

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

JUL 30 2018

S.C. SUPREME COURT

RON SANTA MCCRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002051

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED.....1

STATEMENT2

ARGUMENT

The PCR court erred by finding it was “reasonable” for counsel not to object to the hearsay testimony of Tinna Collins that her young cousin told her “the bad man Ron, bad man Ron shot Reggie,” since this was not only hearsay, it was also constituted impermissible bad character evidence, and it was not reasonable for counsel not to object, and move to strike this inadmissible highly prejudicial testimony4

Relevant Trial Facts4

Petitioner was a “bad man” hearsay testimony8

Order of dismissal10

Discussion10

CONCLUSION.....13

PETITION TO BE RELIEVED AS COUNSEL14

ISSUE PRESENTED

Whether the PCR court erred by finding it was “reasonable” for counsel not to object to the hearsay testimony of Tinna Collins that her young cousin told her “the bad man Ron, bad man Ron shot Reggie,” since this was not only hearsay, it was also constituted impermissible bad character evidence, and it was not reasonable for counsel not to object, and move to strike this inadmissible highly prejudicial testimony?

STATEMENT

Procedural history

Petitioner was indicted by the Berkeley County Grand Jury for the offense of murder. App. 1024. His case was called to trial on October 29, 2012 before the Honorable Kristi Harrington and a jury. App. 1.

Chris Biering represented petitioner. Anne Williams and Brian Alfaro were the assistant solicitors. App. 1

On November 2, 2012 the jury was instructed on the law of murder, and the defense of self-defense. App. 766, l. 22 – 771, l. 8. The jury found petitioner guilty of murder. App. 781, ll. 6-10. Judge Harrington sentenced Petitioner to life imprisonment. App. 795, ll. 13-17.

On direct appeal to the South Carolina Supreme Court, Appellate Project Attorney James K. Falk raised the following issues:

1.

After [Petitioner] discovered that the state failed to provide [Petitioner] with relevant impeachment evidence in advance of [Petitioner's] initial cross examination of an important witness, the court erroneously denied [Petitioner's] request to conduct a second and unlimited cross examination of the witness.

2.

The trial court violated the [Petitioner's] Sixth and Fourteenth Amendment rights to confrontation and cross-examination pursuant to Crawford v. Washington, 541 U.S. 36 (2004) by allowing a witness to testify as an expert in DNA analysis where the expert had no independent basis for her expert opinion and her testimony was based upon testimonial hearsay contained in a report prepared by a non-testifying DNA analyst from the State Law Enforcement Division.

3.

Since the state opened the door to [Petitioner's] proffered testimony regarding the decedent's past criminal record, drug use and violence; and since the evidence was so closely connected with the homicide as to reasonably indicate the decedent's state of mind, the proffered testimony was relevant and the court's refusal to allow it was a violation of [Petitioner's] Sixth and Fourteenth Amendment rights to offer relevant witness testimony.

4.

After [Petitioner] discovered that the state failed to provide [Petitioner] with relevant impeachment evidence in advance of [Petitioner's] initial cross examination of an important witness, the court erroneously denied [Petitioner's] request to conduct a second and unlimited cross examination of the witness.

After oral argument before the Court of Appeals on January 6, 2015, petitioner's conviction was affirmed in State v. McCray, 413 S.C. 76, 773 S.E.2d 914 (filed June 24, 2015). App. 797-808. Petitioner filed an application for post-conviction relief on November 25, 2015. App. 809-846. The state filed a return dated June 9, 2016. App. 847-853.

PCR counsel Lance Boozer filed an amended PCR application dated August 11, 2016. App. 854-856. An evidentiary hearing was held before the Honorable Michael Nettles on August 2, 2017. Lance Boozer represented petitioner, and Lindsey McCallister was the Assistant Attorney General. App. 857. Petitioner and trial counsel Christopher Biering testified. App. 858-988.

An order of dismissal was filed on September 14, 2017. App. 999-1023. This petition for a writ of certiorari follows.

ARGUMENT

The PCR court erred by finding it was “reasonable” for counsel not to object to the hearsay testimony of Tinna Collins that her young cousin told her “the bad man Ron, bad man Ron shot Reggie,” since this was not only hearsay, it was also constituted impermissible bad character evidence, and it was not reasonable for counsel not to object, and move to strike this inadmissible highly prejudicial testimony

Relevant Trial Facts

The facts which follow were found by the South Carolina Court of Appeals in State v. McCray, 413 S.C. 76, 773 S.E.2d 914 (filed June 24, 2015): On September 16, 2009, an officer with the City of Charleston Police Department was called to the scene of a shooting on Jack Primus Road in Berkeley County, South Carolina. [Tinna Mack-Collins lived on this road]. Upon arriving at the scene, the officer saw a female on her knees with Reginald Porcher's head cradled next to her body. He noticed blood around Porcher, who did not appear to be conscious. The officer cleared the group of people who had gathered around the woman and secured the scene. Police arrested McCray the following day and charged him with the murder of Porcher. His case was called for trial on October 29, 2012.

At trial, the State called Joyce Wright to testify. Joyce testified she was sitting on her friend's porch when Porcher was shot. She stated she saw a tall person wearing a white t-shirt walking toward a crowd near a tree with something in his hand. Joyce testified she then heard a gunshot and the children who were playing nearby began to run away from the tree. According to Joyce, she also heard the children yelling "Ron shot Reggie" as they fled the area. Joyce stated she observed Porcher walking around in a circle and holding his neck before he fell to the ground.

Felicia Coaxum, who lived with Joyce, also testified at trial. Coaxum testified that, at the time of the shooting, she was asleep in her mother's room and was awakened by a loud noise. She looked outside and saw Porcher's truck rolling backwards toward the woods. Coaxum testified that-as the truck was rolling-back she saw Porcher lying on the ground, and McCray was standing over him holding something that had a "metal, wooden handle." According to Coaxum, McCray stomped on Porcher while saying "die mother-f***er, die." While Porcher was lying on the ground, Coaxum stated McCray asked the other people in the area if they had a problem and said, "that he's God." Coaxum testified that, after stomping on Porcher, McCray got into a car and left.

In addition to Joyce and Coaxum, the State offered the testimony of Akeem Ashby. Ashby testified he was at the tree when McCray pulled up in his car and got out with a shotgun in his hand. As Ashby began to run away from the area, he said he heard a gunshot. Ashby also testified he heard McCray say "[s]omething like ... I assure you all I'm God."

After Ashby's testimony, the State recalled Joyce and questioned her about a 2001 fraudulent check charge. Joyce confirmed she had a fraudulent check charge on her record, and the State did not ask any additional questions. On cross-examination, McCray asked Joyce if she knew Abdullah Fishburne, but the circuit court instructed McCray that this cross-examination was limited to Joyce's prior convictions. McCray withdrew the question, and Joyce was dismissed. Next, the State recalled Coaxum and questioned her about a 2004 breach of trust charge. McCray had no additional questions for Coaxum on cross-examination.

Porcher's father (Father), Robert Porcher Jr., also testified during the trial. During his testimony, the State asked Father if Porcher would have had a professional football career like Porcher's older brother, and Father responded that an automobile accident prevented Porcher

from playing football. McCray argued that Father's testimony opened the door for testimony regarding prior bad acts because the jury could construe the testimony about a potential football career as evidence of Porcher's good character. As it pertained to the automobile accident, the circuit court limited McCray's cross-examination to the effect the accident had on Porcher's physical abilities. However, after McCray cross-examined Father, the circuit court allowed McCray to proffer testimony from Father regarding Porcher's prior criminal convictions. McCray then questioned Father about Porcher's previous convictions for burglary, disturbing schools, and fighting.

After McCray's cross-examination of Father--but before proffering his additional testimony--McCray argued he should be allowed a second unlimited opportunity to cross-examine Joyce and Coaxum because he did not receive their criminal records in discovery. According to McCray, knowledge of their previous convictions would have altered the way he prepared for and questioned the witnesses. The State acknowledged its failure to immediately turn over the reports was a mistake, but noted it did not realize this mistake until the witnesses were on the stand. The circuit court denied McCray's request for a second unlimited cross-examination of Coaxum and Joyce.

Next, the State called James Boykin to testify. Boykin testified that--after McCray shot Porcher--McCray called him and told him, "I shot that mother-f* * *er" and "I hope he died." McCray also told Boykin he spit in Porcher's face and said, "die mother-f* * *er, die." According to Boykin, McCray arrived at his house the morning after the shooting and told him "he needed to go get his check and stuff because he had to handle some business because he kn[ew] he was in trouble." Boykin testified McCray called his supervisor to have his check put in Boykin's name. Boykin drove to the construction site where McCray had previously worked to

pick up McCray's check and work tools. Boykin stated that, while he was at the site, he spoke with a former employer and the owner of the site, after which he decided to call 911 out of fear of being charged as an accomplice to murder. Next, Boykin testified he took McCray's check to the bank, cashed the check, and gave the money to McCray. Boykin said he then took McCray to a pawn shop where he planned to sell his work tools, but because Boykin had called 911, the police were waiting at the pawn shop where they arrested Boykin and McCray in the parking lot.

[M]cCray took the stand on his own behalf to present his theory of self-defense. McCray testified about the events that led to Porcher being shot. According to McCray, on the day in question, he was riding in a car with Christopher Cleggett on Jack Primus Road when he saw Porcher's truck parked near the tree and told Cleggett to pull over because he wanted to talk to Porcher. McCray testified that he got out of the car and yelled to Porcher that he was coming to speak with him. McCray stated Porcher then ran toward his own truck, got in the driver's side door, grabbed something from under the seat, and got back out of the truck. McCray testified he believed Porcher was grabbing a weapon. In response, McCray said that he went back to the car and grabbed a shotgun. McCray stated he believed Porcher was pointing a gun at him, so he shot at Porcher.

Next, McCray testified that Porcher's truck began rolling backward and ran over Porcher's leg. McCray stated he ran toward Porcher and kicked him while he was lying on the ground in an attempt to "take the weapon off of him." McCray, however, then testified that he never saw a weapon. McCray further testified that Porcher did not appear to have been shot. However, he then stated Porcher had been shot -- and that he kicked Porcher -- but "nothing was wrong with him."

After closing arguments, the circuit court first charged the jury with the elements of murder. Then, because McCray argued he shot Porcher in self-defense, the circuit court charged the jury with the law regarding self-defense. In addition, the circuit court instructed the jury that "[i]f the defendant was on his own premises, the defendant has no duty to retreat before acting in self-defense." McCray objected to the circuit court's charges and requested the court charge the jury with the language from section 16-11-440(C). The circuit court denied McCray's requested jury charge. App. 801-803.

Petitioner was a "bad man" hearsay testimony

During petitioner's trial, the state called Tianna Chanise Mack-Collins as a witness. (hereinafter "Tianna" or "Collins for ease of reference). Tianna had known petitioner and the decedent, Reggie Porcher, "all of her life." App. 146, l. 17 – 147, l. 17.

Tianna was at Joyce Wright's house on the day of the shooting. Joyce Wright was her aunt. Tianna was under the hair dryer at the time of the incident. App. 147, l. 18 – 148, l. 2.

Tianna said that her seven-year-old son and "one of my little cousins" told her she needed to come outside immediately. Tianna testified one of her "little cousins" told her that "the bad man Ron, bad man Ron shot Reggie." At this point, Tianna "ran outside to see what was going on. I started asking where was my kids." People were "running and screaming" at the time. App. 148, ll. 3-23.

At the PCR hearing, petitioner complained that there was no objection made to this highly prejudicial claim that a child told Tianna that "the bad man Ron shot Reggie." App. 916, l. 5 – 917, l. 12.

Trial counsel Christopher Biering also testified at the PCR hearing. He described the area where the shooting took place as a "beautiful area, sandy pines, and then it opens up to these

areas, but you've got these big live oak trees and you have families that have lived there for a very long time, and my understanding from my investigation and from Mr. McCray [was] that people knew one another. This was not a situation where there was a need for identification. My understanding was the families knew one another. Both the McCrays and the Porchers had gone back for some time, and the people that lived in this community knew both McCray and Porcher." App. 925, l. 17 – 926, l. 8.

Biering would continue to describe this "beautiful area" near "the back side of Daniel Island," but he added "while it may have looked like a beautiful home site with a beautiful oak tree and pine forest around it . . . there was this environment that was kind of like an undercurrent that was violent . . ." Biering referred to a videotape in the area which showed twenty-five to thirty men with assault rifles. App. 934, l. 14 – 935, l. 6.

During the cross-examination of trial counsel Biering, the PCR judge asked trial counsel why he did not object to the hearsay testimony which referred to petitioner "as a bad man." App. 955, ll. 3-9. Trial counsel claimed: "I'm not shy to object, your Honor, and I don't object to everything." Biering said he was not "the type of person "who would say, "I wouldn't change anything in life. I have never read a transcript where I thought to myself I'd do everything exactly the same . . ." Trial counsel offered that it was undisputed that petitioner shot the decedent, but he added that he understood petitioner's concern about his failure to object to this hearsay testimony that "bad Ron" shot the decedent. App. 955, ll. 3-20.

Trial counsel would admit that the "bad man Ron" shot the decedent testimony was an out of court statement made by another that was presented "for the truth of the matter asserted" -- hearsay. Trial counsel also admitted that the "bad man component" to the hearsay made the testimony even more damaging. App. 981, l. 6 – 982, l. 1.

Order of dismissal

In the order of dismissal, the PCR court noted petitioner's grounds for relief that "counsel should have objected when Tianna Collins testified the children at the scene told her "the bad man Ron" shot the victim. App. 1021.

The PCR court found that the trial counsel "may have had a basis to object to Tianna Collins' testimony as to the phrase 'the bad man' shot the victim, but given the context of the statement and the lack of emphasis on it in Collins' testimony as a whole, it was reasonable for Collins not to object." The PCR judge reasoned petitioner did not suffer any prejudice from this testimony. App. 1022. For the reasons that follow, petitioner respectfully disagrees since the jury was evaluating the credibility of his self-defense claim.

Discussion

This was a case where the state sought to show petitioner was a person of "bad character," and the defense sought to show that the decedent was on drugs and that he was a very dangerous man. Only the state, in admitting this hearsay bad character testimony was successful in painting petitioner to be a "bad man," "bad Ron," and a person of bad character. The defense bad acts evidence pertaining to the decedent was not allowed to be heard by the jury.

Defense counsel conceded what he had to concede -- that he should have objected to the hearsay testimony of Tianna Collins that her young cousin told her that "bad man Ron" shot the decedent.

Defense counsel admitted at PCR that this was a small community wherein petitioner's family knew the decedent's family, and vice versa. Where, as in this case, there is disputed evidence as to whether a shooting was murder or self-defense, labeling the shooter, who says he is acting in self-defense, a "bad man" can carry the day for the prosecution.

Where evidence is offered to show the defendant is a person of bad character, it is inadmissible. See State v. Bolden, 303 S.C. 41-43, 398 S.E.2d 494, 495 (1990); State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990). Here, it was undisputed that this testimony was inadmissible hearsay. Defense counsel admitted it was more problematic because it had a “further component” of “bad character evidence.” The bad character component was inexplicably entwined into the hearsay.”

Evidence offered to show a person has a bad character, and was acting in conformance with that bad character is inadmissible. See Rule 404(b), SCRE; State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007); State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). Evidence, such as in this case, *can connote bad character even though the evidence does not involve a prior bad act*. That is this case, and this issue. The same analysis applies to such evidence being inadmissible, however. State v. Nelson, 331 S.C. 1, 501 S.E.2d 716, n. 11 (1998), *citing Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989).

Evidence that a defendant is a person of “bad character,” can easily lead a jury to the impermissible conclusion that even if appellant “technically” acted in self-defense in this case, he was still a bad and dangerous man who should be incarcerated for the good of the community.

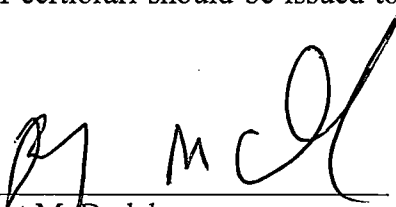
Evidence from a child that petitioner was known as “Bad Ron,” and hearsay testimony that “Bad Ron” shot the decedent was devastating in this self-defense case. Credibility was everything, and being painted as man of bad character unfairly destroyed petitioner’s credibility. Absent the bad character component to this hearsay, the practical, logical approach taken by the PCR court of “petitioner had to shoot him to claim self-defense” mantra might have appeal.

The hearsay bad character evidence in this case should have been objected to, and struck from the record so the jury could not consider it. The PCR court erred by finding trial counsel’s

failure to object was “reasonable” when not even trial counsel asserted that position when pressed during the post-conviction hearing.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

RON SANTA MCCRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

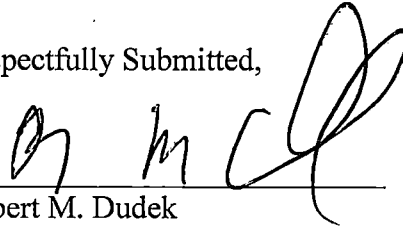
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ron Santa McCray states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Michael G. Nettles, which was held on August 2, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Ron Santa McCray.

Respectfully Submitted,

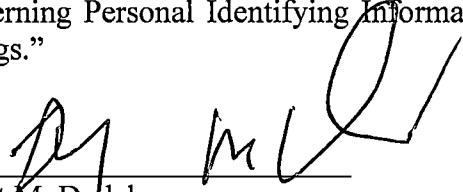


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of July, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 30th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

RON SANTA MCCRAY,

PETITIONER


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Ron Santa McCray, #353031, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of July, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.