

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Hampton County
Deadra L. Jefferson, Circuit Court Judge

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AUG 21 2014

S.C. Supreme Court

KELVIN MAYS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002649

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX 1

ISSUES PRESENTED 2

STATEMENT 3

ARGUMENTS

 1. In this burglary trial, the PCR judge erred in refusing to find counsel ineffective for not objecting to a witness’s statement that Petitioner was a known thief on the ground that the statement constituted improper character evidence..... 4

 2. The PCR judge erred in refusing to find counsel ineffective for not requesting a limiting or curative instruction after the witness testified that Petitioner was a known thief, when counsel objected to the statement on the ground that it was not in response to the question asked, moved for a mistrial and the judge denied the motion for a mistrial 8

CONCLUSION 11

ISSUES PRESENTED

1. In this burglary trial, did the PCR judge err in refusing to find counsel ineffective for not objecting to a witness's statement that Petitioner was a known thief on the ground that the statement constituted improper character evidence?

2. Did the PCR judge err in refusing to find counsel ineffective for not requesting a limiting or curative instruction after the witness testified that Petitioner was a known thief, when counsel objected to the statement on the ground that it was not in response to the question asked, moved for a mistrial and the judge denied the motion for a mistrial?

STATEMENT

In April of 2008, the Hampton County Grand Jury indicted Mays for burglary second degree, indictment #2008-GS-25-0156. On September 8, 2008, Mays proceeded to jury trial before the Honorable Carmen T. Mullen. Stephen Plexico represented Mays at trial. Randolph Murdaugh, III and Tameaka Legette prosecuted the case. The jury returned with a verdict of guilty and Judge Mullen sentenced Mays to fifteen (15) years in prison. A timely notice of intent to appeal was filed. M. Celia Robinson perfected the direct appeal on Mays' behalf. The South Carolina Court of appeals affirmed the sentence and conviction. State v. Mays, Op. No. 2012-UP-301 (S.C. Ct.App. filed May 16, 2012).

On June 13, 2012, Mays filed an application for post conviction relief. The State filed a return on November 5, 2012. On August 27, 2013, an evidentiary hearing was held before the Honorable Deadra L. Jefferson. Marion C. Fairey, Jr. represented Mays at the PCR hearing. Ashleigh R. Wilson was present on behalf of the State. In a written order signed November 6, 2013, Judge Jefferson denied relief and dismissed the application. A timely notice of intent to appeal was filed on December 16, 2013. This petition for writ of certiorari follows.

ARGUMENT

In this burglary trial, the PCR judge erred in refusing to find counsel ineffective for not objecting to a witness's statement that Petitioner was a known thief on the ground that the statement constituted improper character evidence.

The jury found Mays guilty of burglarizing the office of ACCESS Network, a nonprofit organization that assists persons with HIV/AIDS. Eddie J. Bryant, a medical caseworker for ACCESS, testified at trial. On January 21, 2008, at approximately 11:00 PM Bryant received a phone call from Gwen Bamfield, the president of ACCESS. (App. p. 85, line 14 – p. 86, lines 1-18). Bamfield asked Bryant if he would go check on the office because the burglar alarm had tripped. (App. p. 86, line 19 – p. 87, lines 1-11). According to Bryant, when he got to the office he saw Mays coming out the front door. (App. p. 87, lines 7-14). Bryant testified that Mays told him that two guys had broken into the office and he was just trying to see what they were trying to steal. (App. p. 88, lines 5-12).

During the cross examination of Bryant the following exchange took place:

Q: Okay. All right. Now, so he went all around with you, he offered to help you –

A: He didn't offer to help me.

Q: Well, he told you who—

A: He made a statement to try and clear himself.

Q: That's because you tried him and convicted him; isn't it true –

A: No. I didn't try him. I caught him in the act.

Q: You saw a man there who said somebody –

A: No.

Q: -- had nothing, had stolen nothing, who had done nothing wrong –

A: That's a known thief.

(App. p. 100, lines 2-24).

Counsel for Mays told the judge he had a matter of law that he needed to take up outside the presence of the jury. (App. p. 100, lines 15-16). Outside the presence of the jury counsel stated, “Your Honor, he responded that my client – it was not in response to my question – was a known thief, Judge, I believe --” (App. p. 101, lines 8-10). Counsel moved for a mistrial and the judge denied the motion for a mistrial. (App. p. 101, lines 11 – p. 102, lines 1-14). Counsel was ineffective in failing to object to the reference to Mays as a “known thief” as improper character evidence warranting a mistrial.

On direct appeal Mays argued that the trial court erred in denying the motion for a mistrial because his character was wrongly attacked, which most likely impacted the verdict. (App. p. 179). In affirming the conviction the Court of Appeals wrote, “We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding an issue was not preserved when appellant raised relevancy at trial but argued a different ground on appeal, namely that the testimony represented improper character evidence); State v. Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992) (holding an appellant may not be heard on appeal to complain of the admission of evidence elicited by his own counsel).

During the PCR hearing trial counsel agreed that he moved for a mistrial when Bryant testified that Mays was a known thief. (App. p. 227, lines 4-7). When asked about the basis for the mistrial motion, trial counsel testified, “I may have said it was not responsive to my question, but I think what I should have said was it not only not responsive but it put his character into issue when he had not testified.” (App. p. 227, lines 8-12). Counsel was ineffective for not objecting to the

testimony referring to Mays as a “known thief” on the ground that it constituted improper character evidence.

In the order of dismissal the PCR judge wrote, “This Court finds the Applicant failed to meet his burden of proving trial Counsel failed to object to or request a limiting instruction for Bryant’s ‘known thief’ statement. This Court finds Counsel’s motion for Mistrial should have preserved the issue for appeal. This Court also finds that while a curative instruction here was probably advisable, in light of the record, no prejudice resulted at trial. This Court finds a reasonable jury probably would not make its decision solely on Bryant’s testimony about the Applicant being a ‘known thief.’” (App. p. 257) Trial counsel did not object to the “known thief” statement on the ground that it was impermissible character evidence. Instead, Mays objected to the statement because it was not responsive. In contrast to the finding by the PCR judge that the mistrial motion “should have preserved the issue for appeal,” the Court of Appeals correctly found that the issue in regard to Bryant’s reference to Mays as a “known thief” constituting improper character evidence was not preserved for review. The PCR judge erred in finding it was preserved. While the witness’s statement that Mays was a “known thief” was not in response to a question asked by defense counsel, the objection made by defense counsel, defense counsel failed to object to the statement as constituting improper character evidence. Counsel was ineffective in failing to object to the statement as improper character evidence.

Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged. State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). Rule 404(a), SCRE, states the general rule that “[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” Bryant’s testimony that Mays was a “known thief” was

improper character evidence. The error was not harmless in this burglary trial where intent was a critical factor for the jury's determination.

In State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-55 (2001), the South Carolina Supreme court wrote:

Although evidence of appellant's bad character was improperly admitted, we find any error harmless. Whether an error in the admission of evidence is harmless generally depends upon its materiality in relation to the case as a whole. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). The erroneous admission of character evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record. State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996). For instance, we have found such error harmless where there is other properly admitted evidence of conduct demonstrating the particular character trait in question. See State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

The impact of the witness's statement in the present case that Mays was a "known thief" can not be deemed minimal in the context of the entire record of the burglary trial where Mays is seen leaving the front door of the burglarized office and his defense is based on his statement that he saw the true burglars and simply went inside to check on things, as opposed to entering with the intent to commit a crime.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under

prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was ineffective in failing to object to the witness’s statement that Mays was a “known thief” on the ground that it constituted improper character evidence. There is a reasonable probability that if counsel had made the proper objection, the trial judge would have either granted a mistrial or, as discussed in issue two, at least given a curative instruction. The PCR judge erred in refusing to grant relief.

2. The PCR judge erred in refusing to find counsel ineffective for not requesting a limiting or curative instruction after the witness testified that Petitioner was a known thief, when counsel objected to the statement on the ground that it was not in response to the question asked, moved for a mistrial and the judge denied the motion for a mistrial.

After the judge denied the mistrial motion made after witness Bryant testified that Mays was a “known thief,” the trial judge asked, “Anything further we need to put on the record?” (App. p. 102, line 15). Defense counsel responded, “Not from the defense, Your Honor.” (App. p. 102, lines 17). During the PCR hearing defense counsel was asked, “Did you request that the judge give a limiting instruction to the jury?” (App. p. 220, lines 18-19). Defense counsel responded, “No, I didn’t, but I certainly should have.” (App. p. 220, line 20).

In the order of dismissal the PCR judge wrote:

This Court also finds that while a curative instruction here was probably advisable, in light of the record, no prejudice resulted at trial. This Court finds a reasonable jury probably would not make its decision solely on Bryant's testimony about the Applicant being a 'known thief.' This Court also finds the likelihood this statement affected the outcome of the Applicant's trial is minimal considering the overwhelming evidence of the Applicant's guilty presented at trial. The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the outcome of the defendant's trial. Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 575, 552 S.E.2d 718,722 n.3, 725 (2001) The evidence presented at trial showed the Applicant was discovered by one of the State's witnesses leaving the building through its damaged door, was seen backing into the building to avoid detection, and was known to be familiar with the location. The Court finds the Applicant has failed to carry his burden of proving Counsel was deficient and that prejudice resulted from his performance.

(App. pp. 257-258). The PCR judge erred.

Counsel was deficient in failing to request a curative instruction after the witness testified that Mays was a "known thief." As discussed above is issue one, the statement constituted improper character evidence. Counsel admitted that he should have requested a limiting instruction. (App. p. 220, lines 18-20). Mays was prejudiced by the deficient performance. The State's evidence referenced in the order of dismissal does not constitute overwhelming evidence of guilt based on the specific defense in the case. At trial Bryant testified that Mays told him that two guys had broken into the office and he was just trying to see what they were trying to steal. (App. p. 88, lines 5-12). The State's evidence was not overwhelming evidence as to Mays' intent to commit a crime inside the ACCESS office, an element of burglary second degree, the offense charged.

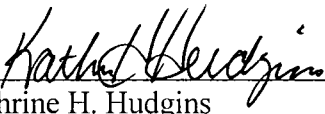
The curative instruction may not have cured the prejudice resulting from the improper character evidence, as discussed in issue one. See State v. Jones, 343 S.C. 562, 575, 541 S.E.2d 813, 820 (2001) ("We decline to hold that a limiting instruction always cures an evidentiary error. Cf. State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) (curative instruction not always sufficient to alleviate prejudice)"). Counsel, however, was deficient in failing to ask for a

limiting or curative instruction to try and limit the prejudice resulting from the improper character evidence. Mays was prejudiced by counsel's failure to request the curative or limiting instruction. There is a reasonable probability that if the judge had instructed the jury to disregard the statement that Mays was a "known thief" that the jury would have found the state failed to prove that Mays had an intent to commit a crime when he entered the ACCESS office. The PCR judge erred in refusing to grant relief.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Hampton County
Deadra L. Jefferson, Circuit Court Judge

KELVIN MAYS,

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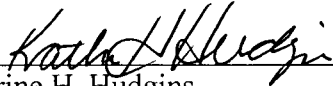
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002649

CERTIFICATE OF SERVICE

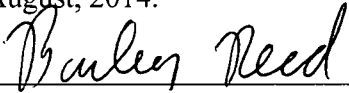
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 21st day of August, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of August, 2014.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.