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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari -PCR- Greenville County
Court of Common Pleas
Alex Kinlaw, Jr. Circuit Court Judge

Appellate Case No. 2019-000907

Jerald D. Gaskins, Jr.#00362923 .... Petitioner,

v.

State of South Carolina .... Respondent.

REPLY TO RETURN

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Question I.

Did the Post Conviction Relief Court err in failing to find trial counsel was ineffective when trial counsel failed to object to the improper cross-examination of Jerald Gaskins when the prosecutor was permitted to ask Mr. Gaskins improper questions on cross-examination?

Failure of trial counsel to object to questions about text messages improperly attributed to Walt Mucienko, the father of the complaining witness

In contending that Petitioner should fail on this issue, the State has argued, "Petitioner has failed to prove that he would have been successful on appeal had trial counsel preserved the issue if the solicitor's questions about the Walt texts because Petitioner has not proven that the solicitor lacked a good faith basis for asking the questions." This is simply not correct. At the Post Conviction Relief hearing, Mr. Gaskins proved there was no good faith basis for asking the question about the alleged tests with the father of the complaining witness. When the father testified the messages used to impeach Mr. Gaskins were not his messages, the lack of a good faith basis has been established. Had trial counsel raised a proper objection as to the good faith basis, this would have been established at the trial. Trial counsel could also have raised the issue that the State failed to disclose the texts as required by Rule 5 of the South Carolina Rules of Criminal Procedure.

Neither at the trial nor at the Post Conviction Relief hearing did the State introduce any evidence that Sandra, the wife of Walter Mucienko gave the solicitor the text messages. The trial counsel did not attempt to cross examine the solicitor as to her

good faith basis for the claim the text messages came from Mr. Gaskins. At the Post Conviction Relief hearing Mr. Gaskins did establish facts that the wife could not have made the representations to the assistant solicitor that the messages were Mr. Mucienko as he denied sending the messages.

The law is well established that a lawyer must have a good faith basis for asking a question. *State v. McEachern,* 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012). In a serious criminal case when the validity of the good faith basis is called into question, the State should not be entitled to reply upon a representation made at trial as to the good faith basis. The State further argues that both the fact that the messages were not sent by Walt and that Sandra made the representation to the assistant solicitor both could be true. Br. of Resp. at 8. What the State appears to be arguing is that a trial is fair when the State is permitted to use representations made to them are in fact false. Thus, a fair trial permits Mr. Gaskins to be impeached with false statements. This should not be the law. Impeaching a witness with false statements is not a fair trial, even if the State did not know the statements were false. If the State elects to cross examine a witness with unverified facts, it should do so at its peril.

The State has argued that Mr. Gaskins has suffered no prejudice as a result of the improper questions. The questions were asked to make Mr. Gaskins out to be a liar. The State argued as much in it closing argument. The State argued:

> What he came to court and presented to you was e3verything is a lie, everything. No, I never tested that dad. No, I never tested that sister. No, I don't even like country music. No, I never said I had tickets to this concert. No, I never went to that concert where I got into it with my wife. No, I don't have Facebook, no, no, no, no, no, nothing.
> App.at 494, ll 14-21.

The State in its brief has attempted to argue that the question was not evidence against Mr. Gaskins and that "[t]he trial court's instructions insulated Petitioner from any harm from the questions." Br. of Resp. at 9. In making this argument the State contends that a jury instruction telling the jury that evidence consists of sworn testimony and exhibits insulates Mr. Gaskins from prejudice when he denied sending the text messages. As noted above, this was certainly not the position taken by the State in its closing argument. The state argued that Mr. Gaskins' denials of the text messages were evidence of his being a liar and a basis to convict him of the charges. By telling the jury sworn testimony is evidence, the prejudice to Mr. Gaskins is actually increased. The jury was told they can consider Mr. Gaskins' denials as evidence. The State argued those denials are evidence of his being a liar.

Today, because of the testimony at the Post Conviction Relief hearing, we know those denials are the truth and not the lie the State represented them to be at the trial. Prejudice to Mr. Gaskins in permitting the cross-examination of alleged texts between Mr. Gaskins and Mr. Mucienko has been shown.

Failure of trial counsel to object to improper cross-examination of by use of alleged text messages to the sister of complaining witness

Trial counsel should have objected to any use of the text messages given the day before trial as a violation of Rule 5 of the South Carolina Rules of Criminal Procedure. Had a proper objection been made, the trial judge would have been forced to either exclude the evidence or permit a continuance so that defense counsel would have the opportunity if the messages were authentic.

In its brief, the State apparently does not take serious issue with the argument of Mr. Gaskins that the text messages when closely examined indicate they did not come from Mr.

Gaskins. (See, Br. of App. at 7-8). The State has not attempted to explain the numerous inconsistencies pointed out by Mr. Gaskins at the Post Conviction Relief hearing and in his brief on this appeal.

The State argues, and somewhat properly, that these inconsistencies were questions for the jury. The problem with the State's argument is that with the late disclosure of the text messages, neither Mr. Gaskins nor his counsel had the time to review the messages in detail to point out the inconsistencies that Mr. Gaskins was able to point out in his testimony at the Post Conviction Relief hearing. When the evidence is fully examined, then perhaps the question is for the jury, assuming the trial judge would have permitted them to be introduced once the discrepancies are pointed out. As noted in the opening brief, a review of the messages shows that the texts were not from Mr. Gaskins. A trial judge would have abused its discretion if the judge had permitted the introduction of the messages without further authentication.

Mr. Gaskins was prejudiced by the admission of the testimony and cross-examination of Mr. Gaskins about these messages. An argument could be made that Mr. Gaskins would have been less prejudiced had the actual messages been introduced. Then, and only then, could the jury have seen that the messages make sense only if they were not from Mr. Gaskins. As noted above, the State used the denials of Mr. Gaskins to its benefit in its closing argument. The State used these messages as a further basis for contending Mr. Gaskins is a liar.

Failure of trial counsel to object to text Messages that placed the character of Jerald Gaskins in issue in violation of Rule 404b of the South Carolina Rules of Evidence and which messages were not properly authenticated

Without any basis in fact to establish that "Jay Fowler" is Jerald Gaskins, the State wants to argue that Mr. Gaskins was not prejudiced when the State asked him if, using pseudonym "Jay

Fowler," he befriended a 12 year old girl while out on bond for criminal sexual conduct with a minor. In a trial such as this, one would have to look long and hard to find a more prejudicial question. At the Post Conviction relief hearing the State made no effort to prove or even introduce any evidence to establish that Jerald Gaskins had opened a Facebook account under the name "Jay Fowler."

While the assistant solicitor never asked about the specific messages, the prejudice from the questions asked is readily apparent. The State has argued that this brief cross-examination was not prejudicial because "[t]he solicitor did not return to the topic during her questioning, nor did she seek to introduce any such messages into evidence." Br. of Resp. at 17. As pointed out in the Brief of Appellant at page 12, when cross-examining Mr. Gaskins about an alleged text exchange with the 404b witness, the assistant solicitor asked Mr. Gaskins, "Well, maybe you did it under Jay Fowler?" App. at 454, l 25. This sarcastic comment simply drove home the argument by the State that Mr. Gaskins had opened up a Facebook account in the name of "Jay Fowler."

The State has argued that the lack of evidence at the Post Conviction Relief hearing as to a good faith basis for asking the question is proof of a good faith basis for asking the question about "Jay Fowler." The State argues, "The solicitor did not testify at the PCR hearing and as a consequence her basis for asking about the profile is not known, but the solicitor's questions surely indicate that she had some reason for to think that Petitioner was behind the Fowler profile;" Br. of Resp. at 19. The State then reviews the text messages to make an assumption that the assistant solicitor may have had a basis to ask the question. Without even knowing how these messages cam into the possession of the assistant solicitor, such a conclusion is sheer speculation.

These text messages were never given to defense counsel. This is another violation of Rule 5 to which no objection was made. Had trial counsel objected to the questions as not having a good faith basis and a violation of Rule 5, the issue would have been preserved for appeal and a reversal would have been very likely. This is especially true since this was not the only Rule 5 violation.

Failure of trial counsel to object improper cross-examination of Jerald Gaskins when he was asked about an alleged violation of a restraining order in violation of Rule 404b of the South Carolina Rules of Evidence.

In discussing this issue, the State appears to concede the questions were not proper and addresses the issue of whether the testimony was prejudicial. As noted in the Brief of Appellant, the only objection preserved for appellate review was that the assistant solicitor and Mr. Gaskins were arguing. Such an objection preserves virtually nothing for appellate review.

In arguing that Mr. Gaskins was not prejudiced, the State argues, "Petitioner's credibility was already throughly rebutted through other evidence presented at trial." Br. of Resp. at 26-27. The other evidence presented at trial are the errors previously discussed in the Opening Brief and this Reply Brief. The essence of the argument of the State is that because other inadmissible impeaching evidence has been introduced, this inadmissible impeaching evidence is harmless.

The point the State does not consider, and will be discussed later, each inadmissible impeaching evidence makes the other inadmissible impeaching evidence have more credibility. This was a complete credibility case. No forensic evidence proved the crime. In fact, the only forensic evidence presented, that the physical examination was normal, tends to prove a crime had not occurred. As this case was purely a credibility case, the improper impeachment as to the violation of a restraining order could easily have led the jury to believe Mr. Gaskins is a liar and

therefore he is guilty.

This Court has reversed cases in a Post Conviction Relief setting when the error as to bolstering is involved in a credibility case. This Court has said, "'The determination whether a bolstering error [prejudiced the outcome of a trial] depends on whether the case turn[ed] on the credibility of the victim.' . . . The outcome of a trial turns on the credibility of the victim when the State presents no physical evidence or 'relie[s] solely upon the victim's testimony to establish the details of the crime ....'" *Chappell v. State,* 429 S.C. 68, 80, 837 S.E.2d 496, 502 (Ct. App. 2019)(internal citations omitted). This case turned solely on the credibility of the complaining witness and Mr. Gaskins. The principle established in *Chappell* require reversal.

Cumulative error

Mr. Gaskins is not arguing that all issues raised in this case should be looked at as cumulative error. He is only arguing that identical issues attacking the credibility of Mr. Gaskins be looked at as cumulative error. This only makes logical sense. If the credibility of a defendant is attacked in 100 improper ways, while no one attack on his credibility may be sufficient, the cumulative effect of 100 improper attacks on his credibility should be view cumulatively. The attacks on Mr. Gaskins credibility were all very similar as they all involved his believability. The State in cross examination and in closing attempted to portray Mr. Gaskins as a person who would lie about any thing, from texting Walt Mucienko, to opening a Facebook account in the name of :Jay Fowler: to lying about a restraining order being issued. All the accusations were an attempt to portray Mr. Gaskins as a liar. They should all be considered together.

Question II

Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective for his failure to object to the expert testimony of Officer Robert Perry as to

delayed disclosure when the officer had not been qualified as an expert?[1]

The State first argues that the statement by Officer Robert Perry was not improper opinion testimony. They argue, "Perry's testimony did not concern the behavioral characteristics of sex abuse victim; instead, Inv. Perry's testimony was about his personal observations in any sexual abuse investigations that it is common for victims to delay disclosing the abuse and that the delay hampers law enforcement officer's ability to acquire evidence to corroborate the allegations." Br. of Resp. at 35. Had Officer Perry simply testified that the delay hampered the investigation in this case, that would arguably be permissible. In this case he went further. He gave an opinion as to whether a delayed report is common or uncommon in child sex abuse cases. This answer was an opinion for which he was not qualified as an expert.

The question and answer went well beyond his experience as to how a delay hampers the investigation. This does not qualify as a lay opinion statement permitted by Rule 701 of the South Carolina Rules of Evidence permit lay opinion testimony. The rule does not permit expert testimony under the guise of lay opinion testimony.

Prejudice in shown in this case as the jury could have had a question in their mind as to why the delay in reporting. The answer to this concern was supplied by Officer Perry who gave his expert opinion without being qualified as an expert. The fact that the complaining witness was 17 years old at the time of the trial has no bearing as to whether this improper testimony impacted the jury's decision. Whether she is 12 or 17 at the time of the trial is simply not a

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[1] In footnote 7, the State argues this issue was not raised below. The issue was not raised in the original or first amended Post Conviction Relief application. It was raised in the second amended application filed on October 25, 2018 which inadvertently was not included in the Appendix.

justification of an improper question and answer. She claimed the alleged abuse started when she was 13 and last about "a year, a year and a half." App. at 197, ll 9-11. Thus, the delay in the reporting was for about one year as she was 15 when she reported it. App. at 56, ll 18-19.

Regardless of the other facts cited by the State to support the conviction, this case still remains a credibility case between Mr. Gaskins and the complaining witness. For that reason alone, the improper testimony was prejudicial against Mr. Gaskins.

Question III

Did the Post Conviction Relief judge err in failing to hold trial counsel to be ineffective when trial counsel failed to object to the improper vouching for the credibility of the complaining witness?

The issue as to bolstering plows no new ground in the jurisprudence of our state. Improper bolstering as to the credibility of a witness in child sex abuse cases has been improper since at least 1989. *State v. Dawkins,* 297 S.C. 386, 377 S.E.298 (1989). Improper bolstering as to the credibility of witness has long been prohibited in our state. *State v. Carroll*, 182 S.C. 19, 188 S.E. 374, 376 (1936)("It is undoubtedly true, we think, that the only possible reason for having the witness testify to these declarations made by him out of court was to bolster up and to lend effect to his positive testimony as to how the killing occurred."). In this case the statements elicited from Officer Perry simply constituted improper bolstering as to the credibility of the complaining witness.

When an investigating officer is permitted to testify that the minor child "presented herself as bright and intelligent. And she presented herself to me as being pretty articulate young lady, and kind of embarrassed that she kind of got manipulated by Mr. Gaskins." (App. at 351, ll

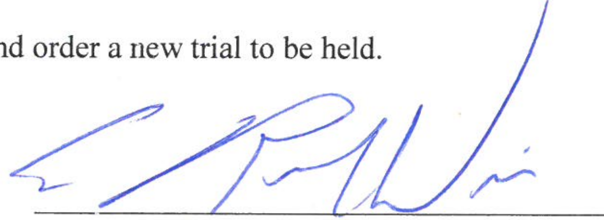
10-14) the officer is simply saying he believes the witness is telling the truth. This is improper bolstering. The jury could not have interpreted the testimony in any other fashion. The state does not discuss this statement as to being improper bolstering. Apparently the State concedes this is improper bolstering. The State simply argues this testimony is not prejudicial to Mr. Gaskins.

The testimony as to Dr. Mary Fran Ratchford Croswell is likewise bolstering. The State had no need to ask the doctor the question, "And would her findings in this exam be consistent with the allegation of the sexual abuse." When the doctored answered, "Yes" (App. a t 338, ll 3-5) she is saying she believed the minor child. This is true because there were no physical findings that would justify the allegation of sexual abuse. This series of questions led to the question on cross-examination when the doctor said, "My testimony is that my patient provided me with a history of sexual abuse, and her exam was consistent with the history provide." App. at 339, ll 15-17. This statement is a comment on the fact that the doctor believed the information given by the minor child. Such testimony is prohibited. *See*, *State v. Kromah*, 401 S.C. 340 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011).

As noted previously, *Chappell v. State,* 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019) holds that when credibility is the sole issue, improper bolstering is prejudicial to a defendant. No charge to the jury can undo the harm of the bolstering testimony in this case. A reasonable trial attorney who handles child sex abuse cases would know the law prohibited this type of testimony. He would know to object to this type of testimony. To fail to do so falls well below the standard of a reasonablely competent criminal defense trial attorney. Mr. Gaskins was prejudiced by the failure to object.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Opening Brief, this Court should reverse the conviction of Jerald Gaskins and order a new trial to be held.



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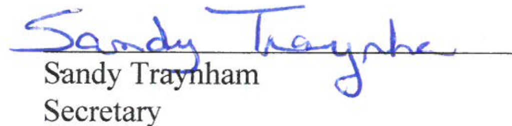
CERTIFICATE OF SERVICE

I, Sandy Traynham, hereby Certify that I am the Secretary for Attorney for the Petitioner in the above entitled case. That on September 12, 2022, I did send via e-mail and US Mail, a copy of the Reply to Return to Taylor Zane Smith, SC Attorney General Office, PO Box 11549, Columbia, SC 29211-1549 and tsmith@scag.gov.

September 12, 2022



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Re: Jerald D. Gaskins, Jr. #00362923 vs. State of South Carolina, Case No. 2019-000907

Dear Ms. Kitchings:

I am enclosing herewith for filing the Reply to Return regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc Taylor Zane Smith, SC Attorney General Office