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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable Frank R. Addy, Circuit Court Judge

HUBERT BROWN,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2016-001363

RETURN TO PETITION FOR WRIT OF CERTIORARI

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The Court of Appeals held properly in finding error as a matter of law per its de novo review of the trial judge’s incorrect jury charge on the law of attempted murder where the trial judge erroneously instructed the jury that specific intent was not an element of attempted murder;¹ and furthermore, the Court of Appeals ruled properly in holding that trial counsel was ineffective in failing to object² to the erroneous jury charge in question because historically attempt offenses have traditionally included the element of specific intent,³ and because the fact that specific intent would apply to attempted murder as an element was clearly outlined in the year 2000 in Sutton⁴ long before the offense of attempted murder was codified by statute in 2010, and finally because the erroneous jury charge was particularly egregious as the jury requested a recharge on the law of attempted murder, which meant the trial judge twice gave the erroneous jury instruction on the law of attempted murder.4

QUESTION 2

The Court of Appeals ruled properly in holding that trial counsel erred in failing to object to the admission of the state’s expert’s hearsay report on the respondent’s mental health and in failing to object to the testimony of the state’s expert’s supervisor regarding the report as this was improper bolstering, all of which prejudiced the defense.11

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¹ State v. King, 412 S.C. 403, 772 S.E.2d, 189 (Ct. App. 2015) aff’d as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), was where the Court held that specific intent was an element of attempted murder.

² The solicitor objected, but the rule is that the issue must be raised and preserved by defense counsel and not another party as the preservation of an issue on appeal requires the defendant to raise the same. State v. Lemire, 406 S.C.558,753 S.E.2d247 (Ct.App. 2013); Gatewood v. SCDC, 304 S.C. 416, 785 S.E.2d 600 (Ct. App. 2016).

³ The Criminal Law of South Carolina by William Shepherd McAninch (2002) at p.504 stating “according to the common law, one may be found guilty of an attempt to commit a crime if with the specific intent to engage in conduct or to achieve a result prescribed by that criminal offense he commits an act in furtherance of that intent [that] goes beyond mere preparation.”

⁴ State v. Sutton, 340 S.C. 393 532 S.C.2d 283 (2000).

QUESTIONS PRESENTED

- 1.) The Court of Appeals held properly in finding error as a matter of law per its de novo review of the trial judge's incorrect jury charge on the law of attempted murder where the trial judge erroneously instructed the jury that specific intent was not an element of attempted murder;⁵ and furthermore, the Court of Appeals ruled properly in holding that trial counsel was ineffective in failing to object⁶ to the erroneous jury charge in question because historically attempt offenses have traditionally included the element of specific intent,⁷ and because the fact that specific intent would apply to attempted murder as an element was clearly outlined in the year 2000 in Sutton⁸ long before the offense of attempted murder was codified by statute in 2010, and finally because the erroneous jury charge was particularly egregious as the jury requested a recharge on the law of attempted murder, which meant the trial judge twice gave the erroneous jury instruction on the law of attempted murder.

- 2.) The Court of Appeals ruled properly in holding that trial counsel erred in failing to object to the admission of the state's expert's hearsay report on the respondent's mental health and in failing to object to the testimony of the state's expert supervisor regarding the report as this was improper bolstering, all of which prejudiced the defense.

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⁸ State v. Sutton, 340 S.C. 393 532 S.C.2d 283 (2000).

STATEMENT OF THE CASE

Respondent Hubert Brown was convicted of first degree burglary and attempted murder per jury trial held during the July 2013 term of the York County General Sessions Court before Judge John C. Hayes, III. The respondent was sentenced to LWOP on both convictions. App. 1-384. David Cook represented the respondent at trial and Assistant Solicitor E.B. Springs appeared on behalf of the state. The respondent appealed, but after briefs were filed (App. 391-425), his convictions and sentences were affirmed by the South Carolina Court of Appeals. See State v. Brown, Unpublished Opinion. No. 2014-UP-425 (S.C. Ct. App. filed November 26, 2014). App. 426-427. Carmen V. Ganjehsani, Esquire, formerly of the South Carolina Office of Appellate Defense, represented the respondent on direct appeal, and Assistant Attorney General Jennifer Ellis Roberts represented the state on direct appeal.

On December 31, 2014, the respondent filed an application for post-conviction relief with the York County Office of the Clerk of Court. App. 430-436. On July 8, 2015, the respondent filed a return and motion for a more definite statement. App. 443-446.

A PCR hearing in the case was convened on April 19, 2016, at the York County Courthouse before Judge Frank R. Addy, Junior. App. 448-537. The respondent was present at the hearing and represented by Tommy Thomas, and Assistant Attorney General Justin Hunter appeared on behalf of the state.

On June 16, 2016, Judge Addy issued an Order granting post-conviction relief to the respondent. App. 541-549. The state appealed and filed a petition for writ of certiorari dated May 9, 2018. On June 28, 2019, the respondent filed a return. The Court of Appeals granted certiorari and affirmed the PCR judge's grant of PCR relief on May 20, 2020. See Brown v. State, 2020-UP-144 (S.C. Ct. of App. filed May 20, 2020). The Court of Appeals issued a

substitute opinion (again affirming the PCR judge's grant of PCR relief) on August 19, 2020. See Brown v. State, 2020-UP-144 (S.C. Ct of App. filed August 19, 2020). Petitioner appealed and filed a petition for writ of certiorari with this Court on September 18, 2020. This return for the respondent follows.

STANDARD OF REVIEW

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765, S.E.2d 123, 127 (2014)).

“In criminal cases an appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41,48, 625 S.E.2d 216, 220 (2006). “An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Id.

QUESTION 1

The Court of Appeals held properly in finding error as a matter of law per its de novo review of the trial judge's incorrect charge on the law of attempted murder where the trial judge erroneously instructed the jury that specific intent was not an element of attempted murder⁹; and furthermore, the Court of Appeals ruled properly in finding that trial counsel was ineffective in failing to object¹⁰ to the erroneous jury charge in question because historically attempt offenses have traditionally included the element of specific intent¹¹, and because the fact that specific intent would apply to attempted murder as an element was clearly outlined in the year 2000 in Sutton¹² long before the offense of attempted murder was codified by statute in 2010, and finally the erroneous jury charge was particularly egregious as the jury requested a recharge on the law of attempted murder, which meant that the trial judge twice gave the erroneous instruction on the law of attempted murder.

In the case at bar, the trial judge gave the following charge on the law of attempted murder:

A specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily injury...App 350, 1.25-App. 351, 1.2.

Then in response to a jury note requesting a recharge on attempted murder (App. 366, 1.14-16), the trial judge's recharge follows:

⁹ State v. King, 412 S.C. 403, 772 S.E.2d, 189 (Ct. App. 2015) aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), was where the Court held that specific intent was an element of attempted murder.

¹⁰ The solicitor objected, but the rule is that the issue must be raised and preserved by defense counsel and not another party as the preservation of an issue on appeal requires the defendant to raise the same. State v. Lemire, 406 S.C.558,753 S.E.2d247 (Ct.App. 2013); Gatewood v. SCDC, 304 S.C. 416, 785 S.E.2d 600 (Ct. App. 2016).

¹¹ The Criminal Law of South Carolina by William Shepherd McAninch (2002) at p.504 stating "according to the common law, one may be found guilty of an attempt to commit a crime if with the specific intent to engage in conduct or to achieve a result prescribed by that criminal offense he commits an act in furtherance of that intent [that] goes beyond mere preparation."

¹² State v. Sutton, 340 S.C. 393 532 S.C.2d 283 (2000).

I received your note and I want to clarify...[and] go back through the charge of attempted murder (App. 367, lines 8-11.) A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit the serious bodily injury.

A.) De Novo Review

The Court of Appeals ruled properly on the question of law reviewed de novo on the trial judge's erroneous charge on the law of attempted murder that excluded the specific intent element, and properly held that the PCR court correctly found in effect as a matter of law that the trial judge's charge in question was erroneous per State v. King, *supra*, which meant that there was no ground upon which to reverse the PCR judge's ruling granting PCR to the respondent because the trial judge twice did not include the element of specific intent to kill in the jury instruction on the law of attempted murder in violation of King. In King, the Court held that the element of specific intent to kill is included in the offense of attempted murder. The petitioner's argument that the case was tried before King and that trial counsel did not err in failing to object to the erroneous charge cannot stand because historically attempt crimes included the element of specific intent.

For example, in the year 2000, our Court in held in State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), that although no attempted murder offense had been codified in our state at that time; nonetheless, if such an offense had existed, then attempted murder would have required a specific intent to kill under the rationale that specific intent is required for any attempt crime as the very definition of an attempt crime means that the defendant consciously intended the completion of act comprising the inchoate offense. Compare the case of State v. Reid, 393 S.C.3325, 713 S.E.2d 274 (2011), where the Court cited to Sutton and held that with respect to the offense of attempted criminal sexual conduct, specific intent, to the extent that the defendant

intended to complete the acts comprising the underlying offense, was an element that must be proven in order to convict on the attempt crime.

Then, approximately a decade later after Sutton was decided, the legislature in 2010 codified attempted murder as an offense under S.C. Code. Ann. § 16-3-29, and defined it as the act of “a person who with intent to kill, attempts to kill another person with malice aforethought either expressed or implied.” In State v. King, 412 S.C. 403, 772 S.E.2d 184 (S.C. Ct. App. 2015), the Court of Appeals concurred with the rationale in Sutton to the extent that attempted murder would require a specific intent to kill, and went on to hold also that prior rulings would dictate that specific intent must be found in order to convict on attempt crimes and that our state legislature intended to require the state to prove the specific intent to kill as an element of attempted murder. The South Carolina Supreme Court reviewed the Court of Appeals’ prior holding in King from 2015 and concurred in 2017 in State v. King, 422 S.C. 47, 810 S.E.2d 181 (2017), that attempted murder required proof that the defendant had the specific intent to kill and reiterated that specific intent meant that the defendant consciously intended the completion of the acts conspiring the attempted offense (again citing to Sutton), and that specific intent was a required element because criminal intent focused on the dangerousness of the actor, not the act; and moreover, that the failure to charge specific intent to kill in an attempted murder case could not be considered harmless error. State v. King, 422 S.C. 47, 810 S.E.2d. 181 (2017).

Moreover, the petitioner’s claim of no error here because the state presented substantial evidence of specific intent is also untenable because the state must present proof beyond a reasonable doubt of all elements of the offense charged (not substantial evidence). See Jackson v. Virginia, 443, U.S. 307 (1979). Also, evidence of alleged substantial evidence of specific intent is meaningless because specific intent is an element of attempted murder.

Therefore, the Court of Appeals properly affirmed PCR court's ruling which follows:

[The respondent] maintains that trial counsel was ineffective for failing to object to the trial court's general intent instruction as it related to the attempted murder charge. Having reviewed the transcript, the [PCR] Court finds that the capable trial judge did mistakenly instruct the jury that the State need only prove general intent as opposed to specific intent. See Trial Transcript, p. 350, line 25 – p. 351, line 4. The Assistant Solicitor did point this fact out to the trial court, but trial counsel did not join in the Assistant Solicitor's efforts to have the jury correctly charged on the law, and the trial court declined to alter the erroneous instruction.

Significantly, the erroneous charge gave the jury the impression that they only had to find general intent to harm, as opposed to a specific intent to kill. See State v. King, 412 S.C. 403 (Ct. App. 2015). The fact that the jury may have struggled with this issue is evident in the jury's request for a recharge on the elements of attempted murder. Trial Transcript, p. 366, lines 14-19. In response to this request, the trial court again recharged general as opposed to specific intent. Therefore, twice the trial court mistakenly stated that specific intent to kill is not an element of attempted murder.

The [PCR] Court finds that trial counsel should have joined in the State's objection to this incorrect instruction and that a reasonable attorney would have objected. Factually, the victim's injuries resulted from a single swipe of the knife, which is quite different from the [respondent] repeatedly attempting to stab the victim. Therefore, specific intent to kill, as opposed to general intent to harm, was a crucial issue in the case, and the jury likely struggles with the distinction in light of their request to be reinstructed on the attempted murder charge. Furthermore, the Court finds that [the respondent] has demonstrated sufficient prejudice in that, but for counsel's error, the outcome at trial would likely have been different. Accordingly, PCR is granted with respect to the attempted murder conviction on this ground. App. 545-546.

B.) Ineffective Assistance of Counsel

In order to establish a claim of ineffective assistance of counsel, the claimant must show that counsel was deficient in his legal representation at trial and that counsel's deficiency prejudiced the case. Strickland v. Washington, 466 U.S. 668 (1984).

Here, the solicitor, not defense counsel made the following objection:

[Solicitor]: The first time you charged this morning I was daydreaming and I wasn't daydreaming this time and I heard you say that only a general and not a specific intent for attempted

murder is required. I think all attempted require [] a specific intent and I don't think the legislature has given us any leeway on that.

The Court: Well that's what I've got in my charge and – A specific intent to kill is not an element of attempted murder. There must be a general intent to commit serious bodily injury

[Solicitor]: I know it was general when we had ABWIK but when we went to attempted –

The Court: That's what I charged them earlier. If you find some law that says that that's not right, that's in my charge and it's in my charge under the heading of Attempted Murder under 16-3-29. I don't see a case cited. Tr. 372, l. 21-p.373, l. 12.

Defense counsel did not object to the incorrect charge, even after the solicitor pointed out the erroneous charge in question. As a rule, the objection in the trial court must have been made by the party that argues the error as an appellate court may not reverse a lower court based on a premise not advanced by the party at the lower court. Repko v. City of Georgetown, 818 S.E.2d 743 (2018). Also, an appellant cannot bootstrap the objection made by another party because the appellant [defendant/defense counsel] must initiate consideration of the issue. State v. Lemire, 406 S.C. 558, 75 3 S.E.2d 247 (Ct. App. 2013); Gatewood v. South Carolina Dept. of Corrections, 416 SC 304, 785 S.E.2d 600 (Ct. App. 2016).

In the case at bar, the trial judge erred in failing to charge the correct law on the offense of attempted murder and as a result trial counsel's failure to object to the error (as it was not the solicitor's duty to so object) constituted deficient legal representation at trial. Moreover, the respondent was prejudiced by counsel's deficient omission in this regard in light of the facts of the case.

At trial, eyewitnesses Michael Mahoney and Christopher Calvert both about what happened in this case. Mahoney testified that the respondent appeared at his residence while he and Calvert were both there on June 8, 2012, and that the respondent pointed a finger at him

during a heated conversation. Mahoney stated that he responded by pushing the respondent. Mahoney stated that the respondent hit him, and that he and the respondent immediately began fighting each other on the ground. Shortly thereafter, the respondent stopped fighting after being hit on his (the respondent's) head. Minutes later, the respondent rose up and started chasing Calvert, but left and then returned holding a machete and cut Calvert's hand (thumb) after entering the house. App. 61, l. 10 – App. 86, l. 25.

Christopher Calvert testified at trial and admitted that he used a gear shift to hit the respondent on his head to break up the fight between the respondent and Mahoney. Then, the respondent left and returned to the residence with a machete. Calvert stated that the respondent used it to cut his hand (thumb). App. 106, l. 16 – App. 121, l. 3.

The defense presented neuro-psychologist Dr. Carol Walser, who concluded that the respondent suffered from traumatic brain injury due to a blow to his head that caused a fractured skull, and that this traumatic brain injury rendered the respondent's behavior so altered that he was not criminally responsible for his actions on June 8, 2012, which meant that he was insane by our legal definition when he acted on that night and more importantly, could not have formed any specific intent to kill when the incidents in question occurred. Dr. Walser stated that the respondent's functioning on the date in question stemmed from a loss of consciousness, confusion, an altered mental state (dazed, disoriented), erratic behavior, and the inability to think clearly. App. 281, lines 11-18; App. 282, l. 18 – 283, l.3; App. 249, l. 13 – p. 251, l. 8; App. 219, lines 12-14; App. 279, l. 21 – p. 280, l. 25. State's witnesses Mahoney and Calvert both stated that the respondent was "dazed" after he was hit on his head. App. 76, lines 2-4; App. 113, lines 1-11. Calvert admitted that he hit the respondent's head "hard." App. 113, l. 11. The respondent's wife testified that the respondent looked "crazy" with "crazy eyes" after he was hit

in the head by Calvert. App. 196, l. 19 – p. 197, l. 16. The respondent's brain could not formulate any mind set of specific intent to kill during the events in question in the case.

Therefore, in the case at bar, the trial judge's erroneous charge that instructed the jury to find general intent with respect to the offense of attempted murder, rather than the correct requirement of a finding of specific intent as an element of attempted murder, should have been objected to by trial counsel, especially since the respondent's defense was that he had no specific intent to kill because he pleaded insanity, which the judge charged (insanity) along with GBMI in the case. The respondent was incapable of formulating a specific intent to kill in this case. Hence, the prejudice that resulted from the trial judge's error and counsel's failure to object to the trial judge's error was obvious.

Clearly, if the jury had been charged with finding a specific intent to kill, then a reasonable probability existed that in light of the respondent's insanity defense (which was proved) due to the brain injury he suffered, it would have would been impossible for the element of specific intent to kill to have been found and the outcome of his trial would have been different. See State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997), where the judge instructed the jury that under insanity, if a defendant does not have criminal intent, then he be acquitted. Also, a judge must charge the correct law to the jury. State v. Marin, 404 S.C. 615, 745 S.E.2d148 (2013).

Thus, the respondent's proved his insanity case by a preponderance of the evidence. As a result, trial counsel's error in failing to object to an erroneous general intent jury instruction with respect to the proper level of mens rea required for the offense of attempted murder, (that brings a specific intent to kill rather than general intent), constituted deficient legal representation in violation of the Sixth Amendment, especially where the respondent's insanity defense or GBMI

had been established at trial, and **particularly where even the solicitor noted error with the judge's general intent charge.** See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Furthermore, but for counsel's error in this regard, a reasonable probability exists that the outcome of the respondent's trial would have been different.

Undoubtedly, but for counsel's error in this regard a reasonable probability exists that had the jury deliberated on the correct statement of the law, including the correct elements of the offense at issue, a different trial outcome would have resulted, especially since the jury asked specifically about the attempted murder charge and received a recharge on the incorrect law, which meant the jury was twice inoculated with the erroneous charge at issue.

QUESTION II

The Court of Appeals ruled properly that trial counsel erred in failing to object to the admission of the state's expert's hearsay report on the respondent's mental health and in failing to object to the testimony of the state's expert's supervisor regarding the report as this was improper bolstering, all of which prejudiced the respondent's defense.

At trial, eyewitnesses Michael Mahoney and Christopher Calvert both about what happened in this case. Mahoney testified that the respondent appeared at his residence while he and Calvert were both there on June 8, 2012, and that the respondent pointed a finger at him during a heated conversation. Mahoney stated that he responded by pushing the respondent. Mahoney stated that the respondent hit him, and that he and the respondent immediately began fighting each other on the ground. Shortly thereafter, the respondent stopped fighting after being hit on his (the respondent's) head. Minutes later, the respondent rose up and started chasing

Calvert, but left and then returned holding a machete and cut Calvert's hand (thumb) after entering the house. App. 61, l. 10 – App. 86, l. 25.

Christopher Calvert testified at trial and admitted that he used a gear shift to hit the respondent on his head to break up the fight between the respondent and Mahoney. Then, the respondent left and returned to the residence with a machete. Calvert stated that the respondent used it to cut his hand (thumb). App. 106, l. 16 – App. 121, l. 3.

Petitioner makes the untenable argument that counsel was not deficient in regarding the failure to object to the state's expert's report entering into the evidence and another expert's testimony regarding that report because said report was cumulative to respondent's expert's report. The State's expert found the respondent legally sane. The respondent's expert concluded that the respondent was not legally sane. To the contrary, the respondent's expert report contradicted the petitioner's expert report.

The respondent's defense was insanity or at the very least GBMI. Defense witness and neuro-psychologist Dr. Carol Walser testified that she interviewed the respondent on three occasions and reviewed his medical records, and then concluded that on the date in question, the respondent suffered from a deep cut from a blow on the head, which caused him (the respondent) to have traumatic brain injury. Dr. Walser explained that the respondent's brain injury caused the resulting erratic behavior that led to the incidents that occurred on the date in question. Dr. Walker added that she diagnosed the respondent with mild neuro-cognitive disorder and depressive disorder, both of which stemmed from his brain injury via his fractured skull. Moreover, Dr. Walser stated that the respondent's functioning on the date in question stemmed from a loss of consciousness, confusion, an altered mental state (dazed, disoriented), erratic behavior, and the inability to think clearly. App. 249, l. 13- p.251, l. 8, App. 219, l. 12-14, App

279, l. 21- p.280, l. 25. According to Dr. Walser, after the blow to the head, the respondent's brain in effect could not have processed normally, which in turn meant that he was operating during the events at issue in actions with a brain that was not criminally liable, i.e. insane. App. 281, lines 11-18; App. 282, l.18 - p. 283, l. 3.

Dr. Walser was asked about reports from Dr. Shannon Hanson, who also interviewed the respondent. Dr. Shannon Hanson was not present at trial to testify as a witness. Dr. Hanson issued a report that contained her finding that the respondent was legally sane (App. 259, l. 9 – p. 260, l. 15), but Dr. Walser did not agree with Dr. Hanson's assessment because of his (the respondent's) traumatic brain injury as said injury rendered him confused, incoherent (with language) and agitated at the scene and thus not criminally responsible. App. 226, l. 13 - p. 230, l. 17. App. 252, lines 6-11. Dr. Walser was very clear in her report that the respondent was insane and could not distinguish legal and moral right and wrong on the date the incidents occurred. App. 255, l. 11-p. 257, l. 3.

During the PCR hearing, trial counsel testified that he must have agreed to the admission of Dr. Hanson's report in to evidence at App. 6, l. 17 – p. 8, l. 2 and App. 288, l. 17 – p. 290, l. 18, but that he should not have done so, and that he should have objected to Dr. Hanson's report, and that he should have objected also to Dr. Frierson's testimony as well. App. 463, l. 3- p. 469, l. 6. Counsel admitted that insanity was the only defense available to the respondent, and that Dr. Hanson's report and Dr. Frierson's testimony, which bolstered Dr. Hanson's credibility and expertise, and that Dr. Hanson's report and Dr. Frierson's testimony negatively impacted his insanity defense. App. 465, l. 3-12; App. 481, l. 20- p. 483, l. 4. App. 490-491.

The PCR judge ruled that trial counsel erred in agreeing to the admission of the respondent's mental evaluation by Dr. Hanson into evidence because Dr. Hanson was not a

witness at trial, and also because Dr. Hanson's report was damaging in that she found the respondent to be criminally responsible, i.e., sane where to the contrary, the respondent's defense was insanity due to his skull fracture (head injury). In addition, the PCR judge found further that counsel undercut the respondent's insanity defense and lessened the impact of the defense's expert's witness' testimony in support of the insanity defense by not objecting Dr. Hanson's report, which was contrary to the insanity defense and prejudicial as Dr. Hanson was not present at trial to be challenged regarding her report. App. 546-549.

The state's expert witness did not appear at trial and could not be challenged on her qualifications nor cross-examined and to present testimony that this witness was unavailable.

Hearsay is a statement, which maybe written, other than are made by the declarant while testifying at trial that is offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. See In Re Care and Treatment of Harvey, 355 S.C 53, 584 S.E. 2d 893 (2003), where the admission of a log containing incidents deemed to be hearsay from a report by a supervisor constituted subjective reports that did not fall under the business records exception. See also State v. Blackwell, 420 S.C. 127, 801 S.E. 2d 713 (2018), where the Court held that the chaplain's notes regarding the death row inmate's remorse comments were excludable as inadmissible hearsay and did not fall under the business records exception.

Also, the business records exception under Rule 803(6), SCRE, was not available for Dr. Hansen because Dr. Hanson was not qualified at trial as an expert as she did not testify at trial and it was therefore impossible to delve into and challenge her alleged expertise. Thus, her opinions were inadmissible. In other words, because Dr. Hanson lacked credible credentials that were not reviewed on voir dire at trial, her report could not have come in under the business records exception. For example, Dr. Hanson was a forensic psychiatry fellow, meaning she was

still in training at the time she interviewed the respondent, and she only spent one hour with the respondent. App. 216, l. 24- p. 217, l. 1; App. 226, l. 13- p. 227, l. 13. Note further that the presumed termination of Dr. Hanson from DMH also bore on her credibility and the credibility of her report on the respondent. Tr. 301, l. 8-16.

Finally, if a defendant is prejudiced by the erroneous admission of hearsay evidence, then a reversal is required. In Re Care and Treatment of Harvey, supra. In the instant case before us, counsel erred in failing to object to the admission of the report in question (Dr. Hanson's report) into evidence, because it was hearsay and Dr. Hanson was not a witness at trial to be confronted and challenged. See. State v. Alexander, 303 S.C 408, 401 S.E. 2d 167 (1991). The respondent was prejudiced because Hanson's report weakened his insanity defense and the defense could not challenge her report.

In addition, it was also error for trial counsel to fail to object to the testimony of Dr. Richard Frierson, whose testimony was used to bolster Dr. Hanson's credibility as an expert. Dr. Frierson stated that he supervised Dr. Hanson's evaluation of the respondent, which in effect placed his endorsement on her credibility, and the credibility of her findings in her report. App. 288, l. 3- p. 291, l. 8. It is imperative to note that Dr. Frierson did not sign off on Dr. Hanson's report. Another doctor, who also did not testify at trial, signed off on Dr. Hanson's report. App. 298, l. 13-17. It was error to allow Dr. Frierson to bolster Dr. Hanson's veracity and it was error for trial counsel to fail to object to Dr. Frierson's testimony in this respect. See State v. Jennings, 394 S.C. 473, 716 S.E. 2d 91 (2011), where the Court reversed and held that the trial court erred in allowing the state to introduce the forensic interviewer's written report (particularly where the mother told the interviewer what the children told her) because it contained inadmissible hearsay that bolstered the children's testimony and allowed the interviewer to vouch for the children's

testimony. Compare Briggs v. State, 421 S.C. 316, 806 S.E. 2d 713 (2017), State v. Kromah, 401 S.C. 340, 737 S.E. 2d 490 (2013). Also, Dr. Hanson's report was not cumulative because it contradicted Dr. Hanson's testimony regarding sanity versus insanity. Trial counsel's error regarding the failure to object to Dr. Hanson's report as evidence and Dr. Frierson's testimony violated the respondent's Sixth Amendment right to competent counsel at trial, and but for the errors made by counsel here via these omissions, a reasonable probability exists that the outcome of respondent's trial would have been different. See Strickland v. Washington, supra.

Additionally, petitioner makes the untenable argument that counsel did not err in failing to object to Dr. Frierson's testimony regarding the state's expert's findings about the respondent because he was an independently qualified expert because this independently qualified expert had never examined the respondent and the result was the bolstering of the report of an unchallenged witness. The independent expert directed the state's expert to conduct a further analysis on the respondent's mental state. Therefore, not only did he not interview the respondent, but the state's expert did not adequately interview the respondent before abruptly leaving her job at DMH. This was improper bolstering. The PCR court ruled properly that counsel erred in failing to object to the admission of the state's expert testimony into evidence at trial.

CONCLUSION

Based on the foregoing argument, counsel for the respondent requests that petitioner's petition be denied and the ruling of the PCR judge affirmed.

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of November, 2020.