

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Jean H. Toal, Circuit Court Judge

MARVIN XAVIER PORCHER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000734

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did trial counsel violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel by failing to request additional voir dire or move to strike a juror for cause where the alleged victim revealed she knew the jury foreperson?

STATEMENT

In November 2011, Nancy Wohlford and Susan Rutledge lived in a mobile home park in Charleston. App. 169, ll. 22-25; App. 170, ll. 13-14. Petitioner and his girlfriend, Cassie Callier, lived next door. App. 171, ll. 23-25.¹ In October and November, Petitioner performed some work on Wohlford's home, including repairing fascia, fixing an awning, and installing a handrail. App. 172, l. 15 – App. 173, l. 1.

On November 2, 2011, Petitioner and Callier went to Wohlford's home. App. 175, ll. 15-18. Wohlford invited her friend Kenny as well. App. 175, ll. 15-18. Wohlford cooked dinner for the foursome. App. 175, ll. 18-19. After the group ate, Petitioner began tattooing Wohlford. App. 175, ll. 19-20. At some point, Wohlford requested a break from the tattooing. App. 175, ll. 21-22. During this break, Wohlford allowed Petitioner to use her computer to go onto Facebook. App. 175, ll. 22-24.

The following day, Wohlford and Callier went to see Petitioner while he was working. App. 176, ll. 21-24. Wohlford paid Petitioner for some of the work he had completed on her home. App. 176, ll. 21-24. Petitioner gave the money to Callier. App. 177, ll. 11-12. Wohlford and Callier then went shopping. App. 177, ll. 13-19. That evening, Wohlford and Callier went out to Rival's and then to Denny's. App. 178, ll. 11-24. Petitioner was not home when the two women left. App. 178, ll. 14-16.

While at Denny's, Wohlford received a phone call from the North Charleston Police Department, inquiring about her laptop. App. 179, ll. 2-11. After the phone conversation, Wohlford and Callier left Denny's to return to Wohlford's home. App. 179, ll. 22-25; Tr. 180, ll.

¹ Wohlford and Callier knew each other prior to Petitioner and Cassie moving in to the mobile home park because both had worked for the same security company in the past. App. 174, ll. 12-17.

3-4. After going through her home, Wohlford told the police that following items were missing: (1) her roommate's television, (2) her laptop, and (3) two jewelry boxes. App. 182, ll. 11-12; App. 194, l. 12 – App. 195, l. 1. Concerning jewelry, Wohlford indicated some pearls were missing. App. 184, ll. 4-7. Wohlford also indicated there was damage to her back door that was not there when she left for the evening. App. 187, ll. 18-24.

The police obtained no fingerprints or other forensic evidence during the processing of Wohlford's home. App. 224, ll. 1-2; App. 225, ll. 1-5; App. 226, ll. 11-13; App. 227, ll. 2-23 (explaining that two print lifts were "insufficient for identification"); App. 228, ll. 14-23.

At 12:04 a.m. on November 4, 2011, Officer Fernando Salgado saw Petitioner riding down a road near his home on a bike. App. 125, ll. 19-23; App. 127, ll. 1-5; App. 128, ll. 1-7. Salgado noticed Petitioner did not have a rear blinking light on his bicycle. App. 128, ll. 4-7. Salgado decided to stop Petitioner to warn him about the lack of light. App. 129, ll. 16-23. During the encounter, Petitioner gave Salgado a false name, "Marvin Swinton." App. 131, ll. 8-12; App. 132, ll. 1-12. Salgado noticed "a bulge in [Ppetitioner's] jacket." App. 131, ll. 17-19; App. 133, ll. 9-11. When Salgado requested permission to search his person, Petitioner readily agreed. App. 133, ll. 14-17. During the search, Salgado found a laptop. App. 133, ll. 18-21. He also found a pearl necklace and cylinder. App. 135, ll. 6-24. Salgado then arrested Petitioner for false information to a police officer. App. 137, l. 23 – App. 138, l. 1.²

At the police station, Detective Mark Evans interrogated Petitioner regarding the items Salgado found on him. App. 153, l. 5 – App. 160, l. 16. Evans used a handheld digital recorder to recorder the interrogation; however, the recording was not available at the time of Petitioner's

² Subsequently, the North Charleston Police charged Petitioner with receiving stolen goods as well. App. 139, l. 23 – App. 140, l. 7. Petitioner entered guilty pleas to the offenses of receiving stolen goods and false information to police. App. 146, ll. 16-17.

trial. App. 157, ll. 10-16; App. 159, l. 25 – App. 160, l. 16. During the interrogation, Petitioner informed Evans that he purchased the laptop from a man on Remount Road. App. 157, ll. 21-23. Petitioner denied stealing the items. App. 159, ll. 14-19.

While examining the laptop, Evans found a resume for Wohlford. App. 151, ll. 5-13. On the resume, he found a telephone number for her. App. 151, ll. 13-14. It was Evans who called Wohlford while she was at Denny's to question her about a laptop. App. 151, ll. 17-22.

When the police were at Wohlford's home investigating the burglary, Callier consent to the police searching the home she shared with Petitioner. App. 214, ll. 20-25; App. 218, l. 25 – App. 219, l. 8. The police did not find "anything that matched the description of the missing television" from Wohlford's house. App. 215, ll. 11-13; App. 221, ll. 12-15. In fact, the police did not collect anything from Petitioner's home. App. 220, ll. 19-22.

The state's only evidence against Petitioner was his possession of items – the laptop and some jewelry – that had been stolen from Wohlford's home.

On July 8, 2013, a Charleston County grand jury indicted Petitioner for burglary in the first degree (2013-GS-10-4867). App. 512-513.³ On July 18-19, 2013, the state, represented by Tyler Schachte Whitaker and Jennifer Kneece Shealy, called the burglary case to trial before the Honorable Deadra L. Jefferson and a jury. App. 1. The jury found Petitioner guilty of first degree burglary. App. 291, ll. 11-15. On the burglary conviction, Judge Jefferson sentenced Petitioner to fifteen years in prison. App. 316, ll. 5-6; App. 514.

³ On April 9, 2012, a Charleston County grand jury indicted Petitioner for breaking and entering a motor vehicle (2012-GS-10-1910). App. 506-507. On January 8, 2013, a Charleston County grand jury indicted Petitioner for breaking and entering a motor vehicle (2013-GS-10-441). App. 509-510. These charges were unrelated to the burglary for which Petitioner stood trial; however, Petitioner entered guilty pleas to the breaking and entering charges at the conclusion of the burglary trial. App. 299, l. 9 – App. 308, l. 11. Judge Jefferson sentenced Petitioner to five years imprisonment on each count of breaking and entering a motor vehicle. App. 316, ll. 2-4; App. 508; App. 511.

Petitioner served a notice of appeal, which was perfected by Lanelle Cantey Durant. App. 319-333. On appeal, Petitioner challenged the trial judge's failure to direct a verdict of acquittal on the burglary charge. App. 319-333. In an unpublished opinion, the Court of Appeals affirmed Petitioner's conviction. App. 350-351; State v. Porcher, 2015-UP-124 (S.C. Ct. App. filed Mar. 11, 2015). Remittitur was issued on April 3, 2015. App. 352-353.

On April 10, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 354-427. The matter proceeded to an evidentiary hearing on September 15, 2016, before the Honorable Jean Hoefler Toal. App 434. Christopher L. Murphy represented Petitioner, and James Rutledge Johnson represented the state. App. 434. By an order filed April 9, 2018, former Chief Justice Toal denied petitioner relief. App. 491-505.

On April 19, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Violating Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, trial counsel failed to request additional voir dire or move to strike a juror for cause where the alleged victim revealed she knew the jury foreperson.

Relevant Facts

After the jury had been selected, the state revealed the alleged victim, Nancy Wohlford, knew one of the jurors. App. 101, ll. 21-25. The trial judge questioned the jury foreperson, Linda Brown, regarding Wohlford's claim. App. 106, l. 4 – App. 110, l. 23. Through the questioning, the parties learned Wohlford's child attended Camp Inventions where Juror Brown worked. App. 107, ll. 1-18. Juror Brown did not recall the last names of any of the children with whom she interacted at Camp Inventions. App. 108, ll. 14-17. Juror Brown could not recall any contact with anyone named Nancy Wohlford. App. 108, ll. 20-23. Trial counsel failed to move to excuse the juror, request any additional voir dire, or oppose the judge's request to retain Juror Brown on the jury. App. 112, ll. 2-11.

During the PCR hearing, Petitioner expressed his dismay at trial counsel's failure to move to strike Juror Brown in light of Wohlford's clear and unequivocal statement that she knew Juror Brown. App. 446, ll. 3-12. Despite the availability of the transcript to trial counsel at the PCR hearing and the undisputed references in the transcript of the limited inquiry conducted by the trial judge, trial counsel claimed no recollection of Wohlford's revelation at trial that she knew Juror Brown. App. 470, ll. 9-12. However, trial counsel stated that he would have moved to strike a juror who knew the alleged victim. App. 470, ll. 13-17. Later, trial counsel clarified that his striking of a juror who knew the alleged victim would "depend[] on how well and what the nature of knowing the person would be." App. 477, ll. 7-12.

In the order denying relief, the PCR judge found trial counsel's testimony on this issue credible because "[t]he record support[ed] counsel's testimony." App. 503. According to the PCR court, there was "no indication any member of the jury pool knew the victim and no member of the panel responded when the trial court inquired as to whether anyone knew the victim." App 504.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "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." Id. at 686. 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. Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

"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." Strickland, 466 U.S. at 694. 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. Specifically, on the prejudice prong, the question to ask is “whether there is a reasonable probability that, absent the errors, the fact finding would have had a reasonable doubt respecting guilt.” Id. (emphasis added). The United States Supreme Court specifically ruled that “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Id. Moreover, the Court held that:

The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

In determining prejudice, “the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” Smalls, 422 S.C. at 188, 810 S.E.2d at 843. “In addition, the PCR court should consider the strength of the state’s case in light of all the evidence presented to the jury.” Id. “In general, the stronger the evidence presented by the state, the less likely the PCR court will find the applicant has met his burden of proving prejudice.” Id. Typically, “this Court has used the phrase ‘overwhelming evidence of guilt’” to describe this analysis. Id.

“Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” Id. at 189, 810 S.E.2d at 844. Instead, a court must balance the impact of counsel’s error against the strength of the state’s case on the point in question. Id. The strength of the state’s case is but “one significant factor the court must consider – along with the specific

impact of counsel's error and other relevant considerations – in determining whether the applicant has met his burden of proving prejudice.” Id.

[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice ... the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.

Id. at 191, 810 S.E.2d at 845.

It is axiomatic that “[a]ll criminal defendants have the right to a trial by an impartial jury.” State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). “[T]he jury must render its verdict free from outside influences of all kinds.” State v. Coaxum, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014). “To protect both parties’ right to an impartial jury, the trial court must conduct voir dire of the prospective jurors to determine whether the jurors are aware of any bias or prejudice against a party, as well as to ‘elicit such facts as will enable [the parties] intelligently to exercise their right of peremptory challenge.’” Id. (quoting State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)). “Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge.” Id. (citing State v. Gullede, 277 S.C. 368, 371, 287 S.E.2d 488, 490 (1982)).

When the trial judge learns that a juror has concealed or withheld information, “the trial court must inquire into whether the withheld information affects the jury’s impartiality.” Id. (citing State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 105, 106 (1998)). This Court has explained that a trial judge should not grant a mistrial based upon a juror’s concealment of information unless it is absolutely necessary to do so. Id. Rather, the judge should exhaust other methods to cure the possible prejudice. Id. If the judge determines the juror intentionally concealed

information, the judge must replace the juror or grant a mistrial. Id. at 328, 764 S.E.2d at 245-246. If the judge determines the juror's failure to reveal was unintentional, the judge must determine whether the concealed information would have supported a challenge for cause or would have been a material factor in a party's exercise of a peremptory strike. Id. at 329, 764 S.E.2d at 246. Thus, the moving party must show that the concealed information demonstrates the juror is potentially biased and the concealed information would have been a material factor in the party's exercise of a strike. Id. Thereafter, the judge may exercise discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial. Id. at 328, 764 S.E.2d at 246.

The trial judge wholly failed to follow the procedures carefully outlined by this Court. During voir dire, the trial judge informed the jurors that "Nancy Wohlford" was one of many "potential witnesses" in the case. App. 52, ll. 18-20. The judge asked if "any member of the panel" were "related by blood or marriage to any of the people" listed or "have a close personal or social relationship with any of the[] individuals." App. 53, ll. 5-9. No one, including Juror Brown, responded. App. 53, l. 10. In the jury selection process, Juror Brown was the eighth person called. App. 67, l. 23. At that time, trial counsel had exercised only three strikes. App. 65, l. 20 – App. 67, l. 20. Thus, trial counsel had peremptory strikes available to use.

At a bench conference, the prosecutor explained, "It appears that our victim may know one of the jurors." App. 101, ll. 21-22. When the judge asked for clarification, the state presented a note. App. 102, ll. 23-25. Prior to conducting any voir dire of the juror or making any inquiries of Wohlford, the judge stated it "sound[ed] like a passing acquaintance." App. 102, l. 10. Trial counsel explained he "would like to at least have the person questioned to make sure there is not ---." App. 102, ll. 15-16. Through the prosecutor, Wohlford indicated she knew

the jury foreperson. App. 103, l. 14. Posing no questions to anyone, the judge indicated that Wohlford “apparently misapprehended [sic] who it is.” App. 103, ll. 15-16.

When the judge requested more information from Wohlford, the solicitor explained that the foreperson was in the school system and worked with Wohlford concerning “issues involving her children.” App. 104, ll. 11-14. Finally, the judge summoned Juror Brown to the courtroom to make some inquiries. App. 106, ll. 1-2. Juror Brown informed the judge that she worked Camp Inventions, which was part of the school system. App. 107, ll. 1-3. Her last involvement with the program was between three and five years prior to the trial. App. 107, ll. 4-8. App. 107, ll. 17-19. Petitioner’s trial was in 2013, and he was alleged to have burglarized Wohlford’s home in 2011, approximately two years prior to the trial. Thus, Juror Brown’s interactions with Wohlford occurred a mere one or two years prior to the burglary.

Although the judge realized the inconsistencies in the information she received, she did not little to make further inquiries. The judge noted that Wohlford initially indicated that her children had not been in South Carolina in the previous eight years, but had then stated that her child attended Camp Invention four years prior to the trial. App. 107, ll. 22-23. The state tried to explain this away by stating that it was unknown how many years Juror Brown taught at Camp Invention. App. 107, ll. 23-25.

Next, the judge asked if Juror Brown ever interacted in the camp with any children by the last name of Wohlford. App. 108, ll. 14-15. Juror Brown did not recall the last names of any of the children with whom she interacted at Camp Inventions. App. 108, ll. 16-17. Juror Brown could not recall any contact with anyone named Nancy Wohlford as a parent of a child in the camp. App. 108, ll. 20-23.

The judge concluded that Juror Brown had “no recollection of Ms. Wohlford or her children,” and there was no “further voir dire” that could be conducted. App. 110, l. 25 – App. 111, l. 3. With no clear indication of whom the judge was referring, the judge stated, “She is sitting right there. She knows who we are talking about. She has seen them go back and forth. She would have said something by now.” App. 111, ll. 5-7. Additionally, the judge remarked,

If she re- -- I mean I think that if she would have - - and also the timeframe is inconsistent. She says the last time she worked at camp was five years ago. Ms. Wohlford says her children haven’t been here for eight years. They are nineteen.

Five years would have been what; they would have been 15 or something. I kind of doubt you would be in a camp at any of those schools at 15 years of age, would you?

App. 111, ll. 9-16. The state agreed that a person would not be in camp at that age; however, the state acknowledged that Juror Brown was “unclear about how many years before that last one she did it.” App. 111, ll. 17-19. Nevertheless, in the prosecutor’s opinion, “she doesn’t remember her so.” App. 111, l. 19. Seizing on the solicitor’s words, the judge stated, “She still doesn’t remember her. I mean apparently it didn’t make any rea - - I mean when you are dealing with that volume of people I can’t imagine that they necessarily would make any indelible impression.” App. 111, ll. 20-23. In short, the judge surmised that Juror Brown “doesn’t remember. She doesn’t know her. She doesn’t have any independent recollection of her child.” App. 111, l. 24 – App. 112, l. 1.

Critically, when the judge asked if trial counsel wanted any additional voir dire, trial counsel declined. App. 112, ll. 2-6. Trial counsel also posed no objection to retaining Juror Brown on the jury when the judge inquired. App. 112, ll. 7-11.

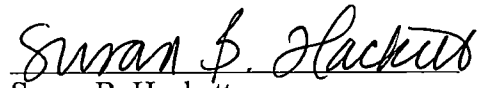
The PCR judge’s factual finding that the record did not indicate any member of the jury pool knew the alleged victim was not supported by the transcript of the trial proceedings. The

PCR order referred only to the general jury voir dire conducted by the trial judge. The order neglected the individual voir dire examination of Juror Brown by the trial judge. As explained, when Wohlford revealed she knew Juror Brown, the trial judge questioned Juror Brown about the relationship. In addition to the voir dire of Juror Brown, the trial judge questioned the lawyers about the relationship. The entire inquisition comprised eight pages of the trial transcript, but were completely ignored by the PCR judge. Thus, the PCR judge's factual finding on this matter was unsupported by the record.

When confronted with Wohlford's unwavering insistence that she knew Juror Brown from Camp Inventions, trial counsel failed to request any additional voir dire or move to strike her for cause. Alternate jurors were available to be placed on the jury and the trial had not even started; thus, there would have been no prejudice to the state. Trial counsel failed to request that Wohlford be identified physically to Juror Brown so that Juror Brown could see her and determine if she recognized her. Trial counsel did not request any additional voir dire such as the first names of Wohlford's children who attended Camp Inventions with whom Juror Brown had contact. Trial counsel's performance was deficient, and that deficiency was prejudicial to Petitioner because it allowed an impartial juror to render judgment against him.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented. In the event this Court grants the petition and dispenses with full briefing, Petitioner respectfully requests this Court reverse the PCR judge, and grant Petitioner a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of September, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Jean H. Toal, Circuit Court Judge

MARVIN XAVIER PORCHER,

PETITIONER

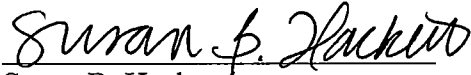
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 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 Petition for Writ of Certiorari and a copy of the Appendix have been served on Marvin Xavier Porcher, #315900, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 21st day of September, 2018.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of September, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023