STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Hampton County
Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2013-002649

KELVIN MAYS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
#100269

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. Whether the lower court properly held counsel was not ineffective for failing to object to testimony that the Petitioner was a "known thief" on the basis that it was improper character evidence?

II. Whether the lower court properly held counsel was not ineffective for failing to request a curative instruction after his motion for a mistrial based on Bryant's testimony that the Petitioner was a "known thief"?

STATEMENT OF THE CASE

For purposes of this Return, the Respondent adopts the Petitioner's "Statement".

ARGUMENT

I. There is probative evidence to support the lower court's finding that counsel was not ineffective for failing to object to Bryant's testimony on the basis that it was improper character evidence when the Petitioner has failed to show counsel's objection to Bryant's testimony on another basis was unreasonable and that counsel's performance affected the outcome of the Petitioner's trial.

The Petitioner was convicted of breaking into an office building shortly after 11pm. At trial, the State presented the testimony of Eddie Bryant who testified he was asked to meet the police at the building shortly after the building's silent alarm was triggered. Bryant testified when he arrived at the building he confronted the Petitioner who was exiting the broken front door of the building as he pulled up in his car. During trial counsel's cross-examination of Bryant, Bryant testified the Petitioner was a "known thief". (App. 100:14). Trial counsel asked that the jury be excused and moved for a mistrial on the basis that Bryant's statement was not in response to counsel's question on cross-examination. Counsel cross-examination of Bryant was replayed for the Court and counsel's motion for a mistrial was denied. (App. 101-102).

The Petitioner alleges counsel was ineffective for failing to object to Eddie Bryant's testimony that the Petitioner was a "known thief". The Petitioner claims counsel should have objected to this statement on the basis that it was improper character evidence. The Respondent submits this claim is without merit. There is probative evidence to support the lower court's finding that counsel was not ineffective for failing to object to Bryant's testimony.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The Petitioner has failed to surmount Strickland's high bar.

As an initial matter, the Respondent submits the Petitioner has failed to show counsel was deficient for failing to object to Bryant's testimony on the basis that it constituted improper character evidence. The record reflects counsel objected to Bryant's testimony and moved for a mistrial on the basis that Bryant's statement was not responsive to any question asked by counsel on cross-examination. (App. 101:6-102:20). While it is possible counsel could have objected to

Bryant's statement on the basis that it constituted improper character evidence, this Court should not find counsel's performance deficient simply because he chose to raise an objection on a different basis than the one suggested by appellate counsel[1] and post-conviction relief counsel. See Salerno v. U.S., 870 F.Supp. 549 (S.D.N.Y 1994) ("Disagreement with the use of objections, without more, will not establish ineffectiveness.") and McElvain v. Lewis, 283 F.Supp.2d 1104 (C.D. Ca. 2003) ("There is no ineffectiveness for failure to object where he record shows an objection.").

In Strickland, the Supreme Court recognized that "there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 688. Strickland also requires an evaluation of counsel's performance from the standard of reasonableness considering all the circumstances. "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. at 689. Based on Strickland's reasonableness standard, the Petitioner has failed to show that counsel's decision to object to Bryant's testimony on an alternative basis other than that suggested by the Petitioner on appeal and on post-conviction relief was not reasonable under professional norms. The Petitioner has failed to show that counsel's alleged error was so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

The Respondent submits further that even if this Court finds counsel's performance was deficient for failing to object to Bryant's testimony on the basis that it constituted improper

[1] On appeal, the Petitioner argued the trial court erred in denying his motion for a mistrial because his character was wrongly attacked, which most likely impacted the verdict. The Court held the issue was not preserved since the Petitioner argued a different basis for his motion for a mistrial on appeal than he argued at trial. (App. 179).

character evidence, the lower court correctly held the Petitioner failed to show that counsel's performance affected the outcome of his trial. The Respondent submits Bryant's statement about the Petitioner being a "known thief" did not greatly impact the jury's verdict in light of the evidence presented by the State at trial.

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. Strickland v. Washington, 466 U.S. 668, 693-95.

"Whether an error in the admission of evidence is harmless generally depends upon it's materiality in relation to the case as a whole. 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. Brown, 34 S.C. 70, 75, 543 S.E.2d 552, 554-55 (2001). In State v. White, the Court of Appeals noted "the appellate courts are disposed to regard as harmless intervening errors where it appears from the record that the conviction is clearly correct on the merits; where it appears on the whole case that substantial justice has been done; where the record shows that accused had a fair trial; where the record conclusively shows that the alleged error could not have resulted in prejudice; where from the whole record the guilt of accused appears to be clearly established; where no other verdict could have been returned on the evidence, and where the conviction was

just and would have been reached if the errors had not been committed." 371 S.C. 439, 448, 639 S.E.2d 160, 164-65 (Ct. App. 2006).

In light of the case as a whole, counsel's failure to object to testimony from Bryant about the Petitioner being a "known thief" on the basis that it was improper character evidence had a minimal impact on the outcome of the Petitioner's trial. As the lower court held, the State presented overwhelming evidence of the Petitioner's guilt. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). At trial, the State presented evidence to show the Petitioner was seen moving near and ultimately exiting the front door of the burglarized building shortly after the silent alarm was triggered. (App. 87: 7-21). The Petitioner was apprehended and handed over to police by one of the business' employees who witnessed the Petitioner exiting the business' broken front door. (App. 88:3-89:13). The State also presented evidence to show that the Petitioner had visited the office at least twice the week prior to burglary and appeared to be looking around the office. (App. 89:14-90:5).

It is also unlikely an objection to Bryant's testimony by counsel on the basis of improper character evidence would have warranted the granting of counsel's motion for a mistrial. "The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Adams, 354 S.C. 361, 376, 580 S.E.2d 785, 793 (Ct. App. 2003). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)). "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977).

The Supreme Court favors the exercise of wide discretion of the trial judge in determining the merits of a mistrial motion in each individual case. State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988). Among the factors to be considered are the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony in the case. Id. Bryant's testimony was not sufficiently prejudicial to warrant the extreme measure of declaring a mistrial. Further, the circumstances of Bryant's testimony, during the heated cross-examination and accusations by Appellant's counsel, do not warrant the declaration of a mistrial. See State v. Quarles, 261 S.C. 413, 418-19, 200 S.E.2d 384, 386 (1973); State v. Culbreath, 377 S.C. 326, 333-34, 659 S.E.2d 268, 272 (Ct. App. 2008); State v. Ferguson, 376 S.C. 615, 658 S.E.2d 101 (Ct. App. 2008). The Respondent submits probative evidence exists to support the lower court's finding that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to object to Bryant's testimony that the Petitioner was a "known thief".

II. There is probative evidence to support the lower court's finding that counsel was not ineffective for failing to request a curative instruction after moving for a mistrial based on Bryant's testimony when the Petitioner has failed to show that he prejudiced by counsel's alleged error.

The Petitioner alleges counsel was ineffective for failing to request a curative instruction after Bryant's testimony that the Petitioner was a "known thief". The Respondent submits this claim is also without merit. There is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to request a curative instruction after Bryant's testimony.

Generally, a curative instruction is deemed to have cured any alleged error. State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006). A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission. Id. "Because a trial court's 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." Id. (citing State v. Patterson, 337 S.C. 215, 224, 522 S.E.2d 845, 849-50 (Ct. App. 1999)). However, this Court has declined to hold that a limiting instruction always cures an evidentiary error. State v. Jones, 343 S.C. 562, 575, 541 S.E.2d 813, 820 (2001) (citing State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) (curative instructions are not always sufficient to alleviate prejudice)).

The Respondent submits the Petitioner has failed to show that counsel's failure to request a curative instruction after Bryant's testimony was an error that affected the outcome of the Petitioner's trial. "Where guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than that the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result." State v. White, 371 S.C. 439, 449, 639 S.E.2d 160, 165 (Ct. App. 2006). As argued before, Bryant's testimony and counsel's failure to request a curative instruction did not affect the outcome of the Petitioner's trial. The State presented overwhelming evidence of the Petitioner's guilt and it is clear from the record a curative instruction from the Court would not have affected the State's clear establishment of guilt. The fact that the Petitioner's defense at trial suggested an alternative basis for the Petitioner's presence in the burglarized business does not negate the overwhelming nature of the evidence presented by the State as the Petitioner suggests. Absent Bryant's testimony regarding the Petitioner being a "known thief", the jury still would not have had a reasonable doubt respecting guilt. The Respondent submits the Petitioner has failed to carry his burden of proving that but for counsel's failure to request a curative instruction after his motion for a mistrial based on Bryant's testimony, the outcome of the Petitioner's trial would have been different. Bryant's

statement had a minimal impact on the outcome of the Petitioner's trial and did not warrant the granting of a mistrial or the reversal of the Petitioner's conviction on post-conviction relief.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: Ashleigh R. Wilson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

January 5, 2015

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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari to the SC Supreme Court has been mailed to the respondent's attorney Kathrine Hudgins.

Anne R. Henley
Legal Assistant

SWORN to before me this
5th day of January, 2015.

_____(L.S.)
Notary Public for South Carolina.
My Commission Expires: 5/14/2024

ALAN WILSON
ATTORNEY GENERAL

January 5, 2015

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Kelvin Mays, #323694 v. State of South Carolina
Appellate Case No. 2013-002649
Lower Court Case No. 2012-CP-25-0211

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari and two (2) copies of appendix to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return to Petition for Writ of Certiorari.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Kathrine Hudgins, Esquire