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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

Honorable John C. Hayes, III, Trial Judge
Honorable Frank F. Addy, Jr., Post-Conviction Relief Judge

Appellate Case No. 2020-001261

Hubert Brown, #161888,.....Respondent,

v.

State of South Carolina, ...Petitioner.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

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II. Did the PCR court err in finding trial counsel was constitutionally ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation report without her being called to testify at where the report was cumulative and Brown's own expert effectively testified as to Brown's mental state at the time of the crime?

III. Did the PCR court err in finding trial counsel was constitutionally ineffective for failing to object to Dr. Richard Frierson's testimony concerning the contents of Dr. Hansen's report when Dr. Frierson helped develop the opinions contained in the report and was independently qualified to testify as an expert in psychiatry?

STATEMENT OF THE CASE

Hubert Brown (Brown) is presently incarcerated within the South Carolina Department of Corrections. App. pp. 550, 553. Brown was indicted at the September 2013 term of the York County Grand Jury for first-degree burglary (2012-GS-46-3185) and attempted murder (2012-GS-46-3187. App. pp. 551-52, 554-55. David C. Cook, Esquire, represented him. App. p. 1.

On July 9-11, 2013, Brown was tried before the Honorable John C. Hayes, III, and a jury. App. p. 1. Pursuant to section 17-25-45 of the South Carolina Code of Laws, the State served notice of its intention to seek life imprisonment without the possibility of parole upon conviction.[1] App. pp. 378-79. At the conclusion of the trial, Brown was found guilty as charged, and Judge Hayes sentenced him to imprisonment for a term of life without the possibility of parole on each charge. App. pp. 375-76, 382-83.

Brown filed a notice of appeal and a direct appeal was perfected by Appellate Defender Carmen V. Ganjehsani, Esquire, of the South Carolina Commission on Indigent Defense – Division of Appellate Defense. App. pp. 388-405. After both parties briefed the issues, the South Carolina Court of Appeals affirmed Brown's convictions by unpublished opinion filed. State v. Brown, Op. No. 2014-UP-425 (S.C. Ct. App. filed November 26, 2014). App. pp. 426-27. The remittitur was returned to the circuit court on December 12, 2014. App. p. 428.

[1] Brown was convicted of first-degree burglary and first-degree criminal sexual conduct in Charleston County in 1989. App. p. 378.

Brown filed a timely application for post-conviction relief on December 31, 2014. Petitioner filed a return on July 8, 2015. App. pp. 442-47. Through counsel, Brown filed an amendments to his application on January 25, 2016. App. pp. 437-41. An evidentiary hearing convened on April 19, 2016, before the Honorable Frank R. Addy, Jr. App. p. 448. Brown was present and represented by Tommy Thomas, Esquire. App. p. 448. App. p. 448. By an Order signed June 16, 2016, and filed June 20, 2016, the PCR court found trial counsel was constitutionally ineffective and granted relief on multiple grounds: (1) failing to object to the general-intent instruction as to the attempted murder charge based exclusively on State v. King, 412 S.C. 403, 409, 772 S.E.2d 189, 192 (Ct. App. 2015), aff'd as modified by State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) ; (2) failing to object to the admission of the Department of Mental Health evaluation on the basis that the doctor who performed the evaluation, Dr. Shannon Hansen, was not present to testify; and (3) failing to object to the testimony of Dr. Richard Frierson about the contents and conclusions of Dr. Hansen's report. [2]

Respondent appealed the grant of relief. Pursuant to Rule 243, SCACR, this Court transferred the appeal to South Carolina Court of Appeals by order dated October 19, 2018. On June 28, 2019, the Court of Appeals granted certiorari on all issues and requested further briefing. The Court of Appeals affirmed the grant of relief on all grounds on May 20, 2020. Brown v. State, 2020-UP-144 (S.C. Ct. App. filed May 20, 2020). The Court of Appeals affirmed on the attempted murder issue based on King and State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 286 (2000)

[2] Out of an abundance of caution, because the language in the Order Granting Relief was not clear, the State also raised the issue of whether the PCR court erred in granting relief on the basis the Assistant Solicitor's reference to Brown's expert as a "lady doctor" was objectionable, despite Brown not raising that issue in his application or at the hearing. The Court of Appeals determined the PCR court did not based its grant of relief on this ground and was merely cautioning against the use of such language.

("Attempted murder would require the specific intent to kill and conduct toward that end."). The Court of Appeals affirmed the two issues related to the report of Dr. Shannon Hansen and the testimony of Dr. Richard Frierson based on Rules 801 and 803(6), SCRE, finding Frierson's testimony was "improper bolstering."

The State then petitioned for rehearing, which was granted on August 19, 2020. On the same day, the Court of Appeals withdrew its previous opinion and substituted and refiled a new opinion, again affirming the grant of post-conviction relief on all grounds. Brown v. State, 2020-UP-144 (S.C. Ct. App. filed August 19, 2020). The substance of the substituted opinion was entirely unchanged; however, it included updated citations to the authority relied upon by the Court of Appeals.

The State timely filed its petition for a writ of certiorari pursuant to Rule 242 on September 18, 2020.[3] By order dated June 18, 2021, this Court granted certiorari and directed briefing.

[3] Respondent failed to file a copy of the petition for writ of certiorari with the Court of Appeals, which then issued a remittitur on September 21, 2020. The State immediately moved to recall the remittitur, and the motion was granted by order filed September 24, 2020.

STATEMENT OF THE FACTS

On June 8, 2012, Brown went to the home of his friend and former coworker, Michael Mahoney (Mahoney). App. pp. 61-62, 69-70. An argument ensued, during which Brown punched Mahoney, and they ended up wrestling on the ground. App. pp. 71-73, 75. Chris Calvert (Calvert), who was living with Mahoney at the time, came up behind Brown and hit him in the head with a gear shift to stop the attack on Mahoney. App. pp. 107, 111-12. The blow dazed Brown and caused him to lose consciousness for a short period of time. App. pp. 75-76, 113. Brown then grabbed a hatchet from the trunk of his vehicle and began chasing Calvert, saying he was going to kill him. App. pp. 77-78, 113-14. Brown was bleeding profusely at this point, and Mahoney tried to convince him to go to the hospital. App. pp. 77, 116. Instead, Brown put down the hatchet, got a machete out of his trunk instead, and began to chase Calvert with it. App. pp. 78-79. After threatening to kill both Mahoney and Calvert, Brown got in his car and appeared to leave. App. p. 82, 116.

Mahoney and Calvert went inside Mahoney's house and began cleaning themselves up in the bathroom, while Mahoney's wife called 911. App. pp. 82, 85, 132-33. Suddenly, Mahoney's wife started screaming. App. p. 85, 133. Brown had returned to the house with the machete. App. pp. 116-17, 133. He swung it toward Calvert's head, and Calvert threw his hand up to protect himself. App. pp. 117-18. The machete hit Calvert's hand, cutting his thumb off most of the way so that it was hanging by the skin. App. pp. 57, 85, 118, 133. When Deputy Mark Whitesides arrived on the scene in response to the 911 call, he talked to the witnesses and developed Brown as a suspect. App. pp. 56-59. Police eventually arrested Brown in Walterboro, and he was charged with attempted murder and first-degree burglary. App. pp. 140, 161-65.

Brown presented an insanity defense at trial and was evaluated by experts for both the State and the defense. App. pp. 6-9, 208, 215; Supp. App. 1-5. At trial, Brown called an expert, Dr. Carol Walser, a neuropsychologist, who testified that although she agreed with the State that Brown was competent to stand trial, she did not find him to be criminally responsible for his actions at the time of the incident, as he was suffering from a mental defect due to a traumatic brain injury. App. pp. 208, 215, 229-30, 249, 254-55. Dr. Walser testified she met with Brown multiple times, over the course of thirteen hours in total, and administered a battery of neuropsychological tests. App. pp. 215-18, 234-35. Dr. Walser concluded Brown showed several signs of traumatic brain injury, including balance issues, amnesia, speech issues (aphasia), paranoia, and episodes in which he would "blank out" in the middle of a conversation. App. pp. 222, 233-34, 241-44. According to Dr. Walser, at the time of the incident, Brown lacked the capacity to reason and was behaving "chaotically." App. pp. 254-55. Dr. Walser also testified she found no evidence of malingering. App. pp. 222-25, 236, 247-48.

The State's evaluator found Brown to be both competent to stand trial and criminally responsible for his actions as the time of the crime. App. 226-27; Supp. App. 1-5. However, the doctor who performed Brown's evaluation at the Department of Mental Health (DMH) left the state was and not available for trial. App. p. 301. Instead, in reply, the State called Dr. Richard Frierson, a medical doctor and psychiatrist with DMH. App. pp. 287-88. Dr. Frierson supervised the doctor who evaluated Brown and discussed Brown's case with her, but never met with Brown himself. App. pp. 288-89, 295-98. Without objection, the State introduced the report of the DMH evaluation through Dr. Frierson. App. p. 290. According to that report, Brown was criminally responsible for his actions at the time of the crime. App. 226-27; Supp. App. 1-5.

At trial, Judge Hayes gave the standard charges on reasonable doubt, burden of proof, and presumption of innocence, as well as a charge on Brown's insanity defense. App. pp. 337-45, 355-57. When he instructed the jury regarding the attempted murder charge, Judge Hayes stated:

> A specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily injury. Intent means intending the result which actually occurs, it means something which – acts which is [sic] not accidental or involuntary. Intent may be shown by acts and conduct[] of the defendant and other circumstances from which you may naturally and reasonably infer intent.
>
> Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injury may be considered in determining the intent with which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully committed an act a natural tendency of which is to destroy another's life.

App. pp. 350-51. At the completion of the jury charges, defense counsel asked the trial judge to cure his charges regarding the defense of guilty but mentally ill, which Brown did not raise. App. p. 363. Judge Hayes agreed and brought the jury back in for a curative instruction. App. pp. 363-65. Judge Hayes asked trial counsel, "And that's all you have?" to which he replied, "That's it, Your Honor." App. p. 365.

Later, the jury sent a note requesting to be recharged on attempted murder. App. p. 366. Judge Hayes recharged attempted murder, again stating, "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." App. pp. 367-72. When Judge Hayes asked whether there was anything from the State on the recharge, the following exchange took place:

> [The State]: 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 attempts 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.
>
> [The State]: 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. But you take exception to that part of the charge?
>
> [The State]: I'm just concerned because the way I was taught all attempts are specific intent. And so when we went from ABWIK which is a general intent to attempted murder I'm afraid maybe we kicked in a specific intent.
>
> The Court: You mean if I have a general intent to harm you and I harm Chris instead, or have a general intent to hurt everybody in here and the only person except Chris and he's the one I hurt and - -
>
> [The State]: Well that can be transferred intent.
>
> The Court: Well you're on the record for that.
>
> [The State]: All right.
>
> The Court: Anything?
>
> [Defense counsel]: Nothing from the defense, Your Honor.

App. pp. 372-74.

Ultimately, the jury found Brown guilty on both charges, and Judge Hayes sentenced him to concurrent sentences of life without parole pursuant to section 17-25-45. App. pp. 375-76, 382-83.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, questions of law are reviewed de novo without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The Court of Appeals erred in affirming the PCR court's grant of relief in finding trial counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because *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), had not yet been decided and trial counsel is not required to be clairvoyant, and therefore, the grant of relief is premised on an error of law.

The Court of Appeals erred in affirming the PCR court's finding trial counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because under the law at the time of Brown's trial, Counsel had no reason to know he needed to object. The PCR court found "a reasonable attorney would have objected" to the general-intent instruction because "a specific intent to kill, as opposed to a general intent to harm, was a crucial issue in this case." App. p. 546. The order granting relief focuses primarily on the prejudice prong, finding Brown's mental state "was the key issue in the case" and noting the intent instruction likely influenced the jury's decision since they asked for a recharge on the elements of attempted murder. App. p. 545. This analysis misapplied the Strickland standard, however, because prejudice is irrelevant in the absence of a deficiency in trial counsel's performance. 466 U.S. at 687 ("A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction... has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense. Unless a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversary process that renders the result unreliable."). Trial counsel was not deficient in failing to object to the charge as given because the law was unsettled at the time of Brown's trial. In any event, even if trial counsel was deficient, Brown was not prejudiced because the evidence of intent the jury considered was evidence of a specific intent to kill.

The State agrees the trial court's instruction that "[a] specific intent to kill is not an element of attempted murder but [there] must be a general intent to commit serious bodily injury" is no longer a proper jury instruction **after** this Court's decision in State v. King. 422 S.C. 47, 56-57, 810 S.E.2d 18, 23 (2017) aff'g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) ("We agree with the Court of Appeals that 'the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.'") (citations omitted). However, Brown was tried and convicted **before** the King decision, and accordingly, the PCR court's exclusive reliance on King to find trial counsel was deficient is an error of law which necessitates this Court's reversal. App. p. 545. The Court of Appeals' King decision was published in June 2015, and this Court's King decision was published in October 2017. Brown was tried in July 2013, well before either decision was published. Accordingly, the PCR court's decision was predicated on an error law requiring trial counsel to be clairvoyant in predicting how the Court of Appeals and this Court would ultimately resolve the question of which level of intent is required for attempted murder under the statute. This Court should therefore reverse the Court of Appeals' decision upholding the PCR court's grant of post-conviction relief.

A. The Court of Appeals erred in affirming the PCR court's finding trial counsel was constitutionally ineffective because trial counsel cannot be not deficient where the ruling establishing the specific-intent standard for attempted murder was not issued until years after the trial took place, and trial counsel is not required to be clairvoyant.

The relevant lens for analyzing trial counsel's performance is "counsel's perspective at the time" of trial. Strickland v. Washington, 466 U.S. 668, 689 (1984); Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). This Court has repeatedly made clear attorneys are not required "to anticipate or discover changes

in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765. At the time of trial, South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute, as noted by this Court in its analysis in King. 422 S.C. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . .").

Trial counsel, therefore, cannot be deficient for failing to object to the jury instruction based on King, because it was not the law at the time of Brown's trial, so trial counsel was not on notice that he needed to object. See, e.g., Frierson v. State, 417 S.C. 287, 297-98, 789 S.E.2d 762, 767-68 (Ct. App. 2016) (finding counsel was not deficient for failing to advise defendant of potential violation of statutory warrant requirement where law at the time of trial was unsettled on the issue); see also Hill v. State, 350 S.C. 465, 567 S.E.2d 857 (2002) (holding failure of trial counsel to object to erroneous jury instruction was ineffective where appellate decision announcing change in law had already become final by the time of defendant's trial). Trial counsel testified the parties discussed the issue in chambers, and the trial judge told them he was going to give the charge as written in the bench book. App. pp. 489-90. Trial counsel also testified if he had any reason to think the instruction was erroneous, he would have objected, but he did not see a reason at that time. App. 490.

The reasonableness of trial counsel's failure to object to the general-intent instruction is informed by the legislative history of attempted murder in South Carolina. Until 2010, South Carolina recognized only the offense of assault and battery with intent to kill (ABWIK), not attempted murder. In 2010, however, the General Assembly "abolished all common law assault and battery offenses and all prior statutory assault and battery offenses," and instead codified

attempted murder. S.C. Code Ann. §§ 16-3-29, 16-3-600; State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). It was well-settled that the old crime of ABWIK required only a general intent to kill. State v. Foust, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) (for ABWIK, the required finding of "malice aforethought, either express or implied" encompasses a requirement of general intent). However, the statutory definition of someone who commits attempted murder, as codified in 2010, now reads: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]" S.C. Code Ann. § 16-3-29. Unfortunately, this definition created ambiguity as to the level of intent required. It was not until 2017 that this Court decided King and found "the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder...." 422 S.C. at 56-57, 810 S.E.2d at 23.

At the time of Brown's trial, the law in South Carolina was not clear as to the required level of intent, and trial counsel did not have the benefit of either the Court of Appeals' or this Court's decision in King. As noted by both the majority opinion and by Justice Kittredge's concurrence in this Court's King decision, existing authority supported the general-intent instruction given at Brown's trial. 422 S.C. at 74-75, 810 S.E.2d at 32 (Kittredge, J., concurring in result only) (concluding he would "affirm the trial court's finding and related jury instruction that '[a] specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm.'"); State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) ("malice aforethought encompasses both the specific and general intent to commit murder"); Foust, 325 S.C. at 14-15, 479 S.E.2d at 5 (explaining, for ABWIK, the required finding of "malice aforethought, either express or implied" encompassed a requirement of general intent). Justice Kittredge, writing separately, noted, "The majority and I agree that the statutory language creates

an ambiguity – 'with intent to kill' speaks to a specific intent crime while 'malice aforethought, either expressed or implied' points to a general intent crime." King, 422 S.C. at 72, 810 S.E.2d at 31. Given this ambiguous language and the legislative history of the attempted murder statute, it was not unreasonable for trial counsel also to interpret the elements of attempted murder as set forth in South Carolina's statute as requiring only general intent. See id. at 73, 810 S.E.2d at 32 ("If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime?") (Kittredge, J., concurring in result only).

Indeed, the very fact this Court went to such lengths to discuss the history of ABWIK and attempted murder in this state and to clarify the standard demonstrates the law was not clearly defined until that decision was rendered. That this Court needed to issue such a detailed decision explaining what the Legislature intended by its wording of the statute illustrates that the PCR court's decision here rests on a requirement for trial counsel's clairvoyance. Trial counsel, therefore, cannot be deficient because King was not the law at the time of Brown's trial, and given the ambiguous and confusing wording of the attempted murder statute, trial counsel was not on notice he needed to object to the general-intent instruction. Id. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . ."); see also Frierson v. State, 417 S.C. 287, 297-98, 789 S.E.2d 762, 767-68 (Ct. App. 2016) (finding counsel was not deficient for failing to advise defendant of potential violation of statutory warrant requirement where law at the time of trial was unsettled on the issue). The PCR court's order finding deficiency and granting relief on this issue is based on appellate decisions that occurred years after Brown's trial, which is an incorrect application of the

Strickland standard. 466 U.S. at 688 ("The proper measure of attorney performance remains reasonableness under prevailing professional norms.").

Even the five justices of this Court who heard the King case could not unanimously agree on which level of intent the legislature intended to assign to attempted murder, and the majority was notably unable to fully reconcile its holding with the wording of the statute. See King, 422 S.C. at 64 n. 5, 810 S.E.2d at 27 n. 5 ("[W]e would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of the word 'implied' in section 16-3-29 *is arguably inconsistent with a specific-intent crime*.") (emphasis added). It would be unfair and contrary to the dictates of Strickland to find trial counsel constitutionally ineffective because he failed to divine which interpretation of internally inconsistent statutory language this Court would ultimately settle on, especially where his and the trial court's belief the statute encapsulated only general intent was a reasonable interpretation of the ambiguous language. See id. at 73, 810 S.E.2d at 32 ("If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime?") (Kittredge, J., concurring in result only); see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

Because the PCR court's order granting relief is based on an error of law in, this Court should reverse the decision of the Court of Appeals affirming the PCR court.

B. The Court of Appeals erred in affirming the PCR court's finding Brown was prejudiced by the general-intent instruction because the State nonetheless presented substantial evidence of a specific intent to kill, and Brown's defense was that he was unable to form *any* intent which the jury considered and rejected.

The PCR court found "a reasonable attorney would have objected" to the general-intent instruction because "a specific intent to kill, as opposed to a general intent to harm, was a crucial issue in this case;" therefore, Brown was allegedly prejudiced by trial counsel's failure to object. App. p. 546. However, trial counsel's failure to object to the general-intent charge did not undermine the defense because the defense expert's testimony was that Brown was incapable for forming *any* intent, either general or specific.

According to the defense expert, Dr. Walser, at the time of the incident, Brown lacked the capacity to reason and was behaving "chaotically." App. pp. 254-55. When pushed by the solicitor as to whether Brown's actions in retrieving the second weapon from his car and going back inside the home showed he was thinking and making decisions at the time, Dr. Walser testified, "[W]e don't know what the intention is there. . . . [I]t could be based on some paranoid thinking which he definitely has had and that is not rational." App. pp. 271-72. She further testified that type of behavior "is to be expected, and it can be part of chaotic behavior. . . [or] paranoia that's occurred from the injury." App. p. 271. When Dr. Walser was asked whether Brown saying "I'm going to kill you" to the victim after being hit in the head showed his ability to "process" information, Dr. Walser explained it "doesn't mean they are one-hundred percent unable to think at all. It may come and go. It's not consistent, and therefore, it's not reliable and you can't say they are reliably able to reason." App. pp. 127, 283. Dr. Walser also repeatedly testified Brown was not capable of determining right and wrong at the time of the incident. App. pp. 256-57, 282-83.

Thus, had the jury credited Dr. Walser's testimony that Brown could not form *any* intent to kill, they would have acquitted him, even under a general-intent theory. Moreover, the evidence of intent the jury actually considered was evidence of specific intent. The State presented significant evidence showing Brown displayed a specific intent to kill in that he told the victim explicitly, "I'm going to kill you;" chased the victim, returned one weapon to his car and chose another, then resumed the chase; left the scene and then returned, entered the house, sought out the victim in the bathroom, and attacked him again. App. pp. 77-79, 82, 113-14, 116, 127. Brown, therefore, was not prejudiced by the general-intent instruction, and this Court should reverse the Court of Appeals' decision affirming the PCR court's grant relief on this basis.

II. The Court of Appeals erred in affirming the PCR court's finding trial counsel was constitutionally ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation report without her being called to testify where the report was cumulative and Brown's own expert effectively testified as to Brown's mental state at the time of the crime, and therefore, Brown was not prejudiced by trial counsel's lack of objection.

The Court of Appeals also erred in affirming the PCR court's finding trial counsel was constitutionally ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation when she was not called to testify, because her "report was furnished for the jury to consider without allowing [Brown] to challenge Dr. Hansen on her assumptions, methods, conclusions, and whether she considered other potential diagnoses." App. p. 546. However, both the Court of Appeals and the PCR court failed to recognize the contents of the report were cumulative to other evidence and testimony presented, and Brown's own expert credibly and effectively testified to his mental state at the time of the crime. Therefore, trial counsel was not deficient, nor was Brown prejudiced by the report's admission.

Importantly, Dr. Walser herself injected the contents of the State's report into the trial, making the report itself and Dr. Frierson's testimony about it cumulative. App. pp. 226-27. Brown

had already been evaluated by DMH at the time Dr. Walser began her testing, and Dr. Walser reviewed the DMH report, among other records, in preparation for making her own report. App. pp. 216-17; Supp. App. 1. Dr. Walser gave detailed testimony about the tests she performed, what each test was designed to measure, Brown's performance on each test, and why the tests were necessary in order to reach a proper conclusion as to Brown's mental state. App. pp. 215-18, 227-29, 234-35. Dr. Walser concluded Brown suffered a traumatic brain injury when he was struck with the gear shift, rendering him temporarily unable distinguish moral or legal right from wrong and to be unable to "think clearly, speak clearly, [or] act in a rational way." App. pp. 229, 252-55.

Further, Dr. Walser specifically referred to the State's report and its conclusions that Brown was both competent to stand trial and criminally responsible for his actions in her testimony. App. pp. 226-27. Thus, the jury was already apprised of the State's conclusion Brown was responsible for his actions. In doing so, Dr. Walser was able to explain not only why her conclusion that Brown was *not* criminally responsible due to the temporary effects of a traumatic brain injury was credible, but also why the State's conclusion was not – because that doctor did not perform any of the necessary tests or even consider the possibility of a traumatic brain injury as the cause of the behavior. App. pp. 227-29. Dr. Walser discussed this deficiency in detail and was therefore able to explain away the State's finding on the basis of an insufficient examination, rather than merely offering her own conclusion.

The State then called Dr. Richard Frierson in rebuttal and introduced Dr. Hansen's report through him, without objection. App. 290. The Court of Appeals affirmed the PCR court's finding it was error for trial counsel to fail to object to the admission of the report. App. 546. However, the information contained in the report was merely cumulative to other testimony already

admitted,[4] and, as the PCR court pointed out, much of the information actually corroborated Dr. Walser's findings. App. 547. For example, the State's report indicates Brown was indeed suffering from paranoia and amnesia, just as Dr. Walser concluded. App. pp. 221-22, 233-34; Supp. App. 4-5. Dr. Hansen's report also concluded Brown was making a true effort to respond during her examination, supporting Dr. Walser's finding Brown was not malingering. App. pp. 247-48; Supp. App. p. 4.

Additionally, the PCR court found fault with the admission of Dr. Hansen's report because of the nature of Brown's defense – namely that the head injury caused "temporary insanity." App. pp. 546-47. The PCR court found it significant that "nowhere in her report did Dr. Hansen indicate that she had considered and excluded temporary insanity due to head trauma as a potential diagnosis, and trial counsel could have potentially brought this to the attention of the jury had the report's author been required to testify." App. p. 457. Notably, however, Dr. Frierson addressed this issue in his testimony, stating he directed Dr. Hansen to consider head trauma as a potential explanation for Brown's behavior and asked her to collect more information in order to support their decision to rule it out. App. pp. 297-98.

Finally, the PCR court found Brown was prejudiced by the admission of Dr. Hansen's report "particularly. . . in light of the erroneous general-intent instruction and in light of the Assistant Solicitor emphasizing Dr. Hansen's report in his closing." App. p. 548. However, as discussed above, the general-intent instruction was proper at the time of Brown's trial. Additionally, the report was cumulative to testimony from Brown's own expert, and in any event, Dr. Frierson was a qualified witness through whom the report could be properly admitted, as

[4] The actual exhibit given to the jury at trial was redacted to remove Brown's criminal history. App. pp. 289-90.

discussed below. Therefore, trial counsel was not deficient for failing to object to the admission of the report, nor was Brown prejudiced by the lack of objection. This Court should therefore reverse the Court of Appeals' decision affirming the PCR court's grant of relief on this ground.

III. The Court of Appeals erred in affirming the PCR court's finding trial counsel was constitutionally ineffective for failing to object to Dr. Richard Frierson's testimony concerning the contents of Dr. Hansen's report because Dr. Frierson helped develop the opinions contained in the report and was independently qualified to testify as an expert in psychiatry, and therefore, trial counsel was not deficient, nor Brown was prejudiced by the lack of objection.

Additionally, the PCR court found, and the Court of Appeals agreed, trial counsel should have objected to Dr. Frierson's testimony since Dr. Frierson had never examined Brown and could not give a diagnosis, and his testimony was merely "bolstering an unchallenged witness." App. pp. 548. However, this finding is not supported by the record because Dr. Frierson participated in the development of the DMH opinion by reviewing medical records and witness statements, developing the report's conclusions in conjunction with Dr. Hansen, and directing the collection of additional information to support those conclusions. App. pp. 297-98. He was also independently qualified as an expert in psychiatry, and therefore, he could give his own opinion as to Brown's criminal responsibility. App. pp. 292-93. This Court should therefore reverse the decision of the Court of Appeals affirming the PCR court's grant of relief on this ground.

Dr. Frierson was independently qualified as an expert in psychiatry, and Brown has not alleged trial counsel was deficient for failing to object to his qualification as an expert. App. pp. 292-93. Dr. Frierson's testimony consisted mostly of opinions regarding hypothetical situations suggested by the evidence introduced at trial, which he was qualified to give as an expert in psychiatry, and trial counsel's objections to hypotheticals outside the evidence were sustained. See Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 604 S.E.2d 385 (2004) (noting it is well settled that opinion testimony of an expert may be based on hypothetical questions, provided the question

is based on facts supported by the evidence); App. pp. 293-95, 299-301. Further, an expert witness "may state an opinion based on facts not within his firsthand knowledge" and "may base his opinion on information, whether admissible or not, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions." Hundley ex rel Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000). An expert may also testify to matters of hearsay for the purpose of showing what information he relied on in reaching his opinion. Id.

Here, although Dr. Frierson testified he reviewed and approved Dr. Hansen's report rather than drafting it himself, he also testified he had personally reviewed Brown's medical records, the witness statements from law enforcement, and the social history obtained by a DMH social worker prior to Dr. Hansen's examination. App. pp. 295-298. Additionally, he testified he and Dr. Hansen discussed and formulated the report's conclusions together, and he raised the possibility Brown's head injury could have been the cause of his actions and directed Dr. Hansen to obtain more information as to what happened at the scene immediately after Brown was struck on the head. App. pp. 297-98. Dr. Frierson then opined, based on his review of the police reports, medical records, and the information gathered by Dr. Hansen, he felt there was significant evidence to find Brown "knew what he was doing" and could distinguish right from wrong. App. pp. 297-98. Further, he testified DMH's conclusions were arrived at jointly between himself and Dr. Hansen, as part of his role as her supervisor. App. pp. 297-98. Thus, Dr. Frierson was not merely bolstering a non-testifying witnesses; rather, he was testifying as to the conclusion he helped develop. See State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) ("Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth. . . .").

Dr. Frierson's testimony in this case was not a comment on the veracity of any other witness, testifying or not. In fact, based on Dr. Hansen's report, it appears both he and Dr. Hansen generally believed Brown's version of events, but disagreed with Dr. Walser that the brain injury alone was sufficient to meet the legal requirements of criminal insanity. Supp. App. p. 5 ("Although [Brown] received treatment for head trauma around the time of his charges. . . he did not report a compulsion, delusion, command auditory hallucination, or other symptoms of mental illness that would have impaired his ability to conform his conduct to the requirements of the law.").

Moreover, the fact that Dr. Frierson never examined Brown himself does not preclude him from offering an opinion, but rather goes to the weight of the evidence. See, e.g., Petersen v. National R.R. Passenger Corp., 365 S.C. 391, 400, 618 S.E.2d 903, 908 (2005) ("The experts' lack of first-hand knowledge, which could have been obtained by an on-site investigation, goes to the weight of the testimony, not its admissibility."). Trial counsel testified, although he could not say it was a trial strategy not to object to Dr. Frierson's testimony on rebuttal, because Dr. Frierson had never evaluated Brown, he was able to use that to Brown's advantage on cross-examination and during closing arguments. App. pp. 465-66. The defense expert, Dr. Walser, emphasized in her testimony a proper diagnosis could not be made using the methodology reflected in DMH's report because none of the necessary testing had been done, but instead the evaluation was based solely on a short interview with Brown. App. pp. 227-29. Additionally, Dr. Frierson conceded on cross-examination that a person could exhibit reasoning and processing functions and still not be criminally responsible for his or her actions. App. p. 301.

Because Dr. Frierson participated in developing the report and its conclusions, he was a witness through whom the report could properly be admitted. He was independently qualified as

an expert in psychiatry and could therefore testify to his own opinions as to Brown's competency and criminally responsibility. Accordingly, trial counsel was not deficient, nor was Brown prejudiced by trial counsel's failure to object to Dr. Frierson's testimony. Because of these errors, this Court should reverse the decision of the Court of Appeals.

CONCLUSION

For all the foregoing reasons, the State requests that this Court reverse the decision of the Court of Appeals affirming the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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