STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2009-CP-30-0725

Nathaniel K. Ferguson, Jr., Respondent-Petitioner,

v.

State of South Carolina, Petitioner-Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Resp.-Pet. was indicted at the July 2004 term of the Laurens County Grand Jury for murder and possession of a weapon during the commission of a violent crime (04-GS-30-628). Chip Price, Esquire, represented him on these charges. From July 19-22, 2005, Resp.-Pet. underwent trial pursuant to which a jury found him guilty as indicted of both charges. The Honorable James W. Johnson sentenced him to thirty years for murder and five consecutive years for the weapon possession charge.

A timely Notice of Appeal was filed on Resp.-Pet.'s behalf and an appeal was perfected by Robert Dudek, Esquire, of Appellate Defense. The South Carolina Court of Appeals affirmed his convictions and sentences. State v. Ferguson, Op. No. 4342 (Ct. App. filed February 20, 2008). Resp.-Pet.'s Petition for Rehearing was denied by the Court of Appeals by Order dated May 22, 2008., and his Petition for Writ of Certiorari was denied by the South Carolina Supreme Court order dated March 5, 2009. The remittitur was issued on March 11, 2009.

Resp.-Pet. filed his initial post-conviction relief (PCR) application on June 10, 2009. Pet.-Resp. filed its Return on October 6, 2009. Resp.-Pet. subsequently filed an amended application on March 30, 2011, alleging trial counsel was ineffective on approximately fourteen different grounds, and also alleging ineffective assistance of appellate counsel. An evidentiary hearing into the matter was convened on April 14, 2011, at the Newberry County Courthouse. At the start of the evidentiary hearing, Resp.-Pet. verbally amended his application to include an allegation of a Brady violation. Resp.-Pet. testified on his own behalf, and also presented the testimony of Kent Jones and his trial counsel. The Honorable Eugene C. Griffith, Jr., granted the the application for PCR by Order dated July 5, 2011 on the basis of prosecutorial misconduct, but denied and dismissed all other allegations with prejudice.

Pet.-Resp. filed a Motion to Alter or Amend Pursuant to Rule 59(E), SCRCP, and/or to Reopen the Record for Additional Testimony Pursuant to Rules 59(a) & 60(B), SCRCP. Resp.-Pet. filed a Response. Judge Griffith denied the motion by Order dated August 2, 2011. Pet.-Resp. filed a Notice of Appeal, and Resp.-Pet. subsequently filed a Notice of Cross Appeal. Pet.-Resp. filed a Petition for Writ of Certiorari along with the Appendix. Resp.-Pet. filed a Return to the Petition for Writ of Certiorari and a Petition for Writ of Certiorari. This Return follows.

STANDARD OF REVIEW

In a PCR proceeding, "the burden is on the applicant to prove the allegations in his application." Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). On appeal, the factual findings of the PCR court will be upheld if there is any evidence of probative value to support them. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). To establish ineffective assistance of counsel, the applicant must show: (1) counsel's performance was deficient; and (2) a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A court must indulge, and an applicant must overcome, "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ...." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

ARGUMENT

I. The PCR court properly found counsel was not ineffective in his handling of the State's plea offer.

Resp.-Pet. failed to meet his burden of proving counsel's advice concerning the plea offer was erroneous or deficient. Although counsel testified he should have further pressured Resp.-Pet. to accept the plea offer, this assertion was made entirely with the benefit of hindsight and is insufficient to support a finding of deficient performance. Even if counsel's advice was somehow

deficient, Resp.-Pet. was not prejudiced as he failed to establish a reasonable probability that, but for counsel's deficient advice, he would have accepted the plea offer.

Relevant Facts

The testimony of both Resp.-Pet. and trial counsel established that Resp.-Pet. was offered a twenty-year plea deal to voluntary manslaughter. App. 769-770; 856-857. When asked if counsel had explained to him the difference between murder and manslaughter at the time of the offer, Resp.-Pet. responded: "We touched base on it but we never did get specifically in detail." App. 770. He testified he chose to turn down that plea, but believes he did so without an adequate understanding of his case and the evidence the State was going to use at trial. He stated he did, however, get the opportunity to look over the discovery in his case, including numerous documents and exhibits that were later used at trial. App. 765-766; 776.

Trial counsel testified he should have pressured Resp.-Pet. more to take the plea. App. 857. However, Resp.-Pet. "wanted something in the neighborhood" of five to eight years, an offer counsel advised Resp.-Pet. that he would never get. Counsel stated that due to the difference between the offer and what Resp.-Pet. wanted "we didn't really pursue it any further." Counsel further testified it was ultimately Resp.-Pet. who made the decision to reject the plea offer, "but he wanted input from me." App. 883.

Order Denying Relief

The PCR court found trial counsel was not ineffective for advising Resp.-Pet. not to take the plea deal. App. 930-931. Although Resp.-Pet. testified he did not have a full understanding of his case when he rejected the plea, the PCR court found counsel's testimony established that he explained the discovery he received and the applicable laws to Resp.-Pet. App. 931. Even though counsel testified he should have pressured Resp.-Pet. to take the plea, the PCR court found counsel's advice was reasonable based on the information available to him at the time.

Analysis

The South Carolina Supreme Court has held "the Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered is ultimately rejected." Judge v. State, 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996), *overruled on other grounds by* Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). In Judge, the Court held the PCR court erred in finding that trial counsel were ineffective for advising the applicant to reject a seven-year plea offer to voluntary manslaughter without first receiving certain Brady evidence where the applicant then proceeded to trial, was convicted of murder, and sentenced to life in prison. In reversing the PCR court's decision, the Court recognized that "**counsel's advice to reject a plea agreement does not fall below the reasonably effective assistance standard simply because, in hindsight, the advice was wrong or the attorney's trial tactics backfired.**" Id. at 561, 471 S.E.2d at 150 (emphasis added). The Court found the applicant's trial counsel were not deficient because the record showed they had no reason to know of the materials they had not received from the prosecution. Id. at 562, 471 S.E.2d at 150-51.

The Court also held that to satisfy the prejudice prong, the applicant was required to show "**a reasonable probability that, but for counsel's advice, the defendant would have accepted the plea.**" Id. (citation omitted). The Court stated that "[m]ere statements by the PCR petitioner that he would have accepted the plea agreement but for counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable."[1] Id. Even though the applicant testified he probably would have relied on whatever advice his counsel gave him, the

[1] In a subsequent case, the Court overruled Judge to the extent it "can be read to hold that a petitioner's statement is insufficient evidence to satisfy the prejudice prong ...." Jackson v. State, 342 S.C. 95, 98, 535 S.E.2d 926, 927, n.2 (2000); but see Smith v. State, 369 S.C. 135, 138-39, 631 S.E.2d 260, 261-62 (2006) (holding allegation in PCR application that applicant would not have pled guilty absent counsel's erroneous advice was not proven where applicant failed to testify to this assertion).

Court found "he presented no evidence establishing a reasonable probability that his trial lawyers would have recommended that he accept the plea agreement even had they reviewed all the Brady materials before they advised him." Id. at 563, 471 S.E.2d at 151.

The instant case is analogous to Judge. There is no evidence in the record suggesting counsel's advice concerning the plea offer was in any manner erroneous or deficient. Although counsel testified he should have further pressured Resp.-Pet. to take the plea deal, this testimony was given with the benefit of hindsight and is based on nothing more than the fact that counsel's trial tactics did not produce the result he hoped for.

Even assuming counsel's advice to reject the plea offer was deficient, Resp.-Pet. suffered no prejudice. Consistent with Judge, Resp.-Pet. had the burden of showing that, but for counsel's deficient advice, he would have accepted the plea offer.[2] Resp.-Pet. did not testify to this effect and otherwise failed to present any probative evidence establishing such. To the contrary, counsel's testimony established Resp.-Pet. did not want to accept the offer because he wanted an offer for much less time. Further, counsel testified the decision to reject the plea offer was ultimately made by Resp.-Pet. Accordingly, the PCR court properly denied relief on this ground.

II. The PCR court properly found counsel was not ineffective for failing to utilize the testimony of Kent Jones at trial.

Counsel articulated a valid, strategic reason for his decision not to call Jones as a witness. Counsel's testimony that he now thinks Jones' testimony would have helped based on "the way the case worked out" was made with the benefit of hindsight and is insufficient to establish

[2] See also Lafler v. Cooper, 132 S.C. 1376, 1385 (2012):

> [H]ere the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment or sentence that in fact were imposed....

deficient performance. Even if counsel was deficient, Resp.-Pet. suffered no prejudice as Jones' testimony failed to provide any additional information sufficient to create a reasonable probability that the result at trial would have been different, and the potential risks associated with calling Jones as a witness far outweighed any potential benefits.

Relevant Facts

Resp.-Pet. testified he wanted trial counsel to call Jones as a witness because Jones had firsthand knowledge of "prior difficulties" with the victim. App. 768. He testified he recalled making phone calls to Jones before and after the incident and leaving messages on his machine, but could not recall what he said in those messages. App. 846.

Kent Jones testified he lived behind the homes where the victim and Resp.-Pet. resided at the time of the incident and shared the driveway that went past their homes. App. 754-755. When asked about prior difficulties with the victim, he testified the victim previously told him he could not use the shared driveway to access his home, and on one occasion some "kids" put up plaques, ropes, and other things to prevent him from accessing the driveway. App. 756. He stated he had to call law enforcement regarding prior incidents with the victim, but did not give any further explanation. App. 756-757. He testified he did not fear the victim. App. 757-758. He also testified trial counsel visited him at his home and listened to a tape he had. App. 755. This tape, he explained, contained two answering machine messages Resp.-Pet. left on his phone immediately before and after the shooting. App. 758-759. He stated he could not, however, recall the contents of those messages. App. 760.

Trial counsel testified he interviewed Jones about the case and listed him as a witness out of an abundance of caution, but his plan going into trial was not to call him. App. 855. He testified that "[w]ith the way the case worked out" he now thinks Jones' testimony would have

helped. App. 856. Counsel listened to the tape recorded messages Resp.-Pet. left on Jones' answering machine, and stated he recalled hearing the following take place on those tapes:

> I listened to it, it happened to be a call that Mr. Ferguson made to Mr. Jones immediately after the shooting. In fact Mr. Ferguson was still there at, right there in close proximity to Ms. Wilson. Mr. Ferguson was still very excited, he was angry. Ms. Wilson was still alive. He thought she was making a move toward the pistol on the ground. Mr. Ferguson yelled at her not to do that, threatened to shoot her if she did reach for it. That sort of thing, it was just kind of ugly.

App. 884-885. Although counsel could not recall the additional details of the tape, he stated he did not call Jones to testify because he was concerned about the tape and thought Jones' testimony would hurt Resp.-Pet.'s case. App. 892-893.

Order Denying Relief

The PCR court found trial counsel was not ineffective for failing to utilize Kent Jones as a witness at trial. App. 931-932. Although counsel expressed the belief he should have called Jones as a witness, the PCR court found this belief was simply formed with the benefit of hindsight based on the outcome of trial. App. 932. Furthermore, the PCR court found counsel's decision not to call Jones was based on concerns over the phone messages Jones received from Resp.-Pet. Therefore, the PCR court found counsel "made an informed and valid decision not to utilize the testimony of Kent Jones."

Analysis

Counsel articulated a valid reason for not calling Jones when he testified his decision was based on concerns about the tape recorded messages and he believed Jones' testimony would hurt Resp.-Pet.'s case. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where ... counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel"). Furthermore, counsel's testimony that, with the benefit of hindsight, he now thinks calling Jones would have helped based on "the way the

case worked out" is insufficient to establish that he was deficient for failing to call Jones. See Strickland, 466 U.S. at 669, 104 S.C.t at 2055 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the time").

Even if counsel was deficient, Resp.-Pet. failed to show how counsel's failure to call Jones prejudiced him. The only additional evidence Jones' testimony would have presented concerned a dispute over the shared driveway. This testimony is not relevant to Resp.-Pet.'s alleged prior difficulties with the victim, and would have done nothing to either help establish Resp.-Pet.'s self-defense claim or mitigate his conviction of murder to a conviction for voluntary manslaughter. Furthermore, the potential risks associated with calling Jones as identified by counsel's testimony far outweighed any benefit his testimony might have provided.

III. The PCR court properly found counsel was not ineffective for failing to utilize Respondent-Petitioner as a witness during the Jackson v. Denno hearing and at trial.

Resp.-Pet. failed to provide any evidence or information his potential testimony at the Jackson v. Denno would have established that would have led to a different result at the hearing or at trial. As to the allegation counsel failed to utilize Resp.-Pet.'s testimony at trial, counsel articulated valid, strategic reasons for his decision not to call Resp.-Pet. as a witness. Counsel's testimony that he should have considered calling Resp.-Pet. at trial was based entirely on hindsight and is insufficient to support a finding of deficient performance. Regardless, Resp.-Pet. suffered no prejudice as he otherwise failed to present any additional information his testimony would have established sufficient to create a reasonable probability of a different result at trial, and the potential risks associated with calling him as a witness outweighed the potential benefits.

Relevant Facts

At the Jackson v. Denno hearing, Officer Sean Cutting testified that when he arrived on scene after the shooting Resp.-Pet. stated, "I am the one that did the shooting." App. 27. Lt. Danny Bolt testified Resp.-Pet. gave a statement indicating an argument ensued between the victim and himself, he asked the victim if she had a gun, and she responded, "I may or I may not." App. 49-50. Resp.-Pet. indicated he then went to his vehicle, retrieved a handgun and began shooting from the door of his car. App. 50. After Lt. Bolt informed Resp.-Pet. that he knew this was not true based on the location of evidence at the scene, Resp.-Pet. indicated he began shooting from the hedgerow between his trailer and the victim's trailer. App. 54.

Trial counsel acknowledged to the trial court that he received notice of the verbal statement made to Officer Cutting, but moved to suppress the verbal statements made to Lt. Bolt on the grounds notice of such statements was never received. App. 72-74. The trial court granted the motion to suppress the oral statements made to Lt. Bolt. App. 74. Even though counsel did not move to suppress the oral statement made to Officer Cutting, the trial court held the statement was admissible as an excited utterance. App. 75. At trial, Officer Cutting repeated his testimony that Resp.-Pet. stated, "I'm the one that did the shooting." App. 311.

At the evidentiary hearing, Resp.-Pet. testified he never stated to Officer Cutting that "I am the one that did the shooting." App. 773. He testified he did not discuss with counsel whether he should testify at the hearing, but in hindsight he would have wanted to. App. 779.

Trial counsel testified it is his practice not to put a defendant on the stand if he can help it because, in his experience, defendants "get chewed by an experienced prosecutor" and he "always looks for some other way to get my client's story out to the jury or to develop a theme." App. 859. He stated he thought he could sufficiently get Resp.-Pet.'s story to the jury through the two written statements he gave police and Kenae's testimony. App. 860. Although he testified "I should not have been as rigid in my thought process about putting Nathaniel up," he

stated he did not want to call Resp.-Pet. because he "felt that the prosecutor would get into problems that he had, threats he had allegedly made or problems he allegedly had with Kimberly." App. 860; 877. Specifically, he explained there were several 911 transcripts from calls made by either Kimberly Wilson or the victim, one of which occurred approximately four months before the incident and indicated Resp.-Pet. has hit Kimberly before and threatened to kill her, jumped on her, and so on. App. 887-888.

Order Denying Relief

The PCR court found counsel was not ineffective for failing to call Resp.-Pet. to testify at the Jackson v. Denno hearing or at trial. App. 932-933. The PCR court found counsel's decision was reasonable based on the information available at that time.

Analysis

The allegation that counsel was ineffective for failing to call Resp.-Pet. as a witness during the Jackson v. Denno hearing is simply without merit. The only evidence Resp.-Pet. presented in support of this allegation was his assertion his testimony could have refuted Officer Cutting's testimony that he stated, "I'm the one that did the shooting." There is no indication in the record that the trial court would have excluded this statement if Resp.-Pet. had testified as the trial court indicated the statement was otherwise admissible as an excited utterance. In addition, the contents of this statement were entirely cumulative to other evidence admitted at trial indicating Resp.-Pet. shot the victim, including his own written statements confessing to the shooting. See App. 367; 966-970. Furthermore, the contents of this statement were entirely consistent with the defense's primary trial strategy of establishing self-defense or voluntary manslaughter as acknowledged by both Resp.-Pet. and counsel. App. 764-765; 858. Thus, Resp.-Pet. failed to establish any degree of prejudice resulting from counsel's failure to call him during the Jackson v. Denno hearing.

As for the assertion counsel failed to utilize Resp.-Pet. as a witness at trial, Counsel articulated valid strategic reasons for advising Resp.-Pet. not to take the stand. See Stokes, supra. Counsel testified it is his usual practice to avoid, if possible, putting a defendant on the stand and subjecting him to cross-examination, and in this case he believed he could sufficiently present his case to the jury through other evidence. Furthermore, counsel's advice to Resp.-Pet. not to testify was based on concerns the State would bring out on cross-examination evidence of prior threats and acts of violence against the victim's daughter, Kimberly Wilson, and other prior difficulties Resp.-Pet. had with her. To the extent counsel testified he should have reconsidered his strategy of not calling Resp.-Pet. as a witness, counsel again was relying on nothing more than hindsight. See Strickland, supra; Simpson v. Moore, 367 S.C. 587, 598, 627 S.E.2d 701, 707 n.2 (2006) ("Though hindsight may provide a different view of counsel's actions," an applicant is not entitled to relief "for the sole purpose of presenting a 'fancier' case").

Even assuming counsel's advice to Resp.-Pet. not to take the stand was erroneous, Resp.-Pet. failed to establish how he was prejudiced by this advice. Resp.-Pet.'s testimony was largely cumulative to the evidence otherwise presented at trial and failed to present any additional information sufficient to create a reasonable probability of a different result at trial. Furthermore, the potential risk of subjecting Resp.-Pet. to cross-examination and the harmful evidence that could have been brought out as a result outweighed any benefit of calling Resp.-Pet. as a witness. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (although counsel was deficient in failing to reevaluate petitioner's decision not to testify after co-defendant unexpectedly implicated him, petitioner suffered no prejudice because prior convictions were probably admissible for impeachment and testimony would not have changed outcome of trial).

IV. The PCR court properly found counsel was not ineffective in his handling of the testimony of Kimberly Wilson.

Resp.-Pet. contends trial counsel was ineffective for failing to properly impeach Kimberly's testimony and for failing to adequately address the trial court's denial of counsel's mistrial motion. To the extent an issue is raised as to the mistrial motion, this issue is procedurally barred because it was adequately raised and ruled on at trial as well as on appeal. In any event, the record is void of any evidence indicating counsel was deficient in his handling of the motion or his cross-examination of Kimberly. Even if counsel was deficient, Resp.-Pet. failed to establish that, but for counsel's errors, the result at trial would have been different.

Relevant Facts

At trial, Kimberly testified on direct that there were three shots and she saw Resp.-Pet. fire the first shot through the window. App. 126; 128; 180-181. She then walked to the front door and was standing on the porch when she saw the victim fall to the ground as the second shot was fired. App. 129; 137; 168; 181-182. She was back inside the trailer when she heard the third shot. App. 137. The Solicitor then impeached Kimberly with her written statement she previously gave police in which she indicated there five to seven shots. App. 169-170.

Kimberly subsequently testified that after the shooting Resp.-Pet. "looked at me and told me that I was next." App. 198. Trial counsel asked that the testimony be stricken because he was never put on notice of this specific statement and moved for a mistrial. App. 198-199. Counsel asserted the statement was inadmissible for several reasons and "[i]t would be so prejudicial that I don't think a curative instruction would take care of it." App. 206. The trial court sustained the objection on the grounds the answer given by Kimberly was unresponsive to the question that was asked. App. 208. Counsel then argued the trial court did not make a ruling as to whether the statement given was more probative than prejudicial under Rule 403, and argued it was more prejudicial. App. 212. The trial court denied the motion for a mistrial. App. 214. Counsel then requested a curative instruction, but repeated on the record his objection to

the trial court's refusal to grant a mistrial. App. 215. The trial court subsequently gave a curative instruction to the jury. App. 214-217.

On direct appeal, Resp.-Pet. argued the trial court "erred by refusing to grant a mistrial where the decedent's daughter testified appellate told her that she 'was next' – meaning next to be shot – where the state never notified the defense during discovery that appellate allegedly made this statement and threat, where the judge ruled the victim's daughter's statement was not responsive to the question asked, where the statement was unquestionably highly prejudicial, and where defense counsel correctly argued a curative instruction could not solve the prejudice." App. 627. In affirming Resp.-Pet.'s convictions, the Court of Appeals held the "trial court properly exercised its discretion in deciding to give a curative rather than granting Ferguson's motion for a mistrial," and found the trial court's curative instruction "cured any potential prejudice ...." App. 665-666. Furthermore, the Court specifically noted that it "deemed the issue preserved for appellate review." App. 666. Resp.-Pet. then raised the same issue in his Petition for Writ of Certiorari in which he argued the Court of Appeals' decision was in error. App. 680. The Supreme Court of South Carolina denied the Petition. App. 712.

At the evidentiary hearing, Resp.-Pet. entered into evidence Wilson's written statement she gave police. App. 971. That statement reads, in relevant part:

> [H]e started to shoot he [sic] when she fell ran upon her and continued to shoot. She never pulled or showed a gun [illegible] the whole [illegible] I was standing on the front porch. Mom had pistol on right side in her pants not visible when he started shooting he shot at least 5 or 7 rounds couple was very close range.

Trial counsel testified he intended to impeach Kimberly with certain inconsistencies between her testimony and her written statement; however, the State went ahead and impeached her statement in the manner he intended to App. 860-861. When asked why he did not further impeach her testimony about where she saw the shots fired from, counsel responded, "I must have just missed

it.... her impeachment is in the record. And if I did not do that then I made a mistake." App. 861. When asked about his handling of the mistrial motion, counsel stated:

> [O]nce the Judge made the decision not to grant a mistrial but do a curative instruction I didn't go into prejudice after that. I don't know why I didn't think that it was necessary. If I made a mistake then so be it but I did not do anything in that regard.

App. 863.

Order Denying Relief

The PCR court found counsel was not ineffective in his handling of the mistrial motion or for failing to further impeach Kimberly using her prior written statement. App. 933-934. "Even though counsel failed to specifically request that the trial court rule on prejudice," the PCR court found "counsel vehemently argued for a mistrial and preserved the issue for appeal." App. 934. As for counsel's cross-examination of Kimberly, the PCR court found "counsel thoroughly cross-examined Kim Wilson and his cross-examination was not rendered ineffective due to his failure to utilize her statement." App. 934.

Analysis

To the extent Resp.-Pet. alleges counsel was ineffective for failing to adequately address the trial court's denial of his mistrial motion, this issue is barred from consideration. First, the motion for a mistrial was fully litigated at trial and considered by the Court of Appeals which found the trial court's curative instruction "cured any potential prejudice." An issue previously litigated at trial and lost on appeal is precluded from being raised in a subsequent PCR action. Koon v. State, 358 S.C. 359, 364-65, 595 S.E.2d 456, 459 (2004), *overruled on other grounds by* State v. Gentry, 363 S.C. 359, 364-65, 595 S.E.2d 456, 459 (2004). Therefore, Resp.-Pet. is collaterally estopped from religitating this matter in a PCR action. To the extent Resp.-Pet. asserts the trial court failed to properly conduct a prejudice analysis, this amounts to nothing

more than an improper allegation of trial court error. See Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) ("Allegations of trial court error are not cognizable on PCR"). Furthermore, this issue was procedurally barred because "errors which can be reviewed on direct appeal may not be asserted for the first time, *or reasserted*, in post-conviction proceedings." Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) (emphasis added).

In any event, the record is void of any evidence indicating counsel was deficient in his handling of the mistrial motion. The record clearly establishes that counsel objected to Kimberly's testimony on several grounds, argued for a mistrial as opposed to a curative instruction because of the prejudicial nature of the testimony, and asked the court to make a ruling as to the prejudicial nature of the statement pursuant to Rule 403. Thus, there is no basis for a finding that counsel's handling of the mistrial motion was "outside the wide range of reasonably competent assistance." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Furthermore, it is impossible for Resp.-Pet. to establish any prejudice from counsel's handling of the mistrial motion in light of the Court of Appeals holding that the curative instruction cured any prejudice.

Likewise, there is no evidence indicating counsel was deficient for failing to properly impeach Kimberly's testimony with her written statement. The record shows the State preemptively impeached Kimberly with the portion of her written statement indicating she heard five to seven shots. The only other evidence Resp.-Pet. specifically asserts counsel failed to impeach Kimberly with was, as stated on page 6 of the Petition, "her written statement which indicated she was on the porch during the entire shooting." Contrary to Resp.-Pet.'s assertion, Kimberly's written statement actually indicates she never saw the victim pull a gun *during* the time she was standing in the porch. App. 971. Thus, her written statement was literally consistent with her testimony at trial. Accordingly, counsel was not deficient for failing to impeach her testimony where her written statement provided no such grounds for impeachment.

In any event, Resp.-Pet. suffered no prejudice from counsel's failure to impeach Kimberly with her written statement. It was undisputed at trial that Resp.-Pet. shot the victim three times. The central issue was whether Resp.-Pet. shot the victim in self-defense or in a heat of passion upon sufficient legal provocation sufficient to establish voluntary manslaughter. Nothing in Kimberly's written statement could have been used to impeach her in a way that would have created a reasonable probability that the jury would have found Resp.-Pet. acted in self-defense or in a heat of passion upon sufficient legal provocation. Therefore, the PCR court properly denied relief on this issue.

V. The PCR court properly found counsel was not ineffective for failing to make contemporaneous objections to the State's cross-examination of Kenae Ferguson.

Counsel was not ineffective for failing to object to the Solicitor's cross-examination of Kenae as the record clearly establishes that the Solicitor laid a proper foundation before impeaching Kenae with extrinsic evidence of a prior inconsistent statement through the reply testimony of his investigator. In support of his argument to the contrary, Resp.-Pet. mistakenly relies on State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999), a case which involved a violation of the defendant's confrontation rights. Sierra is inapposite as no violation of Resp.-Pet.'s confrontation rights occurred in the instant case. Resp.-Pet. also relies on Holman v. State, 381 S.C. 491, 674 S.E.2d 171 (2009), a case in which counsel was held ineffective for failing to object to evidence that was inadmissible, irrelevant, and prejudicial. Holman provides no support for the conclusion counsel was ineffective as Resp.-Pet. has failed to identify any inadmissible or irrelevant evidence counsel failed to object to. To the extent Resp.-Pet. contends counsel was failed to properly address the prior interview of Kenae and the investigator's reply testimony as to her prior inconsistent statements, these issues are barred from consideration.

Relevant Facts

At trial, Kenae testified she never saw any of the shooting, but after the last shot she ran to where she could see the victim sitting on the ground and Resp.-Pet. standing near her. App. 484; 494; 499. On cross-examination, the Solicitor asked Kenae questions about an April 12, 2005 meeting that took place at her high school between herself, the Solicitor and his investigator in the presence of a school resource officer. App. 493-494; 500-501. Kenae affirmed that she recalled the meeting. App. 501. The Solicitor then asked Kenae if she remembered "telling anyone at that time that [the victim] was on the ground and the gun was beside her and at that point in time [Resp.-Pet.] shot again while she was on the ground." Kenae responded that she did not recall making the statement, but could not admit nor deny whether she made it.

After the defense rested, the Solicitor informed the court that he intended to call his investigator as a reply witness to testify as to statements Kenae made at April 12 interview at the high school that were inconsistent with her testimony. App. 511. He explained the investigator was not present in the courtroom at any time during Kenae's testimony. App. 511. He asserted "efforts were made to have the school contact the parent" the day before the interview because he did not have her contact information. App. 514. He argued that this was reply testimony and the investigator's notes were developed as part of their independent investigation, and these notes were provided to the defense prior to Kenae's testimony. App. 514-515.

Defense counsel presented a "three-fold" objection to the investigator's testimony on the following grounds: the manner in which the interview was conducted with a minor; the investigator's notes from the interview were provided to the defense just this morning before Kenae's afternoon testimony; and the investigator's violation of the sequestration order. App. 512-513. The trial court overruled each objection. Although the judge noted he "would be concerned as a parent if the same happened to my child," the judge stated he was "not aware of any legal requirement that the parents of the child be given notice by the Solicitor's office."

App. 515. As to the investigator's notes, the court found "under Rule 5 those are specifically not subject to disclosure." App. 515-516. Although finding the investigator "technically" violated the court's sequestration rule, the court ruled that he could "testify to anything that the witness testified to while he was not present in the courtroom." App. 516.

The investigator then testified that he took notes during the April 12, 2005 interview during which Kenae indicated that while she could not initially see the shots being fired, "she went over to where she could see." App. 517-520. Kenae stated she then saw the victim on the ground with her gun beside her, and that Resp.-Pet. "was standing over her and shot again while [the victim] was on the ground." App. 520.

At the evidentiary hearing, counsel testified the investigator's testimony "gutted" their case and greatly influenced the jury. App. 856; 878. When asked why he did not object when the Solicitor "interject[ed] the facts as he remembers them" on cross examination, counsel stated "he was stunned by the whole thing" and "I should have objected." App. 864.

Order Denying Relief

The PCR court found counsel was not ineffective for failing to make contemporaneous objections during Kenae's testimony. App. 934-935. The PCR court found that although counsel admitted he failed to object to the Solicitor's questions, counsel explained he was not given notice of the meeting at Kenae's school, was provided with notes from the meeting on the morning of Kenae's testimony, and was not prepared to respond to this information that was not disclosed by the Solicitor. App. 934. Thus, the PCR court stated it "cannot find trial counsel ineffective when he was blindsided by the Solicitor and was on the receiving end of prosecutorial misconduct ...." App. 935.

Analysis

The record establishes the Solicitor laid a proper foundation for the introduction of evidence of Kenae's prior inconsistent statement. The admission of extrinsic evidence of a prior inconsistent statement is governed by Rule 613(b), SCRE:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

See also State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 636 (Ct. App. 2003) ("Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement").

Here, the Solicitor advised Kenae of the substance of the prior inconsistent statement, the time it was allegedly made, and the people the statement was made to. The Solicitor then gave Kenae the opportunity to explain or deny the statement, and Kenae did not admit making the statement. Over counsel's objection, the trial court allowed the Solicitor to present extrinsic evidence of the prior inconsistent statement through the reply testimony of the investigator. Accordingly, no basis existed for an objection to the Solicitor's cross-examination of Kenae or subsequent introduction of her prior inconsistent statement as this evidence was properly introduced in accordance with Rule 613(b), SCRE.

Resp.-Pet. relies on State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999) in support of his assertion counsel should have objected to the Solicitor's cross-examination in which "the Solicitor blurred the lines between attorney and witness in violation of the Confrontation Clause with the Solicitor's interjection of his recollection of the meeting." In Sierra, the Court of Appeals held the defendant's confrontation rights were violated when the

prosecutor impeached a defense witness with a prior inconsistent statement allegedly made to the prosecutor. On direct, the witness testified the marijuana was his and Sierra had no knowledge of it. Id., 337 S.C. at 371, 523 S.E.2d at 188. On cross-examination, the prosecutor asked whether the witness previously told the prosecutor in a pretrial conference, "It wasn't mine. It belonged to the other guy." Id. at 371, 523 S.E.2d at 188-89. The witness denied the statement. Id. at 372, 523 S.E.2d at 189. The prosecutor did not withdraw to testify as to the prior inconsistent statement and never presented any independent evidence to establish it before arguing her version of the statement to the jury in her closing argument. Id.

The Court of Appeals concluded the trial court erred in allowing the prosecutor to impeach a defense witness "by publishing allegedly first hand knowledge of prior inconsistent statements, when there was no factual basis in the record at time of the asking, and **no extrinsic evidence was available prove them in the event of denial**." Id. at 379, 523 S.E.2d at 192 (emphasis added). The court found the prosecutor's statements "blurr[ed] the lines between attorney and witness on cross-examination" and "interjected facts in a manner which **did not allow for cross-examination to test their credibility**." Id. at 377-78, 523 S.E.2d at 191-92 (emphasis added). Noting "the right to cross-examine a prosecuting witness is...essential to a fair trial as guaranteed by the Sixth Amendment and the due process clause of the Fourteenth Amendment," the court concluded the prosecutor's conduct denied the defendant the right to meaningful cross-examination. Id. at 378-79, 523 S.E.2d at 192.

The instant case is distinguishable from Sierra. Here, the Solicitor had extrinsic evidence available in the form of the investigator's testimony to prove the prior inconsistent statement in the event of denial, and did in fact prove the inconsistent statement. Furthermore, no violation of Resp.-Pet.'s confrontation rights occurred as Resp.-Pet. had the opportunity to cross-examine the investigator as to the prior statement to test the credibility of this evidence. Contrary to Resp.

Pet.'s assertion, Sierra actually supports the conclusion that the Solicitor's cross-examination and impeachment of Kenae was proper, and there is no evidence in the record to indicate a contemporaneous objection to these matters would have been sustained by the trial court.

Likewise, Resp.-Pet.'s reliance on Holman v. State, 381 S.C. 491, 674 S.E.2d 171 (2009) is misplaced as that case is factually distinguishable from the instant case. In Holman, the South Carolina Supreme Court held trial counsel was ineffective for failing to object to the admission of a handgun into evidence that was not related to the offenses the petitioner was charged with. The Court found "[t]he admission of this irrelevant and prejudicial evidence undermines confidence in the outcome of the trial." Id. at 493, 674 S.E.2d at 172.

Here, Resp.-Pet. has failed to identify any evidence that was irrelevant or inadmissible, or any comments of the Solicitor that were actually improper, that counsel failed to object to. For the reasons stated above, counsel was not deficient for failing to make futile objections to the Solicitor's cross-examination and impeachment of Kenae.

In any event, Resp.-Pet. suffered no prejudice as the investigator's testimony as to Kenae's prior inconsistent statement was cumulative to evidence already admitted at trial. Kimberly testified that after the shooting, Resp.-Pet. told Kenae, "you saw it happen," and Kenae responded, "yeah Dad, I saw it." App. 139.

Furthermore, any error on counsel's part was harmless in light of the overwhelming evidence of Resp.-Pet.'s guilt otherwise presented. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). The evidence in this case showed the victim was shot three times, but no evidence indicated the victim ever fired her weapon or attempted to but misfired. App. 425; 432. Resp.-Pet. admitted to shooting the victim at the scene and in his

subsequent statement to police. App. 311; 365-367. Kimberly testified the Resp.-Pet. seemed agitated and aggravated prior to the shooting, App. 151, and she heard him yell to his children, "no, don't try to stop [me]." App. 120-121. Although Resp.-Pet. gave a statement indicating the victim pointed her gun at him, evidence established Resp.-Pet. made no attempt to retreat to the safety of his home or elsewhere. Instead, he ran to his vehicle and retrieved his pistol, then proceeded back toward the victim as he fired. App. 125; 128; 136; 960. Kenae testified Resp.-Pet. was angry when he retrieved the gun from his car. App. 500. Kimberly testified Resp.-Pet. said "I am tired of you bitch" and argued with the victim before any shots were fired. App. 151; 197. Both Kimberly and Kenae testified there was a pause between the second and third shots, and Kenae further testified that she heard more arguing between Resp.-Pet. and the victim during this pause before the final shot was fired. App. 128; 499-500.

Finally, to the extent Resp.-Pet. alleges counsel was ineffective for failing to adequately address the prior interview of Kenae or the reply testimony of the investigator establishing her prior inconsistent statements, these issues are barred from review. This is because these issues were either raised and ruled on at trial, or could have been raised on direct appeal. See Roscoe, supra ("Allegations of trial court error are not cognizable in PCR"); Cummings v. State, 274 S.C. 26, 27, 260 S.E.2d 187, 188 (1974) ("An application for Post-Conviction Relief is not a substitute for an appeal and errors which could have been reviewed on appeal may not be asserted for the first time, or reasserted in Post-Conviction proceedings"). The facts supporting this argument are fully set forth in Pet.-Resp.'s Petition for Writ of Certiorari, pages 18-19, and Reply to Return to Petition for Writ of Certiorari, pages 3-5.

VI. The PCR court properly found counsel was not ineffective regarding the use of evidence to establish possible defenses and his handling of the jury instructions.

Resp.-Pet. failed to meet his burden of proving counsel was ineffective in his handling of the jury instructions. Counsel was not deficient for failing to request a self-defense instruction that was narrowly tailored to the facts of this case – i.e., by requesting an instruction on character, prior difficulties, or duty to wait – where the trial court specifically instructed the jury on duty to wait, where the record indicates counsel requested an instruction on prior difficulties, and where no evidence of character or prior difficulties was presented at trial. Furthermore, counsel was not ineffective for failing to request an instruction on fear for purposes of voluntary manslaughter where Resp.-Pet. failed to cite any legal authority indicating such a specific instruction was necessary, no evidence was presented at trial indicating Resp.-Pet. shot the victim out of fear, and the trial court otherwise adequately instructed the jury on voluntary manslaughter. The allegation counsel was deficient for failing to object to a portion of the self-defense instruction on the ground it improperly shifted the burden of proof is without merit as the record establishes the instruction was not improper. Even if counsel was somehow deficient in his handling of the jury instructions, Resp.-Pet. suffered no prejudice as the trial court's instructions as a whole adequately covered the law concerning the reasonable doubt standard, self-defense, and voluntary manslaughter.

Likewise, Resp.-Pet. failed to meet his burden of proving counsel was ineffective in failing to utilize certain evidence to establish self-defense, defense of others, and voluntary manslaughter. The assertion counsel failed to present evidence of the victim's toxicology results is directly refuted by the record. The only evidence Resp.-Pet. presented at the evidentiary hearing relevant to character, prior difficulties, fear, and Resp.-Pet.'s knowledge of the victim's prescription drug usage was Resp.-Pet.'s own testimony as to what he would have testified to at trial as well as the testimony of Kent Jones. For the reasons stated in Arguments II and III, supra, counsel articulated valid, strategic reasons for not calling either Resp.-Pet. or Kent Jones at trial.

Furthermore, counsel articulated a valid reason for not going into the character of Resp.-Pet. Regardless, Resp.-Pet. suffered no prejudice as he failed to present any evidence counsel failed to utilize which would have created a reasonable probability of a different result at trial, and any error on counsel's part was harmless in light of the overwhelming evidence of Resp.-Pet.'s guilt.

Relevant Facts

Resp.-Pet. introduced into evidence a copy of counsel's requests to charge from trial. App. 977-981. This exhibit contains a section expressly requesting a charge concerning prior difficulties, but the section has been crossed out with a pen. App. 978-979. Counsel testified he thinks he crossed this section out because the trial judge refused his request to give this charge. App. 879. Counsel testified he did not request an instruction on character because he does not believe any character evidence came out at trial. App. 880. Furthermore, counsel testified he "was leary" of going into Resp.-Pet.'s character because this could have opened the door to evidence of his prior convictions for criminal domestic violence and assault and battery of a high and aggravated nature. App. 875. As for the character of the victim, counsel testified he "should have worked a lot harder in that regard." App. 875. Resp.-Pet. also introduced into evidence a copy of the victim's toxicology report. App. 974.

Order Denying Relief

The PCR court found counsel was not ineffective for failing to request a self-defense instruction that was narrowly tailored to the facts of this case, or for failing to request instructions on fear, prior difficulty, duty to wait, and good character. App. 936. Noting counsel's testimony that there was a conference in chambers in which he submitted specific requests to charge to the trial court, the Court found counsel was not deficient and Resp.-Pet. was not prejudiced since counsel made specific requests to charge and submitted them for the trial court's review. As to the allegation counsel failed to object when the trial court improperly

shifted the burden during the self-defense instruction, the PCR court stated it "thoroughly reviewed the instruction at issue" and found counsel was not ineffective.

Furthermore, the PCR court found counsel was not ineffective for failing to more effectively utilize testimony, exhibits, and case law in the areas of self-defense, defense of others, and voluntary manslaughter. App. 935. Based upon its review of the record, the PCR court found counsel's admissions that he should have done more did not amount to deficient performance, and further found Resp.-Pet. failed to show resulting prejudice.

Analysis

"The law to be charged is determined by the evidence presented at trial." Brunson v. State, 324 S.C. 117, 119, 477 S.E.2d 711, 713 (1996). To show that counsel was deficient for failing to request a certain jury charge, an applicant must show that he was entitled to such charge under the evidence presented at trial. See Id. (finding counsel deficient for failing to request mere presence charge where "there was evidence to support a mere presence charge ... and trial counsel should have requested such a charge"). Even if counsel was deficient in his handling of the jury instructions, an applicant still must show prejudice. See Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (finding applicant was not prejudiced by counsel's failure to request alibi "because, in light of the overwhelming evidence, there was not a reasonable probability that, had the charge been given, the outcome of trial would have been different"); State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied").

Resp.-Pet. argues counsel should have requested specific charges on prior difficulty, character, and duty to wait with regards to self-defense. When charging a jury on the law of self-defense, trial courts have been instructed "to consider the facts and circumstances of the case at

bar in order to fashion an appropriate charge." State v. Fuller, 297 S.C. 440, 443, 337 S.E.2d 328, 330 (1989).

As to Resp.-Pet.'s assertion counsel should have requested a duty to wait charge, the trial court specifically instructed that "a person about to be attacked **is not bound to wait** until his adversary gets the drop on him or gets the upper hand before he takes steps to prevent those occurrences from taking place.... In other words, there is **no duty to retreat** if by doing so one would place himself in further danger...." App. 602. Accordingly, this allegation is directly refuted by the record.

To the extent Resp.-Pet. alleges counsel failed to request a charge on prior difficulty, the record indicates counsel requested such a charge, but the trial court denied the request. Thus, this allegation is also refuted by the record. Furthermore, no evidence such as prior threats or acts of violence by the victim against Resp.-Pet. was presented at trial warranting a charge on prior difficulties. See, e.g. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (holding defendant was entitled to charge on the relevance of prior difficulties where evidence established, *inter alia*, a prior instance in which victim pointed a rifle at defendant); State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000) (holding trial court erred in refusing to instruct jury it could consider prior difficulties where evidence established prior instance in which victim pulled gun on defendant).

Likewise, Resp.-Pet. would not have been entitled upon request to instructions as to his good character or the bad character of the victim. As the Court stated in State v. Harrison, 343 S.C. 165, 170, 539 S.E.2d 71, 73 (2000):

> Generally, where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant.

In the instant case, no evidence was presented concerning either the good character of Resp.-Pet. or the bad character of the victim. Therefore, counsel was not deficient for requesting any such charges.

Relying on State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010), Resp.-Pet. also asserts counsel was ineffective for failing to request a specific instruction on fear as it relates to voluntary manslaughter. The issue in Starnes was whether the trial court erred in refusing to give an instruction on voluntary manslaughter where the appellant testified at trial that he shot the two victims out of fear. Starnes did not address the issue of when a defendant is entitled, if at all, to an instruction on fear as it relates to voluntary manslaughter. Furthermore, no evidence was presented in the instant case similar to that of the appellant's testimony in Starnes indicating the defendant was personally in fear of the victims when he shot them. Thus, Starnes provides no support for Resp.-Pet.'s assertion and is inapposite on the issue of whether Resp.-Pet. was entitled to an instruction on fear. Regardless, the trial court in the instant case otherwise adequately instructed the jury on voluntary manslaughter. See App. 596-599.

Resp.-Pet.'s assertion counsel was ineffective for failing to object to a portion of the trial court's self-defense instruction on the ground it improperly shifted the burden is without merit. "[C]urrent law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998). "When self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." State v. Addison, 343 S.C. 290, 294, 540 S.E.2d 449, 451 (2000). In order to prove prejudice from counsel's failure to object to improper jury instructions, an applicant must show that, "viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that

the jury applied the improper instruction in [a] way that violations the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009). "A jury charge is correct if it contains the correct definition of the law when read as a whole." State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002).

. The portion of the trial court's self-defense instruction Resp.-Pet. challenges reads as follows:[3]

> If the appearance to the defendant at the time of his actions that were made were such that he could not reasonably and safely avoid his actions and a person of ordinary firmness and courage would have arrived at that conclusion and if the other elements are present then he should be found not guilty if he is free from fault in brining on the immediate difficulty.

App. 602. Nothing in above quoted language improperly shifted the burden to Resp.-Pet. to prove the elements of his self-defense claim.

Regardless, Resp.-Pet. cannot prove how he was prejudiced from counsel's failure to object to the above instructions since the charge as a whole adequately conveyed the State's burden of proof as to Resp.-Pet.'s self defense claim:

> Now, **there is no burden of proof on the defendant to establish self-defense but rather the burden is on the State to prove beyond a reasonable doubt that self-defense did not exist.** If the State cannot prove it then find the defendant not guilty, so then if you have a reasonable doubt as to the defendant's guilty after considering all of the evidence including the evidence of self-defense then you must find the defendant not guilty....

App. 603 (emphasis added). Furthermore, the trial court repeatedly and thoroughly instructed the jury that Resp.-Pet. was entitled to the presumption of innocence, that the State had the burden of proving Resp.-Pet.'s guilt as to all elements of the charge beyond a reasonable doubt, and that Resp.-Pet. "is not required to prove his innocence ...." App. 582-585. Accordingly, counsel was not ineffective for failing to object to the trial court's instruction on self-defense.

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[3] See Resp.-Pet.'s Petition for Writ of Certiorari, p. 22 (referencing App. 206, lns. 9-15).

In addition, Resp.-Pet. argues counsel was ineffective for failing to present evidence of character, prior difficulties, fear, the victim's toxicology results, and Resp.-Pet.'s knowledge of the victim's prescription drug usage. In order to show that counsel was ineffective for failing to call a witness or present certain evidence at trial, the applicant must produce or otherwise introduce the witness' testimony or other evidence in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). In order to establish prejudice, the applicant must show a reasonable probability that, but for counsel's failure to present such favorable testimony or evidence, the result of trial would have been different. See Jackson v. State, 329 S.C. 345, 351, 495 S.E.2d 768, 771 (1998) (finding no prejudice from counsel's failure to call witness where applicant failed to show witness' testimony could have provided additional information to what was otherwise admitted at trial to assist in defense).

To the extent Resp.-Pet. asserts counsel failed to present evidence of the victim's toxicology results, the record shows counsel elicited direct evidence of the victim's toxicology results and the effects of the drugs found in her system on cross-examination of Dr. Sexton. See App. 263-267. Accordingly, this allegation is directly refuted by the record.

The only evidence Resp.-Pet. presented at the evidentiary hearing relevant to character, prior difficulties, fear, and Resp.-Pet.'s knowledge of the victim's prescription drug usage was the testimony of Resp.-Pet. himself and that of Kent Jones. For the reasons fully stated in Arguments II and III, supra, counsel articulated valid, strategic reasons for his decision not to call Resp.-Pet. or Kent Jones at trial. See Stokes, supra. The reasons counsel gave for not calling Resp.-Pet. or Jones, especially as it pertains to the potential risks associated with their testimony, far outweighed any potential benefit. Furthermore, counsel articulated a valid reason for his

decision not to go into the Resp.-Pet.'s character based on concerns this would open the door to evidence of Resp.-Pet.'s prior record.

Even if counsel was deficient for failing to present any of the aforementioned evidence, Resp.-Pet. failed to show resulting prejudice. Resp.-Pet.'s testimony at the evidentiary hearing was almost entirely cumulative to the evidence presented at trial. Although Resp.-Pet. testified he was in fear of the victim when he shot her, App. 775-776; 824, this evidence alone is insufficient to create a reasonable probability of a different result at trial. In addition, the only evidence presented as to prior difficulties with the victim came from Kent Jones' testimony that he had prior disputes with her over access to the shared driveway. App. 756-757. This testimony did nothing to establish prior difficulties as between Resp.-Pet. and the victim, or to establish that the victim had a propensity for violence. Therefore, this testimony was not relevant to Resp.-Pet.'s claim of self-defense or voluntary manslaughter. Furthermore, for the reasons fully stated in Argument V, supra, Resp.-Pet. suffered no prejudice in light of the overwhelming evidence of his guilt.

VII. The PCR court properly found counsel was not ineffective for failing to make a contemporaneous objection to the implied malice instruction.

Counsel was not ineffective for failing to object to the trial court's instruction that malice may be inferred from the use of a deadly weapon because State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which established the impropriety of such a charge, was issued after Resp.-Pet.'s trial and that decision expressly indicates its ruling does not apply retroactively or to convictions challenged in a PCR action.

Order Denying Relief

The PCR court found counsel was not ineffective in this regard. App. 936. Noting that the Supreme Court in Belcher specifically stated its ruling will not apply to convictions

challenged on post-conviction relief, the PCR court this claim "is not a proper basis for granting post conviction relief and must fail."

Analysis

In Belcher, the Court held that a trial court errs in instructing a jury that malice may be inferred from the use of a deadly weapon "where evidence is presented that would reduce, mitigate, excuse or justify the homicide." Id., 385 S.C. at 611, 685 S.E.2d at 809. The Court found the erroneous instruction in that case was not harmless because evidence of self-defense was presented at trial. Id. at 612, 685 S.E.2d at 809-10. However, the Court unequivocally declared that the ruling in Belcher would not apply retroactively or to convictions challenged on post-conviction relief:

> Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved. **Our ruling, however, will not apply to convictions challenged on post-conviction relief.**

Id., at 612-13, 685 S.E.2d at 810 (emphasis added) (citations omitted).

In light of the above declaration by the Court, it is impossible for counsel to have been ineffective for failing to object to the malice instruction. Resp.-Pet. was convicted on July 22, 2005, well before Belcher was issued on October 12, 2009. Furthermore, this Court has repeatedly held that counsel is not required "to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); see also Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 765 (1993).

VIII. The PCR court properly found appellate counsel was not ineffective for failing to raise certain issues on appeal.

Resp.-Pet. argues appellate counsel was ineffective for failing to raise on appeal "an argument regarding the testimony of Kenae Ferguson and Investigator Davenport," but fails to identify the specific argument that should have been raised. As for any issues relevant to these matters that were preserved for review, the record and case law indicate any attempt to raise these issues on appeal would have been frivolous. In any event, Resp.-Pet. suffered no prejudice as he cannot establish that, but for counsel's failure to raise these issues, his conviction or sentence would have been overturned. To the extent Resp.-Pet. argues appellate counsel failed to argue that the trial court did not conduct a prejudice analysis when denying Resp.-Pet.'s motion for a mistrial, this issue is without merit as the Court of Appeals expressly held the trial court's curative instruction cured any prejudice.

Relevant Facts

At the evidentiary hearing, Resp.-Pet. testified the issue regarding the interview with Kenae and the impeachment of her testimony should have been raised on appeal. App. 832. Counsel testified he thought the issue of the investigator's violation of the sequestration order and the issue regarding the disclosure of the interview with Kenae would have been raised on direct appeal. App. 867.

Order Denying Relief

The PCR court held Resp.-Pet. "failed to show that appellate counsel's performance was deficient under prevailing professional norms and that he was prejudiced as a result ...." App. 940. Although acknowledging Resp.-Pet.'s allegation that appellate counsel "failed to raise an argument regarding the testimony of Kanae Ferguson and Investigator Davenport on appeal," the PCR court found this instead was an issue of prosecutorial misconduct. App. 941. As to the allegation appellate counsel failed to argue that the trial court did not conduct a prejudice

analysis when denying Resp.-Pet.'s motion for a mistrial, the PCR court found the issue was fully addressed by the appellate court and thus must fail.

Analysis

"A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel." Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985)). An applicant who alleges appellate counsel was ineffective for failing to raise some issue on appeal must show that "failure to raise [the] issue was objectively unreasonable and that, but for this failure, [the applicant's] conviction or sentence would have been reversed." Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (citation omitted). "However, counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome." Bennett, 383 S.C. at 309, 680 S.E.2d at 276 (citation omitted).

Although Resp.-Pet. argues counsel failed to raise an issue concerning the testimony of Kenae Ferguson and Investigator Davenport, Resp.-Pet. failed to specifically identify the arguments appellate counsel should have made. Pet.-Resp. submits this allegation should be dismissed on this basis alone. Resp.-Pet. is essentially asking the Court to examine the record and find an issue appellate counsel could have raised on appeal.

Regardless, the only issues concerning the testimony of Kenae Ferguson or Investigator Davenport that were preserved for appeal came from counsel's objection to the investigator's reply testimony on the following grounds: the manner in which the interview of Kenae was conducted; the disclosure of the investigator's notes the morning before Kenae's testimony; and the investigator's violation of the sequestration order. App. 512-513. All of these objections were overruled by the trial court. App. 515-516. As to each of the above issues raised by trial counsel, Resp.-Pet. cannot prove that appellate counsel's failure to raise the issues was

unreasonable, or that his conviction or sentence would have been reversed but for appellate counsel's failure to raise these issues. There is no relevant legal authority to support the conclusion that the manner in which the interview of Kenae was conducted was improper and that the trial court erred in overruling this objection. For the reasons fully stated in Pet.-Resp.'s Petition for Writ of Certiorari, pages 19-22, the Solicitor's disclosure of the investigator's notes fully comported with the rules of discovery and the law governing disclosure. Any attempt to raise either of these issues on appeal would have been frivolous. Thus, appellate counsel's failure to raise these issues was not unreasonable.

As to the investigator's violation of the sequestration order and subsequent reply testimony, "[t]he decision of whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial judge." State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). "The purpose of the exclusionary rule is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial ...." State v. Huckabee, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010). Furthermore, "reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief." Id. at 242, 694 S.E.2d at 786; see also State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009) (holding trial court did not abuse its discretion in allowing State witness subject to a sequestration order to testify after being present during the testimony of other witnesses where, *inter alia*, the witness was only present for a portion of the testimony of the other witnesses that was not relevant to his own testimony). Here, there is no evidence indicating the trial court abused its discretion in permitting the investigator to testify as a reply witness. The propriety of the trial court's decision is underscored by the fact that the investigator was not present during Kenae's testimony which he testified in reply to.

For the reasons stated above, none of the aforementioned issues concerning the testimony of Kenae or the investigator stood a reasonable likelihood of success on appeal. Therefore, Resp.-Pet. suffered no prejudice as he cannot establish that, but for appellate counsel's failure to raise these issues, his conviction or sentence would have been overturned.

Finally, the allegation appellate counsel was ineffective for failing to argue that the trial court failed to conduct a prejudice analysis is entirely without merit as the Court of Appeals fully considered the issue and concluded the court's curative instruction cured any prejudice.

CONCLUSION

For the reasons stated above, this Court should reverse the PCR Court's Order and grant the Petition for Writ of Certiorari.

Respectfully submitted,

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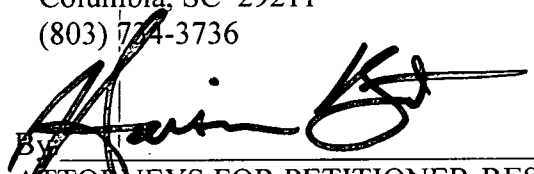

By: _____
ATTORNEYS FOR PETITIONER-RESPONDENT

June 6, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Laurens County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

NATHANIEL K. FERGUSON,JR., 310367

Respondent-Petitioner,

STATE OF SOUTH CAROLINA

Petitioner-Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari Pursuant on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
Post Office Box 12725
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 6TH day of June, 2012.

CHANDRA E. YOUNG
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