

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Clifton Newman, Circuit Court Judge

Appellant Case No. 2019-001925

Stewart Randall Ard,.....Respondent

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATE'S STATEMENT OF QUESTION PRESENTED

The PCR court erred in finding trial counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury charge on attempted murder where Ard's trial took place years before the Court of Appeals and this Court issued their decisions in *King v. State*,¹ [sic] finding attempted murder is a specific-intent crime, and trial counsel is not required to be clairvoyant.

STEWART ARD'S STATEMENT OF QUESTION PRESENTED

Question I

Trial counsel failed to object when the trial judge instructed the jurors attempted murder is not a specific intent crime, when that instruction was contrary to S.C. Code Ann. § 16-3-29, *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), *State v. Thompson*, 374 S.C. 257, 647 S.E.2d 702 (Ct. App. 2007), and *State v. Nesbitt*, 346 S.C. 226, 550 S.E.2d 864 (Ct. App. 2001), thereby denying Stewart Ard his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

Question II

This Court should deny the State's petition for a writ of *certiorari* because one or more of the following errors by trial counsel denied Stewart Ard his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14 and constitute additional sustaining grounds:

- A. When the State presented evidence that Stewart Ard had been to jail before and did not what to go back, trial counsel failed to preserve this issue for appellate review.
- B. Trial counsel failed to object to the trial judge entering the jury room during deliberations.

STATEMENT OF CASE

The State initially charged Stewart Ard with four counts of second-degree assault and battery by mob. R. 468. On April 9, 2014, the Richland County Grand Jury indicted Mr. Ard for attempted murder, three counts of second-degree assault and battery, and

¹ *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *affirmed as modified* by *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), and *overruled on other grounds* by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

carrying a concealed weapon. R.468. On May 23, 2014, the State noticed its intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45. A. 450-51.

From June 23-25, 2014, the State tried Mr. Ard before the Honorable James R. Barber, III and a jury. A. 1-457. Kathryn “Luck” Campbell Hubbird, Dolly Justice Garfield, and Ramie Shalabi represented the State. Aimee J. Zmorczek and M. Wade Downtin represented Mr. Ard. The jurors found Mr. Ard guilty of attempted murder, two counts of second-degree assault and battery, third degree assault and battery as a lesser-included offense of second-degree assault and battery, and carrying a concealed weapon. A. 442-43. Judge Barber sentenced Mr. Ard to life imprisonment without the possibility of parole for attempted murder, a consecutive term of three years for second-degree assault and battery, and concurrent terms of three years for second-degree assault and battery, ninety days for carrying a concealed weapon, and thirty days for third-degree assault and battery. A. 456-57, 503, 506, 509.

Mr. Ard appealed his convictions and sentences. David Alexander of the South Carolina Commission of Indigent Defense, Appellate Defense Division, represented Mr. Ard on appeal and filed an *Anders*² brief, briefing this single issue on appeal:

Whether appellant’s due process rights and right to a jury trial under the federal and state constitutions were violated when the solicitor threatened appellate with increased charges and a mandatory life without parole sentence if he did not accept a plea offer?

A. 458-71. The Court of Appeals affirmed Mr. Ard’s convictions and sentences. *State v. Ard*, Unpublished Opinion No. 2016-UP-243 (filed June 1, 2016). A. 491-92.

² *Anders v. California*, 386 U.S. 738 (1967).

On October 19, 2016, through undersigned counsel, Mr. Ard filed an application for post-conviction relief (“PCR”). A. 493-502. On July 13, 2017, the State filed its return. A. 512-19. On December 13, 2017, the Honorable Clifton Newman convened an evidentiary hearing. A. 520-667. Undersigned counsel represented Mr. Ard. Jessica Kinard represented the State.³ At the conclusion of the evidentiary hearing, Judge Newman took the matter under advisement and called for proposed orders. A. 665.

By written order dated February 13, 2019, Judge Newman granted post-conviction because trial counsel failed to object when the trial judge instructed the jurors that attempted murder is a general intent crime. Judge Newman denied relief on the other grounds presented at the PCR hearing. A. 680-700. On March 1, 2019, the State filed a Rule 59(e), SCRCF motion. A. 701-09. Mr. Ard responded. A. 710-15. On September 20, 2019, the Judge Newman convened a hearing on the State’s motion. A. 716-52. Undersigned counsel represented Mr. Ard. Lindsey A. McCallister represented the State. By written order dated October 25, 2019, corrected on October 30, 2019, Judge Newman denied the State’s Rule 59(e) motion. A. 753.

On July 22, 2020, the State filed a petition for writ of *certiorari* (“Cert Petition”).

This return follows.

³ During closing remarks at the evidentiary hearing, counsel for the State acknowledged, during Mr. Ard’s trial, the prosecution made “a personal attack against Ms. Zmroczek” that “was borderline on professionalism.” Counsel for the State further acknowledged Ms. Zmroczek

was facing great hostility from the solicitor’s office as a whole, in her perspective, both through denial of the – well, they didn’t even get to the matter of bond. But the quick set of the trial date, the late discovery, the triple teaming, the LWOP notice, the lack of negotiations.

A. 658-59.

STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). “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.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015); *cf. Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

The second prong of *Strickland* requires a defendant establish this deficiency prejudiced him. “The 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.” *Strickland*, at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018)⁴ (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

⁴ See also *Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (adhering to *Smalls*).

This Court’s “standard of review in PCR cases depends on the specific issue before” it. *Mangal v. State*, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017) (“*Mangal I*”). This Court will “defer to a PCR court’s findings of fact and will uphold them if there is any evidence in the record to support them.” *Id.* This Court will “not defer to a PCR court’s rulings on questions of law.” *Id.* “Questions of law are reviewed de novo, and [this Court] will reverse the PCR court’s decision when it is controlled by an error of law.” *Id.* “On review of a PCR court’s resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, [this Court] appl[ies] an abuse of discretion standard.” *Id.*

ARGUMENTS

Question I

Trial counsel failed to object when the trial judge instructed the jurors attempted murder is not a specific intent crime, when that instruction was contrary to S.C. Code Ann. § 16-3-29, *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), *State v. Thompson*, 374 S.C. 257, 647 S.E.2d 702 (Ct. App. 2007), and *State v. Nesbitt*, 346 S.C. 226, 550 S.E.2d 864 (Ct. App. 2001), thereby denying Stewart Ard his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

Trial counsel failed to object when the trial judge instructed the jurors, “A specific intent to kill is not an element of attempted murder, but it must be a general intent to commit serious bodily injury.” At the time of Stewart Ard’s jury trial, our state’s case law recognized that all attempt crimes require a specific intent to complete that particular crime. The failure to object deprived Mr. Ard of his rights to effective assistance of counsel because this jury instruction prevented the jurors from considering the lesser included offenses of assault and battery of a high and aggregated nature (“ABHAN”) and first-degree attempted murder when trial counsel’s reasoned trial strategy was to convince the

jurors Mr. Ard is not guilty of attempted murder and ABHAN, but rather is guilty of first-degree assault and battery. PCR Application, ¶¶ 10(a)&11(a)(1), (2), and (3), A. 496-98.

In *State v. Sutton*, this Court recognized, “In general, ‘[a]ttempt is a specific intent crime.’” 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (citing 21 Am.Jur.2d Criminal Law § 176 (1998)). “The act constituting the attempt must be done with the intent to commit that particular crime.” *Id.* (citing Wharton’s Criminal Law Attempt §§ 694-695 (1996) (“To constitute an attempt, there must be an intent to commit a particular crime ... Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.”)). “In the context of an ‘attempt’ crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense.” *Id.* “In other words, the completion of such acts is the defendant’s purpose.” *Id.* (citing *United States v. Calloway*, 116 F.3d 1129 (6th Cir. 1997)). “Attempted murder would require the specific intent to kill and conduct towards that end.” *Id.* This Court in *Sutton* expressly “declin[e]d to recognize a separate offense of attempted murder.” *Id.* 340 S.C. at 398, 532 S.E.2d at 286.

In *State v. Nesbitt*, our Court of Appeals followed *Sutton* and recognized, “Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime.” 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (citing *Sutton*). *Nesbitt* addressed whether the prosecution had presented sufficient evidence, including evidence of a specific intent, to require the trial judge to submit an attempted armed robbery charge to the jurors. In *State v. Thompson*, our Court of Appeals once again recognized, “A person is guilty of attempted armed robbery

if the person has a specific intent to commit armed robbery.” 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) (citing *Nesbitt*).

Our General Assembly enacted S.C. Code Ann. § 16-3-29, creating the offense of attempted murder, “in 2010 as part of the Omnibus Crime Reduction and Sentencing Reform Act.” *King*, 412 S.C. at 408, 772 S.E.2d at 192. Our Court of Appeals in *King* recognized, “Before 2010, our courts held attempt crimes require the State to prove the defendant had specific intent to complete the attempted crime.” *Id.* 412 S.C. at 408-09, 772 S.E.2d at 192 (citing *Sutton*, *Nesbitt*, and *Thompson*). The Court of Appeals held, “[T]he trial court erred by charging the jury that attempted murder is a general intent crime.” *Id.* 412 S.C. at 411, 772 S.E.2d at 193.

The State appealed the Court of Appeals holding in *King*, and this Court “agree[d] with the Court of Appeals that the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.” *King*, 422 S.C. T 55, 810 S.E.2d at 22 (internal quotations omitted). This Court expressly recognized, “[W]hile we agree with the State that the statement referenced from *Sutton* constitutes dicta, it is still an accurate statement of law.” *Id.* 422 S.C. at 55-56, 810 S.E.2d at 22 (citing *King*, 412 S.C. at 411, 772 S.E.2d at 193 (“‘Attempted murder would require the specific intent to kill,’ and ‘specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense.’”)) (quoting *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285)).

Even though the Court of Appeals and this Court issued opinions in *King* subsequent to Mr. Ard’s jury trial, *Sutton*, *Nesbitt*, and *Thompson* clearly established that

attempt crimes in South Carolina require the prosecution to prove a specific intent to complete that particular crime. *Sutton*, decided at a time our state did not have a crime of attempted murder, expressly recognized, “Attempted murder would require the specific intent to kill,” if our General Assembly ever created that offense. *Id.* After *Sutton* (decided in 2000), *Nesbitt* (decided in 2001), and *Thompson* (decided in 2007), “reasonably competent trial counsel should know to object—absent a valid trial strategy—when” a trial judge instructs jurors, “A specific intent to kill is not an element of attempted murder, but it must be a general intent to commit serious bodily injury.” *Briggs v. State*, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017); *cf. Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487, 488 (2018) (reaffirming validity of the *Briggs* analysis).

The facts set forth herein support this claim and, by reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

On July 28, 2013, Stewart Ard cut Scott Flemming, Jesse Patterson, Joe Molino and Gabriel McDaniel during an incident outside Group Therapy in the Five Points district of Columbia, South Carolina. Immediately following the event, Mr. Ard contacted Aimee Zmorczek, who arranged for Mr. Ard to turn himself into law enforcement. Mr. Ard provided a written statement accepting responsibility for his conduct. A. 527-32; Exhibit A-1 (A. 668-69).

During opening statements, trial counsel conceded Mr. Ard is guilty of first-degree assault and battery involving Mr. Patterson, second-degree assault and battery involving Mr. Fleming, and third-degree assault and battery involving Mr. Molino and Mr. McDaniel. A. 70-72.

After hearing from both sides during a charge conference, the trial judge decided to charge assault and battery of a high and aggravated nature and first-degree assault and battery as lesser-included offenses of attempted murder. A. 296-304,

During closing arguments, trial counsel argued Mr. Ard is guilty of first-degree assault and battery as to Mr. Patterson, second-degree assault and battery as to Mr. Fleming, and third-degree assault and battery as to the other two counts of second-degree assault and battery. R. 406.

During closing arguments, the State argued:

[A]ttempted murder is defined by our code of laws as a person with the intent to kill attempts to kill another person with malice aforethought either express or implied, then would be guilty of the crime of attempted murder. And what do some of those terms mean? And the judge will instruct you further using some of these terms, called legal terms of art. (A. 373).

The judge will also instruct you in considering the charge of attempted murder, a specific intent to kill is not an element of attempted murder. We don't have to show that he actually meant to kill him although, I submit, his actions were such in this case. But there must be a general intent to commit serious bodily injury. (A. 376).

So if you find, however, if there is malice, then you don't go to a lesser included. Listen to the Judge. If you find the State did not prove that his acts were malicious, evil intent, intent on doing serious bodily injury, then you may consider assault and battery of a high and aggravated nature. (A. 377-87).

At the very least, if you were to find for some reason that his actions weren't malicious, it is an assault and battery of a high and aggravated nature. (A. 378 (emphasis added)).⁵

⁵ The Solicitor misstated the law by arguing a finding of malice requires a conviction for attempted murder and the absence of malice is required for a conviction for ABHAN. Any degree of assault and battery can be committed with malice. *E.g. State v. Pilgrim*, 326 S.C. 24, 27, 482 S.E.2d 562, 563 (1997) (“Absence of malice is not an element of ABHAN. Therefore, the trial judge erred in equating ABHAN to voluntary manslaughter.”). The State’s petition for a writ of *certiorari*, at 12-14, conflates the elements of malice and a specific intent to kill. For example, the State’s reliance on *State v. Price*, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012) for the prejudice prong of the

Trial counsel did not object to any of these arguments.

The trial judge instructed the jurors, “A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury.” A. 415, line 25 – 416, line 3. Trial counsel did not object. A. 429, lines 12-14. The trial judge submitted the attempted murder charge to the jurors, along with the lesser included offenses of ABHAN and first-degree assault and battery. The trial judge further submitted the three counts of second-degree assault and battery to the jurors, along with the lesser included charge of third-degree assault and battery. A. 421-23.

At the evidentiary hearing, trial counsel reviewed the solicitor’s closing arguments and the trial judge’s instruction to the jurors that attempted murder is a general intent crime and does not require the specific intent to kill. Trial counsel reviewed *Sutton*, which observed that attempted murder is a specific intent crime. She reviewed *Thompson* and *Nesbitt*, which hold attempt crimes are specific intent crimes. Trial counsel agreed the Solicitor’s closing argument and the trial judge’s instruction to the jurors were objectionable misstatements of the law. She did not offer a strategic reason for not objecting. Nor could she, as the strategy was “to encourage the jury to find him guilty of a lesser included” offense. A. 543-57.

Against this legal and factual backdrop, the PCR court granted Mr. Ard post-conviction relief. The PCR court correctly concluded Mr. Ard established deficient performance under the first prong of *Strickland*. “A trial court is required to charge the current and correct law in South Carolina.” *State v. Cottrell*, 421 S.C. 622, 643, 809 S.E.2d

Strickland analysis is misplaced because *Price* involved a conviction for common law assault and battery with intent to kill, which does not require a specific intent to kill.

423, 435 (2017); *cf. State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (courts must “apply controlling precedent”). At the time of Mr. Ard’s jury trial in 2014, *Sutton*, *Nesbitt*, and *Thompson* clearly established that attempt crimes in our state require the prosecution to prove a specific intent to complete that particular crime.

The State argues, “At the time of Ard’s trial in 2014, the law in South Carolina was not clear as to the required level of intent for attempted murder.” Cert Petition, at 9. This statement is incorrect. The PCR court properly looked to *Briggs* as guidance about how to determine trial counsel’s obligation at the time of Mr. Ard’s 2014 jury trial. In *Briggs*, the PCR court relied on cases decided after Briggs’ jury trial regarding “the permissible limits of a forensic interviewer’s testimony [in a child sexual abuse case] in the context of the prohibition against improper bolstering.”⁶ *Briggs*, 421 S.C. at 322, 806 S.E.2d at 716. The State argued trial counsel’s “failure to object was reasonable under the circumstances that existed at the time” of Briggs’ jury trial in 2010. *Id.*, 421 S.C. at 322, 806 S.E.2d at 716-17. This Court, accordingly, examined the case law existing at the time of Briggs’ jury trial and held based on that case law,⁷ “[R]easonably competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose.” *Id.* 421 S.C. at 325, 806 S.E.2d at 718. This Court revisited *Briggs* in *Thompson v. State*, where

⁶ See, e.g., *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015); *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011).

⁷ See, e.g., *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989).

the State argued “trial counsel was without the ‘pointed guidance’ provided by appellate decisions” decided after Thompson’s 2008 jury trial. 423 S.C. at 243, 814 S.E.2d at 491 (2018). This Court once again rejected the State’s argument. Applying a similar approach in this case, the PCR court correctly concluded *Sutton* (decided in 2000), *Nesbitt* (decided in 2001) and *Thompson* (decided in 2007), placed trial counsel on notice that attempted murder is a specific intent crime.

The State’s petition for a writ of *certiorari* discussed *Sutton* and *Nesbitt* in a footnote and ignores *Thompson* altogether. Cert Petition, at 8-9, fn. 4. The State argues, “The PCR court order relies in part upon dicta from *Sutton*, which states, “[i]n general, ‘[a]ttempt is a specific intent crime.’” *Id.* And, “[T]he holding in *Sutton* found ‘specific intent [was] not required to commit’ [assault and battery with intent to kill], which was South Carolina’s equivalent offense to attempted murder at the time.” *Id.* This Court must reject this argument for three reasons. First, this Court already rejected the State’s “dicta argument” in *King* by holding, “[W]hile we agree with the State that the statement referenced from *Sutton* constitutes dicta, it is still an accurate statement of law.” *King*. 422 S.C. at 55-56, 810 S.E.2d at 22. Second, *Nesbitt* and *Thompson*, following *Sutton*, expressly recognized attempt crimes are specific intent crimes. Third, *Sutton* expressly declined to recognize the offense of attempted murder, meaning assault and battery with intent to kill technical was not the equivalent offense to attempted murder at the time. Rather, *Sutton* recognized if our General Assembly ever adopted the crime of attempted murder, then that offense would be a specific intent crime. *See Briggs* and *Thompson v. State, supra*.

Under the second prong or *Strickland*, the trial judge properly examined “the specific impact of counsel’s errors had on the outcome of the trial.” *Smalls*, 422 S.C. 174,

ar 810 S.E.2d at 843. A. 690-91. Mr. Ard “was prejudiced because (1) this instruction deleted the specific intent requirement of attempted murder, (2) reduced attempted murder to the statutory offenses of assault and battery of a high and aggravated nature (“ABHAN”) or first-degree assault and battery, S.C. Code Ann. § 16-3-600(B), and (3) prevented the jurors from considering lesser included offenses of ABHAN and first-degree assault and battery.”⁸ PCR Application, ¶¶ 11(a)(2). Trial counsel’s strategy was to encourage the jurors to convict Mr. Ard of first-degree assault and battery as a lesser included offense of attempted murder. First-degree assault and battery carries a maximum penalty of ten years, S.C. Code Ann. § 16-3-600(C)(2), and would not be subject to enhancement pursuant to section 17-25-45. Mr. Ard, accordingly, established prejudice under the second prong of *Strickland*. Objecting to the trial court’s incorrect jury instruction is not only consistent with Mr. Ard’s trial strategy but also advances that strategy.

This Court, therefore, should deny the State’s petition for a writ of *certiorari*.

(Question II begins on next page)

⁸ The State’s petition for a writ of *certiorari*, at 12, fn. 5, argues against a finding of *Strickland* prejudice because Mr. Ard faced a potential life sentence, pursuant to S.C. Code Ann. § 17-25-45, for convictions of attempted murder or ABHAN. This argument overlooks the trial strategy to influence the jurors to convict Mr. Ard of first-degree assault and battery as a lesser included offense of attempted murder. The PCR court properly considered prejudice in the context of the trial strategy and *Pilgrim*. A. 690-91. *See also Smalls, supra*.

Question II

This Court should deny the State’s petition for a writ of *certiorari* because one or more of the following errors by trial counsel denied Stewart Ard his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14 and constitute additional sustaining grounds:

- A. When the State presented evidence that Stewart Ard had been to jail before and did not want to go back, trial counsel failed to preserve this issue for appellate review.**

Scott Fleming testified about the events outside Group Therapy. He testified Mr. Ard said, “Well, I’ve been to jail. I don’t want to go back.” Mr. Fleming further testified, “I said, ‘Well, I don’t want you to go back either.’” A. 256. Trial counsel did not object. When the witnesses repeated this testimony, trial counsel objected and moved for a mistrial. The trial judge sustained the objection, denied the mistrial motion, and gave a curative instruction. A. 268-72. Trial counsel operated under the mistaken belief that the mistrial motion preserved the issue for appeal and, therefore, did not object to the curative instruction. A. 571-79, 624-25.

It is well-settled that absent specific exceptions, evidence of other bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person.” *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991); *and see State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); Rule 404, SCRE. Trial counsel’s failure to object to this testimony establishes deficient performance under the first prong of *Strickland*. Under the second prong of *Strickland*, evidence of Mr. Ard’s prior criminal record is prejudicial. Trial counsel, in fact, advised Mr. Ard not to testify because of the inherent prejudice resulting from the prosecution asking Mr. Ard about his prior criminal history pursuant to Rule 609, SCRE. A. 625.

B. Trial counsel failed to object to the trial judge entering the jury room during deliberations.

After the jurors began deliberating, and while the attorneys were at lunch, the trial judge received a note from the jurors requesting to hear the “recording of the charge to the jury.” The trial judge went into the jury room. The ensuing discussion between the trial judge and the jurors led the jurors to narrow their request to be recharged on the law. Trial counsel did not object.

In *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781(1983), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), this Court found structural error when the trial judge entered the jury room during deliberations. At the evidentiary hearing, appellate counsel explained that the trial judge entering the jury room was not preserved for appeal because trial counsel did not object. He further explained structural error is the “Holy Grail” of appellate issues because the appellant is not required to establish prejudice in order for the appellate court to reverse. Finally, appellate counsel testified he would have briefed this issue if trial counsel had preserved it for appeal. A. 646-49.

Trial counsel’s failure to object stratifies the deficient performance prong of *Strickland*. If trial counsel had objected to the trial judge entering the jury room, then the appellate court would have reversed pursuant to *Elmore*. Additionally, the jurors changed the scope of their request for reinstruction on the law. Mr. Ard, accordingly, established prejudice under the second prong of *Strickland*.

(conclusion on next page)

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for a writ of *certiorari*.

Respectfully Submitted,

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