

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dillon County

Honorable , Circuit Court Judge

TYREEK HAYES,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2023-000914

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED BY THE STATE

Did the Post-Conviction Relief judge err by granting relief after finding counsel was constitutionally ineffective for failing to object to an erroneous general intent charge in an attempted murder case, when, although counsel was, in fact, deficient for failing to object, the Respondent did not and could not meet his burden of establishing the requisite prejudice in light of the overwhelming evidence that the victims' assailant specifically intended to kill them when he repeatedly and brutally stabbed both of them?

RESPONDENT'S COUNTER-STATEMENT OF THE QUESTION

The State concedes deficient performance. Should this Court grant certiorari to consider the State's claim of overwhelming evidence of guilt when respondent testified at trial that he did not commit this crime, the jury acquitted respondent of criminal sexual conduct, the trial judge charged lesser-included offenses, and Judge Cole found prejudice?

STATEMENT OF THE CASE

On July 23, 2019, respondent Tyreek Dashawn Hayes was tried in Dillon County before the Honorable Roger E. Henderson and a jury. App. 1. Hayes was charged with first-degree criminal sexual conduct, kidnapping, two counts of attempted murder, and a weapons charge. App. 609. Megan B. Bruchstead and Joel Kozak represented the State. App. 1. Matthew Swilley represented Hayes. App. 1. The jury acquitted Hayes of criminal sexual conduct. App. 609. The jury convicted Hayes on the attempted murder, kidnapping, and weapons charges. App. 609. Judge Henderson sentenced Hayes to consecutive thirty year terms of imprisonment for the attempted murder convictions, fifteen years' imprisonment for kidnapping to run consecutively, and five years' imprisonment on the weapons conviction, consecutive. App. 619-20. On November 3, 2021, the Court of Appeals affirmed Hayes' convictions in an unpublished Opinion. App. 684.

On December 26, 2021, Hayes filed a PCR application. App. 688. On July 26, 2022, a hearing was held before the Honorable J. Derham Cole. App. 710. Steven Fowler represented Hayes and Chelsey Marto represented the State. App. 710-14. On April 3, 2023, Judge Cole granted PCR and reversed Hayes' convictions for attempted murder. App. 806-21. The State filed a Rule 59(e) motion, which was summarily denied on June 2, 2023. App. 839. The State now petitions for certiorari.

ARGUMENT

The State concedes deficient performance. No need exists for this Court to consider the State's claim of overwhelming evidence of guilt when respondent testified at trial that he did not commit any crime, the jury acquitted respondent of criminal sexual conduct, the trial judge charged lesser-included offenses, and Judge Cole found prejudice.

The State's main witness, Candace Simpson, claimed respondent Tyreek Hayes raped her. The State's other main witness, Simpson's sister, claimed Simpson told her immediately after the encounter with Hayes that Hayes raped her. The jury did not believe the sisters and acquitted Hayes of first-degree criminal sexual conduct. Hayes testified in his own defense and denied committing any crimes.

Now, after the Honorable J. Derham Cole granted PCR relief based on a conceded error by trial counsel, the State claims this Court should grant certiorari to consider, under the highly deferential standard of review in PCR cases, whether the evidence of Hayes' guilt in this case is so overwhelming that the grant of PCR relief on Hayes' attempted murder convictions should be reversed. Judge Henderson presided over Hayes' trial and charged two lesser-included offenses of attempted murder. No physical evidence is dispositive. Simply put, Judge Cole properly found this case presents a classic jury question and rejected the State's overwhelming evidence of guilt argument. This Court should deny the State's petition.¹

¹ The jury convicted Hayes of two counts of attempted murder after the concededly erroneous jury charge. The PCR court reversed those convictions and the State petitioned for certiorari. The jury also convicted Hayes of kidnapping and a weapons charge. Those convictions were not disturbed by the PCR judge and are not at issue in the State's appeal.

Problems with the Sisters' Testimony

Younger sister CS and older sister AC's testimony differed in several key respects. Younger sister testified that she and Hayes had been chatting "a good bit" on Facebook Messenger. App. 141. On the night of the alleged attack, CS planned to go to a nightclub called "Strikers" with two friends. App. 108. She could not remember whether she asked Hayes that day on Facebook if he was going to be at Strikers. App. 144. Hayes' cousin, Andre Hamilton, testified that Hayes went to Strikers and was going to meet a woman there. App. 475-76.

CS got to Strikers between 10:00 and 11:00pm. App. 108. Older sister AC kept CS's kids. App. 109. CS claimed that she was single at the time. App. 144. AC said she did not know whether CS was single. App. 215. CS said she did not see Hayes at Strikers, but Hamilton testified he saw CS and Hayes talking at Strikers. App. 111. App. 477. Hayes' friend, Lacarius Manning, also testified that he saw Hayes and CS talking at Strikers. App. 484.

CS had "one drink" during the three-and-a-half hours she was at Strikers. App. 110. She then left Strikers for another club, T Lees. App. 111. She went to T Lees with a different friend than the friends with whom she began the evening. App. 111. CS saw Hayes at T Lees. App. 113. They talked in the parking lot and Hayes asked for a ride because he lived near CS's apartment complex. App. 113. CS, her friend, and Hayes all left T Lees together. App. 113-14. CS guessed it was approximately 4:00am when they left T Lees. App. 114-15.

When they got to the apartments, Hayes asked CS if he could come inside. App. 115. Cs agreed that he could "come in for a while," but claimed she told him "nothing's gonna happen." App. 115. The two went into CS's apartment, she turned on the television for Hayes, then went "to wash to get the smoke and stuff off me." App. 116.

After washing, CS returned to the living room and sat in a recliner. App. 116. Hayes was on a sofa. App. 116. Hayes asked her to sit beside her. App. 116. CS got out of the recliner and sat on the sofa next to Hayes. App. 116. Hayes tried to kiss her. App. 116. CS told him no, that he needed to leave because she had to work that morning doing hair. App. 116.

CS claimed at this point, Hayes became violent. App. 116-17. He pulled her into the bedroom, choked her, and raped her. App. 117-120. She asked Hayes to use a condom and he did. App. 118. CS said she woke up later naked on the bed and Hayes was watching her. App. 119. Hayes forced her to perform oral sex and choked her again. App. 119-21. He followed her CS into the bathroom and back into the bedroom. App. 121-22.

CS heard someone walk into the bedroom. App. 122. She ran out of the bedroom and saw her sister, AC. App. 122. CS testified, “And I fell to my knees and I told her he raped me.” App. 122.

AC remembered this differently. App. 195-97. AC went to her sister’s apartment with two boys. App. 195. She went to CS’s bedroom and “saw she was laying across the bed but the boy was laying across her and then I walked out the room.” App. 196. She thought she walked in on them having sex. App. 197. According to AC, CS came out of the room, started crying, and said Hayes was trying to kill her. App. 197. On cross-examination, AC affirmed that CS did not say that Hayes had raped her. App. 209. She said no one had been assaulted in the apartment at that time as far as she could tell. App. 209.

According to CS, when she told her sister that Hayes raped her, AC told Hayes that he had to leave. App. 123. They began fussing in the hallway. App. 123-24. CS thought Hayes was punching AC, but then realized later he was stabbing her. App. 123. CS jumped on Hayes’

back in the hallway. App. 124. AC got free of Hayes and ran into the bedroom with the children and locked the door. App. 124-25.

AC remembered this differently. AC said she and Hayes were tussling in the bedroom with AC on the bed. App. 198-99. CS jumped on Hayes back in the bedroom. App. 199. AC grabbed the children and ran out the front door. App. 199. On cross-examination, AC again confirmed that she never locked herself in her sister's bedroom with the children. App. 210.

During the time CS claimed AC was locked in her bedroom, Hayes supposedly drug her into the kitchen and started stabbing her. App. 124-25. This gave her sister a chance to run for the front door. App. 125-26. When Hayes heard the door open, he ran to the front door. App. 126. CS used this chance to run out the back door. App. 126-27. She said she ran naked to her neighbor, Elaine's apartment. App. 127. The State did not call Elaine to testify.

Hayes' Testimony

Hayes voluntarily went to the police department that day and gave an interview. App. 357-58. After Hayes' interview with the police, the investigator went back to speak to the sisters and ask if there was anyone else in the apartment. App. 362. The sisters said no. App. 362.

Hayes testified that he and CS communicated over Facebook practically every day. App. 497. She told Hayes she was going to Strikers. App. 499. They interacted throughout the evening at Strikers. App. 501. When Strikers closed, Hayes went to T Lees. App. 501.

After hanging out at T Lees, Hayes saw CS "come in by herself and she came straight to me." App. 501. He went with CS and her friend to CS's apartment. App. 502. CS took a shower and came back into the living room and sat on Hayes' lap. App. 503. They kissed. App. 503-04. They went into her bedroom and had sex. App. 504-05.

After sex, “some guy came in the room.” App. 505. Hayes “jumped back” and the guy “got loud.” App. 506. The man was accusing CS of cheating on him. App. 506-07. He then became violent and started threatening Hayes. App. 507.

The man left the room and CS followed him. App. 507. Hayes believed the man was CS’s boyfriend because CS kept calling him “babe.” App. 507. Hayes noticed an adult-sized pair of men’s sneakers and some other male clothing in the room. App. 507.

Hayes heard the man and CS arguing in the kitchen. App. 508. Hayes then heard a loud noise that he described as the man slamming CS to the floor. App. 508. Hayes hurriedly put on his clothes. App. 508. As he was leaving the apartment, he heard CS gasping and asking for his help. App. 508.

Hayes kicked the man off CS. App. 509. The man grabbed a knife. App. 509. He started swinging the knife and cut CS. App. 509. Hayes heard a knock at the door. App. 509. AC and the boys entered the apartment and asked what was going on with her sister. App. 509-10. The man began making his way towards AC and AC pushed him. App. 510. They began fighting. App. 510-11. Then AC left with the kids. App. 511.

Hayes ran out the back patio door. App. 511. Hayes denied raping, stabbing or choking CS. App. 514-15. Hayes denied stabbing AC. App. 515. The solicitor did not impeach Hayes with any prior inconsistent statements. App. 515-19.

No Physical Evidence is Dispositive

The doctor at the emergency room who treated CS said she had multiple injuries and described the cuts as “superficial.” App. 299. She had hemorrhages in her eyes. App. 299. The cut on CS’s neck “was superficial” and the doctor closed it with stiches. App. 303. She had superficial cuts to her hands and fingers. App. 300.

The State's petition for certiorari rests on its claim that the "number, location and severity of the injuries" to CS and AC cannot "logically support any other conclusion but that the assailant intended to kill them." State's Pet. Cert. at 15. The solicitor contradicted this position at the charge conference. App. 523. Defense counsel requested lesser-included offenses ABHAN and first-degree assault and battery. App. 522-23. When asked by the trial judge for her position, the solicitor responded, "I don't think we can really object to lesser includeds being presented if there's evidence that the jury find those, probably, is in this case." App. 523.

Legal Discussion

Deficient performance is conceded by the State. The trial court charged the jury, "A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." App. 585. Appellate counsel for Hayes pointed out the erroneous charge on direct appeal. App. 672. The State realized the magnitude of trial counsel's error during the direct appeal to the extent that it filed a motion to strike this part of Hayes' brief. See State v. Tyreek Hayes, App. Case No. 2019-001303, Motion to Strike, Return to Motion to Strike, and Reply filed July 31, 2020 and August 4, 2020, available on C-Track. The Court of Appeals denied the State's motion to strike. Id. filed August 12, 2020.

The PCR court correctly found both deficient performance and prejudice. App. 816. The court held, "The jury charge in this case negated the requirement of any proof of an essential element of the charge against Applicant. Given the facts of this case, this error cannot be seen as harmless." App. 816. The PCR court also noted the effect of the improper jury instruction on the jury's consideration of the lesser-included offenses—the giving of which the State did not contest at trial. App. 816.

Substantial evidence supports Judge Cole’s finding of prejudice. See Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Judge Cole properly realized that the error affected areas that all lie within the realm of a jury. See State v. Smith, 430 S.C. 226, 233-34, 845 S.E.2d 495, 498-99 (2020) (reversing an attempted murder conviction because the error essentially eliminated the State’s burden of proof on all of the elements of attempted murder beyond a reasonable doubt). Whether a defendant has the required mental state is almost always a question for the jury, particularly with a specific intent crime like attempted murder. See State v. Perry, 440 S.C. 396, 407, 892 S.E.2d 273, 279 (2023) (finding error in confusing jury instructions on specific intent).

The State’s overwhelming evidence of guilt argument fails because the case presented substantial questions of fact that needed to be resolved by a jury. First, Hayes denied committing the crime. He was entitled to a properly instructed jury to assess his guilt. Hayes’ testimony alone means an appellate court cannot find overwhelming evidence of guilt in this case. In Perry, the Court found the specific intent error harmless because of the testimony of a disinterested witness. No disinterested witness exists in Hayes’ case. The defendant in Perry did not testify.

Second, Hayes’ guilt—on any charge—rested on the credibility of CS and AC’s testimony. The jury did not believe everything the sisters told them. The jury acquitted Hayes of rape. The incorrect charge—as Judge Cole found, also affected the jury’s consideration of the lesser included offenses. The State’s overwhelming evidence of guilt argument fails because, even if a jury disbelieved Hayes’ testimony about another man committing the crime, they could have found Hayes guilty of a lesser-included offense. The doctor testified that the wounds were “superficial” and the solicitor acknowledged evidence in the record supported the additional charges.

The State rests its entire argument on State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014), which is easily distinguished. State’s Pet. Cert. at 14-16. First, Middleton was not a PCR case and dealt only with whether the trial judge erred in refusing to charge first-degree assault and battery. Middleton at 314-15, 755 S.E.2d at 433-34. Second, the Supreme Court found the trial judge erred in refusing to give the lesser-included offense. Id. at 316-17, 755 S.E.2d at 434-35. Third, unlike Hayes, the defendant did not testify in Middleton. Fourth, Middleton committed his crime in full view of a stopped school bus. Id. at 314, 755 S.E.2d at 433. Finally, Middleton used a gun and fired directly at two passengers sitting in a car at the bus’s stop sign. Id.

Here, the weapon was a knife and neither sister could say when or how Hayes obtained the knife. The extent of the sisters’ injuries requires inferences of specific intent to kill or some lesser mens rea, and the extent and degree of the injuries and the defendant’s intent are classic issues reserved to jurors, not appellate courts. See also Reese v. State, 441 S.C. 392, 407, 894 S.E.2d 295, 302-03 (Ct. App. 2023) (rejecting State’s overwhelming evidence of guilt argument where eyewitnesses saw the defendant kick and stomp a victim). Furthermore, even the existence of overwhelming evidence of guilt does not automatically mean a PCR applicant cannot show prejudice. Smalls v. State, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018). The Smalls court listed “conclusive” categories that may push the State’s overwhelming evidence of guilt argument across the finish line: a confession, DNA evidence, “or a combination of physical and corroborating evidence so strong” that the Strickland standard cannot be met. Id. at 191, 810 S.E.2d at 845. None of those categories of evidence exist in this case.

Finally, the jury’s deliberations show this was a close case. They first sent a question asking to see or read Hayes’ statement to police. App. 595. The statement was not admitted, so

the jury could not view it. App. 595. The jury later sent a note saying they could not agree on a verdict for one of Hayes' charges. App. 598. The judge gave them an Allen charge. App. 604. Within fifteen minutes of the Allen charge, the jury returned with its split verdict. App. 608. The PCR court properly found prejudice and reversed the relevant convictions. Certiorari should be denied so that a properly instructed jury can decide these issues of fact.

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for certiorari.

s/David Alexander _____
David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

This 17th day of April, 2024.