ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Roger E. Henderson, Circuit Court Judge

KEITH GADSDEN

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002180

PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether, in a child sexual abuse case based on a twenty-three (23) year old allegation, trial counsel's deficient performance in failing to preserve for appeal an objection to the testimony of Dr. Don Elsey, testifying as an expert in "childhood sexual abuse," prejudiced petitioner and violated his Sixth Amendment right to the effective assistance of counsel?

STATEMENT

On June 7, 2010, a Charleston County grand jury indicted petitioner for first degree criminal sexual conduct with a minor. App. 391. On April 9, petitioner was tried before the Honorable Roger M. Young, Sr. and a jury. App. 1. Elizabeth Gordon represented the State. App. 1. Melissa Gay represented petitioner. App. 1. The jury convicted petitioner. App. 291, ll. 16 – 23. Judge Young sentenced petitioner to thirty years' imprisonment. App. 296, ll. 15 – 20. On appeal, Susan B. Hackett represented petitioner and William M. Blitch, Jr. represented the State. App. 336. The Court of Appeals affirmed petitioner's conviction, holding that the issue raised was not preserved. App. 336-37.

On April 22, 2014, petitioner filed a PCR application. App. 338. On July 20, 2015, a hearing was held before the Honorable Roger E. Henderson. App. 350. Rodney D. Davis represented petitioner. App. 350. J. Rutledge Johnson represented the State. App. 350. On September 23, 2015, Judge Henderson denied petitioner's PCR application. App. 383. This petition for certiorari follows.

ARGUMENT

In a child sexual abuse case based on a twenty-three (23) year old allegation, trial counsel's deficient performance in failing to preserve for appeal an objection to the testimony of Dr. Don Elsey, who testified as an expert in "childhood sexual abuse," prejudiced petitioner and violated his Sixth Amendment right to the effective assistance of counsel.

Factual Background

In 2009, **twenty-three years after the fact**, the complainant accused petitioner of sexually abusing him sometime in the mid-1980s. App. 392. The indictment—issued in 2010—alleged the single instance of abuse occurred "between January 1, 1985 and December 31, 1987." App. 391. The abuse supposedly happened while petitioner worked for a Charleston recreation center. App. 74, l. 1 – App. 78, l. 18. According to complainant, petitioner was his basketball coach. App. 74, ll. 1 – 5. Complainant was "[b]etween the ages of seven and eight." App. 74, ll. 6 – 8. He claimed he was sitting on his front porch by himself, petitioner drove up, asked him if he wanted to start on the basketball team, drove him to the recreation center, and anally raped him in the bathroom. App.74, l. 9 – 80, l. 4. Complainant admitted he told no one about this supposed rape from the time of its occurrence in the mid-1980s until 2009. App. 81, l. 1 – 82, l. 11.

Petitioner testified and denied assaulting complainant. App. 239, l. 25 – 240, l. 3. Petitioner did not even start working at the recreation center until 1987. App. 216, ll. 21 – 24. Another employee who worked at the recreation center in the mid-1980s testified that petitioner did not begin working there until 1987. App. 184, l. 5 – 186, l. 19. Petitioner testified that he did not have a team to coach during his first year. App. 217, ll. 19 – 24. Petitioner did not get keys to the building until the early 1990s. App. 219, ll. 1 – 18. Petitioner did not even have a car at the time of the alleged assault. App. 219, ll. 19 – 23. The recreation center employee corroborated petitioner's

testimony on all of these points. App. 192, l. 22 – 194, l. 25 (**no team**); App. 192, ll. 16 – 21 (**no keys**); App. 190, ll. 8 – 191, l. 1 (**no car**). Complainant's allegations were so old that the recreation center's employment records had been destroyed. App. 240, ll. 16 – 21. Complainant also filed a lawsuit in federal court against one of his own witnesses who worked for the city, petitioner, and the City of Charleston. App. 129, ll. 17 – 24.

Complainant made these allegations shortly after a dispute with his stepson, Tarik Robinson ("Robinson"). Robinson testified for the defense and lived with petitioner at the time of the trial. App. 204, l. 22 – 205, l. 2. Robinson had been "best friends" with petitioner's son since middle school. App. 205, ll. 3 – 13. Complainant testified that he did not know any of his stepson's friends. App. 101, ll. 12 – 14.

In October 2008, Robinson and complainant got into an argument and Robinson left and stayed at petitioner's house and subsequently with a cousin. App. 210, ll. 3 – 22. At the time, Robinson got checks from social security. App. 202, ll. 4 – 13. Robinson's mother was the payee. App. 202, ll. 17 – 18. Robinson's cousin helped him change the payee to his own name. App. 202, l. 21 – 204, l. 11.

By July 2009, complainant involved the police in an attempt to entice petitioner into confessing in a recorded conversation. App. 64, l. 2 – 67, l. 13. The recording was admitted into evidence and played for the jury. App. 95, ll. 4 – 5. Petitioner explained that the conversation on the tape concerned Robinson and an instance of corporal punishment. App. 230, l. 22 – 233, l. 5. Petitioner denied that any of the conversation on the tape concerned anything of a sexual nature. App. 230, l. 22 – 233, l. 5.

Dr. Elsey's Testimony

Complainant testified that he did not report the assault because of how his family would react and that he was embarrassed. App. 81, ll. 1 – 21. He also testified that he was afraid people would think he was gay. App. 82, ll. 1 – 3. Complainant said the assault made him have mood swings, affected his employment, and made him question his "gender sometimes." App. 96, l. 24 – 97, l. 22.

Dovetailing with complainant's testimony, the State called Dr. Donald Elsey ("Elsey") as an expert "in the field of childhood sexual abuse." App. 172, ll. 10 – 18. Earlier in the trial, petitioner's lawyer objected to Elsey's testimony; however, when Elsey was offered as an expert, trial counsel stated she had no objection. App. 172, ll. 16 – 18. Petitioner raised the issue of Elsey's testimony on appeal. App. 302. The State strenuously argued that the failure to contemporaneously object failed to preserve any issue related to Elsey's testimony. App. 324-26. The Court of Appeals agreed in a summary unpublished affirmance, citing two cases about the need to make contemporaneous objections. App. 336-37.

Elsey testified generally about "delayed disclosure" and studies indicating a delay "of a year or two." App. 173, ll. 2 – 23. He then testified about his anecdotal experience of running "a group for men at our center." App. 173, l. 24 – 174, l. 4. Elsey stated, "I always ask how long between the event happening and you telling someone, and the average, in my group, is 27 years. That's just my group." App. 173, l. 24 – 174, l. 2. The solicitor then asked, "Are these peer reviewed?" and Elsey responded, "Yes, ma'am." App. 174, ll. 3 – 4.

Elsey's testimony about how sexual abuse affects men matched complainant's testimony. App. 175, ll. 3 – 12. Elsey told the jury:

> Also for boys it's different because most of the time people that hurt kids are men, and for a little boy to be sexually hurt by an older man, it's confusing because

their private part might feel good when this is happening, so they wonder does this mean I'm gay or not gay?

We clearly educate kids this has nothing to do with gay. It's inappropriate, whoever hurts you, but for a little boy, it can be devastating think [sic] this might mean something about their sexuality.

App. 175, ll. 3 – 12.

Straying from the topic of delayed disclosure, Elsey testified about "grooming." App. 175, l. 13 – 176, l. 6. The solicitor asked:

Q. If I gave you a hypothetical, would the promise of being a starter on the basketball team, would that be considered grooming or would that be considered something else?

A. In and of itself, that might be a nice thing, but if it's leading to something more, then it's really part of the grooming process.

App. 176, ll. 9 – 15. The State rested after Elsey's testimony. App. 177, l. 23.

Discussion

Petitioner proved deficient performance because trial counsel failed to preserve the issue of Elsey's testimony for appeal. Strickland v. Washington, 466 U.S. 668 (1984). The failure to preserve an issue for appeal constitutes ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475-76, 746 S.E.2d 41, 46-47 (2013). Just as in petitioner's case, in McHam, trial counsel failed to make a contemporaneous objection after losing a motion in limine. Id. The McHam Court held that trial counsel's performance was deficient. Id. Just as in McHam, trial counsel's failure to preserve this issue for appeal constitutes deficient performance. See Mangal v. State, 415 S.C. 310, 781 S.E.2d 732, 736-37 (Ct. App. 2015) (finding trial counsel ineffective for failing to object to improper bolstering testimony from a doctor in a sexual abuse case). The State's preservation argument in the direct appeal and the Court of Appeals' opinion demonstrate that trial counsel failed to preserve this issue.

The PCR court based its ruling solely on the prejudice prong of Strickland. App. 386-88. The court relied on State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) to determine that Elsey's testimony was properly admitted. The court's reliance on Brown was error. In State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) and State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), this Court emphasized that the testimony of experts such as Elsey must meet the reliability test of State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). In Chavis, despite testimony regarding the expert's "extensive experience and training," the Court found there was insufficient evidence to demonstrate that the expert's testimony was reliable. Chavis at 106-07, 771 S.E.2d at 338-39. See also Commonwealth v. McCaffrey, 633 N.E.2d 1062 (Mass. Ct. App. 1994); Mitchell v. Commonwealth, 777 S.W2d 930 (Ky. 1989). Elsey's anecdote about the twenty-seven years it took men to report abuse is not reliable. This anecdote was especially prejudicial because of the extreme age of complainant's allegations.

As in Anderson, Elsey bolstered the credibility of complainant's twenty-three year old allegations through technique. The State tailored Elsey's testimony about supposedly general characteristics of abuse to the specific allegations made by complainant. Matching complainant's allegation, Elsey testified about how the members of his "men's group" waited an average of twenty-seven years before reporting abuse. App. 173, l. 24 – 174, l. 2. He also bolstered complainant's testimony that he was embarrassed and worried about being seen as gay. App. 175, ll. 3 – 12. In Anderson, the Court held that the expert "vouched for the minor when she testified only to those characteristics which she observed in the minor." Anderson at 219, 776 S.E.2d at 79.

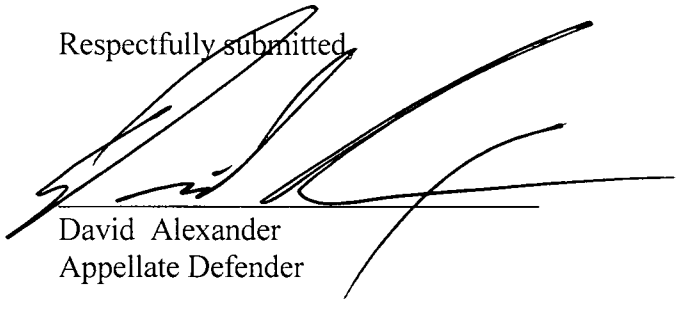
This case contained no physical evidence and was a swearing match between complainant and petitioner. Petitioner was forced to defend himself against an ancient allegation

of abuse. He had no prior record. App. 181, ll. 17 – 18. As the Anderson Court noted, when the case turns solely on the credibility of the accuser and the accused, bolstering errors are extremely prejudicial. Id. at 219-20, 776 S.E.2d at 79-80. The PCR court erred in holding that petitioner was not prejudiced by trial counsel's deficient performance. This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's conviction and ordering a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of March, 2016.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Keith Gadsden, #350463, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of March, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of March, 2016.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.