

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 30th day of April, 2020.

Present: Goodwyn, Mims, Powell, Kelsey, McCullough, and Chafin, JJ., and Koontz, S.J.

Andrew C. Stephens, Appellant,

against Record No. 190510
Circuit Court No. CR18H01071-00

Harold Clarke, Director, VDOC, Appellee.

Upon an appeal from the judgment rendered by the Circuit Court of the City of Newport News.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that there is no reversible error in the judgment that is the subject of this appeal. Therefore, we affirm.

I. BACKGROUND

Amber Stephens (Amber) and Andrew Stephens (Stephens) had a daughter, R.S., in August 2012. On November 2, 2012, Amber had to attend National Guard training, leaving R.S. in Stephens' sole care for the next couple of days. Over the course of these two days, R.S. had episodes of irregular breathing and vomiting after feeding. Stephens took R.S. to the hospital on both November 2 and November 3. Nothing abnormal was found either time and each time Stephens was given feeding instructions and sent home with R.S.

On the morning of November 4, 2012, R.S. woke up fussy. Stephens fed R.S. and she vomited. Stephens called 911 after R.S. went limp, began groaning, and her breathing became irregular. R.S. was transported to Mary Immaculate Hospital by ambulance; Mary Immaculate transferred R.S. to Children's Hospital of the King's Daughters (CHKD) due to R.S. exhibiting "seizure activity."

Dr. Susan Lamb (Dr. Lamb), a pediatrician with the Child Abuse Program at CHKD, examined R.S. A CT scan of R.S.'s head revealed that R.S. had bilateral subdural hematomas, meaning she had bleeding on both sides of her brain. It was also discovered at CHKD that R.S. had a clavicle fracture that was ten days or less old, hemorrhaging in multiple layers in "the lining in the back of" her eyes ("retinal hemorrhaging"), separation and bleeding between two layers of her retina in one eye ("retinoschisis"), and a small bruise on her back.

A. Criminal Proceedings

Stephens was subsequently charged with maliciously wounding R.S. Earl Wheeler (Wheeler), an attorney from the office of the public defender, was appointed to represent Stephens. On June 3, 2015, the Circuit Court for the City of Newport News began Stephens' two-day jury trial.

The Commonwealth called Detective Jeff Senter (Detective Senter) as a witness. Detective Senter was employed with the Special Victims Unit of the Newport News Police Department in November 2012 and testified regarding his investigation into Stephens, concerning R.S.'s injuries. Detective Senter testified that on November 5, 2012, Stephens provided him with a narrative of R.S.'s illness and how it had progressed. Detective Senter also testified that he received a voicemail from Stephens the following day in which Stephens indicated he "had remembered something and he may have made a mistake." Detective Senter followed up and met with Stephens again.

During this follow-up meeting, Stephens told Detective Senter that "he was freaking out because the baby was limp in his arms, and he mentioned that he had basically laid the baby in his forearms and had shaken her like this because he was scared." The trial transcript of Detective Senter's testimony indicates that Detective Senter was making a hand gesture and demonstrating to the jury how Stephens had demonstrated his actions. Detective Senter then testified that Stephens had said when he shook R.S. "he wasn't going to town on her," that he was simply scared, and that he did not want to cause "any damage" when he was shaking her.

At trial, Dr. Lamb qualified as an expert in pediatrics and, specifically, child abuse pediatrics. She testified to her evaluation and diagnoses of R.S. Dr. Lamb stated she diagnosed R.S. with "abusive head trauma," which she defined as "a violent act that injured [R.S.'s] entire brain causing injury to the brain marked by subdural hemorrhages." She clarified that abusive head trauma used to be called "shaken baby syndrome or shaken impact syndrome." Dr. Lamb

explained that abusive head trauma is “a distinct medical diagnosis” and that the injury is a result of “rotational acceleration/deceleration force,” instead of linear forces. She also explained that there can be causes of abusive head trauma other than child abuse, although they are rare. Dr. Lamb explained that she observed a case of abusive head trauma that occurred as a result of a car accident where the car was spinning and resulted in the “complex rotational acceleration/deceleration” forces on the child’s head and brain. After being asked how she came to her conclusion that R.S. had abusive head trauma, Dr. Lamb stated that it was based upon the “constellation” of R.S.’s injuries. She testified: “[s]o in the absence of an accidental history that would have caused it, a medical condition that would cause it, it leaves that this was an inflicted abusive head injury.” Wheeler did not object to any of this testimony.

Upon cross-examination, Dr. Lamb testified that at the time she examined R.S. “any injuries that had occurred at birth, which included subdurals and retinal hemorrhages, would have resolved at that point,” and that R.S.’s symptoms would have occurred immediately upon injury. On redirect examination, Dr. Lamb testified that the combination of subdural brain injury and the retinal injuries, which led her to the abusive head trauma diagnosis, were acute injuries. “[T]hey were fresh, and as I stated the neurologic symptoms, she would have been abnormal immediately after that.” She also stated that R.S. “had brain injury and retinal hemorrhages which don’t go along with birth subdurals.”

The Commonwealth introduced Dr. Lamb’s consultation report into evidence which “memorialize[d] what [she] testified to” at trial. Hundreds of pages of medical records were also admitted into evidence. These medical records consisted of a wide array of documents, including notes from the November hospital visits and notes from R.S.’s follow-up appointments.

Wheeler called Dr. Thomas Young (Dr. Young), a medical doctor who qualified as an expert in forensic pathology. Dr. Young explained how, instead of trauma, R.S.’s subdural hematomas, retinal hemorrhaging, and retinoschisis were more likely caused by “an apparent life-threatening event,” which is an unexplained, temporary cessation of an infant’s breathing. Dr. Young also testified as to why R.S.’s small bruise and clavicle fracture were not necessarily caused by abuse, and why he disagreed with Dr. Lamb’s conclusions regarding abusive head trauma.

At the conclusion of the trial, the jury found Stephens guilty of aggravated malicious wounding.

Stephens, on direct appeal, challenged the sufficiency of the evidence and the circuit court's ruling that his proposed biomechanics expert was not qualified to testify regarding the cause of R.S.'s injuries. The Court of Appeals affirmed Stephens' conviction via an unpublished order. *See Stephens v. Commonwealth*, Record No. 1432-15-1 (Oct. 25, 2016). On July 13, 2017, this Court refused Stephens' subsequent petition for appeal.

B. Habeas Proceedings

On July 12, 2018, Stephens filed a petition for writ of habeas corpus against Harold Clarke, Director of the Virginia Department of Corrections (the Director) in the Circuit Court of the City of Newport News. Relevant to this appeal,^{*} Stephens, claimed that he had ineffective counsel at his trial because (1) Wheeler failed to call Dr. Joseph Dilustro (Dr. Dilustro), a neurosurgeon who had treated R.S., as an expert witness or to call any other neurosurgeon expert witness to testify as to the age of R.S.'s brain bleeding and (2) he failed to object to the Commonwealth's expert, Dr. Lamb, testifying to the ultimate issue in the case.

To support his habeas petition, Stephens included an appendix that contained, among other things, affidavits from Wheeler and Dr. Ronald Uscinski (Dr. Uscinski), a neurosurgeon. Wheeler stated in his affidavit that he never understood the significance of the term "chronic subdural hematoma" and that he now understood that "a chronic subdural hematoma was an injury at least 14 days old." He posited that if he had understood the significance, he would have used at trial the information that the injury was well outside of the several day window when Stephens was alone with R.S. Wheeler also explained in his affidavit that his notes from the case indicated that "most attempts at contacting [Dr. Dilustro] were futile" and that, on the one occasion he did speak to Dr. Dilustro, Dr. Dilustro indicated that he "did not want to talk about child abuse or contradict the doctors at CHKD." In his affidavit, Wheeler noted that he was not aware that Dr. Dilustro had the opinion that "the injury was a chronic subdural hematoma and that it could have happened at birth," and if he had known, he would have used that information on cross-examination of Dr. Lamb and called Dr. Dilustro to testify.

^{*} Stephens made several other claims in his habeas petition that are not relevant to this appeal.

Dr. Uscinski's affidavit stated that he is a neurosurgeon and that R.S.'s CT scans showed "old blood," which meant that there was past subdural bleeding "over two weeks old, which would be a chronic subdural hematoma." He also explained that R.S.'s CT scans showed some "new blood," as well. He noted that there was much more "old blood" than "new blood." Dr. Uscinski noted that "new blood" with "old blood" is not rare because "many patients [can live] without symptoms with a chronic subdural hematoma who then become symptomatic with an acute re-bleed." Dr. Uscinski concluded that he "did not have enough information to give an explanation for this chronic hematoma that re-bled enough to cause this child to suddenly fall sick the weekend of November 4, 2012, but it's clear the cause or initiating event occurred at least two weeks earlier than that weekend." Dr. Uscinski opined that based on R.S.'s traumatic birth, a "reasonable explanation" could be that it was a re-bleed from a birth injury.

On September 27, 2018, the Director filed a motion to dismiss the petition. The Director contended that Wheeler was effective counsel despite failing to present evidence regarding the age of R.S.'s brain bleeding, because he strategically decided to present an alternative theory, through the testimony of Dr. Young, that R.S.'s injuries were not the result of trauma. Dr. Young testified that R.S.'s injuries were caused by "a life-threatening event," rather than by trauma.

The Director also claimed that Stephens failed to demonstrate he was prejudiced by his counsel's failure to call a neurosurgeon as an expert, because Stephens failed to produce an affidavit from Dr. Dilustro demonstrating what his testimony would have been, and that Stephens had failed to produce evidence that the neurosurgeon's testimony would have contradicted Dr. Lamb's diagnosis.

The Director also argued that Stephens' claim that Wheeler was ineffective for failing to object to Dr. Lamb's testimony satisfied neither the requirement that counsel's conduct be shown deficient nor the requirement that the deficient performance must be prejudicial to the defendant, because Dr. Lamb's testimony was admissible as she did not testify to the ultimate issue in the case, and the testimony she provided did not constitutionally prejudice Stephens.

On January 23, 2019, without an evidentiary hearing, the circuit court entered an order denying and dismissing Stephens' petition for a writ for habeas corpus. The circuit court concluded that Wheeler's decision not to call Dr. Dilustro as a witness was objectively reasonable because Dr. Dilustro was undisputedly unresponsive and uninterested in discussing

child abuse or contradicting the CHKD doctors. Additionally, the circuit court found that Stephens failed to establish prejudice because Stephens did not proffer an affidavit from Dr. Dilustro stating he would have contradicted Dr. Lamb.

Similarly, the circuit court concluded that Wheeler was reasonable in not consulting another neurosurgeon and instead relying upon the opinion of Dr. Young, a forensic pathologist, in crafting a defense for Stephens. It ruled that Stephens failed to show prejudice as a result of that strategic decision by his counsel. The circuit court explained that, at trial, Wheeler raised the possibility R.S.'s injuries were caused "during birth or prior" and it was considered by the jury. It concluded that "[w]hen combined with R.S.'s bruise on her lower back, her small clavicle fracture, and [Stephens'] own incriminating statements . . . about shaking R.S.," even if the proffered expert neurosurgeon testimony is considered, Stephens failed to demonstrate the reasonable probability of a different outcome in the proceeding absent counsel's unprofessional conduct.

Additionally, the circuit court concluded that Wheeler was not ineffective for failing to object to Dr. Lamb's testimony, which according to Stephens provided an opinion on the ultimate issue in the case when Dr. Lamb testified that R.S. suffered an "inflicted abusive head injury." The circuit court stated that Dr. Lamb's testimony was admissible because it did not go to the ultimate issue in the case. It concluded that the testimony did not invade the province of the jury and, further, Dr. Lamb did not attempt to attribute the victim's injury to Stephens or to any other specific individual. Thus, Stephens failed to prove either deficient performance by Wheeler, or resulting prejudice to Stephens regarding Wheeler's failure to object to Dr. Lamb's testimony. The circuit court dismissed Stephens' petition for writ of habeas corpus.

Stephens appeals. We granted the following assignments of error:

1. The circuit court erred when it found that trial counsel was not ineffective under the Virginia Constitution and the Sixth Amendment to the United States Constitution for failing to sufficiently investigate R.S.'s symptoms, consult with appropriate experts, and present the investigation, evidence, and expert opinions to the jury.
 - a. The circuit court erred when it failed to find trial counsel ineffective for failing to present the opinion of neurosurgeon Dr. Joseph Dilustro regarding the age and onset of R.S.'s brain bleeding.
 - b. The circuit court erred when it failed to find trial counsel ineffective for failing to present the opinion of an expert neurosurgeon regarding the age and onset of R.S.'s brain bleeding.

2. The circuit court erred when it found that trial counsel was not ineffective under the Virginia Constitution and the Sixth Amendment to the United States Constitution for failing to object to the Commonwealth's expert testifying to the ultimate issue in this case.

II. ANALYSIS

When a circuit court dismisses a petition for writ of habeas corpus without an evidentiary hearing, we apply a de novo standard of review. *Zemene v. Clarke*, 289 Va. 303, 307 (2015). “[E]ntitlement to habeas relief is a mixed question of law and fact” and the circuit court’s legal conclusions are not binding on this Court; this Court is tasked with determining whether the circuit court correctly applied the law to the facts. *Id.* at 307. “In a collateral attack on a judgment of conviction, a prisoner has the burden of proving by a preponderance of the evidence the claims asserted in the petition for a writ of habeas corpus.” *Green v. Young*, 264 Va. 604, 608 (2002).

To establish a claim of ineffective counsel, a petitioner for a writ of habeas corpus must satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). The first prong, the performance prong, requires a showing that counsel’s performance was deficient. *Id.* at 687. The second prong, the prejudice prong, requires the petitioner to “show that the deficient performance prejudiced the defense,” that is to say “counsel’s errors were so serious as to deprive the defendant of a fair trial.” *Id.*

Failure to establish either prong is fatal to a petitioner’s writ. *Green*, 264 Va. at 609. Therefore, there is no need for us to address both *Strickland* prongs if we find one was insufficient. *Bowman v. Johnson*, 282 Va. 359, 368 (2011). Here, we find that, concerning both assignments of error, the analysis of the prejudice prong is dispositive of Stephens’ habeas claim.

In analyzing the prejudice prong, we must consider the totality of the evidence before the habeas court. *Bowman*, 282 Va. at 368. An error by counsel does not warrant setting aside a judgment of a criminal proceeding if the error had no effect on the judgment. *Strickland*, 466 U.S. at 691. Establishing prejudice requires the petitioner to “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. *Id.*

Stephens claimed that Wheeler’s failure to present expert testimony about the age and onset of R.S.’s brain bleeding prejudiced him and claimed that Wheeler’s failure to object to Dr.

Lamb's testimony that R.S. suffered an inflicted traumatic brain injury prejudiced him. Stephens overlooks the great weight of the evidence and key facts in making such assertions; we cannot do the same when deciding this appeal.

The fact that R.S. had a chronic subdural hematoma was placed into evidence at the trial. The medical records admitted into evidence indicate that, upon examination, in November 2012, R.S. had both chronic and acute subdural hematomas. A chronic subdural hematoma is an injury at least 14 days old. In the medical records, it is noted that R.S.'s mother represented that Dr. Dilustro, a neurosurgeon who treated R.S., told her that R.S. had chronic subdural hematomas, which may have happened at birth. Amber also made that assertion in an affidavit in support of the instant habeas corpus petition. There is no testimony or affidavit or medical record which confirms that any such statement was made by Dr. Dilustro or which would explain the relevance of any such statement to the charges brought against Stephens. There is no affidavit from Dr. Dilustro as to what his testimony would have been if he had been called as a witness.

At trial, Dr. Lamb testified that Dr. Dilustro was a part of the treatment team for R.S. and that she had reviewed his notes before reaching her conclusion that R.S. had suffered abusive head trauma. When asked on cross-examination, Dr. Lamb stated that any injuries that occurred at birth, including subdurals and retinal hemorrhaging, would have resolved before November when she examined R.S.

In addition to acute subdural hematomas, the medical records indicate the existence of chronic subdural hematomas as well. There is no allegation that Stephens caused the chronic subdural hematomas. Dr. Dilustro's testimony as to the existence of a chronic subdural hematoma would not be in conflict with the evidence presented at trial by the Commonwealth and does not support a conclusion that it is reasonably probable that the presentation of that testimony would have resulted in a different outcome in the proceeding.

Dr. Uscinski states in his affidavit that there was a chronic subdural hematoma which re-bleed causing the injury to R.S., but his affidavit sheds no light on what might have caused the chronic hematoma to re-bleed, or when the acute re-bleeding began. Dr. Uscinski's affidavit seems to agree with Dr. Lamb that the symptoms that resulted in R.S. needing to be seen at the hospital were because of acute brain bleeding which occurred while she was in the care of her father. His affidavit provides no explanation regarding the retinal injuries, which were observed for the first time upon R.S.'s third trip to the hospital that weekend.

The failure to present expert testimony that R.S. had a prior head injury, which inexplicably re-bled while she was in the care of her father does not create a reasonable probability that presentation of that trial testimony would have changed the outcome of the case. This conclusion is bolstered by consideration of evidence in the record that the child was fine when she was left with Stephens, that although he claimed “not to go to town on her,” Stephens admittedly shook his infant daughter while she was in his care, and that Dr. Lamb and Dr. Uscinski agree that there was acute bleeding in R.S.’s brain which caused her to suddenly fall ill the weekend of November 4, 2012. Additionally, when R.S. was examined at CHKD on November 4, 2012, she suffered from a “constellation” of injuries, which had not been detected upon her previous medical examinations that weekend.

Considering this record, it is clear that Stephens failed to carry his burden of proving that his trial counsel’s failure to call Dr. Dilustro or another neurosurgeon as a witness resulted in prejudice to him sufficient to satisfy the prejudice prong of the *Strickland* test.

Regardless of whether Dr. Lamb’s testimony went to the ultimate issue, Wheeler’s failure to object did not prejudice Stephens. Even if the circuit court had sustained the objection at trial regarding Dr. Lamb’s testimony, Stephens did not object to nor assign error to Dr. Lamb’s report, which was admitted into evidence. Dr. Lamb’s report mentions “abusive head trauma” three times and explains why R.S.’s symptoms and injuries, in Dr. Lamb’s opinion, were highly concerning for abusive head trauma. Dr. Lamb’s report also mentions that R.S.’s other injuries, the clavicle fracture and the small bruise on her back, were concerning for “inflicted” trauma. Thus, even if Wheeler had objected and Dr. Lamb’s testimony regarding an inflicted traumatic brain injury had been excluded, her opinion as to abusive head trauma and “inflicted” trauma would have been before the jury anyway. Further, Dr. Lamb’s purportedly objectionable testimony regarding the cause of R.S.’s injuries did not identify Stephens, or any other individual, as the perpetrator. Considering the totality of the evidence – specifically Dr. Lamb’s report, the “constellation” of R.S.’s injuries, and testimony that Stephens admitted to shaking R.S. – there is not a reasonable probability that Wheeler’s failure to object to Dr. Lamb’s testimony resulted in a different outcome for Stephens.

III. CONCLUSION

Upon reviewing the record, including the trial transcript and counsel’s affidavits and exhibits, the Court concludes that Stephens has not demonstrated that there is a reasonable

probability that, but for counsel's alleged errors, the result of Stephens' criminal proceeding would have been different. Thus, Stephens failed to establish that Wheeler's purported actions prejudiced him and the circuit court did not err in dismissing Stephens' petition for habeas corpus relief. Accordingly, we affirm the judgment of the circuit court. This order shall be certified to the Circuit Court of the City of Newport News.

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Teste:



Clerk