STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
Edgar W. Dickson, PCR Judge

App. Case No. 2019-001887

RECEIVED
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S.C. SUPREME COURT

RODNEY C. BRYAN

PETITIONER/RESPONDENT

v.

STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER

RESPONDENT/PETITIONER'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUE PRESENTED

Petitioner/Respondent's Statement of Issues Presented

I. Did the PCR court correctly grant [Bryan] a belated direct appeal where the PCR court correctly determined appellate counsel provided ineffective assistance by failing to raise on appeal that [Bryan]'s failure to testify was not the product of a knowing, intelligent, and voluntary waiver?

II. Did trial counsel violate [Bryan]'s constitutional rights to the effective assistance of counsel and to plead not guilty when he conceded [Bryan]'s guilt on two of the five charges against him during closing argument to the jury without [Bryan]'s express or implied consent?

III. Did trial counsel violate [Bryan]'s right to effective assistance of counsel by failing to object to the state's expert witness improperly bolstering the testimony of the complaining witness, which prejudiced [Bryan] where (1) the case hinged upon credibility due to the lack of physical evidence, (2) the state relied heavily upon the improper testimony during its closing argument, and (3) the error was compounded as it derived from a witness imbued with the imprimatur of being an expert?

IV. Did appellate counsel provide ineffective assistance by failing to raise on appeal that [Bryan]'s right to testify was violated, or in the alternative, did trial counsel provide ineffective assistance by failing to object to the violation of [Bryan]'s right to testify?

Respondent/Petitioner's Counter-Statement of Issues Presented

I. Whether the PCR court erred in granting Bryan a belated appeal due to ineffective assistance of appellate counsel where: (1) Bryan had a direct appeal and a belated appeal is not the appropriate remedy; (2) Bryan never asserted appellate counsel was ineffective for failing to argue he involuntarily waived his right to testify; (3) appellate counsel reasonably did not argue the unpreserved issue; and (4) no prejudice resulted because the waiver issue was not preserved?

II. Whether the PCR court properly found trial counsel articulated a valid trial strategy for conceding Bryan was guilty of simple CDV by explaining he was arguing about the CVD charge Bryan had already pleaded guilty to, and Bryan presented no evidence he did not want trial counsel to concede the violation of protection order?

III. Whether the PCR court correctly found Dr. Ross's testimony was not improper bolstering testimony where trial counsel strategically attacked the victim's memory of the events, why the victim did not call for help, and why the victim did not leave the home an issue at trial?

IV. Whether the PCR court correctly found trial counsel was not ineffective for failing to preserve the waiver issue where the only credible evidence shows Bryan knowingly and voluntarily waived his right to testify at trial?

STATEMENT OF THE CASE

Petitioner/Respondent Rodney C. Bryan (Bryan) was indicted for criminal domestic violence of a high and aggravated nature (CDVHAN), violating an order of protection, kidnapping, and two counts of spousal sexual assault. App. 807-08; 810-11; 813-14; 716-19. Bryan was represented by Robert "Theo" Williams, Sr. (trial counsel) of Williams, Stitely & Brink, PC. App. 1. Assistant Solicitors Shawn Graham and Emily Howard prosecuted the case. App. 1.

Bryan's case proceeded to a jury trial before Judge R. Knox McMahon on July 14, 2008. App. 1. Bryan's charges stem from domestic disputes with his wife, Rachel Bryan (Rachel), over the weekend of September 14–16, 2007. The State alleged Bryan assaulted Rachel, violated an order of protection, kidnapped her by not allowing her to leave the home or call for help, and raped her two times over the weekend. A.B. (daughter) and D.B. (son), Bryan and Rachel's children, testified at trial. Daughter was ten-years-old at trial. Son was seven-years-old at trial.

The jury convicted Bryan as indicted for CDVHAN, violation of a protection order, kidnapping, and one count of spousal sexual battery. The jury acquitted Bryan of the second count of spousal sexual battery. App. 434; 816-17. Judge McMahon sentenced Bryan to serve concurrent terms of ten years for spousal sexual battery, ten years for CDVHAN, thirty days for violating an order of protection, and twenty-five years for kidnapping. App. 448-49; 809; 812; 815; 820. Bryan appealed.

Appellate Defender Robert Pachak (appellate counsel) represented Bryan on appeal. Appellate counsel perfected Bryan's appeal by submitting an *Anders*[1] brief arguing the following issue:

[1] *Anders v. California*, 386 U.S. 738 (1967).

> Whether the trial court erred in ruling that two minor children of the victim could testify against [Bryan] without him being physically present in the courtroom?

App. 454. Thereafter, Bryan submitted a *pro se* brief to the Court of Appeals, presenting the following issues:

> 1. Did the trial judge abuse his discretion in finding the necessity to conduct an alternative procedure for the testimony of [Bryan's] ten-year-old daughter and seven-year-old son, by invoking S.C. Code Ann. § 16-3-1550(e)?
>
> 2. Did the trial judge err by failing to implement the correct procedure to invoke S.C. Code Ann. § 16-3-1550(e) and violate [Bryan's] Constitutional Rights by removing him from the Court Room prior to and during the testimony of [Bryan's] ten-year-old daughter and seven-year-old son?
>
> 3. Did the trial judge err in allowing the state[']s Expert Witness to be physically present in the Court Room during the victims['] testimony, for the purpose of the Expert Witness to bolster the victims['] testimony?
>
> 4. Did the trial judge err in allowing State's Exhibit No. 8 to be entered as evidence?
>
> 5. Did the trial judge abuse his discretion by failing to recuse himself?

App. 462.

The Court of Appeals dismissed the appeal "[a]fter thorough review of the record, [appellate] counsel's brief, and Bryan's *pro se* brief." App. 481; *State v. Bryan*, Op. No. 2010-UP-136 (S.C. Ct. App. filed Feb. 22, 2020). Bryan then filed a *pro se* petition for rehearing. App. 482-83. The State made its return to the petition for rehearing on April 5, 2010. App. 484-95. The Court of Appeals denied the petition for rehearing on April 23, 2010. App. 497-98. Bryan then petitioned the South Carolina Supreme Court for a writ of certiorari to the Court of Appeals. App. 499-511. The South Carolina Supreme Court dismissed the petition. App. 513-14. The case was remitted

back to the circuit court on May 28, 2010. App. 515. Bryan sought review in the United States Supreme Court (USSC). App 516. The USSC denied review on January 10, 2011. App. 569.

Bryan commenced the underlying PCR action on February 17, 2011. App. 570-83. An evidentiary hearing into the matter convened on August 15, 2013, before Judge Edgar W. Dickson. App. 610. Bryan was present and appeared *pro se*. App. 610. Assistant Attorney General J. Walt Whitmire represented the State. App. 610. The State moved to reconvene the evidentiary hearing to present trial counsel's testimony regarding his discussions with Bryan about Bryan's right to testify. App. 697; 699. The PCR hearing reconvened on November 13, 2014, before Judge Dickson. App. 699. On February 2, 2018, Judge Dickson found Bryan was "entitled to a new appeal as a result of appellate counsel's deficient performance regarding [Bryan's] right to testify," but denied relief on all other grounds. App. 741-53. The State timely moved to alter or amend pursuant to Rule 59(e), SCRE, on February 12, 2018. App. 754-65. Judge Dickson denied the State's motion on October 19, 2019. App. 804-05. On November 6, 2019, Bryan served his notice of appeal. The State served its notice of cross-appeal on November 13, 2019.

STATEMENT OF THE FACTS

On Friday, September 14, 2007, Rodney (Bryan) and Rachel (Rachel) Bryan picked up their children from daycare. Rachel was in the driver's seat, Bryan was in the passenger seat, and their children—Daughter, Son, and their youngest child (Child)—were in the back seat. App. 125; 156. They were sitting in the daycare parking lot, and Rachel was "messing with" Bryan's phone. App. 136-37; 139. Bryan was yelling at Rachel, and Rachel yelled, "Stop." App. 137. Rachel then "popped" Bryan in the mouth. App. 138. Then, Bryan slapped Rachel, Rachel hit the steering wheel and got a black-eye "and it was swelling real bad." App. 138; 157. Bryan told Rachel to "Drive." Rachel drove home. App. 125-26; 157.

When they arrived home, Bryan went to the side of the house with "a wire cutting tool." App. 127. Rachel and the children went inside. App. 129. Bryan then entered the house, and Rachel put a movie on for the children. Daughter went into her parents' bathroom and heard Rachel crying. Daughter, Son, and Child then went into the bathroom and saw Rachel crying on the ground. Bryan was in the doorway "looking angry at [Rachel]." App. 130. Bryan walked away, and Daughter helped Rachel get up off the floor. After Daughter helped Rachel off the bathroom floor, they all went into the living room. Then, "[Bryan] was trying to hurt [Rachel] in the living room, and then . . . [Bryan] looked at [Daughter] and then [Daughter] tried to call the police." App. 130-31. Daughter dialed 911, but "for some reason it didn't work." Daughter then went outside and saw the phone line was cut. Daughter went back inside. App. 131.

Once inside, Daughter got scared, and she, Son, and Child went in the "broken bathroom" because "it's the only bathroom that has a lock." App. 131-32. After a while, Daughter exited the bathroom and tried to go to the neighbor's house to use the phone. App. 132. However, Daughter tried to leave and Rachel asked if Daughter was coming back. Daughter was scared, and this made

her more scared, so she, Son, and Child all three went to try and use the neighbor's phone. Bryan and Rachel stopped the children from going to the neighbors. App. 149. Son was about to enter the woods to get to the neighbor's house when "[Bryan] rushed over there and grabbed Son . . . by the stomach and squeezed . . . the side of his waist." App. 133. The children were crying and calling Bryan names, and Bryan put Son down and said "everything's going to be okay." App. 133. Everyone went back in the house, and the children went to sleep. App. 133-34.

The next morning, Bryan and Rachel were fighting again. Daughter recalled Bryan yelling "Fuck you," to Rachel. App. 134. Rachel was "a little angry and very sad." App. 134. The next Wednesday at school, Daughter told her teacher what happened the past weekend because "I was scared and I didn't want nothing [to] happen again because I was tired of Dad beating up my Mama." App. 135.

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value 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, the 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 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). For ineffective assistance of appellate counsel, the applicant must first show deficiency—appellate counsel's performance "fell below an objective standard of reasonableness." *Pantovich v. State*, 427 S.C.

555, 561, 832 S.E.2d 596, 599 (2019). The inquiry is retrospective, seeking to determine whether counsel was deficient at the time of the alleged error. *Strickland*, 466 U.S. at 689. Then an applicant must show prejudice "by demonstrating that, but for counsel's deficient performance, there is a reasonable probability the result of the appeal would have been different." *Pantovich*, 427 S.C. at 561, 832 S.E.2d at 599.

ARGUMENT

I. The PCR court erred in granting Bryan a belated appeal due to ineffective assistance of appellate counsel because: (1) Bryan had a direct appeal and a belated appeal is not the appropriate remedy; (2) Bryan never asserted appellate counsel was ineffective for failing to argue he involuntarily waived his right to testify; (3) appellate counsel reasonably did not argue the unpreserved issue; and (4) no prejudice resulted because the waiver issue was not preserved

Relevant Facts from Trial

At trial, after the State rested its case, and trial counsel moved for a directed verdict on each charge, the trial court asked:

> [Trial] Court: All right. [Counsel], do - - do I need to interview Mr. Bryan with regard to his right to testify or not testify?
>
> (Sotto voce discussion between [Counsel] and the defendant.)
>
> [Trial counsel]: Your Honor, you do not need to interview Mr. Bryan. I have talked to Mr. Bryan about him testifying and not testifying, and he is not testifying.
>
> [Trial] Court: All right. With that being said then, and your advising the Court I do not need to interview him, I - - I will not do so. Again, I am sure you've explained it to him fully and completely, and if you need any more time to discuss that with him, you certainly may have that, [trial counsel].
>
> [Trial counsel]: Your Honor, I think we're okay on this.

App. 373-74.

PCR Testimony

At the PCR hearing, Bryan clarified his ineffective assistance of appellate counsel claims were "ineffective assistance of appellate counsel on post[-]trial motions of the structural error on the judge not recusing himself as well as the motion for directed verdict." App. 732. Bryan never asserted appellate counsel was ineffective for failing to present the waiver issue on appeal.

1. Bryan had a direct appeal and the relief granted is not the appropriate remedy

Appellate counsel was not constitutionally ineffective. However, the PCR court erred in granting Bryan a belated appeal as this was not the appropriate remedy for ineffective assistance of appellate counsel. *See Ezell v. State*, 345 S.C. 312, 315-16, 548 S.E.2d 852, 854 (2001) (stating the appropriate remedy for ineffective assistance of appellate counsel is a new trial); *Pantovich*, 427 S.C. 555, 832 S.E.2d 596 (granting the applicant a new trial due to ineffective assistance of appellate counsel). Relief pursuant to *White v. State* is "limited to situations where the PCR applicant did not knowingly and intelligently waive his right to a direct appeal." *Douglas v. State*, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (2006); *see also Legge v. State*, 349 S.C. 222, 224 n.1, 562 S.E.2d 618, 619 n.1 (2002) (noting the PCR court's grant of a belated appeal pursuant to *White v. State* due to ineffective assistance of appellate counsel was in error because *White* is inapplicable to cases where the applicant was not denied his right to a direct appeal).

There is no question Bryan received a direct appeal in this case. Accordingly, the PCR court erred in granting a belated appeal pursuant to *White v. State* because Bryan already had a direct appeal of his conviction. As such, Bryan's petition for a writ of certiorari should be denied, the State's petition for a writ of certiorari should be granted, and the portion of the PCR court's order granting a belated appeal should be reversed in part.

2. Bryan never asserted appellate counsel was ineffective for failing to argue he involuntarily waived his right to testify

The PCR court, *sua sponte*, found appellate counsel was constitutionally ineffective for failing to brief whether Bryan knowingly and voluntarily waived his right to testify at trial. The PCR court found, "[Appellate counsel's] failure to address [this issue] on appeal without explanation to the court [was] ineffective assistance of appellate counsel." App. 751-51. The PCR court erred because it granted relief on an issue never raised. *See Mize v. Blue Ridge Ry. Co.*, 219 S.C. 119, 129-30, 64 S.E.2d 253, 258 (1951); *State v. Taylor*, 399 S.C. 51, 64, 731 S.E.2d 596, 603 (Ct. App. 2012); *Duncan v. Hampton Cty. Sch. Dist. No. 2*, 335 S.C. 535, 545 n.6, 517 S.E.2d 449, 454 n.6 (Ct. App. 1999) (all holding a matter not raised by one of the parties to be unpreserved for appeal even if the trial court raises it *sua sponte*). Therefore, certiorari should be granted, and the portion of the PCR court's order granting Bryan a belated direct appeal should be reversed and vacated.

Bryan had the burden of proving his allegations of ineffective assistance of counsel. *See Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application."). Similarly, Bryan also had the burden of raising any and all issues he wished for the PCR court to consider. *See* Rule 71.1, SCRCP ("[PCR counsel] shall insure that all available grounds for relief are included in the application and shall amend the application if necessary."). Additionally, Bryan prosecuting his PCR action *pro se* does not allow the PCR court to rule on issues not before it. Indeed, "The right of self-representation is not a license . . . . not to comply with relevant rules of procedural and substantive law." *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). Bryan knowingly and voluntarily waived his right to PCR counsel in this case. Therefore, Bryan should be held to the same procedural standards as a PCR attorney. If Bryan wanted the PCR court to rule

on whether appellate counsel was ineffective for failing to brief whether he knowingly and voluntarily waived his right to testify, he needed to "duly raise" the issue in his PCR application or an amendment thereto.

Bryan simply never raised whether appellate counsel was ineffective for failing to brief whether he knowingly and voluntarily waived his right to testify at trial. Similarly, the PCR court erred in ruling on an issue that was never presented to the court. Because of these procedural errors, the issue of whether appellate counsel was ineffective for failing to brief whether Bryan knowingly and voluntarily waived his right to testify at trial is itself not preserved for this Court's review. Therefore, Bryan's petition for a writ of certiorari should be denied, the State's petition for a writ of certiorari should be granted, and the portion of the PCR court's order granting a belated appeal should be reversed in part.

3. Appellate counsel reasonably did not argue the unpreserved issue

In any event, the PCR court erred in finding appellate counsel was deficient for failing to raise the waiver issue because appellate counsel the State does not have the burden of proof to "produce . . . evidence as to why it was not addressed," and this issue was not preserved at trial so appellate counsel cannot be deficient for failing to raise it. App. 751.

First, the PCR court erred by shifting the burden of proof to the State in concluding, "The State produced no evidence as to why the issue was not addressed." App. 751. It is well settled that a PCR applicant bears the burden of proving both deficient performance and prejudice. *See Strickland*, 466 U.S. at 687 ("First, the [applicant] must show that counsel's performance was deficient. . . . Second, the [applicant] must show that the deficient performance prejudiced the defense."); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.");

Rule 71.1, SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.").

Here, Bryan needed to prove there was no reasonable explanation for why appellate counsel did not brief the waiver issue. Bryan presented no such reason; as shown above, Bryan did not even argue appellate counsel was ineffective for failing to present the issue. It was Bryan's burden to overcome the high bar of *Strickland*, not the State's burden of showing appellate counsel was not ineffective. *See Strickland*, 466 U.S. at 669 ("Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.").

As noted above, the trial court asked trial counsel if it needed to advise Bryan of his right to testify at trial. "A defendant's knowing and voluntary waiver of . . . constitutional rights . . . 'may be accomplished by colloquy between the Court and the defendant, *between the Court and defendant's counsel*, or both.'" *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (emphasis added). Here, the trial record showed that Bryan knowingly waived the trial court advising him of his right to testify at trial. The waiver was evinced by the trial court's colloquy with trial counsel. Trial counsel not only did not object to the lack of questioning of his client, he informed the trial court, "[Y]ou do not need to interview Mr. Bryan. I have talked to Mr. Bryan about him testifying and not testifying, and he is not testifying." The trial court clarified that trial counsel was advising the court it did not need to interview Bryan. Trial counsel stated the trial court did not. App. 373-74.

Further, the waiver issue was not preserved for appeal as there was no objection to the trial court failing to advise Bryan of his right to testify at trial. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); *State v. Byers*, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011) (quoting *State v. Torrence*, 305 S.C. 45, 67, 406 S.E.2d 315, 327 (1991)) ("The rationale behind the requirement of a contemporaneous objection is to 'enable [ ] trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition.'"). It was reasonable for appellate counsel not to argue the unpreserved issue, as this Court directed in *Dunbar*, "An issue that was not preserved for review should not be addressed . . . ." 356 S.C. at 142, 587 S.E.2d at 694. Further, this Court has held appellate counsel is not ineffective for failing to raise an issue that was not preserved. *See Legge*, 349 S.C. at 225, 562 S.E.2d at 620 (finding appellate counsel not ineffective for failing to raise an unpreserved issue). Therefore, the PCR court erred in finding appellate counsel was ineffective because the issue was not preserved.

In concluding the State failed to produce no evidence as to why the issue was not addressed on appeal, the PCR court ignored the "highly deferential" standard that is to be applied to appellate counsel's performance and improperly shifted the burden of proof to the State. Therefore, Bryan's petition for a writ of certiorari should be denied, the State's petition for a writ of certiorari should be granted, and the portion of the PCR court's order granting a belated appeal should be reversed in part.

4. No prejudice resulted because the waiver issue was not preserved

The PCR court granted Bryan a belated direct appeal due to ineffective assistance of appellate counsel for failing to present whether he knowingly and voluntarily waived his right to

testify, finding the issue was not addressed by appellate counsel in Bryan's original appeal, and, "[t]he State produced no evidence as to why the issue was not addressed." App. 751. As noted above, the PCR court erred in shifting the burden of proof to the State and by not applying the deferential standard afforded to appellate counsel's decisions in determining deficiency. Additionally, the PCR court did not conduct a prejudice analysis, but, rather, granted a belated appeal because the issue was not briefed on direct appeal. The PCR court erred because the issue was not preserved, and the record shows that Bryan knowingly and voluntarily waived his right to testify at trial; therefore, the outcome of the appeal would not have been different. For the reasons discussed below, certiorari should be granted, and the portion of the PCR court's order granting Bryan a belated appeal should be reversed.

As noted above, an applicant must show prejudice "by demonstrating that, but for counsel's deficient performance, there is a reasonable probability the result of the appeal would have been different." *Pantovich*, 427 S.C. at 561, 832 S.E.2d at 599. Bryan cannot show the result of his appeal would have been different because, as discussed in section 3, *supra*, the waiver issue was not preserved for appellate review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("An issue that was not preserved for review should not be addressed . . . ."). Here, not only is it unlikely his appeal would have been different, the issue would not have even been addressed because it was unpreserved.

Further, had the issue been preserved, the Court of Appeals would have affirmed Bryan's conviction because the record shows that Bryan knowingly and voluntarily waived his right to testify at trial.

"A defendant's knowing and voluntary waiver of . . . constitutional rights . . . 'may be accomplished by colloquy between the Court and the defendant, *between the Court and*

defendant's counsel, or both.'" *Pittman*, 337 S.C. at 599, 524 S.E.2d at 625 (emphasis added). Here, the trial court's colloquy with trial counsel satisfies the knowing and voluntary waiver requirement. The trial court asked trial counsel if it needed to advise Bryan of his right to testify. App. 373-74. Then, the record shows there was a brief discussion between trial counsel and Bryan. App. 374. After their discussion, trial counsel informed the trial court it did not need to interview Bryan because trial counsel had spoken to Bryan about testifying, and Bryan was not going to testify. App. 374. The trial court then stated, "I am sure you've explained [the right to testify] to [Bryan] fully and completely, and if you need any more time to discuss that with [Bryan], you certainly may have that." App. 374. Trial counsel responded, "[W]e're okay on this." App. 374.

Had the issue been preserved and presented to the Court of Appeals by appellate counsel, the Court of Appeals would have affirmed Bryan's conviction. Accordingly, Bryan cannot show he was prejudiced by appellate counsel's alleged failure to present the waiver issue on direct appeal, and the PCR court erred in granting Bryan a belated appeal due to ineffective assistance of appellate counsel. For this reason, and the reasons stated above, Bryan's petition for a writ of certiorari should be denied, the State's petition for a writ of certiorari should be granted, and the portion of the PCR court's order granting a belated appeal should be reversed in part.

II. Trial counsel articulated a valid trial strategy for conceding Bryan was guilty of simple CDV by explaining he was arguing about the CVD charge Bryan had already pleaded guilty to, and Bryan presented no evidence he did not want trial counsel to concede the violation of protection order

Bryan argues trial counsel was ineffective and violated his right to plead not guilty by admitting his guilt at trial. Bryan argues the PCR court's reliance on trial counsel's explanation for conceding guilt to CDV is not supported by the record, and there is no evidence in the record supporting Bryan consented to trial counsel making the concession. First, at the time of trial, Bryan had already pleaded guilty to CDV that occurred on September 14, 2020; therefore, by pleading

guilty to hitting Rachel on September 14, he had already acknowledged he violated the order of protection. Second, Bryan failed to meet his burden of proof, because as he admits, there is nothing in the record showing he consented to trial counsel's concessions. However, there is also nothing in the record showing he did not consent to the concessions. Finally, there is ample evidence in the record to support the PCR court's finding that trial counsel was referring to the CDV Bryan has already pleaded guilty to.

As noted above, Bryan was tried for CDVHAN, violating an order of protection, kidnapping, and two counts of spousal sexual assault. App. 807–20. Bryan was tried for CDVHAN that occurred on Saturday, September 15, 2007. App. 811. Bryan was also tried for violating a protection order between March 5, 2007 and September 16, 2007. App. 808. However, Bryan pleaded guilty to CDV October 15, 2007. The CDV Bryan pleaded guilty to occurred on September 14, 2007, when Bryan hit Rachel while she was driving the car. App. 75–79. Trial counsel stated in his closing argument Bryan was guilty of CDV and violating an order of protection. App. 406–07. However, trial counsel never conceded Bryan was guilty of CDVHAN. This distinction is important considering trial counsel's reasoning for stating Bryan was guilty of CDV and violating the order of protection.

At the PCR hearing, Bryan testified that trial counsel stipulated a CDV occurred on Friday, September 14, 2007, and "stipulated that that incident emanated to the more serious charges." App. 659. Bryan agreed he pleaded guilty to the first CDV charge, which was the incident that occurred in the car. App. 663. There is nothing in the record that Bryan alleged Counsel conceded the order of protection charge without his consent. Indeed, it would be illogical for Bryan to disagree with trial counsel's strategy in conceding the order of protection because Bryan had already pleaded guilty to CDV that occurred within the time frame of when he violated the order of protection.

Trial counsel explained Bryan was confusing which CDV trial counsel conceded, "You see, he had already been convicted of the CDV, that charge. And arguably the thing she was referencing could have been the prior CDV which he had already pled guilty to." App. 675. Trial counsel explained the point he was trying to make was Rachel's "reference to the cell phone was a reference to a prior CDV which he had already pled guilty to, or it had anything to do with the charge that he was being tried on." App. 675–66.

Trial counsel explained his trial strategy for the kidnapping was "that no one should believe that [Bryan] was guilty of kidnapping because [Rachel] easily could have gone somewhere else." App. 676. Trial counsel explained his strategy was to concede:

> Not the CDV that he was being tried for, but to indicate that he had already been convicted of the CDV. If they were going to use that video, and if they were going to say that that video is indicative of what happened then, then what she's referring to is another CDV, not anything that was occurring then.

App. 677.

At trial, a video was introduced that depicted Bryan and Rachel speaking to each other. App. 281; 298. In the video, Bryan asked Rachel, "What do you want me to do?" Rachel responded, "I don't want you to hit me anymore." Bryan asked, "Do you want a divorce?" Rachel answered, "Yes." App. 403. In trial counsel's view, this was the most damning evidence against Bryan. So, trial counsel tried to lessen the blow by arguing attempting to argue the hitting she was referring to was the hitting Bryan had already pleaded guilty to. Trial counsel's reasonably articulated he was not conceding the CDVHAN Bryan was being tried for, but the CDV that he had already pleaded guilty to. Therefore, trial counsel was not deficient, certiorari should be denied on this issue, and the PCR court should be affirmed on this issue.

III. Dr. Ross's testimony was not improper bolstering testimony because trial counsel strategically attacked the victim's memory of the events, why she did not call for help, and why she did not leave an issue at trial

Trial counsel was not ineffective for failing to object to Dr. Ross's testimony for two reasons. First, Dr. Ross's testimony was not improper bolstering testimony. Second, at the time of Bryan's trial in 2008, the law was unclear when a defense attorney should object to a witness's testimony that indirectly conveyed they believed the victim. Therefore, certiorari should be denied and the PCR court should be affirmed on this issue.

Rachel testified she did not leave the home because she was afraid that attempting to leave or call for help would make matters worse. App. ***. However, Rachel admitted, "I was just afraid of [Bryan]. . . . but it's just common sense to know that yes, as some point when [Bryan] left, I could have gone to the neighbors." App. 305. Rachel claimed Bryan prevented her from leaving through intimidation. App. 323.

The crux of the prohibition against improper bolstering testimony is "a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017).

First, Dr. Ross's testimony was not improper bolstering testimony; rather, it was offered in response to trial counsel strategically attacking Rachel's credibility by making why she could not remember certain events, why she did not call for help, and why she did not immediately report the abuse issues at trial. *See e.g. Briggs*, 421 S.C. at 327, 806 S.E.2d at 719 (holding the expert's testimony the victim had not been coached—which arguably provided an indirect indication to the jury she believed the victim—was not improper bolstering where trial counsel strategically made coaching an issue at trial).

Second, Dr. Ross's testimony did not directly convey her opinion that Rachel was telling the truth. Here, the question is whether trial counsel should have objected to Dr. Ross's testimony that may have indirectly conveyed she believed Rachel. At the time of Bryan's trial in 2008, the law was unclear when a defense attorney should object to a witness's testimony that indirectly conveyed they believed the victim. *See Briggs*, 421 S.C. at 325, 806 S.E.2d at 718 (stating the Court had struggled with whether testimony that indirectly conveyed the witness believed another witness was improper bolstering testimony, and, therefore, it was reasonable for trial counsel not to object). Here, just as in *Briggs* it was reasonable for trial counsel not to object to Dr. Ross's testimony that did not directly convey to the jury she believed Rachel. Therefore, certiorari should be denied on this issue and the PCR court should be affirmed on this issue.

IV. Trial counsel was not ineffective for failing to preserve the waiver issue because the only credible evidence shows Bryan knowingly and voluntarily waived his right to testify at trial

Bryan acknowledges trial counsel discussed his right to testify at trial, and Bryan never asserted he wished to testify at trial until PCR. Importantly, trial counsel informed Bryan of the benefits and dangers of testifying at trial, and trial counsel informed Bryan that it was Bryan's decision alone whether or not to testify. App. 700–01. Therefore, trial counsel was not ineffective for failing to preserve the waiver issue because trial counsel reasonably believed Bryan did not want to testify at trial after discussing with Bryan the right to testify at trial, and the only credible evidence in the record shows that Bryan knowingly and voluntarily waived his right to testify.

"An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." *Brown*, 317 S.C. at 272, 453 S.E.2d at 252. There is no requirement for an on-the-record waiver in non-capital cases. *Id.* "A defendant's knowing and voluntary waiver of . . . constitutional rights . . . may be

accomplished by colloquy between the Court and the defendant, *between the Court and defendant's counsel*, or both.'" *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (emphasis added).

Here, the trial court's colloquy with trial counsel satisfies the knowing and voluntary waiver requirement. The trial court asked trial counsel if it needed to advise Bryan of his right to testify. App. 373-74. Then, the record shows there was a brief discussion between trial counsel and Bryan. App. 374. After their discussion, trial counsel informed the trial court it did not need to interview Bryan because trial counsel had spoken to Bryan about testifying, and Bryan was not going to testify. App. 374. The trial court then stated, "I am sure you've explained [the right to testify] to [Bryan] fully and completely, and if you need any more time to discuss that with [Bryan], you certainly may have that." App. 374. Trial counsel responded, "[W]e're okay on this." App. 374. Importantly, trial counsel informed Bryan of the benefits and dangers of testifying at trial, and trial counsel informed Bryan that it was Bryan's decision alone whether or not to testify. App. 700–01. Bryan's PCR testimony that he wanted to testify at trial is unsupported by anything in the record. However, trial counsel's testimony he informed Bryan of the benefits and dangers of testifying at trial, and trial counsel informed Bryan that it was Bryan's decision alone whether or not to testify is amply supported by the record before the Court—the colloquy at trial. Therefore, trial counsel was not ineffective because Bryan knowingly and voluntarily waived his right to testify at trial. Accordingly, certiorari should be denied on this issue, and the PCR court should be affirmed on this issue.

CONCLUSION

Based on the forgoing, the PCR court erred in granting Bryan a belated appeal due to ineffective assistance of appellate counsel. First, *if* appellate counsel was ineffective for failing to

present the waiver issue, the appropriate remedy is a new trial, not a belated appeal as relief pursuant to *White v. State* is only available when an applicant was denied his right to a direct appeal. Bryan had a direct appeal; as such, a second appeal is not the appropriate remedy.

However, the PCR court correctly found trial counsel articulated a valid trial strategy for conceding Bryan was guilty of simple CDV by explaining he was arguing about the CVD charge Bryan had already pleaded guilty to, and Bryan presented no evidence he did not want trial counsel to concede the violation of protection order. The PCR court correctly found Dr. Ross's testimony was not improper bolstering testimony because trial counsel strategically attacked Rachel's memory of the events, why she did not call for help, and why she did not leave an issue at trial. Finally, the PCR court correctly found trial counsel was not ineffective for failing to preserve the waiver issue because the only credible evidence shows Bryan knowingly and voluntarily waived his right to testify at trial.

Therefore, the Court should deny certiorari on Bryan's issue I, grant certiorari on the State's issue I in its cross-petition, and reverse the PCR court's finding that Bryan is entitled to a belated appeal where he has already had a direct appeal. The Court should also deny certiorari on Bryan's issue II, III, and IV, and affirm the PCR court on those issues.

Respectfully submitted,

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