STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO LEXINGTON COUNTY
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-000242

MICHAEL RAY ELDERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT PURSUANT TO *AUSTIN V. STATE*

ALAN WILSON
Attorney General

KELLY OPPENHEIMER
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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

I. The post-conviction relief did not err in finding trial counsel was not ineffective for failing to object when the forensic interviewer, Lysa Miller-Dupre, testified by opining that the minor victim ("Victim") had not be coached, opining that Victim was not affected by suggestibility, and recommending evidence-based therapy for Victim, when Petitioner suffered no prejudice, as the jury was given specific instructions to weigh the credibility of each witness.

II. Petitioner's argument the post-conviction relief court erred in failing to find trial counsel ineffective for failing to object to the alleged hearsay testimony by the SANE nurse, Robin Baker, is not preserved for appellate review. Even if Petitioner's argument were preserved, trial counsel was not ineffective when highlighting the fact Victim used the term "sexually assaulted," which is an unusual term for children to use, in describing the abuse was part of trial counsel's strategy in suggesting Victim may have been coached. Further, Petitioner suffered no prejudice, as this line of testimony was merely cumulative to other testimony already presented at trial.

STATEMENT OF THE CASE

Michael Ray Elders (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its October 2009 term, the Lexington County Grand Jury indicted Petitioner for first-degree criminal sexual conduct with a minor (2009-GS-32-2677). App. 540-41. Subsequently, during its February 2011 term, the Lexington County Grand Jury indicted Petitioner for two counts of committing a lewd act upon a minor (2011-GS-32-0364; -0365). App. 418, 543. William Y. Rast, Jr. Esquire, (Counsel) represented Petitioner on these charges. App. 1. On February 28-March 2, 2011, Petitioner proceeded to a jury trial before the Honorable William P. Keesley. App. 1. Following deliberations, the jury convicted Petitioner as indicted for first-degree criminal sexual conduct with a minor and one count of committing a lewd act upon a minor (2011-GS-32-0364). App. 417-18. The jury acquitted Petitioner for the other count of committing a lewd act upon a minor, in which the indictment alleged Petitioner had forced Victim to touch his penis (2011-GS-32-0365). App. 418.

Petitioner filed a timely notice of appeal, and Appellate Defender Elizabeth A. Franklin-Best, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented him. Thereafter, on December 7, 2011, this Court issued a written order of dismissal dismissing the appeal due to Petitioner's desire to withdraw the appeal. App. 548. The Remittitur was issued January 6, 2012. App. 549.

Petitioner then filed his first application for post-conviction relief on August 2, 2012 (2012-CP-32-03136). App. 427-32. Tristan, M. Shaffer, Esquire, represented him in this post-conviction relief action. App. 432. Respondent submitted its Return on March 15, 2013,

requesting an evidentiary hearing be held. App. 433-38. Thereafter, through his counsel, Petitioner filed a document captioned, "Supplemental Grounds for Post-Conviction Relief," on August 14, 2013[1]. Supp. App. 2-3. A hearing into the matter was subsequently convened on August 14, 2013, at the Lexington County Courthouse, before the Honorable Edgar W. Dickson. App. 439. Assistant Attorney General J. Walter Whitmire, of the South Carolina Attorney General's Office, represented Respondent. App. 439. Thereafter, Judge Dickson issued an order denying and dismissing the application with prejudice on April 28, 2014. App. 503-15; Supp. App. 1. Petitioner did not appeal this order.

Petitioner then filed a second application for post-conviction relief, alleging he was denied his right to appeal from Judge Dickson's order by post-conviction relief counsel's failure to file an appeal. App. 516-23. Respondent submitted its Return on March 17, 2015, requesting an evidentiary hearing be held on this issue. App. 524-28. An evidentiary hearing into the matter was held on April 23, 2015, at the Lexington County Courthouse, before the Honorable Brooks P. Goldsmith. App. 529. Anna R. Good, Esquire, represented Petitioner, and Assistant Attorney General J. Walter Whitmire represented Respondent. App. 529. At the hearing, Respondent consented to *Austin*[2] relief. App. 531-32. Judge Goldsmith issued an order to this effect on January 4, 2015. App. 535-39.

Petitioner filed a timely Notice of Appeal, appealing Judge Dickson's 2014 order denying his application for post-conviction relief pursuant to *Austin*. Petitioner then filed a Petition for Writ of Certiorari and Petition for Writ of Certiorari pursuant to *Austin v. State*. September 6,

[1] Petitioner submitted these additional grounds to Respondent on April 19, 2013. Supp. App. 3.
[2] *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

2016. Respondent filed its Return to Petition for Writ of Certiorari[3] and Return to Petition for Writ of Certiorari pursuant to *Austin v. State* on February 8, 2017. This Court subsequently issued a written order, granting the Petition for Writ of Certiorari from Judge Dickson's order and granting the Petition for Writ of Certiorari from Judge Goldsmith's order with respect to questions one and three. Petitioner filed his Brief of Petitioner pursuant to *Austin v. State* May 3, 2018. This Brief follows.

[3] In this Return, Respondent indicated it did not oppose the post-conviction relief court's granting of *Austin* relief to Petitioner.

STATEMENT OF FACTS

After the jury had been sworn, a pre-trial hearing on the admissibility of Victim's videotaped interview at the Dickerson Center for Children (Dickerson Center) in West Columbia, South Carolina was held. App. 132-47. During this hearing, Victim, who was twelve years old at the time of trial, first testified. Victim testified Petitioner is her father, and she began visiting him when she was approximately eight years old. App. 132-33. Victim would visit Petitioner every other weekend at his home. App. 133. When she was approximately eight or nine years old, Petitioner touched Victim's "private parts" almost every time she would visit. App. 135. Petitioner also made Victim touch his penis. App. 135. Victim did not tell her mother about the abuse, until her mother asked her if Petitioner had touched her. App. 136. At this point during Victim's testimony, Petitioner stipulated there was a criminal investigation into this allegation of abuse, Victim went to the Dickerson Center, and Victim will testify in front of the jury. App. 137.

Next, Lysa Miller-Dupre, a forensic interviewer at the Dickerson Center and qualified as an expert in forensic interviewing and child abuse assessment, testified. App. 138-39, 141. Miller-Dupre interviewed Victim on July 6, 2009, at the Dickerson Center and made a written report and DVD of the interview. App. 143-44. During that interview, Victim indicated she was initially touched when she first began visiting with Petitioner, which was about one year prior to the interview. App. 144. Victim further indicated the assault took place at Petitioner's home during her visits. App. 145. Miller-Dupre also testified it was not her job to determine whether Victim was telling the truth or a lie. App. 144. She further indicated there was nothing about

Victim's disclosure which would lead her to believe the disclosure was the result of third-party influence, nor that Victim had been coached or affected by suggestibility. App. 145.

Following this testimony, the State moved under section 17-23-175 of the South Carolina Code for the videotaped interview to be admissible. App. 147. The State argued the video met the standard of the Victim hearsay law that a Victim's statement be made in an investigative interview. App. 147. The State further argued the interview had guarantees of trustworthiness based on Miller-Dupre's testimony. App. 147. Petitioner had no objection to the admissibility of the videotape. App. 147.

At trial, Victim testified. Victim testified she started spending time with Petitioner when she was approximately eight years old, and her older brother would sometimes go with her to visit Petitioner. App. 170. She further testified she is no longer allowed to visit Petitioner, because he touched her private parts. App. 171. When she would visit, Victim would sleep in the same bed as Petitioner, where the assault usually happened. App. 176. Petitioner began touching her during her visit, when she was eight years old, and he would touch her often. App. 171-72. Victim testified Petitioner touched her approximately ten times. App. 175. Petitioner would put his hand in her pants and touch her on the outside and inside her "front private part" but would not touch her anywhere else. App. 172-73. Petitioner also made Victim put her hand down his pants. App. 173. Victim also testified she did not tell anyone because she was scared and because Petitioner told her not to tell anyone. App. 173. However, she finally told her mother. App. 174. At the time of her disclosure to her mother, Victim indicated Petitioner had touched her about two days prior. App. 175.

On cross-examination, Victim testified she and Petitioner slept in her Uncle George's room, and there was no door to the bedroom. App. 178-79. She testified the touching occurred in her uncle's room, and she denied ever saying it happened in her grandmother's room. App. 179-80. Victim told her mother about the touching because she asked, though she initially denied it and only admitted to the touching after her mother continued to ask. App. 180-81. Victim did not recall how many times the touching occurred and could not recall where she was when Petitioner told her to touch his penis. App. 181-82. Victim also testified she told the people at the Dickerson Center Petitioner had not made her touch him, but Petitioner did make her touch his penis. App. 182. Petitioner always touched her privates and would insert his finger inside her, which felt cold. App. 183, 185. Victim denied looking at her mother during cross-examination and denied that she was attempting to get answers from her mother. App. 185. Victim testified her brother was not there every time she would visit Petitioner, and no one saw Petitioner touching her. App. 186-87.

On redirect examination, Victim testified no one other than Petitioner touched her. App. 187. She testified despite the touching, she still wanted to go to Petitioner's house in order to see her friend. App. 188. She also testified there were times when Petitioner said her brother could not come to the house, and she did not want to go when her brother did not go because she knew what would happen—that Petitioner would put his hand down her pants. App. 188. When she visited, she usually slept in her uncle's or her grandmother's room, but she would always sleep with Petitioner. App. 189. Petitioner would put his hand down her pants and put his finger in her vagina. App. 189-90. Victim did not scream when Petitioner touched her because she was scared, and she did not tell her mom because she was embarrassed. App. 188. She also did not

tell the people at the Dickerson Center about Petitioner making her touch his penis because she was nervous. App. 189.

Following Victim's testimony, Lysa Miller-Dupre, the forensic interviewer at the Dickerson Center, testified. The trial court qualified Miller-Dupre as an expert in forensic interviewing and Victim abuse assessment. App. 194. Miller-Dupre testified she conducted a forensic interview of Victim on July 6, 2009, when Victim was ten years old. App. 198. She testified at the beginning of the interview, Victim indicated she was there because she had been sexually assaulted by Petitioner, and Petitioner began touching her about a year prior to the interview. App. 199. During the interview, Victim indicated Petitioner would touch her while she was in his bed, and her grandmother was sleeping in her room; but the touching also occurred in another room at a different time. App. 200. Victim also indicated Petitioner did not make her do anything to him, but Miller-Dupre indicated it was common for children to add to their account of the assault. App. 203. At the end of every interview, Miller-Dupre will ask the minor victim if anyone had talked to him or her before the interview about the assault or about what he or she should or should not say during the interview. App. 199. Miller-Dupre further testified there was nothing about Victim's disclosure which would lead her to believe it was the product of third-party influence, and she did not believe Victim's disclosure was affected by suggestibility or coaching. App. 202-03. Miller-Dupre also recommended Victim for evidence-based therapy at the Dickerson Center. App. 203.

During cross-examination, Miller-Dupre testified she told Victim if she thought of anything else to come back, but Victim never came back. App. 204-05. She also testified it is not her job to determine whether or not the minor victim is telling the truth or lying. App. 205.

She further testified "sexually assaulted" is not a typical term for a ten year old, but she believes Victim heard that term from the nurse. App. 205. Miller-Dupre also indicated Victim has probably discussed the abuse not only with the people at the Dickerson Center for therapy but also law enforcement, the Department of Social Services ("DSS"), and nurses at the hospital. App. 208. During redirect, Miller-Dupre testified she did not find Victim's disclosure problematic. App. 209.

Next, Katelyn Bradley, Victim's cousin, testified. She testified on the night of June 27th, she had a conversation with Christy Kirkland. App. 211. She further testified after that conversation she called her mother, because she did not know what to do. App. 212.

On cross examination, she explained she was told that Johnny Hutto had seen Petitioner feeling on Victim's leg. App. 212-13. She also testified this was the first time anything had been brought out about Petitioner molesting Victim, but there had always been thoughts about it from Victim's mother's family. App. 213. She elaborated no one had any evidence of any inappropriate behavior. App. 213. She also testified Petitioner neither drinks nor does drugs, but Victim's mother used to do cocaine. App. 213-14.

Felicia Schwall, Bradley's mother and Victim's aunt, then testified. She testified Bradley informed her that Christy Kirkland told her there was some stuff going on between Victim and Petitioner. App. 215. After learning this information, she then called Victim's mother. App. 215.

On cross-examination, she testified there was touching and improper displays going on—that Petitioner had Victim on his lap and was making Victim touch him. App. 216. She further testified Bradley told her Christy Kirkland saw this behavior, and Christy had mentioned this to

her previously. App. 216-17. Schwall elaborated she called Victim's mother early in the morning, about 3:30 or 4, and told her she thought she needed to pick Victim up because "stuff may be going on." App. 217. She also testified she has seen Petitioner giggling, smacking Victim on her butt, and pulling Victim down into his lap. App. 218.

The State then called Victim's mother (Mother) to testify. She testified Petitioner did not claim Victim as his until she was about eight years old; and at that point, Victim and Petitioner began spending time together. App. 228. Victim would see Petitioner every other weekend at Petitioner's mother's house, where he lived. App. 228. Once Victim began visiting Petitioner, Victim's older brother would only visit Petitioner once a month. App. 229. Victim also acted as if she did not want to go over to Petitioner's house. App. 230. She also testified her family made allegations Petitioner was abusing Victim, but when she asked Victim, Victim denied anything was happening. App. 230. She further testified she received a call from her sister, Schwall, about Petitioner touching Victim, and she told Victim what she had heard and that she needed to tell the truth. App. 230-31. She elaborated when she woke Victim up, she asked her about the abuse, and Victim initially denied it but then started crying and stated Petitioner had touched her. App. 232. She testified she then called Petitioner, who responded Victim was a "fucking little liar." App. 231. She also testified she went to the police to make a report and also took Victim to the hospital for an exam. App. 232. Victim did not talk to her mother about what happened, but went to the Dickerson Center for counseling. App. 233, 234.

During cross-examination, she testified DSS became involved when the allegations involving Petitioner arose. App. 236. She also testified she has had Petitioner arrested multiple times for unrelated offenses, none of which resulted in convictions. App. 240. Counsel had

Mother read her statement into the record, and highlighted in that statement, she used both "sexually assaulted" and "privates" to describe what happened to Victim. App. 238-39, 241. She testified although "sexual assault" is not a child's phrase, the adults around Victim had been using that term. App. 241-42. She also testified all of her children use the term "privates" to describe their genitals. App. 241. When asked whether or not Victim looked at Mother during her testimony, Mother responded: "Yeah, she kept looking at me. I'm her mother. I'm her support." App. 242. She also denied Victim would do what Mother wanted her to do, adding "if you're insinuating that I put my daughter through a trial like this to get to somebody, you're crazy." App. 242.

Investigator Danielle McCord of the City of Cayce Police Department testified next. She testified she met with Victim on June 30th and obtained statements from both Victim and Mother. App. 251. Investigator McCord also testified based on the forensic report, she obtained a warrant for Petitioner's arrest. App. 252. She elaborated she located Petitioner at his home and informed him he was under arrest for criminal sexual conduct, and she did not ask Petitioner any questions at that time. App. 252, 255. She further elaborated Petitioner immediately asked if the arrest was in reference to Victim and that "they were liars." App. 255. She also testified the term "sexual assault" is a term "we all commonly use." App. 255.

During cross-examination, she disagreed with Counsel that "kids don't use the words private" and testified she has heard some Victim victims of sexual abuse describe their genitals as privates, while others use the terms penis or vagina. App. 256-57. She also testified Mother told her Johnny Hutto had seen Petitioner put his hand down Victim's pants. App. 257. She

further testified she did not speak with Hutto. App. 257. Investigator McCord also testified Petitioner had no prior convictions. App. 258.

The State then presented the testimony of Robin Baker, who was a former SANE nurse at Palmetto Health Richland. Baker was qualified as an expert in sexual assault examination. App. 264. She testified she performed an exam on Victim on June 29, 2009. App. 265. She testified at the start of each exam, she ask about the events that occurred, what led to the events, where the victim hurt, if they received any injuries and, if so, where, if there was any penile penetration, if there was any ejaculation and, if so, where did it occur, and whether or not there was any type of oral, vaginal, or anal sex. App. 265. She further testified Victim complained of painful urination and stated she had been sexually molested—that Petitioner had placed his finger down her pants and started rubbing her privates, which hurt. App. 266. Victim stated she was there because Petitioner was touching her in her private places, and she was just walking around, and he put his hand down her pants. App. 266. Victim told Petitioner to leave her alone. App. 266. Victim also told her Johnny Hutto also saw this happen, and Hutto got really mad. App. 266. Victim indicated she was touched in her "private," underneath her clothes. App. 267. Victim also indicated this hurt. App. 267. Victim stated Petitioner had not touched her anywhere else, but Petitioner made her touch "his private," which felt "really, really bad." App. 267. Victim said she had touched Petitioner under his clothes—that Petitioner unzipped his pants, "pulled it out," nothing happened, and "it stayed the same." App. 267. When asked who did this to her, Victim stated Petitioner did. App. 267. Victim also told her Petitioner asked if her friend, Brittany Jones, would play truth or dare with him[4]. App. 267. Baker testified she examined

[4] Counsel objected to this statement, indicating "I don't think that has anything to do with what she was doing in this particular case. It's irrelevant, immaterial." App. 267-68. The trial court overruled this objection. App. 268.

Victim from the pubis to the anus and saw redness on Victim's labia majora. App. 270-71. Baker opined this injury was consistent with sexual assault caused by some type of friction. App. 274-75. She further opined this injury could have been caused by a urinary tract infection (UTI), but Victim was not diagnosed with a UTI. App. 275. Baker testified in her medical opinion, she believed Victim had been sexually assaulted based on Victim's history and injuries. App. 276.

On cross-examination, Baker testified a forceful rub or friction, which would be painful for a ten year old, would cause the injury. App. 276-77. She further testified touching the outside of the vagina would cause this type of injury and would not have to be caused by any type of insertion. App. 277. Baker also testified this injury would not have been caused by wearing jeans without underwear. App. 277. Baker further testified after the examination, she indicated finger penetration had been attempted, but had not penetrated Victim's vagina. App. 279. She also testified she based her findings on what Victim told her and the redness in her genital area. App. 282. She further testified in any sexual assault case, "you have to go by the history and by your physical findings." App. 284. She testified had Victim not told her anything, "then I would have to still conclude, due to the redness and my background in the medical field of sexual assaults in the pediatric area, that redness is usually not there." App. 282. Baker also testified other causes of the redness included a UTI that became infected and feces around the area. App. 283. She testified an attempt to insert a finger in the vagina every two weeks would cause the vagina to be red. App. 283. During redirect, Baker testified the history and physical findings were consistent with Victim's story and with some type of physical injury or trauma to the genital area. App. 285.

Johnny Hutto, Petitioner's cousin, then testified. Hutto testified he lived at Petitioner's home "on and off" and was staying there on June 27, 2009. App. 290-91. He witnessed Victim sitting in Petitioner's lap in Petitioner's truck. App. 292. After seeing this, he told Petitioner he was a "sick fucker and I was going to beat his ass." App. 292. He never saw Petitioner put his hand down Victim's pants. App. 292. He testified Victim, Petitioner, and Victim's grandmother slept in the same room, and Victim and Petitioner slept together. App. 293.

On cross-examination, Hutto testified he had never seen Petitioner put his hand down Victim's pants. App. 294. He testified Victim and Petitioner were close, and Victim was not afraid of Petitioner. App. 295. He further testified he has seen Petitioner blow his horn at teenage girls up the road, but has never seen Petitioner touch any young girl. App. 295-96. He denied ever telling anyone he had seen Petitioner touch a young girl. App. 296. Hutto then read his statement, in which he said he had seen Victim riding in the truck in Petitioner's lap and Petitioner alleged he was teaching Victim how to drive. App. 297.

On redirect, he testified he has never seen Petitioner teaching Victim's older brother how to drive. App. 299. He further testified he has never seen Victim's brother on Petitioner's lap. App. 299.

The State then called Laurie Caldwell, who was recognized as an expert in Victim abuse assessment. App. 324. Caldwell generally testified to delayed disclosure and Victim abuse sexual accommodation syndrome. *See* App. 324-32. Caldwell testified delayed disclosure is not connected to false allegation. App. 333. She also testified she had not spoken with Victim, nor looked at any of the statements or videos associated with this case. App. 332.

The State rested, and Petitioner presented his case. Petitioner first called Dr. John Michael Carroll, Victim's pediatrician, to testify. He was recognized as an expert in pediatrics. App. 343. Dr. Carroll testified he had a well-check with Victim on April 9, 2009, and no complaints were made nor did anyone mention Victim was being sexually abused. App. 344. He further testified he did not examine Victim's genitals during this exam. App. 344. He also saw Victim for a vaccine visit on June 9, 2009, during which there were neither problems nor complaints. App. 345-46. He saw Victim again on December 29, 2009, because she was sick, at which point neither Victim nor Mother mentioned sexual abuse nor complained of painful urination. App. 346. He testified he had no indication Victim was sexually abused, but he had not examined Victim's genitals in some years. App. 347. He further testified when he has examined Victim's genitals, he has never seen any redness. App. 347. On cross-examination, Dr. Carroll testified it is uncommon for a Victim to complain to a pediatrician that they had been sexually assaulted. App. 347. He further testified he has no training in forensic exam. App. 347.

Petitioner then presented the testimony of Gene Ray Elders, Sr., Petitioner's father. He testified Victim and Petitioner got along, and Victim would hold Petitioner's hand. App. 351. He further testified Victim would sit in Petitioner's lap, and Petitioner would ask her to sit on the couch; but two minutes later, Victim would go back to sitting in Petitioner's lap and hug on his neck. App. 352. He testified he has never seen Petitioner touch Victim and has not seen Petitioner touch any other children. App. 353. He testified no one has told him they saw Petitioner doing something wrong. App. 353. He also testified Victim's older brother did not visit as often as Victim. App. 352.

Next, Gene Ray Elders, Jr., Petitioner's brother, testified. He testified he lives in the same house as Petitioner, and there are no doors to the bedrooms, except for his mother's room. App. 356. He testified Victim slept in his mother's room, and Petitioner would not sleep with Victim, but rather would sleep with Georgie. App. 356. He further testified he never saw Petitioner doing anything wrong to Victim or to any other children, and no one has ever told him they saw something wrong. App. 357, 358.

During cross-examination, he testified it was not always true that Victim and Petitioner would sleep on an air mattress in his mother's room, but Petitioner would sit there until Victim fell asleep. App. 359. He also testified Hutto told Petitioner he was a "sick fucker," but he does not know why Hutto said that. App. 360. He elaborated when this happened both Christy Kirkland and Victim were there. App. 360. He further elaborated Kirkland ensured she was at the house when Victim was there, but she did not tell him she suspected abuse. App. 362. He also testified Kirkland told him Victim did not need to be there. App. 362.

Finally, Petitioner called Ashley Nicole Wooten, Petitioner's niece, to testify. She testified she has not seen Petitioner do anything to Victim and has not seen Petitioner touch Victim, nor any other Victim. App. 364. She also testified no one ever told her Petitioner touched a Victim. App. 365.

STANDARD OF REVIEW

The standard of review in post-conviction relief cases depends on the specific issue before the reviewing court. It will defer to a post-conviction relief 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 post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe,* 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). An applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Strickland*, 466 U.S. at 689. In assessing

counsel's performance, counsel's decisions must be evaluated at the time in which they were made and "every effort [must] be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is 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.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances,

the identified acts or omissions were outside *the wide range* of professional competent assistance" required of a criminal defense attorney." *Id.* at 690 (emphasis added).

ARGUMENT

I. The post-conviction relief did not err in finding trial counsel was not ineffective for failing to object when the forensic interviewer, Lysa Miller-Dupre, testified by opining that Victim had not be coached, opining that Victim was not affected by suggestibility, and recommending evidence-based therapy for Victim, when Petitioner suffered no prejudice, as the jury was given specific instructions to weigh the credibility of each witness.

Petitioner argues the post-conviction relief court erred in its determination that Counsel was not ineffective for failing to object when Miller-Dupre testified at trial that she believed Victim had not been coached, believed Victim was not affected by suggestibility, and recommended evidence-based therapy for Victim. Petitioner asserts this line of testimony served to bolster Victim's out-of-court statements about the abuse. Petitioner further asserts the lack of objection by Counsel served to bolster the credibility of Victim[5]. However, this argument is without merit and the post-conviction relief court's ruling should be affirmed, as Petitioner suffered no prejudice.

The mere fact a witness is qualified as an expert does not require the jury to give that witness's testimony any greater deference than that of a lay witness. *State v. Baker*, 390 S.C. 56, 67-68, 700 S.E.2d 440, 445 (Ct. App. 2010), *rev'd on other grounds by State v. Baker*, 411 S.C.

[5] Petitioner also asserts, within his argument, Counsel was ineffective for permitting Agent Laurie Caldwell, a forensic interviewer with the South Carolina Law Enforcement Division (SLED), to testify as to delayed disclosure and Victim sexual abuse accommodation syndrome. Respondent argues this is not properly raised for appellate review. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal."). Even if this issue is properly presented for appellate review, this argument is wholly without merit. As an initial matter, Counsel vociferously objected to Agent Caldwell's qualification as an expert, specifically highlighting Agent Caldwell did not possess the necessary qualifications to be considered an expert. *See* App. 303, 307, 318. Furthermore, an expert's testimony does not improperly bolster or corroborate a minor victim's testimony when the expert never interviewed the victims in that case nor had any specific knowledge of the facts of the case. *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). *See also State v. Smith*, 411 S.C. 161, 767 S.E.2d 212 (Ct. App. 2014) (finding a general explanation of the medical or scientific reasons a minor victim might not immediately disclose sexual trauma appropriate where the expert gives no indication as to the victim's truthfulness). Here, Agent Caldwell testified generally about delayed disclosure, tentative disclosure, and Victim sexual abuse accommodation syndrome. *See* App. 324-32. She further testified she had neither talked with Victim nor reviewed any statements or videos in Petitioner's case. App. 332. Moreover, she never indicated whether or not she thought Victim was telling the truth. Accordingly, such testimony was not improper.

583, 769 S.E.2d 860 (2015). Indeed, "the same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony." *State v. Douglas*, 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009) (citing *Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E.2d 104 (1943)). "As with any witness, the jury is free to accept or reject the testimony of an expert witness." *Id.* (citing *State v. Milian-Hernandez*, 287 S.C. 183, 186, 336 S.E.2d 476, 478 (1985)). This point is made particularly clear when the trial court charges the jury it is to determine the effect, value, weight, and truth of the evidence presented. *Baker*, 390 S.C. at 68, 700 S.E.2d at 445-46.

Here, the trial court charged the jury:

> . . . You alone determine the truth of the evidence, its effect, its value and its weight. You alone judge the credibility of witnesses, in other words, whether or not a witness' testimony is believable.
>
> In that regard, you may believe all that a witness said or none of it. You may believe part of what a witness said and not believe the balance. You may believe one witness against many or many against one. You may consider an interest, bias or prejudice that you feel that a witness has in the case. You may consider the demeanor and the appearance of the witness and the opportunity for knowledge that the witness had. You may consider whether a witness has been consistent or inconsistent. And you may consider the lack of evidence presented by the State.

App. 394-95. The trial court further charged: "You may accept or reject the opinions and testimony of an expert witness just as you may any other witness in whole or in part." App. 395. Clearly, the jury was aware of its duty to weigh the credibility of each witness and determine whether or not each witness was believable. Furthermore, the jury was clearly aware it did not have to afford any expert's opinion greater deference than that of any of the other witnesses.

At trial, the State presented numerous witnesses who all testified Petitioner had abused Victim, including Victim. These witnesses were both lay witnesses and expert witnesses. None

of these witnesses, with the exception of Victim, however, testified they never witnessed the abuse, though both Johnny Hutto and Felicia Schwall testified they saw some inappropriate behavior between Petitioner and Victim. Moreover, all of these witnesses testified Petitioner and Victim would sleep together when Victim visited Petitioner.

To the contrary, Petitioner presented multiple witnesses, all of whom testified they had never seen Petitioner touch Victim inappropriately. Furthermore, Petitioner presented the testimony of his own expert—Victim's pediatrician—who testified he had no indication Victim was being abused. These witnesses further testified they had never witnessed this type of behavior from Petitioner with any Victim. Still further, they testified Petitioner and Victim would not sleep together when Victim would visit. In addition, Counsel's strategy at trial was to diminish the credibility of the State's witnesses by suggesting these allegations against Petitioner were the result of a "witch hunt" led by Mother. Counsel articulated this strategy by highlighting the fact Mother had previously had Petitioner arrested multiple times, none of which resulted in a conviction. Counsel further articulated this strategy by emphasizing the fact Victim used terms, such as "sexual assault," in her disclosure—a term which is not commonly used by minors.

The jury was presented with two very different stories at trial, and the members of the jury chose to believe the version of events as presented by the State. Clearly, the jury had the opportunity to weigh the testimony of **each witness** presented by both the State and Petitioner. The jury also had the opportunity to determine whether or not the testimony presented by a particular witness was the result of any interest, bias, or prejudice against Petitioner. Furthermore, the trial court clearly instructed the jury not to afford an expert's testimony greater deference than that of any expert presented. In fact, any argument the jury gave greater weight

to Miller-Dupre's testimony by the mere fact she was an expert witness is rendered moot by the fact Petitioner presented the testimony of his own expert at trial. For the foregoing reasons, this Court should affirm the findings of the post-conviction relief court.

II. Petitioner's argument the post-conviction relief court erred in failing to find trial counsel ineffective for failing to object to the alleged hearsay testimony by the SANE nurse, Robin Baker, is not preserved for appellate review. Even if Petitioner's argument were preserved, trial counsel was not ineffective when highlighting the fact Victim used the term "sexually assaulted," which is an unusual term for children to use, in describing the abuse was part of trial counsel's strategy in suggesting Victim may have been coached. Further, Petitioner suffered no prejudice from the admission of such testimony, as it was merely cumulative to other testimony presented at trial.

Petitioner further contends the post-conviction relief court erred in finding trial counsel was not ineffective for failing to the SANE nurse, Robin Baker's, testimony that Victim told her during the pre-screening interview she had been sexually molested by her father, Petitioner, who had placed his finger in her pants and rubbed her genitals and also made Victim touch his penis.

Initially, Respondent notes Petitioner's argument is not preserved for appellate review, as this argument was not ruled upon by the post-conviction relief court. Pursuant to section 17-27-80 of the South Carolina Code, the post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. S.C. Code Ann. § 17-27-80. The failure to specifically rule on the issues precludes appellate review of the issues. *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). In the present case, the post-conviction relief court did not specifically address whether trial counsel was ineffective for failing to object to testimony presented by Baker that Victim told her, during a pre-screening interview, Petitioner had touched her genitals and, likewise, made her touch his penis.

In *Marlar v. State*, the Supreme Court held the applicant's failure to file a Rule 59(e), SCRCP, motion asking the post-conviction relief judge to make specific findings of fact and conclusions of law as to rejected post-conviction challenges rendered those challenges waived

for appellate review, precluding further review on the merits. 375 S.C. 407, 653 S.E.2d 266 (2007). Indeed, the Supreme Court noted:

> Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP.

Id. at 410, 653 S.E. 2d at 267. In the current case, Petitioner failed to make the proper motion under Rule 59. Accordingly, the issue is not preserved for appellate reviewed and should be dismissed.

The current case is similar to *Marlar* because Petitioner did not make a Rule 59(e) motion. Petitioner's argument to this Court is the post-conviction relief judge erred in refusing to find counsel ineffective for failing to object when Baker testified that Victim told her Petitioner had sexually assaulted her. The only issue ruled upon by the post-conviction relief court in its Order of Dismissal concerning Baker was whether Counsel was ineffective "for not adequately specifying his objection to Baker testifying to pre-examination interview with [Victim]." App. 510. The objection to which the post-conviction relief court is referring occurred after Baker testified Victim told her Petitioner asked if her friend, Brittany Jones, would play truth or dare with him. App. 267. Specifically, the following exchange took place at trial:

> Q: Did she say anything else about what she did?
>
> A: Do you mind if I read my notes?
>
> Q: No, if that helps you refresh your memory.
>
> A: . . . The other comments, I asked her if there was something else that she needed to add, if there's something, you know, prevalent to, you know, what

happened to her that day. And she said, Yes. He asked if my friend, Brittany Jones, would play truth or dare with him.

[Counsel]: Objection, Your Honor.

The Court: Yes, sir.

[Counsel]: I don't think that has anything to do with what she was doing in this particular case. It's irrelevant, immaterial.

. . .

The Court: The objection's overruled. You have something to add?

[Counsel]: You overruled it?

The Court: The objection's overruled. It's merely duplicative of what's already been entered into evidence.

App. 267-68. Additionally, Petitioner did not make a Rule 59(e) motion asking the post-conviction relief court to make specific findings of fact and conclusions of law on his current allegation he now raises for appellate review. Therefore, under *Marlar*'s holding, the current issue now raised is not preserved for appellate review.

Even if Petitioner's argument were preserved for appellate review, Petitioner's argument lacks merit. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Strickland*, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (quoting *Massaro v. United States*, 538 U.S. 500 (2003)). Indeed, trial counsel must be given leeway to make reasonable strategic decisions. "[N]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate

decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Furthermore, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). *See also Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. at 122, 417 S.E.2d at 531 (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)).

Moreover, in *Watson v. State*, the Supreme Court reversed a post-conviction relief court's determination trial counsel was ineffective for failing to prevent the introduction of hearsay testimony of several witnesses who testified about the abuse allegations against the defendant. 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). The Supreme Court specifically held "counsel articulated a valid reason for failing to object to the hearsay testimony" where that reason was that counsel "wanted to avoid the possibility that the prosecution would have shown the video of the victim talking about the sexual abuse." *Id.*

As with *Watson*, Counsel had a "valid reason for employing a certain strategy [and] such conduct [should] not be deemed ineffective assistance of counsel." *Watson*, 370 S.C. at 72, 634 S.E.2d at 644 (citing *Stokes*, 308 S.C. at 546, 419 S.E.2d at 778). Counsel testified he intentionally tried to highlight Victim claimed some things to others—such as Petitioner had made her touch his penis—while not referencing those allegations in her forensic interview. He wanted to highlight that inconsistent testimony. App. 460-61. In fact, Counsel intentionally entered a written statement from Victim's mother as Defense Exhibit 1 for the purpose of challenging the assault claims and calling into question the terminology Victim and her mother had used.

> **[Counsel]: Could you read the statement for me, please?**
>
> **A: Yes, sir. I received a phone call . . . telling me that [Petitioner] has been sexually assaulting our daughter, [Victim]. I told [Victim] I was aware of what was going on and I needed her to tell me.**
>
> . . .
>
> A: She told me **her father had been putting his hands down her pants** and playing with her private area. I asked her how long this had been going on, she said every time she went over to his house for about a year. The call I received was from my sister . . . She told me [Petitioner's] cousin, Johnny Hutto, saw [Petitioner] touching [Victim] inappropriately and I needed to ask [Victim] what was going on.
>
> . . .
>
> Q: . . . Did you use the words sexually assaulted?
>
> A: Yep, sure did.
>
> Q: And you also used the word that he had been touching her privates?
>
> A: Yes, sir.
>
> **Q: That's the exact same words [Victim] uses, isn't it, sexually assaulted and privates?**
>
> . . .

Q: Isn't it true that most kids refer to private parts by different words--

. . .

Q: --such as tutu, wee-wee?

. . .

Q: And sexual assault, they use that phrase all the time, too?

A: Yeah. Yeah, I do. Uh-huh.

Q: That is not a Child's phrase, is it?

A: No, it's not a Child's phrase . . .

Q: And when [Victim] was testifying, she kept looking at you sitting back here behind me, didn't she?

A: Yeah, she kept looking at me. I'm her mother. I'm her support.

Q: And she's going to do what you want her to do?

App. 238-42 (emphasis added).

This narrative of Victim using terminology from other adults, like Baker, was also addressed by Counsel during cross-examination of Miller-Dupre:

[Counsel]: [Victim] **said she was sexually assaulted by dad. Sexually assaulted is not terms a ten-year-old uses, is it?**

A: Not typically.

Q: [Children] say something else. [Victim] got [the term] sexually assaulted from somebody else then, didn't she?

A: **I think [Victim] said that the nurse said that [term] to her.**

App. 205 (emphasis added). Accordingly, Counsel employed a valid trial strategy in highlighting the specific terminology Victim used in her disclosure and her testimony and, therefore, was not deficient.

Assuming Counsel should have objected to this line of testimony, Petitioner suffered no prejudice. "'Improper admission of hearsay testimony constitutes reversible error **only** when the admission causes prejudice.'" *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (quoting *State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010)). The improper admission of hearsay testimony that is merely cumulative to other evidence, however, may be viewed as harmless. *Id.* at 478, 716 S.E.2d at 93-94 (citing *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)). *See also State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (finding when two other witnesses testified, without objection, the victim told them the rape occurred at the appellant's home, any testimony from the mental health counselor that the victim told her the rape occurred at the appellant's home was merely cumulative to the two other witnesses and, therefore, any error in the admission of the counselor's testimony was harmless); *Smith*, 411 S.C. at 169-70, 767 S.E.2d at 217 (finding no reversible error when the forensic interviewer testified the victim reported "he was about six or seven years old 'when his dad started to do these things to him'" because such testimony was cumulative to other testimony through which the appellant was identified as the perpetrator).

Here, several witnesses testified, without objection, either (1) Victim told them Petitioner had abused her or (2) Mother reported to them Petitioner had sexually abused Victim. *See Smith*, 411 S.C. at 170, 767 S.E.2d at 217 ("Florencio testified without objection that the aunt and the victim reported to him that the victim had been sexually abused by his father. Thus, Smith was previously identified as the perpetrator without objection, rendering Twitty's testimony harmless because it was cumulative."). First, Officer Desiree Busko testified Mother advised her the

assault occurred at Petitioner's home. App. 166. Next, Katelyn Bradley testified she was told Johnny Hutto had seen Petitioner "feeling on Victim's leg." App. 212. She further testified she gathered this information from Christy Kirkland, who had heard it. App. 213. Felicia Schwall also testified Bradley told her Kirkland had told her there was some stuff going on between Victim and Petitioner. App. 215. Moreover, Mother testified Victim told her Petitioner had touched her. App. 232. Similarly, Investigator Danielle McCord testified Mother told her Johnny Hutto had seen Petitioner put his hand down Victim's pants. App. 257. All of this testimony was entered without objection. Accordingly, Petitioner had already been identified as the perpetrator, and Baker's testimony as to what Victim told her in the pre-screening interview was merely cumulative. Based on the foregoing, this Court should affirm the findings of the post-conviction relief court.

CONCLUSION

For the foregoing reasons, this Court should affirm the post-conviction relief court.

Respectfully submitted,

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