

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Colleton County

Honorable Jennifer B. McCoy, Circuit Court Judge
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QUOTEAS S. NESBITT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000072
—————

PETITION FOR WRIT OF CERTIORARI
—————

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ISSUES PRESENTED

1. Trial counsel erred in failing to object to the testimony of two police officers who stated that they were familiar with petitioner and where one officer identified petitioner in connection with the shooting because this constituted inadmissible and prejudicial prior bad acts testimony.

2. Trial counsel erred in failing to move for a mistrial when the trial judge sustained an objection to testimony about facts not in evidence (a favorable photographic lay-out identification) in the case.

STATEMENT OF THE CASE

Petitioner Quoteas Nesbitt was convicted of murder and possession of a weapon during the commission of a violent crime per jury trial held during the August 2014 term of the Colleton County General Sessions Court before Judge Perry M. Buckner, who sentenced petitioner to an aggregate fifty-year prison sentence. App. 1-605. Petitioner was represented at trial by Matthew L. Walker, and Assistant Solicitor Tameaka A. Legette appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed. See State v. Nesbitt, Op. No. 2016-UP-098 (S.C. Ct. App. 2016) Assistant Appellate Defender Susan B. Hackett, of the Office of Appellate Defense represented petitioner on direct appeal.

On September 28, 2016, petitioner filed a PCR application with the Colleton County Office of the Clerk of Court. App. 607-612. The respondent filed a Return dated October 23, 2018. App. 613-618. Petitioner filed an amended PCR application on August 19, 2019. App. 620-621. A PCR hearing was convened on August 27, 2019, at the Colleton County Courthouse before Judge Jennifer B. McCoy. App. 622-655. Petitioner was present at the hearing and represented by James A Falk, Esquire, and Assistant Attorney General Benjamin H. Limbaugh appeared on behalf of the state. On January 7, 2020, Judge McCoy issued an Order of Dismissal in the case. App. 657-668. Petitioner appealed. This petition follows.

QUESTION I

Trial counsel erred in failing to object to the testimony of two police officers who stated that they were familiar with petitioner and where one officer identified petitioner in connection with the shooting because this constituted inadmissible and prejudicial prior bad acts testimony.

The state alleged that petitioner shot to death one Moray Dupree Holmes on September 6, 2012, at Chase Lounge in Colleton County. At trial, Holmes' wife, Renatta Holmes, testified that she was with her husband at the Lounge on that evening and waited in the car while her husband (Moray Holmes) exited the car and walked up to talk to a few of the men there. Renatta Holmes stated that shortly thereafter she heard gunshots and saw petitioner shoot her husband (Moray Holmes) dead. App. 174 l.—p. 190, l.5.

Eyewitnesses Brian Manigo, Nicholas Williams, Kelvin Mitchell, and Donald Odom were all were present at the Lounge on the date in question and witnessed petitioner shoot Moray Holmes. App. 429, l.8-p.453, l.11. App. 460, l.22-p.468, l.5, App. 474, l.16-p.480, l.21, App. 483, l.8-p.493, l.8.

An arrest warrant was drawn up by Officer James Davis for petitioner's arrest after he learned from Officer Leslie Jamison that a person had selected petitioner's photograph from a photographic lay-out therein identifying petitioner as the perpetrator/shooter. At that point in the trial, the solicitor asked that the testimony regarding the photographic layout be stricken, which the trial judge agreed to do, and subsequently gave a curative instruction regarding the same. App. 313, l. 23 – p. 315, 13.

Prior to trial, petitioner objected to allowing Officer Chapman to identify petitioner from a videotape from the Lounge where the people at the crime scene were gathered based on his prior knowledge of having known petitioner via his past dealings with petitioner in the

community. A Neil v. Biggers, 409 U.S. 188 (1972) followed. hearing was held. Defense counsel argued that Officer Chapman's identification was the equivalent of an inadmissible prejudicial show-up identification made in the case, especially since Officer Chapman was not an eyewitness to the shooting at issue. App. 94, 1.21-p. 95, 1.24. Although defense counsel argued that Officer Chapman's identification also signaled inadmissible prior bad acts testimony due to his having knowledge of who petitioner was in the community; nonetheless, defense counsel informed the court specifically that his objection to Officer Chapman's testimony was an identification objection. App. 95, 1.17-p.96, 1.5. There was no separate objection to Chapman's testimony based on a prior bad acts ground violation.

Also at trial, Police Officer Dorothea Gathers-Grant testified that she assisted in locating petitioner after the shooting because she had known petitioner from the community during previous years when she worked at the local jail, and that she knew the areas in Walterboro where he would hang out. App. 160, 1.1-p. 161, 1.10. There was no objection to this testimony from Officer Gathers-Grant based on a prior bad acts ground violation.

During the PCR hearing held in the case, petitioner raised the issue of trial counsel's failure to object to the police officer who stated that she knew petitioner from her employment at the local jail. App.626, 1.3-10; App. 651, 1.3-19. Trial counsel testified that he did not object to that testimony because he did not want to cause undue attention to the jail reference. App. 629, 1.6 – p. 630, 1.17. Petitioner's counsel explained that the statements made by the officers were prejudicial. App. 644, lines 7-8, App. 648, 1.1-2; App. 648, 1.14-18.

The PCR judge ruled that petitioner failed to show that counsel's failure to object to the officers' testimony was deficient performance or prejudicial to the case. App. 662-664.

Clearly, both of the police officers' statements made during their testimony before the jury indicated that they both had prior dealings with petitioner in a criminal setting and were familiar with petitioner from their knowledge per criminal dealings with petitioner, which without a doubt established that petitioner probably had a prior criminal record. This constituted a negative portrayal of petitioner to the extent that he possessed (via their inference) what was an alleged criminal predisposition suggesting that to the jury that he probably committed the crimes for which he was on trial.

Generally, prior crimes or bad acts cannot be presented to show that the defendant had the propensity to commit the crime charged, i.e., that he is a bad person. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008). Also, even if prior crimes are considered under the Lyle¹ exceptions; nonetheless, the value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Prior crime evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). Unfair prejudice results when there is an undue tendency to make a decision on improper basis, and also prejudice comes into play when jury's verdict influenced by the challenged evidence. State v. Martucci, *supra*.

Trial counsel's error in failing to object to the prior crime evidence stated above constituted deficient legal representation that violated petitioner's Sixth Amendment right to effective assistance of counsel, (see Strickland v. Washington 466 U.S. 668 (1984)), such that

¹ Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

but for the error there is a reasonable likelihood that the outcome of the trial would have been different or at least the issue would have been preserved for appellate review.

QUESTION II

Trial counsel erred in failing to move for a mistrial when the trial judge sustained his objection to testimony about facts not in evidence (a favorable photographic lay-out identification) in the case.

At trial, the following colloquy occurred regarding Officer James Rush Davis' testimony:

Q And what did you base that arrest warrant on?

A I had received information from – she is now Major Leslie Jamison. She was the investigator at the time. She had received information from two people that they had been on the scene as well. One of which positively identified the defendant, Mr. Nesbitt, as the shooter, and actually picked him out of a photo lineup. Based off of the witness statements, that was the probable cause used to obtain the arrest warrants.

Q And thereafter, you met with Mr. Odom.

A Yes ma'am.

Defense Counsel: your Honor, before we pursue that, I'm going to object.

THE COURT: Counsel approach.
(WHEREUPON, A BENCH CONFERENCE IS HELD OFF THE RECORD AND OUT OF THE HEARING OF THE JURY.)

THE COURT: Proceed. My understanding is that the objection is withdrawn, in light of our conference?

Defense Counsel: Yes, Your Honor.

THE COURT: Proceed.

ASST. SOL. LEGETTE: Your Honor, I would ask that the statements regarding any identification of Mr. Nesbitt in a photo lineup be stricken from the record at this time, Your Honor.

THE COURT: Any objection?
Defense Counsel: No, Your Honor.

THE COURT: Ladies and gentlemen of the jury, you will disregard any comment made in this case concerning the photo lineup. That is not in evidence in this case, and the parties agree that it should not be a part of your decision. Proceed. App. 313, 1.23-p. 315, 1.3.

The PCR judge ruled that counsel's failure to object and move for a mistrial with respect to this error did not constitute deficient legal representation and no prejudice resulted. App 667.

Counsel's failure to object to the curative instruction and move for a mistrial constituted ineffective assistance of counsel in violation of Strickland v. Washington, supra, and petitioner was prejudiced by counsel's error here because this brought out hearsay identification testimony and alleged facts that were not in evidence where no witness was produced and no foundation was laid. As a result, the jury was left to speculate on an additional identification that was not even admitted into evidence at trial.

In order to preserve an issue after a curative instruction is given, there must be an objection contemporaneously to the sufficiency of the curative charge or for a motion for a mistrial then. State v. George, 476 S.E.2d 903(1996).

CONCLUSION

Based on the foregoing arguments, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above raised issues.

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2020.