

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

James R. Barber, III, Circuit Court Judge

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DEC 31 2015

S.C. Supreme Court

JARVIS GIBBS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000447

REPLY BRIEF

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ARGUMENT IN REPLY

Defense counsel was ineffective for failing to object to unsubstantiated, inadmissible claims of witness intimidation that the State deliberately elicited from Arthur Macklin and emphasized during closing arguments in an effort to bolster Macklin's credibility and to imply, without evidentiary support, Petitioner's guilt.

Discussion

The State argues that Petitioner's case is "readily distinguishable" from other South Carolina cases addressing unsubstantiated claims of witness intimidation by a defendant, "as Macklin freely and unequivocally declared that [Petitioner] was not the perpetrator of his attack and had not threatened him in any way." Respondent's Brief at p. 12. This contention is incorrect.

Macklin never "freely and unequivocally" declared that Petitioner was not the perpetrators of the attacks. Respondent's Brief at p. 12 Macklin stated that he had never been threatened by Petitioner, that he did not know the identity of his assailants, and that his assailants did not tell him why they attacked him. App 184, ll. 13-24.

Despite the total absence of evidence connecting Petitioner to Macklin's assault, Macklin clearly associated being assaulted with being identified as a cooperating witness: "[w]hat I'm worried about is my life, is my safety. Something happened . . . I got hurt behind that [*sic*]. After I talked to the detectives, I was knocked out I was supposed to be killed . . . some guys jumped on me and knocked me out and they were supposed to shoot and kill me," finally he declared, "[the police] put [my name and the robbery] in the paper and I got hurt behind [*sic*] that." App. 170, ll. 1 - App. 171, ll. 11.

The State also baldly asserts that the prosecution, "never argued that [Petitioner] inflicted those injuries on Macklin or the attack was at [Petitioner's] order or direction." *Id.* In actuality, the State devoted a large portion of its closing argument to bolstering Macklin's credibility by

conjecturing that Macklin was assaulted because his testimony was damaging to Petitioner and that any inconsistencies in his testimony were attributable to his fear:

You know, [Macklin] actually tried to take the Fifth up here on a couple of questions. You know, he did not want to be here. Once we got done with him, you know, he essentially told the same thing to you that he told to [the detective] back on July 25, 2008. ***And what happened because he talked to [the detective] and told him the story? He got beat up. He got knocked out. He said his whole face was swole [sic] up. He didn't want to be here. He didn't wanted [sic] to get hurt. He didn't [want] to get killed.***

But guess what? He was here. He told the same story. He even said -- if you remember, I asked him, if he wanted to be here, do remember what he said the Sheriff's Department finally caught up with him to serve him that subpoena to be here? 1:30 Monday morning. ***You know, he was trying not to get up there.***

But what did he do? He told the truth. He told the same story, you know. Is the statement consistent? It is the same thing that he told Lee Boan back on July 25th, 2008. That is consistent.... The truth is the truth. And I submit Arthur Macklin was telling the truth.

App. 403, ll. 18 – App. 404, ll. 20 (*emphasis added*).

In addition, the State wrongfully contends that *State v. Rogers*, 96 S.C. 350, 80 S.E. 620 (1914) and *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510 (1994); are “readily distinguishable”. *Mincey* is virtually indistinguishable from the Petitioner’s case. Likewise, any distinctions between *Rogers* and the present case are distinctions without differences. In both cases, witness intimidation testimony was inadmissible because the State had no evidence to connect the violence or threat to the defendant.

In *Mincey*, as in the present case, the witness whom prosecutors alleged changed his testimony due to the defendant being a “pretty intimidating man” explicitly denied that the defendant had threatened him: as this Court noted the witness, “***denied that Mincey had in any way threatened him.***” 314 S.C. at 357, 444 S.E.2d at 511 (*emphasis added*). Accordingly, defense counsel was ineffective for failing to object to the solicitor’s closing argument. *Id.*

In *Rogers*, this Court dealt with two alleged instances of alleged witness intimidation. 96 S.C. 350, 80 S.E. 620. First, a witness received an anonymous threatening letter; it was admitted into evidence accompanied by a jury instruction that it should be disregarded if the State failed to connect the letter to the defendant. *Id.* On appeal, this Court noted that the trial court should have removed the letter from evidence once the state failed to present evidence linking the letter to the defendant, but held that the accompanying instruction rendered the error harmless. *Id.*, 80 S.E. at 621.

Second, the trial court inadvertently submitted an affidavit, previously ruled inadmissible, by defendant's wife stating that the defendant's father had threatened her in an effort to prevent her testifying and her daughter from testifying. *Id.* In reversing the conviction, this Court held that "[t]here was nothing to connect the defendant with this attempt on the part of the father to suppress testimony." *Id.*

In contrast, the witness intimidation evidence in *Edwards* was admissible because the victim's mother testified that the defendant "told her 'to get in touch with [the victim] and have her not show up because he had a hit on her.'" 383 S.C. at 68, 678 S.E.2d at 406. In affirming the defendant's conviction, this Court noted that "[e]stablishing the defendant as the source of the intimidation provides the necessary reliability for admissibly." *Id.* at 72, 678 S.E.2d at 408.

By arguing in its brief that Macklin "affirmatively stated" that Petitioner was not responsible for the assault; the State is necessarily conceding that there was no evidence linking Petitioner to the alleged witness intimidation and that such testimony, if objected to, would have been inadmissible. The *Rogers* court memorably stated that, "[i]t would be a prostitution of justice to prejudice the defendant thereby where there is evidence of wrongdoing on the part of some one acting for himself, or some one else other than a defendant, and no proof of any nature, kind, or description

that in any manner connects the defendant with the tampering or interfering.” 96 S.C. at 350, 80 S.E. at 621.

During trial, whenever Macklin gave an answer that the State did not expect or that was unhelpful to their theory of the case, the prosecution circled back to the assault and Macklin’s fear of testifying. The State made his fears and the assault central to their closing argument. Macklin’s denial does not cure the unfair prejudice suffered by Petitioner.


As in *Mincey* and *Rogers*, defense counsel’s failure to object to this clearly inadmissible testimony and the related statements in closing argument, prejudiced Petitioner and “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because “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 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

CONCLUSION

For the additional reasons set forth herein, Petitioner Jarvis Gibbs respectfully requests this Court to grant post-conviction relief and hold that Petitioner's Sixth Amendment rights were violated when defense counsel failed to object to claims of witness intimidation in testimony by the State's witness and in prosecutors' closing arguments when there was no evidence linking Petitioner to the alleged intimidation.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER.

This 30th day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

James R. Barber, III, Circuit Court Judge

JARVIS GIBBS,

PETITIONER,

V.


STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-000447

CERTIFICATE OF SERVICE

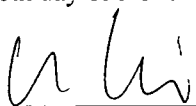
The undersigned attorney hereby certifies that a true copy of the Reply Brief in the above referenced case has been served upon Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of November, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 30th day of November, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.