ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Georgetown County

George C. James, Jr., Circuit Court Judge

STEVEN L. HEWITT JR.,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-002027

RETURN TO PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT

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ISSUES PRESENTED

I. Does the record support the PCR court's finding that trial counsel rendered ineffective assistance in derogation of the Sixth and Fourteenth Amendments by eliciting testimony about a prior molestation accusation against Respondent which could not be cured by the trial court's curative instruction?

II. Does the record support the PCR court's finding that trial counsel rendered ineffective assistance in violation of Respondent's rights pursuant to the Sixth and Fourteenth Amendments for eliciting testimony from a witness that she believed victim?

III. Does the record support the PCR court's finding that trial counsel rendered ineffective assistance in violation of Respondent's rights pursuant to the Sixth and Fourteenth Amendments by failing to elicit testimony from a witness that the victim recanted?

IV. Does the record support the PCR court's finding that trial counsel rendered ineffective assistance in violation of Respondent's rights pursuant to the Sixth and Fourteenth Amendments by failing to impeach the victim with his prior criminal record where the criminal charges were pending at the time the victim made the allegations and were his motive for making the allegations?

V. Does the record support the PCR court's finding that trial counsel was ineffective for eliciting testimony about the identity of the perpetrator from two witnesses who counseled victim concerning the alleged sexual assaults where the testimony exceeded the time and place exception to the rule against hearsay?

STATEMENT

On March 4, 2009, the Georgetown County grand jury indicted Respondent for criminal sexual conduct with a minor in the first degree (2009-GS-22-0302). App. 291-292. Months later, on November 4, 2009, the Georgetown County grand jury indicted Respondent for lewd act on a minor (2009-GS-22-1199). App. 288-289. The state, represented by Candice Lively, called the cases for trial before the Honorable Steven H. John and a jury on May 24, 2010. Verdell Barr represented Respondent. App. 1. The jury found Respondent guilty as charged. App. 277, ll. 18-25. Judge John sentenced Respondent to twenty-five years' imprisonment for criminal sexual conduct and to fifteen years' imprisonment for lewd act. He ordered the sentences to be served concurrently. App. 285, ll. 12-22; App. 290; App. 293. Respondent filed a timely notice of appeal, which was perfected by LaNelle C. Durant. On February 29, 2012, the Court of Appeals affirmed Respondent's convictions in an unpublished opinion. The Court found the issue raised was not preserved for appeal. State v. Hewitt, Op. No. 2012-UP-117 (S.C. Ct. App. filed Feb. 29, 2012).

On August 14, 2012, Respondent filed an application for post-conviction relief (PCR). App. 294-312. Respondent, represented by Tristan Shaffer, appeared before the Honorable George C. James on March 21, 2014 for an evidentiary hearing. Joshua L. Thomas represented Petitioner. App. 313. Trial counsel was deceased at the time of the hearing. App. 315, ll. 18-19. By an order filed on July 11, 2014, Judge James granted Respondent relief on five separate grounds. App. 388-402. By a motion dated July 18, 2014, Petitioner requested Judge James alter or amend the judgment. App. 403-406. By an order filed on August 13, 2014, Judge James denied the motion. App. 407.

Petitioner filed a notice of appeal. On April 6, 2015, Petitioner filed a petition for writ of certiorari. Respondent now files his return.

ARGUMENT

Introduction

The proper standard for appellate review of a PCR court's grant of relief is whether "any evidence of probative value" exists to sustain the PCR court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If any probative evidence exists to support the PCR court's decisions, the ruling *must* be upheld. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). The reviewing court must give great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). As will be discussed in greater detail infra, extensive evidence in the record supports the PCR court's order granting Respondent relief on *five* instances of ineffective assistance of trial counsel.

Petitioner argued this Court should grant certiorari "to correct the post-conviction relief judge's failure to indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Cert. pet. at 3. This argument has no merit as evidenced by the order demonstrating the court properly analyzed Respondent's claims. Thus, this Court should deny the petition for certiorari. Additionally, this Court should deny certiorari because Petitioner abandoned an alternative ruling on a ground for relief; thus, that ground is the law of the case.

All five of the claims presented involve Respondent's right to the ineffective assistance of trial counsel as guaranteed by the Sixth and Fourteenth Amendments; thus, the PCR court required Respondent to establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

I. The record supports the PCR court's finding that trial counsel rendered ineffective assistance in derogation of the Sixth and Fourteenth Amendments by eliciting testimony about a prior molestation accusation against Respondent, which could not be cured by the trial court's curative instruction.

Relevant facts

Trial facts

On August 8, 2008, Respondent's son ("victim") alleged that Respondent sexually abused him on two occasions in the fall of 2001, "when the leaves were turning," during overnight visits. App. 49, ll. 7-18; App. 51, ll. 6-14; App. 52, ll. 4-5; App. 54, ll. 5-15; App. 103, ll. 6-8; App. 114, ll. 21-24; App. 116, ll. 12-17. Two years later, when victim was sixteen-years old, Respondent was tried by a jury. App. 1; App. 101, ll. 16-17. The prosecution presented victim as its main witness. There was no physical evidence to support the accusations. App. 42, ll. 23-24. The only evidence to corroborate victim's testimony were the claims of three witnesses that he had disclosed the abuse to them and that he was exhibiting "classic" symptoms of someone who was sexually abused. App. 65, l. 23 – App. 66, l. 23; App. 91, ll. 17-20; App. 160, l. 3 – App. 161, l. 14. Respondent testified in his defense denying the accusations and proving to the jury that he was in jail from September 11, 2001 until November 9, 2001 when he was released to the custody of his mother in Andrews; thus, eliminating the possibility that he could have abused victim during that timeframe. App. 205, l. 24 – App. 206, l. 3; App. 207, l. 19 – App. 208, l. 23.

In his defense, Respondent called his sister, Renee Howard, to testify. App. 181, ll. 23-25. Howard recalled victim visiting at her grandmother's, where Respondent lived, "a few times." App. 182, l. 23 – App. 183, l. 3. She "never recalled [victim] staying the night." App. 183, ll. 4-8. After Howard testified that Respondent was never accused of "inappropriate touching" while growing up, trial counsel asked, "Do you have any knowledge of him ever being actually accused other than this incidence of being a pedophile, touching children, anything like that?" App. 186, ll. 6-18. Howard

responded, "I think he was accused of for his daughter but it was thrown out because they said there wasn't enough evidence. They, I don't think they did a trial but they investigated." App. 186, ll. 19-22. When asked who made the complaint, Howard stated she believed Respondent's wife did. App. 186, l. 23 – App. 187, l. 2.

The solicitor seized on this evidence during cross-examination by asking the witness if she were aware of the allegation that Respondent had molested his four-year old daughter and if she were aware that the case did not proceed to trial because "the child was ... too young to testify." App. 190, l. 18 – App. 191, l. 3.

When Respondent was testifying, the solicitor asked him repeatedly if he had "threatened anybody in regards to coming to court and testifying." App. 214, ll. 13-19. During the discussion of the solicitor's improper questioning, the solicitor indicated she had a witness who claimed Respondent asked him to testify that Respondent's wife had lied about what happened to daughter and that victim was lying also at the direction of wife. App. 216, ll. 9-23.

To this, Judge John noted that Respondent denied that he was claiming that wife was directing victim's accusations. Further, he explained that he expected an objection when the allegations of prior abuse "first came up" because that evidence had "absolutely nothing to do with this case." He noted the solicitor's questions indicating that Respondent had committed a crime by threatening a witness had compounded the prejudicial error. App. 216, l. 24 – App. 217, l. 8. When the testimony about the accusations by daughter was presented, he "expected somebody to do their job and object at that point in time." App. 217, ll. 14-25. Thereafter, Judge John considered whether to grant a mistrial sua sponte based on the egregious errors. App. 218, ll. 2-6.

Judge John refused to grant a mistrial finding "[a] defense witness introduced into this case a matter totally unrelated to this prosecution, a matter that should never have been raised in this

courtroom at all, and that was the issue about minor daughter of the defendant and any alleged actions by him when the child was two to three." Although the information was prejudicial and irrelevant, Judge John explained he would not grant a mistrial because "[a] defendant cannot cause, and the court cannot allow a defendant to cause a mistrial based on its own actions, and he is responsible, a defendant is responsible for the actions of his witnesses and his attorney." App. 224, ll. 5-17. Despite determining that a mistrial was not in order, Judge John found that a curative instruction was required. App. 225, ll. 5-18; App. 233, ll. 8-12; App. 226, l. 3 – App. 229, l. 14.

PCR hearing

During the PCR hearing, Respondent testified that he never discussed a defense strategy with trial counsel. App. 336, ll. 1-2. Further, Respondent never consented to trial counsel introducing evidence of the allegations of prior abuse. In fact, Respondent never informed trial counsel of the prior allegations – Respondent's sister did. App. 338, l. 20 – App. 339, l. 8; App. 347, ll. 16-18. Renee Howard also testified at the PCR hearing. She admitted that she told trial counsel about the prior allegations of abuse against Respondent when she met with trial counsel in the courthouse conference room "right before trial." Trial counsel told her to "bring up the fact that there was a prior accusation" of sexual abuse by Respondent's daughter during her testimony at trial. App. 356, ll. 12-20.

Order granting relief

Concerning this allegation, the PCR court accepted the state's argument that trial counsel introduced the prior allegations of abuse to establish that Respondent's wife had prompted false molestation charges before and was doing so again as part of some strategy. The PCR judge found "counsel's implementation of this strategy fell below accepted professional norms" because "there was no substance to the strategy and no effective preparation for its proper implementation. App.

391. The judge noted that such a strategy was incongruous with the evidence presented where Respondent testified that his previously contentious relationship with his wife had "cooled down" over the last five years, which would have encompassed when victim made the allegations of abuse, and that Respondent was not suggesting to the jury that wife had put victim up to making false allegations in the present case. App. 391-392.

Although the PCR court found trial counsel was not ineffective for failing to object to the curative instruction, the PCR court held "any prejudice brought upon [Respondent] by his own attorney was not sufficiently cured by the judge's instruction that the evidence be disregarded." App. 394. The court explained "[t]he evidence that [Respondent] had been accused of sexual abuse perpetrated upon another child of his was simply too inflammatory." Further, the court noted that the evidence of guilt was not overwhelming. App. 394. Thus, the PCR judge found trial counsel was ineffective for eliciting the damaging testimony where there was no valid reason for employing the supposed strategy suggested by the state, and the judge's curative instruction had not removed the prejudice.

Discussion

In this criminal sexual conduct case involving Respondent's son, who was seven years old at the time of the alleged abuse, trial counsel's introduction of evidence that Respondent had been accused of sexually assaulting his four-year old daughter, was prejudicial deficient performance where the only evidence against Respondent was the vague and contradictory testimony of victim. The accusation of prior sexual abuse provided the jury with propensity evidence to use against Respondent.

South Carolina's rules and case law make it clear that the prior allegations by daughter would not have been admissible at Respondent's trial. The South Carolina Rules of Evidence

and case law preclude the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) identity, (3) a common scheme or plan, (4) the absence of mistake or accident, or (5) intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In order to introduce evidence of some other act by the defendant under one of the exceptions, the prosecutor must lay a proper foundation and the act must be proven by clear and convincing evidence that the defendant committed the other act, if the defendant was not convicted of the act. State v. Wesley Smith, 391 S.C. 353, 361, 705 S.E.2d 491,495 (2011)(citing State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b), SCRE. Id. (citing State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)). This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404(b), SCRE, exceptions. Id. If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)). The state would have been unable to satisfy these requirements; therefore, the evidence would have been inadmissible had the state tried to introduce it.

Although the evidence elicited by trial counsel did not concern a prior conviction, this state's jurisprudence in that area is instructive. In Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), this Court found trial counsel ineffective for failing to argue the prejudicial effect of the defendant's prior convictions outweighed their probative value. At Green's trial for distribution of crack cocaine and distribution of crack cocaine within proximity of a school, the prosecutor

impeached Green with two prior convictions of possession of crack cocaine and possession of cocaine. Id. at 431, 527 S.E.2d at 100. Declining to hold that all similar prior convictions are inadmissible, this Court held that trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine in their discretion whether to admit the evidence. Id. at 433-434, 527 S.E.2d at 101. This Court held the trial counsel's failure prejudiced Green where his credibility was critical because the jury was forced to choose between his version of events and those expressed by SLED agents. Id. at 434, 527 S.E.2d at 101. Rejecting the state's argument that any error was cured by the trial court's limiting instruction, this Court found persuasive authority in a Fourth Circuit Court of Appeals case:

> Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that the defendant committed the similar offense for which he is currently charged.

Id. at 434, 527 S.E.2d at 101 (quoting United States v. Beahm, 664 F.2d 414, 418-419 (4th Cir. 1981)).

Confronted with a case similar to Respondent's, the Washington Court of Appeals found trial counsel ineffective for eliciting on direct examination the defendant's prior conviction for possession of methamphetamine. State v. Saunders, 958 P.2d 364 (Wash. Ct. App. 1998). At trial, the prosecution maintained that methamphetamine found in a wallet in a car in which the defendant was driving belonged to the defendant. Id. at 366. However, the defense argued that the possession was unwitting as the defendant was a mechanic who had just finished working on the vehicle and was test driving it when he was stopped by police. Id. at 366. During the defendant's direct examination, his counsel asked if he had any prior convictions for similar offenses. The defendant answered that he had been convicted of possession of methamphetamine previously. Id. The

Washington Court of Appeals ruled evidence of the prior conviction would have been ruled inadmissible if challenged, in light of the state's evidentiary rules, which are similar to South Carolina's. Id. On this point, the Washington Court of Appeals noted "[e]vidence of a prior conviction is inherently prejudicial when the defendant is the witness because it shifts the jury's focus from the merits of the charge to the defendant's general propensity for criminality." Further, "greater prejudice may result from the nature of the conviction; the more similar the prior crime to the one presently charged, the greater the prejudice." Id. at 367. Turning to the prejudice prong, the court found that the evidence against the defendant was not overwhelming and the defense was plausible. Thus, the court found a reasonable probability that the outcome would have been different but for the introduction of the defendant's prior conviction existed. Id.

Petitioner relies upon the all-encompassing and ubiquitous defense of "trial strategy" to explain away trial counsel's obvious failures. Despite the wide range of conduct forgiven by a reasonable and valid trial strategy, the record below demonstrates a case in which no valid and reasonable trial strategy could support trial counsel's conduct. If trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). This Court found counsel deficient in Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002) for failing to object to the state's vouching for the credibility of a witness where counsel stated he decided not to object based upon a strategy, but never articulated that strategy. In Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002), this Court determined trial counsel's reason for not objecting to an officer's hearsay testimony of the alleged assault on a child victim, which was that the testimony would help show the allegations were vague, was unreasonable because the hearsay corroborated the victim's testimony.

Trial counsel's supposed strategy of claiming victim's mother put him up to making the allegations just as she had done with daughter was not objectively reasonable. The strategy was incongruous with the evidence presented and could only serve to harm Respondent – particularly, when the solicitor's questioning of the witnesses indicated the charge was not prosecuted due to the child's age, not because the accusations were unsupported. Respondent testified that he was not suggesting that wife was behind the allegations; thus, trial counsel's alleged strategy of blaming wife was contrary to what Respondent understood the strategy to be – a denial of the charges – and Respondent's own understanding of how the charges arose. See McKnight v. State, 378 S.C. 33, 44, 661 S.E.2d 354, 359 (2008)(finding trial counsel did not employ a valid trial strategy when she called a single expert witness whose testimony undermined the defense strategy); Ingle v. State, 348 S.C. 467, 471, 560 S.E.2d 401, 403 (2002)(finding counsel ineffective for calling a witness whose testimony contradicted the defense theory).

The egregiousness of trial counsel's error was readily apparent to the trial judge. He entertained a motion for mistrial sua sponte – something almost unheard of among trial judges. The record supports a conclusion that the trial judge would have granted the mistrial except for the fact that the defense elicited the testimony. In fact, the judge issued a curative instruction concerning the evidence based upon how damaging the evidence was to Respondent's right to a fair trial and impartial jury. However, as the PCR court found, there was no way to cure this error because it "was simply too inflammatory." It must be noted that the evidence was presented "by his own attorney," giving the jury a reason to credit the reliability of the damaging evidence. App. 394. The evidence of Respondent being accused of a similar offense by wife did little to suggest wife was behind victim's allegation and "[t]he jury, despite limiting instructions,

can hardly avoid drawing the inference that the past conviction suggests some probability that the defendant committed the similar offense for which he is currently charged." See Green, 338 S.C. at 434, 527 S.E.2d at 101.

The record amply supports the PCR court's conclusions that trial counsel rendered ineffective assistance by eliciting testimony concerning prior accusations of child sexual abuse levied against Respondent by his daughter.

II. The record supports the PCR court's finding that trial counsel rendered ineffective assistance in violation of Respondent's rights pursuant to the Sixth and Fourteenth Amendments for eliciting testimony from a witness that she believed victim.

Relevant facts

Trial facts

The only direct evidence against Respondent was victim's testimony. Realizing the weakness of such a case, the state presented the testimony of others who claimed that Respondent had "disclosed" his allegations of sexual abuse to them. App. 65, l. 23 – App. 66, l. 23; App. 91, ll. 17-20; App. 160, l. 3 – App. 161, l. 14. One such witness was a school-based counselor named Patricia Brown. She began counseling victim in 2008 because he was exhibiting scholastic and behavioral problems at school. App. 89, l. 20 – App. 90, l. 14. One day, a teacher found a poem and a drawing in victim's possession. The poem was of a violent nature and the drawing showed a person crying. Concerned, the teacher referred the matter to the guidance counselor who referred it to Brown. When Brown confronted victim with the violent poem and drawing in February 2008, victim claimed that he had been sexually abused. App. 91, ll. 1-23; App. 93, ll. 11-18; App. 94, ll. 11-20; App. 127, ll. 6-10. Thereafter in April 2008, Brown referred victim to another counselor. App. 95, ll. 8-15.

On cross-examination, trial counsel asked Brown if she got a "specific feeling that this might have been an obviation and not necessarily the truth." Brown responded, "No, I didn't get that feeling from him." Undeterred, trial counsel asked again, "You didn't?" Brown responded, "No, I believe him, I believe what he said was true." App. 98, ll. 6-11. Thus, trial counsel elicited testimony from the counselor that she believed victim was being truthful when he alleged Respondent had sexually abused him.

During her closing argument, the solicitor emphasized, as she had in her opening statement, that the law does not require the state to prove corroboration of a victim's allegation of sexual abuse. App. 256, ll. 8-10.[1] However, she claimed she had corroboration in several forms. One form of corroboration was in victim's "disclosures" of sexual abuse, one of which was to Brown. App. 256, ll. 11-14. According to the solicitor, Brown had "nothing to gain by being here. She had to come away from her job to be here. She has no bias in this case." App. 257, ll. 15-17. Noting that victim did not give Brown any details of the alleged sexual abuse, the state argued the jury should believe the allegations because Brown did: "I told her I was molested. He didn't give her any other details but after the defense got up and questioned her he said after seeing those pictures and the poem do you think this may have been some ideation or something of a teenage kid, and she said it from that stand, no, I believe him." App. 258, ll. 11-16.

Order granting relief

The PCR judge recognized the definitive rulings by the appellate courts that "in child sex abuse cases, prosecutors are forbidden from having witnesses such as Ms. Brown vouch for the credibility of the victim." App. 395. The judge found "there was no valid trial strategy that was furthered by eliciting testimony that Ms. Brown believed the victim. The testimony would certainly not have been admissible if the state had tried to have it admitted." Further, the judge found Respondent had established prejudice because "[i]t was undeniable that the issue of the victim's credibility was of paramount importance in this case, and for trial counsel to elicit this testimony

[1] In her opening statement, the solicitor told the jury that the legislature did not make it impossible for her "in cases like these because they understand that children are our most vulnerable victims, so what our legislature has done to help me, to help victims of these type of crimes, is we actually have a statute that says if someone has been raped and violated it's not necessary for us to have corroborating evidence in order to prosecute the case." App. 42, ll. 2-8.

bolstering the victim's credibility was extremely prejudicial." The court noted this evidence was "devastating" to Respondent. App. 396.

Discussion

It has long been the law in South Carolina that one witness may not comment on the veracity of another witness. See State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015)(finding that a witness's recommendation that the defendant not be around the alleged victim for any reason "can only be interpreted as [the witness] believing victim's claim that [the defendant] sexually abused her and such testimony is improper); State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013)(noting that "though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others"); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011)(explaining that "[f]or an expert to comment on the veracity of a child's accusations of sexual abuse is improper"); Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998)(holding that it is improper to ask a witness "to comment on the truthfulness ... of an adverse witness"); State v. Dawkins, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989)(holding a prosecutor asked an improper question when the prosecutor asked if the witness believed another witness); State v. Sapps, 295 S.C. 484, 485-486, 369 S.E.2d 145, 145-146 (holding that asking the defendant if each of the other three witnesses were lying was improper); State v. Taylor, 404 S.C. 506, 514-515, 745 S.E.2d 124, 128 (Ct. App. 2013)(explaining that "[g]enerally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain the assessment of witness credibility within the exclusive province of the jury")(internal quotation omitted); State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)(explaining that witnesses are not allowed to testify whether another witness is telling the truth); State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011)(noting "[t]he

law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter); State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000)(holding a child sexual abuse counselor improperly vouched for a witness's credibility). See also, State v. Milbradt, 756 P.2d 620, 624 (Ore. 1988)(finding error where a psychotherapist rendered an opinion on a witness's credibility – "We have said before, and we will say it again, but this time with emphasis – we really mean it – *no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state.*").

As explained by the PCR judge, Respondent's case presented striking similarities to Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) where this Court found trial counsel failed to object to hearsay testimony that improperly corroborated the alleged victim of the criminal sexual conduct. A forensic interviewer testified that she found the alleged victim's testimony believable regarding the allegation of sexual abuse and testified the alleged victim had no reason not to be truthful. Id. at 564, 689 S.E.2d at 631. This Court held trial counsel was deficient for failing to object to the forensic interviewer's testimony. Id. at 568, 689 S.E.2d at 633. Further, this Court found trial counsel's deficient performance prejudiced Smith where "the outcome of the case hinged on the victim's credibility regarding identification of the perpetrator, and there was otherwise an absence of overwhelming evidence of Smith's guilty." Id. at 569, 689 S.E.2d at 633. See also Dawkins v. State, 346 S.C. 151, 156-157, 551 S.E.2d 260, 262-263 (2001)(holding trial counsel's deficient performance in failing to object to the testimony of multiple witnesses that the alleged victim identified Dawkins as the perpetrator in violation of the rule against hearsay was prejudicial because improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless and the testimony served only to bolster victim's credibility).

Trial counsel performed deficiently by eliciting testimony from Brown that she believed victim's allegation of sexual abuse by Respondent where the evidence was clearly inadmissible based on a long line of cases in South Carolina. This error prejudiced Respondent because the entire case boiled down to victim's credibility. See Strickland, supra. There was no other evidence against Respondent – just victim's word. Despite Petitioner's claim that the "solicitor did not attempt to use the imprimatur of Brown's belief of the victim's story to bolster the victim's credibility," the solicitor did just that. See Cert. pet. at 11. In her closing argument, the solicitor told the jury that she was not required to provide evidence to corroborate the victim's allegation, but she had such corroborating evidence in the form of the witnesses who testified that victim disclosed the sex abuse to them. App. 256, ll. 12-19. After remarking that Brown had "nothing to gain" by testifying, the solicitor informed the jury that Brown testified that she believed victim: "He didn't give her any other details but after the defense got up and questioned her he said after seeing those pictures and the poem do you think this may have been some ideation or something of a teenage kid, and she said it from that stand, no, I believe him." App. 258, ll. 11-16. Thus, the solicitor did use the improper testimony in closing to bolster, yet again, the credibility of the victim.

Petitioner admitted the evidence was inadmissible, but argued that trial counsel had a strategy for eliciting the testimony. Cert. pet. at 9-10. According to Petitioner, trial counsel "attempted to confront Brown with her delayed reporting in cross-examination, and asked the jury to presume the delay was because the victim's story was unbelievable." Cert. pet. at 10. This assessment belies what the record demonstrated to the PCR court – trial counsel asked Brown for her opinion on victim's credibility. He did not simply show there was a delay in reporting the incident to law enforcement or a delay in referring victim to a different counselor. Trial counsel's question permitted the witness to testify as to her opinion of the victim's veracity, which did not

further any alleged strategy to show that a delay in reporting was the equivalent of Brown not believing victim. The record amply supports the PCR court's findings and holdings on this issue.

III. The record supports the PCR court's finding that trial counsel rendered ineffective assistance in violation of Respondent's rights pursuant to the Sixth and Fourteenth Amendments by failing to elicit testimony from a witness that the victim recanted.

Relevant facts

Trial facts

During cross-examination, trial counsel asked if victim ever discussed the situation with his "Aunt Jerri Hewitt." App. 144, ll. 8-10. When victim indicated his confusion, trial counsel clarified that he was referring to Respondent's sister. App. 144, ll. 11-12. Upon hearing this clarification, victim responded, "She knows what happened, I've never told her details. I have not told a lot of people details. She does know that it happened and she knows that I was going to court and everything." App. 144, ll. 13-18. Trial counsel asked when victim discussed this with Respondent's sister, and victim responded that he was asked by Respondent's sister "if what he went to jail for was true" and victim told her "yeah." He further told her "it did happen." App. 144, l. 19 – App. 145, l. 5. Trial counsel asked no further questions of victim about conversations he had with Respondent's sister.

Trial counsel called Respondent's sister, Renee Howard, to testify. He asked no questions of her regarding her discussions with victim regarding the allegations. App. 180, l. 16 – App. 188, l. 20.

PCR hearing

At the PCR hearing, Howard testified that she told trial counsel that victim told her "it was not true, what they were accusing his father of." Despite Howard telling trial counsel that the jury needed to be informed of this critical information, trial counsel told her that "he couldn't bring it up, it was hearsay." App. 354, ll. 18-23. When she explained that victim told her that the accusations were false, trial counsel responded, "He'll just say no." App. 355, ll. 1-4. Without question, trial

counsel told her "not to bring up the fact that victim gave a different story" to her. App. 355, ll. 11-13. Further, Howard explained that she would have testified that victim admitted the allegations were false if trial counsel would have allowed her. App. 357, ll. 3-6. Howard explained that victim told her the allegations were not true soon after Respondent was arrested. App. 358, ll. 16-23.

Order granting relief

The PCR court found that it was clear that Howard's testimony that victim admitted he made false allegations against Respondent "would have been admissible under Rule 801(d)(1)(A), SCRE." Further, the PCR court explained "victim could have been cross-examined about the alleged statement as contemplated by Rule 613(b), SCRE, when he testified." The PCR court found Howard's testimony at the PCR hearing credible. Additionally, the court found "trial counsel was simply not aware of or had misinterpreted the relevant hearsay rules governing the admissibility of prior inconsistent statements." Not only was the evidence admissible, but the jury could have considered it as substantive evidence that the crimes did not occur. The PCR judge emphasized the centrality of victim's credibility to the state's case. Thus, the court concluded "[t]he absence of this admissible evidence was prejudicial to [Respondent], as there is a reasonable probability that the outcome of the trial would have been different if the evidence had been properly presented." App. 397.

Discussion

Petitioner admits that trial counsel was aware of victim's recantation to Respondent's sister. Cert. pet. at 12. Although Petitioner quotes case law explaining that trial counsel may have a strategic reason for not presenting evidence, Petitioner points to no reason for trial counsel's failure to elicit the prior inconsistent statement – an actual recantation – in this case. Instead, Petitioner simply argues that trial counsel was entitled to a presumption of competence. Cert. pet. at 12. Case

law and the rules support the PCR judge's determination that trial counsel rendered ineffective assistance by failing to present testimony from Howard that victim recanted his allegations of sexual abuse.

According to the South Carolina Rules of Evidence, a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony." Rule 801(d)(1), SCRE. Without question, Howard's testimony that victim told her that the sexual abuse never occurred would be a statement inconsistent with victim's testimony. Thus, per the Rule, it would not be considered hearsay, and would be admissible at the trial.

Further, the introduction of extrinsic evidence of prior inconsistent statements of a witness is permitted when

> the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness *does not admit* that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613, SCRE (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998)(finding error in failing to admit extrinsic evidence of a statement where the witness denied making the statement). A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

The Court of Appeals observed that "[i]n determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification." State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App.

2003)(citing State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) & C.J.S. Witnesses 727 (2002)). The Court explained that "[g]enerally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. Blalock, 357 S.C. at 80, 591 S.E.2d at 636.

> If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, or as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Id. (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Nothing short of an absolute unequivocal admission satisfies Rule 613(b). In Blalock, 357 S.C. at 80, 591 S.E.2d at 636, the Court of appeals held the witness's response to questions about her prior statement did "not meet the standard of a clear and unequivocal admission that the precedent case law demands." Acknowledging that the witness did "admit that she said the portion of the statement quoted" toward the end of the examination, the Court held such an admission was not sufficient because the witness was adamant throughout her testimony that the statement as recorded by the detective was incomplete. Id. at 81, 591 S.E.2d at 636.

Similarly, in State v. Carmack, 388 S.C. 190, 201-202, 694 S.E.2d 224, 230 (Ct. App. 2010), the Court of Appeals held that a prior inconsistent statement by a witness who said his prior statement was "'accurate,'" that "certain details were not in his original statement because such details were not inquired into at the time and 'everything was chaotic'" was admissible because the witness "did not unequivocally admit making a prior inconsistent statement." In State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010), the Court of Appeals held the trial court properly admitted a prior inconsistent statement by a witness who testified she "could not remember" having made the prior statement because such was "not an unequivocal admission."

Clearly, Howard's testimony was admissible to impeach victim's credibility, which was the state's entire case against Respondent. When trial counsel fails to present such testimony, ineffective assistance of counsel results. When trial counsel fails to impeach a witness with prior inconsistent statements, deficient performance that prejudices a defendant results. See Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097 (3d Cir. 1996) (trial counsel failed to impeach with inconsistent eyewitness identifications).

Driscoll was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach an alleged eyewitness who claimed he saw Driscoll stab the guard and that Driscoll confessed to the murder. Driscoll's attorney knew the witness had told police that he only spoke to Driscoll after the stabbing and that Driscoll had not claimed responsibility. Id. at 709-12. The centrality of the witness's testimony was an important factor in the court's consideration in finding the failure to impeach prejudicial. The court found the failure "was a breach with so much potential to infect other evidence, that without it, there is a reasonable probability that the jury would find reasonable doubt of Driscoll's guilt." Id.; See also Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998) (holding that defendant was prejudiced by trial counsel's failure to impeach a witness with a prior denial that a crime occurred); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009) (remanding case for prejudice inquiry because of trial counsel's failure to impeach police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

In Black v. State, 151 S.W.3d 49, 56 (Mo. 2004), trial counsel failed to impeach several witnesses regarding prior inconsistent statements that "related directly to the central issue of whether Mr. Black acted with deliberation or in a fit of rage or out of self-defense." The court found counsel's failure prejudiced Black because it went to the key issue of deliberation where

the record showed the jury was focused on that issue based on its note requesting further information on "cool reflection." Id.

The state's case was weak. Victim claimed he was sexually abused by Respondent in fall 2001 when the leaves were falling, but the undisputed evidence was that Respondent was in jail from the middle of September through the end of November of that year. Further, victim claimed the abuse occurred during an overnight visit. Respondent and Howard testified that victim never spent the night. Further weakening the state's case, victim did not tell anyone about the abuse for several years and his testimony was vague and contradictory regarding what actually transpired. There was simply no strategy that trial counsel could employ that would support trial counsel's failure to produce this evidence; perhaps, this is why Petitioner has offered none. The record amply supports the PCR court's findings and holdings.

IV. The record supports the PCR court's finding that trial counsel rendered ineffective assistance in violation of Respondent's rights pursuant to the Sixth and Fourteenth Amendments by failing to impeach the victim with his prior criminal record where the criminal charges were pending at the time the victim made the allegations and were his motive for making the allegations.

Relevant facts

Trial facts

Prior to victim testifying, the state moved to exclude cross-examination on his prior criminal history. App. 84, ll. 5-7. Victim was charged with assault and battery of a high and aggravated nature (ABHAN) on July 29, 2005, which was dismissed on March 14, 2009. App. 85, ll. 9-16; App. 86, ll. 14-16. Additionally, victim was charged with simple possession of marijuana on May 14, 2008, approximately two months before he disclosed the alleged sexual abuse to the police, and entered a guilty plea to the charge on June 3, 2009. App. 84, ll. 12-16. Trial counsel argued that he should be permitted to question victim about the convictions because the convictions were likely the result of some form of negotiated plea. App. 85, ll. 1-10. Citing Rule 609, SCRE, Judge John determined trial counsel could not question victim regarding his criminal record. App. 85, l. 20 – App. 86, l. 19.

The solicitor brought out that victim had been getting into trouble and that he had tried smoking pot allegedly "to try and get these things off [his] chest." However, the solicitor and victim told the jury that victim's "acting out" was a product of the abuse he suffered. App. 118, ll. 13-18; App. 123, ll. 4-8; App. 124, ll. 3-10; App. 147, l. 25 – App. 148, l. 6. Due to the judge's ruling and trial counsel's failure to argue the correct legal basis for admission, Respondent was unable to give the jury an alternative theory for victim getting into trouble and the abuse allegations.

During her closing argument, the solicitor argued victim had no reason to lie. She argued that victim had no contact to with Respondent; therefore, he was not making the allegations to get

away from him. App. 254, l. 14-17; App. 262, ll.1-5. The solicitor then explained that victim was "a great student, he's making A's throughout school," but there was something going on. App. 254, l. 17-23. She notes victim "started having problems in school, grades are dropping" around the time he makes the allegation of sexual abuse in fall of 2007 and 2008. App. 256, l. 24 – App. 254, l. 2. The solicitor, echoing McGrogan's testimony, told the jury that the sexual abuse, a traumatic event in his life, was causing him "to not be able to cope" as demonstrated by his "sleeplessness, nightmares, inability to focus, things like that." App. 259, ll. 5-11. According to the solicitor, the sexual abuse "consumed" victim causing stress, confusion and anger. App. 259, l. 12-17.

Vouching for victim's credibility, the solicitor argued, "You would have to believe that he put himself in this position for what reason and I would tell you that reason would be to tell the truth which is what he told you he did." App. 262, ll. 6-9. "It would be for him to be able to move on with his life, to be a man, to have a chance to not be different.... It doesn't make sense as to why anybody would do it." App. 262, ll. 9-15.

PCR hearing

During the PCR hearing, Respondent testified that victim told him that he made up the sexual abuse allegations "to get out of trouble." App. 348, ll. 10-13. Respondent was aware that victim had been charged with some criminal acts and "might be going away" based on information he received from his sister shortly before he was arrested based on victim's allegations of sexual abuse. App. 349, ll. 2-13.

Order granting relief

As noted by the PCR court, both charges were pending at the time victim made the abuse allegations against Respondent in 2008, but had been disposed of by the time of the May 2010 trial. App. 398. The PCR court found "there is no real doubt that the evidence was admissible under Rule

608(c)" to show bias, prejudice, or motive on the part of victim. Further, the PCR court found the "evidence would have survived a Rule 403 analysis." App. 398. According to the PCR court, victim was ten or eleven years old when he was charged with ABHAN and thirteen of fourteen when he was charged with drug possession. Those charges were pending against victim when he made the allegations of sexual abuse. "The same solicitor's office that was prosecuting these two charges was also prosecuting [Respondent]." App. 399. The charges served to demonstrate that victim "had a motive to fabricate the charges in order to ease any blame or punishment he may receive for the two charges against him." As such, the probative value was not outweighed by the danger of unfair prejudice. Thus, the PCR court found "[t]rial counsel's failure to pursue this avenue of admissibility fell below accepted professional norms, and if the evidence had been introduce, there is a reasonable probability the outcome of the trial would have been different." App. 399.

Additionally, the PCR court found the solicitor opened the door to the use of the evidence when victim testified that he had been getting into trouble and that he had smoked pot. App. 399. According to the PCR court, this testimony opened the door to cross-examining victim about the two pending charges and how the charges may have caused him to be upset with his life. "Trial counsel's failure to pursue this opening of the door fell short of the accepted professional norms, and prejudice resulted because there is a reasonable probability the outcome of the trial would have been different if the evidence had been introduced." App. 400.

Discussion

Petitioner conceded the PCR judge's legal analysis concerning Rule 608(c), SCRE, was "legally correct." Cert. pet. at 14.[2] Instead, petitioner argued that the PCR judge erred because he failed to "indulge a strong presumption trial counsel acted reasonably under the circumstances." Cert. pet. at 14. According to petitioner, the PCR judge "ignore[d] the possibility Judge John would have nevertheless ruled the conviction inadmissible" even if trial counsel argued the correct theory for admissibility. Cert. pet. at 14. This argument misses the point. Had trial counsel argued the proper legal theory and Judge John ruled against him, then the argument would have been preserved for appeal. As the record stood, the legal theory advanced by trial counsel, to the extent one existed, was not the proper legal theory to ensure admissibility of the evidence, as Petitioner conceded.[3]

As the PCR judge ruled, in the alternative, the prosecutor opened the door to the evidence of victim's prior criminal history and how those charges motivated his accusations. South Carolina

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[2] The correctness of the PCR judge's legal analysis cannot be questioned. The plain language of Rule 608(c), SCRE makes clear that evidence of bias, prejudice, or motive may be shown to impeach a witness. See also State v. Sims, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002)(holding that a defendant should have been allowed to cross examine a witness regarding criminal charges to expose possible bias and prejudice because there was a substantial possibility the witness would give biased testimony in order to highlight to his future judge how he cooperated); State v. Jones, 343 S.C. 562, 569, 541 S.E.2d 813, 817-818 (2001)(holding that a defendant was entitled to cross examine an alleged accomplice about past dealings between the accomplice and the prosecuting office to expose the accomplice's bias and prejudice); State v. McEachern, 399 S.C. 125, 140-141, 731 S.E.2d 604, 612 (Ct. App. 2012)(noting that proof of bias is almost always relevant because the jury must weigh the credibility of the witnesses).

[3] Petitioner argued the PCR judge failed to consider "the fact trial counsel might have chosen to not further argue with Judge John." Cert. pet. at 14. It is hard to conceive of a more egregious example of misconduct for a trial attorney to know of a proper legal theory to argue to ensure evidence is admitted or that the argument is preserved for appeal and yet fail to present the argument based upon some desire "to not further argue with" the trial judge. Further, the trial transcript revealed Judge John was receptive to any and all arguments by the parties before him and did not limit them in any way. There would have been no reason for trial counsel not to advance a winning argument.

law permits the introduction of otherwise inadmissible evidence when the opposing party opens the door to that evidence. State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004); State v. White, 361 S.C. 407, 415-416, 605 S.E.2d 540, 544 (2004); State v. Dunlap, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003); State v. Taylor, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998); State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990); State v. Doby, 273 S.C. 704, 710, 258 S.E.2d 896, 899-900 (1979); State v. Adcock, 194 S.C. 234, 234, 9 S.E.2d 730, 732 (1940); State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008). In State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984), our Supreme Court explained that opening the door occurs "[w]here one party introduces evidence as to a particular fact or transaction," which entitles the other party "to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially."

The prosecutor asked numerous questions relating to victim "acting out." The solicitor even brought out that victim had been getting into trouble and that he had tried smoking pot, allegedly to handle the abuse he suffered. During the testimony of Hope Smith, Brown, McGrogan, and victim, the solicitor engaged in lengthy discussions of victim's mental health, including his behavior, his scholastic performance, his diagnoses for ADHD and PTSD, and how victim was coping with the abuse he allegedly suffered. Without question, these discussions opened the door for Respondent to question victim about his prior criminal conduct as it was part and parcel of the behavior he was allegedly exhibiting.

Petitioner put forward no argument to support his contention that the PCR judge "also erred in finding trial counsel ineffective for failing to argue the state opened the door to the admission of the conviction." Cert. pet. at 15. "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not

presented for review." Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). In light of the state's abandonment of this issue, this ground becomes the law of the case. See Atlantic Coast Builders & Contractors, L.L.C. v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 285 (2012); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). This Court should deny certiorari because Petitioner failed to appeal this alternative ruling by abandoning it through the failure to present case law or argument, and therefore, it is the law of the case that trial counsel was ineffective in failing to argue the state opened the door to the admission of victim's prior charges.

The evidence of victim's prior charges occurring around the time he made his "disclosures" of alleged sexual abuse and the disposition of those charges before the trial was necessary to combat the solicitor's argument to the jury asking why would victim lie or fabricate the allegations of abuse. Repeatedly, the prosecutor told the jury that victim did not have a motive to lie about the allegations. Repeatedly, the prosecutor told the jury that victim's "acting out" was the product of him handling the abuse he allegedly suffered. Had the jury known of the evidence of victim's drug use and involvement with law enforcement around the time that he made the allegations, the jury could have answered those questions in a way helpful to Respondent. Victim's prior criminal record supported an argument that victim was claiming to have been abused in order to get out of trouble – very serious trouble. This would have been a clear motive to fabricate the story of alleged abuse. Further, victim's prior criminal record supported an argument that victim's mental health diagnoses and his "acting out" were not the result of childhood sexual abuse, but were the result of a rebellious teenager.

V. The record supports the PCR court's finding that trial counsel was ineffective for eliciting testimony about the identity of the perpetrator from two witnesses who counseled victim concerning the alleged sexual assaults where the testimony exceeded the time and place exception to the rule against hearsay.

Relevant facts

Trial facts

As mentioned, the only evidence against Respondent was the testimony of the alleged victim, who claimed Respondent abused him nine years before the trial, six years before he first disclosed the abuse, and seven years before he disclosed the abuse to law enforcement. The state used the testimony of the individuals to whom he "disclosed" to buttress its case – calling the testimony regarding the "disclosures" corroborative of victim's allegations. One of those individuals was Patricia Brown, the school-based counselor. On direct examination, Brown explained that victim disclosed to her that something happened to him as a child when he was around age seven. App. 91, ll. 17-25. The solicitor was careful to ensure Brown did not testify to "exactly everything that he disclosed." App. 91, ll. 17-19. Brown merely told the jury that victim said "something had occurred to him" at "[a]ge seven." App. 94, l. 24 – App. 95, l. 2. Frankly, the solicitor's line of questioning did not even relate to the jury that victim disclosed being sexually abused; rather, the questions were simply that "something had occurred" or "something that happened."

Despite the solicitor's narrow line of questioning, trial counsel asked questions on cross-examination that elicited testimony regarding whom the victim claimed was his abuser. Specifically, trial counsel asked Brown why she did not report the allegation of abuse in February 2008 when she learned of it. Brown responded, "Well at the time victim was, father wasn't in the home with him and he was just telling me what was going on with him." App. 97, ll. 7-14. Thus, Brown's testimony on cross-examination revealed the identity of the alleged perpetrator. Further,

this question allowed the solicitor to emphasize the testimony in re-direct. The solicitor remarked that Brown was not required to report the allegation to law enforcement unless she felt victim was "going home to a dangerous situation." Brown agreed and reiterated: "And that's why I say his father wasn't in the home with him at the time." App. 100, ll. 5-12.

A similar colloquy transpired with the state's "expert" in "sexual abuse trauma," Kathy McGrogan. On direct examination, the solicitor asked if victim had disclosed to her "a time and place of a particular event that had occurred in his childhood" that she found to be significant. App. 158, ll. 12-15. McGrogan responded that victim told her "that a traumatic event had occurred ... when he was around age seven to eight and that it occurred at his grandmother's house." App. 158, ll. 16-18. On cross-examination, trial counsel asked why McGrogan waited from April until August of 2008 to inform victim's mother of the allegations of abuse. McGrogan responded that victim told her that Respondent "was in jail" and that victim believed "father was in jail for that reason and it turned out that wasn't the reason." In other words, McGrogan believed the abuse had been reported and that Respondent had been arrested as a result. App. 168, l. 17 – App. 169, l. 17.

In her closing argument, the solicitor told the jury about the rules governing hearsay in criminal sexual conduct trials:

> The law restricts the state from being able to put in hearsay evidence about what victim specifically told her and there's a reason for that. We want to make sure in fairness to the defendant that all the evidence about exactly what happened comes out through the child. That's a big burden on that child but we accepted that. So each one of the witnesses who he disclosed to they're not supposed to tell you what he said. They can tell you the timing and the place that it occurred and each one of you, of them that got up and said what they were allowed to say told you, including Hope Smith, that it happened when he was around seven years old at his Grandma Reddick's house.

App. 254, l. 24 – App. 255, l. 13. Further, the solicitor reminded the jury that McGrogan told them "an interesting fact. She said I thought he was already in jail for this and it had been adjudicated, he

being the defendant." App. 259, ll. 22-24. The solicitor also argued the counselors – McGrogan and Brown – had no duty to report the allegations "unless they felt like a child is in danger or going home to a perpetrator." App. 260, ll. 8-10.

Order granting relief

The PCR judge found that while "it was likely apparent to the jury that the victim told these witnesses that [Respondent] was the perpetrator, case law and Rule 801(d)(1)(D) clearly stand for the proposition that corroborating witnesses may only testify as to time and place factors, and may not testify that the victim identified the defendant as the perpetrator." App. 400. The PCR court found that "McGrogan directly implicated [Respondent] as the perpetrator named by the victim." App. 400. Further, the PCR court found "[t]here was no trial strategy that could have been furthered" by trial counsel eliciting this testimony or asking the judge to strike the testimony from the record. Thus, the PCR court granted relief. Additionally, the PCR court stated "[c]oupled with the other errors noted herein, the failure to object to this evidence was prejudicial to [Respondent]." App. 401.

Discussion

All criminal defendants are entitled to a fair trial. U.S. Const. Amend. VI; S.C. Const. Art. 1, § 14. The Rules of Evidence are designed to ensure a fair trial occurs. One of the most important Rules of Evidence concerns the rule against hearsay; however, many exceptions to hearsay exist. A statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony 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." SCRE 801(d)(1)(D). This Court made clear the necessity of the statement remaining limited to time and place of the alleged incident. Jolly v. State,

314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). If the statement goes beyond time and place, then it is hearsay and in order to be admissible, it must fall within one of the exceptions to the general rule against hearsay. State v. Burroughs, 328 S.C. 489, 497, 492 S.E.2d 408, 412 (Ct. App. 1997)(citing Rule 802, SCRE).

In Jolly, 314 S.C. at 19, 443 S.E.2d at 568, this Court found trial counsel provided ineffective assistance by failing to object to testimony by an uncle that the alleged child victim told the uncle that Jolly had abused her. Trial counsel had objected to a social worker testifying that the alleged victim made a prior statement that Jolly had abused her, but failed to object to the uncle's testimony. Id. On direct appeal, Jolly challenged the trial judge's decision to allow the social worker to testify to the hearsay statement. No decision was made as to the error of the ruling because no objection had been made to the uncle's testimony making the social worker's testimony cumulative to the uncle's testimony and the alleged victim's testimony. Id. This Court reiterated the rule that in criminal sexual conduct cases, evidence from other witnesses that the alleged victim complained of a sexual assault is admissible in corroboration limited to the time and place of the assault and excluding details or particulars. Id. at 20, 443 S.E.2d at 568. This Court went on to hold that "[i]mproper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Id. at 21, 443 S.E.2d at 569 (emphasis in original). Thus, this Court held that had the uncle's testimony been properly objected, the appellate court would not have held the social worker's testimony was harmless and the outcome of the direct appeal would have been different. Id.

The testimony by Brown and McGrogan, which was improperly elicited by trial counsel, went beyond time and place because the witnesses indicated victim identified Respondent as his

perpetrator. The testimony was clearly inadmissible as hearsay and did not fall into any of the recognized exceptions. The state's argument that trial counsel elicited the testimony as part of a strategy to show the excuse for not reporting the disclosure was not believable and is undermined by the record. The reason for not reporting the disclosure necessarily required identification of Respondent as the perpetrator and was believable. Further, the reason for not reporting the disclosure revealed to the jury that Respondent was in jail on other charges; thereby implicating him in other crimes. There was simply no strategy helpful to Respondent that could have been furthered by eliciting this testimony. See Sanchez, 351 S.C. at 276, 569 S.E.2d at 366 (2002)(holding trial counsel's reason for not objecting to an officer's hearsay testimony of the alleged assault on a child victim, which was that the testimony would help show the allegations were vague, was unreasonable because the hearsay corroborated the victim's testimony); Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002)(finding trial counsel ineffective for eliciting and failing to object to hearsay testimony by an expert witness and a police officer identifying Ingle as the perpetrator).

Petitioner's argument that "the state could have easily elicited testimony about the particulars of victim's disclosure because Respondent's defense was that the victim fabricated the allegation" is misleading and misconstrues the case law cited to support the proposition. In State v. Jeffcoat, 350 S.C. 392, 396, 565 S.E.2d 321, 323 (Ct. App. 2002), the Court of Appeals held the witnesses were permitted to go beyond the time and place limitation because the prior consistent statement was being offered to rebut an express or implied charge of recent fabrication or improper influence or motive pursuant to Rule 801(d)(1)(B), SCRE. Although Respondent's position was that the abuse never occurred and by implication victim must be fabricating his story, Respondent did not allege "recent fabrication or improper influence or motive" as the Rule

requires. Instead, Respondent's theory was that victim had made up the story from the very beginning – not recently.

Trial counsel's questioning of Brown and McGrogan was particularly harmful in light of the very limited testimony elicited by the solicitor during her direct examination of these witnesses. The solicitor's colloquy with the witnesses merely revealed that victim had disclosed that "something had occurred" or "something that happened." While it would not take too great of a leap for the jurors to conclude that "something" referred to the sexual abuse as testified to by victim, the jurors received no direct evidence from Brown and McGrogan that victim had indeed disclosed sexual abuse instead of some other form of trauma. By eliciting this testimony from Brown and McGrogan, trial counsel buttressed the state's case and gave further credibility to victim's claims of sexual abuse. This is the exact opposite of what a defense attorney is supposed to do. Clearly, as the PCR judge found, trial counsel's conduct fell below professional norms and was prejudicial to Respondent.

CONCLUSION

Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 21st day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

George C. James, Jr., Circuit Court Judge

STEVEN L. HEWITT JR.,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Joshua L. Thomas, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Steven Lee Hewitt #303283, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 21st day of August, 2015.

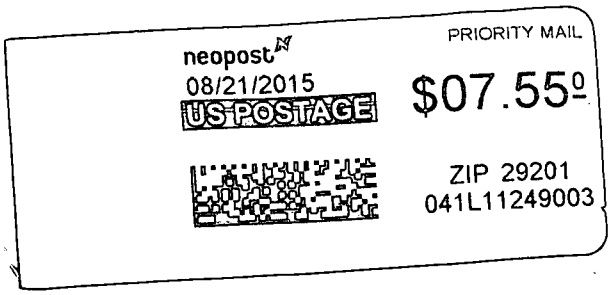
Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 21st day
of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.



South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

CONFIDENTIAL LEGAL MAIL

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