

RECEIVED

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Jan 30 2023

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Appellate Case No. 2022-000634

BREON JACOBY MAYERS

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General
S.C. Bar No. 101188

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEYS FOR RESPONDENT

INDEX

TABLE OF AUTHORITIES..... ii

STATEMENTS OF THE ISSUE 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 6

ARGUMENT..... 7

 I. The PCR court correctly held trial counsel acted reasonably by
 deciding not to seek a mistrial based on a juror's tenuous
 connection to a State's witness where the trial court removed
 the juror and replaced her with a suitable alternate. 7

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989).....	8
<u>Earley v. State</u> , 418 S.C. 255, 792 S.E.2d 226 (2016)	10
<u>Fields v. Brown</u> , 503 F.3d 755, 776 (9th Cir. 2007)	12
<u>Galowski v. Murphy</u> , 891 F.2d 629 (7th Cir. 1989).....	8
<u>Gardner v. Ozmint</u> , 511 F.3d 420, 426 (4th Cir. 2007)	12
<u>Green v. State</u> , 351 S.C. 184, 569 S.E.2d 318 (2002)	9
<u>Harrington v. Richter</u> , 562 U.S. 86, 110 (2011)	12
<u>Smalls v. State</u> , 422 S.C. 174, 810 S.E.2d 836 (2018).....	6
<u>State v. Bantan</u> , 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010)	10
<u>State v. Coaxum</u> , 410 S.C. 320, 328, 764 S.E.2d 242, 246 (2014).....	10, 11
<u>State v. Patterson</u> , 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)	10
<u>State v. Woods</u> , 338 S.C. 561, 527 S.E.2d 128 (Ct. App. 2000).....	11
<u>State v. Woods</u> , 345 S.C. 583, 550 S.E.2d 282 (2001)	11
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	8, 9
<u>United States v. Chapman</u> , 593 F.3d 365 (4th Cir. 2010)	9

STATEMENT OF ISSUES ON APPEAL

- I. The PCR court correctly held trial counsel acted reasonably by deciding not to seek a mistrial based on a juror's tenuous connection to a State's witness where the trial court removed the juror and replaced her with a suitable alternate.

STATEMENT OF THE CASE

In February 2012, a Lexington County Grand Jury indicted Petitioner Breon Mayers for murder, first-degree burglary, armed robbery, and possession of a weapon during the commission of a violent crime. Robert T. Williams, Sr., represented Mayers at a jury trial before the Honorable Roger M. Young, Sr. Following a multi-day trial, the jury convicted Mayers as indicted on all offenses. Judge Young sentenced Mayers to concurrent sentences of life imprisonment without the possibility of parole for murder, life without the possibility of parole for burglary, thirty years for armed robbery, and five years for possession of a weapon during the commission of a violent crime. Mayers filed a timely notice of appeal. Appellate Defender David Alexander perfected the appeal by filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), alleging the trial court erred in allowing the State to amend the original indictment. Mayers did not file a pro se brief in response. On September 24, 2014, the Court of Appeals issued an unpublished opinion affirming the convictions and granting appellate counsel's request to be relieved. State v. Mayers, Op. No. 2014-UP-344 (S.C. Ct. App. filed Sept. 24, 2014). The case was remitted back to the circuit court on November 24, 2014.

Mayers filed an application for post-conviction relief (PCR) on April 28, 2015, alleging ineffective assistance of counsel. Mayers, through PCR counsel, filed an amended application on August 10, 2015, raising 28 allegations of ineffectiveness. A hearing was convened on January 30, 2017, at the Lexington County Judicial Center. Mayers was present at the hearing and represented by Mindy W. Zimmerman.

Johanna C. Valenzuela represented the State. Mayers testified on his own behalf at the hearing, as did his trial counsel, Robert T. Williams, Sr.

The Court denied relief via email on March 1, 2017, and directed the State to submit a formal proposed order of dismissal. By order filed May 4, 2017, the court issued an order denying post-conviction relief and dismissing the action with prejudice. Both parties were served with the order on May 11, 2017. Mayers, through substitute PCR counsel, W. Coleman Lawrimore, subsequently filed a timely motion to alter or amend the order pursuant to Rule 59(e), SCRCP, on May 17, 2017. A virtual hearing was convened on July 21, 2020, via WebEx, to address the motion. The PCR court denied the motion as it related to the issue now raised on appeal in a written order dated April 28, 2022, and filed May 2, 2022. (App.1244–54). Mayers petitioned for a writ of certiorari on October 12, 2022. This return follows.

STANDARD OF REVIEW

The appellate court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them, but will reverse if its decision is controlled by an error of law. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018).

ARGUMENT

- I. **The PCR court correctly held trial counsel acted reasonably by deciding not to seek a mistrial based on a juror's tenuous connection to a State's witness where the trial court removed the juror and replaced her with a suitable alternate.**

The sole issue raised in this appeal is trial counsel's decision not to move for mistrial after one of the original jurors in the case was removed. The juror in question, Jennifer Farmer, had a tenuous connection with one of the detectives who testified at Mayers's trial. Farmer testified that she knew the detective's wife, but had only "seen [Detective Novak] once or twice." (App.431). Farmer learned from a mutual friend that Detective Novak's wife told her Farmer was a juror in a case in which Novak was a witness. (App.427). Farmer called Novak's wife and explained that she recognized Novak after trial had started, but that it would not affect her decision. (App.427). When Detective Novak reported this interaction, the trial court questioned Farmer about it. Farmer explained that she called Detective Novak's wife to tell her that the connection was "not going to sway her decision," and that she did not discuss the case with Novak's wife or anyone else. (App.427–28). The trial court told her that it sounded "innocent enough," but that she should have brought it to the court's attention rather than calling Novak's wife. (App.428). Farmer explained she called because Novak's wife "had discussed it" with the mutual acquaintance. (App.428).

Trial counsel moved to exclude Farmer, and the State consented. (App.429). Trial counsel agreed to replace Farmer with one of the alternate jurors. (App.430).

At the PCR evidentiary hearing, trial counsel testified he was not concerned about Farmer's connection with Novak. (App.1161–62). He testified that in a small community like Lexington, it was not unusual for jurors to have some connection with a witness, and noted there was no indication Farmer had spoken with any of the other jurors about the case. (App.1161–62).

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove his counsel's deficient performance and resulting prejudice. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). A PCR applicant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of trial would have been different. Id. The applicant is required to overcome the presumption that counsel was effective in order to receive relief. Id.

Mayers has not shown deficiency or prejudice. As to deficiency, the "decision whether to move for a mistrial or instead to proceed to judgment with the expectation that the client will be acquitted is one of trial strategy." Galowski v. Murphy, 891 F.2d 629, 639 (7th Cir. 1989). Trial counsel is afforded "wide latitude . . . in making tactical decisions." Strickland v. Washington, 466 U.S. 668, 689 (1984). "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of

counsel was unreasonable." Id. This is especially true in a case, such as this one, where trial counsel had many years of experience in criminal defense. (App.1159).

Trial counsel's decision not to move for a mistrial in this case was reasonable. Trial counsel testified he "liked" both alternate jurors. (App.1180). He did not strike either alternate, despite having strikes available. (App.1180). Trial counsel was not required to move for a mistrial, which could have resulted in Mayers being tried in front of an unfavorable jury. See Green v. State, 351 S.C. 184, 193, 569 S.E.2d 318, 322 (2002) (finding trial counsel's decision not to move for mistrial following jury note referencing defendant's failure to testify was reasonable trial strategy because counsel "believed a mistrial was not necessary because Green had a 'good' jury more likely to acquit"); United States v. Chapman, 593 F.3d 365, 368 (4th Cir. 2010) (explaining that "deciding whether to seek a mistrial . . . involves an on-the-fly balancing of the probable damage caused by the trial error against the likelihood that a different jury might be more inclined to acquit—a question that itself requires considering how receptive the current jury is to the defendant, whether key witnesses have testified as anticipated, etc."). This was a strategic decision entitled to great deference from this court.

Likewise, Mayers has not shown prejudice. Mayers alleged during the virtual hearing on his motion to reconsider the denial of his application that trial counsel "allowed the entire jury pool to be tainted." (App.1195). There is absolutely no evidence to support this assertion. As the PCR court noted, the only evidence is

that the juror did not speak to any other jurors about the case or her tenuous relationship to the officer. (App.1209).

For this reason, it is unlikely that the trial court would have granted a mistrial even if Mayers would have requested one. See Earley v. State, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016) ("To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion."). Given that trial court replaced Farmer with an alternate juror who was suitable to both parties, and that Farmer did not discuss the case with any of the other jurors, it would certainly have been within the court's discretion to deny the extreme remedy of a mistrial. See State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) ("The granting of the motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."); State v. Coaxum, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) (explaining the trial court "should not grant a mistrial based on a juror's concealment of information 'unless absolutely necessary' . . . Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial"); State v. Bantan, 387 S.C. 412, 422, 692 S.E.2d 201, 206 (Ct. App. 2010) ("A defeated party is not entitled to a new trial for every act of misconduct by or affecting the jury, as such misconduct . . . in order that a new trial may be granted on such ground the misconduct of the jury must relate to a

material matter in dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors.").

Mayers relies on State v. Woods, 338 S.C. 561, 527 S.E.2d 128 (Ct. App. 2000), aff'd, 345 S.C. 583, 550 S.E.2d 282 (2001), to support his argument. Woods was a direct appeal case where the trial court denied the defendant's motion for a new trial after discovery of potential juror bias where the juror participated in jury deliberations and voted to convict. The Supreme Court explained in Woods that there is a distinction between intentional concealment of a juror's connection with a party—which raises a presumption of bias—and unintentional concealment, "where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." State v. Woods, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001). The Supreme Court subsequently explained in State v. Coaxum that "if a juror's nondisclosure is unintentional, the trial court may exercise its discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial." State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 246 (2014). Farmer testified that she had only seen Detective Novak "once or twice," and did not recognize him until a friend brought it to her attention that Novak was a witness in the case. (App.427-31). There is no indication she intentionally concealed the connection. Accordingly, it was well within the trial court's discretion to refuse the extreme remedy of a mistrial.

Regardless, Woods has little bearing on this Court's analysis of the reasonableness of trial counsel's decision in this case to seat an alternate juror rather than seek a mistrial. Farmer did not sit on the jury that convicted Mayers. She was replaced with an alternate and did not participate in jury deliberations and did not vote to convict Mayers. The only evidence in the record is that Farmer did not discuss the case with any other juror. (App.427–28). There is no evidence that Farmer "tainted" any of the other jurors. PCR counsel admitted "we have no idea what she told the jurors before it was discovered" (App.1154). Mayers's speculative argument is an improper attempt to have this Court presume prejudice. See Gardner v. Ozmint, 511 F.3d 420, 426 (4th Cir. 2007) ("Gardner failed to offer any evidence of asserted prejudice resulting from the juror's service. He simply averred then, as he does before us now, that the participation of a biased juror is presumptively prejudicial.").

Mayers was fairly tried by a jury consisting of 12 impartial jurors. See Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.") (citation and internal quotations omitted). "Replacement of one unbiased juror with another unbiased juror should not alter the outcome." Fields v. Brown, 503 F.3d 755, 776 (9th Cir. 2007). The record supports the PCR court's findings that trial counsel acted reasonably pursuant to valid trial strategy, and that Mayers was not prejudiced by his decision not to seek a mistrial. Certiorari should be denied.

CONCLUSION


For all the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON

JOSHUA A. EDWARDS
Assistant Attorney General



S.C. Bar No. 101188
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

January 30, 2023

ATTORNEYS FOR RESPONDENT