STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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AUG 24 2015

S.C. Supreme Court

Appeal from Dillon County
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2014-002401

Jeffrey Caulder, No. 336973.....Appellant,

v.

State of South Carolina.....Respondent.

AMENDED PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

The applicant was indicted on three counts of Unlawful Neglect of a Child, in violation of S.C. Code Ann. Section 63-5-70 (Supp. 2008). The victims were Minor One, age eight, Minor Two, age ten; and Minor Three, age 12 at the time of trial, which took place September 14, 2009. The Hon. J. Michael Baxley presided at trial. The applicant was represented by Rosalind Sellers, Esquire.

The state's testimony consisted of the three young children (who were the applicant's stepchildren), the arresting officer, the children's mother, and two counselors, one the director of the local forensic interview center. The applicant did not testify in his own defense, nor did he present any witnesses in his defense.

The applicant was convicted on all three charges, and was sentenced by Judge Baxley on September 19, 2009 to ten years on each count, to run consecutive.

The applicant timely served notice of appeal and was represented on appeal by Robert M. Pachak, Deputy Appellate Defender, who filed a brief pursuant to *Anders v. California*, 386 U.S. 738(1967). The South Carolina Court of Appeals affirmed the conviction and sentence in an unpublished opinion, No. 2011-UP 223, filed May 18, 2011.

The applicant filed his application for post-conviction relief on April 10th, 2012. He subsequently amended his application, serving it on the Office of the Attorney General on January 10th, 2014.

The applicant appeared with his counsel. The sole witness in the proceedings was the applicant's former trial counsel, Rosalind Sellers. After considering the evidence and testimony, this court concluded that the applicant was not entitled to relief.

I. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE TESTIMONY OF THE INVESTIGATING OFFICER THAT THE APPLICANT WAS GUILTY.

a. The expression of an opinion as to the applicant's guilt by the investigating officer was irrelevant and prejudicial.

The investigating officer from the Dillon County Sheriff's Department was Randolph Tyler. On direct examination by the prosecution, the state elicited from him three times that he had "probable cause" to arrest the applicant. [App. pp. 157; 158; 160.] Defense counsel also elicited from the investigating officer that he had "probable cause" to make the arrest. [App. p. 162.] He then testified in response to her question that "based on what the [forensic interview center] stated, I believe that there was probable cause that they had committed this crime." [App. p. 163, l. 7-9.] Defense counsel then elicited from the investigating officer that he had gone to the grand jury and sworn under oath that he believed that the applicant had committed the offenses. [App. p. 166, l. 19-26.]

Finally, on redirect examination by the state, the investigating officer was permitted to testify, without objection, that the Durant Center, the forensic interview center, were "experts" in what happened to children and that he took their recommendations "very seriously."

> ...when they say they believe that this has occurred, I'm not an expert in that field. I'm not a counselor with children. I don't have the training to do that, so I rely very heavily on places like the Durant Center to determine if a crime has been committed, which is what I did in this case.

[App. p. 167, l. 19-25.] In response to the next question by the prosecutor, he testified, "I determined that child abuse had been committed by both Ms. Miller and the [applicant] here." [App. p. 168, l. 2-3.]

In *S.C.D.S.S. v. Lisa C.*, 380 S.C. 406, 669 S.E.2d 647 (Ct.App. 2008), the court of appeals addressed this same kind of testimony, and found it not only irrelevant, but "highly

prejudicial," in a civil child protection proceeding. *Id*, 380 S.C. at 417, 669 S.E.2d at 653. The mode of trial there was a bench trial. Here, the fact-finder was a jury, where the potential for prejudice was even greater.

Moreover, the investigating officer finally gave a direct opinion on the ultimate issue – the guilt of the applicant. It is improper and highly prejudicial for an expert to give an opinion in a criminal trial that the defendant is guilty. *See, e.g. State v. Odom*, 116 N.J. 65, 79, 560 A.2d 1198, 1205 (1989); *Smith v. State*, 674 So.2d 791 (Fla.Dist.Ct.App. 5th Dist. 1996). Clearly it would be irrelevant and highly prejudicial for the investigating police officer to give such an opinion. *See*, *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001), where a police officer's opinion on the ultimate issue of the defendant's claim of self-defense was improper. *Cf.*, *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), where the investigating officer merely testified as to what investigative actions he took in response to an interview with a young child abuse victim.

The testimony of the investigating officer was irrelevant and highly prejudicial to the applicant.

b. Trial counsel's performance fell below the standard of care and was prejudicial to the applicant.

In order for the applicant to obtain relief on post-conviction due to the ineffective assistance of counsel, he must show (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) prejudice, that is to say, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Dawkins v. State*, 346 S.C. 151, 155-156, 551 S.E.2d 260, 262 (2001), citing *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Brown v. State,* 340 S.C. 590, 533 S.E.2d 308 (2000).

Trial in this case took place on September 14th, 2009. *S.C.D.S.S. v. Lisa C., supra*, was decided by the South Carolina Court of Appeals on October 30th, 2008, nearly a year before trial in this case. Hence, trial counsel is charged with knowing the law of this case. Trial counsel therefore fell below the standard of care in failing to object to the testimony of the officer. Indeed, she elicited improper repetition of the testimony in her cross-examination of the investigator.

Trial counsel explained at the post-conviction hearing that her strategy consisted in part of an attempt to impeach the thoroughness of the police investigation. [App. p. 65.] Instead, however, her questions on cross-examination not only elicited the investigator's "probable cause" to arrest Mr. Caulder, he was able to double-down on it in redirect examination. [App. pp. 167-168.]

The failure of trial counsel to object to this testimony, compounding it with her elicitation of the prejudicial testimony, was not harmless. *See*, *State v. Ellis*, 345 S.C., 178, 547 S.E.2d 490 (2001)(a police officer's improper opinion which goes to the heart of the case is not harmless.) Furthermore, there was no physical evidence of physical abuse or injury to any of the three children introduced at trial. The case against the applicant depended solely on whether the three children, along with their mother, were to be believed. As such, improper corroboration of such evidence which is merely cumulative cannot be harmless beyond a reasonable doubt. *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), citing *State v. Ellis, supra*, and *Dawkins v. State, supra*. While the PCR court found that the officer had not given testimony about his opinion of the applicant's guilt, that is most assuredly what the officer did. [App. p. 10.]

Hence, counsel's ineffective performance was prejudicial to the applicant.

II. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE TESTIMONY OF THE EXPERTS ATTESTING TO THE CREDIBILITY OF THE CHILD WITNESSES.

a. The testimony of the experts vouching for the credibility of the child victims was inadmissible.

Krystal D. Tuck, the director of the Durant Center, was qualified as an expert in forensic interviewing without objection. In response to questioning by the prosecutor, she testified that the symptoms exhibited by the children were "consistent" with the applicant being the perpetrator of child abuse and moreover, the symptoms were inconsistent with a child who was not being truthful. [App. p. 399, l 1-8.] (While her testimony was somewhat ambiguous, it is clear from the context that this is the testimony which was elicited.) She also testified that there was no evidence the children had inflated their stories. [App. p. 419, l. 10-14.]

Gaye Allen-Cook was the therapist for the children, a licensed counselor. She was permitted to testify, without objection, that Minor Three's "symptoms" were not consistent with a child who was lying, nor had he inflated his version of events. [App. p. 434, l. 13-21.] She also allowed that the child had named no one other than the applicant as the perpetrator of the harm. *Id.* Rather incredibly, she further testified in response to questioning by trial counsel that she had never had a child under her care lie about being abused or make up stories. [App. p. 440, l.20 – p. 441, l. 1.]

It has long been the law of this state that a counselor or therapist cannot render an opinion as to whether a child, or any witness for that matter, is credible.

> "'We have said before, and we will say it again, this time with emphasis – *no psychotherapist may render an opinion on whether a witness is credible in any trial in this state.* The assessment of credibility is for the trier of fact and not for psychotherapists.'"

State v. Morgan, 326 S.C. 503, 514, 485 S.E.2d 112 (Ct.App.1997), citing *State v. Milbradt*, 305 Ore. 621, 756 P.2d 620, 624 (1988), emphasis in the original. (*Rev'd on other grounds* in *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). See also, *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct.App. 2000).

While other witnesses may be employed to corroborate testimony of child abuse victims, this testimony is limited to the time and place of the assault. *See*, *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). Testimony regarding the victim's identification of the perpetrator does not fall within the hearsay exception. *Id.*

Here, the therapists were not only permitted to comment on the veracity of the children, they were also called upon to corroborate the identity of the perpetrator. Such testimony is inadmissible. While the PCR court found that their testimony about the emotional or mental condition was relevant to the elements of the crime charged – potential harm to the children's mental health – their testimony vouching for the children's veracity was nevertheless inadmissible.

b. Trial counsel's performance fell below the standard of care and was prejudicial to the applicant.

As discussed above, the entire case against the applicant depended upon the believability of the three children, and their mother. There was no physical evidence of child abuse or maltreatment – no medical records, no photographs or recordings, nor any documentary evidence. Hence, the testimony of the two professional witnesses was cumulative.

Moreover, the prosecutor relied on the testimony of these two witnesses regarding the identity of the perpetrator in his closing argument, without objection by trial counsel. [App. p. 467, l. 7-9.]

As has been held in *State v. Jennings*, *supra*, such improper corroborative testimony can never be harmless beyond a reasonable doubt, and trial counsel was ineffective for failing to challenge this evidence. Moreover, such a failure could not amount to a valid trial strategy. *See*, *Dawkins v. State*, *supra*, 346 S.C. 157, 551 S.E.2d 263, where the improper corroboration of a victim's allegation of sexual abuse by several witnesses had a "devastating impact" on the petitioner's trial and counsel's failure to object because he did not want to confuse or upset the jury did not constitute a valid defense strategy. Trial counsel was therefore ineffective in failing to challenge this testimony.

III. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE INTRODUCTION OF EVIDENCE PLACING THE APPLICANT'S CHARACTER IN ISSUE AT TRIAL.

a. The prosecution impermissibly put the character of the accused in issue.

At trial, the prosecutor asked the following question of Minor Three:

"How do you feel about Jeffrey?"

Minor Three's answer:

"I think – what I think about Jeffrey is...I think to him the character we will always be to me is really – I don't think Jeffrey has a heart. I think that he doesn't care about no one but himself, and I don't think he ever will. I think he hates the whole world."

[App. p. 269, l. 13-19.]

The prosecutor later argued this same assertion in his closing:

"[Minor Three] said he doesn't think Jeffrey has a heart. And what about this, when [Minor Three] said, parents are supposed to have a firm hand and loving heart. That came by a twelve year old, a twelve year old who for years lived with a mother and a mother's boyfriend, who had a very abusive hand and a hateful heart."

[App. p. 474, l. 14-19.]

To begin with, questions about the victim's "feelings" about the accused are rarely, if ever, going to elicit relevant, admissible evidence. *See*, *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240 (2001). Such a question can only invite error, if not an objection.

Here, the applicant did not take the stand, and hence could not put his character in issue, at all. *See*, Rule 608, South Carolina Rules of Evidence. Nor did the applicant offer evidence of his character, inviting rebuttal from the prosecution. Rule 404(a)(1), South Carolina Rules of Evidence.

Instead, the prosecution clearly invited comment by the youngster on the character of the accused, then argued it to the jury. This was error.

The rules circumscribing the use of character evidence are grounded on the policy that such evidence in inadmissible to prove "that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." *State v. Nelson*, 331 S.C. 1, 6, 501 S.E.2d 716, 718-719 (1998)(internal citation omitted).

The only possible reason for eliciting this evidence was to prove that the accused here had a bad character; it was not introduced as proof of motive or state of mind, nor any other limited purpose. *See, e.g., State v. Coleman*, 301 S.C. 57, 389 S.E.2d 659 (1990), where admission of the defendant's social use of cocaine had no purpose other than to demonstrate his bad character and social irresponsibility. Moreover, the PCR court does not address this issue, merely passing instead on whether in general the testimony of the children was part of the *res gestae* of the crime alleged. *See*, Order Denying Relief at App. p. 11

The introduction of such evidence is subject to a harmless error analysis. *See*, *State v. Richardson*, 358 S.C. 586, 595 S.E.2d 858 (Ct.App. 2004), where improper character evidence was cumulative to other evidence introduced at trial and therefore harmless error. Because the prosecution relied on the young boy's assertion about the applicant's character in closing, this court cannot conclude that the reliance by the state on character evidence to prove the applicant's guilt was harmless beyond a reasonable doubt.

b. The failure of trial counsel to object to this evidence prejudiced the applicant.

Trial counsel was ineffective in failing to object to this evidence, and the prosecutor's use of the statement at trial. The prosecutor's use of the child's assertion was not a passing reference; instead the prosecutor relied on it as evidence of the applicant's guilt. The introduction and use of this testimony was not merely cumulative; while the three children and their mother testified, the entire case rested on the credibility of their testimony and not

corroborative evidence. *Cf.*, *Geter v. State*, 305 S.C. 365, 409 S.E.2d 344 (1991), where the testimony of victims of child sexual abuse was corroborated by medical evidence.

Counsel's failure to object to the introduction and argument of this impermissible attack on the applicant's character prejudiced the defendant, because there is a reasonable likelihood the outcome of the trial would have been different absent this evidence.

IV. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE COURT'S INSTRUCTION ON REASONABLE DOUBT.

a. The trial court's instruction to the jury on the meaning and application of reasonable doubt was contrary to the law of this state.

This Supreme Court has set forth suggested instructions on the meaning of reasonable doubt in *State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991). There, this court suggested that a trial court instructing a jury on reasonable doubt go no further than to define a reasonable doubt as the kind of doubt which would cause a reasonable person to hesitate to act. The instructions are not mandatory, however. *State v. Johnson*, 315 S.C. 485, 445 S.E.2d 637 (1994). A failure to strictly adhere to the suggested instruction is not fatal. *Todd v. State*, 355 S.C. 396, 585 S.E.2d 305 (2003). Instructions to the jury on reasonable doubt must be examined in their entirety. *Id.*

The trial court's charge to the jury on reasonable doubt is in the record at App. pp. 500 – 501. In charging the jury, the trial court judge employed the recommended language of *Manning*, but went further:

> A reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. If you have a doubt for which you can assign or give a reason as to the guilt of the defendant... then the defendant is not guilty.

The trial court prefaced this charge with an attempted explanation of what did not constitute a "reasonable doubt:"

> It is not an imaginary or fanciful doubt; it is a substantial doubt. It is a doubt that the words imply. A doubt for which you can assign or give a reason based on the evidence and testimony in this case. A reasonable doubt is not any sort of a doubt. You and I know from every day experiences that we may have any

> sort of a doubt about anything. What tie to wear to some event, or what pair of shoes to wear to some event, that is not a reasonable doubt.

While the instruction does not employ the terms "moral certainty," or "search for the truth" which was the offending language in *Manning* warned about, it does utilize the language which undermines the meaning of reasonable doubt by requiring that it be "substantial," and a doubt which requires some explanation by the defendant, thereby shifting the burden of proof. *See*, *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998), and its discussion of the permissible and impermissible language employed to define "reasonable doubt" for a jury.

The trial court compounded its error by following its explanation by saying that whether a jury engages in a full and free discussion of the issue of guilt or not did not automatically mean that reasonable doubt "existed in this case, or any other case for that matter." Coupled with language requiring an honest, sincere, conscientious juror, rather than a reasonable person, the clear inference is that the state's burden of proof is vitiated.

The comment by the court comes dangerously close to a charge on the facts. Irrespective of that difficulty, however, the comment has the effect of minimizing the gravity of the burden of proof the state must carry to convict. This instruction, coupled with the others, could only confuse or mislead a jury. *State v. Leonard*, 292 S.C. 133, 355 S.E.2d 270 (1987).

The charge to the jury on reasonable doubt, taken as a whole, was defective.

b. The failure of trial counsel to object to the instruction was prejudicial to the defendant.

The case against the applicant consisted solely of testimony by the victims and their mother. There was no corroborative evidence, as has been discussed.

The instructions, taken as a whole, with the fatal language employing substantial doubt, a "conscientious juror," and minimizing the existence of doubt in a full and free discussion could

only have the effect of "vitiating all of the jury's findings." *State v. Jeffries*, 316 S.C. 13, 446 S.E.2d 427, 432 (1994), citing *Sullivan v. Louisiana*, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Therefore, the erroneous instruction was not harmless, and the applicant was prejudiced by its charge to the jury. *Id.* 113 S.Ct. at 2082, 124 L.Ed.2d at 190.

CONCLUSION

For the forgoing reasons, the petition for certiorari should be granted for complete review of all four questions presented here.

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By: 
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August 24th, 2015

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

Counsel certifies he has served the foregoing amended petition for certiorari and appendix on all parties by delivering a copy of the same to counsel for the respondent at the address below, on this 24th day of August, 2015:

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August 24th, 2015

HAND DELIVERED

Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina

RE: Jeffrey Caulder v. State
Appeal No. 2014-002401

Dear Honorable Clerk:

Enclosed please find the original and six copies of the amended petition for certiorari in this post-conviction relief case together with two copies of the appendix. The latter has also been amended, consistent with the order of the court entered August 13th, 2015 requiring redaction pursuant to the rules of this court.

The amended petition also redacts the names of the children involved in the prosecution, and corrects typographical errors.

By copy of this letter I am serving the office of the Attorney General with the amended petition and redacted appendix. Please let me know if you need anything further to complete filing of the petition and appendix.

Sincerely,

John D. (Jay) Elliott

JDE:

Encl.

cc: Joshua Thomas, Esquire
Assistant Attorney General