsel was not constitutionally ineffective for his handling of evidence Ard had previously been incarcerated and did not want to go back to prison. One victim, Flemming, testified on two occasions that during course of events leading up to the incident, Ard told him that he had been to prison or to jail and that he did not want to return. App. pp. 256, 268. Trial counsel did not object to the first testimony on this point. App. p. 256. Upon the second instance, trial counsel moved for a mistrial and the trial court gave a curative instruction:

that any comments that were made or allegedly made by the Defendant prior to the alleged incident relation to his not having any interest in going to jail at any time

are to be disregarded by you and are not [to] be considered by you whatsoever with respect to anything involved in this trial. They don't have anything to do with the case. So you disregard those.

And when you have your deliberations I'm going to instruct you that that is not to enter into your deliberations and be part of your conversation.

App. pp. 268-271.

The PCR court correctly found Ard did not meet his burden of demonstrating Strickland error and prejudice as to this allegation. "If the trial judge sustains a timely objection to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction." State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006); State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). While it cannot be refuted from the record that trial counsel did not object to the first testimony that Ard had previously been to jail, Counsel sought and received a curative instruction that covered both mentions of Ard's prior incarceration, and the instruction was sufficient as a matter of law. "A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005); State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986).

Therefore, Ard was not prejudiced by the failure to preserve for appeal either the substance of the curative instruction or counsel's objection to Flemming's testimony. The curative instruction was complete such that there exists no reasonable likelihood of a different outcome had counsel preserved the issue in the appropriate manner.

**B. The PCR court correctly found Counsel was not constitutionally ineffective for failing to object to the trial judge entering the jury room.**

Ard alleges a structural error occurred when the trial judge's entered the jury room during deliberations. The trial record reflects the jury commenced deliberations at 11:40 AM. App. p.

429. And returned with a note sometime between 12:12 and 1:06 PM, at which time the trial judge made the following record:

[Trial Court]: Do we have everybody here? All right. As I have told the attorneys outside the courtroom, I received a note from the jury. And the first note said: "We would like to hear your recording of the charge to the jury. Is this possible?" Signed by Ms. Setzer.

Because y'all were at lunch and lunch had been delivered almost contemporaneously with my getting a note, **I went to the jury and said, "Look, if you want to hear the charge it's going to take a little bit of time to find it and it's going to take time to hear it and lunch is here. So what I'm going to do is let y'all eat your lunch and then we'll bring [y'all] in."** Plus the lawyers had just left. Y'all -- I assume y'all had gone to get something to eat.

And they said okay and then one of them said, "Well, can we ask you a question?" **And I said, "no, you can't do that."** She said, "Well, we may not want to hear the whole thing." **And I said, "well, if you know what you want to hear if you will write it down, then I will give it to the court reporter and we'll see if we can find it."**

I then, after they had an opportunity to eat, I asked y'all to come down and as I think as the solicitors were walking up, they brought a second note to me. And it said: "Please re-read the attempted murder charge and assault and battery of a high and aggravated nature."

So they have reduced what they -- the whole charge. So, I'm going to bring them out, Ms. Young has located on her equipment where those charges are, and confirm with them again that that's what they want to hear and we'll play that charge. And if that's sufficient for them, then we'll allow them to retire to the jury room again. If they want more well play whatever they want.

So, anything from the State with respect to the notes and what I did up to this point?

[Solicitor]: No, sir.

[Trial Court]: Anything from the Defendant?

[Trial Counsel]: No, Your Honor.

[Notes marked Court's Exhibits 4 and 5] [**Jury brought into the courtroom**].

[Trial Court]: All right. Thank you, Madam Forelady. I have received both of your notes, and I have reviewed them with the attorneys and I just informed them a little bit that **when I got your first note I went into the jury room because they weren't here and told y'all we were going to wait until you had an opportunity to eat because the food had just gotten here and they had gone to lunch and it would take a little bit of time to hear the charge.**

**And somebody indicated, well, maybe you could reduce what you wanted to hear. And I asked you to write down whatever it is you wanted to hear.** And your note, the second note came just as the attorneys got here.

So, we have located it. It says: "Please re-read the attempted murder charge and assault and battery of a high and aggravated nature charge."

What I'm going to do is replay what my charge was before. And Ms. Young has located that on her computer, and we will play that. **If you want to hear something after that, let me know that and we'll play whatever it is you want to hear.**

[Portions of jury instructions played for jury].

App. pp. 437-40 (emphasis added)). The jury then resumed deliberations with no objection by either party. App. p. 441.

Ard alleges trial counsel was constitutionally ineffective because Counsel failed to object to and preserve for appellate review, the trial judge entering the jury room unaccompanied by any party or the defendant. Ard characterizes the error as structural and premises his allegation upon State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). In that case, this Court found reversible error when, in the guilt phase of a capital trial, the trial judge entered the jury room to answer a

jury's question accompanied by counsel from both the state and defense, but not the capital defendant. The court held "this conduct to be reversible error regardless of the presence of counsel" and cautioned the bench "that this procedure is highly improper and also runs counter to the requirement that in a death case the defendant be present at all stages of trial." 279 S.C. at 421-22, 308 S.E.2d at 784-85, overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (citations omitted). In the penalty phase of that same case, the judge entered the jury room without counsel for either side to "request for periodic reports on the status of jury deliberations." Id. at 423, 308 S.E.2d at 785. The Court again found this action improper. Id. (citing State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951)).

However, in this case, the trial judge entered the jury room merely for an administrative issue, and Ard therefore cannot prove either deficiency or prejudice. "A defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his or her presence would contribute to the fairness of the procedure." Starnes v. State, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991) (emphasis in original). "[T]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record." State v. Caldwell, 300 S.C. 494, 500, 388 S.E.2d 816, 819 (1990), overruled on other grounds by State v. Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006).

Ard was not prejudiced by the trial judge's interaction with the jury, as the circumstances in his case are distinguishable from the errors found to have occurred in Elmore, as well as from other similar pre-Elmore jurisprudence in our jurisdiction. State v. James, 116 S.C. at 243, 107 S.E. at 908 (defendant "has a right to be present at every part of the trial proper, to hear the evidence, to hear the judge's charge, to see, know, and hear what the judge says when he communicates with the jury, in answering their questions or further instructing them, unless he

absents himself”); State v. Smart, 278 S.C. 515, 523-25, 299 S.E.2d 686, 691-92 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (“This Court recognizes that the better practice would be to have the defendant present in the courtroom [when a deliberating jury’s inquiry is answered by the trial court]. We do not, however, hold that prejudice should be presumed without some showing.”); see also, In Interest of Dwayne M., 287 S.C. 413, 415, 339 S.E.2d 130, 131 (1986) (“While the right to be present is a substantial one, there is no presumption of prejudice.”).

The trial judge in this case did not enter the jury room to ask about the status of deliberations or to substantively respond to any jury question off the record and out of the defendant’s presence. The trial judge entered the jury room because they had asked a question and it was, presumably, going to take a while to return them to the courtroom for an answer because the parties to the case had gone to lunch. The trial judge refused to answer the jury’s precise inquiry and re-instructed the jury as to the appropriate procedure for submitting questions to the court during deliberations. The trial judge then made a full record of what occurred and did not respond to the jury’s inquiry until all parties were present and a record could be made. (R. pp. 438-40). This interaction does not form a basis for post-conviction relief. Contra State v. James, supra (defendant prejudiced where he remained in lock-up while trial court answered jury’s inquiry to issue further instructions on the law of self-defense); cf. State v. Smart, 278 S.C. at 523-25, 299 S.E.2d at 691-92, overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding no prejudice in the content of the court’s response to jury’s inquiry, from which defendant was absent, where court made a record of the full response given). Such an interaction was not critical to the proceeding’s outcome and constitutes a ministerial communication from which neither structural error nor prejudice can be discerned.

**CONCLUSION**

As to all other issues, the State reiterates the arguments made in its Petition for Writ of Certiorari. For all the foregoing reasons and the reasons contained in the Petition for Writ of Certiorari, the State requests this Court grant its petition and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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October 27, 2020

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**CERTIFICATE OF SERVICE**

Pursuant to the Supreme Court’s Order “RE: Operation of the Appellate Courts During the Coronavirus Emergency,” dated March 20, 2020, the undersigned hereby certifies a true copy of Petitioner’s Motion to File Reply to Return to Petition for Writ of Certiorari Out of Time and Reply to Return to Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel’s primary e-mail address as listed in the Attorney Information System (AIS):

**E. Charles Grose, Jr., Esquire**  
**charles@groselawfirm.com**

This 27th day of October, 2020

s/ Lindsey A. McCallister  
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## Lindsey McCallister

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**From:** Lindsey McCallister  
**Sent:** Tuesday, October 27, 2020 5:20 PM  
**To:** 'Charles Grose'  
**Subject:** Ard reply  
**Attachments:** ARD Stewart - Motion & Reply to RPWC (02413650xD2C78).pdf

**Follow Up Flag:** Worldox

Charles,

Attached is my reply and the motion to file out of time, as we discussed this morning. Thanks!

Lindsey



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