THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Edgefield County
Court of Common Pleas
William P. Keesley, Circuit Court Judge

Opinion No. 2015-UP-174 (S.C. Ct. App. filed April 1, 2015)

Appellate Case No. 2015-001342

TOMMY S. ADAMS, #311901 Respondent,

v.

STATE OF SOUTH CAROLINA Petitioner.

PETITION FOR REHEARING

Respondent, Tommy S. Adams, through the undersigned counsel hereby petitions the Court for rehearing due to this Court's factual and legal errors in its per curiam opinion reversing the decision of the Court of Appeals.

Specifically, the Court of Appeals held that Adams' statement to the alleged victim that "Your cooter belongs to your daddy, and if anybody wants to touch that or bother that, you need to tell them to ask me," App. 67, was inadmissible character evidence in Adams' trial for lewd acts on a child and criminal sexual conduct with a minor (1st degree). This Court held, however, that this statement was relevant because the "statement could be

interpreted, and was interpreted by the solicitor, as circumstantial evidence of Adams' control over and sexual use of the victim."

In reaching this conclusion, however, this Court has overlooked the pertinent context of Adams' statement to the alleged victim and the context in which it arose in the investigation of the charges against Adams. The incident report from the police detective that included this information in her testimony reveals the exact context.

> We told [Adams] of the allegations of child sexual abuse of [AW]. Tommy Adams denied any sexual contact. He did stated [sic] he talks openly about sex with the older children. He is referring to [AW], [CA], and [TJ]. [CA] and [TJ] are his children by a prior marriage. He said he had said things like [TA] his 7 year old already had boobs. He was speaking of breasts. Mr. Adams stated he'd tell the kids don't have sex until you are married and your cooter belongs to your daddy. If they want to touch you tell him to ask me first. He was talking about [AW] vagina. Mr. Tommy Adams denied any sexual contact.

App. 402.[1] Admission of discussing abstinence and sex education with his children is a far cry from any discussion or admission of "control over and sexual use of the victim." That

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[1] The evidence in the PCR hearing corroborates the fact that Adams' statement was made only in the context of a "sex education" discussion with his children. Both of his sons testified that they were present, along with the alleged victim and her mother, when Adams made the statement in question.

> [W]e were discussing the birds and the bees story as some people put it, and it was taken out of context the way that he said it. He didn't mean it as it was his. It was that if anybody was to come to date [AW] or anything like that, that she was supposed to come to him and ask him because he was her father, just like he would do the same with us.

App. 289-90.

> Daddy was having a talk to us about sex because Daddy had taken me and [TJ] to work with him one day and I had found a condom and I didn't know what it was, and he told us that he would sit us down and talk to us about it, and we all sat down in the living room and talked about it.
>
> And when he said that, he was saying it because he doesn't want people to harm [AW]. He didn't want other men to just take control of her. He was protecting her as he was protecting all of us.

App. 293.

was simply not the context nor the intent. Nor is that what the solicitor argued when he told the jury that this statement showed "what's in his heart, malice." App. 134-135. *See also* App. 138 ("That's his attitude. That's his true colors . . . .").

Adams' statement is inadmissible just as the defendant's general statement about being "uncomfortable around adult women" and having "fantasies about children" were inadmissible in *State v. Nelson*, 331 S.C. 1, 15, 501 S.E.2d 716, 723 (1998). In *Nelson*, the statement showed the defendant's "general sexual attitudes [and] were not relevant or material to the crime charged because they were admitted to show character." 331 S.C. at 15, 501 S.E.2d at 724. Here, Adams' statement does not even show "general sexual attitudes." Moreover, this was not a statement that Adams made to the alleged victim during the alleged crimes as part of the *res gestae*.[2] *Cf. State v. Gilmore*, 396 S.C. 72, 82-84, 719 S.E.2d 688, 693-94 (Ct. App. 2011). Nor was it a "confession to the specific crime charged" or a statement "intended to convey to the officer that he had committed the sexual assault on the victim." *State v. Tufts*, 355 S.C. 493, 498-99, 585 S.E.2d 523, 526 (Ct. App. 2003). It was simply an irrelevant statement taken completely out of context and urged by the state as evidence of Adams' character and "attitude." App. 138.

Moreover, this Court held that "counsel articulated a reasonable trial strategy for not objecting because he expected Adams to testify that the statement was made during a conversation in which he was advising the victim not to let anyone touch her inappropriately." Again, this Court misperceives the facts because counsel did not even

[2] Indeed, the state did not even offer evidence of the statement through the alleged victim.

purport to have a strategic reason for the failure to object.

> I didn't think it was objectionable. It was a statement of the accused. I think both sides get to interpret its meaning as they choose. The jury ultimately has to make that decision.

App. 336. While counsel gave further testimony that he thought this evidence could be explained in anticipated testimony from Adams and that objecting before the jury could raise a "red flag to the jury," App. 336-37, the bottom line is that he simply did not view the evidence as objectionable.[3] He conceded, however, that he would have preferred to keep the evidence out if possible, App. 345, and that the statement was a "[c]onfession of nothing," App. 344. He also conceded in his testimony that if the evidence was objectionable, "[a]s to whether or not it could be a strategic choice to allow it in, I would generally say no." App. 378. Specifically, he conceded that if Adams' statements were not admissible and were "detrimental," his failure to object "well may warrant . . . a new trial." App. 378.

Furthermore, counsel's testimony that he expected Adams to testify completely lacks credibility. Adams testified in the PCR hearing that he did not testify because counsel advised him not to. His family members corroborated this testimony. Specifically, Adams testified that counsel had advised him prior to trial that he did not want him to testify. App. 321. Likewise, Adams, his ex-wife, and his three children from this prior marriage, all testified that counsel told Adams at a recess that he would not call him to testify because he thought Adams would get upset and get "red" in the face. App. 286, 291, 295, 299-300,

[3] Even assuming counsel did not object to avoid raising a "red flag" before the jury, counsel's conduct would still be deficient because this issue could have been litigated outside the presence of the jury. *See, e.g., Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001); *Vail v. State*, 402 S.C. 77, 88-89, 738 S.E.2d 503, 509-10 (Ct. App. 2013).

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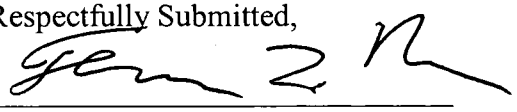
Counsel, on the other hand, testified: "[I]t certainly was my intention and understanding that Mr. Adams was always going to testify in the case." App. 334. *See also* App. 332. He expressed being "somewhat surprised that he made the decision not to testify, even though I felt that the State's case was weak." App. 334. Counsel acknowledged, however, that he would never respond to a client's question when asked, "What should I do?" App. 338. Likewise, he has never advised a client that "you should not testify," or "you should testify." App. 351. "I never tell them, 'I'm advising you to do this or that.' . . . I don't do that." App. 352. "I don't tell them my opinion . . . ." App. 353. "I'm not going to tell any client that, . . . 'In my opinion, you shouldn't testify.'" App. 355. No exception is made, even if the client is mentally retarded or has a low IQ. App. 354. Thus, even if counsel's testimony is to be believed, by counsel's own testimony he never actually advised Adams to testify.

Conclusion

Wherefore, for the foregoing reasons, Adams requests this Court to grant rehearing and affirm the decision of the Court of Appeals.

Respectfully Submitted,



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May 5, 2016.

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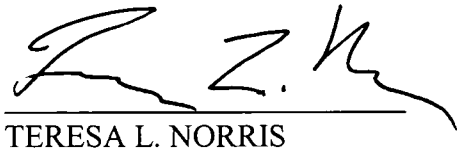
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing and a copy of the Opposition to Motion to Revoke Appeal Bond has been served upon Respondent's counsel by first class mail, postage prepaid, addressed to counsel of record, Patrick Schmeckpeper, Post Office Box 11549, Columbia, South Carolina 29211.



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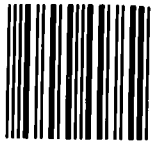

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