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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO LEXINGTON COUNTY

Court of Common Pleas

The Honorable Thomas A. Russo, Trial Judge

The Honorable William A. McKinnon, Post-Conviction Relief Judge

Appellate Case No. 2020-000730

GONZALES REESE WARDLAW

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

- I. The PCR judge erred in refusing to find trial counsel ineffective for failing to question the decedent's fiancée about decedent's gun possession when she told the police during an interview that decedent had guns, Petitioner testified that the decedent brought the gun to the marijuana sale and threatened Petitioner, resulting in a scuffle over the gun and fatal shooting.
- II. The PCR judge erred in refusing to find trial counsel ineffective for failing to impeach the decedent's fiancée with her prior statement to police that the decedent sold marijuana when at trial she testified that she had no idea that he sold marijuana.
- III. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the judge, in opening comments to the jury, stated that a trial is a search for the truth to ensure a fair and just verdict.
- IV. The PCR judge erred in refusing to find trial counsel ineffective for failing to request the Logan circumstantial evidence charge.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

- I. The PCR court correctly determined trial counsel was not constitutionally ineffective for failing to cross-examine the victim's fiancée about whether the victim owned firearms where counsel made a tactical decision to forego emphasis on the gun and bullets in order to downplay her client's culpability; where counsel reasonably chose to limit her cross-examination of the victim's fiancée, who was very emotional, to avoid potentially alienating the jury by antagonizing a sympathetic witness about the victim's character; and where Wardlaw never informed trial counsel of the victim's violent nature of that he was afraid of the victim.
- II. The PCR court correctly determined trial counsel was not constitutionally ineffective for failing to impeach the victim's fiancée, who provided emotional testimony on direct examination and was evasive on cross-examination, about her knowledge of the victim's drug dealing where neither the State nor Wardlaw contested that the shooting occurred as a result of a drug deal and where counsel made a strategic decision to avoid appearing too aggressive by badgering the victim's fiancée about the specifics of her statement to law enforcement.

- III. The PCR court correctly determined trial counsel was not constitutionally ineffective for failing to object to the trial judge's use of "search for the truth" and "fair and just" language in his preliminary remarks to the jury because the challenged comments derived from the trial court's explanation of the roles of the parties within the courtroom and did not in any way pertain to or touch upon the burden of proof where any conceivable prejudice was cured by the trial court's extensive instructions that the State bore the burden of proving guilt beyond a reasonable doubt.
- IV. The PCR court correctly determined trial counsel was not constitutionally ineffective for failing to request the *Logan* circumstantial evidence charge where the trial judge's jury instructions as presented were sufficient to adequately and properly convey the applicable law to the jury, including the law regarding the fact that Wardlaw could not be convicted unless the evidence—regardless of whether it was direct or circumstantial—proved his guilt beyond a reasonable doubt.

STATEMENT OF THE CASE

In June 2012, the Lexington County grand jury indicted Gonzales Reese Wardlaw (Petitioner) for murder. (App'x 426–27). On February 10, 2014, Wardlaw proceeded to a jury trial before the Honorable Thomas A. Russo. (App'x 1–425). Lexington County Public Defender Elizabeth C. Fullwood represented Wardlaw. Deputy Solicitors Samuel R. Hubbard, III, and D. Shawn Graham of the Eleventh Circuit Solicitor's Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

The underlying facts of this action concern the December 29, 2011 murder of Thomas Hofer in the parking lot of the Olive Garden on Harbison Boulevard. The victim was shot shortly after receiving a series of phone calls and leaving his family at the restaurant to walk out to meet an unknown party. No one could identify the shooter, but a witness in the Olive Garden parking lot saw a dark-skinned, shorter male in jeans and a hoodie speaking to the victim immediately prior to hearing the gunshot. (App'x 133–200).

The victim's cell phone, recovered from the parking lot, showed that the phone number who had been contacting the victim's phone immediately prior to the shooting was registered to Wardlaw's mother, Sharon Wardlaw. (App'x 201–26). Wardlaw's stepfather identified the phone number which had been contacting the victim as belonging to Wardlaw; he testified that Sharon Wardlaw bought that phone for Wardlaw. (App'x 260). Cell tower triangulation testimony presented at trial placed the phone registered to Sharon Wardlaw in and around the Harbison Boulevard area

at the time of the murder. (App'x 280–89).

Wardlaw was arrested and it was discovered he been staying at the apartment of a female friend named Ce-Kia Bolton. Bolton consented to a search of her apartment, where law enforcement recovered rap lyrics, later identified to be handwritten by Wardlaw. (App'x 228–50). The lyrics read in part:

SC Metro; right above Atlanta ho . . . hitting 'em in his chest and leave'em coughing up that yellow shit. . . . No face then no case. News 10 no evidence. Caught 'em at the Olive Garden munching on a breadstick. . . . live my life to da fullest . . . I'm going out with a bang, dis is so spontaneous. . . . he bound to die . . . Hustling is the prefix, killing is the suffix. . . . you bout to die if you cause disruptions . . . I'm going for da kill.

(App'x 251–52).

Wardlaw's stepfather testified that late on the night the victim was murdered, Wardlaw called and asked to be picked up at the Waffle House on Greystone Boulevard and taken to meet a young woman at the Red Roof Inn. During this interaction, Wardlaw told his stepfather that he got himself in some trouble; that he thought he shot somebody; that he went to buy marijuana from the victim and did not like what he got; that he pulled the gun out and the victim reached for it and it went off; and that he threw the gun in the river. He testified that the next day, he saw the shooting on the news and called Wardlaw, who responded to his stepfather's questions that he "already" knew Wardlaw had been at the Olive Garden the night before and that "he knew" the victim had died because "he saw it" on TV too. (App'x 257–72).

B. Petitioner's Testimony

Wardlaw testified at trial as well. He stated he knew the victim from school and had purchased marijuana from him before. He testified he did not have a weapon, and that the victim pulled a gun on him when Wardlaw challenged the victim about the purchase. (App'x 307–59). Wardlaw testified he “just dropped the weed and [he] reached for the gun to try to wrestle it away from him.” (App'x 314). He testified they were “wrestling over the gun. [They were] tussling over the weapon. And, you know, everything just happened so fast. The gun just went off.” (App'x 314). He testified the victim ran after the gun went off, and Wardlaw put the gun in his pocket and picked up the weed and “the box of bullets that fell out of [the victim's] pocket” and ran. (App'x 315). He testified he threw the gun in the Broad River. (App'x 317). He also admitted that he did write the rap lyrics found in Bolton's apartment. (App'x 320–21).

C. Verdict & Subsequent Proceedings

On February 14, 2014, the jury convicted Wardlaw as indicted. (App'x 410). Judge Russo sentenced Wardlaw to life imprisonment without the possibility of parole. (App'x 424, 428).

Wardlaw filed a timely notice of appeal. Appellate Defender David Alexander perfected Wardlaw's appeal by filing an *Anders*¹ brief with the Court of Appeals on the following issue:

Whether the trial court erred in allowing the solicitor to make a “golden rule” argument when he asked the jury, “Is

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

this a proper thing to happen in our county?” and telling the jury, “You speak for the people, the community.”

(App’x 429–40). The Court of Appeals affirmed Wardlaw’s conviction and sentence. *State v. Wardlaw*, 2015-UP-296 (S.C. Ct. App. filed June 17, 2015). (App’x 444–45). The case was remitted back to the circuit court on July 6, 2015.

Wardlaw timely commenced the underlying PCR action August 25, 2015, raising multiple claims of ineffective assistance of counsel. (App’x 446–91). Wardlaw thereafter filed a *pro se* memorandum in support of the *pro se* allegations on September 29, 2015.² The State requested an evidentiary hearing through its return on November 16, 2016. (App’x 492–97). Aimee Zmroczek, Esquire, was subsequently appointed to represent Wardlaw. By and through PCR counsel and pursuant to Rule 71.1, SCRPC, Wardlaw filed an amended application on August 2, 2018. (App’x 498–503). The State made the return to that application on September 4, 2018, and later moved for a more definite statement on December 31, 2018. (App’x 504–16). Discovery was authorized in this case pursuant to S.C. Code Ann. § 17-27-150 and a series of orders initiated by Wardlaw and resolved with the State’s consent.

On April 3, 2019, the PCR court convened an evidentiary hearing before the Honorable William A. McKinnon. Wardlaw was present and represented by Counsel Zmroczek. Assistant Attorneys General Caroline Scrantom and Samuel Bailey appeared for the State. Wardlaw, Counsel Fullwood, and Deputy Solicitor Graham testified at the hearing. Both parties presented closing arguments on the morning of

² Wardlaw filed this memorandum prior to counsel being appointed.

April 4, 2019. Judge McKinnon took the matter under advisement.

By order signed May 31, 2019, and filed June 17, 2019, Judge McKinnon denied the application on all grounds and dismissed the action with prejudice. (App'x 737–68). In response, Wardlaw filed a motion to alter or amend pursuant to Rule 59(e), SCRPC, and a corresponding memorandum. (App'x 769–72; 773–98). The State filed a response. (App'x 799–827). On April 23, 2020, the PCR court issued an order denying Wardlaw's 59(e) motion. (App'x 828–42). This appeal follows.

STANDARD OF REVIEW

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

LAW APPLICABLE TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct “was so ineffective as to require reversal” of the applicant's

conviction. *Id.* at 687. To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)). Significantly, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696.

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. “A court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). With respect to prejudice, the applicant must demonstrate that, “but for counsel’s unprofessional errors,” there is a “reasonable probability” that the “result

of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.* The likelihood of that result must be “substantial, not just conceivable.” *Richter*, 562 U.S. at 112.

ARGUMENT

- I. **The PCR court correctly determined trial counsel was not constitutionally ineffective for failing to cross-examine the victim’s fiancée about whether the victim owned firearms where counsel made a tactical decision to forego emphasis on the gun and bullets in order to downplay her client’s culpability; where counsel reasonably chose to limit her cross-examination of the victim’s fiancée, who was very emotional, to avoid potentially alienating the jury by antagonizing a sympathetic witness about the victim’s character; and where Wardlaw never informed trial counsel of the victim’s violent nature of that he was afraid of the victim.**

Wardlaw first contends Counsel was ineffective for failing to cross-examine the victim’s fiancée about whether the victim owned guns or regularly carried a gun. The PCR court rejected this claim, finding Wardlaw failed to overcome the strong presumption that his counsel’s decision to refrain from aggressively cross-examining the victim’s girlfriend constituted sound trial strategy. Wardlaw failed to demonstrate how trial counsel’s failure to elicit testimony regarding the victim’s possession of guns “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. As these findings are supported by probative evidence and do not constitute an error of law, this Court should deny certiorari.

Wardlaw contends trial counsel failed to specifically question the victim’s

fiancée, Shaquana Outing, about whether she had ever seen the victim with a gun. Outing and their eight-month-old daughter were with the victim at Olive Garden on the night of the incident. (App'x 147–49). When they first arrived, the victim told Outing to wait in the car while he met with someone in the back outside the building. (App'x 149). Outing did not see the meeting nor did she know who the victim was meeting. (App'x 149). She testified she heard a gunshot only one or two minutes after she saw the victim disappear behind the building. (App'x 151). When the victim came back to the car, he told Outing he was shot and to call an ambulance. (App'x 152).

At the PCR hearing, Wardlaw expressed confidence in trial counsel's assessment that his version of events supported a case for self-defense which would be presented at trial. (App'x 542). Wardlaw also affirmed his testimony from trial: that he met the victim at the Olive Garden on Harbison Boulevard to buy marijuana from him; that when he questioned the quality of the drugs he became scared for his life; that he and the victim wrestled over the gun which went off; and that he took a box of bullets and the gun with him from the shooting and then threw the gun in the river. (App'x 548–51).

Wardlaw testified that he was friends, or at least acquaintances, with the victim because he had previously bought marijuana from him. (App'x 543). He stated he told trial counsel what he knew about the victim; including a belief that the victim was violent, had run from police in the past, and had gun charges pending against him at some time. (App'x 543–45). However, the PCR court found trial counsel's testimony that Wardlaw never told her about the victim's violent nature during the

course of their representation to be credible. (App’x 615–16, 633, 814–15). *See Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (“The PCR court’s evaluation of witness credibility is to be afforded great deference.”).

Regarding Wardlaw’s failure to inform trial counsel about the victim’s alleged gun possession, the PCR court reasoned that, “to the extent trial counsel was informed at the time of trial, any of the victim’s prior convictions for drugs would not have been particularly probative of any alternative defense because she had no reason to believe her client had previous knowledge that caused him to fear the victim.” (App’x 815). The PCR court’s finding on this matter is consistent with *Strickland*’s instructions to reviewing courts that:

The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions.

466 U.S. at 691. Accordingly, in part because Wardlaw never informed trial counsel of the victim’s violent nature or that he feared the victim, the PCR court correctly

found she was not ineffective in this regard.

As to Outing's testimony, trial counsel recalled that Outing was very emotional on direct examination and was evasive on cross-examination. (App'x 579). She stated it was obvious that Outing was not credible and that kept "talking in circles while she was being cross-examined." (App'x 579). Because she did not witness any part of the altercation, Outing's testimony was not particularly important to the State's case or probative of any aspect of Wardlaw's self-defense claim. As a result, trial counsel testified she made a decision not to "beat up" the victim's fiancée in front of the jury; she was the mother of the victim's child. (App'x 579). Trial counsel was aware of the victim's prior convictions, but she assessed at PCR that the introduction of the victim's purported bad character was dicey: it may not have been admissible and she may not see it wise to tarnish or otherwise blame the victim in front of the jury. (App'x 633).

In *Bergmann v. McCaughtry*, the Seventh Circuit Court of Appeals examined a similar claim: ineffective assistance of counsel for failure to cross-examine the victim on several alleged inconsistencies in her testimony, all of which "relate[d] to collateral issues and not to the substance of the crimes." 65 F.3d 1372, 1379–1380 (7th Cir. 1995). Noting that Bergmann "offer[ed] no reason why [counsel's] decision did not fall within the wide range of reasonable professional assistance" the Court held that "deciding not to cross-examine [a] sympathetic witness [is] well within the realm of sound trial strategy, and we will not, in hindsight, second-guess that decision." 65 F.3d 1372, 1379–1380 (7th Cir. 1995). Wardlaw similarly failed to

overcome the strong presumption that trial counsel’s decision not to more aggressively cross-examine Outing was reasonable and strategically calculated to avoid coming across as “beating up” a sympathetic witness. *See State v. Kinder*, 942 S.W.2d 313, 335 (Mo. 1996) (“Subjects covered and the extent of cross-examination are matters of trial strategy and must be left to the judgment of counsel.”). *See Ex parte McFarland*, 163 S.W.3d 743, 756 (Tex. Crim. App. 2005) (“Cross-examination is inherently risky, and a decision not to cross-examine a witness is often the result of wisdom acquired by experience in the combat of trial.”); *see also Washington v. State*, 294 Ga. 560, 566 (3), 755 S.E.2d 160 (2014) (noting that decisions about cross-examination “do not amount to deficient performance unless they are so unreasonable that no competent attorney would have made them under similar circumstances”); *Shields v. State*, 2020 WY 101, ¶ 59, 468 P.3d 1097, 1114 (Wyo. 2020) (examining the “risks associated with excessive cross-examination: ‘the witness may reconcile inconsistencies, additional unfavorable testimony may be elicited, and ineffective efforts to attack credibility may in fact enhance the witness’s testimony’ “ (internal citations omitted)).

The PCR court ultimately—and correctly—concluded that “trial counsel’s collective strategy concerning treatment of the victim [and] the victim’s girlfriend . . . [was] objectively reasonable, especially given [Wardlaw]’s failure to inform trial counsel about the victim’s alleged violent reputation.” (App’x 758). Trial counsel’s articulated strategic reasons for choosing not to aggressively cross-examine Outing, coupled with Wardlaw’s failure to ever mention to trial counsel that he was afraid of

the victim, support the PCR court's conclusion that Wardlaw failed to establish trial counsel's performance was deficient or that he suffered any resulting prejudice. *Fitzgerald v. Thompson*, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial); *Cf. Sallie v. State of N.C.*, 587 F.2d 636, 640 (4th Cir. 1978) (*Strickland* standard was not developed to was not "intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness").

II. The PCR court correctly determined trial counsel was not constitutionally ineffective for failing to impeach the victim's fiancée, who provided emotional testimony on direct examination and was evasive on cross-examination, about her knowledge of the victim's drug dealing where neither the State nor Wardlaw contested that the shooting occurred as a result of a drug deal and where counsel made a strategic decision to avoid appearing too aggressive by badgering the victim's fiancée about the specifics of her statement to law enforcement.

Wardlaw further contends counsel was ineffective for failing to impeach Outing with her statement to law enforcement that the victim dealt drugs. The PCR court rejected this claim, finding again that Wardlaw failed to overcome the strong presumption that his counsel's decision to refrain from aggressively cross-examining the victim's girlfriend constituted sound trial strategy. Additionally, Wardlaw failed to establish prejudice given that neither Wardlaw nor the State contested that the shooting occurred as a result of a drug deal. As these findings are supported by probative evidence and do not constitute an error of law, this Court should deny certiorari.

Wardlaw correctly notes that counsel referenced the previous interview Outing

gave to police on cross-examination. The following exchange occurred at trial:

FULLWOOD: Okay. And you acknowledged to them that [the victim] had been involved in some illegal things, correct?

OUTING: Correct, in the past when he was in high school, yes, ma'am.

FULLWOOD: Well, didn't you tell them on that day that some of those things were ongoing, but you hope - had hoped that he was getting out of that because, you know, now that you two had a child?

OUTING: No, ma'am. I acknowledged them that he was changing, that he has changed because he had a child and he did not do those things that he did previously before.

FULLWOOD: So you had no idea that he dealt in marijuana?

OUTING: Not at the time, no, ma'am.

(App'x 156–57).

This exchange supports trial counsel's position that Outing was being evasive during her cross-examination and that she was "sort of talking around in circles." (App'x 579). Trial counsel clearly asked Outing about the victim's prior drug dealing, but she denied knowing he was selling marijuana at the time of the incident. (App'x 157). At the PCR hearing, trial counsel was questioned about impeaching the victim by introducing her recorded statement to law enforcement. (App'x 579). As aforementioned, trial counsel was validly concerned that any attack on Outing, who was very emotional on the stand, regarding the character of the deceased father of her child might backfire and garner sympathy points with the jury. Trial counsel further testified that she assessed Outing as "not very credible" and she found any inconsistent statement by Outing regarding the victim's character as "just sort of a

minor matter.” (App’x 579).

When analyzing counsel’s performance, the reviewing court must “strong[ly] presume[e] that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (internal quotation marks omitted); see *Stone v. State*, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing “the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment” and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice). Like the manner and scope of cross-examination generally, “[i]mpeachment tactics are generally held to be matters of trial strategy which are to be afforded deference.” *Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980); see *id.* at 905 (addressing a counsel’s failure “to utilize prior sworn testimony of various witnesses in an effort to destroy their in-court identification with alleged inconsistencies” and concluding failure was “obviously a matter of trial tactics and falls far short of ineffective counsel”); cf. *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002) (acknowledging that “sometimes, the hallmark of effective advocacy is to know when to ‘leave well enough alone’”).

Here, the PCR court correctly concluded that Wardlaw failed to establish counsel was deficient in choosing not to impeach Outing with her prior inconsistent statement regarding her knowledge of the victim’s drug dealing. Neither Wardlaw nor the State contested that the dispute occurred during a drug deal that led to shooting (App’x 633). The State even acknowledged at least once that the victim was

selling drugs. (App'x 633). *See Dell v. Straub*, 194 F. Supp. 2d 629, 652 (E.D. Mich. 2002) (finding the petitioner failed to show he was prejudiced by counsel's failure to elicit certain testimony on the victim on cross-examination because "[s]ome of the points that petitioner wished to have raised would have been of marginal benefit in attacking the prosecutor's case").

Like counsel's decision not to ask Outing about the victim's gun possession, Wardlaw failed to overcome the strong presumption that trial counsel's decision not to impeach Outing with her prior inconsistent statement was reasonable and strategically calculated to avoid coming across as "beating up" a sympathetic witness. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Specifically, Wardlaw failed to show the testimony would have assisted in Wardlaw's self-defense claim or provided any insight into who was the aggressor. *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir.1987) (refusing to find ineffective assistance merely because "other testimony might have been elicited from those who testified). He therefore failed to show that counsel's failure to elicit testimony from Outing regarding the victim's marijuana use or dealing "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, at 686; *see also Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) ("The burden of proof is on [the applicant] to show that counsel's performance was deficient as measured by prevailing professional norms, and that [the applicant] was prejudiced by this

deficiency.”); *cf. Fugate v. Head*, 261 F.3d 1206, 1219–20 (11th Cir. 2001) (highlighting that, “[a]bsent a showing of ‘a single specific instance where cross-examination arguably could have affected the outcome of either the guilt or sentencing phase of the trial,’ the petitioner is unable to show prejudice necessary to satisfy the second prong of *Strickland*” (internal citations omitted)).

III. The PCR court correctly determined trial counsel was not constitutionally ineffective for failing to object to the trial judge’s use of “search for the truth” and “fair and just” language in his preliminary remarks to the jury because the challenged comments derived from the trial court’s explanation of the roles of the parties within the courtroom and did not in any way pertain to or touch upon the burden of proof where any conceivable prejudice was cured by the trial court’s extensive instructions that the State bore the burden of proving guilt beyond a reasonable doubt.

Wardlaw contends trial counsel ineffectively failed to object to opening remarks by the trial court, which he characterizes as inappropriately emphasizing the truth-seeking function of the jury. Specifically, Wardlaw complains that the trial judge’s comments about a trial being a “search for the truth” and the jury returning a “fair and just verdict” diluted or shifted the burden of proving guilt beyond a reasonable doubt. The PCR court rejected this claim, finding the remarks were not objectionable because they were given in the context of the jury’s role in determining witness credibility and Wardlaw was not prejudiced because the instructions as a whole properly and correctly conveyed the applicable law to the jury. As these findings are supported by probative evidence and do not constitute an error of law, this Court should deny certiorari.

This Court has cautioned that “truth-seeking” language by trial courts are

disfavored and should be avoided. *See State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) (explaining that jury instructions on reasonable doubt which also charge the jury to “seek the truth” or “search for the truth” run the risk of unconstitutionally shifting the burden of proof to the defendant); *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing trial courts to discontinue using charge that jury’s duty is to return a verdict that is just and fair to all parties). In *Aleksey*, however, this Court found the “truth-seeking” language in that case was harmless because it did not appear in the reasonable doubt or circumstantial evidence portion of the jury charge, but rather in conjunction with the credibility of witnesses charge. 343 S.C. 20, 28–29, 538 S.E.2d 248, 252 (2000).

Citing *Aleksey*, the defendant in *State v. Beaty* objected to the trial judge’s use of the phrases “search[ing] for the truth,” “true facts,” and “just verdict” in his preliminary remarks to the jury. 423 S.C. 26, 33, 813 S.E.2d 502, 505–06 (2018). In that case—decided after Wardlaw’s trial—this Court instructed trial judges to avoid these terms but agreed with the trial judge that “the disputed comments can be distinguished from *Aleksey* because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in *Aleksey*.” *Id.* at 34, 813 S.E.2d at 506. This Court found the comments were harmless error because, based on a review of the entire trial record and the full opening comments to the jury, there was no prejudice sufficient to warrant reversal. *Id.*

Here, the trial judge presented preliminary remarks at the outset of trial that

were nearly identical to those given in *Beaty*. The “search for the truth” language was given in an effort to explain the trial process and its importance to the jury. (App’x 119–21). As his remarks continued, the trial judge instructed the jurors the State had the burden of proving Wardlaw’s guilt beyond a reasonable doubt; specifically informed the jurors it was their duty “to decide whether the State has met that burden;” noted Wardlaw had no burden to prove anything during the trial; and explained that Wardlaw was presumed to be innocent of the charged offenses. (App’x 122–24). *See generally Moore v. State*, 283 Ga. 151, 155, 656 S.E.2d 796, 801 (Ga. 2008) (“[T]he pattern charge’s mention of jurors ‘seeking the truth’ does not . . . dilute or cause confusion over the State’s burden of proof and the role of the jury by suggesting that the jurors embark on ‘their own intuitive search for the truth.’ In criminal cases, the factfinder does have the task of seeking the truth. But, the jury is to determine the truth in view of the evidence, considered in light of the court’s instructions. The court’s instructions properly focused the jurors on their consideration of the evidence presented at trial.” (citations omitted)). Thereafter, at the conclusion of trial several days later, the trial judge fully and accurately instructed the jury on the applicable law through his jury charge, explained to the jury Wardlaw was presumed to be innocent, repeatedly indicated the State had the burden of proving Wardlaw’s guilt beyond a reasonable doubt, and thoroughly defined reasonable doubt for the jury. (App’x 390–93, 400, 403).

At the PCR hearing, trial counsel was asked whether she was aware of this Court’s 2012 opinion, *State v. Daniels*. (App’x 568–69). In *Daniels*, an opinion issued

just a few months prior to Wardlaw’s trial, the same trial judge was admonished—but not reversed—by this Court for including in his jury charge “that a criminal jury’s duty is to return a verdict that is ‘just’ or ‘fair’ to all parties.”³ 401 S.C. at 256, 737 S.E.2d at 475. Trial counsel testified she was aware the *Daniels* opinion and stated that, in hindsight, she would have objected to the “truth-seeking” language. (App’x 568–70). However, trial counsel’s own backward-looking assessment of something she should have done is not determinative for purposes of evaluating whether she was constitutionally ineffective under *Strickland*.

The PCR court correctly concluded that the limited nature of this phrase imparted no duty upon counsel to object in light of the *Aleksey* decision, which existed at the time of trial, and the failure to object to this limited phrase did not render counsel’s performance deficient. Further, even if that one little portion of the trial judge’s opening remarks are improper, this Court has refused to reverse a conviction where the instructions as a whole properly informed the fact-finders that a criminal defendant is presumed innocent unless the State is able to prove his guilt beyond a reasonable doubt. *Aleksey*, 343 S.C. at 26–27, 538 S.E.2d at 251; *Daniels*, 401 S.C. at 260, 737 S.E.2d at 477 (“In the instant case, the trial court included several improper statements as part of his jury instruction. However, the trial court prefaced those

³ It is worth noting that the “search for truth” remarks in *Daniels* were made at the end of trial during the trial judge’s charges on the law rather than in his preliminary remarks to the jury, as they were in Wardlaw’s trial. *See State v. Patterson*, 425 S.C. 500, 512, 823 S.E.2d 217, 224 (Ct. App. 2019) (distinguishing *Daniels* because the trial court’s improper comments in *Patterson* “came at the beginning of trial rather than during the charge on the State’s burden of proof at the end, which . . . is when such a statement would have the most prejudicial effect.”).

remarks with full and adequate instructions on reasonable doubt. . . . [D]espite the trial court's mistake, the instruction as a whole properly conveyed the law to the jury and it is not reasonably likely that the jury acted in contravention of the reasonable doubt standard.") (Toal, C.J., concurring for the majority). Accordingly, the PCR court properly denied relief as to this issue.

IV. The PCR court correctly determined trial counsel was not constitutionally ineffective for failing to request the *Logan* circumstantial evidence charge where the trial judge's jury instructions as presented were sufficient to adequately and properly convey the applicable law to the jury, including the law regarding the fact that Wardlaw could not be convicted unless the evidence—regardless of whether it was direct or circumstantial—proved his guilt beyond a reasonable doubt.

Finally, Wardlaw contends trial counsel was ineffective for failing to request the *Logan* charge on circumstantial evidence. The PCR court rejected this claim, finding the jury was properly instructed on the means of analysis appropriate for circumstantial evidence in accordance with *Grippon* and approved in *Logan*. Because the jury instruction, when read as a whole, adequately covered the State's burden of proof and the difference between circumstantial and direct evidence, the PCR court correctly determined Wardlaw failed to establish he was prejudiced as a result of counsel's alleged omission. As these findings are supported by probative evidence and do not constitute an error of law, this Court should deny certiorari.

As far as jury instructions on circumstantial evidence are concerned, a variety of different circumstantial evidence charges have been recognized as proper throughout the course of South Carolina history. *See State v. Lynch*, 412 S.C. 156,

176–77, 771 S.E.2d 346, 357 (Ct. App. 2015) (outlining the different circumstantial evidence jury instructions that have been approved of in South Carolina over the years). In *State v. Grippon*, this Court recommended the following circumstantial evidence charge in future cases:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. 79, 83–84, 489 S.E.2d 462, 464 (1997). Several years later, in *State v. Cherry*, this Court held the language from “*Grippon* [was] the sole remaining charge to be utilized by the courts of [South Carolina] in instructing juries in cases relying, in whole or in part, on circumstantial evidence.” 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004).

Thereafter, in *State v. Logan*, this Court considered “the proper means for evaluating circumstantial evidence and how the trial court may best instruct a jury as to its analytical responsibility” given the different approaches used to analyze direct and circumstantial evidence. 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013); *see id.* (acknowledging that, “[w]hile direct and circumstantial evidence carry the same value, a jury cannot accurately analyze these two types of evidence using identical

approaches”). While recommending a supplemental jury charge encompassing the determinations critical for analyzing circumstantial evidence, this Court in *Logan* affirmed Logan’s conviction after recognizing the continuing accuracy of the circumstantial evidence charge articulated in *Grippon*. *Logan*, 405 S.C. at 100, 747 S.E.2d at 452–53 (“Thus, we modify *Grippon* and *Cherry* to allow the additional language provided above *if requested by a defendant*.” (emphasis added)).

At the PCR hearing, trial counsel was asked whether it is her general practice to submit written charges to the Court during charging conferences. Counsel responded:

It depends on the case. Sometimes all you need is the standard charges. Sometimes saying, well, you know, there might be an unusual issue or something unusual about the evidence where you want to bring in some supplemental charges that you’re asking for specific to that case.

(App’x 640). While trial counsel admitted she did not consider the *Logan* charge and whether to request it, she also testified she did not find anything unusual about the evidence in Wardlaw’s case which would lead her to believe a supplemental charge would be beneficial. (App’x 640).

This Court in *Logan* ultimately concluded any error in the trial court’s jury instructions was harmless beyond a reasonable doubt because the trial court “clearly instructed the jury regarding the reasonable doubt burden of proof” and its jury instruction, “as a whole, properly conveyed the applicable law.” *Logan*, 405 S.C. at 94 n. 8, 747 S.E.2d at 449 n. 8 (citations omitted). Likewise, the PCR court correctly found counsel was not ineffective for failing to request the *Logan* charge, particularly

in light of the fact that the trial judge’s instruction was accompanied by a thorough and correct reasonable doubt charge. *See State v. Jenkins*, 408 S.C. 560, 573–74, 759 S.E.2d 759, 766 (Ct. App. 2014) (“[A]ny error in the omission of other language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court’s instruction, as a whole, properly conveyed the applicable law.”); *cf. McFadden v. State*, 342 S.C. 637, 641, 539 S.E.2d 391, 393 (2000) (noting that “the prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal”). Accordingly, trial counsel was not ineffective in this regard.

CONCLUSION

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

Respectfully submitted,

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