

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Debra R. McCaslin, Circuit Court Judge

DAVID JAMES WELCH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000811

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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STATEMENT

Petitioner David James Welch was charged with armed robbery, kidnapping, criminal sexual conduct, and possession of a weapon during the commission of a violent crime in Horry County. The charges stemmed from his purported involvement in an incident occurring on January 8, 2015, with Jerrica Nelson (Nelson). App. 9, ln. 15—R. 11, ln. 2; App. 548-49; Rr. 551-52. His case proceeded to a jury trial before the Honorable Steven H. John from April 17th through 20th, 2017. Petitioner was represented by Ralph J. Wilson, Jr. (Trial Counsel), while the State was represented by Joshua D. Holford and Cara J. Walker. App. 1.

Trial

During trial, the State produced testimony from Nelson indicating she communicated through Facebook with a person she knew as David Royal, but identified as Petitioner in court. App. 78, ln. 4—App. 24; App. 83, ll. 3-17. Nelson stated that, after multiple messages and phone calls on January 8th with Petitioner, Nelson agreed to meet him at the Burger King by the Coastal Grand Mall around 8:00 pm. App. 83, ln. 11—R. 87, ln. 23; App. 89, ll. 10-23. Petitioner knocked on the window of her vehicle, got in, and the two talked.

According to Nelson, she rebuked Petitioner's advances, but still provided him with a ride to the Town Square Apartments at his request. App. 91, ln. 1—R. 13. Once in the parking lot of the apartments, Nelson indicated Petitioner pulled a silver handgun, forced her to have sex with him in the back seat, and then ran from her vehicle with her purse.¹ App. 96, ln. 3—App. 97, ln. 8. Nelson got dressed, and ultimately drove to Belk's to call for help. After first calling her mother, she contacted 911 at 8:32 pm. App. 97, ll. 9-18; 107, ll. 9-20. On direct exam, Nelson acknowledged she gave several stories regarding the alleged assault. She provided

¹ Nelson's purse and much of its contents was found at a foreclosed home the following month. App. 186, ln. 10—R.187, ln. 22; App. 190, ln. 22—App. 192, ln. 25.

versions to her mother, to the 911 operator, and to the investigators and her mother again during later interviews. App. 102, ln. 21—App. 103, ln. 23; App. 106, ln. 18—App. 114, ln. 24; App. 128, ln. 1—App. 155, ln. 16; App. 162, ln. 8—App. 164, ln. 3.

Petitioner was arrested at his home the same night close to midnight. No condom, condom wrappers, or firearms were collected either in his possession or from Nelson's vehicle. App. 208, ln. 24—App. 211, ln. 5. Further, neither the swabs from Nelson's vehicle, nor Petitioner's clothing were sent for DNA testing. App. 222, ll. 2—App. 226, ln. 5. Although Nelson stated Petitioner penetrated her briefly prior to putting on a condom, no forensic evidence from the SANE kit linked Petitioner to sexual activity with Nelson. App. 155, ll. 2-16; App. 156, ln. 11—App. 157, ln. 20; App. 293, ln. 3—App. 295, ln. 22.

Detective Jeremiah Beam (Det. Beam) of the Myrtle Beach Police Department also testified. App. 232, ll. 2-15. On direct examination, Det. Beam's testimony included the following exchange regarding whether he vetted Nelson's complaint to ensure it was credible and true:

Q: In your job, could you even be able to ballpark how many complaints of sexual assault you get?

A: We get a lot. Unfortunately, we're a tourist town, Spring Break, college, it's a lot.

Q: *And are you trained to vet these complaints?*

A: We have to vet them just like any other case. So, *yes, sir, we do our very best to try to vet it to make sure it appears to be credible and that it's true.*

App. 240, ll. 9-16. Immediately after, he likewise verified details regarding Nelson's version of events when questioned as to whether Nelson ever changed her story:

Q: And did you—do you sometimes threaten them telling them they could be facing a felony if they're filing a false police report?

A: Sometimes. I personally try not to. Not often, especially for sexual assault, I'm not a big fan of that, but sometimes there is a time and place where you have to let them know that if it is a false report, that there are consequences.

Q: And in this case, *did [Nelson] ever deny that she was sexually assaulted?*

A: *No, sir.*

Q: *Did she ever deny that she was robbed at gunpoint?*

A: *No, sir.*

Q: *Even when questioned hard by you, a trained detective, did she deny her story?*

A: *She never denied it. The story didn't really change.*

App. 240, ln. 17 —App. 241, ln. 7 (emphasis added). Det. Beam further testified regarding Nelson's identification of Petitioner's picture from Facebook as the person who assaulted her:

Q: What name was the Defendant using on Facebook?

A: His Facebook user name was David Royal.

Q: Okay. But we know that that's the Defendant sitting in the courtroom?

A: Correct.

Q: This picture we've seen, 17, State's 17, did you pull that up on Facebook?

A: I did; yes, sir.

Q: And under what name did you pull it up?

A: It was under David Royal.

Q: Okay. *And then the victim told you this was the person who had assaulted her and stolen her stuff?*

A: *That is correct.*

Q: *Did she ever change that story?*

A: *No, sir.*

Q: *She stuck to that to this day?*

A: *She did.*

App. 247, ln. 16—App. 248, ln. 7 (emphasis added).

On cross-examination, Trial Counsel likewise questioned Det. Beam regarding Nelson's statements, including the following:

Q: Okay. And my question to you is this, please tell the jury whether or not her story changed, whether or not she omitted things when she first called 911?

A: Yeah. Initially, she did not tell about the sexual assault.

Q: Okay. Let me ask you a question, are omissions lies in your book?

A: Omissions, it depends on the context, situational based.

Q: I've known you for a long time; you're a good detective?

A: Uh-huh (affirmative response).

Q: And you're very seasoned. So, if you go and you talk to anyone, a victim or you talk to someone who did something wrong, and they leave something out and it's pertinent to the case, *would you consider it to be a lie, yes or no?*

A: I think it depends on the intent *and also she's a victim of sexual assault. So, I mean she's a trauma victim. So, there's explanations for her state of mind.*

Q: Okay. And *so the explanation for her state of mind here in your opinion was what?*

A: *She's been a victim of sexual assault* and that, you know, we were speaking and continued to ask questions and gather details.

App. 257, ll. 2-23 (emphasis added). No motions were made by Trial Counsel regarding Det. Beam's answers to his questions. On re-direct examination of Det. Beam, the State continued along its vein of questions pertaining to Nelson's version of events as follows:

Q: Detective Beam, in that interview, basically you go over the story with her about three times and then one more time with her mom?

A: We went over it, yes, sir, several times.

.....

Q: But can we agree that some points never change?

A: It's my understanding that, you know, you can split hairs and say, you know, certain times, details were said or weren't, *but the story did not change in my opinion.*

Q: The Defendant used a gun?

A: Yes.

Q: He stole her purse and her phone?

A: Yes.

Q: He forcibly made her have sex at gunpoint?

A: Yes.

Q: It was at the Town Square Mall?

A: Yes, sir.

Q: There was a struggle—

A: Town Square Apartments, I'm sorry.

Q: —Time Square Apartments, I apologize. Okay. There was a struggle over the purse?

A: Yes, sir.

Q: And the Defendant ran afterwards?

A: Correct.

Q: Even when pressed with her mom, by you multiple times, she stuck to that story?

A: And a lot of times, in our experience, pressing you get—sometimes you're able to break them, whether it be a rape allegation or any other kind of investigation, that's why we go over it again and again to see if we get—we're able to get them to recant.

Q: No question you *were skeptical at first*?

A: *Always*—not always but, you know, we have a lot of, of sexual assaults. I mean, it's just the nature of Myrtle Beach, unfortunately, and Horry County, and some of it did not make sense to me *initially*.

Q: *Did you do a further investigation after that interview?*

A: *I did; yes, sir.*

Q: *And did Myrtle Beach Police Department choose to charge this Defendant with criminal sexual conduct and kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime?*

A: *Yes, sir; we did.*

Q: *And was he arrested for those offenses?*

A: *Yes, sir; he was.*

App. 264, ln. 13—App. 266, ln. 10 (emphasis added). Trial Counsel made no objections.

During closing arguments, Trial Counsel indicated Nelson and Petitioner had a consensual encounter both at Burger King and in the parking lot of the Town Square Apartments, and Nelson's multiple stories to police indicating anything to the contrary—including the presence of a gun, or that sex between the two was forcible—were not credible. App. 336, ln. 12—App. 338, ln. 8; App. 340, ln. 2—App. 342, ln. 1; App. 346, ll. 1-119. He further pointed to

the omissions in Nelson's statements to erode her credibility, as well as to Det. Beam knowing "when people are lying." App. 339, ll. 3-11; App. 344, ll. 6-10.

The State likewise focused on the credibility of Nelson's claims in its closing argument. For instance, at one point the State acknowledged Nelson did not tell police at first that she was sexually assaulted, but mollifies the omission by telling the jury, "[w]as she traumatized, was she embarrassed, was she ashamed; I can't tell you. . . . But what I can tell you is that it's true. You know it's true because you've heard it from her." App. 332, ll. 10-22. The State further buttressed Nelson's version of events saying, "[t]hat's the same story she told the detective. That's the same story she told you. That's proven by corroborating evidence because it's the truth." App. 333, ll. 11-13. Finally, in its reply closing argument, the State acknowledged Petitioner's defense of consent, and asserted the matter was non-consensual based upon the veracity of Nelson's story when questioned by police. App. 348, ln. 2—App. 349, ln. 8.

Deliberations began on the third day of trial and continued into the next day. App. 361, ll. 9-13; App. 366, ln. 21—App. 368, ln. 20. Appellant was acquitted of armed robbery and possession of a weapon during the commission of a violent crime, but found guilty of kidnapping and first degree criminal sexual conduct. App. 369, ll. 13-24. The trial court imposed concurrent sentences as follows: twenty-four (24) years for kidnapping; twenty-four (24) years for first degree criminal sexual conduct; and six (6) years for his probation revocation. App. 394, ll. 4-21.

Petitioner timely appealed. An Anders brief was filed with the Court of Appeals. His direct appeal was dismissed in an unpublished *per curiam* opinion² on December 12, 2018, and remittitur was sent on December 28, 2018. App. 399; App. 406; App. 533.

Post-Conviction Relief

² State v. Welch, Op. No. 2018-UP-451 (S.C. Ct. App. filed Dec. 12, 2018).

Petitioner's Post-Conviction Relief (PCR) Application was filed on February 21, 2019. App. 398. The State's Return was filed May 29, 2019. App. 418. Petitioner's PCR hearing was held before the Honorable Debra McCaslin on January 5, 2023. He was represented by Christopher Geel (PCR Counsel), while the State was represented by Chelsey Marto. App. 421. PCR Counsel filed an amended PCR Application the same day alleging, *inter alia*, that Trial Counsel provided ineffective assistance for "failing to object to improper corroboration of the victim's statements, improper vouching, and improper bolstering testimony." App. 420. Three witnesses testified at the PCR Hearing: Petitioner; Trial Counsel; and Assistant Solicitor Joshua D. Holford (ASOL Holford). App. 422.

Petitioner's testimony included recitation of Det. Beam's examinations from trial touching upon Nelson's credibility, and trial counsel's failure to object. App. 441, ln. 10—App. 446, ln. 6; App. 448, ln. 9—App. 452, ln. 2; App. 454, ln. 21—App. 460, ln. 3. On cross-examination, Petitioner acknowledged some of the testimony from Det. Beam was in response to Trial Counsel's questions, and that Trial Counsel did not move to strike the improper responses. App. 477, ln. 9—App. 478, ln. 4.

Trial Counsel testified as well. He acknowledged that Nelson's credibility "was the centerpiece of this case." App. 493, ll. 16-19. PCR Counsel asked him about Det. Beam's responses during direct, cross, and re-direct examinations, and whether it constituted bolstering. Trial Counsel acknowledged he did not object to several points of Det. Beam's testimony, and said it was his strategy to allow Det. Beam to testify about how hard Nelson was questioned, whether police vetted her case, and whether it appeared to be credible and true. App. 494, ln. 3—App. 498, ln. 12. Trial Counsel further indicated that Det. Beam's testimony was not objectionable regardless of his trial strategy. App. 496, ln. 1—App. 497, ln. 20. He likewise did

not view as objectionable the State's examination of Det. Beam regarding the identification of Petitioner as "the person who assaulted" Nelson, or whether Nelson ever changed her story. App. 498, ln. 14—App. 499, ln. 9. Trial Counsel also did not view his questioning of Det. Beam regarding omissions and lies, or Det. Beam's response that Nelson was "a victim of sexual assault" and a "trauma victim," as bolstering; however, he did acknowledge his intention was to try and show contradictions rather than elicit the response given. App. 499, ln. 10—App. 502, ln. 5. Finally, Trial Counsel testified he did not believe the State's questions and Det. Beam's answers on re-direct examination constituted bolstering. App. 503, ln. 6—App. 7. Trial Counsel denied that comments violated Rule 801 either; in his view, the State was permitted "to question [Det. Beam] on the stand about whether or not he found this to be true, whether or not he believed that these things were happening. He has that right." App. 510, ln. 3—App. 512, ln. 5. He further stated that he "wanted this stuff to come out because [he] wanted [Det. Beam] to talk about it." App. 512, ll. 3-4. On cross-examination, Trial Counsel again confirmed he did not see anything that constituted bolstering. He also agreed that he typically does not object to his own questions. App. 512, ll. 21—App. 513, ll. 5.

ASOL Holford was called by the State to testify at Petitioner's hearing as well. When asked if, in his opinion, Det. Beam's complained-of testimony constituted improper bolstering, ASOL Holford answered as follows:

My intention was not to have him say whether he thought the victim was telling the truth or not, *but credibility was certainly an issue in this trial, so I had to elicit to the jury whether the police department found credible evidence in addition to what she had been telling them, that a crime had occurred, and that was the reason for the arrest, and that was the reason for the prosecution.*

App. 515, ll. 10-18 (emphasis added).

The PCR Court filed its Order of Dismissal on April 28, 2023. App. 532; App. 547. As to the issue of objecting to Det. Beam's testimony, the PCR Court held as follows:

[Petitioner] has not met his burden of proof concerning this allegation. This Court concurs with [Trial Counsel] and [ASOL Holford] in their assertions that none of the portions highlighted constituted improper bolstering. Additionally, several of the highlighted portions included questions [Trial Counsel] intended to ask himself, which this Court finds are not appropriate for [Trial Counsel] to object to. Further, this Court finds that none of the highlighted portions were so crucial as to undermine the results of the proceedings.

App. 542. No motion to reconsider was filed pursuant to Rule 59(e), SCRE.

This petition for writ of certiorari follows.

ARGUMENT

The PCR Court erred by holding Trial Counsel was not ineffective for failing to object to improper corroboration and bolstering testimony from Detective Beam where Applicant was tried for charges including Criminal Sexual Conduct, where the investigator provided testimony going to the credibility of the victim, and where Trial Counsel himself elicited some of the offending testimony.

Trial Counsel provided ineffective assistance by failing to object to portions of Det. Beam's testimony that corroborated Nelson's version of events and bolstered her credibility. "To prove ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced thereby." Mincey v. State, 314 S.C. 355, 358, 444 S.E.2d 510, 512 (1994); See also Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). The applicable standard applied is whether Counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced Petitioner to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed. 2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

"The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a [victim] in a sex abuse matter." State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011)). This is because "[t]he assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

Furthermore, "the rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (reversing the PCR court where counsel was

ineffective for failing to object to hearsay evidence that corroborated the victim's testimony). One exception permits corroborative testimony in criminal sexual conduct (CSC) cases, the scope of which is limited to the time and place of the alleged assault. See Rule 801(d)(1), SCRE; see also Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010) (interpreting and applying Rule 801(d)(1), SCRE). "The corroborative testimony cannot include 'details or particulars' regarding the assault." Smith, 386 S.C. at 566, 689 S.E.2d at 632. Moreover, the limited exception in CSC cases permitting such corroborative hearsay testimony applies even when the victim testifies. Dawkins, 346 S.C. at 156, 551 S.E.2d at 262.

In the present case, Trial Counsel's performance was deficient, as it fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-88. Specifically, Det. Beam was permitted to testify in a manner that corroborated Nelson's version of events and bolstered her credibility. First, Det. Beam's direct examination testimony included the following exchange regarding whether Det. Beam vetted Nelson's complaint to ensure it was credible and true:

Q: In your job, could you even be able to ballpark how many complaints of sexual assault you get?

A: We get a lot. Unfortunately, we're a tourist town, Spring Break, college, it's a lot.

Q: And *are you trained to vet these complaints?*

A: We have to vet them just like any other case. So, *yes, sir, we do our very best to try to vet it to make sure it appears to be credible and that it's true.*

App. 240, ll. 9-16. In other words, Det. Beam was essentially asked if, in his job as a police officer he determined whether complaints like Nelson's were credible and truthful, which he affirmed. Immediately after, he verified details regarding Nelson's version of events when questioned as to whether Nelson ever changed her story:

Q: And did you—do you sometimes threaten them telling them they could be facing a felony if they're filing a false police report?

A: Sometimes. I personally try not to. Not often, especially for sexual assault, I'm not a big fan of that, but sometimes there is a time and place where you have to let them know that if it is a false report, that there are consequences.

Q: And in this case, *did [Nelson] ever deny that she was sexually assaulted?*

A: *No, sir.*

Q: *Did she ever deny that she was robbed at gunpoint?*

A: *No, sir.*

Q: *Even when questioned hard by you, a trained detective, did she deny her story?*

A: *She never denied it. The story didn't really change.*

App. 240, ln. 17 —App. 241, ln. 7 (emphasis added). Such testimony on the witness' credibility was forbidden as it amounted to bolstering and impermissible corroboration: it readily implied Det. Beam vetted Nelson's story to be true because in his view it did not change in the face of vigorous questioning, and confirmed details of Nelson's story told to him by Nelson. See, e.g., Hill, 394 S.C. at 294, 715 S.E.2d at 376; McKerley, 397 S.C. at 464, 725 S.E.2d at 141 (citing Wright, 269 S.C. at 417, 237 S.E.2d at 766). Yet no objection was made by Trial Counsel.

Additionally, Det. Beam's later testimony further corroborated Nelson's version of events regarding the alleged sexual assault, and Trial Counsel made no objection. For example, he impermissibly corroborated Nelson's identification of Petitioner's picture from Facebook as the person who assaulted her, which bolstered Nelson's credibility:

Q: What name was the Defendant using on Facebook?

A: His Facebook user name was David Royal.

Q: Okay. But we know that that's the Defendant sitting in the courtroom?

A: Correct.

Q: This picture we've seen, 17, State's 17, did you pull that up on Facebook?

A: I did; yes, sir.

Q: And under what name did you pull it up?

A: It was under David Royal.

Q: Okay. *And then the victim told you this was the person who had assaulted her and stolen her stuff?*

A: *That is correct.*

Q: *Did she ever change that story?*

A: *No, sir.*

Q: *She stuck to that to this day?*

A: *She did.*

App. 247, ln. 16—App. 248, ln. 7 (emphasis added). This continued on re-direct examination of Det. Beam, wherein the State continued to question Det. Beam regarding Nelson's version of events—again, without objection from Trial Counsel:

Q: Detective Beam, in that interview, basically you go over the story with her about three times and then one more time with her mom?

A: We went over it, yes, sir, several times.

.....

Q: But can we agree that some points never change?

A: It's my understanding that, you know, you can split hairs and say, you know, certain times, details were said or weren't, *but the story did not change in my opinion.*

Q: The Defendant used a gun?

A: Yes.

Q: He stole her purse and her phone?

A: Yes.

Q: He forcibly made her have sex at gunpoint?

A: Yes.

Q: It was at the Town Square Mall?

A: Yes, sir.

Q: There was a struggle—

A: Town Square Apartments, I'm sorry.

Q: —Time Square Apartments, I apologize. Okay. There was a struggle over the purse?

A: Yes, sir.

Q: And the Defendant ran afterwards?

A: Correct.

Q: Even when pressed with her mom, by you multiple times, she stuck to that story?

A: And a lot of times, in our experience, pressing you get—sometimes you're able to break them, whether it be a rape allegation or any other kind of investigation, that's why we go over it again and again to see if we get—we're able to get them to recant.

Q: No question *you were skeptical at first*?

A: *Always*—not always but, you know, we have a lot of, of sexual assaults. I mean, it's just the nature of Myrtle Beach, unfortunately, and Horry County, and some of it did not make sense to me *initially*.

Q: *Did you do a further investigation after that interview?*

A: *I did; yes, sir.*

Q: *And did Myrtle Beach Police Department choose to charge this Defendant with criminal sexual conduct and kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime?*

A: *Yes, sir; we did.*

Q: *And was he arrested for those offenses?*

A: *Yes, sir; he was.*

App. 264, In. 13—App. 266, In. 10 (emphasis added). Thus, in the capacity of lead detective, Det. Beam was permitted to confirm details of the Complaining Witness' version of events regarding the alleged abuse. Such testimony is expressly forbidden by both the South Carolina Rules of Evidence and case law, despite ASOL Holford's explanation of his intentions at Petitioner's PCR Hearing.³ In fact, ASOL Holford's testimony agrees to the importance of Nelson's credibility in the case, and further highlights the State's intention to bolster her credibility through Det. Beam's testimony. Regardless of whether ASOL Holford intended to do so with other evidence, the State's questioning and Det. Beam's responses were violative of South Carolina law, against which Trial Counsel failed to object. See Rule 801(d)(1), SCRE; see also Smith, 386 S.C. at 566, 689 S.E.2d at 632 (interpreting and applying Rule 801(d)(1), SCRE); Dawkins, 346 S.C. at

³ ASOL Holford testified as follows regarding his line of questions to Det. Beam:

My intention was not to have him say whether he thought the victim was telling the truth or not, *but credibility was certainly an issue in this trial, so I had to elicit to the jury whether the police department found credible evidence in addition to what she had been telling them, that a crime had occurred, and that was the reason for the arrest, and that was the reason for the prosecution.*

App. 515, ll. 10-18 (emphasis added).

156, 551 S.E.2d at 262; Hill, 394 S.C. at 294, 715 S.E.2d at 376; McKerley, 397 S.C. at 464, 725 S.E.2d at 141 (citing Wright, 269 S.C. at 417, 237 S.E.2d at 766).

Furthermore, Trial Counsel's own questions in his cross-examination of Det. Beam also elicited impermissible testimony that bolstered Nelson's credibility. For example, Trial Counsel's cross-examination included the following exchange:

Q: Okay. And my question to you is this, please tell the jury whether or not her story changed, whether or not she omitted things when she first called 911?

A: Yeah. Initially, she did not tell about the sexual assault.

Q: Okay. Let me ask you a question, are omissions lies in your book?

A: Omissions, it depends on the context, situational based.

Q: I've known you for a long time; you're a good detective?

A: Uh-huh (affirmative response).

Q: And you're very seasoned. So, if you go and you talk to anyone, a victim or you talk to someone who did something wrong, and they leave something out and it's pertinent to the case, *would you consider it to be a lie, yes or no?*

A: I think it depends on the intent *and also she's a victim of sexual assault. So, I mean she's a trauma victim. So, there's explanations for her state of mind.*

Q: Okay. And *so the explanation for her state of mind here in your opinion was what?*

A: *She's been a victim of sexual assault* and that, you know, we were speaking and continued to ask questions and gather details.

App. 257, ll. 2-23 (emphasis added). As a result, the jury was permitted to hear Det. Beam "give testimony as to his . . . opinion about the credibility of a [victim] in a sex abuse matter." Hill, 394 S.C. at 294, 715 S.E.2d at 376. Yet again, no motions were made by Trial Counsel regarding Det.

Beam's bolstering answers that were unresponsive to the questions asked. See, e.g., State v. Smith, 336 S.C. 39, 44, 518 S.E.2d 294, 297 (Ct. App. 1999) ("The decision whether to strike a witness' answer as non-responsive is within the sound discretion of the trial Judge.") (citing Anders v. Nash, 256 S.C. 102, 180 S.E.2d 878 (1971); see also 98 C.J.S. Witnesses § 488 ("Testimony that is not responsive to a question is generally inadmissible, and an unresponsive answer may be stricken⁴ in the discretion of the trial judge.")).

Moreover, despite Trial Counsel's insistence that the questions to and answers from Det. Beam were part of his trial strategy, such a strategy was unreasonable. App. 496, ln. 1—App. 497, ln. 20; App. 510, ln. 3—App. 512, ln. 5. "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness." Ingle v. State, 348, S.C. 467, 470, 560 S.E.2d 401, 401 (2002); see also Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"). Here, Trial Counsel did not articulate an objectively reasonable trial strategy. See Stacy v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges."). While Trial Counsel desired to show "contradictions," the testimony of Det. Beam went far beyond that and swerved directly into the lane of impermissible bolstering and corroboration of Nelson's accusations against Petitioner. App. 498, ln. 14—App. 502, ln. 5; App. 510, ln. 3—App. 512, ln. 5. In a case where Trial Counsel unequivocally agreed that credibility of the complaining witness was critical, testimony bolstering Nelson's credibility and corroborating her version of events was devastating to Petitioner's defense of consent. App. 493, ll. 16-19.

Accordingly, the PCR court erred in finding that trial counsel provided effective assistance of counsel because trial counsel's performance was not reasonable "under prevailing professional norms." See Strickland, 466 U.S. at 687-88; Cherry, 300 S.C. 115, 386 S.E.2d 624.

Further, Petitioner was prejudiced because Trial Counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 692). As indicated above, credibility of Nelson's version of events was central to the case against Petitioner. Additionally, scant physical evidence existed supporting the State's theory of a nonconsensual sexual encounter between Nelson and Petitioner. For example, no silver gun was found or recovered, nor was a condom or condom wrapper. See, e.g., State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) (reversing where "[t]he only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts."); cf. State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) ("An officer's improper opinion which goes to the heart of the case is not harmless."). In other words, the State's case against Petitioner rested upon the credibility of Nelson's story. Yet, due to Trial Counsel's ineffective assistance, Nelson's credibility was impermissibly bolstered and her story impermissibly corroborated through Det. Beam's testimony. Therefore, Petitioner was prejudiced, and the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

For the foregoing reasons, Petitioner David James Welch respectfully requests that this Court grant his petition for certiorari, reverse the PCR Court, and grant him a new trial.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of January, 2024.