

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lexington County

Honorable Jocelyn J. Newman, Circuit Court Judge

JO PRADUBSRI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-002090

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR court erred in finding that trial counsel was not
ineffective for failing to contemporaneously object to Agent
Lovin’s improper testimony.....8

CONCLUSION.....15

ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel was not deficient for failing to object to the testimony of a federal agent that the amount of drugs in this case were indicative of drug trafficking?

STATEMENT

Petitioner was indicted at the February 2009 term of the Lexington County grand jury for trafficking in crack cocaine, possession with intent to distribute crack cocaine in proximity to a school (PWID in proximity), and unlawful carrying of a pistol. App. 754-59.

Facts

On November 9, 2008, Petitioner and his then-girlfriend Melissa Martin were stopped while leaving a grocery store parking lot. The officer that stopped them had done so based on tips from a confidential informant who had told police that Petitioner and Martin sold narcotics, along with various other details not relevant here. App. 38, ll. 12-18. During the traffic stop, police saw a firearm. App. 169, l. 23 – 171, l. 11. This led them to conduct a search of Petitioner, the vehicle, and Martin. App. 172, ll. 1-7. Police found sixty-seven (67) grams of crack cocaine, all on Martin's person. App. 211, ll. 8-18; 246, ll. 12-19.

Martin originally told the police that the drugs belonged to her. App. 299, ll. 15-16. Later, however, Martin sent a letter to the solicitor's office asking for a deal and saying she was "willing to do anything that needs to be done" for a lighter sentence and bond reduction. App. 324, ll. 4-10. She testified against Petitioner at his trial. In exchange, she was permitted to plead guilty to possession of crack cocaine, rather than trafficking, and unlawful possession of a firearm. App. 329. She received a sentence of eighteen months' imprisonment, rather than the mandatory minimum seven years she faced for trafficking. App. 329.

Petitioner's First and Second Trials

The case was originally tried on February 11, 2010, before the Honorable Thomas A. Russo and a jury. App. 663. Petitioner was convicted of all three counts and sentenced to thirty years' imprisonment for trafficking, fifteen years for PWID in proximity, and one year for

unlawful carrying, all to run consecutively. *State v. Pradubsri*, 403 S.C. 270, 275 743 S.E.2d 98, 101 (Ct. App. 2013) (*Pradubsri I*). On direct appeal, however, the Court of Appeals held in a published opinion that the trial court had impermissibly limited the scope of Petitioner's cross-examination of Martin. *Id.* at 276, 743 S.E.2d at 101. Importantly, the Court of Appeals conducted a harmless error analysis and found that the error was not harmless because Martin's testimony was the only evidence of Petitioner's constructive possession. *Id.* at 284, 743 S.E.2d at 106. Thus, there was not overwhelming evidence to overcome the harmless error standard. *Id.* Therefore, it reversed Petitioner's convictions and remanded for a new trial. *Id.* The second trial ended in a mistrial after an indictment containing the first jury's guilty verdict was inadvertently sent back with the second jury. App. 446, ll. 13-17.

Petitioner's Third Trial

On January 13, 2015, Petitioner's third trial was held before the Honorable Clifton B. Newman and a jury. App. 1. Dayne C. Phillips and David Mauldin represented Petitioner; Lester M. Bell, Jr. and Casey N. Rankin represented the state. App. 1.

The state presented testimony from Special Agent Brian Lovin with the Bureau of Alcohol, Tobacco, and Firearms (ATF). App. 343. Over Petitioner's objection, Lovin was qualified as an expert in "the value of narcotics on the street." App. 352, ll. 8-14. He testified that the reason the crack cocaine found on Martin's person was divided in the manner that it was found in was "for distribution." App. 353, l. 16. He went on to testify as follows:

[SOLICITOR]: Is this how much a smalltime dealer would have on him?

[LOVIN]: No, sir.

Q. What does this amount indicate to you?

A. *A drug trafficker*; one who routinely engages in the sale of narcotics.

Q. Now you said that each one of these little squares can go for about \$20?

A. Yes, sir.

Q. And do you know how many grams are in each of these little squares?

A. It's generally about .2 grams.

Q. Okay. And you have had a chance to review this BEST kit containing this crack cocaine?

A. I have.

Q. Okay. In reviewing this BEST kit with this crack cocaine, do you have an estimated-

App. 353, ll. 9-25 (emphasis added). It was at this point that Petitioner's trial counsel informed the trial court that he had a matter of law. App. 356, ll. 1-2. However, the trial court told the solicitor to proceed. App. 356, l. 3. After two additional questions, the state ended its examination, and the trial court sent the jury out of the courtroom. App. 356, ll. 5-19.

Petitioner moved for a mistrial. App. 356, ll. 23-24. Defense counsel Phillips argued that Lovin's testimony was "as to trafficking," and that testimony exceeded Lovin's expertise, which was to prove "intent on the proximity charge." App. 357, l. 2. The trial court responded that "[T]here was no objection to the testimony. The witness characterized this person as being a trafficker and that testimony was un-objected to." App. 357, ll. 11-14. Phillips responded, "Well, we would argue that it invades the province of the jury." App. 357, ll. 15-16. To that, the trial court responded:

Well, maybe it does, but that's why you're there as the lawyer to object if objectionable testimony comes in and not sit quietly by

and then ask for a mistrial that – to the extent that you – you’re now objecting subsequent to the testimony. I agree that it’s the jury’s determination as to whether or not he’s a drug trafficker and they will be so instructed with a cautionary instruction...and the motion for mistrial is denied.

App. 357, l. 17 - 358, l. 2. The trial court gave the following curative instruction to the jury:

All right. Mr. Foreman, members of the jury, as I indicated to you earlier, expert witnesses can offer testimony in areas where lay witnesses cannot and expert witnesses can offer opinion testimony where lay witnesses cannot, but an expert witness cannot offer an opinion that infringes upon the ultimate issue to be determined by the jury. One of the charges against this Defendant is trafficking in crack cocaine, and none of this witness’s testimony can be construed to infringe upon your ultimate role and that is to determine whether or not the Defendant is guilty of this offense of trafficking in crack cocaine, and to the extent that a witness may comment or give an opinion on an ultimate issue, *it is for you to decide if you should disregard.*

App. 360, ll. 9-22 (emphasis added). Trial counsel did not contemporaneously object to the sufficiency of the curative instruction. *See, e.g.*, App. 360, ll. 1-2 (“The defense would request a curative instruction on this issue”). The jury ultimately found Petitioner guilty on all three counts. App. 435-36. Judge Newman sentenced Petitioner to twenty-five years’ imprisonment for trafficking and fifteen years’ imprisonment for PWID in proximity, to be served concurrently. App. 444, ll. 1-6.

On direct appeal, in a second published opinion,¹ the Court of Appeals affirmed. App. 450-60. Neither the prejudicial nature of the testimony, the trial court’s refusal to grant a mistrial, nor the sufficiency of the curative instruction was raised on direct appeal. *Id.* This Court granted certiorari, but after the completion of the briefing, this Court dismissed the writ as improvidently granted. App. 550.

¹ *State v. Pradubsri*, 420 S.C. 629, 803 S.E.2d 724 (Ct. App. 2017) (*Pradubsri II*).

Post-Conviction Relief Proceedings

On July 5, 2019, Petitioner filed a timely application for post-conviction relief (PCR). App. 552-60. An evidentiary hearing was held on June 8, 2022, before the Honorable Jocelyn Newman. App. 585. Ola Johnson represented Petitioner; Lillian Meadows represented the state. App. 586. Petitioner alleged that trial counsel had provided ineffective assistance of counsel, *inter alia*, by failing to object to Special Agent Lovin's testimony that the amount of drugs found indicated that Petitioner was a "drug trafficker." App. 578.

When asked by the assistant attorney general about not objecting to the "drug trafficker" testimony, Phillips testified that, while he continued to "find that objectionable," the state was able to get "in a few other questions before I chimed in with a matter of law." App. 629, ll. 21-25. He agreed that he "could...have made" the objection "contemporaneously" and that he "wish[ed] [he] would've objected immediately." App. 630, ll. 3-4, 25. He also testified that he requested a curative instruction for the purpose of appellate preservation, stating:

Yeah, ultimately for [error] preservation, for appeals, when you make a motion for a mistrial if the judge ultimately denies your request for a mistrial, you have to ask for a curative and then basically say that the curative would not cure the prejudice basically. You can't unring a bell of argument where it's not preserved. It's a little bit of a shell argument that I can't stand, personally.

App. 630, ll. 15-21. However, he went on to testify that he did not believe a proper objection "changed the Court's ruling," because "Judge Newman had denied all the prior motions that went to the heart of this issue and I...object a few lines later and as far as the transcripts concerned and make the motion outside the presence of the jury, in camera, for the mistrial." App. 631, ll. 1-6.

The PCR court dismissed the application. App. 663. As to the allegation at issue here, the PCR court first found that “Agent Lovin did not testify that [Petitioner] was a drug trafficker. Agent Lovin’s testimony was that...possession of...76 grams of crack cocaine...was indicative of drug trafficking and narcotics sale.” App. 731. The PCR court would go on to find that, regardless of whether trial counsel had rendered deficient performance, Petitioner had failed to prove prejudice since the curative instruction is presumed as a matter of law to have cured any error. App. 731 (*citing, inter alia, State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013)). Further, the PCR court found credible trial counsel’s testimony that “it was unlikely a contemporaneous objection would have resulted in a successful mistrial motion.” App. 731.

This petition follows.

ARGUMENT

The PCR court erred in finding that trial counsel was not ineffective for failing to contemporaneously object to Agent Lovin’s improper testimony.

By failing to properly object to Agent Lovin’s testimony that Petitioner was a “drug trafficker,” trial counsel removed the trial court’s ability to properly declare a mistrial and thus the appellate courts’ ability to review that decision. Because the evidence against Petitioner was not overwhelming—as previously observed by the Court of Appeals—trial counsel’s errors prejudiced Petitioner. This Court should grant certiorari and reverse.

To prevail on a claim of ineffective assistance of counsel, Petitioner must show both that his attorney performed deficiently and that the deficient performance prejudiced him. *Milledge v. State*, 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018); *accord*, *Strickland v. Washington*, 466 U.S. 668 (1984). An attorney is unconstitutionally deficient when their performance falls “below an objective standard of reasonableness.” *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722 (2001). The Petitioner satisfies the prejudice prong by showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). When the deficiency alleged is the failure to preserve an issue for appellate review, the PCR court essentially transforms into an appellate court and must determine prejudice by determining whether the petitioner was likely to succeed on appeal, using the same standard of review as an appellate court would have. *Milledge v. State*, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018).

A. Trial Counsel’s Failure to Properly Object was Deficient Performance.

First, trial counsel was deficient in failing to preserve the motion for mistrial for appellate review. To preserve a motion for mistrial for appellate review, trial counsel must do four things:

(1) make a contemporaneous objection to the improper testimony; (2) move for a mistrial; (3) accept the trial court's offer of a curative instruction; and (4) either immediately renew the mistrial motion or object to the sufficiency of the curative instruction. *See generally, e.g., Washington v. State*, 440 S.C. 550, 891 S.E.2d 668 (Ct. App. 2023); *State v. Bantan*, 387 S.C. 412, 418, 692 S.E.2d 201, 204 (Ct. App. 2010).

Trial counsel failed to make a contemporaneous objection to Agent Lovin's testimony, instead waiting several more questions before informing the trial court that he had a matter of law. Trial counsel also accepted the curative instruction offered by the trial court, but he neither contemporaneously objected to its sufficiency nor renewed the motion for a mistrial. This is even though, as he testified at the PCR hearing, trial counsel was aware of the required procedure to preserve a mistrial motion for appellate review. *See Chappell v. State*, 429 S.C. 68, 80, 837 S.E.2d 496, 502 (Ct. App. 2019) (key question in PCR cases is whether trial counsel "should have known to object"). The error preservation rules surrounding motions for mistrial are no different now than they were at the time of Petitioner's trial. Therefore, trial counsel "was ineffective at the time of the alleged error." *Pantovich v. State*, 427 S.C. 555, 562-63, 832 S.E.2d 596, 600 (2019).

Further, the PCR court's conclusion that trial counsel was not deficient because Lovin "did not testify that [Petitioner] was a drug trafficker" is incorrect. The PCR court found that Lovin's testimony did not invade the province of the jury at all; rather, it found that Lovin had simply testified that, in his experience, possession of that much crack cocaine was indicative of drug trafficking. Just because Lovin's testimony was not literally "Petitioner is a drug trafficker," does not mean that his testimony did not invade the jury's province. For the exact same reason, for example, courts have held that a forensic pathologist who testifies in their "opinion" that a

certain amount of trauma to a murder victim signifies an intent to murder invades the province of the jury, because only the jury is entitled to draw such inferences from circumstantial evidence. *State v. Commander*, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011) (citing *State v. Howard*, 195 Mont. 400, 403-04, 637 P.2d 15, 17 (1981)).

Petitioner was on trial for trafficking in crack cocaine. The elements of that offense are: (1) possession; (2) of more than ten grams; (3) of crack cocaine. *See* S.C. Code Ann. § 44-53-375(C). Therefore, Agent Lovin's opinion, that possession of more than seventy grams of crack cocaine was indicative of drug trafficking, was an opinion squarely on the ultimate issue. Possession of *any* amount of crack cocaine, in excess of ten grams, is indicative of trafficking. A jury is able to make that connection without a federal agent's instructions.

In any event, Lovin was qualified to testify as an expert only as to the street value of crack cocaine. His testimony regarding whether the amount of drugs involved in this case was indicative of "drug trafficking" was outside of the scope of his expertise. *See, e.g., State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001); *State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991). Since the Rule 704, SCRE, exception applies only to expert witnesses testifying within their field of expertise, Agent Lovin's testimony was objectionable twice over.

Accordingly, trial counsel rendered deficient performance by failing to properly raise his objection to Lovin's testimony and motion for mistrial.

B. Petitioner was Prejudiced by Trial Counsel's Errors.

Generally, an expert witness giving opinion testimony that "embraces an ultimate issue to be decided by the trier of fact," is not improper, so long as the testimony is "otherwise admissible." Rule 704, SCRE. However, there are exceptions to this general rule in criminal cases. For example, an expert may not testify to a criminal defendant's state of mind, or whether

they are guilty or not guilty. *Commander*, 396 S.C. at 268-69, 721 S.E.2d at 420-21 (collecting cases). The danger in permitting such testimony is that the jury may “not [be] permitted to reach its own conclusion concerning the criminal defendant’s guilt or innocence.” *Id.* at 269, 721 S.E.2d at 421.

For example, a forensic pathologist may opine that the manner of death in a murder case is “homicide” because this testimony only answers one of the many questions that the jury must answer to reach a verdict. If the jury believes that the manner of death was “homicide,” they will believe that a crime was committed, but they must still determine whether the defendant on trial committed it. *Id.* (citing *State v. Richardson*, 158 Vt. 635, 636, 603 A.2d 378, 379)). *But see State v. Westmoreland*, 421 S.C. 410, 421, 807 S.E.2d 701, 707 (Ct. App. 2017) (coroner’s lay testimony that “Victim’s death was a homicide, *which he defined as an intentional act*, was an opinion on Appellant’s state of mind and, thus, his guilt under the circumstances of this case.” (emphasis added)). The same forensic pathologist could not testify that “based on the nature of the injuries, the person who inflicted them did so with the intent to murder because the jury was as qualified as the doctor to draw an inference of intent from circumstantial evidence.” *Id.* (citing *Howard*, 195 Mont. 400, 637 P.2d 15 (in parenthetical)).

In this case, however, when asked what the amount of drugs involved in the case “indicate[d] to” him, Agent Lovin answered, “A drug trafficker; one who routinely engages in the sale of narcotics.” This testimony went directly to an issue of fact that must be decided by the jury. For the reasons stated *supra*, Agent Lovin was not testifying within his field of expertise. “An officer’s improper opinion which goes to the heart of the case is not harmless.” *Ellis*, 345 S.C. at 178, 547 S.E.2d at 491 (citing, *inter alia*, *Fordham v. State*, 254 Ga. 59, 325 S.E.2d 755

(1985)). Therefore, Petitioner was prejudiced by trial counsel's failure to timely object to Agent Lovin's testimony.

Even if Agent Lovin were properly testifying within his field of expertise, trial counsel's errors would be prejudicial. Even when an expert witness testifies, that testimony may "not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." *Commander*, 396 S.C. at 269, 721 S.E.2d at 421.

Agent Lovin testified that the amount of drugs in this case was indicative of "a drug trafficker." One of the charges against Petitioner was trafficking. This testimony, therefore, is an opinion on the *law*, because trafficking has a special meaning in the code, as it is the name of a criminal offense. *See Commander*, 396 S.C. at 269, 721 S.E.2d at 421 (disapproving of expert testimony regarding, *inter alia*, "matters of law"). The testimony is also different from testimony that has been approved, such as a forensic pathologist testifying that the manner of death was "homicide." Unlike "homicide," which is a neutral term that merely means that one person caused the death of another person, without regard to whether that killing was lawful or not, "trafficking" describes a criminal offense. *See Richardson*, 158 Vt. at 636, 603 A.2d at 379. Agent Lovin's testimony is more akin to a forensic pathologist testifying that a person's manner of death was "murder," testimony that would not be permitted, because it contains within it an opinion about the defendant's mental state. *See Westmoreland*, 421 S.C. at 421, 807 S.E.2d at 707 (coroner's testimony that "Victim's death was a homicide, *which he defined as an intentional act*, was an opinion on Appellant's state of mind and, thus, his guilt under the circumstances of this case." (emphasis added)).

Further still, the PCR court erred in finding that the curative instruction given by the trial court rendered any error harmless. It is true that “[g]enerally, a curative instruction is deemed to have cured any alleged error.” *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). However, that general rule is not absolute, and a curative instruction can be insufficient to cure an error if it does not meet certain parameters. *See, e.g., State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006). For example, in *State v. Smith*, this Court reversed a case where the solicitor had solicited testimony from an officer which commented on the defendant’s right to remain silent. 290 S.C. 393, 394, 350 S.E.2d 923, 924 (1986). In response to that testimony, the trial court simply asked the jurors if anyone remembered the solicitor’s question. *Id.* When one answered in the affirmative, the trial court responded, “forget it.” *Id.*

This Court reversed. *Id.* It held that “[g]reat care should be exercised in the delicate, difficult, and important matter of instructing the jury to disregard incompetent evidence.” *Id.* at 395, 350 S.E.2d at 924 (internal quotation marks omitted). The jury must be “*specifically instructed* to disregard the evidence, and not to consider it for any purpose during deliberations.” *Id.* (emphasis added).

Here, the trial court did not “specifically instruct” the jury to disregard Lovin’s testimony or disregard it. Rather, the trial court instructed the jury, “to the extent that a witness may comment or give an opinion on an ultimate issue, *it is for you to decide if you should disregard.*” This instruction does not specifically instruct the jury to disregard evidence; rather, it instructs the jury that they should choose rather to disregard the evidence, and they are free to consider it

if they want to.² The trial court's curative instruction, therefore, cannot be said to have cured the prejudice suffered by Petitioner.

Further, with presumably identical evidence presented in Petitioner's first trial, the Court of Appeals held that there was not overwhelming evidence of Petitioner's guilt to constitute harmless error. *See generally, Pradubsri I*, 403 S.C. 270, 743 S.E.2d 98. This fact further supports Petitioner's claim of prejudice.

Therefore, Agent Lovin's testimony—and trial counsel's failure to properly object thereto—prejudiced Petitioner. The appellate courts of this state have held several times that testimony going to the heart of the issue is not harmless. *Ellis*, 345 S.C. at 178, 547 S.E.2d at 491 (citing, *inter alia*, *Fordham v. State*, 254 Ga. 59, 325 S.E.2d 755 (1985)). It has further been recognized by some courts that, at least in certain situations, improper testimony from a police officer can be more prejudicial than improper testimony from a civilian witness. *Cf. Wheeler v. State*, 690 So.2d 1369 (Fla. 4th DCA 1997) (holding “that testimony that the police had targeted the area of appellant's arrest because of the area's reputation for crack cocaine sales was inadmissible and prejudicial.”) (parenthetical in *Latimore v. State*, 819 So.2d 956, 959 (Fla. 4th DCA 2002)). And in this case, the improper testimony was not just from a typical beat cop, but a federal agent, who almost certainly commanded additional respect from the jury.

For these reasons, trial counsel was ineffective for failing to properly object to Agent Lovin's improper testimony. Further, Petitioner was prejudiced by this error. Accordingly, this Court should grant certiorari and reverse the PCR court's contrary order.

² Trial counsel did not object to the sufficiency of the curative instruction. That particular error was not raised as an allegation of ineffectiveness to the PCR court, so it is not independently argued here. However, Petitioner asserts that trial counsel was ineffective in an additional manner by failing to object to the insufficient curative instruction, and this error compounded the prejudice that Petitioner already suffered.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to allow full briefing on the issue raised in this petition.



W. Chandler Norville
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ATTORNEY FOR PETITIONER

This 13th day of February, 2026.