

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Certiorari to Greenville County
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000283

FREDERICK R. CHAPPELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE

Did the PCR court properly deny Petitioner's application for post-conviction relief as Trial Counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. During its December 2010 term, the Greenville County Grand Jury indicted Petitioner for lewd act upon a child (2010-GS-23-7901) and first-degree criminal sexual conduct (CSC) with a minor (2010-GS-23-7902). Susannah C. Ross, Esquire, represented Applicant. On August 6, 2012, Petitioner proceeded to trial before the Honorable D. Garrison Hill and a jury. The jury convicted Petitioner of both charges. On August 7, 2012, Judge Hill sentenced the Applicant to concurrent terms of fifteen years for lewd act upon a child and life imprisonment for first-degree CSC with a minor.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. Petitioner raised one issue on appeal the following issue on appeal: Did the trial judge err in allowing an expert in child sexual abuse and treatment to testify generally about “child abuse dynamics” when the witness had no knowledge of the child in question and the expert testimony was irrelevant? The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Chappell, Op. No. 2014-UP-272 (S.C. Ct. App. filed June 30, 2014). The Court found Petitioner's contention that the expert's testimony was improper because it constituted improper vouching for the victim was not preserved for appellate review. See (2003) (noting be considered on State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 “[i]ssues not raised and ruled upon in the trial court will not appeal” and “[a] party may not argue one ground and trial and an alternate ground on appeal”). The remittitur was sent on July 16, 2014.

On November 5, 2014, Petitioner filed an application for post-conviction relief. Petitioner alleged ineffective assistance of counsel in that trial counsel allowed the expert's testimony, which "constituted improper vouching." Respondent made its return on March 31, 2015 requesting an evidentiary hearing be convened. An evidentiary hearing was held on December 17, 2015, at the Greenville Courthouse before the Honorable Perry H. Gravely. Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented Respondent. Thereafter, Judge Gravely denied and dismissed the PCR application by order filed January 21, 2016.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner submitted a Petition for Writ of Certiorari and Appendix on October 3, 2016. Respondent filed a return to Petitioner's petition for writ of certiorari on March 23, 2017. On May 2, 2018, this Court granted certiorari. This brief of Respondent follows.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the reviewing court. It will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

In a PCR proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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, 286 S.C. at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

- I. **The PCR court properly denied Petitioner's application for post-conviction relief as Trial Counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony.**

Petitioner asserts trial counsel erred in failing to enter a specific improper vouching objection to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well. This argument is without merit. Here, the PCR court properly denied Petitioner's application for post-conviction relief as Trial Counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony.

During trial, the State called Shauna Galloway-Williams to testify. (App.p.178). Ms. Galloway-Williams testified she was employed as the executive director of the Julie Valentine Center, a child abuse and sexual assault recovery center that provides a "full range of services," including education, prevention, investigation, and treatment services related to child abuse and sexual assaults. (App.p.178-79). Although the Center also provided forensic interviews for potential victims, Ms. Galloway-Williams did not conduct a forensic interview of the victim in this case. (App.p.179, lines 20-24). Ms. Galloway-Williams then testified regarding her background, education, and training, and stated that it was her understanding that the purpose of her testimony was to share information related to dynamics of child sexual abuse. (App.p.180-82).

When the State moved to qualify Ms. Galloway-Williams as an expert in "child sexual abuse and treatment," defense counsel was permitted voir dire. (App.p.184, lines 1-12). Trial

counsel asked one question as follows: “So you have not seen the video of [the victim], you’ve not met with her, talked to her, or any of her family members related, specifically, to this case?” (App.p.184, lines 8-11). Ms. Galloway-Williams stated she had not. (App.p.184, line 12). Trial counsel then told the trial judge, “I’d simply object on grounds of relevancy since she hasn’t, actually, had any experience with the – with this case.” (App.p.184, lines 13-15). The trial judge acknowledged the objection but found Ms. Galloway-Williams qualified as an expert in the stated field under the Watson case¹ and Rules 702, 401, and 403. (App.p.184, lines 16-19). The judge then gave a charge regarding expert and opinion testimony and advised that the credibility of the expert testimony was to be determined by the jury. (App.p.184, line 20 – p. 185, line 2). Ms. Galloway-Williams continued with her direct testimony and Appellant raised no objections to any of the testimony elicited. (App. p.185-96). The issue of the expert witness’s testimony was raised on direct appeal and the Court of Appeals found Petitioner’s contention that the expert’s testimony was improper because it constituted improper vouching for the victim was not preserved for appellate review.

At the PCR hearing, Petitioner made the allegation of ineffective assistance of counsel. Specially, Petitioner argued that Trial Counsel did not object to improper vouching. (App.p.293). At the evidentiary hearing Trial Counsel testified that she was mindful of potential vouching and did not believe there was any in this case. (App.p.310). In denying Petitioner’s application for post-conviction relief, the PCR judge found the Petitioner failed to meet his burden of proving trial counsel should have objected to Ms. Shauna Galloway-Williams’ testimony finding there was no error in trial Counsel's lack of objection during Galloway-Williams' testimony because

¹ Presumably, the trial judge was referring to Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), a case dealing with the qualification of expert witnesses and the reliability of expert testimony.

her testimony did not contain vouching statements. (App.p.310-311). Further, the court found the recent appellate decision in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) was instructive in Petitioner's case (and, in fact, deals with the same expert witness testifying about the same topic of delayed disclosure of abuse by minors). (App.p.310). Furthermore, the PCR court found that there was no basis for Trial Counsel to have made an objection to vouching. (App.p.310).

Here, the PCR court properly denied Petitioner's application for post-conviction relief as trial counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony. "An expert may give an opinion based upon personal observations or in answer to a properly framed hypothetical question that is based on facts supported by the record." See Weaverling, 337 S.C. at 474-475, 523 S.E.2d at 794. "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499 (2013). "For an expert to comment on the veracity of a [victim's] accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This Court stated:

"Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013).

In Brown, this Court found that an expert witness's testimony regarding the behavioral characteristics of child sex abuse victims was not only "relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse," but that such testimony did not constitute improper bolstering because the expert: (1) did not testify as a forensic interviewer; (2) never interviewed the victims; (3) did not prepare a report for her testimony; (4) did not express an opinion regarding the general credibility of child sex abuse victims' allegations; and (5) did not express an opinion regarding the credibility of the specific minor victims in the case. State v. Brown, 411 S.C. 332, 341, 768 S.E.2d 246, 251 (Ct. App. 2015). Further, the Court specifically noted "the fact that [the expert witness's] testimony corroborated some of the minor victims' reasons for delaying disclosure of the abuse does not mean her testimony improperly bolstered their accounts [of the abuse]," because the expert's testimony "merely offered reasons why children might delay disclosing instances of sexual abuse to assist the trier of fact's understanding of the complex dynamics of child victims in sexual abuse cases." Id. at 345, 768 S.E.2d at 253.

In the case at bar, at no time did the witness bolster or vouch for the credibility of the victim but merely gave her opinion about the dynamics of sexual abuse in children for which she was an expert in. In giving her testimony the expert, Ms. Shauna Galloway-Williams testified to the following at trial:

Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge. And children often are unable to anticipate what the next question is that someone is going to ask them. So if a child is - you know, has been interviewed by law enforcement, and they've been - talked to DSS, and they've talked to a forensic interviewer, you know, generally, if the child is lying, there are going to be some - someone is going to - at some point, the child is going to - it's going to become apparent among those interviewers. They're just not sophisticated enough to carry a story out over multiple interviews like that. (App.p.189-190).

Here, the expert's testimony discussed generally how children react and respond to sexual abuse. At no time did Ms. Galloway-Williams comment on the victim specifically or make mention to anything the victim said. More specifically, Ms. Galloway-Williams' answer was in response to a question from the state which asked "Do children lie about things like - - of a sexual nature or abuse? And can you tell us the dynamics of lying and sexual abuse?" (App.p.189). This kind of testimony provided by the State's expert was intended to explain the dynamics of child sexual abuse and how children react to questions being asked by adults. The testimony did not indicate the child was telling the truth, instead it merely offered a rationale and explanation for children's behavior when it comes allegations of sexual abuse. Moreover, the expert witness had no personal experience with victim or the facts of her case, did not testify she believed victim, victim was telling the truth, or victim's behavior suggested she was telling the truth. Cf. State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (finding testimony to constitute improper bolstering in a child sexual abuse case where the witness testified she recommended Chavis not be around the victim for any reason, which could only be interpreted as a statement the witness believed the victim's claim Chavis had sexually abused her); State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013) (instructing forensic interviewers should not testify about a child's veracity or tendency to tell the truth, vouch for a child's believability, state they made a compelling finding of abuse, assert they believed the child, or indicate the child's behavior suggests the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding a forensic interviewer's testimony constituted improper vouching where the interviewer testified the victims provided compelling disclosures of abuse by Jennings and provided details consistent with the background information provided by the victims' mother, the police report, and other children); State v. McKerley, 397 S.C. 461,

465-466, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding a forensic interviewer's testimony to be improper where the interviewer testified about giving an opinion as to whether something happened and about consistent information and compelling findings). As a result, Ms. Galloway-Williams did not improperly bolster or vouch for the credibility or believability of the victim.

Furthermore, during the PCR hearing the PCR judge referenced State v. Brown 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). In Brown, Ms. Galloway-Williams, the same expert witness in this case testified about child sex abuse and more specifically delayed disclosure of abuse by minors. The court ruled in Brown that Ms. Galloway's testimony did not amount to vouching because she never directly or indirectly commented about the creditability of the victims' allegations. That case is applicable here because there exist many of the same facts. Among them are that Ms. Galloway-Williams was never the forensic interviewer for the victim and had no prior knowledge of the facts of the case. She simply offered her expert opinion about sexual abuse among children, Additionally, during the PCR hearing the judge asked the Petitioner and his PCR Counsel about Ms. Galloway-Williams' testimony. (App.p.297-298).

PCR Court: Let me ask you a question, are you aware of any place in the transcript where they discuss the credibility of the particular victim? Did she ever make any discussions about this victim or was it just all general type comments about how victims in general react?

Petitioner: I do know that she said that she'd never spoke to her.

PCR Court: Did she ever give an opinion as to whether this girl was telling the truth or not, in the transcript? Are you aware of anything?

Petitioner: I'm not aware of that, to be honest with you.

PCR Counsel: I don't believe so, Your Honor.

The Petitioner made the allegation that his trial counsel failed to object to improper vouching or bolstering by the witness but when asked by the PCR judge about any discussions regarding comments on credibility the Petitioner's response along with his PCR Counsel suggest that Ms. Galloway-Williams' testimony did not comment on the creditability of the victim. Because of this, the expert witness's testimony did not constitute improper vouching.

Furthermore, Respondent acknowledges this Court's decision in Brown held among other factors the expert witness's testimony did not constitute improper bolstering because the expert did not express an opinion regarding the general credibility of child sex abuse victims' allegations. Brown, 411 S.C. at 341, 768 S.E.2d at 251. It is important to note at the time of Petitioner's trial in 2012, Brown had not been decided. No South Carolina court has ever required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). The relevant time frame for analysis is when the alleged ineffectiveness occurred. Id. at 310. While the rules of preservation require that objections to the admissibility of evidence be specific, they most certainly do not require clairvoyance. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). Therefore, trial counsel cannot reasonably be held ineffective for failing to object based on case law that had not even been decided at the time of trial. Because of this the PCR court properly denied Petitioner's application for post-conviction relief as trial counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony.

CONCLUSION

For the foregoing reasons, this Court should affirm the post-conviction relief court's denial of relief.

Respectfully submitted,

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