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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO COLLETON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Post-Conviction Relief Judge

Appellate Case No. 2020-00072

QUOTEAS S. NESBITT,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

- 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.
- 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.

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

- I. The PCR court correctly found trial counsel was not constitutionally ineffective for failing to object to the detective's alleged improper character evidence; however, Petitioner's contention trial counsel was ineffective for failing to object to the identifying officer's alleged prior bad act testimony is not preserved for appellate review.
- II. The PCR court correctly found trial counsel was not constitutionally ineffective for failing to move for a mistrial based on the photo lineup testimony because the curative instruction cured any potential prejudice particularly in light of the cumulative nature of the direct eyewitness testimony identifying Petitioner as the shooter and counsel's valid strategy to avoid bringing further attention to the testimony.

STATEMENT OF THE CASE

On March 28, 2013, the Colleton County grand jury indicted Petitioner for murder (2012-GS-15-0663) and possession of a weapon during a violent crime (2012-GS-15-0664). On August 25–28, 2014, Petitioner proceeded to a jury trial before the Honorable Perry M. Buckner, III. Matthew L. Walker, Esquire, of the Fourteenth Circuit Public Defender’s Office, represented Petitioner. Assistant Solicitor Tameaka A. Legette of the Fourteenth Circuit Solicitor’s Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

On the afternoon of September 6, 2012, a group of people, including Petitioner, gathered at Chase Lounge, a local pool hall. Moray “Bobo” Holmes (Victim) arrived, still dressed in his work clothes from logging all day. (App. 417–18). Victim had a drink and left, promising to return later. (487–88). Around 8:00 or 8:30 PM later that evening, Victim and his wife, Renetta Holmes, returned to Chase and pulled into the parking lot. (App. 178–89). Holmes waited in the car talking to her cousin, Kenya Kelly, while Victim got out of the car to greet his friends. (App. 179, 193, 405, 437, 465). Kelvin Mitchell and Brian Manigo were parked nearby in a white Hyundai Sonata. (App. 433–34, 462–63). Victim began walking toward the Sonata, when Petitioner stopped him in the parking lot. (App. 179, 437, 465, 477–78, 489). After the two spoke briefly, Victim turned around and continued walking through the parking lot. (App. 437–38, 465–66, 489). Petitioner then shot Victim twice in the back. (App. 179–80, 185–186, 438, 443, 466, 480, 489). Multiple eyewitnesses identified Petitioner as the shooter at trial. (App. 429, 460, 468, 474, 480, 483, 493, 540).

B. Verdict & Subsequent Proceedings

At the conclusion of trial, the jury convicted Petitioner as indicted. Judge Buckner

sentenced Petitioner to consecutive terms of forty-five years' imprisonment for murder and five years for possession of a weapon during the commission of a violent crime.

Petitioner filed a timely notice of appeal. Appellate Defender Susan B. Hackett perfected Petitioner's appeal by filing an *Anders*¹ brief with the Court of Appeals on the following issue:

Did the trial judge err in allowing a police officer to identify [Petitioner] as the perpetrator where the officer was not a witness to the crime but was asked by fellow officers to identify [Petitioner] in a grainy video of the shooting in violation of [Petitioner]'s right to due process of law?

(Supp. App. 1–19). Petitioner filed a *pro se* brief. (Supp. App. 20–30). The Court affirmed Petitioner's convictions and granted appellate counsel's motion to be relieved in an unpublished opinion issued March 2, 2016. *State v. Nesbitt*, Op. No. 2016-UP-098 (S.C. Ct. App. filed March 2, 2016) (Supp. App. 31). The case was remitted back to the circuit court on May 18, 2016. (Supp. App. 32).

Petitioner timely commenced the underlying PCR action on September 28, 2016. (App. 607). The State requested an evidentiary hearing through its return on October 23, 2018. (App. 613). On August 28, 2019, the PCR court convened a hearing before the Honorable Jennifer B. McCoy. Petitioner was present and represented by James K. Falk, Esquire. Assistant Attorney General Benjamin H. Limbaugh represented the State. Petitioner and Counsel both testified at the hearing. On January 14, 2020, the PCR court issued an order denying relief and dismissing the action with prejudice. (App. 657). This appeal follows.

¹ *Anders v. California*, 386 U.S. 738 (1967).

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989); *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)). “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

ARGUMENT

- I. The PCR court correctly found trial counsel was not constitutionally ineffective for failing to object to the detective’s alleged improper character evidence; however, Petitioner’s contention trial counsel was ineffective for failing to object to the identifying officer’s alleged prior bad act testimony is not preserved for appellate review.**

As an initial matter, the “use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation.” *United States v. Nguyen*, 379 F. App’x 177, 181 (3d Cir. 2010); *see Humphries v. Ozmint*, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) (“[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under *Strickland*.”); *cf. Bergmann v. McCaughtry*, 65 F.3d 1372, 1380 (7th Cir.1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel’s performance, the reviewing court will “strong[ly] presume[e] that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (internal quotation marks omitted); *cf. Sallie v. State of N.C.*, 587 F.2d 636, 640 (4th Cir. 1978) (*Strickland* standard was not developed to was not “intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness”). Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *see Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) (“Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel).

Rule 404, SCRE, limits the circumstances when a defendant’s character may be properly

brought into evidence. For example, evidence of prior bad acts is generally not admissible to prove a defendant's guilt for the charged crime. *State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006); *see* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). The purpose of Rule 404 is to exclude evidence that tends to prove a defendant's guilt based merely on his reputation or character, i.e. evidence which implies "because this person is a bad guy or acted in a manner similar to this before, he is guilty." *State v. Gonzales*, 360 S.C. 263, 270, 600 S.E.2d 122, 126 (Ct. App. 2004), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[e]vidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime." *State v. Green*, 261 S.C. 366, 200 S.E.2d 74 (1973).

A. Detective Dorothea Gathers-Grant

In Petitioner's case, the alleged prior bad act testimony occurred during the State's direct examination of Detective Gathers-Grant, who gave a brief background of her career at the Colleton County Sheriff's Office over the past eleven years, and stated that she started out as a jailer. (App. 154–55). After identifying Petitioner in the courtroom, the following exchange occurred:

ASST. SOL. LEGETTE: Now, Ms. Gathers, you said you know [Petitioner]. How long would you say you've known him?

GATHERS-GRANT: I've known Quoteas for some years, working at the jail.

ASST. SOL. LEGETTE: You just know him from the community?

GATHERS-GRANT: I just know him from the community, yes.

(App. 160).

At the PCR hearing, Counsel testified he *could have* made a 404(b) objection to Detective

Gathers-Grant's statement about knowing Petitioner the jail, although Counsel did not specifically recall this particular exchange. (App. 629). He surmised that he may have simply missed the objection but that in this context he likely decided to "let it go and not call further attention to it." (App. 629). As the PCR court noted, Counsel's inability to recall this particular certainly be attributed to the trial having taken place five years prior to the evidentiary hearing; however, it is worth noting that Counsel testified he specifically decided not object to other potentially damaging statements to avoid calling the jury's attention to them. *See United States v. Allison*, 59 F.3d 625, 629 (7th Cir. 1995) ("Counsel's failure to object to a single improper statement does not establish objective deficiency, particularly where it may have been sound trial strategy to let the comment pass rather than draw additional attention to it . . .").

In finding Petitioner failed to overcome "the strong presumption that trial counsel's decision was sound trial strategy," the PCR court correctly noted that the solicitor's following question cured any potential prejudice by allowing Detective Gathers-Grant to clarify that she did not in fact know Petitioner from the jail, but rather that she "just kn[e]w him from the community." (App. 160). Moreover, Detective Gathers-Grant vague, isolated comment about the jail did not create a prejudicial inference that defendant had been convicted of another crime. *See State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony that he compared defendant's fingerprints with fingerprint card agency had on record was not so prejudicial to defendant as to warrant mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); *State v. Singleton*. 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985) (finding an arresting officer's vague references to prior crimes in the jury's presence did not warrant the granting of a mistrial), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991);

State v. Robinson, 238 S.C. 140,150–51, 119 S.E.2d 671, 676 (1961) (finding a witness’s testimony Robinson told him he was on the way to the “prohibition office” did not create an inference Robinson had been convicted of another crime), *overruled on other grounds by Torrence*, 305 S.C. 45, 406 S.E.2d 315.

A. Captain Jason Chapman

Petitioner’s contention trial counsel was ineffective for failing to object to Captain Chapman’s alleged prior bad act testimony is not preserved for appellate review because it was neither raised nor ruled upon by the PCR court.² The only issue Petitioner raised regarding Captain Chapman’s testimony was his identification of Petitioner in the video, which was contemporaneously objected to and raised on direct appeal. (App. 620–21; 664–65). No testimony was elicited regarding Captain Chapman’s alleged prior bad act evidence, nor was the issue raised in the PCR application nor addressed in the order of dismissal.

However, even if preserved, Counsel could not be found ineffective for failing to raise a separate prior bad acts objection to Captain Chapman’s testimony because Counsel made this exact argument during the *Neil v. Biggers* hearing. (Supp. App. 9–10). Specifically, Counsel argued “it

² In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. *Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); *see also* Jean Hofer Toal et al., *Appellate Practice in South Carolina* 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). The key purpose of those requirements is “to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006); *cf. Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App.2004) (“Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.”).

would be prejudicial in that it might suggest to the jury that Quoteas was engaged in prior bad acts because of his knowledge and contact with law enforcement.” (App. 95). The trial court nonetheless found Captain Chapman’s testimony admissible, explaining that it was up to the jury to determine the accuracy of the identification and the believability of each identification witness. (App. 98). This ruling was affirmed on appeal.

II. The PCR court correctly found trial counsel was not constitutionally ineffective for failing to move for a mistrial based on the photo lineup testimony because the curative instruction cured any potential prejudice particularly in light of the cumulative nature of the direct eyewitness testimony identifying Petitioner as the shooter and counsel’s valid strategy to avoid bringing further attention to the testimony.

This Court has made clear that declaring a mistrial “is an extreme measure which should be taken only where an incident is *so grievous that prejudicial effect can be removed in no other way.*” *Earley v. State*, 418 S.E. 255, 267, 792 S.E.2d, 233 (2016) (emphasis added); *cf. State v. Johnson*, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) (noting that “[a] mistrial should not be ordered in every case where incompetent evidence is received”). “An instruction to disregard objectionable evidence is usually deemed to cure the error in its admission.” *State v. Patterson*, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) (citing *Johnson*, 334 S.C. 78, 512 S.E.2d 795). Accordingly, a PCR applicant alleging ineffective assistance of counsel based on failure to move for a mistrial “must demonstrate that, had counsel moved for a mistrial, the trial court’s denial of the motion would have amounted to an abuse of discretion.” *Earley*, 418 S.C. at 266, 792 S.E.2d at 232.

At Petitioner’s trial, Detective James Rusty Davis testified he obtained an arrest warrant based in part on two unspecified witness picking Petitioner out of a photo lineup. Counsel immediately objected to the photo lineup reference, and a bench conference was held. Although he could not recall any specific details about what was said during the bench conference, Counsel

withdrew his objection and the solicitor asked that all “statements regarding any identification of Mr. Nesbitt in a photo lineup be stricken from the record.” (App. 314). The trial court then instructed the jury to “disregard any comment made in this case concerning the photo lineup. That is not evidence in this case, and the parties agree that it should not be a part of your decision.” (App. 314–15).

At the PCR hearing, Counsel testified that he *could have* moved for a mistrial at that point and *could have* objected to the sufficiency of the curative instruction. (App. 634). However, Counsel stated the testimony in question was cumulative to that of several direct eyewitnesses and he did not want to call any further attention to it by objecting again. (App. 634). He did not move for a mistrial at that point because he received the curative instruction he wanted from the original objection and the jury had time during the bench conference to let the testimony pass without further attention. (App. 634). He also stated that the trial judge simply was not going to grant a mistrial on this basis. (App. 634).

The PCR court agreed with this assessment, finding reasonable Counsel’s strategy for not moving for a mistrial or making any additional objections. *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (finding counsel’s decision not to request a curative instruction in an effort to avoid bringing attention to the objected matter valid trial strategy), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *see, e.g., Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 (“Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.”).

The PCR court found the curative instruction regarding the photo lineup cured any potential prejudice. *See Johnson v. State*, 325 S.C. 182, 187–88, 480 S.E.2d 733, 735–36 (1997) (reversing

the grant of PCR where counsel did not object or seek a mistrial in response to the solicitor's statement during closing that "the defendant has not put up a defense, he's not testified" and finding there was no evidence the accused was deprived of a fair trial because the trial court instructed the jury that it was not to consider the accused's failure to testify in any way and could not use it against the accused).

Petitioner failed to present any evidence that the curative instruction was insufficient or that, had Counsel moved for a mistrial, it would have been an abuse of discretion for the trial judge to deny it. As Counsel pointed out, the photo lineup identification was cumulative to the testimony of multiple eyewitnesses, who identified Petitioner at trial. *See State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."); *State v. Oglesby*, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence.").

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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