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ISSUE PRESENTED

Whether trial counsel was ineffective because, after the State failed to present any evidence regarding one of the elements of lewd act, she moved for directed verdict thereby allowing the State to reopen its case, instead of waiting until the end of the trial when the trial judge would have lacked discretion to allow new evidence to be introduced?

STATEMENT

On July 21, 2011, a York County grand jury indicted petitioner for lewd act upon a child. App. 214. On January 11, 2012, petitioner was tried before the Honorable John C. Hayes, III, and a jury. App. 1. Erin Joyner represented the State. App. 1. Melissa A. Inzerillo represented petitioner. App. 1. The jury convicted petitioner. App. 164, l. 17 – 165, l. 7. Judge Hayes sentenced petitioner to fifteen years' imprisonment. App. 168, ll. 1 – 4. On October 16, 2013, the Court of Appeals dismissed petitioner's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Clarkson, No. 2013-UP-390 (S.C. Ct. App. Oct. 16, 2013).

On February 11, 2014, petitioner filed a PCR application. App. 169. On November 17, 2014, the Honorable Allison R. Lee held a hearing on petitioner's application. App. 183. W. Michael Hemlepp represented petitioner. App. 183. J. Rutledge Johnson represented the State. App. 183. On May 27, 2015, Judge Lee denied petitioner's application. App. 208. This petition follows.

ARGUMENT

Trial counsel was ineffective because, after the State failed to present any evidence regarding one of the elements of lewd act, she moved for directed verdict thereby allowing the State to reopen its case, instead of waiting until the end of the trial when the trial judge would have lacked discretion to allow new evidence to be introduced.

After the State rested, trial counsel moved for a directed verdict. App. 128, l. 20 – 129, l. 15. Trial counsel only made a general motion for directed verdict and stated no specific grounds. App. 129, ll. 13 – 15. Judge Hayes denied trial counsel’s motion. App. 129, ll. 16 – 22. The trial judge then conducted an examination of petitioner regarding his right to testify. App. 129, l. 23 – 133, l. 6. Judge Hayes indicated his intention to meet with the attorneys in chambers regarding the jury charge. App. 132, ll. 4 – 10. Court then recessed for lunch. App. 133, ll. 7 – 8.

When court resumed after lunch, trial counsel renewed her motion for directed verdict. App. 133, ll. 12 – 21. Trial counsel stated she “neglected to make the motion under—or request for a directed verdict for the lack of testimony as to the element of the defendant’s age, being over the age of 14.” App. 133, ll. 16 – 21. She further stated that this more specific argument should be incorporated into her directed verdict motion. App. 133, ll. 16 – 21.

The State immediately moved “to reopen its case just based on that fact alone.” App. 133, ll. 23 – 24. Judge Hayes immediately ruled that he would allow the State to reopen its case. App. 133, l. 25 – 134, l. 5. Trial counsel offered no argument that the State should not be allowed to reopen its case. App. 133, l. 23 – 134, l. 5. The jury returned and the State called Detective Fred Moore, who testified that petitioner was fifty-three years old at the time of the alleged crime. App. 133, ll. 16 – 25. Other than a general renewal of all previous motions, trial

counsel made no further specific arguments regarding the directed verdict or the court's decision to allow the State to reopen its case. App. 165, l. 25 – 166, l. 1.

At the PCR hearing, trial counsel explained that during her initial motion for directed verdict, she “didn’t catch” that the State had missed an element of the crime. App. 197, ll. 20 – 25. She testified that in chambers during the lunch break, she raised the subject of renewing her directed verdict motion with Judge Hayes because she was concerned it would be disallowed as untimely. App. 198, ll. 1 – 21. Judge Hayes indicated his inclination to allow the State to reopen its case if she made the motion. App. 198, ll. 1 – 21. Trial counsel explained that she made the motion despite the trial judge's indication in an attempt to preserve the issue for petitioner's appeal. App. 198, ll. 9 – 21. Trial counsel admitted that had she not renewed the motion and waited until a motion for new trial, she would have been in a much stronger position to argue that the State failed to prove a required element. App. 199, l. 11 – 200, l. 4.

Petitioner argued at the PCR hearing that trial counsel's general motion for a directed verdict was sufficient. App. 202, l. 17 – 203, l. 25. By renewing the motion with the knowledge that the State would be allowed to reopen its case, trial counsel negated her supposed strategy of preserving the issue for appeal. App. 202, l. 17 – 203, l. 25. Had the State not reopened the case, on appeal petitioner would have been able to successfully argue that the State did not prove his age and petitioner was entitled to a directed verdict. App. 202, l. 17 – 203, l. 25. Finding that trial counsel's actions were “a judgment call,” the PCR court denied relief. App. 210-11.

The PCR court erred. Trial counsel had already preserved the directed verdict issue for appeal. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603

S.E.2d 910, 912 – 13 (Ct. App. 2004). Trial counsel moved for directed verdict—the only basis of which is insufficiency of the evidence. App. 129, ll. 13 – 15. The trial court denied trial counsel’s motion. App. 129, ll. 16 – 22. The trial judge ruled there was “ample evidence from which the jury could reach the conclusion that the State’s case has been proven.” App. 129, ll. 16 – 22. This ruling preserved the directed verdict issue and, on appeal, petitioner could have raised the lack of evidence regarding his age.

Essentially, trial counsel “de-preserved” the directed verdict issue by raising it again when she knew the trial judge would allow the State to cure the defect in its evidence. Had trial counsel waited until after closing arguments or the verdict, the trial judge would not have been able to allow the State to reopen its case. While the decision whether to allow a party to reopen its case is within the trial court’s discretion, the cases discussing this issue all deal with a request after the party has rested, but **before** argument and charge. See State v. Green, 350 S.C. 580, 586, 567 S.E.2d 505, 508-09 (Ct. App. 2002) (indicating State was allowed to reopen its case after defendant moved for directed verdict); State v. Humphery, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981) (indicating State was allowed to reopen its case after defendant moved for directed verdict); State v. Harrison, 236 S.C. 246,251, 113 S.E.2d 783, 785 (1960) (“There is a further exception to the effect that after the close of the testimony, the Court erred in permitting the State to reopen the case and prove that the prosecutrix was unmarried.”). In none of the above-cited cases affirming a trial judge’s decision to allow the State to reopen a case did that decision come after argument and charge. Because trial counsel had already made a directed verdict motion which was denied, this would not constitute “sandbagging” an issue.

Trial counsel’s knowing transformation of a preserved winning appellate issue into a non-winning issue constitutes ineffective assistance of counsel. See McHam v. State, 404 S.C. 465,

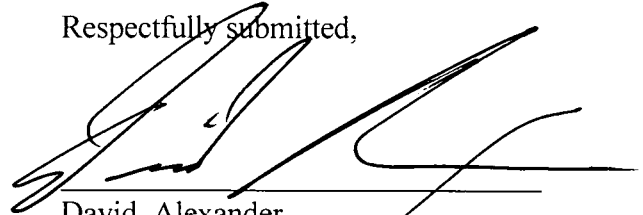
474, 746 S.E.2d 41, 46 (2013) (holding that failure to preserve an issue for appeal constitutes ineffective assistance of counsel). Petitioner was prejudiced because he would have won his appeal. See Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (holding that to prove prejudice, a PCR applicant must prove it is probable that the outcome of the trial would have been different). “In all criminal prosecutions, the government must prove beyond a reasonable doubt every element of a charged offense.” State v. Odom, 412 S.C. 253, 267, 772 S.E.2d 149, 156 (2015) (internal quotations omitted). In Odom, the Court acknowledged the rule that the jury may consider the defendant’s appearance in determining his age, but that there must be some other evidence in conjunction with the defendant’s appearance. *Id. citing* State v. Lauritsen, 261 N.W.2d 755, 757 (1978).

In this case, the only other evidence regarding petitioner’s age was an offhand estimation by Minor of the age of someone other than petitioner. App. 86, l. 19 – 87, l. 9. Minor was asked whether somebody else came over to the house and Minor answered that a male who was younger than petitioner arrived. App. 86, l. 19 – 87, l. 9. Minor **guessed** at this person’s age as “Twenties, **maybe.**” App. 86, l. 19 – 87, l. 9 (emphasis added). Minor’s mere guess at the age of another person does not satisfy the rule in Odom and had trial counsel not eliminated the directed verdict issue by giving the State the opportunity to reopen its case, petitioner would have prevailed on appeal. For the foregoing reasons, petitioner’s conviction should be reversed. Because the remedy from petitioner’s appeal but for trial counsel’s ineffective assistance would have been a judgment of acquittal, no new trial should be ordered.

CONCLUSION

For the foregoing reasons, petitioner's conviction should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of January, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
ALISON RENEE LEE, CIRCUIT COURT JUDGE

EDWARD MARTIN CLARKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001354

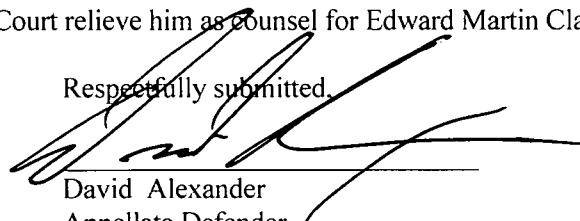
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Edward Martin Clarkson states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on November 17, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Edward Martin Clarkson.

Respectfully submitted,



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of January, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Alison Renee Lee, Circuit Court Judge

EDWARD MARTIN CLARKSON, PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO. 2015-001354

CERTIFICATE OF SERVICE

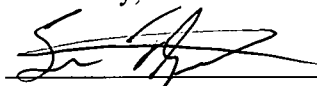
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Edward Martin Clarkson, #237856, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 20th day of January, 2016.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of January, 2016.



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