

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
D. Craig Brown, Circuit Court Judge

RECEIVED
MAR - 9 2016
SC SUPREME COURT

ROBERT L. JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001597

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1. Did the PCR court err in failing to find trial counsel ineffective for not objecting to testimony by Ursula Wardy, the juvenile's teacher, which went beyond the scope of Rule 801(d)(1)(D) by describing more than time and place of the incidents?
2. Did the PCR court err by failing to find trial counsel ineffective for not objecting to testimony by Debbie Elliott, the forensic interviewer, which went beyond the scope of Rule 801(d)(1)(D) by describing more than time and place of the incidents when she was not qualified as an expert, and for providing improper opinion recommendations that juvenile have no contact with petitioner and begin therapy for sexual victimization?
3. Did the PCR court err in failing to find trial counsel ineffective for refusing the trial judge's offer of a curative instruction following counsel's objection to improper testimony of prior police reports, which was sustained, and which refusal resulted in the waiver of the right to raise this issue on appeal?

STATEMENT

The juvenile in this case, at age thirteen, had sex with her boyfriend, K.R., who was a year younger than her. She became pregnant by K.R., as shown through blood testing of the baby boy who was born when the juvenile was fourteen. App. 76, ll. 11 – 23; App. 83, ll. 22 – 23; App. 91, ll. 21 – App. 92, ll. 19; App. 110, ll. 9 – 25.

The juvenile, who was sixteen at trial, testified that when she was in middle school, her teacher recognized that the juvenile was pregnant. It was then that the juvenile also claimed that her “Uncle Robert,” who was her mother’s brother, was having sex with her at the same time. She claimed that “Uncle Robert” had started touching her sexually when she was six or seven. The touching allegedly progressed to oral sex when she was around eleven. When she turned twelve, Johnson allegedly had physical intercourse with her. The child stated that Johnson allegedly used a taser to threaten her into compliance. The child had never made these allegations before then. App. 74, ll. 1 – App. 83, ll. 23.

Based on the juvenile’s allegations, in June 2010, the Florence County Grand Jury indicted Robert Lee Johnson on four counts of second degree criminal sexual conduct (CSC) with a minor; contributing to the delinquency of a minor; and three counts of committing a lewd act on a minor. On August 2, 2010, Johnson proceeded to trial before the Honorable Michael G. Nettles and a jury. Petitioner Johnson was represented by Vick Meetze, and the state was represented by John Jepertinger and David Richardson. App. 1; App. 27.

Ursula Wardy, the special education teacher for the juvenile when she was in the eighth grade, testified at trial. Ms. Wardy noticed in the fall of 2007 that the juvenile appeared to be pregnant. Ms. Wardy testified that the juvenile told her she had been sexually abused. App. 48, ll. 8 – App. 50, ll. 23.

State: Did she say where that sexual abuse took place?

Wardy: Yes, sir.

State: Where did she say?

Wardy: At her uncle's house.

State: And did she give you any time frame that that sexual abuse may have taken place?

Wardy: No, sir. She just said that she was being molested by her uncle at her uncle's house.

App. 50, ll. 24 – App. 51, ll. 7.

There was no objection by defense counsel. App. 51, ll. 8 – 25.

Debbie Elliott was called by the state as a witness because she conducted the forensic interview of the juvenile. The state moved to have her qualified as an expert in child abuse assessment. Defense counsel objected on the basis that “the testimony being presented here is not testimony that would require her to be classified as an expert.” After an in-camera hearing, the judge ultimately agreed and ruled that he was not going to qualify her as an expert. App. 141, ll. 11 – App. 147, ll. 8. The judge ruled:

I'm going to allow her to testify as to her personal observations and allow her as a lay witness to offer testimony in the form of opinions or inferences that she draws from her experience and her knowledge, but I am not going to qualify as an expert because to do so would unnecessarily bolster her testimony.

App. 147, ll. 9 – 17.

Ms. Elliott then testified that she conducted a forensic interview of the juvenile when the juvenile was fourteen based on a referral from Investigator Michael Robinson with the Florence Police Department. App. 152, ll. 25 – App. 153, ll. 21. The solicitor asked Ms. Elliott what was the testimony of the juvenile to her of the time frame of the assaults. Elliott responded:

Well, she was actually 14 the day that she came into the interview. It was her birthday that day. She talked about having been assaulted. But the last time that the sexual intercourse had happened was when she was 13, but that fondling had started around the age of seven or eight and progressed into other forms of sexual abuse.

App. 153, ll. 22 – App. 154, ll. 4.

Elliott then continued to say that the juvenile told her the abuse happened at her uncle's home in his bedroom, but happened other places as well. App. 154, ll. 5 – 25. The solicitor later asked Elliott if she made any reports or recommendations for the juvenile. Elliott answered:

Yes, I did. I recommended that she have no direct or indirect contact with her uncle. That she begin therapy to begin the process of sexual victimization.

App. 155, ll. 21 – App. 156, ll. 3.

There was no objection by defense counsel to the recommendation, and no objection to any of Elliott's testimony. App. 156, ll. 4 – App. 157, ll. 13; App. 148, ll. 1 – App. 152, ll. 25.

Detective Michael Robinson of the Florence Police Department responded to a call from Williams Middle School regarding the juvenile. After talking with the teacher and counselor, Detective Robinson called the Department of Social Services to be involved. The detective referred the juvenile to the Care House of the Pee Dee for a forensic interview. App. 164, ll. 5 – App. 166, ll. 22.

Detective Robinson then met with Petitioner Johnson for an interview. App. 167, ll. 1 – App. 168, ll. 24. As part of the interview, Detective Robinson said he wanted to establish a timeline so he wanted Johnson's specific addresses of where he had lived. The detective testified: "He was able to help confirm with me ---in the meantime, I had used police reports from the police department to establish his residency filed in police reports, so he was able to help establish.."

Defense counsel objected and an in-camera hearing was held. App. 172, ll. 25 – App. 174, ll. 11.

Defense counsel argued that the use of the word “other police reports” by Detective Robinson led to the assumption that there were reports of prior “legal situations that Mr. Johnson had gotten into.” The judge agreed and ruled that he “sustain any reference to any prior police reports.” The judge continued to rule that the detective could say those were addresses where Johnson had lived but not to say where the information came from. App. 174, ll. 12 - App. 175, ll. 25.

Defense counsel then asked for a mistrial because he argued that the mistake could not be cured. He argued that Johnson’s ability to receive a fair trial had been compromised. The judge responded that he sustained the objection but he was not going to grant a mistrial. The judge stated that, “at the Defendant’s option,” he would order that any reference to police reports be stricken and that he would give a curative charge that defense counsel would agree to. App. 176, ll. 1 – 22.

Defense counsel then said:

Your Honor, I would object to any curative charge, but would move that any testimony be stricken from the record.

App. 176, ll. 23 – 25.

The judge replied that if he did strike it from the record, he probably needed to give a curative charge because he would have to call attention to the mistake. Counsel again objected to a curative charge, and asked that the testimony just pick up without referencing police reports. The judge told defense counsel that the judge was “in a position to grant a more thorough curative charge” but he understood that the defense had requested that he not do so. Defense counsel said: “Correct.” App. 177, ll. 1 – App. 178, ll. 3.

The jury returned verdicts of guilty on all charges as indicted. App. 271, ll. 20 – App. 273, ll. 10. Judge Nettles sentenced Petitioner Johnson to twenty years on one CSC with a minor second degree. On the second CSC with a minor second degree, the judge sentenced Johnson to twenty

years consecutive. On the two other CSC with a minor second degree charges, the judge sentenced him to twenty years each concurrent. Judge Nettles sentenced Johnson to concurrent sentences of fifteen years each on the three counts of lewd act on a minor; and three years for contributing to the delinquency of a minor. App. 288, ll. 16 – App. 290, ll. 7.

The South Carolina Court of Appeals affirmed Petitioner Johnson's convictions on October 31, 2012. State v. Johnson, Op. No. 2012-UP-590 (Ct. App. filed October 31, 2012).

On April 29, 2013, Johnson filed an application for post-conviction relief (PCR). The state filed a return on May 14, 2014. An evidentiary hearing was held on April 15, 2015 before the Honorable D. Craig Brown. Petitioner Johnson was represented by Jonathan Waller, and the state was represented by Croom Hunter. App. 304.

At the PCR hearing, Johnson's PCR attorney told the court that the issues Johnson was raising were general ineffective assistance of counsel, and that trial counsel was ineffective for not objecting to testimony that was objectionable. App. 307, l. 1 – Ap.. 308, ll. 21.

Petitioner Johnson testified that his trial counsel told him that he was very likely to be found guilty at trial. Johnson admitted that he had a plea offer for ten years but it was his idea to go to trial. He gave his trial attorney a list of witnesses who could prove his innocence. But his counsel never called them at trial. Trial counsel advised Johnson not to testify. App. 312, ll. 16 – App. 318, ll. 21; App. 309, ll. 1 – 25; App. 320, ll. 3 – 24.

Trial counsel testified that he sent his investigator to talk with the witnesses Johnson provided to him. However, counsel felt these witnesses would not benefit Johnson from a testimonial standpoint. App. 322, ll. 25 – App. 323, ll. 25.

When asked if he knew Rule 801(d), SCRE, counsel replied that he thought it regarded testimony of the time and place of alleged sexual assaults by "disclosure witnesses." Then PCR

counsel asked him what his trial strategy was in not objecting to the testimony by Ursula Wardy that the juvenile told her the sexual abuse was by her uncle and happened at her uncle's house. (Page 25¹ of the trial transcript). App. 325, ll. 1 – 23. Trial counsel replied:

There would not have been any strategy. It would have ---if it's objectionable, it would be an objection that I missed.

App. 325, ll. 24 – 25.

When asked what his strategy was for not objecting to the same kind of testimony by Debbie Elliott that the juvenile told her that she was abused by her uncle at her uncle's home in his bedroom, and happened other places as well (Page 128,² ll. 1- 10 of the trial transcript). Counsel replied: "No strategy. If it's objectionable, it's an objection that I missed." App. 326, ll. 1 – 9.

Then PCR counsel asked about trial counsel's mistrial motion that he made on page 148³ of the trial transcript in response to the testimony of one of the officers. Trial counsel replied that he objected to Detective Michael Robinson's testimony regarding obtaining Johnson's previous addresses from prior police reports. The judge sustained the objection and counsel asked for a mistrial which the judge denied. App. 326, ll. 10 – App. 327, ll. 21. When asked his reason for not asking for a curative charge, trial counsel responded:

I'll be honest with you. One thing that has always confused me is the proper way to preserve a mistrial motion and a denial of a mistrial. And why you can't just say I move for a mistrial, have that mistrial denied, and it be preserved, I don't know. But there are steps that you have to go through, and some people say you're supposed to ask for a curative instruction and then object to it after it's given, which doesn't make any sense to me, but that may be the proper way to do it.

App. 327, ll. 22 – App. 328, ll. 5.

¹ Page 25 of the trial transcript is page 51 of the Appendix. It is the testimony of Ursula Wardy.

² Page 128 of the trial transcript is page 154 of the Appendix. It is the testimony of Debbie Elliott.

³ Page 148 of the trial transcript is page 174 of the appendix. It is the testimony of Detective Michael Robinson.

Counsel continued to testify that he was trying to think of the proper way to preserve the motion because he knew that just making the motion and having it denied was not the right way to do it. That was something that had always confused him. App. 328, ll. 6 – 18.

PCR counsel argued in his closing that there were two main issues for Petitioner Johnson for his PCR. The first was the testimony of Ursula Wardy, the teacher, and the testimony of Debbie Elliott, the forensic interviewer, when both of them went outside the scope of Rule 801(d), SCRE. Both went beyond time and place of the sexual assaults. Both were improper corroboration testimony that was not harmless because they enhanced the cumulative effect. Counsel also argued that this failure to object to this testimony was prejudicial and was ineffective assistance of counsel. App. 335, ll. 12 – App. 337, ll. 2.

PCR counsel then argued the second issue which was trial counsel not asking for a curative instruction when the judge sustained his objection but denied counsel's mistrial motion. App. 337, ll. 3 – 15.

On June 24, 2015, Judge Brown issued an order denying Johnson's PCR application and dismissing it with prejudice. App. 340 – App. 348. The PCR judge ruled that he found trial counsel's testimony credible and found Petitioner Johnson's testimony to not be credible. App. 342. The judge ruled that Petitioner Johnson failed to show that trial counsel's performance fell below an objective standard of reasonableness. The order provided that trial counsel's performance was not "deficient" for failing to object to the testimony of Ursula Wardy and Debbie Elliott. Judge Brown ruled that Johnson failed to show there was a substantial likelihood that the result of his trial would have been any different if counsel had objected. App. 346. The order stated that trial counsel did a "fine job" of challenging the state's case so there was no ineffectiveness on counsel's part for not

objecting. App. 347. Judge Brown ruled that Petitioner Johnson could show no prejudice because there was overwhelming evidence of guilt. App. 347.

This petition follows.

ARGUMENT

1.

The PCR court erred in failing to find trial counsel ineffective for not objecting to testimony by Ursula Wardy, the juvenile's teacher, which went beyond the scope of Rule 801(d)(1)(D) by describing more than the time and place of the incidents.

Ursula Wardy, the special education teacher for the juvenile when she was in the eighth grade, testified at trial. Ms. Wardy noticed in the fall of 2007 that the juvenile appeared to be pregnant. Ms. Wardy testified that the juvenile told her she had been sexually abused. App. 48, ll. 8 – App. 50, ll. 23.

State: Did she say where that sexual abuse took place?

Wardy: Yes, sir.

State: Where did she say?

Wardy: At her uncle's house.

State: And did she give you any time frame that that sexual abuse may have taken place?

Wardy: No, sir. She just said that she was being molested by her uncle at her uncle's house.

App. 50, ll. 24 – App. 51, ll. 7.

There was no objection by defense counsel. App. 51, ll. 8 – 25.

As seen, Rule 801(d)(1)(D), SCRE, provides that sexual assault victim's prior consistent statements limited to time and place of alleged incident are not hearsay, if victim testifies at trial and is subject to cross-examination. It allows other witnesses to testify that victim complained of assault, but only as to time and place; it specifically circumscribes such testimony by excluding details or

particulars. State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002); citing Rule 801(d) (1) (D), SCRE; Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002).

In State v. Jeffcoat, *supra*, the Court ruled that Rule 801(d) (1) (D) does not allow a witness to testify as to identity of alleged perpetrator if the victim testifies. In Sanchez v. State, *supra*, the Supreme Court ruled that trial counsel was ineffective for not objecting to the testimony of the mother and father of the child victim that Sanchez was the perpetrator because it was hearsay testimony since it went beyond time and place.

Where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Petitioner Johnson’s case, the testimony of the teacher regarding the statement by the child that her uncle sexually abused her numerous times at his house was inadmissible hearsay and

should have been excluded. It was prejudicial to Johnson because it bolstered the testimony of the juvenile who testified and went beyond time and place.

ARGUMENT

2.

The PCR court erred by failing to find trial counsel ineffective for not objecting to testimony by Debbie Elliott, the forensic interviewer, which went beyond the scope of Rule 801(d)(1)(D) by describing more than time and place of the incidents when she was not qualified as an expert, and for providing improper opinion recommendations that juvenile have no contact with petitioner and begin therapy for sexual victimization.

Debbie Elliott was called by the state as a witness because she conducted the forensic interview of the juvenile. The state moved to have her qualified as an expert in child abuse assessment. Defense counsel objected on the basis that “the testimony being presented here is not testimony that would require her to be classified as an expert.” After an in-camera hearing, the judge ultimately agreed and ruled that he was not going to qualify her as an expert. App. 141, ll. 11 – App. 147, ll. 8.

The judge ruled:

I’m going to allow her to testify as to her personal observations and allow her as a lay witness to offer testimony in the form of opinions or inferences that she draws from her experience and her knowledge, but I am not going to qualify as an expert because to do so would unnecessarily bolster her testimony.

App. 147, ll. 9 – 17.

Ms. Elliott then testified that she conducted a forensic interview of the juvenile when the child was fourteen based on a referral from Investigator Michael Robinson with the Florence Police Department. App. 152, ll. 25 – App. 153, ll. 21. The solicitor asked Ms. Elliott what was the testimony of the juvenile to her of the time frame of the assaults. Elliott responded:

Well, she was actually 14 the day that she came into the interview. It was her birthday that day. She talked about having been assaulted. But the last time that the sexual intercourse had happened was when she was 13, but that

fondling had started around the age of seven or eight and progressed into other forms of sexual abuse.

App. 153, ll. 22 – App. 154, ll. 4.

Elliott then continued to say that the juvenile told her the abuse happened at her uncle's home in his bedroom, but happened other places as well. App. 154, ll. 5 – 25. The solicitor later asked Elliott if she made any reports or recommendations for the juvenile. Elliott answered:

Yes, I did. I recommended that she have no direct or indirect contact with her uncle. That she begin therapy to begin the process of sexual victimization.

App. 155, ll. 21 – App. 156, ll. 3.

There was no objection by defense counsel to the recommendation, and no objection to any of Elliott's testimony. App. 156, ll. 4 – App. 157, ll. 13; App. 148, ll. 1 – App. 152, ll. 25.

As seen, Rule 801(d)(1)(D), SCRE, provides that sexual assault victim's prior consistent statements limited to time and place of alleged incident are not hearsay, if victim testifies at trial and is subject to cross-examination. It allows other witnesses to testify that victim complained of assault, but only as to time and place; it specifically circumscribes such testimony by excluding details or particulars. State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002); citing Rule 801(d) (1) (D), SCRE; Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002).

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Rule 701, SCRE, provides that if a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those which are (a) are rationally based

on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

In State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), a forensic interviewer, Ginger Griggs, was qualified as an expert in child abuse assessment. The Court did not reach the expert issue on Griggs but found error in Griggs' recommendation that Chavis not be around the victim for any reason. The Court ruled that this recommendation could only be interpreted that Griggs believed the victim's claim of sexual abuse. The Court ruled that this recommendation was inadmissible as improper bolstering of the victim's credibility.

In State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), the Supreme Court held that the forensic interviewer did not need to be qualified as an expert. Her only opinion was that the child needed a medical examination. The interviewer did not vouch for the child's veracity. Therefore, her testimony was not prejudicial to Douglas.

In Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), the Supreme Court reversed the trial court's denial of Jolly's PCR application because trial counsel was ineffective for failing to object to witness' hearsay testimony that the alleged victim had told the witness that the defendant had sexually assaulted her as the testimony was not limited to time and place of the assault.

The Court in Jolly, citing State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989), also ruled that improper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the Supreme Court found that the testimony of the forensic interviewer of the young victim, that the victim had given a "compelling

finding of child abuse,” was the equivalent of the interviewer stating that the victim was telling the truth, and thus was inadmissible in the prosecution for the infliction of great bodily injury upon a child.

Where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Debbie Elliott’s opinion recommendations were improper whether she was an expert or not. Common sense should have told trial counsel that her recommendations that Petitioner should have no contact with this juvenile should have told the jury that Elliott believed that the juvenile was telling the truth. Trial counsel had the benefit of the opinion in Douglas, and of Justice Pleicones’ dissent.

Elliott's recommendation that the juvenile have no contact with Petitioner Johnson bolstered the juvenile's credibility, and was highly prejudicial to Johnson because again, it indicated Elliott believed the juvenile. Trial counsel was successful in keeping the trial court from qualifying Elliott as an expert. However, counsel did not follow through because he did not object to her opinion/recommendation testimony. She should have been treated like any other witness once the judge did not qualify her as a witness and be limited to time and place of the assaults in her testimony pursuant to Rule 801(d)(2)(D), SCRE. Her testimony was prejudicial to Johnson because her recommendations that the juvenile have no contact with Petitioner Johnson, and that the juvenile begin therapy for sexual victimization clearly indicated that she believed the juvenile. Her testimony was corroborative of the juvenile's testimony and had the cumulative effect which was prejudicial to Johnson.

Elliott's opinion/recommendations went beyond the scope of Rule 701, SCRE, as a lay witness. For her to recommend that the juvenile have therapy in a certain area of sexual victimization required special knowledge or skill.

ARGUMENT

3.

The PCR court erred in failing to find trial counsel ineffective for refusing the trial judge's offer of a curative instruction following counsel's objection to improper testimony of prior police reports, which was sustained, and which refusal resulted in the waiver of the right to raise this issue on appeal.

Detective Michael Robinson of the Florence Police Department responded to a call from Williams Middle School regarding the juvenile. After talking with the teacher and counselor, Detective Robinson called the Department of Social Services to be involved. The detective referred the juvenile to the Care House of the Pee Dee for a forensic interview. App. 164, ll. 5 – App. 166, ll. 22.

Detective Robinson then met with Petitioner Johnson for an interview. App. 167, ll. 1 – App. 168, ll. 24. As part of the interview, Detective Robinson said he wanted to establish a timeline so he wanted Johnson's specific addresses of where he had lived. The detective testified: "He was able to help confirm with me ---in the meantime, I had used police reports from the police department to establish his residency filed in police reports, so he was able to help establish." Defense counsel objected and an in-camera hearing was held. App. 172, ll. 25 – App. 174, ll 11.

Defense counsel argued that the use of the word "other police reports" by Detective Robinson led to the assumption that there were reports of prior "legal situations that Mr. Johnson had gotten into." The judge agreed and ruled that he "sustain any reference to any prior police reports." The judge continued to rule that the detective could say those were addresses where Johnson had lived but not to say where the information came from. App. 174, ll. 12 - App. 175, ll. 25.

Defense counsel then asked for a mistrial because he argued that the mistake could not be cured. He argued that Johnson's ability to receive a fair trial had been compromised. The judge responded that he sustained the objection but he was not going to grant a mistrial. The judge stated that, "at the Defendant's option," he would order that any reference to police reports be stricken and that he would give a curative charge that defense counsel would agree to. App. 176, ll. 1 – 22.

Defense counsel then said:

Your Honor, I would object to any curative charge, but would move that any testimony be stricken from the record.

App. 176, ll. 23 – 25.

The judge replied that if he did strike it from the record, he probably needed to give a curative charge because he would have to call attention to the mistake. Counsel again objected to a curative charge, and asked that the testimony just pick up without referencing police reports. The judge told defense counsel that the judge was "in a position to grant a more thorough curative charge" but he understood that the defense had requested that he not do so. Defense counsel said: "Correct." App. 177, ll. 1 – App. 178, ll. 3.

Once the trial court has sustained an objection and/or stricken improper testimony, counsel must request a curative instruction in order to preserve an error for appeal. If the trial judge offers to give a curative instruction, and counsel refuses the offer, the refusal will result in the waiver of the right to complain of the error on appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996).

When an objection to testimony is made, and the trial judge sustains the objection, the opposing party must also move to strike the testimony, request that the jury be instructed to disregard the testimony, and in appropriate cases, move for a mistrial. State v. Wingo, 304 S.C. 173,

403 S.E.2d 322 (Ct. App. 1991). Failure to seek relief beyond the objection may fail to preserve the error on appeal. State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981).

Where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

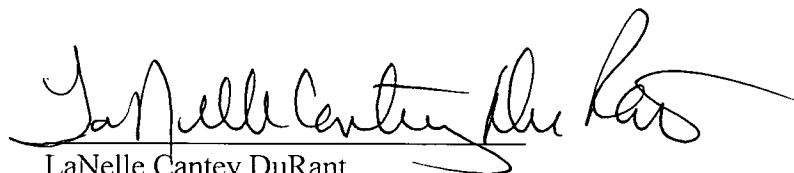
Trial counsel was ineffective for not requesting a curative instruction and for refusing the judge’s offer for a curative which the judge offered three times. Trial counsel should have accepted the curative instruction. Then, when it was given, he should have objected to it as not being sufficient. Then he needed to move for the mistrial again. Because of counsel’s refusal, Petitioner Johnson did not have the chance for the appellate court to review the issue of the improper testimony of Johnson’s address in prior police reports. For the jury to have heard of the connection between Johnson and prior police reports was prejudicial to Johnson as it was reasonable for the

jury to then believe that he was in frequent trouble with the law. For the appellate court not to be able to review this was prejudicial to Petitioner.

CONCLUSION

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences vacated, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

D. Craig Brown, Circuit Court Judge

ROBERT L. JOHNSON,

PETITIONER,

V.

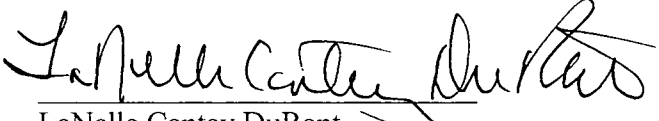
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001597

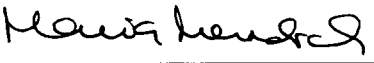
CERTIFICATE OF SERVICE

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 J. Croom Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Robert Johnson, #211854, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of March, 2016.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of March, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.