

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Maite Murphy, PCR Judge
Deadra L. Jefferson, Trial Judge
Appellate Case No. 2018-000738

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S.C. SUPREME COURT

JOHNNY TAMAR BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Statement of Issues

- I. The PCR judge ruled properly in granting petitioner's request for a belated direct appeal in the case.
- II. Trial counsel erred in failing to object to the state's presentation of PSANE nurse Katherine Fabrizio as an expert in sex cases, and in failing to move for a mistrial when said nurse gave testimony that bolstered the minor's allegations and when the nurse gave testimony that fell outside the "time and place" parameters.

Respondent's Statement of Issues

- I. The post-conviction relief court properly determined that Petitioner was entitled to belated appellate review of direct appeal issues pursuant to White v. State, 263 S.C 110, 208 S.E.2d 35 (1974).
- II. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective in regards to State's witness, PSANE nurse Katherine Fabrizio.
 - A. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to object to testimony from State's witness, PSANE nurse Katherine Fabrizio, where Fabrizio had the requisite qualifications to be admitted as an expert in pediatric sexual assault examination.
 - B. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to request curative instructions or move for a mistrial following his sustained objections to testimony from State's witness, PSANE nurse Katherine Fabrizio, where counsel provided strategic reasons for declining to request curative instructions or move for a mistrial and there is no reasonable likelihood a mistrial would have been granted.
 - i. Whether counsel was ineffective for failing to request a curative instruction or move for a mistrial following Fabrizio's testimony about Victim bathing after the assault, her reasons for not collecting the minor's clothing, and the state of Victim's hymen is not preserved for this Court's review.
 - ii. Petitioner cannot establish any constitutional ineffectiveness for failing to request curative instructions or move for a mistrial, as counsel provided a reasonable strategic reason for his actions and any request for curative instructions or motions for a mistrial would have been denied.

STATEMENT OF THE CASE

Procedural History

During the November 2013 term, the Charleston County Grand Jury indicted Petitioner Johnny Tamar Brown for two counts of first-degree criminal sexual conduct with a minor (2013-GS-10-6759, 2013-GS-10-6760). Thereafter, during the April 2015 term, the Charleston County Grand Jury indicted Petitioner for third-degree criminal sexual conduct with a minor (2015-GS-10-2362). The indictments stemmed from an incident on June 20, 2013, when Petitioner vaginally and anally raped his cousin's thirteen-year-old daughter while her two-year-old sister was nearby.

Petitioner had previously been convicted of first-degree criminal sexual conduct with a minor, and, accordingly, the State informed Petitioner it intended to serve him with notice to seek life without parole pursuant to Section 17-25-45 of the South Carolina Code of Laws. On June 24, 2014, Petitioner appeared before the Honorable Roger M. Young, Sr., circuit court judge, where he rejected the State's plea offer for a recommended sentence of twenty years imprisonment. The court advised Petitioner that it was "very likely" the State would seek life without parole pursuant to Section 17-25-45 based on his prior conviction for first-degree criminal sexual conduct with a minor if he rejected the plea offer and Petitioner advised the court he understood and had discussed this with his attorney. Thereafter, the State served Petitioner with notice of its intent to seek life without parole.

On April 13, 2015, Petitioner appeared in the Charleston County Court of General Sessions and proceeded to a jury trial before the Honorable Deadra Jefferson, circuit court judge. Assistant Public Defender Charles Cochran of the Charleston County Public Defender's office

represented Petitioner. Assistant Solicitors Debbie Herring-Lash and Shannon Elliott of the Ninth Circuit Solicitor's Office prosecuted the case. On April 15, 2015, the jury convicted Petitioner as indicted of all three offenses. Judge Jefferson sentenced Petitioner to life imprisonment for both first-degree criminal sexual conduct with a minor convictions and to fifteen years for the third-degree criminal sexual conduct. Petitioner did not file a notice of appeal.

Petitioner did file a timely application for post-conviction relief on March 29, 2016. On June 23, 2016, the State (Respondent) served its return to the application and requested an evidentiary hearing. Thereafter, on December 3, 2017, Petitioner, through appointed counsel James K. Falk, filed an amended application. An evidentiary hearing into the matter was convened January 31, 2018, at the Charleston County Courthouse before the Honorable Maite Murphy, circuit court judge. At the evidentiary hearing, Petitioner proceeded forward on the following claims:

1. Ineffective assistance of counsel for failing to object to testimony of State's witness Katherine Fabrizio, including
 - a. testimony was beyond the scope of permissible non-expert testimony
 - b. testimony amounting to bolstering and a violation of the Confrontation Clause
2. Ineffective assistance of counsel for failing to move for a curative instruction following bolstering testimony from Katherine Fabrizio
3. Ineffective assistance of counsel for failing to perfect a direct appeal

Petitioner was present at the hearing and represented by counsel Falk. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of Respondent. Following the evidentiary hearing, Judge Murphy

granted Petitioner a belated review of direct appeal issues pursuant to White v. State¹ and denied all remaining grounds in the application.

Petitioner filed a notice of appeal. On October 31, 2018, Petitioner filed a Petition for a Writ of Certiorari and a Brief of Appellant Pursuant to White. This Return to Petition for a Writ of Certiorari and accompanying Brief of Respondent Pursuant to White follow.

Summary of Facts Adduced at Trial

On June 20, 2013, Petitioner's cousin lived in Charleston County with her thirteen-year-old daughter (Victim) and two-year-old daughter. (App. 64-65, 122-26). That afternoon, Petitioner's cousin left for work, leaving her two daughters at home as she typically did while she worked. (App. 124-26). While she was gone, Petitioner came over to the house. (App. 70). Petitioner began tickling the girls, starting first with the younger child and eventually tickling Victim. (App. 72-73). Petitioner then pushed Victim's clothing to the side and penetrated her vagina and anus with his penis. (App. 74-78, 86-88). This was not the first time Petitioner had sexually assaulted Victim—Petitioner had previously anally penetrated her when she was just six years old. (App. 112-14).

When Petitioner finished assaulting the thirteen-year-old child, he attempted to pay Victim twenty dollars, went into the bathroom, and then left the house. (App. 88). Petitioner later sent his other cousin, Solomon, to the home to try to give Victim some candy, which she refused. (App. 88-89). Once Petitioner left, Victim took a shower and then gave her two-year-old sister a bath. (App. 89). She then began to cry and continued to do so until her mother came home a few

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

hours later. (App. 89-90). When her mother arrived home, Victim disclosed the abuse to her mother, who took her to the hospital for evaluation. (App. 90-94, 129-31).

At the hospital, Victim was evaluated by Katherine Fabrizio (Fabrizio), a nurse practitioner and pediatric sexual assault nurse examiner (PSANE). (App. 158-61). Fabrizio started her examination of Victim between 11:00 p.m. and 12:00 a.m. on the day of the assault. (App. 165). Fabrizio described Victim's demeanor as "very quiet, very tearful, very much in shock." (App. 165). Fabrizio collected swabs from the child's mouth, vagina, and rectum, as well as collected fingernail scrapings. (App. 167). Fabrizio did not observe any trauma to the child's vaginal or anal area. (App. 178-79). The collected swabs were sent to the laboratory for analysis, where Victim's vaginal swab tested positive for gonorrhea. (App. 182-85, 299-301, 314-16). A urine sample taken from Petitioner also tested positive for gonorrhea. (App. 307-10, 314-16). Additional testing also detected semen on Victim's vaginal swabs, although a DNA profile was not able to be developed from the swab. (App. 284, 290-96).

Victim's mother also took Victim to Lowcountry Children's Center, where she again disclosed her sexual assault to a forensic interviewer. (App. 132, 246-247). Victim also disclosed the sexual assault to the nurse at her school. (App. 316-20).

Petitioner, who was a registered sex offender based on a prior conviction for first-degree criminal sexual conduct with a minor, was required to wear an ankle monitor that tracked his location at all times with GPS data. (App. 225). This GPS data corroborated Victim's disclosure and established Petitioner was at Victim's home during the times she reported Petitioner had sexually assaulted her. (App. 256-61).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The post-conviction relief court properly determined that Petitioner was entitled to belated appellate review of direct appeal issues pursuant to White.

Petitioner asserts counsel was ineffective for failing timely file a direct appeal on his behalf and asserts he wanted to appeal his convictions and life sentence. Respondent conceded Petitioner was entitled to and the post-conviction relief court properly granted belated appellate review of direct appeal issues pursuant to White.

“Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal.” Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (internal citations omitted). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967).” Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (internal citation omitted). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Simuel, 390 S.C. at 271, 701 S.E.2d at 740 (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (internal citation omitted).

In the present case, there is no evidence that Petitioner made a knowing and intelligent decision not to pursue a direct appeal. Rather, the record establishes Petitioner wanted to pursue a direct appeal. Therefore, since Petitioner did not knowingly and intelligently waive his right to appeal, the post-conviction relief court properly determined Petitioner is entitled to a belated appellate review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Respondent addresses the issues raised in this belated appellate review in the accompanying Brief of Respondent Pursuant to White v. State, also served on today’s date.

II. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective in regards to State's witness, PSANE nurse Katherine Fabrizio.

On appeal, Petitioner argues the post-conviction relief court erred in denying him relief as to two of his allegations pertaining to State's witness Katherine Fabrizio, a PSANE nurse who evaluated Victim within hours of the sexual assault. First, Petitioner contends trial counsel was ineffective for failing to object to her giving expert testimony without being offered or qualified as an expert witness. Second, Petitioner contends trial counsel was ineffective for failing to move for a curative instruction or mistrial when Fabrizio's testimony bolstered Victim after his timely objection was sustained. Petitioner argues both of these errors or omissions by trial counsel rise to the level of constitutional ineffectiveness and warrant the reversal of his various sexual assault with a minor convictions and a remand for retrial. The post-conviction relief court properly found Petitioner did not meet his requisite burden of proof as to either allegation.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624,

625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner 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.

Petitioner failed to meet this high burden of proof required of him as to either allegation, and accordingly, the post-conviction relief court properly denied relief. This Court should affirm the post-conviction relief court's findings.

A. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to object to testimony from State's witness, PSANE nurse Katherine Fabrizio, where Fabrizio had the requisite qualifications to be admitted as an expert in pediatric sexual assault examination.

First, Petitioner contends trial counsel was ineffective for failing to object to Fabrizio's testimony because she was not qualified as an expert witness, and, even if she had been, her testimony went beyond the scope of her qualifications. The post-conviction relief court rejected this argument, finding Fabrizio would have been qualified by the trial court as an expert witness in pediatric sexual assault examinations and any objection would have been overruled had

counsel objected based on her qualifications. Moreover, the post-conviction relief court found Petitioner could not establish any requisite prejudice based on the overwhelming evidence of his guilt. These findings are not premised on any error of law and are supported by ample probative evidence in the record. Certiorari should be denied as to this issue.

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). “Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.” Id. at 445-46, 699 S.E.2d at 175. “The qualification of a witness as an expert falls largely within the discretion of the trial judge.” State v. Myers, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Expert testimony is admissible “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE; see also State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) (explaining an expert’s testimony is admissible where “it is relevant and based on some factual predicate in the record”). Before admitting expert testimony, the trial court must find (1) the expert’s testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v.

Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) (“Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.”).

A witness can properly be qualified as an expert where “the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.” State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness’s knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) (“The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.”). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008).

In the present case, Fabrizio clearly had the qualifications to testify as an expert witness in pediatric sexual assault examination. During trial, the prosecutor placed Fabrizio’s qualifications on the record, which included: a Bachelor’s of Science Degree from the University

of North Carolina at Chapel Hill, a Master's Degree from the Medical University of South Carolina's School of Nursing, a year and a half post-Master's work at Emory University, a certification as a family nurse practitioner, twenty-five years as a nurse practitioner working with abused children (including sexual abuse, physical abuse, medical neglect, exposure to domestic violence and substance abuse), six months of intensive training to becoming a PSANE (which required passing a specialized examination), and professional affiliations with the International Forensic Nursing Association. (App. 158-60). As noted by the post-conviction relief court, it appears the prosecutor intended to offer Fabrizio as an expert witness after placing these qualifications on the record, but for unknown reasons, omitted to formally tender her as an expert, and accordingly, Fabrizio was never formally admitted as an expert witness.² Regardless of the reason for why she was not offered as an expert witness, Fabrizio clearly had the requisite qualifications to be admitted and testify as an expert in pediatric sexual assault examinations. Counsel acknowledged this at the evidentiary hearing and stated he should have objected when she testified as to expert opinions without being qualified as an expert witness, but readily acknowledged that Fabrizio would have been properly admitted as an expert witness based on her qualifications. (App. 435-37, 448-51). As Fabrizio would have been admitted as an expert witness had counsel objected, Petitioner cannot establish any requisite prejudice from trial counsel's failure to object. The post-conviction relief court properly denied this allegation.

Moreover, the post-conviction relief court also properly found Petitioner could not establish any prejudice based on the overwhelming evidence of his guilt. Petitioner attempts to

² This same omission happened during the testimony of another expert witness, Stephanie Stanley, and counsel objected to her testimony because she had not yet been admitted as an expert. The State immediately offered Stanley as an expert in DNA and serology, and the witness was qualified as an expert before the jury without further objection. (App. 274-83).

frame the evidence in this case as weak, asserting that “[t]his case hinged on minor’s testimony practically as there was no forensic evidence presented against petitioner” and “[b]ut for Fabrizio’s testimony . . . there was insufficient proof of guilt beyond a reasonable doubt.” (PWC 8). This is an inaccurate portrayal of the evidence presented in this case. The evidence in this case is “a combination of physical and corroborating evidence so strong that the Strickland standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’ cannot possibly be met.” Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018). Victim testified during trial about the sexual abuse she suffered at Petitioner’s hands without contradiction or rebuttal, which was corroborated by her mother’s account of the abuse reported to her by Victim immediately after the assault. See State v. Miller, 266 S.C. 409, 413, 223 S.E.2d 774, 776 (1976) (“The positive, uncontradicted identification of appellants and their codefendant as the perpetrators of the crime charged and their apprehension a short time later in the identified getaway car, with the incriminating evidence found therein, so overwhelmingly establishes their guilt as to render any violation of Bruton ‘harmless beyond a reasonable doubt.’ ”); see also State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) (recognizing an error in the admission of evidence can be rendered harmless when other direct or circumstantial evidence is presented that corroborates the evidence). Additionally, numerous witnesses beyond Fabrizio testified about Victim’s consistent disclosures of the sexual abuse after it was finally revealed, including the forensic interviewer who interviewed Victim and the registered nurse at Victim’s school to whom Victim disclosed the abuse. Furthermore, GPS tracking data from Petitioner’s ankle monitor established Petitioner was at Victim’s home during the times she reported her abuse, and

semen was found on the vaginal swabs collected from Victim.³ Finally, corroborating Victim's disclosure, Petitioner and Victim—a thirteen-year-old-girl—both tested positive for gonorrhea, a sexually-transmitted disease. Critically, based on that evidence of guilt, Petitioner's guilt was overwhelmingly established, and there is no reasonable probability the result of the trial would have been different but for Fabrizio's testimony. The post-conviction relief court properly determined Petitioner could not establish prejudice and denied relief. Certiorari should be denied as to this issue.

B The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to request curative instructions or move for a mistrial following his sustained objections to testimony from State's witness, PSANE nurse Katherine Fabrizio, where counsel provided strategic reasons for declining to request curative instructions or move for a mistrial and there is no reasonable likelihood a mistrial would have been granted.

Next, Petitioner contends trial counsel was ineffective for failing to request curative instructions or move for a mistrial following sustained objections to Fabrizio's testimony. First, Petitioner contends Fabrizio's testimony about Victim bathing after the assault, her reasons for not collecting the minor's clothing, and the state of Victim's hymen was impermissible as it exceeded the scope of time and place, and accordingly, counsel should have requested a curative instruction or moved for a mistrial after his timely objection was sustained. Second, Petitioner contends Fabrizio's testimony about Victim's demeanor was impermissible because it bolstered Victim's testimony, and therefore, counsel should have requested a curative instruction or moved for a mistrial after his timely objection was sustained. This Court should deny certiorari as to these issues.

³ Notably, Victim lived with her mother and two-year-old sister, but no men resided in the home.

- i. **Whether counsel was ineffective for failing to request a curative instruction or move for a mistrial following Fabrizio's testimony about Victim bathing after the assault, her reasons for not collecting the minor's clothing, and the state of Victim's hymen is not preserved for this Court's review.**

As an initial matter, Petitioner's argument on appeal that counsel was ineffective for failing to request a curative instruction or move for a mistrial following Fabrizio's testimony about Victim bathing after the assault, her reasons for not collecting the minor's clothing, and the state of Victim's hymen was impermissible as it exceeded the scope of time and place is not preserved for this Court's review, as it was not raised to or ruled upon by the post-conviction relief court.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review).

The same preservation requirements apply in post-conviction relief actions. Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007); Pruitt v. State, 310 S.C. 254, 256, 423

S.E.2d 127, 128 (1992). The failure of the post-conviction relief court to specifically rule on an issue ordinarily precludes appellate review of the issue. Id. Although our courts have recognized the somewhat relaxed procedures in post-conviction relief cases and will excuse procedural defaults in extraordinary cases, “[i]n most PCR cases, however, [appellate courts] have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases.” Mangal, 421 S.C. at 97, 805 S.E.2d at 574.

In Petitioner’s case, he did not raise this issue to the post-conviction relief court in his original application or amended application, and the post-conviction relief court did not rule on this issue. Accordingly it is not preserved for this Court’s review.

- ii. **Petitioner cannot establish any constitutional ineffectiveness for failing to request curative instructions or move for a mistrial, as counsel provided a reasonable strategic reason for his actions and any request for curative instructions or motions for a mistrial would have been denied.**

Petitioner cannot establish any constitutional ineffectiveness for failing to request curative instructions or move for a mistrial as counsel provided a reasonable strategic reason for his actions and any request for curative instructions or motions for a mistrial would have been denied. Petitioner cannot establish any requisite prejudice as to these allegation, as there is no reasonable likelihood any mistrial motion would have been granted.

As to Fabrizio’s testimony about Victim’s demeanor, counsel testified he did object to this line of questioning based on bolstering, which was sustained by the trial court, but that he did not ask for a curative instruction as he did not want to highlight this testimony again to the jury and that he believes curative instructions in this type of situation are of limited futility based on his experience. Counsel testified he also believes this testimony was not intended to bolster

Victim's testimony or vouch for her credibility, but rather was Fabrizio explaining why she accepted non-verbal responses from Victim. Counsel noted Victim had already testified and exhibited a similar demeanor on the witness stand, so the testimony was not highly probative to any issue and likely did not have any impact on the trial. Counsel provide sound strategic reason for not requesting a curative instruction or moving for a mistrial, and accordingly, did not perform deficiently. See Earley v. State, 418 S.C. 255, 270, 792 S.E.2d 226, 234 (2016) (noting counsel's discussion of the various factors weighing against his decision not to seek a mistrial could be construed as valid, strategic reasons).

Furthermore, any such motion would have been denied. During the course of a criminal trial, the occurrence of an error in some form or fashion is "virtually inevitable[.]" which is why a defendant is only guaranteed a fair trial as opposed to a perfect one. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); see State v. Black, 400 S.C. 10, 29, 732 S.E.2d 880, 891 (2012) ("[A] defendant is entitled to a fair trial, not a perfect one."). When an error occurs, one remedy available to a trial judge is to grant a mistrial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). However, the granting of a mistrial is an extreme remedy that should only be imposed when an incident occurs during trial that is so grievous its prejudicial impact cannot be removed through any other means. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). In determining whether to grant a mistrial, the trial court should consider whether the mistrial is dictated by manifest necessity and must exhaust all other methods to cure any possible prejudice that occurred prior to stopping the trial. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002); see Council, 335 S.C. at 13, 515 S.E.2d at 514 ("[T]he trial judge should exhaust other methods to cure possible prejudice before aborting a trial."); State v.

Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) (“The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public’s interest in a fair trial designated to end in just judgment.”). Significantly, a mistrial should *not* be granted unless “absolutely necessary.” Harris, 340 S.C. at 63, 530 S.E.2d at 627-628; see State v. Brown, 389 S.C. 84, 94, 697 S.E.2d 622, 627 (Ct. App. 2010) (“A manifest necessity must exist for the trial court to discharge the jury and declare a mistrial.”). In Petitioner’s case, there is no reasonable likelihood a mistrial would have been granted.

Moreover, as discussed in detail previously, Petitioner cannot establish any requisite prejudice based on the overwhelming evidence of his guilt wholly independent from Fabrizio’s testimony, including Petitioner and Victim—a thirteen-year-old child—both testified positive for gonorrhea; Victim’s immediate disclosure to her mother within hours of the assault; Victim’s disclosure to a forensic interviewer and a school nurse; semen was found on the vaginal swabs taken from Victim; and GPS tracking data establishing Petitioner was at Victim’s home during the times she reported her abuse. There is no reasonable probability the result of Petitioner’s trial could have been different had counsel requested curative instructions or moved for a mistrial.

In sum, the post-conviction relief court properly determined trial counsel was not constitutionally ineffective for failing to request curative instructions or move for a mistrial following sustained objections to Fabrizio’s testimony. Certiorari should be denied as to this issue.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari as to issue two. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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April 17, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Maite Murphy, PCR Judge
Deadra L. Jefferson, Trial Judge
Appellate Case No. 2018-000738

RECEIVED
APR 17 2019

S.C. SUPREME COURT

JOHNNY TAMAR BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.


PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in interagency mail, addressed to:

Deputy Chief Appellate Defender Wanda H. Carter
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 17th day of April, 2019.


Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 17 2019
S.C. SUPREME COURT

April 17, 2019

Deputy Chief Appellate Defender Wanda H. Carter
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

RE: Johnny Tamar Brown v State – Appellate Case No. 2018-000738

Dear Ms. Carter:

I am enclosing two copies of Respondent's Return to the Petition for Writ of Certiorari and Brief of Respondent pursuant to White v. State in the above-referenced case.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

MHJ/

Enclosures

cc: ~~The Honorable Daniel Shearouse (original and 14 briefs & original and 6 returns)~~
Victims Advocacy Division