

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-01543
Appellate Case No. 2013-001287

Randy Thomas, SCDC # 313802, Petitioner

v.

State of South Carolina, Respondent.

REPLY OF THE PETITIONER

MATTHEW A. ABEE
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

ATTORNEY FOR PETITIONER

Other Counsel of Record:
MEGAN E. HARRIGAN
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3319

INDEX

INDEX 1

ARGUMENTS IN REPLY

I. CHARACTER EVIDENCE IS ALWAYS RELEVANT AND TRIAL COUNSEL DID NOT ARTICULATE A VALID REASON FOR FAILING TO PREPARE FOR EVIDENCE OF THOMAS’S CHARACTER WHERE HIS CHARACTER WAS THE SEMINAL ISSUE IN THE CASE..... 2

A. Character evidence in a criminal case is always relevant and failing to permit the jury to review evidence of the accused’s good character is always prejudicial. 2

B. Trial counsel did not articulate any reason for failing to present character evidence to the jury. 5

C. The State’s manufactured reason for trial counsel failing to introduce character evidence is not objectively reasonable. 6

D. Introducing character evidence was the only manner of combating the numerous improper attacks on Thomas’s character..... 8

1. Inadmissible corroboration improperly inflated the victim’s credibility at the expense of Thomas’s credibility. 8

2. Other improper evidence undermined Thomas’s credibility and necessitated counsel respond with evidence of Thomas’s good character. 9

II. THE RECORD ESTABLISHES THE STATE’S WITNESS VIOLATED THE COURT’S SEQUESTRATION ORDER WITHOUT OBJECTION FROM TRIAL COUNSEL. 10

CONCLUSION..... 11

ARGUMENTS IN REPLY

I. Character evidence is always relevant and trial counsel did not articulate a valid reason for failing to prepare for evidence of Thomas’s character where his character was the seminal issue in the case.

The State argues that the PCR Court was correct in finding trial counsel articulated a valid reason for failing to introduce character evidence during the trial and, therefore, trial counsel was not ineffective in her representation of Petitioner Randy Thomas (“Thomas”). This argument ignores both the testimony in the record and the well-established relevancy of character evidence in the South Carolina courts. Trial counsel’s failure to recognize the importance of Thomas’s character and to plan accordingly warrants review by this Court.

A. Character evidence in a criminal case is always relevant and failing to permit the jury to review evidence of the accused’s good character is always prejudicial.

There can be little doubt that evidence of an accused’s good character carries great weight because of its ability to influence a jury’s determination of guilt. *See State v. Harrison*, 343 S.C. 165, 171-72, 539 S.E.2d 71, 74 (Ct. App. 2000); *Sosebee v. Leeke*, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987); *accord Michelson v. United States*, 335 U.S. 469, 476 (1948) (“because character is relevant in resolving probabilities of guilt . . . this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.”).

The South Carolina Court of Appeals has stated “‘a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may *in and of itself* create a doubt as to guilt and should be considered by the jury.’” *State v. Lee-Grigg*, 374 S.C. 388, 410, 649 S.E.2d 41, 53 (Ct. App. 2007) (emphasis added). Given its ability to establish innocence “in and of itself,” failing to permit the jury to consider character evidence

is always prejudicial.¹ If character evidence can by itself exonerate a defendant, its exclusion cannot be anything other than prejudicial. The State ignores this logical conclusion, and argues that the character traits for which the witnesses would have been called were not pertinent character traits. This argument fails to account for statements of witnesses such as Terry Burnette who would have testified that he “trusted my kids with [Thomas] implicitly.” (App. 72.) There can be no higher trust reposed in a person than the trust of one’s children. If this testimony is not probative of Thomas’s character, then scant character evidence will conform to the type argued for by the State.

This principle is reflected in *State v. Harrison*. 343 S.C. at 173-75, 539 S.E.2d at 75-76. In *Harrison*, the Court of Appeals affirmed the introduction of evidence that the defendant actively counseled adolescents and volunteered extensively with his church. *Id.* The Court reversed the trial court’s failure to instruct the jury on evidence of the defendant’s good character in light of his argument that “his conduct on the night of his arrest was not part of his normal lifestyle.” *Id.* at 168-70, 539 S.E.2d at 72-73. Unlike the present case, however, *Harrison* contained testimony of an independent, eyewitness—an officer who saw the defendant drop a bag of cocaine. *Id.* at 174, 539 S.E.2d at 75. Even in light of this damning evidence, the Court of Appeals determined the admission of the evidence was proper and the refusal to charge the jury regarding the defendant’s good character was prejudicial. *Id.* at 75-76.

If good character evidence can shed light on the innocence of a defendant as it did in *Harrison* when an officer testifies to personally observing the defendant during the crime, in a

¹ Only one South Carolina case has held otherwise. See *State v. Green*, 278 S.C. 239, 240, 294 S.E.2d 335, 335 (1982). In *Green*, the Court held that the failure was not prejudicial because the defendant confessed and the State presented other conclusive evidence. *Green* at 240, 294 S.E.2d at 335. Unlike *Green*, Thomas has always maintained his innocence. Furthermore, the evidence fails to conclusively establish his guilt. Thus, *Green* is inapplicable.

case such as Thomas's where there is little more than a "swearing contest" between the defendant and the victim, exclusion of character evidence *must be* prejudicial. Had the jury been allowed to consider Thomas's character evidence, it is highly probable that it would have reached a different verdict. For this reason, trial counsel's failure to recognize the importance of character evidence, to investigate the circumstances surrounding it, and to object to the State's impermissible collateral attacks on Thomas's character warrants review by this Court.²

While the State tries to downplay the importance of character evidence in the trial, the record indicates that almost every party involved in the proceedings realized its importance. (See App. 63 (Thomas's requests that trial counsel present the character witnesses); App. 1316 (presiding judge stating, "I think to a large degree the case came down to the issue of credibility . . ."); App. 1025 (State requesting the jury to judge credibility).) Unfortunately, the only person who failed to recognize the importance of Thomas's character was the only person in the courtroom charged with arguing his credibility to the jury—trial counsel.

Instead of addressing the importance of a defendant's introduction of evidence of his good character, the State points out that corroboration of a victim's testimony in a criminal sexual conduct trial is unnecessary. (Return Pet. Cert. 6 (citing S.C. Code Ann. § 16-3-657).) Thomas does not argue that trial counsel somehow should have required the State to

² *State v. Bryant* further supports this argument. 369 S.C. 511, 518-19, 633 S.E.2d 152, 156 (2006) (holding that where a defendant's defense "hinged entirely on his own testimony," his "credibility was essential to his defense," and the State's attacks on his character were not harmless). Here, Thomas asserts the sexual intercourse was consensual. The only physical evidence found at the scene, a comforter with a mix of semen and saliva, is consistent with this defense. The State's own forensic expert conceded this point. (App. 838.) Additionally, the attending physician called by the State testified the victim was "not traumatized," and exhibited no bruising or other signs of physical altercation. (App. 401-02.) Officer Gonzales also confirmed the absence of marks on the victim. (App. 600.) Just as in *Bryant*, Thomas's defense of consensual intercourse "hinged entirely on his own testimony." *Bryant*, 369 S.C. at 518-19, 633 S.E.2d at 156. Thus, Thomas's "credibility was essential to his defense."

corroborate the victim’s testimony.³ Instead, Thomas argues that because the case contained no independently verifiable evidence of his guilt, trial counsel should have known his character was at issue and should have prepared to introduce evidence from one of the sixteen character references he provided to trial counsel months prior to trial. (App. 126; *see also Lounds v. State*, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) (reiterating trial counsel’s duty to interview witnesses).) Thomas does not assert he should be rewarded or that the State should be penalized because the events happened within the confines of a private residence—Thomas argues he should not be deprived of his Constitutional rights because trial counsel failed to conduct any investigation and failed to present the evidence of his good character to the jury.

B. Trial counsel did not articulate any reason for failing to present character evidence to the jury.

Contrary to the State’s argument, trial counsel offered no reason for not calling character witnesses, other than to say that, in hindsight, she probably should have called the witnesses. (App. 117.) When asked on cross-examination if she remembered deciding that calling character witnesses would be risky, trial counsel stated, “I don’t remember necessarily making that decision.” (App. 125.) Nevertheless, the State uses this same testimony to manufacture a “valid” trial strategy out of thin air. The State and the PCR Court hang their argument on the “fear of opening the door to allow the State to call witnesses of his or her own to impugn Petitioner’s character” (Return Pet. Cert. 7; App. 15.) This simply is incorrect. A strategy will not be deemed ineffective where “counsel *articulates* a valid reason for employing a certain strategy” *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (emphasis added). Trial counsel could not have “articulated” a valid trial strategy

³ In fact, Thomas argues just the opposite—trial counsel should have prohibited the State from corroborating the victim and from improperly disparaging his character by objecting.

because there was not one; trial counsel never conducted an investigation into the witnesses, (App. 97; App. 157-60), never spoke with the witness present in the courthouse during the trial, (App. 70), and never called the witnesses. Instead, trial counsel believed Thomas's credibility was not in issue, an erroneous belief trial counsel repeated to Thomas when he asked her frequently about utilizing the character witnesses. (App. 63.)

C. The State's manufactured reason for trial counsel failing to introduce character evidence is not objectively reasonable.

Notwithstanding trial counsel did not "articulate" a valid trial strategy, the State argues trial counsel's decision was reasonable because introducing character evidence would have allowed the State to offer rebuttal character evidence.⁴ (App.7.) The State asserts that calling the character witnesses would have allowed the State to present evidence of three issues in particular, all of which were introduced to the jury without those witnesses being called.

First, the State argues trial counsel's decision to not introduce the character evidence was "based on a fear of opening the door to allow the State to call witnesses of their own to impugn Petitioner's character is objectively reasonable, particularly in light of Petitioner's previous similar assault of the victim" (Return Pet. Cert. 7.) The State has forgotten it introduced this testimony through three different witnesses even when the character evidence was not presented. (App. 433-38 (the victim's testimony); App. 555-57 (Ashley Mishoe's testimony); App. 931-33 (Thomas's cross-examination).) Trial counsel also elicited the testimony from a fourth witness by calling Detective Peppers from the Clemson Police Department. (App. 956-62.) Thus, any fear that calling character witnesses would permit the

⁴ Additionally, the State argues trial counsel's failure to produce character testimony was reasonable because there was no way for her to know "every detail about her client's background." (Return Pet. Cert. 7.) If this were a valid reason, then *every* situation in which trial counsel failed to introduce character evidence would be objectively reasonable.

State to introduce testimony regarding the prior incident was unfounded because both the State and trial counsel had already introduced the testimony.

Second, the State argues the character witnesses would have opened the door for evidence of Thomas's mental health concerns. The State's argument is unfounded for two reasons. First, a defendant's mental health is an improper subject of inquiry where the defendant has not placed his mental health at issue. *See Heilman v. Waldron*, 287 F.R.D. 467, 477 (D. Minn. 2012) (finding defendant's mental health history inadmissible because he did not place his mental condition at issue). Thomas never suggested he lacked the capacity for the alleged crimes because of his mental condition and nothing in the character witnesses proposed testimony even discussed his mental health at issue such that rebuttal character evidence would have been proper on cross-examination. Second, trial counsel and the State had previously agreed that the State would "stay away" from Thomas's mental health. (App. 1218-19.) Thus, the State's own stipulation made on the record prohibited introducing this evidence. Therefore, any manufactured strategy founded on avoiding Thomas's mental health was objectively unreasonable.

Finally, the State contends that introducing character evidence would have opened the door for introduction of Thomas's 2003 conviction for conspiracy. (App. 1298-99.) Again, the State has forgotten this evidence was admitted twice during Thomas's testimony even without the character witnesses testifying. (App. 905 (direct-examination); App. 952 (cross).)

Therefore, the State's argument in reliance on a "valid, reasonable strategic rationale" "articulated" by trial counsel is without merit because (1) trial counsel never articulated the reason; and (2) even if failing to introduce the character evidence is attributed to a strategic

decision made by trial counsel, that strategy is objectively unreasonable as the three pieces of evidence trial counsel could have avoided were already in evidence or were inadmissible.

D. Introducing character evidence was the only manner of combating the numerous improper attacks on Thomas’s character.

Even if the fears of opening the door for rebuttal evidence were founded, introducing character evidence was the only way to combat the credibility gap trial counsel permitted the State to create by their numerous improper attacks on Thomas’s character.

1. Inadmissible corroboration improperly inflated the victim’s credibility at the expense of Thomas’s credibility.

Apart from the victim’s initial testimony, the State relied on secondhand witnesses parroting the victim’s statements on the stand. (App. 562 (Ashley Mishoe); App. 587-89, 601 (Officer Gonzales); App. 618-20 (Katria Weyl); App. 629-30 (Dr. Stewart); App. 651-55 (Officer Livingston).) South Carolina courts have repeatedly excluded such evidence because using parroted testimony to corroborate a victim’s statements improperly bolsters the victim’s credibility at the expense of the defendant’s. *Sanchez v. State*, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002).⁵ Furthermore, “[i]mproper corroboration testimony that is merely cumulative to the victim’s testimony cannot be harmless” because of its devastating impact on the defendant’s credibility. *Vail v. State*, 402 S.C. 77, 88-89, 738 S.E.2d 503, 509 (Ct. App. 2013).⁶ Not only is failing to object to improper cumulative hearsay testimony in a sexual

⁵ Court Rules and statute reflect this principle as well. *See* Rule 801(d)(1)(D), SCRE (statement is not hearsay in a criminal sexual conduct case “where the declarant is the alleged victim and the statement is limited to the time and place of the incident”); *cf.* S.C. Code Ann. § 17-23-175 (restricting scope of admissibility of prior consistent hearsay statements to time and place of the abuse in a criminal sexual conduct case where the victim is a child).

⁶ Contrary to the State’s assertion, this error is preserved for review. As this Court has previously concluded, the relative credibility of the defendant and the victim is at the heart of the hearsay issue—the cumulative effect of parroted testimony “enhances the devastating

assault case objectively unreasonable, but trial counsel's failure to combat its use by introducing character evidence during Thomas's cases in chief is also objectively unreasonable.

2. Other improper evidence undermined Thomas's credibility and necessitated counsel respond with evidence of Thomas's good character.

During the trial, the State offered improper evidence of flight and of Thomas's bond without objection by trial counsel. The State argues trial counsel's failure to object was not ineffective because the flight evidence was proper, the bond testimony was beneficial to Thomas, and trial counsel's actions were objectively reasonable. The State's argument ignores the role of trial counsel in a criminal proceeding.

Trial counsel bears the burden of objection to improper questioning and the arguments of counsel to preserve the issue for review. *State v. Richardson*, 358 S.C. 586, 597, 595 S.E.2d 858, 863-64 (Ct. App. 2004). At times, where the trial counsel fails to object to the improper question or comment, the failure establishes ineffective assistance of counsel. *See McFadden v. State*, 342 S.C. 637, 645, 539 S.E.2d 391, 395 (2000). Failing to object to improper questions or comments because of a desire to avoid drawing attention to the issues is not a valid trial strategy. *See Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009).

This is the precise situation presented here. Trial counsel failed to object to this testimony or to preserve the issues for appeal. Trial counsel could not even remember the testimony, much less articulate a valid strategy for her failure to object. (App. 116.) Without a valid strategy, trial counsel's failure to object was deficient. By permitting the State to elicit

impact of improper corroboration." *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). Here, the effect of the corroboration was the impermissible inflation of the victim's credibility. Not only did the PCR Court rule on the issue of credibility, but it held that Thomas's character trait for veracity or truthfulness "alone would have been the 'pertinent character trait' most useful to establish to the jury as the case turned in large part on his credibility versus Victim's credibility." (App. 17.)

the irrelevant and unfairly prejudicial testimony, trial counsel added to Thomas's character deficiency—one that could have been cured only by presenting available character witnesses.

II. The record establishes the State's witness violated the Court's sequestration order without objection from trial counsel.

The State's assertion that Thomas and the undersigned counsel have misstated the record focuses on only one line of the record at the ignorance of the remaining testimony. Additionally, the assertion misses the point that trial counsel's failure to object and develop the testimony surrounding the violation was trial counsel's deficient performance.

On cross-examination, the State elicited the testimony from James Aakhus that the Monday the trial began, he and the victim discussed the time of Thomas's visit to her parents' house.⁷ When discussing what he remembered about their conversation that Monday, Aakhus testified "[the victim] called me up asking me if it was in September, and I hadn't even thought about the timing at all at that point, and I said, you know, I thought it was more closer to, you know, July." (App. 899-900.) Thomas concedes this testimony gives rise to differing opinions. Therein lays the deficient performance. Trial counsel was deficient in failing to recognize that the victim had likely violated the sequestration order. Had trial counsel recognized this, she could have asked the Court to exclude the jury to develop the testimony further. Instead, trial counsel asked only four questions on redirect examination, one of which invited an objection that ended the questioning. (App. 902-03.)⁸

⁷ This issue was material as it tended to collaterally disprove the victim's first sexual assault allegation. If the visit occurred shortly after the first incident, then it is reasonable to expect that Thomas's visit with the victim's father would not have been a friendly encounter—nevertheless, there was no altercation at this visit. (App. 6-7.)

⁸ Adding insult to injury, the State relied on the sequestration order during closing arguments to bolster their witnesses testimony. (App. 1058.)

Therefore, trial counsel was ineffective for failing to object to the violation of the sequestration order and to develop the testimony surrounding the violation.

CONCLUSION

For all of the reasons stated above, this Court should grant Thomas's Petition for Writ of Certiorari to review the denial of his application for Post-Conviction Relief.

Respectfully submitted,

By:  _____

MATTHEW A. ABEE
Nelson Mullins Riley & Scarborough, LLP
South Carolina Bar Number 101100
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorney for Petitioner Randy Thomas

This 2nd day of July 2014.

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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G. Thomas Cooper, Circuit Court Judge

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Randy Thomas, Petitioner,
v.
State of South Carolina, Respondent.

Proof of Service

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Randy Thomas, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

REPLY OF PETITIONER

Counsel Served:

Megan Harrigan, Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Roxanne E. Daniel
Administrative Assistant

July 2, 2014

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.256.7500
www.nelsonmullins.com

Matthew A. Abec
Admitted in SC and NC
Tel: 803.255.9335
matt.abec@nelsonmullins.com

July 2, 2014

Hand Delivered

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Randy Thomas v. State of South Carolina
Appellate Case No.: 2013-001287
Our file no.: 38769/01510

Dear Mr. Shearouse:

Enclosed please find an original and seven copies of the Reply of the Petitioner in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving all interested parties.

Very truly yours,



Matthew A. Abec

MAA:rd
Enclosures
cc: Megan Harrigan, Esquire

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