

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Feb 21 2023

S.C. SUPREME COURT

Certiorari to Greenville County

Honorable G.D. Morgan, Jr., Circuit Court Judge

MARK ANTHONY BAYNE,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001693

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation by declining the trial court's offer of a curative instruction in response to witness testimony that Petitioner had been in prison, where counsel erroneously believed he had to decline the curative instruction in order to preserve his mistrial motion?

STATEMENT

On September 22, 2015, a Greenville County Grand Jury indicted Petitioner, Mark Bayne, Sr., for armed robbery, kidnapping, carjacking, and possession of a weapon during the commission of a violent crime. Petitioner was also charged with an additional count of armed robbery, an additional count of possession of a weapon during the commission of a violent crime, and two counts of criminal conspiracy. Petitioner was tried before the Honorable D. Craig Brown and a jury, from April 6 – 8, 2016. Petitioner was represented by John Abdalla. Justin Holloway prosecuted the case.¹

On the night of October 18, 2014, two men were separately robbed at gunpoint in front of a home on Keller Road in Taylors. Aaron “Rich Boy” Shunk and David Ennis were both drug dealers. Shunk had been riding around with his neighbors Vickie Trammell and her daughter, Nikki Gardner, looking for “pain pills” in Shunk’s tan Dodge Ram pickup truck. Shunk was grossly intoxicated and he was being offensive with Gardner, making vulgar remarks and grabbing her breasts while she drove his truck. An argument ensued and Vickie Trammell hit Shunk. Vickie Trammell also called her son Donald Trammell and complained about Shunk’s behavior. Gardner decided to drive Shunk’s truck back to where she and Vickie Trammell lived, on Keller Road, and let Shunk walk home.²

When they pulled into the driveway, several people approached the truck, including two men with guns. Shunk said he was pulled out of the truck by Donald Trammell, who had a handgun. Shunk was handed off to a second man, who held a sawed-off shotgun. Shunk said it was extremely dark and he was never able to identify the second gunman. Shunk alleged Donald

¹ App. 597 – 602; App. 5, ll. 1-9; App. 1.

² App. 101, l. 2 – 103, l. 23; App. 82, ll. 16-21; App. 116, l. 2 – 123, l. 13; App. 148, ll. 2-3; App. 159, l. 16 – 164, l. 8.

Trammell forced him around back of the house and made him sit on the back porch. Shunk said Donald Trammell punched him in the face and told him not to do anything stupid. Shunk eventually heard his truck leaving. He ran home through the woods and called the police.³

A second man, David Ennis, also called police and reported being robbed at gunpoint a few minutes later at the same place. Ennis was a methamphetamine dealer who was called out to the home by Donald Trammell to sell drugs. When Ennis arrived and got out a large bag of methamphetamine, Donald Trammell grabbed the drugs from Ennis, and he demanded and took cash out of Ennis's pocket.⁴

Ennis initially appeared as a State's witness for the trial pursuant to subpoena, but he left the courthouse before the trial began. A bench warrant was issued for Ennis's arrest. Ennis did not testify at trial. However, police officers testified that Ennis was shown a photograph of Petitioner's son, Mark Bayne, Jr., and Ennis told officers that the son, Mark Bayne, Jr., was the second perpetrator. Mark Bayne, Jr., was initially charged with the offenses.⁵

However, after speaking with Vickie Trammell and Mark Bayne, Jr., Investigator Owens believed that Petitioner, and not his son, was the second perpetrator. Investigator Owens stated that Petitioner and his son had "strikingly very similar" appearances. Warrants were obtained for Petitioner's arrest and when he was arrested, Shunk's stolen pickup truck was out in front of the

³ App. 82, l. 22 – 90, l. 4.

⁴ App. 101, l. 2 – 103, l. 11; App. 221, ll. 17-25; App. 235, l. 10 – 237, l. 20; App. 242, l. 24 – 245, l. 7.

⁵ App. 280, l. 20 – 282, l. 10; App. 45, l. 12 – 46, l. 5; App. 194, l. 13 – 196, l. 17; App. 295, l. 15 – 296, l. 1.

house. Donald Trammell was staying at the same house as Petitioner. Police officers found the keys to the stolen truck inside Donald Trammell's shoes.⁶

Prior to trial, Donald Trammell, who was originally charged with multiple offenses in this case, pleaded guilty to reduced charges including attempted armed robbery, and he received only a five-year sentence. Donald Trammell had a significant prior criminal record, which included convictions for domestic violence, burglary, assault and battery, possession of controlled substances, and assaulting a police officer. Donald Trammell also liked to hit women, including his sister.⁷

Donald Trammell claimed that when Gardner and Vickie Trammell arrived home unexpectedly with Shunk, he opened the truck door to confront Shunk. Donald Trammell admitted he had called Ennis out to sell drugs, and he said he forced Shunk to the back porch so that Ennis would do the drug deal when he arrived. Donald Trammell denied punching Shunk in the face. (As seen, Shunk said Donald Trammell punched him in the face and police officers photographed Shunk's black eye as part of their investigation.)⁸

Donald Trammell claimed there was no plan to rob Ennis, and robbing Ennis was opportunistic and spontaneous. Nevertheless, Donald Trammell claimed he "snatched" the drugs from Ennis and Petitioner came up to Ennis's car with a shotgun. Donald Trammell claimed Petitioner rifled through the backseat of Ennis's car. When Donald Trammell was questioned by Investigator Owens, he claimed he only took \$90 in cash from Ennis and no drugs. However, at

⁶ App. 282, l. 2 – 284, l. 24; App. 267, l. 23 – 276, l. 1; App. 223, l. 2 – 224, l. 10.

⁷ App. 214, l. 20 – 215, l. 17; App. 255, l. 11 – 262, l. 4; App. 186, l. 25 – 187, l. 20.

⁸ App. 235, l. 10 – 242, l. 8.

trial, Donald Trammell claimed he took \$1200 in cash and a bag of methamphetamine from Ennis.⁹

Vickie Trammell and Nikki Gardner also testified at trial. Vickie Trammell was blind in one eye. She had a criminal history of thefts, drug offenses, and vehicular offenses. Vickie Trammell had pending charges at the time of trial, but she believed they were going to be “dropped” or pleaded down to probation. Vickie Trammell claimed that when she arrived back home with Shunk and Gardner, four people approached Shunk’s truck: her estranged husband Larry Trammell, her son Donald Trammell, Petitioner, and Petitioner’s girlfriend Corrie Morgan. Vickie Trammell claimed that Petitioner opened Shunk’s door and hit Shunk in the face. Vickie Trammell said she recognized Petitioner because he was her husband’s cousin and she had known him for thirty years. Although Vickie Trammell was charged with conspiracy in this case, she claimed she had no knowledge any conspiracy was going on.¹⁰

Vickie Trammell said her son ordered her and Gardner to go into the house and they complied. According to Vickie Trammell, she and Gardner later jumped into the back seat of Shunk’s truck as it was leaving; she thought that her son Donald Trammell was driving but it was actually Petitioner. The truck stopped at a nearby home and the women got into another car with Donald Trammell.¹¹

Nikki Gardner also testified at trial. She was facing a violation of a home incarceration program and was on the waiting list for an inpatient drug treatment facility. Gardner said that

⁹ App. 242, l. 24 – 248, l. 1.

¹⁰ App. 130, l. 2; App. 133, l. 2 – 135, l. 15; App. 123, l. 20 – 125, l. 11; App. 138, l. 24 – 139, l. 1.

¹¹ App. 124, ll. 12-24; App. 128, l. 19 – 131, l. 20.

Donald Trammell, not Petitioner, opened Shunk's car door and hit Shunk in the face. Gardner claimed Petitioner opened her car door, and that Larry Trammell and Corrie Morgan were also there. She recalled that Donald Trammell had a gun. Gardner alleged she went inside the house with her mother after Donald Trammell ordered them inside. She saw Ennis's car pull in while looking out the window. However, the two women came out shortly afterwards and got into Shunk's truck with Petitioner and Corrie Morgan. Gardner claimed that while they were driving, Petitioner told her they had planned to rob Ennis of drugs.¹²

Gardner claimed she knew both Petitioner and his son, Mark Bayne, Jr., and she claimed she was sure it was Petitioner and not his son. During Gardner's testimony, the solicitor asked Gardner about how she knew Petitioner, and how long she had known Petitioner and his wife. Gardner stated, "But from when I can remember her was back in—when I can actually remember her is when he had—he hadn't been released from prison long." App. 149, ll. 14-17. Petitioner objected and moved for a mistrial; he argued the comment improperly deprived him of the presumption of innocence. He also noted his prior motion in limine to prevent any references to his prior criminal record. The court denied the mistrial motion and offered to give the jury a curative instruction. Counsel asked for time to consider whether to accept a curative instruction, which the court permitted, so that any curative would not be given immediately so as to draw the jury's attention to the testimony.¹³

During the charge conference, the court proposed to charge the jury that it could not consider evidence Petitioner was incarcerated as evidence of guilt. However, counsel declined the curative instruction. Counsel appeared to be under the mistaken impression that to preserve

¹² App. 146, ll. 4-22; App. 166, l. 4 – 173, l. 2.

¹³ App. 173, ll. 3-18; App. 149, l. 2 – 155, l. 18; *See* App. 41, l. 14 – 44, l. 12.

his mistrial motion for direct appeal, he needed to refuse the curative instruction. “Since I’m not giving up my right to the objection, we don’t want the charge.” App. 303, l. 23 – 306, l. 1.

As seen, neither of the alleged victims in the case identified Petitioner as a perpetrator. The jury deliberated for four hours. It asked to be recharged on hand of one, hand of all. It asked what would happen if it could not come to a verdict. It received an *Allen* charge. *See Allen v. United States*, 164 U.S. 492 (1896). It twice more indicated it was having trouble with hand of one, hand of all. It asked for new verdict forms because it indicated it wanted to change some of the verdicts. At the conclusion of deliberations, Petitioner was convicted of half of the offenses and was acquitted of the other half.¹⁴

The jury found that Petitioner was not guilty of armed robbery of Shunk, not guilty of possession of a weapon during the commission of a violent crime against Shunk, and it found him not guilty of criminal conspiracy as to crimes against Shunk and against Ennis. It found Petitioner guilty of armed robbery of Ennis, guilty of possession of a weapon during the commission of a violent crime against Ennis, guilty of kidnapping Shunk, and guilty of carjacking Shunk.¹⁵

Petitioner directly appealed his mistrial issue and the Court of Appeals affirmed, finding the trial court did not err in denying Petitioner’s mistrial motion. Petitioner timely filed an application for post-conviction relief (PCR) on November 9, 2018. On April 25, 2019, the State made its return and motion for a more definite statement. On November 8, 2021, a hearing was

¹⁴ App. 383, l. 1 – 400, l. 22.

¹⁵ App. 401, l. 3 – 402, l. 10.

held on the matter before the Honorable G.D. Morgan, Jr., via WebEx. Mills Ariail represented Petitioner. Taylor Smith represented the State.¹⁶

Trial counsel testified that he refused the curative instruction, as he almost always does, because “my thinking is don’t remind the jury of him being in prison with a curative instruction. Because you can’t unring the bell. I think it should have been a mistrial but I’m not in charge . . .” App. 547, l. 17 – 548, l. 14.

On November 21, 2022, the PCR court issued an order of dismissal. The PCR court found Petitioner “has failed to prove that there was any deficiency in trial counsel’s performance with respect to trial counsel’s decision not to request a curative instruction. Trial counsel had valid, strategic reasons for not requesting a curative instruction: he did not want the jury to be reminded of the fact and he did not want to draw attention to the fact.” “Gardner’s reference to Applicant’s having been in prison was brief, did not include details about the length of the sentence, did not include details about the crime or crimes for which Applicant was serving time in prison, and was not revisited for the remainder of the trial. Under those circumstances, trial counsel’s decision not to revisit the issue with the jury was reasonable according to prevailing professional norms.”¹⁷

This petition for writ of certiorari follows.

¹⁶ App. 464 – 465; App. 467 – 479; App. 480 – 491; App. 492; App. 494, ll. 1-2.

¹⁷ App. 590 – 594.

ARGUMENT

The PCR court erred in finding counsel provided effective representation by declining the trial court's offer of a curative instruction in response to witness testimony that Petitioner had been in prison, where counsel erroneously believed he had to decline the curative instruction in order to preserve his mistrial motion.

Counsel should have accepted the trial court's offer of a curative instruction and then objected to the sufficiency of the instruction. By doing so, he would have both preserved his mistrial motion and taken the sting out of the improper testimony.

“[A]s the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review.” *State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) (citing *State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (because a curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review). “While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced.” *State v. White*, 371 S.C. at 446, 639 S.E.2d at 164 (citing *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996)).

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s

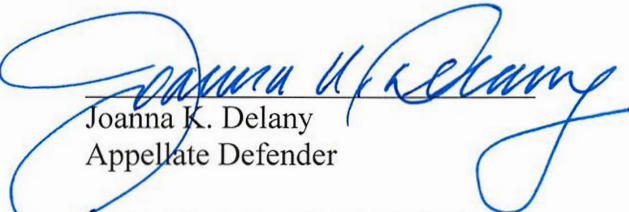
performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687. “To show prejudice, [a PCR] applicant must show that, but for counsel’s errors, there is a reasonable probability the result of the trial would have been different.” *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Counsel’s explanation to the trial court of why he was declining the curative instruction seems to reflect that he was mistaken about the law. Counsel apparently believed he needed to reject the curative instruction in order to preserve the issue for appeal. *See* App. 303, l. 23 – 306, l. 1. This was incorrect, as explained *supra*. *State v. White*, 371 S.C. at 446, 639 S.E.2d at 164.

Petitioner was prejudiced because had the jury received a curative instruction, there is a reasonable possibility that it would have found Petitioner not guilty. As seen, neither victim identified Petitioner as a perpetrator and Ennis identified Petitioner’s son as the perpetrator. The jury deliberated for four hours, asked numerous questions, received an *Allen* charge, and ultimately acquitted Petitioner of half of the charges. Petitioner has proven error and prejudice. *Strickland v. Washington*, 466 U.S. 687.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari to allow full briefing on this issue.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 21st day of February, 2023.

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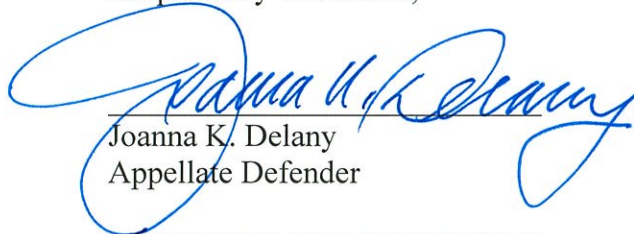
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Anthony Bayne states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge G.D. Morgan, Jr., which was held on November 8, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Mark Anthony Bayne.

Respectfully Submitted,



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2023.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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This 21st day of February, 2023.