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JUN 27 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

June 27, 2018

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

Re: James Watson, #352843, Respondent v. State of South Carolina, Petitioner
Case No. 2015-CP-27-0181

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.

A copy of the State's request for the post-conviction relief hearing transcript has also been submitted for filing on today's date.

Sincerely,

Christian Saville
Assistant Attorney General
S.C. Bar No. 103272

CS/trb
Enclosures

cc: James K. Falk, Esquire
Barton Vincent, SCDC Attorney
The Honorable Margaret Bostick, Jasper County Clerk of Court
The Honorable Isaac McDuffie Stone, III, Solicitor
Robert M. Dudek, Chief Appellate Defender
Victim Advocacy Division

STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN 27 2018

CERTIORARI TO JASPER COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2015-CP-27-0181

James Watson, #352843.....Respondent,

v.

State of South Carolina,Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Thomas A. Russo's order granting post-conviction relief filed May 7, 2018. A copy of the order on appeal is attached to this notice.

June 27, 2018

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General
S.C. Bar No. 103272
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: *Christian Saville*
Attorneys for the Petitioner

Other counsel of record:
James K. Falk, Esquire
Falk Law Firm, LLC.
Post Office Box 1058
Charleston, SC 29402
Attorney for Respondent
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STATE OF SOUTH CAROLINA
In The Supreme Court
CERTIORARI TO JASPER COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

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S.C. SUPREME COURT

Case No. 2015-CP-27-0181

James Watson, #352843.....Respondent,

v.

State of South Carolina, Petitioner.

PROOF OF SERVICE

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

James K. Falk, Esquire
Falk Law Firm, LLC.
PO Box 1058
Charleston, SC 29402

I further certify that all parties required by Rule to be served have been served this 27 day of June, 2018.



CHRISTIAN SAVILLE
S.C. Bar. No. 103272
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA)
)
 COUNTY OF JASPER)
)
 James Watson)
 Applicant)
 Vs.)
 State of South Carolina)
 Respondent,)

COURT OF COMMON PLEAS
 FOR THE 14th JUDICIAL CIRCUIT
 2015-CP-27-00181
 Order Granting
 Post-Conviction Relief

2018 MAY -7 AM 10:26
 CLERK OF COURT
 JASPER COUNTY
FILED

The above captioned matter comes before this court via an application for post-conviction relief (PCR) filed by James Watson. This Court convened an evidentiary hearing during the October 9th PCR term of court for the 14th Circuit. Applicant was present at the hearing and represented by James K. Falk, Esq.; Ruston W. Neely Esq., of the South Carolina Attorney General's Office, represented Respondent. For the reasons set forth below, the application for Post-Conviction Relief is GRANTED.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Jasper County Clerk of Court. The Applicant was indicted at the August 2011 term of the Jasper County Grand Jury for one (1) count of Criminal Sexual Conduct with a Minor – Victim Under 11 years old (2011-GS-27-00345). Applicant was also indicted at the September 2012 term for one (1) count of Unlawful Neglect of Child (2012-GS-27-00430). Robert Hughes, Esquire, represented Applicant at trial. The Applicant proceeded to a jury trial and was found guilty as indicted. The Honorable Perry M. Buckner sentenced Applicant to incarceration for thirty (30) years for Criminal Sexual Conduct with a Minor and ten

(10) years for Unlawful Neglect of Child or Helpless Person, with the sentences to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Watson, 2014-UP-144 (Filed on April 2, 2014). The Remittitur was issued on April 18, 2014. On April 20, 2015, Applicant filed an Application for Post-Conviction Relief with the Jasper Circuit Court Clerk. In his application, he alleged the following instances of ineffective assistance of counsel: Failure to object to hearsay and leading statements; failure to object to inadmissible hearsay testimony of Deputy Ruiz; and failure to object to inadmissible bolstering during the forensic interview. James K Falk, Esq. was appointed to represent Applicant in this matter.

FINDINGS OF FACT AND CONCLUSION OF LAW

A criminal defendant has a Sixth Amendment right to counsel which includes a right to the effective assistance of counsel. McMann v. Richardson 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed 2d. 763 (1970). A two-pronged test is used 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. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The Applicant must

overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Under the second prong of the Strickland test, Applicant must show that his trial counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Applicant has proven that his trial counsel's performance was deficient and therefore he met the first of Strickland's two prongs. Specifically, Trial counsel Robert Hughes was deficient for failing to challenge the testimony offered by the following State's witnesses: Alhhandre Ruiz, G. Janell Barker, Mary Beth Hefner, Dr. Sarah E. Schuh, and Detective Eric Baxter. At the PCR hearing, trial counsel was asked whether his decisions to not challenge the particular testimony were part of a trial strategy. In each case, Mr. Hughes either had no explanation for his failure to challenge the testimony or he testified that, based upon his prior experience with the trial judge, he thought any objections or challenges to such testimony would have been futile. As a direct consequence of trial counsel's failure to object to the following testimony, the issue of whether it was prejudicial error for the jury to have heard this testimony was not preserved for review.

The following summarizes trial counsel's unprofessional errors by failing to object to the following testimony. This Court finds that, had trial counsel properly objected to this testimony, it is likely that the objection would have either been upheld at trial or, if properly preserved, formed the basis for a reversal on appeal.

ALHANDRE RUIZ, employed as a resource officer at the victim's school.

Officer Ruiz was asked what led to his involvement in the case. Officer Ruiz replied that he was asked to sit in on an interview with DSS, the child, and faculty. When asked why he was called to the interview, he responded: *From what I was advised prior to coming to the office, there was a child that was struck in the eye. She was also instructed to lie to the faculty.* (R.143 l. 19 – p. 144 l. 5). Trial counsel failed to contemporaneously object to this hearsay statement. Officer Ruiz later repeated that the child was hit in the eye, and trial counsel's objection was then sustained. (R.143 l. 14-15). However, trial counsel was ineffective for failing to preserve for appeal any objection to the testimony that the child was instructed to lie. Additionally, once the court sustained trial counsel's objection to Officer Ruiz' second statement about the eye injury, trial counsel was ineffective by not seeking a curative instruction.

G. JANELL BARKER, the victim's foster parent.

1. Trial counsel failed to object to Baker's hearsay testimony regarding a conversation she had with the victim's physician. She testified that the doctor told her *I am so glad to see [victim] he was supposed to see me every year for a check-up, and this is the first time he had seen him in four years.* (R.159 l. 20-23). This testimony was inadmissible hearsay and greatly prejudiced Applicant as it tended to support the allegation of unlawful neglect of a child.

2. Trial counsel failed to object to a hearsay statement made by Barker regarding a conversation that she had with the victim. Barker testified that the victim told her about someone's penis was put in her mouth. (R.164 l. 21-23). This statement was both inadmissible hearsay and impermissible bolstering of the victim's testimony.

3. Trial counsel should have objected when Barker testified that the reason that victim was removed from Applicant's house was because of physical abuse. (R.158 l. 3-5). This statement was both speculative and beyond the scope of the witness's first-hand knowledge; and trial counsel rendered ineffective assistance by failing to object to the statement. Moreover the possibility of prejudice from the publication of this statement greatly outweighed any probative value.

MARY BETH HEFNER was admitted to testify as an expert in the field of Forensic Interviewing and delayed disclosure.

1. Trial counsel failed to object to both the Solicitor's and Hefner's frequent use of the term "non-offending" care giver (R.192 l. 22; 199 l. 24; 211 l. 10, 11, 12, & 16; 238 l. 11). In this context, the use of the term implied that Watson was the *offending care giver*. The term was highly prejudicial, served no probative value, and amounted to a commentary by an expert witness regarding defendant's guilt. Ms. Hefner's use of this term exceeded the permissible scope of her expert testimony under Rule 702 SCRE because it amounted to her opinion that Mr. Watson was guilty of offending against the victim. See State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011) (adopting a rule that an expert in forensic pathology's opinion testimony as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the

criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence.)

2. Trial Counsel failed to seek a hearing pursuant to State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) regarding the admissibility of Hefner's credentials as an expert in forensic evaluation or the admissibility of her testimony regarding the RATAC protocol for conducting forensic interviews. When the State moved to admit Hefner as an expert in the fields of forensic interviews and delayed reporting, Trial Counsel neither sought additional voir dire, nor did he object to Hefner's testimony as an expert in those fields.

3. Trial Counsel was deficient by not objecting to the following testimony from Ms. Hefner that impermissibly bolstered the victim's testimony:

Q. And in your expert opinion as a forensic interviewer, was the victim's disclosure internally coherent?

A. It was.

Q. Can you please explain what exactly internally coherent means?

A. Alison's disclosure, she provided many details, contextual details that seemed to be consistent throughout the interview. It was very logical and reasonable. She was also able to draw a diagram, which added to the consistency and the internal coherence that you referred to. She was also able to demonstrate with her own body the experience that she had. (R.210 l. 17 – p. 211 l. 4).

Additionally, trial counsel did not object to the following testimony during redirect examination of Ms. Hefner:

Q And to your knowledge, has [victim] been consistent as to the sexual abuse that she has disclosed and who it was committed by?

A Yes, she has. (R.239 l. 3 – 6).

Ms. Hefner testified that the victim had been coached prior to her forensic interview. (R. 234 l. 11-24). Trial counsel should have objected to the testimony as both speculative and exceeding the limits of Hefner's expertise. Applicant was prejudiced by this testimony as it further bolstered the victim's in-court testimony as it provided an excuse for the victim's prior inconsistent testimony.

4. Hefner provided hearsay testimony from a conversation that she had with G. Janell Barker regarding the victim exhibiting "hypersexualized behaviors". (R.237 l. 15- p. 238 l. 8). Trial counsel should have objected that the testimony as inadmissible hearsay.

DR. SARAH E. SCHUH, who was admitted to testify as an expert in the field of physical and sexual child abuse and child sexual assault examinations.

1. The State sought to admit Dr. Schuh as an expert in the field of physical and sexual child abuse and child sexual assault examinations. Trial counsel did not object to her qualifications as an expert in the fields nor did he seek additional *voir dire*. (R. 245 l. 16 – 22).

2. Trial counsel failed to object to Dr. Schuh's opinion's regarding the health of victim's teeth and her dental hygiene. This testimony was outside her field of expertise. (R. 259 l. 1-5).

3. Trial counsel failed to object to Dr. Schuh's hearsay testimony.

a. Dr. Schuh testified that the victim said "my daddy put something in me." (R. 253 l. 8-10).

- b. Dr. Schuh testified that the victim told her that her daddy punched her in the nose. (R. 261 l. 20-21).

Both of these statements were hearsay and fell outside the exception permitted by Rule 703 SCRE. Moreover, since these statements went beyond testimony regarding the time and place of a sexual assault, they also fell outside of the limited exception provided in Rule 801(d)(1) SCRE. Trial counsel should have objected to this inadmissible corroborating evidence and its admission was prejudicial. See State v Barrett, 299 S.C. 485, 487 386 S.E.2d 242, 243 (1989) (reversing defendant's CSC conviction where DSS worker improperly testified to the details of sexual abuse reported to her by the victim).

2. On re-direct examination, Dr. Schuh was asked whether it was more likely than not that victim was a victim of sexual abuse. Dr. Schuh testified in the affirmative. Based upon the lack of evidence supporting her opinion, trial counsel was ineffective for failing to object to her opinion testimony. However, there is insufficient testimony in the record to support her opinion. The testimony supporting her opinion was summarized in the record on page 271 as follows: The victim had anxiety about Dr Schuh having to stick something in victim's privates as part of her examination; reports of victim displaying hypersexualized behaviors; an irregularity of the hymen but no damage to the genitalia or rectum (R. 267 l. 7-10); and victim's statement that there was blood.

DETECTIVE ERIC BAXTER of the Jasper County Sherriff's office.

1. Trial Counsel failed to object to Detective Baxter's statement that "I determined that [the child] was a victim of sexual abuse. (R. 276 l. 6-7). Detective Baxter was not offered as an expert in the field. He reached this conclusion without speaking to the victim or attending the forensic

interview. (R. 275 l. 1. 3- 17). Baxter reached this conclusion without the benefit of his own first hand observations and merely reviewed reports provided to him. (R. 275 l. 22 – p. 276 l. 7).

2. Trial Counsel failed to object to Baxter's hearsay statement that that the mother knew of the abuse and had actually participated in cleaning up the blood from one of the incidents. (R. 277 l. 9-12). Trial counsel should have objected that the testimony was inadmissible hearsay and its publication violated Applicant's 6th Amendment right to confront his accusers.

The failure by Applicant's trial counsel to object when inadmissible and prejudicial evidence was offered constituted a waiver Applicant's right to raise these issues on appeal. An issue not properly preserved at trial cannot be raised for the first time on appeal. State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995). Trial counsel's failure to object to the testimony described above satisfies the first prong of the Strickland test. See Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (holding that trial counsel's failure to object to the admission of inadmissible corroborative hearsay was an error that fell below an objective standard of reasonableness); Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (holding that in a CSC case, trial counsel was objectively unreasonable in failing to object to hearsay testimony from a police detective regarding statements that the victim made to him); Sanchez v. State, 351 S.C. 270, 569 S.E. 2d 363 (2002) (in CSC case, counsel's failure to object to victim's hearsay statements was unreasonable when the statements went beyond corroborating merely time and place of sexual assault); and Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (where defendant was charged with CSC with a minor, trial counsel was deficient for failing to object to hearsay testimony from forensic examiner regarding victim's description of sexual abuse). This Court finds that trial counsel offered no reasonable explanation for his failure to challenge the testimony.

Applicant was prejudiced by trial counsel's deficient performance and thus has satisfied the second of Strickland's two prongs. There is no other way to interpret Ms. Hefner's testimony other than to show that Ms. Hefner believed the child's report during the forensic interview. It is improper for a solicitor to elicit testimony from its expert regarding the veracity of a child's testimony. State v. Dawkins, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989); see also State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (holding that the trial courts admission of portions from forensic examiner's written report containing similar language was not harmless error). The State's case against Mr. Watson was similar to the State's case in Jennings because both cases were heavily reliant upon the victim's credibility. Therefore because the testimony of the victim in the case at bar was so critical to the State's case, testimony by the State's expert which bolstered the victim's credibility was not harmless. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) (an officer's improper opinion which goes to the heart of the case is not harmless).

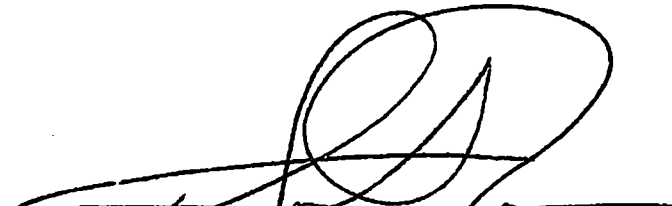
The state's case against Watson hinged upon the credibility of the victim's testimony, similar to the State's cases in State v. Thompson, 419 S.C. 250, 797 S.E.2d 716 (2017) and State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989). Here, the State offered no forensic evidence to corroborate the victim's testimony. However, the victim's testimony was both corroborated and bolstered by unchallenged yet inadmissible testimony. The cumulative effect of the unchallenged admission of this evidence greatly prejudiced applicant's trial. If trial counsel had objected to the testimony, it is reasonable to assume that his objection would have been sustained. Alternatively, had trial counsel's objections been overruled, such errors could have been addressed on direct

appeal. Absent trial counsel's deficient performance, it is likely that Applicant would either have been acquitted at trial or his conviction reversed and remanded on appeal.

BASED ON THE FORGOING, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

1. Mr. Watson's application for PCR relief is granted;
2. Applicant's convictions under indictments 2011-GS-27-0034 and 2012-GS-27-00430 are set aside;
3. This case is to be remanded back to the Jasper County Court of General Sessions for a new trial; and,
4. Applicant is to be released from the custody of the South Carolina Department of Corrections.

IT IS SO ORDERED.



The Honorable Thomas A. Russo

April 25, 2018

Florence, South Carolina

2018 MAY -7 AM 10:26
CLERK OF COURT
JASPER COUNTY

FILED