STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

G. Thomas Cooper, Circuit Court Judge

RECEIVED

Nov 12 2020

S.C. SUPREME COURT

RENATA JONES,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2020-000343

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. Whether the post-conviction relief court erred in granting relief, where Counsel was not deficient for failure to obtain 911 calls because he made a standard discovery request at the start of the case, did not know a 911 call existed, and thus, expecting further discovery requests regarding the 911 call would be unreasonable.

II. Whether the post-conviction relief court erred in granting relief, where Counsel reasonabl[y] investigated the passenger as a potential witness when Counsel interviewed the witness, put her on the witness list, and ultimately excluded her testimony because of irrelevance.

RESPONDENT'S COUNTER QUESTIONS PRESENTED

I. Should this Court deny certiorari where the state failed to appeal the PCR court's grant of relief based upon defense counsel's failure argue for the admissibility of testimony establishing a witness confessed to the crime for which Respondent stood trial to a police officer using well-established rules of evidence?

II. Should this Court deny certiorari where the evidence supports the PCR court's factual findings that trial counsel provided ineffective assistance by failing to conduct a reasonable investigation that would have resulted in the procurement and presentation of a recording of a 911 call, which was favorable to Respondent on the only critical issue in the case?

III. Should this Court deny certiorari where the evidence supports the PCR court's factual findings that trial counsel provided ineffective assistance by failing to investigate and present a favorable witness to testify that Respondent was not the driver?

STATEMENT OF THE CASE

On November 19, 2016, Respondent, her cousin, Randall Scott, and their friend, Kimberly Hughes, were in a car heading toward Spartanburg from Greenville. App. 61, l. 14 – App. 62, l. 6. As the car was re-entering the highway after a stop at a convenience store, the car hit a guardrail. App. 62, ll. 14-24. Scott called 911. App. 62, l. 25 – App. 63, l. 1. State Trooper Glen Elder responded to the scene. App. 38, ll. 8-9; App. 39, ll. 1-16. Although Scott told Elder that Respondent was the driver,[1] Scott later admitted he was the driver. App. 62, ll. 14-24; App. 63, ll. 19-24. Scott called Elder the next day to confess that he was driving the car. App. 64, ll. 13-16.

When Elder arrived at the scene, no one was in the wrecked car. App. 50, ll. 6-14. However, he noticed the smell of alcohol on all three individuals, who were sitting on the guardrail. App. 41, ll. 16-18. Hughes and Respondent went to the hospital for treatment. App. 41, ll. 13-15; App. 42, l. 7. In light of Hughes and Respondent going to the hospital, Elder did perform any sobriety tests on them. App. 42, ll. 4-10. Elder did not perform any sobriety tests on Scott because he denied driving the car. App. 54, ll. 23-25.

On February 23, 2017, a Spartanburg grand jury indicted Respondent for driving under the influence. App. 252-253. The state, represented by Andrew Miller and Sydni Kallam, called the case for trial before the Honorable Robin B. Stillwell and a jury on August 9, 2017. App. 1. Josh Schultz represented Respondent. App. 1. During the trial, Scott told the jurors that he was driving. App. 62, ll. 14-24. Additionally, he told the jurors that Respondent was sitting in the front passenger seat while Hughes was sitting in the back seat. App. 63, ll. 2-4. According to Scott,

[1] Scott's statement to Trooper Elder was recorded by Trooper Elder's dash camera, and it was played for the jurors. App. 42, l. 11 – App. 44, l. 2.

Respondent and Hughes were asleep at the time of the accident. App. 63, ll. 13-14. Scott explained that he lied to Elder initially because he was intoxicated and nervous. App. 64, ll. 10-12; App. 67, ll. 22-23.

With no other evidence to support its case, the state offered Elder's *opinion* that Respondent was the driver of the vehicle. App. 46, ll. 5-6. Further, the state offered Elder's *opinion* that Respondent was under the influence of either alcohol or drugs that affected her ability to drive. App. 46, ll. 15-22. Despite the dearth of evidence, the solicitor argued in closing that it was "clear" Respondent was driving that night. App. 79, l. 25 – App. 80, l. 1. The solicitor relied heavily upon what Scott told Trooper Elder after the accident, which was captured on video. App. 80, ll. 3-11; App. 80, ll. 22-25.

Approximately forty-five minutes into deliberations, the jury requested a written copy of the testimony. App. 96, ll. 3-12. The judge responded to the jury's note, and then the judge played the testimony of Scott for the jurors. App. 96, ll. 6-22. After deliberating for approximately twenty more minutes, the jury found Respondent guilty as charged. App. 97, ll. 3-4; App. 97, l. 23 – App. 98, l. 2. Judge Stillwell sentenced Respondent to eighteen months imprisonment suspended upon the service of ninety days and probation for two years. App. 102, ll. 13-17; App. 254. Defense counsel failed to file a notice of appeal on Respondent's behalf. App. 232.

On August 6, 2018, Respondent filed an application for post-conviction relief (PCR). App. 104-170. The state filed its return and partial motion to dismiss on June 17, 2019. App. 171-183. The matter proceeded to an evidentiary hearing on October 11, 2019, before the Honorable G. Thomas Cooper. App. 184. Susannah C. Ross represented Respondent, and Jacob A. Isenberg represented the state. App. 184.

Respondent explained that she asked defense counsel to get the 911 call. App. 195, ll. 7-11. However, she was uncertain if he ever reviewed it because he never said anything else to her about it. App. 195, ll. 11-13. Respondent urged defense counsel to play the 911 call. App. 195, ll. 13-15. Neither the state nor the defense submitted the 911 call into evidence at the trial. App. 202, ll. 15-21. After her trial, Respondent obtained the 911 call by submitting a FOIA request to the Spartanburg County 911 dispatch. App. 197, l. 1 – App. 201, l. 21.

Defense counsel recalled that during his first meeting with Respondent, she was adamant that she was not the driver. App. 214, l. 22 – App. 215, l. 1. He was uncertain if he received a 911 call, but he did not think he did. App. 215, ll. 5-20; App. 220, ll. 21-24; App. 221, ll. 4-7. However, defense counsel heard the 911 call when it was played for the PCR judge. App. 218, ll. 15-17. He did not think the caller admitted to driving the car. App. 218, ll. 18-21. Nevertheless, he "wish[ed he] had played it" for the jury. App. 218, ll. 23-24.

Finally, defense counsel admitted he failed to argue for the admissibility of Elder's testimony regarding a phone call with Scott the day after the accident. App. 221, l. 22 – App. 222, l. 15. Specifically, when the state objected to Elder's testimony as hearsay, defense counsel failed to argue the testimony was admissible to rebut an allegation of recent fabrication by the state. App. 221, l. 22 – App. 222, l. 15.

By an order filed January 27, 2020, Judge Cooper granted Respondent relief from her conviction and sentence. App. 231-236. Judge Cooper found "[t]he crux of [Respondent's] case was whether she or Mr. Scott was driving." App. 234. He noted that Scott testified at trial that he was the driver despite his denial to Trooper Elder at the scene. App. 234. Further, Judge Cooper found the "recording of the 911 call Scott made just after the accident in which he states that they had an accident and [Respondent] was in the passenger seat when the accident occurred." App.

233. Judge Cooper explained that "Respondent testified that she told her lawyer that the 911 recording was important, which it was, because at trial the state presented a video of Mr. Scott telling Trooper Elder at the scene that he was a passenger in the car." App. 233. The jury's question during deliberations "showed it was a close case." App. 233.

Defense counsel "said that he did not receive the 911 recording in his discovery package." App. 233. However, "reasonable preparation for trial would require [defense counsel] to review the video presented by the state at trial which references the 911 call." App. 235. "Reasonable investigation would require that he question what the 911 call stated and why i[t] was not produced in discovery." App. 235. "Reasonable representation would require he make timely, appropriate motions regarding discovery violations." App. 235. Had counsel done so, the outcome of the case would likely have been different. App. 235. "Either the 911 tape would have been provided in discovery and available to be used to rebut the video at the scene resulting in [Respondent's] likely acquittal or, if it was not produced prior to trial pursuant to Brady, the violation would likely result in a dismissal given its exculpatory nature." App. 235-236.

Judge Cooper found that a reasonable investigation "would have led to the 911 tape recording which supported [Respondent]'s theory of the case" and "would also require interviewing potential witnesses." App. 236. He found defense counsel's failure to procure the 911 tape and failure to interview Hughes was deficient. App. 236. Due to counsel's failure to obtain the 911 call or interview Hughes, counsel's failure to present these items to the jury could not have been based upon reasonable trial strategy. App. 236. Finally, Judge Cooper found "[b]ut for counsel's failure to present favorable evidence along with his failure to make effective evidentiary arguments regarding Scott's subsequent call to Trooper Elder, the jury would likely have acquitted [Respondent]." App. 236.

Judge Cooper explained that although defense counsel proffered the testimony of Elder that Scott called him the day after the accident to confess he was driving, defense counsel failed to appeal the case, which prevented appellate review. App. 235. The judge explained defense counsel "failed to make the reasonable argument that the call was not hearsay because it was being offered to rebut a charge of recent fabrication." App. 235. According to the judge, the 911 call was referenced in the body cam footage shown to the jurors, but the 911 call was not played for the jury. App. 235. "The defense did not put up a case or argue in closing that the 911 tape should have been presented by the state." App. 235. "This left the jury with the false impression that Mr. Scott had denied being the driver all along until he changed his story at [Respondent]'s trial to protect her." App. 235. "This misrepresentation of facts allowed the state to attack Mr. Scott's credibility with a convincing argument of recent fabrication." App. 235. Judge Cooper noted the solicitor's closing argument relied heavily upon the video from the scene and used it to attack Scott's credibility during the trial. App. 235. However, "[e]vidence of Scott's call the next day and the 911 call would have shown that argument to be false and likely changed the outcome of the case." App. 235.

Thereafter, the state filed a motion to reconsider pursuant to Rule 59(e), SCRCP. App. 238-242. In the motion, the state requested that "additional testimony be added to [the] order" to "fully represent what occurred at the evidentiary hearing." App. 239. According to the state, counsel testified that "he does not customarily utilize statements made by intoxicated individuals in trial strategy," that "he had no plans to use statements from the 911 call because they came from Scott while intoxicated," and "his strategy was to paint Scott as lying while intoxicated and telling the truth when sober." App. 239. Yet, the PCR transcript belies the state's request for the inclusion of this additional testimony. Not once did defense counsel indicate that he customarily does not

use statements made by intoxicated individuals as a matter of trial strategy. Instead, he indicated that Hughes' intoxication, not Scott's intoxication, "could have been a factor" in his decision not to call her as a witness. Further, defense counsel never indicated he had no plans to use the 911 call; rather, defense counsel could not remember if he ever received the 911 call. In fact, defense counsel regretted not playing the 911 call for the jurors.

Additionally, the state requested the inclusion of "[c]ounsel's testimony that Hughes had no recollection of stopping at a gas station because she was asleep. Counsel's testimony that he opined her testimony would not be relevant in light of the fact that she had no knowledge of who drove after they left the gas station." App. 239; see also App. 241. Contrary to the state's position, the PCR hearing transcript provides no indication that defense counsel testified that Hughes had no recollection of stopping at a gas station because she was asleep. According to defense counsel, Hughes informed him she was asleep in the backseat and she "was in and out during the whole course of this incident." App. 216, ll. 10-15. In response to a leading question from the state, defense counsel indicated he did not think her testimony would be relevant and helpful because she was falling asleep throughout the course of the ride. App. 216, l. 25 – App. 217, l. 3.

Despite the state's claim that the PCR court's order failed to "specify whether [the 911 call] statements were made in response to prior fabrication, improper influence, or improper motive, which meant the state was "without sufficient notice of the basis for th[e] court's finding that the testimony at issue was non-hearsay," the PCR order was clear. Cf. App. 240 with App. 235. According to the PCR order, Judge Cooper concluded defense counsel failed to argue the Trooper Elder's testimony regarding his conversation with Scott was not hearsay because it served to rebut an express or implied charge of recent fabrication. App. 235 ("Mr. Schulz failed to make the reasonable argument that the call was not hearsay because it was being offered to rebut a charge

of recent fabrication. (R. p. 56), SCRE 801(d)(1)(B)"). Therefore, to the extent such notice was required, the state was on notice of the basis for the Court's finding that the testimony at issue was non-hearsay.

Finally, the state alleged the PCR court "overlooked factual circumstances that made recovering this 911 call impossible and an improper basis for a continuance." App. 240. According to the state, "[t]he undisputed factual circumstances being that a server issue caused the 911 call to be unavailable throughout the entire duration of [Respondent]'s case." App. 240. Further, the state claimed that "[t]he undisputed testimony being that, to the best of counsel's knowledge, this 911 call would be unavailable for an undetermined period of time." App. 240-241. Thus, the state argued, "counsel appropriately proffered evidentiary review was not appropriate for a continuance request[] where the item was impossible to access for an undeterminable period of time." App. 241. Despite an exhaustive search of the trial transcript and the PCR hearing transcript, Respondent is unable to find any support for the state's contentions. No one mentioned the 911 call was unavailable due to a "server issue." Therefore, there were no "undisputed factual circumstances" to support the state's assertion on this point. Further, there was no "undisputed testimony" from counsel that the 911 call was unavailable for an undetermined period of time. These claims are simply unsupported by the record.

In light of the state's request not being reflective of the record, Judge Cooper denied the state's motion on February 18, 2020. App. 247. The state, represented by Chelsey F. Marto, served its notice of appeal on February 25, 2020. Thereafter, the state filed its petition for writ of certiorari. This return follows.

ARGUMENT

The proper standard for appellate review of in PCR cases "depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d at 839. The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. This Court must sustain a PCR court's grant of relief if there is "any evidence of probative value" exists to sustain the PCR court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); see also Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). The reviewing court must give great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). The appellate court "will review questions of law de novo, with no deference to trial courts." Smalls, 422 S.C. at 180-181, 810 S.E.2d at 839. "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Sellner, 416 S.C. at 610, 787 S.E.2d at 527; see also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

As will be discussed in greater detail infra, extensive evidence in the record supports the PCR court's order granting Respondent relief on *three* instances of ineffective assistance of trial counsel. Therefore, this Court should deny certiorari. **Additionally, this Court should deny certiorari because Petitioner raised only two issues on appeal where the PCR court granted relief on three separate grounds; thus, the PCR court's grant of relief on the third ground is the law of the case. In other words, even if this Court reversed the PCR court on the two issues raised by the state, Respondent would still be entitled to relief from her conviction based upon the third ground on which the PCR court granted relief.**

Criminal defendants are entitled to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct 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. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

I. This Court should deny certiorari because the state failed to appeal the PCR court's grant of relief based upon defense counsel's failure argue for the admissibility of testimony establishing a witness confessed to the crime for which Respondent stood trial to a police officer using well-established rules of evidence.

Relevant facts

Elder admitted to defense counsel that Scott called him by telephone the day after the collision. App. 49, ll. 7-8. When defense counsel asked Elder what Scott said, the state objected on the basis of hearsay. App. 49, ll. 9-12. After a bench conference, which was not transcribed, the judge instructed defense counsel to finish his examination of Elder, which did not include the

substance of Scott's testimony.[2] App. 49, ll. 16-20. At the conclusion of Elder's testimony, the judge allowed defense counsel to proffer the testimony. App. 55, ll. 9-10. According to Elder, Scott called him the day after the accident to say "that he was driving the car and not [Respondent]." App. 56, ll. 11-13.

After the proffer, the judge indicated he would not admit the testimony unless defense counsel could "articulate it to [him] with specificity" how the statement was not hearsay. App. 57, ll. 14-121; App. 57, l. 25 – App. 58, l. 2. Counsel put up no argument. Counsel indicated he could not "think of an exception." App. 58, ll. 3-6. Nevertheless, the jury did learn from Elder that Scott called him the day after the accident. App. 60, ll. 1-16. The jury did not learn the substance of the call from Elder.

The solicitor challenged Scott's credibility in his closing argument. Specifically, the solicitor asked the jurors to rely upon what Scott told Elder on the scene of the accident, which was captured on Elder's video. App. 80, ll. 3-25. According to the solicitor, Scott's condemnation of Respondent as the driver to Elder as it was captured on video "ma[d]e a whole lot of sense." App. 80, ll. 3-25. He accused Scott of fabricating his trial testimony after he "[h]ad a little time to think about it." App. 80, ll. 3-25. The solicitor urged the jurors to credit Scott's statements to Elder on the video when Scott did "[n]ot [have] a whole lot of time to think." App. 81, ll. 14-22.

During the PCR hearing, defense counsel recalled his attempt to elicit testimony from Elder regarding Scott's phone call to him in which Scott confessed to being the driver. App. 221, l. 24 – App. 222, l. 15. Further, he admitted he failed to argue that Elder's testimony regarding the

[2] An objection made during an off-the-record conference, such as a bench conference, which is not made part of the record, does not preserve the question for review. York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997).

phone call from Scott was not hearsay because it was being offered to rebut an allegation of recent fabrication by the state. App. 221, l. 24 – App. 222, l. 15.

The PCR court noted that defense counsel proffered the testimony of Elder that Scott called him the day after the accident to confess he was driving; however, defense counsel failed to appeal the case, which prevented appellate review. App. 235. The judge found defense counsel "failed to make the reasonable argument that the call was not hearsay because it was being offered to rebut a charge of recent fabrication." App. 235.

Turning to the prejudice prong, the PCR court found "[b]ut for counsel's … failure to make effective evidentiary arguments regarding Scott's subsequent call to Trooper Elder, the jury would likely have acquitted [Respondent]." App. 236. Although the jury heard from Scott that he had called Elder the following day to confess, defense counsel's failure to elicit this information from Elder directly "left the jury with the false impression that Mr. Scott had denied being the driver all along until he changed his story at [Respondent]'s trial to protect her." App. 235. "This misrepresentation of facts allowed the state to attack Mr. Scott's credibility with a convincing argument of recent fabrication." App. 235. As the PCR court explained "[e]vidence of Scott's call the next day … would have shown that argument to be false and likely changed the outcome of the case." App. 235.

Discussion

It is axiomatic that appellate counsel must appeal all grounds upon which the ruling was based. This is long-established law in South Carolina. See Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (finding arguments on appeal barred by the two-issue rule where the master found in favor of the opposing party on three causes of action, but the appealing party appealed only the findings two); Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d

475, 477 (1996) (refusing to consider an issue on appeal where the judge ruled against the party on two grounds, but only one ground was challenged on appeal); Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (explaining that "[f]ailure to argue is an abandonment of the issue and precludes consideration on appeal" where the appellant failed to appeal the findings of waiver, ratification, or estoppel, which were alternative rulings for the trial judge).

"It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." Toal, Appellate Practice in South Carolina, at 80. "Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal." Id. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellate appeals all grounds because the unappealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

The PCR judge granted relief to Respondent on three separate bases. The state's petition for writ of certiorari addressed only two of the three. The state failed to challenge the PCR judge's grant of relief based upon trial counsel's failure to argue for the admissibility of Elder's testimony regarding the phone call from Scott confessing to the crime pursuant to Rule 801(d)(1)(B), SCRE. In light of this failure, this Court should deny the state's petition for certiorari.

In the alternative, should this Court wish to ignore the procedural bar and consider whether to grant the petition based on the merits, this Court should deny the petition based on the merits. "Hearsay is not admissible except as provided by [the Rules of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. "'Hearsay' is 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." Rule 801(c), SCRE.

> A statement is not hearsay if … [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is …

> consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE. "Rule 801(d)(1)(B) changed the common law in South Carolina where proof of a prior consistent statement had been admissible to rehabilitate a witness who had been impeached with a prior consistent statement." State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003).

The Supreme Court has made clear "[t]he plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence." State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001). "Although questioning a witness about a prior inconsistent statement does call the witness's credibility into question, that is not the same as charging the witness with 'recent fabrication' or 'improper influence or motive.'" Id.

Throughout the cross-examination of Scott, the solicitor impeached him with his prior inconsistent statement to Elder regarding who was driving the car. App. 63, l. 19 – App. 64, l. 12. However, the solicitor's questioning of Scott went beyond simple impeachment. The solicitor's questioning charged Scott with recent fabrication. Specifically, the solicitor questioned why Scott told Elder that Respondent was driving. App. 64, l. 10. He wanted to know why Scott told Elder that he allegedly said "slow down cuz," if Respondent were not the driver. App. 64, l. 10. The solicitor suggested Scott's testimony was based upon a recent fabrication when he questioned the reasonableness of Scott driving Respondent's car in light of Scott's testimony that he was intoxicated, and Respondent had consumed less alcohol than he had. App. 64, l. 17 – App. 65, l. 9; App. 66, ll. 20-24.

In his closing argument, the solicitor's charge of recent fabrication was made more exact. After comparing Scott's testimony to what he said to Elder at the scene, the solicitor accused Scott of changing his story after he "[h]ad a little time to think about it." App. 80, ll. 3-8. The solicitor requested the jurors discredit Scott's trial testimony because his trial testimony was a "story" that did not make sense whereas his "perfectly detailed account of what happened" to Elder, which was made when he got out of the car, made "perfect sense." App. 81, ll. 1-22.

Despite defense counsel's proffer of Elder's testimony regarding the telephone conversation with Scott was admirable, but it did little to give the judge a reason to admit the testimony. Just as an objection must be on a specific ground, the proponent of the admissibility of evidence must articulate a reason for the admission of the evidence and respond to the other side's objection in a specific manner. See State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997). Objections and their responses must be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge. See State v. New, 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct. App. 1999). Here, defense counsel failed to articulate any reason for the admissibility of Elder's testimony when one was readily available. See Stone v. State, 419 S.C. 370, 389, 798 S.E.2d 561, 571 (2017) (holding trial counsel performed deficiently by omitting several grounds for objection to impermissible testimony).

Defense counsel's deficient performance – failing to articulate a basis for admission of Elder's testimony regarding the phone call from Scott – prejudiced Petitioner. The only issue for the jury to decide in this case was who was driving the car – Respondent or Scott. Therefore, all evidence on this issue was critical to the jury's decision. The only evidence before the jury that Respondent was driving was Scott's statements to Elder on the recording and Trooper Elder's opinion, which could be given little credence as he was not an eyewitness to the accident.

Although the jury learned of the phone call from Scott, the jury did not learn of the phone call from an independent source – Elder. The solicitor destroyed Scott's credibility related to his trial testimony, which included Scott's claim that he called Elder to confess to being the driver. Without Elder's corroborating testimony, the jury had little choice but to discredit Scott's testimony on this point. Thus, trial counsel's failure to articulate a proper basis for admission of Elder's testimony, which was deficient performance, prejudiced Respondent as it allowed the solicitor to discredit all evidence that Respondent was not the driver.

II. This Court should deny certiorari because the evidence supports the PCR court's factual findings that trial counsel provided ineffective assistance by failing to conduct a reasonable investigation that would have resulted in the procurement and presentation of a recording of a 911 call, which was favorable to Respondent on the only critical issue in the case.

Relevant facts

Scott informed the jurors that he called 911 after the accident. App. 62, l. 25 – App. 63, l. 1. He also informed the jurors that Respondent and Hughes were asleep when he made the 911 call. App. 63, ll. 13-14. When Scott confessed to the jury that he was driving the car, the state impeached him with his prior inconsistent statements to Trooper Elder in which he pointed the finger at Respondent as the driver. App. 62, l. 13 – App. 64, l. 6; App. 65, l. 20 – App. 66, l. 4. The state did not use – or even attempt to use – the 911 call to present evidence of who was driving.

During his closing argument, the solicitor claimed it was "clear" Respondent was driving. App. 79, l. 25 – App. 80, l. 2. The solicitor asked the jurors to focus on the video, in which the jurors "saw what Mr. Scott said that night." App. 80, ll. 3-5. He claimed that "no one contested it at the scene that she was the driver." App. 80, ll. 5-6. The solicitor contrasted the video with Scott's testimony, confessing to be the driver. According to the solicitor, Scott "[h]ad a little time

to think about it, get his story." App. 80, ll. 7-8. He asked the jurors to believe Scott's "first sense reaction immediately after the events," which was captured on the video. App. 80, ll. 8-11. When asking the jurors to judge Scott's credibility, the solicitor noted that part of judging credibility was "the situation." App. 81, ll. 14-16. He noted the situation in this case was "an accident," and Scott did not have "a whole lot of time to think." App. 81, ll. 14-18. Thus, what Scott told Trooper Elder on the video at the scene was credible, not his testimony at trial. App. 81, ll. 17-22. He encouraged the jurors to "take another look at that video." App. 81, ll. 23-25. The solicitor told the jurors that Scott's testimony did not "really make a whole lot of sense," but "what he said that night," made sense. App. 80, ll. 22-25.

Although defense counsel "received the usual package of discovery," he claimed he did not receive a 911 call in connection with the charge against Respondent. App. 215, ll. 5-20; App. 220, ll. 21-24; app. 221, ll. 4-7. Defense counsel "want[ed] to say yes," when asked if Respondent or anyone else informed him that the 911 tape may have been relevant, but he did not remember. App. 215, l. 21 – App. 216, l. 2. Despite the fact the 911 call was mentioned during the trial, defense counsel did not make a request for the call. App. 221, ll. 8-18. Further, defense counsel did not argue in closing that the state's failure to play the 911 call showed a desire on the state's behalf to hide evidence. App. 221, ll. 19-23.

According to an affidavit of discovery created by the solicitor's office and contained within the Clerk of Court's records, the solicitor provided defense counsel with the 911 call on July 18, 2017, less than one month before Respondent's trial. Supp. App. 10. Defense counsel filed his request for discovery on December 12, 2016. Supp. App. 15-17. Thereafter, on January 11, 2017, the state provided some materials, such as a warrant and bond sheet. Supp. App. 11. On January

31, 2017, the solicitor's office supplemented the discovery by providing a driver record. Supp. App. 12. Then, as mentioned, the solicitor provided "1 CD – 911 call" on July 18, 2017.

At the PCR evidentiary hearing, defense counsel heard the 911 call from Scott. App. 218, ll. 15-17. He found it "difficult to say" what impact the 911 call would have had on Respondent's trial. App. 218, ll. 18-20. He did not "think the gentleman on the 911 call said I was the driver." App. 218, ll. 20-21. Nevertheless, he "wish[ed he] had played it" at the trial. App. 218, ll. 23-24.

Judge Cooper found that trial counsel was on notice of the existence of the 911 call based upon the evidence presented. First, "reasonable preparation for trial would require [defense counsel] to review the video presented by the state at trial which references the 911 call." App. 235. Further, Judge Cooper found that "[r]easonable investigation would require that he question what the 911 call stated and why i[t] was not produced in discovery" as defense counsel claimed. App. 235. Had the 911 call not been produced in discovery, "[r]easonable representation would require he make timely, appropriate motions regarding discovery violations." App. 235. "Either the 911 tape would have been provided in discovery and available to be used to rebut the video at the scene resulting in [Respondent's] likely acquittal or, if it was not produced prior to trial pursuant to Brady, the violation would likely result in a dismissal given its exculpatory nature." App. 235-236.

Based upon the evidence presented, Judge Cooper found that a reasonable investigation "would have led to the 911 tape recording which supported [Respondent]'s theory of the case." App. 236. Thus, he found defense counsel performed deficiently by failing to obtain the 911 tape. App. 236. Judge Cooper found trial counsel could not have had a strategic reason for not introducing the 911 tape during the trial because he failed to conduct a reasonable investigation in

order to obtain the tape. App. 236. Importantly, Judge Cooper found "[b]ut for counsel's failure to present favorable evidence …, the jury would likely have acquitted [Respondent]." App. 236.

Discussion

"'[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting Strickland v. Washington, 466 U.S. 668, 691 (1984)). Although attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the defendant, the decision not to investigate must be reasonable. Wiggins v. Smith, 539 U.S. 510, 533 (2003) (holding counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); see also Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004) (holding trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from "'major depressive episodes with severe symptoms of anxiety and possible prepsychotic features'").

"When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland, 466 U.S. at 691)). "[W]hile the scope of a reasonable investigation depends upon a number of issues, 'at a minimum, counsel had a duty to interview potential

witnesses and to make an independent investigation of the facts and circumstances of the case.'" Id. at 331-332, 642 S.E.2d at 597 (quoting Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986)).

During the PCR hearing, defense counsel vacillated between not remembering if he got the 911 call and affirmatively indicating he did not get the 911 call from the state. Nevertheless, it was undisputed that testimony at the trial put counsel on notice of the 911 call. Even, the solicitor mentioned the 911 call twice in his closing argument to the jury. App. 80, ll. 16-17; App. 80, ll. 19-20. As the PCR judge found, "[a] reasonable investigation would have led to the 911 tape recording." App. 236. In this case, it even appears counsel received the 911 call based upon the affidavit of discovery filed by the solicitor with the Clerk of Court. Defense counsel's failure to make reasonable efforts to procure the 911 recording, or to use it if it were in his possession as the documentation suggests, was deficient performance prejudicial to Respondent. Contrary to the state's argument on appeal, it was counsel's duty to conduct an independent investigation of the facts surrounding the criminal charge. Such an investigation would have easily led to the 911 recording as Trooper Elder and Scott were aware of the call. Scott mentioned the call during his trial testimony, and the solicitor referenced the call twice in his closing argument. At any rate, one can hardly imagine a criminal case in which no 911 call exists as typically, it is some distress call that alerts the police to the criminal activity. It is not reasonable to expect a criminal defense attorney to file supplemental requests for discovery – or even to seek information directly from the source as Respondent did – especially for information as basic and ubiquitous in criminal cases as a 911 recording.

Turning to prejudice, the PCR judge correctly found Respondent suffered prejudice as a result of defense counsel's deficient performance related to the 911 call. During the 911 call, Scott

explained that a car cut in front of them and ran them off the road. 911 Tape. Although it is inaudible regarding who "mashed the brakes," Scott is clear that someone in the car mashed the brakes. 911 Tape. It would have been for the lawyers to argue who mashed the brakes. Critically, Scott stated that his cousin was asleep in the front seat. 911 Tape. This important fact supported Scott's trial testimony that Respondent was not the driver because she was asleep in the front passenger seat. Further, this important fact provided convincing evidence that Scott, not Respondent, was the driver because Respondent was asleep in the front seat.

Most significantly, the 911 recording would have prevented the solicitor from making its argument to the jury that what Scott said *initially* should be believed. Without the 911 call being admitted into evidence, the solicitor argued that Scott's first statements about the accident were to Trooper Elder when he arrived on the scene and that those statements placed the blame on Respondent. Without the 911 call being admitted into evidence, the solicitor argued Scott's first statements to Trooper Elder were more believable than his trial testimony because Scott did not have time to make up a story to tell, like he did at trial. Without the 911 call being admitted into evidence, the solicitor argued Scott's first statements to Trooper Elder were more believable because Scott was still caught up in the excitement of the car accident. Had defense counsel put the 911 call before the jurors, then defense counsel could have used the exact argument the solicitor used to persuade the jurors that it was Scott who was driving, not Respondent. With the 911 call, defense counsel would have been able to argue that Scott's initial reaction to the car accident – his "first sense reaction immediately after the events" – was to confess his crime, and this initial reaction should be believed rather than Scott's statements to Trooper Elder, who arrived over ten minutes after first receiving the call, which allowed Scott time to think of a story. See App. 39, ll. 7-14.

III. This Court should deny certiorari because the evidence supports the PCR court's factual findings that trial counsel provided ineffective assistance by failing to investigate and present a favorable witness to testify that Respondent was not the driver.

Relevant facts

During jury voir dire, defense counsel added a last-minute addition to his witness list. App. 10, l. 22 – App. 11, l. 8. Specifically, defense counsel added Kimberly Hughes Lyles to his list of potential witnesses. App. 10, l. 22 – App. 11, l. 8. After the state rested, defense counsel requested a five-minute recess when the judge asked if he intended to present any witnesses. App. 72, ll. 19-23. After the short break, defense counsel informed the judge that he did not intend to call any witnesses, including Respondent. App. 73, ll. 4-19.

At the PCR evidentiary hearing, Kimberly Hughes confirmed that she was in the backseat of the car that wrecked on November 19, 2016. App. 207, ll. 20-24. Further, she confirmed that Randall Scott was driving. App. 207, l. 25 – App. 208, l. 1. Though Hughes fell asleep in the car, she knew that Scott was driving when she first got into the backseat and after they left the convenience store. App. 210, l. 21 – App. 211, l. 1. Importantly, Hughes explained that although she was present for Respondent's trial, defense counsel did not talk to her about testifying. App. 208, ll. 7-25. Hughes was willing to testify at Respondent's trial, and she would have informed the jurors that Scott was driving. App. 208, ll. 7-25.

Defense counsel claimed he spoke to Hughes about the case. App. 216, ll. 3-9. Defense counsel was aware that Hughes was asleep in the backseat. App. 216, ll. 10-13. According to defense counsel, Hughes "was in and out during the whole course of this incident there, the accident that, that occurred." App. 216, ll. 13-15. Defense counsel did not "remember specifically why" he did not call Hughes as a witness, but he "guess[ed] it was probably because she was in

and out during the course of the incident there." App. 216, ll. 16-23. He "felt that her testimony would be attacked by the state as to someone that didn't have a clear recollection of events." App. 218, ll. 2-6. Hughes's intoxication "could have been a factor as well." App. 218, ll. 7-11.

Judge Cooper found that a reasonable investigation "would also require interviewing potential witnesses." App. 236. He further found defense counsel's failure to interview Hughes was deficient performance. App. 236. Based upon defense counsel's failure to interview Hughes, defense counsel could not claim that he failed to present Hughes as a witness due to some trial strategy. App. 236. Turning to the prejudice prong, Judge Cooper found "[b]ut for counsel's failure to present favorable evidence …, the jury would likely have acquitted [Respondent]." App. 236.

Discussion

A trial attorney "'has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting Strickland, 466 U.S. at 691). "[W]hile the scope of a reasonable investigation depends upon a number of issues, 'at a minimum, counsel had a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.'" Ard, 372 S.C. at 331-332, 642 S.E.2d at 597 (quoting Troedel, 667 F.Supp. at 1461). "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Walker, 407 S.C. at 405, 756 S.E.2d at 147.

In Walker, 407 S.C. at 407, 756 S.E.2d at 147, this Court held trial counsel rendered ineffective assistance by failing to interview Walker's girlfriend regarding Walker's whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker's girlfriend

testified that when she was dating Walker, which included the time of the alleged kidnapping and sexual assault, the two spent every weekend together. Id. at 406, 756 S.E.2d at 147. This Court acknowledged that the girlfriend's "testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her." Id. at 407, 756 S.E.2d at 147. Thus, "it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. at 406, 756 S.E.2d at 147.

Based on the evidence presented, the PCR judge found defense counsel never interviewed Hughes. App. 236. Essentially, the PCR judge credited Hughes' testimony that although she spoke to defense counsel in his office, she did not speak to defense counsel about the case. App. 236. In light of the evidence in the record to support the PCR judge's factual finding, this Court must afford deference to it. See Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Further, as the PCR judge found, defense counsel's decision to not call Hughes as a witness could not have been based upon a reasonable strategy because defense counsel was unaware of what Hughes would say as he had not interviewed her.

The only issue before the jury was who was driving the car that wrecked on the highway. Only three people could provide reliable and credible evidence as to who was driving – Respondent, Scott, and Hughes – because those were the only three people in the car. Respondent entered a plea of not guilty; therefore, the jury was aware that she denied driving the car. Scott gave conflicting statements on this point. When he called 911, he suggested he was the driver because he stated Respondent was asleep. When he spoke to Trooper Elder in person, he pointed the finger at Respondent as the driver. When he spoke to Trooper Elder the following day by phone, he confessed his crime. When he testified before the jury, he again confessed his crime. Thus, out of the four times that Scott discussed the car accident, he confessed his guilt on three of

those occasions, though the jury only heard about two of those. Had Hughes testified, she would have corroborated Scott's testimony. Admittedly, Hughes was asleep at the time of the accident, but she testified unequivocally that Scott was driving the car when she entered the backseat and when the car left the convenience store.

Contrary to the state's assertion that Hughes' testimony was not credible, the PCR judge, who was in the best position to judge credibility, made no such credibility finding. In fact, the PCR judge believed Hughes' testimony over defense counsel's testimony when he found that defense counsel did not interview Hughes. Additionally, the state's argument about Hughes' credibility is based upon an alleged inconsistency in her testimony. There was nothing inconsistent in her testimony that she was subpoenaed to trial "potentially to be a witness" and that defense counsel never talked to her about testifying.

Further, contrary to the state's argument that defense counsel's failure to interview Hughes and call her as a witness was not prejudicial to Respondent because her testimony "was a repetition of Scott's actual testimony" that "was already rejected by the jury," Hughes would have corroborated Scott on the only issue in the case that mattered. Hughes' testimony was not "merely cumulative" to Scott's testimony. See McCabe v. Sloan, 184 S.C. 158, 158, 191 S.E. 905, 909 (1937) (explaining that evidence is not cumulative if it relates to the main issue between the parties as opposed to some collateral or subordinate facts bearing on that issue).

CONCLUSION

Respondent respectfully requests this Court deny the state's petition for writ of certiorari.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 12th day of November, 2020.