

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

S.C. SUPREME COURT

William P. Keesley, Circuit Court Judge

Opinion No. 2011-200566 (S.C. Ct. App. filed Dec. 14, 2016)

TOMMY S. ADAMS, #311901Petitioner,

v.

STATE OF SOUTH CAROLINARespondent.

REPLY BRIEF OF APPELLANT

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Arguments

- I. Adams was denied the effective assistance of counsel during trial, in which the state's case relied on uncorroborated testimony of the alleged victim and irrelevant, inadmissible, and prejudicial testimony by a law enforcement officer, due to counsel's failure to rebut the state's misrepresentation of the nature of Adams' statement.**

The State suggests trial counsel had a valid strategic reason for not calling TJ and CA to explain the “cooter” comment when it argues, “This issue turns on whether trial counsel’s assessment of the testimony in the context of the events and testimony at trial was reasonable.” Brief of Respondent, pp. 8-9. The State then contends the PCR record supports a conclusion that trial counsel reasonably assessed the testimony because the “cooter” comment “was not the damaging evidence that the State was making it out to be,” while also acknowledging trial counsel “lean[ed] towards” believing the testimony was harmful to Adams’ defense. *Id.* These acknowledgments by trial counsel are evidence of his deficient performance. The “damaging” nature of the testimony about the “cooter” comment is readily apparent, and any failure to recognize it as such is objectively unreasonable. Recognizing the testimony as damaging to Adams’ defense but not placing it into context, when testimony was readily available from TJ and CA, is also objectively unreasonable and not excused by any valid trial strategy.

The State further contends trial counsel reacted reasonably to the testimony about the “cooter” comment by pointing to his PCR testimony that “both sides get to interpret its meaning as they chose” and trial counsel’s belief he “could explain [the comment] and give it a neutral and positive meaning.” Brief of Respondent, pp. 8-10. These arguments are not persuasive. As this Court recently reminded, “the PCR court should consider the specific impact of counsel’s error had on the outcome of the trial.” *Smalls v. State*, No.

2016-001079, 2018 WL 736339, at *6 (S.C. Feb. 7, 2018). Here, trial counsel had three options for explaining the comment, none of which exclude any of the other options. The first option was through Adams' testimony. The second option was through the testimony of TJ and CA. The third option was explaining it during his closing argument. Addressing the testimony during closing argument is not persuasive without first addressing it through one or more of the witnesses. The trial record does not contain any evidence that trial counsel ever attempted to explain the comment. He did not ask TJ and CA about the comment when they testified, and he did not mention it during his closing argument. Trial counsel never offered the jurors a "neutral" or "positive" interpretation of the "cooter" comment.

The State's attempt to excuse trial counsel's deficient performance because Adams surprisingly decided not to testify must be rejected. Trial counsel was not limited to one witness to explain the statement. In fact, TJ and CA providing similar testimony corroborates each other and enhances the credibility of their explanations for the comment.

Ultimately, trial counsel acknowledged he did not have a strategic reason for not asking TJ and CA about the comment when he testified: "[A]s to why I did not specifically ask them to clarify it, as I sit here today, I can't give you an answer." A. 339. *See Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015) ("If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.").

II. Adams was denied the effective assistance of counsel due to counsel's failure to object, request that the jurors and bailiffs be questioned, and failure to request that the jurors be returned to court for proper instructions following improper communications between jurors and the bailiffs.

The State's brief never addressed trial counsel's misunderstanding of the law pertaining to when the trial judge should provide an *Allen*¹ charge, which established deficient performance and eliminates the possibility of trial counsel making a valid strategic decision. *See* Brief of Appellant, p. 14.

The State however, does acknowledge that juror Warrena Mathis changed her vote from not guilty to guilty because of the bailiff's communication and her resulting belief that the jurors would have to remain until they reached a guilty verdict. Brief of respondent, p. 17. The State suggests this Court should overlook Ms. Mathis changing her vote because "the jury did not stay [overnight] and agree, but specifically *asked* to return the next day and deliberations resumed." *Id.* (emphasis original). The State's suggestion does not negate the juror's belief that the jurors would be required to remain day-to-day until they reached a guilty verdict.

The State additionally asks this Court to excuse trial counsel's deficient performance because "there was no expression by the jury that it was deadlocked." Once this Court considers "the specific impact counsel's error had on the outcome of the trial," *Smalls, supra*, the need to grant post-conviction relief becomes apparent. Trial counsel should have requested the trial judge question the jurors about the improper communication from the bailiff. *See, e.g., State v. Salters*, 273 S.C. 501, 505, 257 S.E.2d 502, 504 (1979) ("[T]his Court has approved a similar procedure whereby the trial judge conducts an inquiry or Voir dire of the jury in order to discern if any prejudice or bias on

¹ *Allen v. United States*, 164 U.S. 492 (1896).

their part has been generated by inflammatory news accounts published prior to or during the trial.”). Such questioning would have revealed that the jurors were deadlocked. The resulting *Allen* charge would have informed the jurors that “the law doesn't require that a juror violate his or her conscience just to agree with the other jurors,” and the jurors’ inability to agree on a verdict would mean “12 other people in this county will have to decide this” case. *State v. Williams*, 344 S.C. 260, 262, 543 S.E.2d 260, 262 (Ct. App. 2001). Such an instruction would have reassured Ms. Mathis and the other jurors that the trial court would not have kept the jurors day-after-day until they reached a guilty verdict. Accordingly, there is “a reasonable probability that, but for counsel's errors, the result of the trial would have been different.” *Smalls*, at *6.

Conclusion

Wherefore, for the reasons set forth in the Brief of Appellant and this Reply Brief, this Court should grant post-conviction relief.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that Appellant's Reply Brief has been served upon Respondent's counsel by first class mail, postage prepaid, this 12th day of February, 2018, addressed to counsel of record, Melody J. Brown, Post Office Box 11549, Columbia, South Carolina 29211.



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