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OCT 03 2017

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 3, 2017

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

Re: Ralpheal Robertson, Respondent v. State of South Carolina, Petitioner
Case No. 2016-CP-02-1903

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter requesting the transcript.

Sincerely,

Julie A. Coleman
Assistant Attorney General
SC Bar #102214

JAC/cc
Enclosures

cc: Lance S. Boozer, Esquire
South Carolina Department of Corrections
Aiken County Clerk of Court
Solicitor J. Strom Thurmond, Jr.
Office of Appellate Defense
Victim Advocacy Division

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Aiken County
Maité Murphy, Circuit Court Judge

Case No. 2016-CP-02-1903

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S.C. SUPREME COURT

RALPHAEL ROBERTSON, #306718,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable Maité Murphy dated March 16, 2017, and filed March 27, 2017, granting post-conviction relief to Respondent. The State filed a motion to reconsider, which was denied by an Order dated September 5, 2017 and filed September 12, 2017. A copy of the order on appeal is attached to this notice.

[signature page to follow]

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
SC Bar #102214

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803)734-3737

By 
ATTORNEYS FOR PETITIONER

Columbia, South Carolina
October 3, 2017

Other counsel of record:

Lance S. Boozer, Esquire
The Boozer Law Firm, LLC
1400 Laurel Street
Suite 4A
Columbia, SC 29201

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Aiken County
Maité Murphy, Circuit Court Judge

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S.C. SUPREME COURT

RALPHAEL ROBERTSON, #306718,

Respondent,

v.

STATE OF SOUTH CAROLINA,

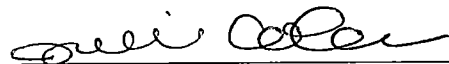
Petitioner.

PROOF OF SERVICE

I, Julie A. Coleman, Counsel for Petitioner, certify that I have today served the within notice of appeal upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Lance S. Boozer, Esquire
The Boozer Law Firm, LLC
1400 Laurel Street
Suite 4A
Columbia, SC 29201

I further certify that all parties required by Rule 243 and Rule 203 to be served have been served this 3rd day of October, 2017.



Julie A. Coleman
SC Bar #102214
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803)734-3737
Attorney for Petitioner

STATE OF SOUTH CAROLINA)
)
 COUNTY OF AIKEN)
)
 Raphael Robertson, #306718,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SECOND JUDICIAL CIRCUIT
 C/A NO: 2016-CP-02-1903

**ORDER GRANTING APPLICATION
 FOR POST-CONVICTION RELIEF**

FILED 3-27 2017 12:25 SP
 Robert J. Harie
 C.C.P. & G.S.
 Shadell Fields
 Deputy Clerk

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is currently confined in the South Carolina Department of Corrections pursuant to the Aiken County Clerk of Court's orders of commitment. Applicant was indicted by the Aiken County Grand Jury for two (2) counts of criminal sexual conduct with a minor, first degree, (2014-GS-02-382, 384) and two (2) counts of lewd act on a child (2014-GS-02-385, 386). Applicant was tried by jury before the Honorable Eugene C. Griffith, Jr. on July, 17, 2014. Applicant was represented by Michael Routzong, Esquire ("counsel"). The jury found Applicant guilty of all charges and Judge Griffith sentenced the Applicant to thirty (30) years imprisonment for both convictions of CSC, first degree, to run concurrently, and fifteen (15) years imprisonment for one conviction of lewd act, to run concurrently, and ten (10) years consecutive for the other conviction of lewd act.

Applicant filed a timely Notice of Appeal. The South Carolina Court of Appeals affirmed the appeal. State v. Robertson, Unpublished Opinion No. 2016-UP-329 (S. Ct. App. June 29, 2016). The Remittitur was issued on July 19, 2016.

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN
 I, Robert J. Harie, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

MAR 27 2017

Robert J. Harie
 C.C.P. & G.S., Aiken County, S.C.
 Shadell Fields
 Deputy Clerk SP

Applicant initially filed an Application for post-conviction relief on August 2, 2016.

Applicant raised the following allegations:

1. Ineffective assistance of counsel.
 - a. Failure to object - Erroneous jury instructions, coercive Allen charge and improper corroboration testimony.
2. Ineffective assistance of appellate counsel.
 - a. Failure to brief coercive Allen charge.

Applicant subsequently filed an amendment on January 13, 2017, alleging:

1. Counsel failed to object to Allen charge being given.
2. Counsel failed to object to the substance of the Allen charge.
3. Counsel failed to move for mistrial following the Allen charge.
4. Counsel failed to object to hearsay testimony by witness Santana Gonzalez.

The State made its Return on December 16, 2016. An evidentiary hearing was convened on January 26, 2017, at the Bamberg County Courthouse before the Honorable Maite Murphy. The Applicant was present and represented by Lance S. Boozer, Esq. The State was present and represented by Julie Coleman, Esq. This Court makes the following findings of fact and conclusions of law.

STANDARD OF REVIEW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 268 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Based on the record and testimony presented at the PCR hearing, this Court finds that the Applicant has met his burden of proof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Counsel failed to object to Allen charge.

Applicant alleged and testified counsel was ineffective for failing to object to the trial court issuing an Allen charge; failing to object to the substance of the Allen charge; and failing to move for mistrial following the Allen charge and guilty verdict.

Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896) allows trial courts to instruct hung juries to reconsider their opinions and work together to reach a unanimous verdict. As long as these instructions are not unduly coercive, they are lawful and constitutional. South Carolina has adopted four factors to examine whether the instructions are unconstitutionally coercive. These factors are set out in Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001), and are known as the "Tucker factors":

- (1) Does the charge speak specifically to the minority juror(s)?
- (2) Does the charge include any language such as "You have got to reach a decision in this case?"
- (3) Is there an inquiry into the jury's numerical division, which is generally coercive?
- (4) Does the time between when the charge was given, and when the jury returned a verdict, demonstrate coercion?

These four factors are used to examine the facts of each specific case. The factors were adopted from the definitive United States Supreme Court decision on the constitutionality of an Allen charge, Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988). Lowenfield held that the question of whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the circumstances." Id.

Based on the trial record and testimony presented at the PCR hearing, this Court finds the Allen charge issued by the trial court was not unconstitutionally coercive and trial counsel was not ineffective in failing to object to the charge and/or move for mistrial following the jury verdict. This Court further finds, even if counsel should have objected to the charge, Applicant was not prejudiced by counsel's failure to object. Accordingly, this allegation is denied and dismissed with prejudice.

2. Counsel failed to object to impermissible hearsay testimony.

Applicant alleged and testified counsel was ineffective for failing object to impermissible hearsay testimony made by the victim's mother, Santana Gonzales. Specifically, Applicant alleged and testified counsel should have objected to the following:

Q: Santana, who did MINOR say touched her?

A: The defendant.

Trial tr. p. 102, ll. 13-14.

At the PCR hearing, counsel admitted he did not object to the testimony. Counsel also admitted that this would constitute improper hearsay testimony and he was not aware of any good reason why he did not object and concluded he must have missed the objection.

The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). A well-settled exception in criminal sexual conduct cases allows limited corroborative testimony. Id. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and not include details or particulars or the identity of the perpetrator. In Sanchez, the mother and father of an alleged sexual assault victim testified that their daughter identified the defendant (Sanchez) as the perpetrator of the sexual assault. Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002). Counsel did not object. The Court found since the mother's and father's testimony was inadmissible hearsay, counsel was ineffective for failing to object. Id. at 275. The Court further found "Sanchez was prejudiced by counsel's deficient performance because

improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless." Id.; see also Jolly v. State, 314 S.C. at 21, 443 S.E.2d at 560, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." The Court in Sanchez found Applicant was entitled to a new trial.

This Court finds Ms. Gonzalez's testimony that her daughter identified the Applicant as the perpetrator was inadmissible hearsay testimony. This Court finds counsel was ineffective for failing to object to the testimony and that the the testimony and counsel's inaction prejudiced Applicant. The Court further finds, based on the trial record and PCR hearing testimony, the corroborative testimony was not harmless. Accordingly, this Court finds Applicant is entitled to a new trial.

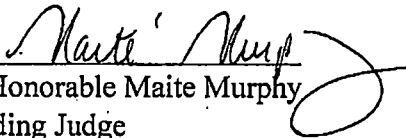
CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has met his burden of proof in showing he received ineffective assistance of counsel and counsel's performance prejudiced him. Accordingly, this application for post-conviction relief must be granted.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be granted;
2. The Applicant's convictions and sentences are vacated;
3. Applicant is entitled to a new trial; and
4. Applicant is remanded to the custody of Aiken County.

AND IT IS SO ORDERED this 16 day of March, 2017.


The Honorable Maite Murphy
Presiding Judge
Second Judicial Circuit

St. George, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2016CP0201903

Ralphael Robertson		South Carolina State Of	
--------------------	--	-------------------------	--

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

3/27/2017

Date

For Clerk of Court Office Use Only

This judgment was entered on 3-27-17, and a copy mailed first class or placed in the appropriate attorney's box on 3-27-17, to attorneys of record or to parties (when appearing pro se) as follows:

Lance S. Boozer 1400 Laurel Street Suite 4A Columbia, SC
29201

Julie Amanda Coleman PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Robert J Harte by J Park
JHC
Robert J Harte - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
