STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

LATRONE T. BUTLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000736

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred by ruling improper bolstering only occurs when an expert witness improperly opines a complaining witness is telling the truth where defense counsel here failed to object to an impermissible lay opinion that the victim's identification of petitioner was consistent with other reliable identifications she had witnessed, since this was an improper bolstering opinion on the only issue in the case – the reliability of petitioner's identification – and counsel was ineffective for failing to object to it?

ARGUMENT

The PCR court erred by ruling improper bolstering only occurs when an expert witness improperly opines a complaining witness is telling the truth where defense counsel here failed to object to an impermissible lay opinion that the victim's identification of petitioner was consistent with other reliable identifications she had witnessed since this was an improper bolstering opinion on the only issue in the case – the reliability of petitioner's identification – and counsel was ineffective for failing to object to it.

Relevant Facts

Petitioner was indicted at the June 11, 2012, term of the Charleston County Grand Jury for the offenses of carjacking, attempted murder, and kidnapping. App. 486–491. His case was called to trial on January 15, 2014 before the Honorable Roger M. Young, and a jury. Mary Ford represented petitioner, and Elizabeth Shealy and Andrew Evans were the assistant solicitors. App. 1.

Sixty-nine-year-old Letty Martin was the victim in this case. She was sixty-seven on December 5, 2011, when the carjacking occurred. App. 90, ll. 6-10. After Martin's husband died, she moved into a mobile home park -- Jericho mobile home park -- in Ravenel, South Carolina. App. 90, l. 22 – 91, l. 11.

On December 5, 2011, Martin taught her line dancing class at the senior center in Mount Pleasant. Afterwards she went Christmas shopping, and she returned to the Jericho mobile home park in her 1996 Accura. App. 92, l. 20 – 94, l. 17.

When Martin returned home, she pulled her car "into the carport." She was unloading "my dance stuff in a black case that has wheels," and she claimed, "I saw the defendant coming around the end of my house . . ."[1] App. 96, ll. 1-14.

Martin maintained, "He came up behind me. He grabbed my left arm, put something in my ribs he said [it] was a gun, told me not to scream or fight or he would shoot me and [he] demanded my car keys." App. 96, l. 22 – 97, l. 2. Martin testified she started her car as the robber demanded. She never saw a gun. The robber forced her into the passenger seat, and he drove down Highway 165.

She estimated the robber was 5'10" to 6 feet tall. App. 97, l. 10 – 98, l. 25. Martin said she gave him her purse with the cash in it, and her cell phone. App. 99, ll. 13-17. Martin claimed she tried to look at the robber, but he threatened, "Keep your eyes on the road. Don't look at me or I will shoot you." App. 99, l. 23 – 100, l. 18.

Martin remembered that the robber turned down Hyde Park Road, went onto an unpaved road, and stopped the car. The man "told me to put my purse on the trunk, and then he put his hand on my forehead and one on my chin and started jerking my head." App. 103, l. 17 – 104, l. 7. He did this two or three times and she "fell to the ground." She testified the man was "trying to break my neck . . ." However, a car came down Highway 165 with the headlights on "and he pushed me down to the side of the road, got in the car, and drove off." App. 104, l. 13 – 105, l. 23.

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[1] Martin claimed earlier that morning she had seen petitioner knocking on her neighbor's trailer door. "He turned away from the door while I was looking out the window," and, "no one answered the door." App. 94, l. 18 – 95, l. 16.

Martin walked to a nearby house and Ms. Mizell answered the door. Martin told her she had been carjacked and Mizell called 911. App. 106, ll. 6-25. The police and EMS then arrived at Mizell's house. App. 111, ll. 10-25.

Two days later, Martin was called to the sheriff's office to talk to Detective Christina Smith. Smith wanted her to "to look at a photo lineup to see if I could identify anyone." App. 112, ll. 15-22. "She explained the process and read a series of statements that I initialed in stating that I understood them, and I read them along with her and she showed me a sheet with six photographs on it, and I looked at the photographs and picked one of them." App. 113, ll. 14-20.

As led by the solicitor on direct examination, Martin said she was told it was important to pick the right photograph to "clear someone in a crime," and she was also informed the "police would continue to investigate if she could not identify anyone." App. 114, l. 21 – 118, l. 3. Martin said the photograph she identified "looks most like the person that carjacked me and tried to kill me." App. 118, ll. 4-6. She then identified "the defendant seated between his attorneys." App. 118, ll. 10-21.

The state later called Christina Smith as a witness. Smith said on December 7, 2011, she was investigating the carjacking in this case. She was not involved in putting together the photographic lineup. App. 190, ll. 5-25.

Smith said it was the department's policy that she did not "even know who a possible suspect in the lineup was when it was shown" to a victim. App. 193, ll. 2-18. The following occurred on direct examination of Smith by the solicitor:

> Q. When showing this to Ms. Martin, could you describe to the jury **what level of care she seemed to be giving the photographs**? How did she appear when she was looking at them?

A. *She studied the photographs*, making sure that each -- you can see *as just her and other folks that have seen photo lineups, they look at each individual picture* to see if they can pick out whoever is in that photo.

Q. And while Ms. Martin was there -- I'll get to that in just a second. So how did she indicate to you that she, in fact, identified someone?

A. She pointed to the picture that she thought was the person that had carjacked her.

Q. Okay. And it's showing you on your screen there, State's Exhibit 15?

A. Yes.

App. 193, l. 9 – 25. (emphasis added).

The defense called its investigator, Matthew Davis, to testify and identify tattoos petitioner had on both of his hands, his neck, and his arms. Martin never mentioned the carjacker having obvious tattoos all over his body. App. 285, l. 7 – 289, l. 9.

In her closing argument, defense counsel Ford said petitioner "has very noticeable tattoos on his hands" that Martin would have noticed that if petitioner was in fact the carjacker. App. 312, ll. 7-17. Ford also told the jury that petitioner was arrested fifty-five hours after the carjacking because he was in possession of Martin's car at a bar. This explained petitioner's fingerprints and DNA being in the vehicle. App. 305, l. 9 – 307, l. 20.

However, Ford told the jury that petitioner being in possession of the vehicle did not prove he was the carjacker. In fact, it would not make any sense for petitioner to remain in possession of the vehicle if he was the carjacker, and not someone who bought the stolen vehicle or otherwise came to possess it after the carjacker had to get rid of it.

An hour and fifteen minutes into deliberations on the third day of trial, January 17, 2014 the jury returned asking several questions. App. 340, l. 9 – 341, l. 25. The jury later found petitioner guilty on all three counts. App. 342, ll. 5-24.

At sentencing, the judge told petitioner he was disturbed by his apparent lack of a motive for the crime. "Maybe the car and the stupidity of riding around in the car after you stole it is an issue." The judge asserted that he thought petitioner would have murdered the victim if another car had not come along. He then sentenced petitioner to consecutive sentences of thirty years for attempted murder, thirty years for kidnapping, and twenty years for carjacking – 80 years imprisonment. App. 351, l. 16 – 352, l. 17.

Petitioner thereafter filed an application for post-conviction relief on September 14, 2016. The PCR application included a packet of exhibits. App. 354 – 385.

On June 8, 2017, the state filed a return and motion to dismiss the PCR application. App. 386 – 397. A conditional order of dismissal was filed on June 14, 2017, by the Honorable Deadra L. Jefferson. App. 398 – 401. An amendment to the PCR application was then filed. App. 402 – 408. The state then filed an amended return dated October 5, 2017, requesting that an evidentiary hearing be held. App. 409 – 421.

An evidentiary hearing was convened on January 31, 2018, before the Honorable Maite Murphy. James Falk represented petitioner. Megan Harrigan Jameson was the assistant attorney general. App. 422.

Defense counsel Mary Ford testified at the PCR hearing that the defense in this case was that petitioner came into possession of the stolen vehicle after the carjacking at some time before he was arrested fifty-five hours after the carjacker sold or otherwise got rid of the car. The argument, as seen, was that petitioner would not have kept the car in his possession if he had

been the carjacker. Since he was not the carjacker, and was in possession of the car, the fact that petitioner's fingerprints, DNA, and certain other possessions of his were inside the car was not inculpatory. App. 440, l. 22 – 443, l. 2.

Ford recalled that petitioner was a quiet person and she did not remember specifically whom petitioner may have told her sold him or gave him possession of the car. App. 443, ll. 15-23. At the PCR hearing petitioner testified he had pled guilty to the prior crimes he had committed, he did not commit this crime, and he thought the police did not believe him due to his extensive criminal record. App. 452, l. 5 – 456, l. 24.

Ford said repeatedly during the post-conviction relief hearing that the victim's identification of petitioner was not a "confident" identification. App. 428, ll. 13-16, App. 435, ll. 17-20; App. 437, ll. 22-24; App. 445, ll. 14-16. Ford admitted that she thought Christina Smith's testimony regarding the identification from the photographic lineup was meant "to bolster" the state's contention that the "not confident" identification was nonetheless very reliable. App. 437, ll. 7-21.

As seen, Smith testified that the victim "studied" the photographs before making an identification, and that she had watched other eyewitnesses do the same in other cases. All this conveyed to the jury that the identification of petitioner as the carjacker was reliable.

In the order of dismissal, the PCR judge quoted the objectionable testimony, noted defense counsel Ford's testimony about the testimony being bolstering, and he wrote:

> "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'"

App. 483 – 484. (emphasis added).

Discussion

Improper bolstering does often arise in the context of child criminal sexual conduct cases where the expert subtly -- or not so subtly -- opines to the jury that he or she believes the alleged victim is telling the truth. The error of law the PCR judge made here was his failure to recognize that Smith, who was not an expert, was opining to the jury that the identification procedure here was reliable. That was improper opinion bolstering since it was impermissible lay opinion testimony.

The only issue involved in this case was the identity of the carjacker. This entire case came down to the reliability of Martin's identification of petitioner and the lay witness, Smith, improperly opined that the identification procedure was reliable, in violation of Rule 701, SCRE.

Eyewitness identification is a matter that has been studied extensively and opinions on the subject do require professional knowledge, experience, or training. Cf. Rule 701, SCRE. Further, eyewitness identification is a matter that requires specialized knowledge, it is scientific, and therefore Smith's opinion on the matter which improperly bolstered the reliability of Martin's identification also violated Rule 702, SCRE.

Smith's opinion testimony was not the opinion of a law enforcement lay witness identifying the perpetrator from personal knowledge. Cf. State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012). Instead, she was impermissibly vouching for the victim's identification by opining it was reliable when compared to other reliable identifications she had witnessed.

In State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), this Court held that an opinion as to the position of the victim was in when he was shot was scientific evidence beyond the knowledge of a crime scene processor, and it was improper because the witness was not a "crime scene reconstruction" expert. The improper opinion was devastating to the defense of "self-defense," because the opinion that the victim was riding a bicycle when he was shot meant the victim could not have been a threat to Ellis.

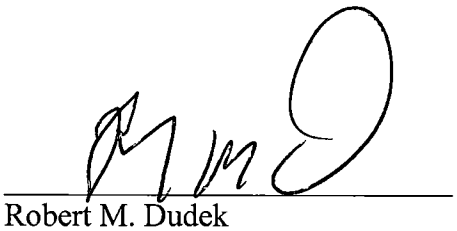
Here, similarly, petitioner's defense was that he was not the carjacker, and he only came into the possession of the victim's automobile after the carjacker got rid of the inculpatory vehicle. Unauthorized use of a vehicle in certain small communities, such as the one in this case, was not unusual, and this certainly was not an incredible defense.

Consequently, Smith's improper opinion that the identification procedure was reliable, which bolstered Martin's identification of petitioner, was highly prejudicial.

The PCR judge erred as a matter of law by ruling "bolstering" only occurs when an expert opines a complaining witness is telling the truth. The failure to object to the improper bolstering opinion in this case that the identification was reliable prevented the trial court from performing his gatekeeping function to ensure scientific evidence is reliable before it is admitted. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). If the trial judge had done his gatekeeping duty when ruling on the proper objection, this opinion testimony would have been excluded, and the extreme prejudice prevented. The ruling of the PCR court denying petitioner relief should be reversed.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of November, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Latrone T. Butler states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Maite Murphy, which was held on January 31, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Latrone T. Butler.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of November, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Latrone T. Butler, #303325, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 2nd day of November, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of November, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.