

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Georgetown County

Thomas A. Russo, Circuit Court Judge

RONNIE W. WILSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000521

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Did the PCR judge err by finding counsel provided effective representation where counsel failed to object to improper testimony of prior physical abuse of Felita Graham by Petitioner since the evidence was inadmissible as a prior bad act under Rule 404(b), SCRE, which unfairly prejudiced Petitioner?

STATEMENT OF FACTS

On July 18, 2007, the Georgetown County Grand Jury indicted Petitioner for kidnapping, first-degree burglary, criminal domestic violence of a high and aggravated nature (CDVHAN), and possession of a weapon during commission of a violent crime. App. 556 – 557; App. 571. Petitioner's case proceeded to a jury trial before the Honorable Paul M. Burch. App. 1. C. Reuben Goude represented Petitioner. Robert H. Bryan represented the State. App. 1.

Prior to trial, defense counsel moved to exclude evidence of any prior physical abuse against Petitioner's former girlfriend, Felita Graham, by Petitioner. App. 24, ll. 6 – 9. Defense counsel explained that Graham gave a videotaped statement to police in which she alleged that in January or February of 2004, more than three years before the alleged incident in this case, Petitioner assaulted her. App. 24, ll. 10 – 12. Counsel explained that there were no police report or medical records confirming the alleged assault and the State should not be allowed to mention the "prior uncharged misconduct." App. 24, ll. 12 – 16. The solicitor had already discussed with Graham that she was not to testify about the alleged 2004 physical assault. App. 24, ll. 17 – 22. The judge agreed that the alleged physical assault "could not be elicited on direct examination." App. 24, l. 23.

At trial, the state alleged that on May 9, 2007 in Georgetown County, South Carolina, Petitioner entered Graham's home without her consent, choked her, and threatened to kill her. The state claimed that Petitioner forced Graham and their two-year old daughter into a car, and drove around for hours. App. 73, l. 3 – App. 77, l. 8. The state further alleged that Petitioner would not allow Graham to leave his side and threatened her with a steak knife. App. 77, ll. 12 – 21.

When Graham did not show up at work that morning, her mother, Queen Grant, went to Graham's house. App. 55, ll. 16 – 19. After discovering that Graham and her granddaughter were not at home, Grant went to the police department to report that her daughter and granddaughter were

missing. App. 55, ll. 22 – 23. When police arrived at Graham’s home, she and Petitioner had already returned. App. 91, l. 12 – App. 92, l. 5. Petitioner was arrested.

Graham explained that she and Petitioner began a romantic relationship in 2003. App. 60, ll. 1 – 3. They moved to Myrtle Beach, South Carolina, where they both began to work. App. 60, ll. 6 – 23. Graham became pregnant and she and Petitioner separated. Graham claimed:

“Well when I went back to my mother’s home I went back to her house because **he had become violent towards me in his verbal as well as becoming physical** and I did not want to lie to my mother so I told her . . .”

App. 62, ll. 16 – 19 (emphasis added). Defense counsel made no objection to this testimony.

Graham continued:

“[I] did not want to continue a relationship with him because of the fact that I was pregnant with his child and **I felt that he was going to harm me.**”

App. 62, ll. 6 – 19 (emphasis added). Again, counsel did not object to Graham’s testimony.

When the solicitor asked Graham whether Petitioner attempted to contact her prior to the alleged kidnapping and assault for which Petitioner was on trial, Graham responded:

“Yes, sir, he had been calling me every day. He had been, he had come by my job. He had been calling my house. I had my mother come and stay with me for two weeks because **he was harassing me and I was afraid that he would probably end up try to hurt me . . .**”

App. 63, ll. 15 – 24 (emphasis added). Defense counsel made no objection.

The solicitor then inquired about an incident in which Petitioner went to see Graham at her job. Graham explained:

“He showed up and my job a couple of times . . .”

App. 64, l. 4.

“I answered the phone, you know, told him why are you calling, you need to stop calling here, hung up the phone, and **he came into the building one day and I told him he needed to leave.** He wanted to talk and he said, well can I talk to you when you get off from work, I said no, and **he still at that point still harassed me . . .**”

App. 64, ll. 4 – 13 (emphasis added). Defense counsel made no objection.

Finally, the solicitor asked Graham:

“Okay, so anything else that the jury needs to know about your relationship leading up to the incident on May the 9th?”

App. 66, ll. 10 – 12.

Graham replied:

“There was one at the time that **he did grab me by my neck.** There **were physical bruises** and I went to my mother’s house at that time, this is just before I left to go to, to go to pleasant hill to live with my aunt, **there were bruises on my neck . . .**”

App. 66, ll. 19 – 23 (emphasis added). Defense counsel finally made an objection. App. 67, ll. 1 – 5. In addition to objecting to the inadmissible prior bad act, counsel moved for a mistrial. Counsel argued that the trial judge had ruled that no evidence regarding any prior abuse or assault by Petitioner in 2004 would be admitted. App. 67, l. 10 – App. 68, l. 12.

The solicitor argued that the judge’s ruling *in limine* “was made with respect to one incident that happened in 2004.” App. 69, ll. 12 – 15. The solicitor continued:

“[I]t’s not my role to object so I was actually turned around waiting for Mr. Goude to object if he had a prior bad act motion. My position is the proper thing to do is **when you hear inadmissible testimony your role in the courtroom as a defense lawyer is to object timely and, and then ask for a curative instruction or a mistrial at that time, not to let it**

go on and on and on before you object and then say that it can't be corrected at that point."

App. 69, ll. 16 – 24 (emphasis added). The solicitor objected to a mistrial and stated that he had no problem with a curative instruction. App. 72, ll. 15 – 17. The trial judge offered a curative instruction, but defense counsel explained that a curative instruction would not be sufficient. The judge denied defense counsel's motion for a mistrial. App. 71, l. 24 – App. 72, l. 10.

The jury found Petitioner guilty of kidnapping and CDVHAN. App. 396. Petitioner was found not guilty of first-degree burglary and possession of a weapon during commission of a violent crime. App. 395. The judge sentenced Petitioner to twenty-two years' imprisonment for the kidnapping charge and ten years' imprisonment for the CDVHAN, to run concurrently. App. 406. Petitioner appealed his convictions and sentences.

The S.C. Court of Appeals affirmed Petitioner's convictions and sentences in a published opinion. See State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (2010). Kathrine H. Hudgins represented Petitioner. App. 434. The remittitur was issued on September 2, 2010. App. 438.

Petitioner filed a PCR application on May 4, 2011. App. 439. On June 3, 2011, Respondent filed its return requesting an evidentiary hearing. App. 445. On August 27, 2012, a PCR hearing was held before the Honorable Thomas A. Russo. App. 450. T. Andrew Johnson, Sr. represented the State. Lewis H. Hutto, III. represented Petitioner. App. 450.

At the PCR hearing, Petitioner alleged that counsel failed to object to inconsistent statements by the state's witnesses. Within that general allegation, as explained by Petitioner, that defense counsel did not "timely object" to the introduction of "prior bad act" evidence. App. 489 – 490. Petitioner stated that counsel was deficient in failing to object to testimony from Graham about the alleged prior physical abuse by Petitioner. Petitioner also indicated that counsel was

deficient in failing to accept the curative instruction from the judge in response to the inadmissible prior bad act evidence. App. 490.

Defense counsel agreed that Graham gave testimony that she was not supposed to. App. 544. Counsel agreed that he did not immediately object to Graham's inadmissible and prejudicial testimony of alleged prior abuse by Petitioner. App. 540 – 541. However, counsel explained:

“[I]f you stand up and say, ‘Ladies and Gentlemen of the jury, please ignore that the witness just said my guy had beat her up before because I don’t want you [to] hear that he’s a beater up of women.’ You know, if you stress that thing to their common brain, they (sic) going to think it’s a big deal . . .”

App. 541, ll. 8 – 14.

The PCR judge issued an order of dismissal September 10, 2012. In the order, the judge wrote that “[c]ounsel is not required to object to every potentially objectionable but likely harmless statement at trial.” App. 552. The judge opined that it was “clearly a reasonable trial strategy by counsel” to not object to certain statements so as not to drill it into the jury’s heads.” App. 552. The judge found that counsel was not deficient in his representation and Petitioner did not establish prejudice. App. 553. PCR counsel did not file a notice of appeal.

On February 19, 2014, Petitioner filed a PCR application in which he contended that he did not voluntarily waive his right to appeal the PCR judge’s order of dismissal. On May 29, 2014, Respondent filed its return and motion to dismiss. On February 5, 2015, the matter proceeded to a hearing before the Honorable G. Thomas Cooper, Jr. App. 579. Joshua Thomas represented the State. Stephen Fowler represented Petitioner. App. 579.

By an order signed on February 13, 2015, Judge Cooper granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 600 – 604. Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding counsel provided effective representation where counsel failed to object to improper testimony of prior physical abuse of Felita Graham by Petitioner since the evidence was inadmissible as a prior bad act under Rule 404(b), SCRE, which unfairly prejudiced Petitioner.

Evidence of prior physical abuse by Petitioner against Graham was inadmissible. The alleged abuse was an isolated, three-year old incident which had no similarity to the crime for which Petitioner was on trial. Evidence of the alleged physical abuse was improper character evidence and portrayed Petitioner as a stalker. As the solicitor properly pointed out, defense counsel had an obligation to object to the impermissible evidence. The purpose of a contemporaneous objection is so the trial judge can prevent or cure prejudice to the defendant. Therefore, counsel's failure to contemporaneously object to the impermissible prior bad acts evidence unfairly prejudiced Petitioner.

Evidence of prior bad acts is inadmissible to show propensity to commit the specific crime charged. Rule 404(b), SCRE. Such evidence may, however, be admissible to establish a motive, intent, absence of mistake, common scheme or plan, or identity of the perpetrator. Rule 404(b), SCRE; see also State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). Where those acts are not the subject of a conviction, they must first be proven by clear and convincing evidence. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Even if such evidence is clear and convincing and falls within a Rule 404(b) exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; see also State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) ("When . . . the

previous alleged bad act is strikingly similar to the one for which [defendant] is being tried, the danger of unfair prejudice is enhanced.”).

This Court has held that counsel’s failure to object to impermissible evidence at trial constituted ineffective assistance. In Mitchell v. State, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989), this Court found trial counsel ineffective when he failed to object to the admission of character evidence elicited from witnesses for the State. Id. at 188, 379 S.E.2d at 125. Trial counsel also failed to object to references to this evidence during the State’s closing argument. Id. This Court found “a reasonable probability that, had defendant’s character not been improperly placed into issue, the outcome would have been different” and, therefore, reversed the PCR judge’s decision denying relief. Mitchell, 298 S.C. at 189, 379 S.E.2d at 125.

In Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), this Court also found counsel ineffective for failing to object. This Court found that “prejudice clearly flowed from counsel’s erroneous failure to object to state’s opening statement vouching for . . . witness’s credibility.” Id. at 228, 565 S.E.2d at 285. In that case, the State’s case-in-chief of placing the applicant at the scene of the crime, rested on the credibility of this witness. Id. at 229, 565 S.E.2d at 285. Holding that the State improperly vouched for the witness’s credibility and trial counsel was deficient in failing to object, this Court reversed the PCR judge’s ruling denying relief to the applicant. Id. at 228, 565 S.E.2d at 285. See also Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (Trial counsel’s failure to object to the forensic interviewer’s testimony, which was improper hearsay and bolstered the victim’s testimony, was deficient and prejudiced the applicant.).

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question

becomes, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel’s assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel’s “deficient performance prejudiced the defendant to the extent 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, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Here, defense counsel was ineffective for failing to immediately object to Graham’s impermissible testimony that Petitioner physically abused and harassed her prior to the date of the alleged incident for which Petitioner was on trial. Prior to trial, defense counsel moved to exclude any testimony of alleged physical abuse from 2004 and argued that such evidence was a prior bad act and, therefore, inadmissible. Although the alleged physical abuse that Graham testified to was not the subject of defense counsel’s motion to exclude, the evidence was impermissible and unfairly prejudicial nonetheless.

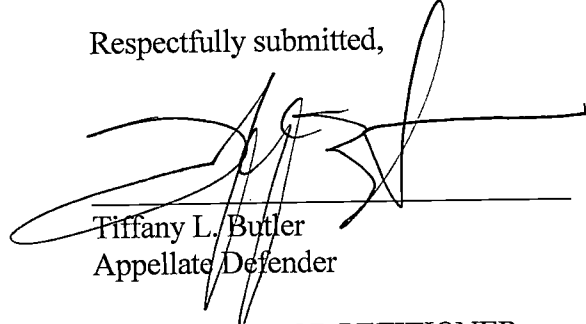
Because counsel failed to immediately object to the impermissible prior bad acts evidence, Graham continued to discuss the alleged prior abuse in front of the jury. Hearing testimony that

Petitioner had physically abused and harassed Graham in the past allowed the jury to make the impermissible inference that since he abused Graham in the past he was guilty of the CDVHAN for which he was on trial.

CONCLUSION

For the reasons argued above, Petitioner Ronnie W. Wilson respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tiffany L. Butler', is written over a horizontal line. The signature is stylized and somewhat cursive.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Thomas A. Russo, Circuit Court Judge

RONNIE W. WILSON,

PETITIONER,

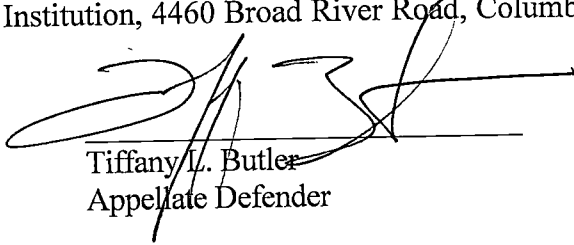
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

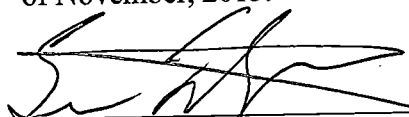
I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ronnie W. Wilson #235803, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of November, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of November, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.