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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
Honorable Diane S. Goodstein, Trial Judge
Honorable Heath P. Taylor, PCR Judge

Appellate Case No. 2023-000362

VERNON COOLEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

- I. Did the PCR judge correctly find that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)?

- II. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to improper bolstering when a detective testified that she interviewed the minor witness who reported a sexual assault, that the minor witness made a similar report to the nurse completing the sexual assault kit, and made a similar report to the forensic interviewer, and then testified that, "Given the report from MUSC that I received and the consistent disclosures from the juvenile, I prepared an affidavit and presented it to the magistrate for a warrant."?

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

- I. Whether the PCR court erred in finding Petitioner did not voluntarily waive his right to a direct appeal and is entitled to an appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

- II. Whether the PCR court correctly found trial counsel was not ineffective for failing to object to a detective's testimony for improper witness bolstering when the detective that interviewed the minor victim testified she prepared an affidavit and presented it to the magistrate for a warrant because of consistent disclosures from the minor victim, who reported the sexual assault to the nurse completing the sexual assault kit and a forensic interviewer.

STATEMENT OF THE CASE

In August 2018, the Dorchester County Grand Jury indicted Vernon L. Cooley (“Petitioner”) for criminal sexual conduct with a minor - second degree (2016-GS-18-0534). (App. 352-53). On August 27, 2018, Petitioner proceeded to a jury trial before the Honorable Diane S. Goodstein. The State was represented by Assistant Solicitors Sheila Mims and Ryan Templeton. Petitioner was represented by Charlie Whirl (“trial counsel”). The jury convicted Petitioner as indicted. Judge Goodstein sentenced Petitioner to twenty (20) years in prison. (App. 354). Trial counsel did not file a notice of intent to appeal.

On July 23, 2019, Petitioner filed an application for post-conviction relief (“PCR”). (App. 355-61). On November 17, 2021, the State filed a return and a partial motion to dismiss. (App. 362-69). On January 25, 2023, an evidentiary hearing was convened before the Honorable Heath P. Taylor. Assistant Attorney General Caroline Whitney O’Kelly represented the State, and Christopher R. Geel, Esquire, represented Petitioner at the hearing.

On February 21, 2023, Judge Taylor granted Petitioner’s PCR relief in part, granting a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) and denied Petitioner relief on remaining grounds. (App. 404-12). On March 2, 2023, a notice of intent to appeal was served. On September 27, 2023, Petitioner filed a petition for writ certiorari and a separate brief pursuant to *White*.

STATEMENT OF THE FACTS

At trial, minor victim (“Victim”) testified that, when she was twelve (12) years old, her grandfather agreed to take Victim and her siblings to breakfast. (App. 99-100). Victim stated when she arrived at her grandfather’s house, no one was there but him. (App. 101). Victim testified that while in the home, her grandfather began kissing on her neck and touching her vaginal area inside of her pants. (App. 101). Victim testified the two went to his room, wherein she laid on the bed and he pulled down Victim’s pants and inserted his fingers in her vagina. (App. 101-02). After the incident, Victim called her stepfather to pick her up and disclosed the events to her stepfather, who contacted the police. (App. 104-05). Victim testified she spoke to police, talked to a detective, and was taken to the hospital. (App. 106).

Melissa Blanchard (“Detective Blanchard”), a Dorchester County Sheriff’s Office detective, testified she arrived at the scene and spoke to Victim and her stepfather. (App. 182-83). Blanchard testified Victim ultimately revealed that a sexual assault occurred. (App. 183). Blanchard called a victim’s advocate to escort Victim to MUSC to submit to a sexual assault kit and set up a forensic interview at the Dorchester Children’s Advocacy Center. (App. 184).

Katherine Fabrizio (“Fabrizio”), an expert in child abuse pediatrics, testified she examined Victim while working at MUSC. (App. 259). Fabrizio took pictures during the first examination of Victim and reviewed pictures from a previous visit. (App. 261). Fabrizio testified she observed redness of the hymenal tissue in the first examination but did not observe redness in the subsequent examination. (App. 261-63). Fabrizio testified the disappeared redness meant Victim probably had an acute injury to that area initially, and the injury had resolved. (App. 263). Fabrizio further testified the injury is consistent with digital penetration. (App. 263-64).

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the 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). To establish prejudice, the applicant must prove "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).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and "every effort [should] be made to eliminate the distorting effects of hindsight." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689).

ARGUMENT

I. The PCR court correctly found Petitioner did not knowingly and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to *White v. State*.

The State concedes Petitioner did not knowingly and voluntarily waive his right to an appeal and is entitled to a belated appeal pursuant to *White*. Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974); *Turner v. State*, 380 S.C. 223, 670 S.E.2d 373 (2008). Absent an intelligent waiver by the defendant, counsel must initiate an appeal or comply with the procedure in *Anders*.¹ *Id.* The PCR court found Petitioner did not knowingly and voluntarily waive his right to a direct appeal because Petitioner testified that he never waived his right to an appeal and didn't intend to do so, and trial counsel testified that he did not file a notice of appeal to ensure Petitioner had a meritorious issue to raise in a PCR proceeding. (App. 407). The PCR court further found trial counsel was misinformed or unaware of the procedural issues and consequences of failing to file an appeal, and the decision not to file an appeal was not the produce of strategic reasoning or adequate understanding of the law. (App. 407). Thus, the PCR court correctly found Petitioner is entitled to a belated appeal.

II. The PCR court correctly found trial counsel was not ineffective for failing to object to the detective's testimony for improper witness bolstering because the detective did not express an opinion about the credibility, believability, or veracity of the minor victim by testifying that the minor victim made consistent disclosures.

Petitioner asserts Detective Blanchard's testimony constituted improper bolstering because Blanchard's testimony about consistent disclosures from the juvenile indicated the detective believed the minor was credible. The PCR court correctly found trial counsel was not ineffective

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

for failing to object to Detective Blanchard's testimony for improper bolstering because the law available at the time of trial permitted the testimony, and Detective Blanchard did not express an opinion directly or indirectly about Victim's credibility. Failing to object does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018). "One of the key circumstances a court must consider in its examination of counsel's decision not to make a particular objection is whether there was any law to support the objection." *Winkler v. State*, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016).

The assessment of a witness' credibility is within the exclusive province of the jury, and witnesses are generally not allowed to testify whether another witness is telling the truth. *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. *Id.* at 358-59, 737 S.E. at 499-00; *compare Smith v. State*, 386 S.C. 562, 564-65, 689 S.E.2d 629, 631 (2010) (finding a forensic interviewer's testimony that she found the victim's statement "believable" was improper bolstering), *with State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (finding a forensic interviewer's testimony was not improper bolstering where an interviewer never stated she believed the victim and gave no other indication concerning the victim's veracity).

In *State v. Kromah*, the Supreme Court found a forensic interviewer's testimony was improper bolstering when the interviewer testified there was a "compelling finding" of child abuse. *Kromah*, 401 S.C. at 356, 737 S.E.2d at 498-99. The Court analogized the forensic interviewer's comments with similar comments made by another forensic interviewer in *State v. Jennings*, in which the *Jennings* interviewer testified to a "compelling finding" of abuse. *Id.* at 359, 737 S.E.2d at 500 (citing *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011)). Concerned with comments

by forensic interviewers, the Court set forth the following list of comments forensic interviewers should avoid at trial. *Id.* at 360, 737 S.E.2d at 500.

- Statements that the child was told to be truthful;
- A direct opinion as to the child's veracity or tendency to tell the truth;
- Any statement that vouches for the child's believability, such as stating a "compelling finding of abuse;"
- Any statement to indicate the interviewer believes the child's allegations; or
- An opinion that the child's behavior indicated the child was telling the truth.

At Petitioner's trial, Detective Blanchard testified to the following.

Q: Okay. Did you have – did you have the opportunity to speak with the victim in this case?

A: I did.

...

Q: Okay. Did she ultimately reveal the sexual assault occurred?

A: She did.

...

Q: Did you review the report from [the] sexual assault kit?

A: I did.

Q: Did she make a similar report to the nurse doing that sexual assault kit?

A: She did.

...

Q: What other interviews did you set up with her?

A: I set up a forensic interview at Dorchester Children's Advocacy Center in Summerville.

Q: Okay. And did you actually – you didn't conduct that interview, did you?

A: I did not.

Q: Okay. Did you view that interview?

A: Yes, sir, I watched it.

Q: Okay. Did she indicate the same actions occurred?

A: Correct.

Q: Okay. Once you had all that information together, what did you do next?

A: Given the report from MUSC that I received and the consistent disclosures from the juvenile, I prepared an affidavit and presented it to the magistrate for a warrant.

(App. 409-10).

The law available at the time of Petitioner's trial permitted Detective Blanchard's testimony. To support his claim that counsel was ineffective, Petitioner cites to *State v. Geter*, 434 S.C. 557, 569-70, 864 S.E.2d 569, 575-76 (Ct. App. 2021), *cert. granted* (Sept. 7, 2022). However, *Geter* was decided in 2021, and was not the available and controlling law at the time of Petitioner's trial in 2018. Trial counsel is not required or expected to anticipate changes in the law. Notwithstanding, Detective Blanchard's testimony is distinguishable from the facts of *Geter*.

In *Geter*, the Court of Appeals found an investigator's testimony constituted improper bolstering when the investigator testified that the victim's pre-trial statement and trial testimony were consistent. *Geter*, 434 S.C. at 568, 864 S.E. at 575. The investigator testified at trial that he spoke to the victim and took a statement at his home. *Id.* at 562, 864 S.E.2d at 572. The investigator then testified that he observed the victim testify at trial, and the victim's testimony was "exactly what [the victim] told [him.]" *Id.* The investigator further testified that the same thing the victim told the jury happened is what the victim told the investigator, and the statements were "absolutely consistent." *Id.* The court applied the following factors from *Chappell* in assessing whether the investigator's statements constituted to improper bolstering:

- (1) The witness directly states an opinion about the [other witness]'s credibility;
- (2) The sole purpose of the testimony is to convey the witness's opinion about [the other witness]'s testimony; or
- (3) There is no way to interpret the testimony other than to mean the witness believes the [other witness] is telling the truth.

Id. at 569, 864 S.E.2d at 575 (quoting *Chapell v. State*, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019)). The court reasoned that although the investigator did not directly comment to the veracity of the victim's statements, the investigator's testimony constituted improper bolstering because the investigator indirectly commented on the veracity of the victim's statements by stating they were "absolutely consistent," noting that while stating another witness' statement is consistent does not necessarily mean truthful, it does mean "free from variation or contradiction," which creates an impression of accuracy and truthfulness. *Id.* at 569-70, 864 S.E.2d at 576-77 (finding the statements were also inadmissible under the prior consistent statements exception to hearsay under Rule 801(d)(1)(B), SCRE). The court determined that by comparing the victim's prior pre-trial statements to the victim's trial testimony and speaking directly to the consistency of the statements, the investigator's statements served no other purpose than to improperly bolster the victim's statements. *Id.*

Even applying the precedent from *Geter*, Detective Blanchard's testimony did not constitute improper bolstering. Unlike the investigator in *Geter*, Detective Blanchard did not compare Victim's pre-trial statements to Victim's trial testimony. Detective Blanchard testified that the Victim's pre-trial statements were consistent, and the statements were the basis for obtaining a warrant. Detective Blanchard did not state that Victim's trial testimony was consistent with Victim's pre-trial testimony, unlike the investigator in *Geter*. Detective Blanchard's statement that Victim's disclosures were "consistent" did not include suggestive language, which is distinguishable from the investigator in *Geter* who testified to "*absolutely* consistent" statements

from the victim as the word “absolutely” is suggestive. Further, applying the factors from *Chappell*, (1) Detective Blanchard did not directly state an opinion about Victim’s credibility; (2) the sole purpose of the testimony was not to convey an opinion about Victim’s testimony; and (3) Detective Blanchard’s testimony can be interpreted in ways other than to mean she believed Victim was telling the truth. Thus, Detective Blanchard’s testimony is distinguishable from *Geter*.

At the time of Petitioner’s trial, there was no prevailing law that prohibited a witness from testifying merely that another witness’ statements were consistent. The precedents from *Kromah*, *Smith*, *Douglas*, and *Jennings* were all available at time of Petitioner’s trial and stood for the proposition that a witness could not testify to the credibility, believability, or veracity of another witness or his (or her) statements. These cases further reiterated that testimony calling another witness’ statements “compelling” was prohibited.

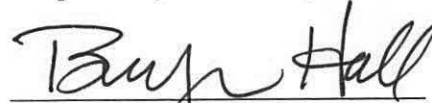
The PCR court correctly found that counsel was not ineffective for failing to object because Detective Blanchard directly or indirectly express an opinion about the credibility of Victim. (App. 410). As the PCR court found, Detective Blanchard did not express her opinion about the veracity or believability of Victim’s statements, which was the primary concern expressed in *Kromah*. (App. 410). The PCR court cited, and applied the precedent from *Kromah*, in finding trial counsel was not deficient for failing to object where trial counsel testified at PCR hearing testimony that he did not believe Detective Blanchard’s testimony was improper vouching or bolstering. (App. 408-410). Therefore, the PCR court correctly found trial counsel was not ineffective, and certiorari should be denied as to this issue.

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CONCLUSION

Based on the foregoing argument, the PCR court correctly found trial counsel was not ineffective for failing to object to Detective Blanchard's testimony. Accordingly, the State respectfully requests this Court deny Petitioner's writ for certiorari on question two. The State concedes Petitioner did not knowingly and voluntarily waive his right to an appeal and is entitled to a belated appeal.

Respectfully submitted,



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