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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County

Alison Renee Lee, Circuit Court Judge

ROBERT CANNON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002143

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Did trial counsel's failure to investigate and present evidence of Petitioner's alibi violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments were the prosecution presented no physical evidence linking Petitioner to the crime?
- II. Did trial counsel's failure to move for a mistrial and object to the trial judge's charge when the jury revealed it was deadlocked on one count against Petitioner and additional deliberations would not assist violate Petitioner's Sixth and Fourteenth Amendment right to the effective assistance of counsel?
- III. Did trial counsel's failure to object to the trial judge's erroneous admission of gruesome photographs where the danger of unfair prejudice outweighed the probative value of the photographs violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel?

STATEMENT

Zack Waltemath¹ and his sister Molly worked at Sonic. App. 568, ll. 12-25; App. 730, l. 19 - App. 731, l. 9. Molly and Melissa Davy, who also worked at Sonic, were best friends. App. 570, l. 23 – App. 571, l. 6; App. 731, ll. 16-25. Melissa and Joshua Zoch were in an abusive and volatile relationship. App. 588, l. 25 - App. 589, l. 3; App. 756, ll. 1-3; App. 772, ll. 6-14. Early Saturday morning, Melissa and Zoch argued because Zoch was using drugs, specifically crack cocaine, in the house. App. 732, l. 13 – App. 733, l. 11; App. 741, ll. 3-25; App. 756, l. 16 - App. 757, l. 17; App. 786, l. 11 - App. 787, l. 15. Melissa left with Molly and Zack and stayed at their house from Saturday, until Wednesday. App. 573, l. 18 – App. 572, l. 10; App. 733, ll. 10-11. After work on Wednesday, Zack, Molly, and Melissa went to get some stuff from Zoch’s home. App. 581, ll. 1-7; App. 735, ll. 15-19; App. 765, ll. 2-8. Melissa walked into the home and found Zoch, who had been beaten to death. App. 581, ll. 1-7. Melissa freaked out and called 911. App. 581, ll. 1-11; App. 736, ll. 3-23; App. 742, ll. 9-22; App. 765, l. 21 – App. 767, l. 14.

The investigation zeroed in on Petitioner, Christopher Whitehead, and Derrick McDonald, when the police learned from Allen Brown, an employee at Sonic, that Petitioner and the co-defendants, who also worked at Sonic, had been at Sonic around 10 p.m. on December 12, and that Petitioner had been wearing a ski mask. App. 513, line 1 – App. 515, line 10. Thereafter, the police interrogated the two teenagers - Petitioner and McDonald – securing “confessions.” App. 917, line 6 – App. 947, line 12; App. 949, line 8 – App. 970, line 3.

On February 7, 2007, a Kershaw County grand jury indicted Petitioner for burglary in the first degree and murder. App. 2101-2102; App. 2104-2015. On May 6-13, 2008, the state, represented by John Meadors, Joanna McDuffie, and Ron Moak, called the case to trial before the

¹ At the time of the trial, Zack and Melissa were dating. App. 588, ll. 21-24.

Honorable G. Thomas Cooper, Jr., and a jury. App. 191. Petitioner stood trial with two co-defendants, Whitehead, represented by Marcus Whitlark and Nathan Sheldon, and McDonald, represented by Neil Riley and David Reuwer. App. 191. Joshua Kendrick represented Petitioner. App. 191. Ultimately, the jury convicted Petitioner, McDonald, and Whitehead of murder and burglary in the first degree. App. 1695, l. 17-25; App. 1696, ll. 10-15. Judge Cooper sentenced Petitioner to concurrent terms of thirty-five years' imprisonment. App. 1744, l. 18-21; App. 1744, l. 24 – App. 1745, l. 3; App. 2103; App. 2106.

Petitioner filed a notice of appeal, and was represented by Melissa J. Kimbrough. App. 1776-1794. Petitioner raised three issues: (1) the admissibility of his statement, (2) the late disclosure of material evidence, and (3) the introduction of unfairly prejudicial photographs. App. 1776-1794. The Court of Appeals affirmed his convictions and sentences. State v. Cannon, 2011-UP-267 (Ct. App. filed June 8, 2011); App. 1831-1832.²

On February 9, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 1834-1840. Petitioner amended his application on March 12, 2014. App. 1849-1853. The matter proceeded to an evidentiary hearing on March 17, 2014, before the Honorable Alison Renee Lee. App. 1855. Tara Shurling represented Petitioner, and Megan Jameson represented the state. App. 1855. By an order dated September 14, 2015, Judge Lee denied Petitioner relief from his convictions and sentences. App. 2070-2100. Petitioner filed a timely notice of appeal. This petition follows.

² Petitioner's co-defendants appealed the introduction of the redacted statements. In both cases, the Court of Appeals found no error. See State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012); State v. Whitehead, Op. No. 2012-UP-526 (S.C. Ct. App. filed Sept. 12, 2012). However, this Court held the redacted statements violated the Confrontation Clause where the jury would readily infer they referred to and incriminated the co-defendants. Nevertheless, this Court held the errors were harmless. State v. McDonald, 412 S.C. 133, 135, 771 S.E.2d 840, 841 (2015); State v. Whitehead, 2015-MO-033 (S.C. Sup. Ct. filed June 10, 2015).

ARGUMENT

I. Trial counsel's failure to investigate and present evidence of Petitioner's alibi violated Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments were the prosecution presented no physical evidence linking Petitioner to the crime.

Relevant facts

Trial evidence

In December 2006, Cosmo Baccomo lived near the deceased in Kershaw County. App. 528, ll. 15-23. On December 12, 2006, Baccomo took his son's dog out for a walk at 11:25 p.m. App. 529, l. 12 – App. 530, l. 14. While walking the dog, Baccomo heard a noise, like kicking or slamming, but he could not see anything. App. 530, ll. 16-19. Baccomo and the dog returned inside. App. 530, ll. 19-20. About ten minutes later, Baccomo heard another noise – people talking and a door slamming. App. 530, l. 20 – App. 531, l. 13. Baccomo also saw headlights of a small car. App. 530, l. 24; App. 534, ll. 8-14. He heard “a car spun down the road, spun out, went up the street.” App. 530, l. 25 – App. 531, l. 1.

According to Dr. Joel Sexton, the pathologist, Zoch died as a result of cerebral contusion due to a closed head injury blunt head trauma. App. 1319, ll. 2-5. Specifically, Zoch was hit at least six times in the head and each were capable of causing death. App. 1288, ll. 5-8. The police told Dr. Sexton they believed Zoch died during the early morning hours of December 13, 2006, and Dr. Sexton concurred. App. 1329, ll. 5-24. When asked for a narrower or more specific window of time, Dr. Sexton would say only sometime between midnight and six in the morning. App. 1330, ll. 2-4. Additionally, Dr. Sexton could not say how long a person with the types of injuries the deceased received would live after the fatal blow. App. 1318, l. 1 – App. 1319, l. 1. He explained

the person would be immediately unconscious after the fatal blow, but may live for minutes, hours, or even days. App. 1381, ll. 16-21.

PCR hearing evidence

Petitioner informed trial counsel that he had an alibi. App. 1872, ll. 1-2. Specifically, he told trial counsel that between the hours of 11:00 and 12:00, he was “in Columbia next door to [his] mother’s house at [his] other neighbors’ house who were having a party.” App. 1872, ll. 3-7. However, while attending the party, Petitioner “was constantly in and out” of his mother’s house, “[u]sing the restroom, grabbing cups of ice.” App. 1873, l. 21 – App. 1874, l. 4. He saw his mother during these times and spoke to her. App. 1874, ll. 8-13. He advised trial counsel accordingly. App. 1874, ll. 14-16. Additionally, Petitioner told trial counsel that he left the party and went to stay with his then-girlfriend Ember Blow, arriving at her house shortly after midnight. App. 1878, ll. 2-24. During the trial, trial counsel told Petitioner he was not going to present any evidence – including evidence of an alibi – because he did not want to lose “the last say-so in the closing arguments.” App. 1879, l. 16 – App. 1880, l. 6.

According to Petitioner’s mother, Veronica Davis, on the night of the decedent’s death, Petitioner was at the neighbor’s party. App. 1939, l. 15 – App. 1940, l. 1; App. 1940, ll. 7-10. She noticed that Petitioner was “in and out of the house” and used the bathroom several times. App. 1940, ll. 2-4; App. 1940, ll. 16-23. She told Petitioner that he had to “stay in or stay out.” App. 1940, ll. 5-6. This happened between 11:00 p.m. and 11:45 p.m. App. 1944, ll. 16-17. Davis could not pinpoint the exact time, but explained that her husband worked third shift at the time and she was waiting on him to call during his lunch break at 11:45 p.m. App. 1944, l. 6 – App. 1945, l. 4. Petitioner decided he was “staying out” and going to Ember’s. App. 1941, ll. 13-20. Davis told trial counsel’s investigator of her ability to account of Petitioner’s whereabouts during the time in

question prior to trial. App. 1948, l. 22 – App. 1949, l. 1; App. 1951, ll. 18-24. Additionally, Davis told trial counsel after the trial hearing that she could say where Petitioner was. App. 1953, ll. 11-20.

Petitioner arrived at Ember Blow's house between midnight and 12:30 on the night of the decedent's death. App. 2027, l. 21 – App. 2028, l. 20. Petitioner stayed the rest of the night with her. App. 2028, ll. 21-22. She took him home "about 6, 6:15" because her mother got off work at 7:00 a.m., and Petitioner had to be gone before her mother arrived home. App. 2028, l. 24 – App. 2029, l. 2. Blow was not contacted by Petitioner's trial counsel or investigator, but if she had been, she would have been willing to testify on behalf of Petitioner. App. 2030, l. 20 – App. 2031, l. 2; App. 2034, ll. 12-14.

Trial counsel admitted that he did not "clearly remember why or when" he "specifically decided alibi wasn't gonna work." App. 1966, ll. 22-25. However, he thought "the problem with the alibi was that it did not cover necessarily the time that this happened." App. 1966, l. 25 – App. 1967, l. 2. Trial counsel directed his investigator to interview Davis and the neighbors. App. 1967, ll. 11-12. After an unspecified discussion with his investigator, trial counsel "decided not to pursue an alibi defense." App. 1967, ll. 15-16; App. 1986, ll. 4-23. Trial counsel was not familiar with Blow at all; however, based on her testimony during the PCR hearing, he said he would not have been "interested in using her as an alibi witness." App. 1967, ll. 17-23; App. 2014, l. 23 – App. 2015, l. 5. According to trial counsel, Blow's testimony would not have covered the time necessary. App. 1967, l. 24 – App. 1968, l. 7. Later, trial counsel reiterated that he did not think Petitioner had an alibi defense because the witnesses did not cover the time "well enough." App. 1985, ll. 2-8; App. 1988, ll. 4-17; App. 2008, ll. 4-13. On this point, trial counsel was forced to admit the pathologist put the time of death at some time during the early morning hours. App. 1999, ll. 17-20.

Specifically, the doctor testified the death occurred “sometime between midnight and six in the morning.” App. 2016, ll. 3-23. However, the state’s theory at trial was the assault occurred around 11:30 p.m. App. 2024, l. 19 – App. 2025, l. 3.

Trial counsel admitted that it was “highly likely” that he told Petitioner he was not going to present any evidence because he “wanted last argument.” App. 1984, ll. 11-13. Trial counsel stated he would not “do that now” because he no longer “care[s] about the last argument. App. 1984, ll. 13-14. However, “at that time against that solicitor, that may have been a concern.” App. 1984, ll. 14-15.

Order denying relief

According to the PCR judge, trial counsel was not ineffective in failing to present evidence of Petitioner’s alibi in the form of testimony from his mother and ex-girlfriend or in failing to give the state notice of an alibi defense (Allegations 3, 4, and 9). The PCR court found “no error” in trial counsel’s decision not to pursue an alibi defense “[b]ased upon the timeline of events presented at trial, Davis’ testimony, and Kendrick’s testimony.” App. 2088. Concerning Blow’s ability to provide an alibi, the Court likewise found no error “[b]ased upon the timeline of events presented at trial, Blow’s testimony, and Kendrick’s testimony.” App. 2088-2089. Additionally, the PCR court held Petitioner could not establish prejudice resulting from trial counsel’s failure to investigate and present the alibi witnesses and defense. App. 2087-2089; App. 2093.

Discussion

“The benchmark for judging any claim of ineffectiveness must be 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.” Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance

was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Id. at 688. Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

Without question, a trial attorney “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting Strickland, 466 U.S. at 691). “One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable.” Id. This Court has held that if trial counsel articulates a valid reason for employing certain strategy and the strategy used satisfies an objective standard of reasonableness, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

In Walker, 407 S.C. at 407, 756 S.E.2d at 147, this Court held trial counsel rendered ineffective assistance by failing to interview Walker’s girlfriend regarding Walker’s whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker’s girlfriend testified that when she was dating Walker, which included the time of the alleged

kidnapping and sexual assault, the two spent every weekend together. Id. at 406, 756 S.E.2d at 147. This Court acknowledged that the girlfriend’s “testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her.” Id. at 407, 756 S.E.2d at 147. Thus, “it would be physically impossible for Walker to have committed the kidnapping and assaults.” Id. at 406, 756 S.E.2d at 147.

According to the state’s theory at trial, Zoch received the fatal injuries on December 12, 2006, between 11:30 p.m. and midnight based upon the testimony of Baccomo. Although his time of death could not be pinpointed, the pathologist concurred with the police that he died during the early morning hours – between midnight and 6:00 a.m. – on December 13, 2006. Thus, Petitioner’s alibi needed to account for his whereabouts between 11:30 p.m. on December 12, 2006, and 6:00 a.m. on December 13, 2006. The testimony of Davis and Blow did just that. According to Davis, Petitioner was in and out of her home in Columbia between 11:00 and 11:45 p.m. on December 12, 2006. Blow placed Petitioner at her home, also in Columbia, between midnight and 6:00 a.m. on December 13, 2006. In light of the murder occurring in Kershaw County, it would have been physically impossible for Petitioner to go to the deceased’s home in Elgin, participate in the crimes, and return to Blow’s home by midnight or even 12:30 a.m. Further, Blow placed Petitioner in her home until 6 a.m., which was the latest Dr. Sexton said Zoch would have died. Contrary to trial counsel’s testimony and the PCR judge’s conclusion, the timeline offered by the alibi witnesses actually covered the timeline of the crimes. Thus, trial counsel performed deficiently by failing to investigate and present evidence of Petitioner’s alibi defense. The only strategic reason offered at the PCR hearing – the ability to maintain last closing argument – was disavowed by trial counsel at the hearing when he testified that at the

time of the trial, when he was fairly unexperienced and trying his first murder case, he concerned himself with maintaining last argument, but he no longer had such a concern based on his greater experience.

In light of the fact that an alibi provides a complete defense, the prejudice resulting from trial counsel's deficient performance cannot be overstated. No physical evidence connected Petitioner to the crime. There were no eyewitnesses placing Petitioner at the crime scene, and the police recovered no forensic evidence that linked Petitioner to the crime. The only remaining evidence was Petitioner's statement to police. At first blush, his statement appears very damaging, but the presentation at trial blunted the damage considerably. Through the testimony of the investigators who interrogated Petitioner, the police captain who appeared at Petitioner's home during the interrogation, and the fact that Petitioner was not arrested immediately after the interrogation that resulted in an incriminating statement, it was readily apparent that Petitioner had been offered promises rendering his statement unreliable. Additionally, the jury deliberations, described more fully in Issue II, infra, demonstrate the struggle the jury had concerning the murder charge levied against Petitioner. The jury deadlocked on the charge after deliberating for hours, requesting additional instructions, and requesting transcripts of the majority of the testimony presented. Clearly, counsel's deficient performance prejudiced Petitioner.

II. In violation of Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, trial counsel failed to move for a mistrial and object to the trial judge's charge when the jury revealed it was deadlocked on one count against Petitioner and additional deliberations would not assist.

Relevant facts

Trial evidence

The judge began instructing the jury at 6:54 p.m. on Friday, May 9, 2008. App. 1637, l. 11. The jury began its deliberations at 7:30 p.m. App. 1659, ll. 14-15. The jury requested a transcript of Investigator Danny Catoe's testimony. App. 1659, ll. 19-21. At 9:17 p.m., the judge instructed the jury that he could play back the testimony, which would take approximately four and a half hours or the jurors could get a transcript by 10 a.m. the following morning. App. 1662, ll. 1-23. The jury then informed the judge of their desire for transcripts of the testimony of Catoe, Investigator Phillip Crawford, and Michael Jenkins. App. 1664, ll. 10-12. The judge informed the jurors that the earliest the transcripts would be available would be Tuesday of the following week. App. 1664, ll. 25-33. The jury insisted on the transcripts and agreed to return on Tuesday, May 13, 2008. App. 1665, ll. 2-4. The judge released the jurors at 9:43 p.m., just over two hours after the deliberations began. App. 1666, l. 21.

On Tuesday morning, the jury asked to hear the jury instructions again. App. 1667, ll. 15-17. At 10:50 a.m., the judge instructed the jury yet again. App. 1668, l. 1 – App. 1686, l. 25. The jury began deliberating again at 11:10 a.m. App. 1687, l. 2. At 3:32 p.m., the jury informed the judge that unanimous verdicts had been reached on all indictments except for the murder indictment against Petitioner. App. 1689, ll. 1-6. The jury further stated that additional deliberation would not result in a verdict on that particular indictment. App. 1689, ll. 9-14. After a bench conference,

which was not transcribed, the judge gave the jury additional instructions and asked them to continue deliberating. App. 1689, l. 20 – App. 1693, l. 24. Specifically, starting at 3:43 p.m., the judge told the jurors:

I will tell you that this happens from time to time, that a jury is unable to reach a decision, whether it's one charge or four charges or ten charges. And I wanted to discuss something with the lawyers before we proceed.

But I'll tell you that when any matter is in dispute, it's not always easy for two people to agree. Therefore, I understand when 12 persons must agree, it becomes much more difficult. But it is important that litigation, and this case is litigation, be ended if it can be ended without a single one of you doing violence to your individual judgments or your conscience.

It's your duty as jurors to consult with one another and to deliberate with a view towards reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if you are convinced that your opinion is erroneous. No juror is expected to give up his or her opinion based on reasoning satisfactory to yourself merely for the purpose of reaching a verdict. And I want you to understand that. Do not surrender your honest convictions as to the weight or effect of the evidence solely because the opinion of your fellow jurors is contrary to your opinion or for the mere purpose of returning a verdict.

You are not called upon often to try cases. As one of 46 circuit judges whose work is to try cases from day-to-day throughout the year, it's very unusual, almost unheard of, for a jury to go out and promptly return a verdict. I know you have not had that - - I mean, that has not been the case here. However, at some time we usually get a verdict. And I know have you worked hard on these six indictments. And I am referring to now is the sole indictment that you have been able to reach a verdict on.

What this means is that while it is normal for jurors to disagree at first, the fact we normally get a verdict also means that after reasonable persons lay aside all extraneous matters and determine to decide the case on the basis of the law and the evidence, then they do somehow come to an understanding and write a verdict.

It's never been intended that a verdict of a jury should be the verdict of one person; and, on the other hand, the verdict of the jury is the collective reasoning of

all persons put together. The reason we have a jury is so we might have the benefit of collective thought and collective reasoning of the jury.

It may help, if you have not already done so, to tell the other jurors how you feel about the case and why you do. And I'm sure you've been doing that. And, on the other hand, it may help if other jurors explain their position to you and exchange views with you. And I ask that you listen to each other and give to each others' thoughts such meanings you think they should have.

A mistrial in a case is a very unfortunate thing. If you as a juror do not agree on a verdict, it doesn't mean that anybody wins or that the case is over. It just means at some future time at another term of court before me or some other judge that some other jury will sit where you are in the trial of this case; that is, the sole case that you've been unable to reach a verdict on.

The same participants will come. The same lawyers will probably come, and they will basically ask the same questions and presumably will get the same answers. We will go through the entire process again with regard to this single indictment.

Now, I have no reason to believe that any other 12 jurors from Kershaw County will represent a more cross section of the county, would be more intelligent or might be more capable of solving this controversy than you are. And one day this will have to be decided.

I'm going to ask that you again retire to your jury room and further deliberate in this case to see if you can write a verdict with regard to this indictment.

Let me close again by saying that while it's important that litigation be ended, it should be ended in the form of a verdict without any juror doing violence to his or her own conscience. No juror is expected to give up an opinion based on reasoning satisfactory to himself or herself merely for the purpose of being in agreement.

Now, with these instructions I'm going to ask you to retire to your jury room and further deliberate solely on the indictment as to Mr. Cannon that you have been unable to reach a verdict on.

App. 1689, l. 24 – App. 1693, l. 22. Trial counsel did not object to the charge or request a mistrial. Thereafter, the jury renewed deliberations at 3:47 p.m. App. 1693, l. 25. Approximately one hour later, the jury had reached a verdict on the murder count. App. 1695, l. 7.

PCR hearing evidence

Petitioner testified that when the jury informed the judge of its impasse and that additional deliberations would not assist, he wanted his trial counsel to request a mistrial. App. 1900, ll. 15-22. After acknowledging the jury's deadlock as to the charge of murder against Petitioner and the jury's response that further deliberations would not aid, trial counsel testified he did not remember why he did not move for a mistrial. App. 1974, ll. 3-13. He further testified he did not know why he did not object to the subsequent jury instructions provided by the judge. App. 1974, ll. 14-19; App. 1975, ll. 4-5. Trial counsel knew the count was "ten to two for guilty." App. 1974, l. 23 – App. 1975, l. 11.

Order denying relief

The PCR judge found the trial judge's supplemental instruction to the jury after the revelation of the deadlock was "not objectionable." App. 2096. Thus, the PCR court found trial counsel was not ineffective for failing to move for a mistrial when the jury indicated it was at an impasse and the judge provided additional instructions. App. 2096. Further, the PCR court found that if trial counsel had moved for a mistrial, the court would not granted it, and therefore, Petitioner had not shown prejudice. App. 2096. Therefore, the PCR court denied Petitioner relief on this claim.

Discussion

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner 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. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

The South Carolina Code of Laws sets forth the procedure to follow when a jury fails to agree. Pursuant to the statute, “[w]hen a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation.” S.C. Code Ann. § 14-7-1330. However, “if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.” Id. The purpose of the statute is to give the jury the right to indicate to the court its view as to when time for due and thorough deliberation has elapsed. State v. Simon, 126 S.C. 437, ___, 120 S.E. 230, 232 (1923). Further, the statute “is intended ‘to prevent forced verdicts, and to prevent undue severity of jury service.’” State v. Barnes, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013)(quoting State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916)).

“The trial judge has the duty to urge, but not coerce a jury to reach a verdict.” Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002)(citing Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)); see also Workman v. State, 412 S.C. 128, 130, 771 S.E.2d 636, 638

(2015). “An Allen³ charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other’s views.” Id. (citing Green, 351 S.C. at 194, 569 S.E.2d at 323). “Whether an Allen charge is unconstitutionally coercive must be judged ‘in its context and under all the circumstances.’” Id. (quoting Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)); see Lowenfield v. Phelps, 484 U.S. 231, 237 (1988).

In Tucker, this Court adopted the standard set forth by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. In Lowenfield, the United States Supreme Court considered, among other things, the following factors: (1) whether the charge speaks specifically to the minority juror(s); (2) whether the charge includes such language as “You have got to reach a decision in this case;” (3) whether there is an inquiry into the jury’s numerical division; and (4) whether the jury returns a verdict shortly after the supplemental charge. Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237); see also Workman, 412 S.C. at 130-131, 771 S.E.2d at 638.

In this case, trial counsel performed deficiently by failing to move for a mistrial and failing to object to the Allen charge. Although the jury returned only once indicating the impasse, the judge inquired of the jury whether additional deliberations would be of assistance, and the jury emphatically and unequivocally, “no.” Thus, the jury indicated, as required under the statute, that it was not consenting to continued deliberations. Rather, the jury had deliberated for a considerable length of time, reviewed actual transcripts of the testimony, and heard the jury instructions twice. The jurors had reached verdicts on five of the six indictments. The judge’s failure to follow the statute, which requires that the jury determine when continued deliberations

³ Allen v. United States, 164 U.S. 492 (1896).

would be of assistance, the judge insisted the jurors return to the jury room and resume deliberating. Trial counsel's failure to request a mistrial was deficient performance. Additionally, trial counsel's failure to object to the Allen charge was deficient performance in light of the charge speaking directly and specifically to the minority jurors, the language insisting the jurors reach a decision in the case, the fact that the numerical division had been revealed, and the brevity of the deliberations after the Allen charge.

Trial counsel's deficit performance was prejudicial to Petitioner where the mistrial would have been granted in light of the statute. As discussed, the statute ensures the jury controls the length of deliberations, not the judge. When the jury indicated that continued deliberations would be of no assistance, the judge was required to dismiss them per the statute. Had trial counsel moved for a mistrial, it would have been granted because the jury was hung. Further, had trial counsel objected to the Allen charge, the appellate courts would have reversed due to the charge's violation of Lowenfield and Tucker.

III. In violation of Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, trial counsel failed to object to the trial judge's erroneous admission of gruesome photographs where the danger of unfair prejudice outweighed the probative value of the photographs.

Relevant facts

Trial evidence

Immediately prior to the state calling the pathologist, Dr. Joel Sexton, to testify, the state informed the judge of the need to determine the admissibility of certain photographs. App. 1261, l. 5 – App. 1263, l. 23. The judge heard in camera testimony from Dr. Sexton concerning the photographs. According to Dr. Sexton, State's Exhibit #111 had "information on it telling [him] something about the condition of the body at the time the injury was inflicted ... on the back of the head." App. 1265, ll. 10-17. The photograph showed the injuries on the back of the head were inflicted when he was in the same position as he was in the photograph. App. 1265, ll. 18-25. According to the doctor, State's Exhibit #113 showed injuries to the decedent's face. App. 1267, ll. 14-22. State's Exhibit #114 showed an injury to the decedent's cheek. App. 1267, l. 23 – App. 1268, l. 5. State's Exhibits #115 and #116 showed injuries to the knees. App. 1268, ll. 6-16. Another photograph, State's Exhibit #117, showed "the blood on top of the decedent's socks that ha[d] been smeared there." App. 1268, ll. 119-21. The next photograph, State's Exhibit #118, showed the injuries to the back of the head. App. 1269, ll. 10-19. The final photograph, State's Exhibit #119, displayed a "different" view of the back of the head. App. 1269, l. 22 – App. 1270, l. 1.

On cross-examination, Dr. Sexton revealed the photographs would assist him in showing the jury that the wounds were inflicted by another as opposed to self-inflicted. App. 1271, l. 12 –

App. 1272, l. 2. He admitted he had drawings depicting the injuries, which would not show the gruesome details on display in the photographs. App. 1272, ll. 4-11. His only complaint about his drawings was that they were not as detailed as the photographs. App. 1272, l. 20 – App. 1273, l. 1. Dr. Sexton claimed the photographs showed “the type of instrument that might have caused” the injuries and one photograph showed “the position of the body at the time the injury occurred.” App. 1274, ll. 1-3. Trial counsel did not participate in the cross-examination and did not pose any objections to the photographs.

After hearing the in camera testimony of Dr. Sexton, the trial judge ruled the photographs would be admitted. App. 1276, l. 23.⁴ Thereafter, Dr. Sexton testified to his findings during the autopsy and he displayed the photographs to the jury, including State’s Exhibits #37, #39, and #92 had not been presented during the in camera hearing. App. 1278, l. 5 – App. 1331, l. 4; App. 1297, l. 20 – App. 1299, l. 4; App. 1311, ll. 20-21.⁵

Direct appeal

Although Petitioner challenged the introduction of the photographs on appeal, Petitioner, through counsel, conceded at oral argument that the issue was not preserved, as had been argued by the state. State v. Cannon, 2011-UP-267 (Ct. App. filed June 8, 2011); App. 1831.

PCR hearing evidence

During the PCR hearing, trial counsel expressed his belief that he had objected to the

⁴ The judge excluded one photograph, State’s #112, when the doctor stated it did not provide any additional information. App. 1276, ll. 9-12.

⁵ A careful review of the trial transcript reveals State’s Exhibit #37 was admitted during the testimony of Michael Sellers. App. 857, ll. 16-18. Further, it appears that trial counsel *did* object to the introduction of that particular photograph. App. 857, ll. 23-24. Therefore, Petitioner will not pursue a claim of ineffective assistance of counsel for failing to object to the introduction of State’s Exhibit #37 where the record makes clear trial counsel interposed an objection when the photograph was presented initially.

introduction of crime scene and autopsy photographs. App. 1982, l. 21 – App. 1983, l. 17. When confronted with the record, trial counsel admitted he had failed to preserve the issue for appellate review. App. 1999, l. 24 – App. 2000, l. 8. On cross-examination, trial counsel revealed that he was unable to remember which precise photographs were introduced, but admitted that “quite a few photos” were not introduced. App. 2014, ll. 6-22. At the conclusion of the hearing, the judge clarified that the PCR claim concerned the following state’s exhibits admitted during the trial: 37, 39, 92, 111, 113, 114, 115, 116, 117, 118, and 119. App. 2041, l. 25 – App. 2042, l. 2.

Order denying relief

The PCR judge indicated that photographs were objected to and admitted into evidence during the testimony of the pathologist; however, trial counsel failed to join in the objection of the co-defendants’ counsel in this regard. App. 2098. Thus, trial counsel failed to preserve the issue for appeal for Petitioner. App. 2098. These photographs included “close-up photographs of the victim lying on the floor, face down, showing the back of the victim’s head which was bloody and his skull smashed.” App. 2098. There were two additional photographs admitted, which showed the alleged victim’s head after it had been cleaned and partially shaved during the autopsy. App. 2098. The PCR judge found trial counsel’s failure to object was deficient, but she found no prejudice resulting from the deficient performance. App. 2098. According to the judge, “the omission of the photographs would not have affected the resulting verdict, particularly in light of the overwhelming evidence of guilt implicating” Petitioner. App. 2098.

Discussion

Petitioner 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. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Generally, “[a]ll relevant evidence is admissible.” Rule 402, SCRE. “Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent.” State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

However, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). Thus, the first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. The third step requires balancing of the probative value and unfair prejudice. “When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one”).

Recently, this Court reiterated its long-standing precedent that “[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to substantiate material facts or conditions.” State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010)(citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). Photographs are unfairly prejudicial when they have a “tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” Id. (citing State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)); see also State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009); State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986); State v. Patrick, 289 S.C. 301, 308-309, 345 S.E.2d 481, 485 (1986), *overruled on other grounds by* Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); State v. Dial, 405 S.C. 247, 259, 746 S.E.2d 495, 501 (Ct. App. 2013); State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008); State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). This Court warned that the photographs at issue were “at the outer limits of what our law permits a jury to consider ... [and] strongly encouraged all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.” Torres, 390 S.C. at 623-624, 703 S.E.2d at 229.

This Court recently addressed the danger of unfair prejudice in the introduction of gruesome autopsy photographs in State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). A majority of this Court held the introduction of the photographs was erroneous. Collins, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge, J. and Hearn, J., concurring); Id., at 540, 763 S.E.2d at 30-31 (Pleicones, J., dissenting). However, four members of this Court determined the erroneous admission was harmless. Id., at 536, 763 S.E.2d at 28-29 (majority opinion); Id., at 539, 763

S.E.2d at 30 (Kittredge, J. and Hearn, J., concurring).⁶ Despite the split among this Court, the point of the opinion is clear – evidence must be probative of some fact at issue in the case and the danger of unfair prejudice resulting from gruesome photographs must be guarded against at all times.

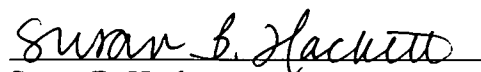
Trial counsel's failure to object to the photographs was deficient performance prejudicial to Petitioner. There was no question the deceased died as a result of blunt force trauma, and there was no question the trauma was inflicted by a baseball bat. Although the state had to prove malice as an element of murder, the judge did not charge the jury on any lesser-included offenses; therefore, the question of malice was not at issue. The judge also did not charge the jury regarding any defense, also demonstrating the question of malice was not at issue. The sole issue before the jurors was whether Petitioner was involved in the beating death of Zoch. The solicitor used the photographs to inflame the passions and prejudices of the jury to urge the jury to find Petitioner guilty where no other evidence of his guilt existed. See App. 1568, l. 18 – App. 1570, l. 10.

⁶Justice John Cannon Few wrote the opinion for a unanimous panel of the Court of Appeals finding the introduction of the photographs erroneous and not harmless. State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012).

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR judge, reverse his convictions and order a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of June, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Alison Renee Lee, Circuit Court Judge

ROBERT CANNON,

PETITIONER,

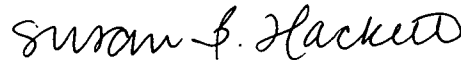
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

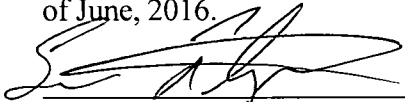
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Robert Cannon #328347, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 20th day of June, 2016.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of June, 2016.

 (L.S.)

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