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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Certiorari to Charleston County
Court of Common Pleas
The Honorable Thomas A. Russo, Post-Conviction Relief Judge

Appellate Case No. 2018-002249

ROBERT LEE WRIGHT, #358939,

PETITIONER,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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STATEMENTS OF ISSUES ON CERTIORARI

Petitioner's Statement of Issues of Certiorari

- I. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to testimony regarding toxicology testing and results from the pathologist where the pathologist did not perform the actual toxicology tests and acted as a mere conduit for the results?
- II. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to the state's questioning of Petitioner, which pitted his testimony against the testimony of the state's key eyewitnesses, where the only evidence the state presented to contradict Petitioner's testimony that he acted in self-defense was from those eyewitnesses, making credibility critical?
- III. Did trial counsel provide ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments by failing to object to inaccurate and misleading portions of the jury instructions?

Respondent's Counterstatement of Issues of Certiorari

- I. Did the post-conviction relief court properly find Petitioner failed to establish trial counsel was constitutionally ineffective for failing to object to testimony regarding toxicology testing where Petitioner cannot establish he suffered any prejudice and where the toxicology results were ultimately irrelevant to the central issues of his case and had no impact on his defense strategy?
- II. Did the post-conviction relief court properly find Petitioner failed to establish trial counsel was constitutionally ineffective for failing to object to pitting of several eyewitnesses to the altercation where Petitioner cannot establish prejudice because the underlying facts of the altercation were not in dispute and this had no bearing on the outcome of the trial?
- III. Did the post-conviction relief court properly find Petitioner failed to establish trial counsel was constitutionally ineffective for her handling of the jury instructions where Petitioner was not prejudiced when trial counsel failed to object to portions of jury instructions where the evidence did not support the elements of self-defense?

STATEMENT OF THE CASE

Robert Lee Wright (Petitioner), is confined in the South Carolina Department of Corrections. During its June 2010 term, the Charleston County Grand Jury indicted Petitioner for murder (2010-GS- 10-6153). App. 1282-1283. Petitioner was represented by Lorelle Proctor and Alicia Penn (Counsel). Benjamin Simpson and Jessica Baldwin of the Ninth Circuit Solicitor's Office prosecuted the case. On February 24, 2014, Petitioner proceeded to a jury trial before the Honorable Kristi L. Harrington. After presentation of both the State's and defense's cases, during the jury charge, Judge Harrington instructed the jury concerning murder, voluntary manslaughter, involuntary manslaughter, and self-defense. App. 863 – 869. At the conclusion of trial, the jury found Petitioner guilty of murder. App. 876. Judge Harrington sentenced Petitioner to forty years' imprisonment. App. 884; 1284. On February 27, 2014, Petitioner filed a motion to reconsider sentence. App. 887-888. On that same date, Petitioner filed a motion for new trial. App. 889. By order filed March 25, 2014, Judge Harrington denied both of Petitioner's post-trial motions. App. 890.

Petitioner filed a notice of appeal and was represented by Appellate Defender Susan B. Hackett (Appellate Counsel) of the South Carolina Commission on Indigent Defense – Division of Appellate Defense. On April 7, 2015, Appellate Counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). App. 891-907. On March 3, 2016, the Court denied Appellate Counsel's motion to be relieved and directed the parties to brief the following issue:

Whether the trial court erred in ruling the defenses of accident and self-defense are mutually exclusive and whether this issue is preserved for appellate review.

App. 908. On March 29, 2016, Appellate Counsel filed a brief addressing the question presented by the Court. App. 909-928. On January 11, 2017, the Court of Appeals affirmed Petitioner's conviction, finding trial counsel abandoned her request for a jury instruction on accident. App.

955-956; State v. Wright, 2017-UP-005 (S.C. Ct. App. filed Jan. 11, 2017). The remittitur was issued on January 27, 2017. App. 957.

On March 31, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 958-1194. Subsequently, Petitioner, through counsel, filed amendments to his PCR application. App. 1195-1196. On March 1, 2018, the PCR court convened an evidentiary hearing before the Honorable Thomas A. Russo. App. 1212. Senior Assistant Deputy Attorney General Megan Jameson appeared on behalf of the State. App. 1212. James K. Falk, Esquire, represented Petitioner. App. 1212. By order filed December 6, 2018, Judge Russo denied Petitioner relief and dismissed the PCR application with prejudice. App. 1256-1281.

Petitioner filed a notice of appeal from the PCR court's dismissal on December 18, 2018. On July 8, 2019, Petitioner filed a petition for writ of certiorari requesting review of four issues including the three issues addressed in this Brief and one additional issue:

Did trial counsel provide ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments by abandoning her request for a jury instruction on the defense of accident where the evidence supported such an instruction?

On September 29, 2021, this Court denied the petition for writ of certiorari on additional issue above and granted review of the remaining three issues addressed within. Petitioner filed his Brief of Petitioner on November 21, 2021. This brief follows.

STATEMENT OF FACTS

During the early evening hours of June 10, 2010, Petitioner Robert Wright assaulted Christopher Jenkins (Victim), by repeatedly punching and stomping him while he lay on the ground. App. 551, 552, II; App. 581, II. Victim's two nephews and one of their friends witnessed the beating. App. 548, II. 3-15; App. 578, II. 8-18; App. 592, II. 19-25. The next day, Victim died as a result of the attack. App. 716, II. 16. The pathologist concluded that cause of death was blunt force trauma and noted the victim had ten broken ribs and numerous external injuries. App. 705, II. 4-8.

On June 10, 2010, Victim's two nephews, thirteen-year-old Robert and fourteen-year-old Jocqui, were playing with a friend, thirteen-year-old Maurice, at their home. App. 543, II. 10 – App. 544, II. 1. At that point in time, Victim and his two nephews lived with Mary Jenkins, Victim's mother. App. 541, II. 21 – App. 542, II. 25. While the children were playing, Tamika Jenkins, the mother of Robert and Jocqui and sister of Victim, asked the boys to go to the store for her. App. 544, II. 3. It was getting dark so Victim decided to walk with the boys. App. 545, II. 3. The three boys were walking a few feet in front of Victim down the sidewalk. App. 547, II. 2-3. When Robert turned around to make sure Victim was still following them he saw a car pull up. App. 547, II. 3-10.

All three boys witnessed Petitioner get out of the vehicle and walk towards Victim. App. 548, II. 3-15; App. 578, II. 8-18; App. 592, II. 19-25. Before Victim could turn around completely, Petitioner picked up Victim and "body slammed" him to the ground. App. 550, II. 3-5. Petitioner then began to punch Victim in the face, between five and ten times. App. 551, II. 11-25. He then forcefully stomped Victim's body with his feet, between five and ten times. App. 552, II. 1-5. During the assault, Victim did not fight back but "was just laying there on the ground". App. 581,

II. 5. Victim did not speak to or act violent towards Petitioner leading up to or during the assault. App. 554, II. 2-17; App. 584, II. 25 – App. 585, II. 6. Robert yelled at Petitioner to stop attacking his uncle. Petitioner responded to Robert, “shut your retarded ass up and come do something about it”. App. 595, II. 5-7. Petitioner then walked back to his car and drove away. App. 581, II. 11-15.

After Petitioner left, Victim stood up and attempted to walk with the boys the remainder of the way to the store. App. 553, II. – App. 554, II. 5. Victim was unable to continue so the boys went on to the store without him. App. 555, II. 6-19. Minutes later, both Victim and the boys returned home. App. 556, II. 1-4. The family watched as a bleeding and bruised Victim walked upstairs, holding his side in pain, to rest. App. 556, II. 7-21; App. 609, II. 21-24. Sounds of moaning could be heard by everyone downstairs. App. 556, II. 24; App. 611, II. 20-24. Robert explained to Mary, Victim’s mother, that Petitioner had just attacked Victim and had yelled at Robert. App. 626, II. 15. Mary, being a concerned mother and grandmother, went to Betty’s house to talk about Petitioner and the incident. App. 637, II. Betty did not know about the incident and Petitioner was not there when Mary arrived. App. 639, II. 21.

The next day, June 11, 2010, Victim was still in excruciating pain and spent the day lying in bed. App. 612, II. 2-12. Petitioner and Betty came over to Victim’s house to speak with Mary, not about the assault but the statement to Robert. App. 612, II. 16. Tamika was present and felt Petitioner was not concerned about Victim. App. 613, II. 4. Petitioner told Tamika, “he was tired of [Victim] disrespecting his mother and he would have did it again if he had to.” App. 615, II. 15-17. Petitioner and Betty left soon thereafter.

A couple of hours later, Tamika decided to call EMS after her other brother went upstairs to check on Victim and witnessed Victim having two seizures. App. 614, II. 9-20. At approximately 3:00 p.m., an ambulance arrived at the home and transported Victim to the hospital.

App. 633, II. 21. Victim died at 5:54 p.m. that day. App. 716, II. 16.

On June 12, 2010, Detective Barry Goldstein of the Charleston Police Department responded to Mary's home to investigate Victim's death. App. 644, II. 2. He spoke with Robert and Maurice about the incident and asked if they could identify the man that had attacked Victim. App. 559, II. 4-22; App. 597, II. 10-25. They both positively identified Petitioner out of a photo lineup. App. 559, II. 4-22; App. 597, II. 10-25. After interviewing Robert and Maurice, the children took Detective Goldstein to the incident location. App. 646, II. 5. Detective Goldstein observed blood spatter and drops where Victim had been assaulted. App. 646, II. 20. Officer Randall Unterbrink, with the Charleston Police Department Crime Scene Unit, photographed and collected samples of the blood found on scene. App. 670, II. 3-5; App. 672, II. 10. He was able to determine a total of forty-eight blood drops had been left at the incident location. App. 679, II. 21. The blood samples were positively identified as belonging to Victim. App. 727, II. 1. Later that day, Detective Goldstein obtained an arrest warrant for Petitioner. App. 647, II. 23. Detective Goldstein observed Petitioner did not have any bruising or injuries to his body at that time. App. 588, II. 13.

On June 12, 2010, an autopsy was performed on Victim by Dr. Nicholas Batalis. App. 697, II. 3. Dr. Batalis observed multiple injuries when conducting an external examination of Victim's body. App. 697, II. 12. Victim had a laceration to his left eye, a scrape to the lower lip, two scrapes on the left knee, and a large bruise on the upper left side of his chest. App. 697, II. 12-18. During the internal examination of Victim, Dr. Batalis noted that ten of the twelve ribs on Victim's back right side were fractured in a straight line, which could only have occurred by the use of a significant amount of force. App. 698, II. 8-14; App. 700, II. 15. The pathologist conceded that forceful stomping could cause fracturing similar to Victim's injuries. App. 701, II. 15-20. This fracturing caused significant bleeding into the chest cavity and bruising to the right side of his

back. App. 698, II. 15-18. Dr. Batalis's ultimate finding was that Victim's cause of death was blunt force trauma to the chest. App. 705, II. 7-8.

At trial, Petitioner testified to his version of the facts. App. 300–31, II. He claimed he followed Victim so they could talk about Betty. App. 798, II. 14-24. Petitioner got out of his car and called out to Victim. App. 799, II. 7-10. Petitioner testified Victim turned around and put his hands up to fight. App. 799, II. 10-13. According to Petitioner, the two then locked shoulders and Petitioner flipped Victim over onto the ground. App. 784, II. 22-24; App. 785, II. 2-15. Petitioner admitted to intentionally punching Victim three to five times. App. 801, II. 22-25. Petitioner then walked to his car and left the scene. App. 786, II. 2.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the post-conviction relief court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCPP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways.

Strickland, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

Leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); *see also id.* at 380, 811 S.E.2d at 804 (“[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court’s finding If so, an appellate court would necessarily have affirmed the trial court’s [ruling] . . .”).

Similarly, “[a]n ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence.” *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). “If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally ‘unreasonable’ action, nor can it prejudice the defendant against whom the evidence was admitted.” *Id.*; *see Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d

1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

I. The post-conviction relief court properly found Petitioner failed to establish trial counsel was constitutionally ineffective for failing to object to testimony regarding toxicology testing where Petitioner cannot establish he suffered any prejudice and where the toxicology results were ultimately irrelevant to the central issues of his case and had no impact on his defense strategy.

Petitioner contends Counsel was ineffective for failing to object to testimony from Dr. Batalis regarding toxicology testing of Victim and the toxicology results of Victim. Petitioner asserts that because Dr. Batalis did not perform the actual toxicology test, he acted as a mere conduit for the results when he testified to them at trial, and therefore Counsel's failure to object prejudiced Petitioner. To the contrary, the PCR court correctly determined Petitioner was not prejudiced by Counsel's failure to object to the limited testimony regarding the toxicology report because whether Victim was under the influence was irrelevant to the defense's theory of self-defense and/or accident. Further, the testimony did not affect any factor in establishing any element of the crime and therefore Petitioner cannot establish he suffered any prejudice from the testimony.

At trial, Dr. Batalis testified he reviewed the toxicology report and thereafter incorporated the results into his autopsy report. Specifically, Dr. Batalis testified to the following concerning the results of the Victim's toxicology results:

Q. And, Doctor, you mentioned sending off bodily fluids for toxicology purposes. You would get the results back from another trusted source of that toxicology report?

A. Yes. We send these samples to a nationally accredited forensic laboratory. They do the testing. They then provide the results back to us to interpret and incorporate into our report.

Q. And are those results something that you rely upon in making — may be relevant that you rely upon in making your final conclusion?

A. Yes. We definitely consider the toxicology findings in determining our cause or manner of death.

App. 696, II, 14-25.

Q. And what were the results of that toxicology screen of Christopher Jenkins?

A. So we tested blood that- we obtained at the autopsy and it was positive for only three substances. One is a drug called atropine, which is commonly used by EMS or physicians in the emergency room to revive the heart or resuscitate somebody. He also had caffeine in his system, and then the drug called Naprosyn, which is an anti-inflammatory drug. If you've ever taken Aleve, that's what Naprosyn is. Similar to ibuprofen.

Q. So present in his system was a drug commonly used by EMS in treating somebody?

A. EMS and physicians, yes.

Q. Caffeine?

A. Yes.

Q. And something you would get from Aleve?

A. Yes.

Q. Any alcohol in his blood at the time the toxicology report was done?

A. There was no alcohol whatsoever.

Q. Any narcotics such as cocaine, marijuana?

A. No.

Q. The three we discussed were the only results from the toxicology screen?

A. Yes, and just for an idea for the jury, our screen tests for three to 400 different drugs including all the different drugs of abuse such as cocaine, heroin, alcohol, as well as numerous, numerous medications as well.

Q. And none present other than the things you've already testified to?

A. Correct.

When Counsel was questioned at the PCR hearing as to why she did not object to this line of questioning, trial counsel testified the testimony was irrelevant to the defense's theory of self-defense and/or accident. Therefore, she had no reason to object and highlight the testimony to the jury when it was ultimately neutral testimony for both the State and the defense. Counsel additionally testified that she was able to elicit favorable testimony from Dr. Batalis on cross-examination regarding the toxicology report. Counsel agreed Dr. Batalis testified at trial that any alcohol that might have been in the Victim's body approximately twenty-four hours earlier during the altercation would have fully metabolized out of his body by the time of the autopsy. App. 1239. Specifically, during trial, on cross-examination, Dr. Batalis testified that the toxicology results at the time death, would not be indicative of whether there was alcohol in Victim's system at the time of the incident as the incident occurred roughly 18 to 24 hours prior to death¹. App. 716. Therefore, Counsel was effectively able to cross-examine Dr. Batalis at trial and present to the jury that Victim had a drinking issue and the tests done would not have been able to detect whether or not alcohol was in his system at the time of incident. The PCR court agreed, stating: "this testimony was ultimately irrelevant and dispositive to the main issue at hand trial counsel was able to fully cross-examine Dr. Batalis on the toxicology results which resulted in favorable testimony for [Petitioner]." App. 1272.

The PCR court's finding is further supported by testimony elicited from Tamika Jenkins, Petitioner's sister, during trial, that though Petitioner had a problem with alcohol, he was withdrawing from alcohol at the time of the incident. App. 618; 620-621. Additionally, Counsel testified at the PCR hearing, that she retained a pathologist in this case to review the pathology

¹ While testimony was elicited at trial that Victim drank excessively and there was a fatty build up on the liver that was most likely caused by excessive alcohol consumption, there was no alcohol in Victim's body at the time of death. App. 716-717.

report. App. 1235. Counsel stated the retained pathologist did not disagree with anything in the pathology report and agreed death was related to blunt force trauma that led to internal bleeding. App. 1236. Though Counsel testified she investigated and initially believed death could have been caused by something other than the incident, nothing came of her investigation. App. 1236-1237.

The issue of whether or not Victim had alcohol in his system at the time of the incident had no bearing on the result of the trial and was not a factor in establishing any element of the crime. Petitioner's assertion he was acting in self-defense is wholly unaffected by any speculation Petitioner was intoxicated at the time of the incident. Because the testimony presented at trial indicates Petitioner attacked Victim with no provocation, whether or not Victim had alcohol in his system, is inconsequential to both the defense and to the State. Thus, Petitioner can show no prejudice resulting from any alleged deficiency by Counsel because the testimony was ultimately unrelated to Petitioner's case, the testimony was neutral and immaterial to the crime alleged, and importantly, potentially beneficial to Petitioner due its ambiguity.

Petitioner asserts Dr. Batalis acted as a mere conduit at trial when he testified to the results of the toxicology testing done by an external laboratory. At trial, Dr. Batalis testified concerning the procedures and processes he undertakes when conducting an autopsy on a person to determine the cause of death. App. 695-696. Following his explanation regarding the autopsy process, Dr. Batalis testified, "Once that's all done we get the report together and typically produce a report that's usually somewhere between four and six pages, after we are finished." App. 696. During that same line of questioning, Dr. Batalis testified that another lab provides the toxicology testing and results, where after he receives those results, interprets them, and incorporates them into his final autopsy report. App. 696. Dr. Batalis further stated the toxicology findings are considered when determining cause or manner of death. App. 696 – 697. Dr. Batalis as mentioned above, used

these results, as an expert, applying his training and expertise, to produce Victim’s autopsy report—an original product—that was able to be examined and tested through cross-examination. The toxicology report in this case was not created for the sole purpose of being used against Petitioner at trial, nor were the results relevant to the State proving an element of the crime. Petitioner has wholly failed to show how the toxicology testing was done for the purpose of gaining evidence against Petitioner for any purpose other than the completion of the autopsy report.

Petitioner contends Dr. Batalis’s testimony about the toxicology report violates the Confrontation Clause.² While Petitioner cites a number of cases concerning police interrogation, ongoing emergency circumstances, documents prepared specifically for the production of evidence to be used at trial, and parroting testimonial hearsay, the majority of those cases are not applicable to the matter at hand, are dissimilar to this case, and would not preclude Dr. Batalis from testifying about the results of the toxicology report. Further, our Supreme Court in *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013) determined that a document of this nature is non-testimonial. In *Brockmeyer*, the Court analyzed whether a witness reading a computerized chain-of-custody log violated the Confrontation Clause and was impermissibly testimonial. Significant to the case *sub*

² “The Sixth Amendment’s Confrontation Clause guarantees that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’” *State v. McCray*, 413 S.C. 76, 90, 773 S.E.2d 914, 921–22 (Ct. App. 2015) (quoting U.S. Const. amend. VI.) “[T]he purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation. *Bullcoming v. New Mexico*, 564 U.S. 647, 670 (2011). Statements are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2006). “The touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination.” *McCray*, 413 S.C. at 90, 773 S.E.2d at 921–22 (internal quotations omitted). Thus, the issue hinges on whether the testifying expert merely served as a conduit for introducing the results of tests that were performed by an expert who did not testify. *Id.*

judice, *Brockmeyer* found those computerized chain-of-custody logs to be non-testimonial in nature as they were “not created for the sole purpose of providing evidence against the defendant.” *Id.* (quoting *Melendez-Diaz*, 557 U.S. at 323). The Court further found the documents were not testimonial because “their primary purpose is not to constitute evidence in a criminal trial.” *Id.*

The case *sub judice* concerns itself with an expert witness interpreting and incorporating toxicology results necessary for the completion of an autopsy report, and specifically involves the use of toxicology results from a secondary laboratory for the purpose of determining cause or manner of death in an autopsy report. Like in *Brockmeyer*, the bodily fluids taken from Victim were not taken for the purposes of proving intoxication, such as when used from a DUI suspect for the sole purpose of being used against them in criminal prosecution or admitted to prove suspected drugs are what they are alleged to be like in *Melendez-Diaz*, 557 U.S. 306 (2009). Rather, the fluids were taken from a deceased victim and analyzed for the purpose of completing an autopsy to determine cause and manner of death. Therefore, the toxicology results, unlike forensic testing done for the sole purpose to prove an element of a crime, were not used in any way by the State to prove an element of murder during the State’s case-in-chief. In this case, Dr. Batalis did not simply parrot testimonial hearsay from an out of court declarant, but instead testified to toxicology results used in formulating an expert opinion as to the cause of the Victim’s death and the processes and procedures used to determine such cause.

Therefore, the PCR court correctly found trial counsel was not constitutionally ineffective for failing to object because the testimony in question from Dr. Batalis was proper as Dr. Batalis did not act as a mere conduit for the toxicology results and because Petitioner was not prejudiced by the non-existence of alcohol in Victim’s bloodstream as it did not relate to any of the elements needed to convict Petitioner of murder and because the toxicology report of Victim was irrelevant

to Petitioner's defense. Further, the testimony did not affect any factor in establishing any element of the crime and therefore Petitioner cannot establish he suffered any prejudice from the testimony.

II. The post-conviction relief court properly found Petitioner failed to establish trial counsel was constitutionally ineffective for failing to object to pitting of several eyewitnesses to the altercation where Petitioner cannot establish prejudice because the underlying facts of the altercation were not in dispute and this had no bearing on the outcome of the trial.

Petitioner contends Counsel was ineffective for failing to object to impermissible pitting of several eyewitnesses statements against Petitioner's testimony regarding the altercation between Petitioner and Victim. Specifically, Petitioner alleges he was prejudiced when asked if he knew of a reason the men (the three minor witnesses) would "make up untruths" about him. App. 800. The State's impermissible pitting of Petitioner's testimony against that of the minor witnesses did not prejudice Petitioner because, in light of other uncontroverted evidence and the minor discrepancies revealed through conflicting testimony, the outcome of the trial would not have been different.

"No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper." *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (citing *State v. Bryant*, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994); *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145, 145–46 (1988)). "However, improper pitting constitutes reversible error only if the accused is unfairly prejudiced." *Id.* "To establish his claim of ineffective assistance of counsel, petitioner had to show a reasonable probability that the result of his trial would have been different if counsel had objected to the solicitor's improper questions." *Id.* (citing *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of a trial. *Id.*

Petitioner argues the following portion of the State’s cross-examination of him improperly pitted his testimony against the young boys who witnessed the altercation and testified as State’s witnesses:

Q. Okay. Can you think of some reason that three young boys would have to make up untruths about you?

[PETITIONER]: I can’t think of a reason, sir.

Q. Having asked that question let me ask a follow-up question. You admit that a person facing what you are facing here this week might have quite a powerful reason to come up with things that are untrue?

[PETITIONER]: Yes, sir.

App. 800. Counsel did not object to this line of questioning. At the PCR hearing, trial counsel admitted she did not know why she did not object to the State’s line of questioning. App. 1222. Although the State’s questioning of Petitioner was improper, when considered in conjunction with all other uncontroverted testimony concerning the altercation, the PCR Court found the State’s brief inquiry regarding minor discrepancies between Petitioner’s version of events, the State’s witnesses’ testimony regarding their version, and the motivations for the State’s witnesses to tell “untruths” about Petitioner, had no impact on the outcome of the trial and therefore did not prejudice Petitioner.

Importantly, there were multiple witnesses, including Petitioner, who testified to facts supporting the charge which were not directly contradictory to the aforementioned State’s witnesses’ testimony. Specifically, uncontroverted testimony at trial was presented showing that Petitioner and Victim were involved in a physical altercation, Petitioner flipped Victim over his leg causing him to hit the ground, and Petitioner intentionally punched Victim three to five times. While some discrepancies exist regarding how the altercation started, testimony from the minor witnesses indicate Petitioner was the individual who initiated the physical altercation.

Significantly, Petitioner's own testimony was that the victim walked towards him with his fists raised, testifying "Now, we right face-to-face. I flip him right like this over my leg." App. 785. Petitioner further elaborated that after he and Victim were on the ground, Petitioner was the one who threw punches, with no mention of Victim throwing a punch. App. 785.

Moreover, there was no testimony from Petitioner at trial that the victim initiated the physical altercation or that Petitioner was in imminent fear of danger sufficient to warrant self-defense. Thus, even if trial counsel had objected to this testimony, the outcome of the trial would not have been different. Accordingly, Petitioner failed to show resulting prejudice and the post-conviction relief court properly dismissed the allegation. The PCR court correctly found that although the State's questioning of Petitioner was improper because it asked him to "comment on the truthfulness or explain the testimony of an adverse witness," Applicant was not prejudiced. App. 1269.

III. The post-conviction relief court properly found Petitioner failed to establish trial counsel was constitutionally ineffective for her handling of the jury instructions where Petitioner was not prejudiced when trial counsel failed to object to portions of jury instructions where the evidence did not support the elements of self-defense.

Petitioner contends Counsel was ineffective for failing to object to inaccurate and misleading portions of the jury instructions. Specifically asserting that because Counsel failed to the object to the erroneous instruction, Petitioner was prejudiced. Trial counsel was not ineffective for failing to object to the erroneous jury instruction as the evidence did not support the elements of self-defense and the duty to retreat was not at issue. Therefore, Petitioner was not prejudiced by the instruction.

The relevant portion of the jury instruction is as follows:

The final element of self-defense is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did

in this particular instance. The defendant has a duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase.

App. 869.

The State concedes the jury instruction was an incorrect statement of the law. Petitioner did not have a duty to retreat if doing so would increase his danger of being killed or suffering serious bodily injury. However, Petitioner cannot show prejudice from the erroneous jury instruction because the record establishes Petitioner could not have met all four elements of self-defense. Specifically, “to establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. *State v. Bryant*, 336 S.C. 340, 344–45, 520 S.E.2d 319, 321–22 (1999).

As to the first element, the evidence establishes Petitioner was not without fault in “bringing on the difficulty,” as the uncontroverted testimony proved Petitioner initiated the interaction by getting Victim’s attention, getting out of his car, and approaching Victim. Therefore, even if the jury believed Petitioner’s assertion Victim was walking towards him with his fists raised, Petitioner had a part in “bringing on the difficulty.”

As to the second element, Petitioner did not provide testimony at trial that established any belief he was in imminent danger of losing his life or sustaining serious bodily injury. Moreover,

if the jury believed the minor witnesses' testimony, they would be precluded from believing Petitioner's assertion he believed he was in imminent danger. As to the third element, Petitioner did not present any testimony indicating he was in imminent danger or believed himself at the time to be in imminent danger. Rather, the testimony shows that Petitioner at best threw Victim on the ground and punched him multiple times and at worst, the State's witnesses testified Petitioner threw Victim on the ground, stomped on his chest, and punched him multiple times.

Petitioner's own testimony at trial was that they both fell to the ground, Victim did not throw punches, and Petitioner got up before Victim because he did not want to be on the bottom during a fight. App. 801. A person walking toward you with fists raised who is then thrown on the ground would not cause a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself. As to the fourth and final element, Petitioner had every means of avoiding the danger. Even assuming Petitioner's testimony is true, Petitioner could have avoided the danger. Petitioner testified he yelled to the victim twice to get his attention, that Victim turned around the second time he yelled, stepped off the sidewalk towards him with his fists up, then walked some distance toward him before Petitioner took him to the ground. Petitioner had ample opportunity after seeing Victim raise his fists to walk away from the situation instead of initiating a physical altercation. Petitioner could have walked away from the situation or gone to his nearby car to avoid confronting the victim. Instead, Petitioner waited until the victim was in his face to throw him to the ground, stomp on his chest, and punch him in the face. Therefore, Petitioner was not prejudiced because he could not have met any of the elements of self-defense, let alone all of them. The post-conviction relief court properly denied the allegation on this ground.

Counsel was not ineffective for failing to object to testimony regarding Victim's toxicology testing where the testing was irrelevant to the central issues in this case, had no impact on

Petitioner's defense strategy, and where Petitioner did not suffer prejudice as a result of the testimony. Additionally, Counsel was not ineffective for failing to object to the pitting of several eyewitnesses to the altercation because the underlying facts of the altercation were not in dispute, the pitting had no bearing on the outcome of the trial, and Petitioner was not prejudiced. Lastly, Counsel was not ineffective for failing to object to portions of the jury instructions regarding self-defense where the evidence presented at trial did not support the elements of self-defense and as a result, Petitioner was not prejudiced by the erroneous instruction. Therefore, because the PCR court correctly denied Petitioner's application for post-conviction relief, this Court should affirm the PCR court's denial of relief.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's findings in full.

Respectfully submitted,

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