STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Union County

Honorable Thomas A. Russo, Circuit Court Judge

STEPHEN DOUGLAS BERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001092

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Did the PCR judge err in finding that trial counsel was not ineffective for failing to preserve her meritorious objections to the state's expert witness where trial counsel made numerous objections after significant amounts of objectionable testimony were presented before the jury, counsel's objections were sustained, and counsel failed to move to strike, ask for a curative instruction, or move for a mistrial, and therefore this Court found that these objections were not preserved for appellate review?

2.

Did the PCR judge err in finding that appellate counsel was not ineffective for failing to properly raise trial counsel's objection to the state's expert not being qualified to diagnose the alleged victim with post-traumatic stress disorder where this Court held that appellate counsel made a different argument on appeal than that which was argued below and therefore found the issue procedurally barred?

STATEMENT

Petitioner was indicted in July of 2012 by the Union County grand jury for criminal sexual conduct with a minor in the second degree. App. 969. On February 5, 2013, his case was called to trial before the Honorable John C. Hayes, III and a jury. App. 1. Petitioner was represented by Erik Delaney and Melissa Inzerillo. The state was represented by John C. Anthony. App. 1.

Petitioner was the youth pastor at New Life Baptist Church were Minor[1] was a member. App. 102, ll. 10 – 24. Minor was close friends with one of Petitioner's daughters. App. 103, l. 22 – 104, l. 10. Minor accused Petitioner of digitally penetrating her on several different occasions while she was a member of his church. App. 111, ll. 4 – 23; app. 116, ll. 9 – 17; app. 118, ll. 7 – 19; app. 120, ll. 5 – 15.

Minor also accused Petitioner of engaging in nonconsensual sexual intercourse with her on one occasion; specifically claiming that Petitioner raped her in front of two of Petitioner's own daughters, neither of whom corroborated Minor's accusations. App. 126, l. 3 – 130, l. 12; app. 530, l. 6 – 533, l. 7. Nancy Henderson, the pediatrician who performed a physical exam on Minor after she claimed to have been sexually assaulted, found that Minor's hymen was fully intact. App. App. 564, l. 25 – 570, l. 10. Minor claimed that the digital penetration continued to occur once a week for over a year. App. 121, l. 25 – 122, l. 18. Petitioner was found guilty as charged. App. 645 – 646. The judge sentenced him to fifteen years imprisonment. App. 654.

On direct appeal, Petitioner was represented by League Creech. Petitioner raised the following issues in his appeal:

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1 Minor was fifteen at the time that the majority of the alleged conduct occurred. Minor claimed that the alleged conduct continued after her sixteenth birthday, which was the listed end date in the indictment against Petitioner. App. 100, l. 23 – 101, l. 1; app. 969 – 970.

1. Did the trial court err in allowing the victim to testify regarding alleged other acts which exceeded the scope of the indictment and which were not criminal in nature; and

2. Did the trial court err in failing to suppress two inadmissible aspects of the state's expert's testimony?

App. 660. The Court of Appeals affirmed. State v. Berry, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015); App. 712. Appellate counsel Creech filed a petition for rehearing which was denied on November 20, 2015. App. 724 – 740. Appellate counsel then filed a petition for a writ of certiorari on January 11, 2016. App. 742. This Court granted the petition and affirmed the Court of Appeals as modified. State v. Berry, 418 S.C. 500, 795 S.E.2d 26 (2016); App. 786.

Petitioner filed his PCR application on June 30, 3017 and the state filed its Return and partial motion to dismiss on October 6, 2017. App. 790 – 826. An evidentiary hearing was held on February 1, 2019 before the Honorable Thomas A. Russo. App. 827. Petitioner was represented by Leah Moody and the state was represented by Janell Gregory. App. 827. Testifying at the hearing were Petitioner, both of his trial attorneys and his appellate counsel. App. 828. The PCR judge denied Petitioner's application for relief. App. 951 – 967.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR judge erred in finding that trial counsel was not ineffective for failing to preserve her meritorious objections to the state's expert witness because trial counsel made numerous objections after significant amounts of objectionable testimony were presented before the jury, counsel's objections were sustained, and counsel failed to move to strike, ask for a curative instruction, or move for a mistrial, and therefore this Court found that these objections were not preserved for appellate review.

Relevant Facts

The state called Kimberly Roseborough, who was qualified as an expert in the field of "child sexual abuse assessment and treatment." App. 444, l. 18 – 449, l. 13. Roseborough testified that she personally counseled Minor and her family from 2005 until 2007 while Minor's parents were getting divorced. App. 449, l. 15 – 450, l. 6. Minor's father had sole custody of her, and her mother only had weekend visitations. App. 181, l. 19 – 182, l. 16. Roseborough began counseling Minor again in 2010 regarding Minor's mother attempting to re-establish visitation pursuant to a family court order. App. 450, l. 19 – 451, l. 6. During this time period, Roseborough would meet with Minor once or twice a month. App. 452, ll. 2 – 6.

After Minor made the initial allegations against Petitioner, Roseborough recalled:

> In March of 2011, there was a police report where Minor disclosed sexual abuse and at that point I was still working with the family around the visitation issues and I also began to see Minor some individually that was more specifically related to the sexual abuse allegations even though I did continue to work with the family and the other child with mom's visitation.

App. 452, ll. 10 – 16. Minor allegedly told Roseborough that she began being sexually abused in "May or June of 2010" and it continued "until several weeks prior to her making the police report." App. 452, l. 22 – 453, l. 6.

The assistant solicitor asked Roseborough what observations she made about Minor's demeanor during her counseling sessions regarding the allegations of sexual abuse. Roseborough answered:

> Over time, and I did see [Minor] for some time after that, I noticed several things about her demeanor, including many symptoms that related to trauma. She was very avoidant. Many times of trying – of me trying to talk to her about what happened she became increasing[ly] more agitated and depressed. She became more angry. She had a lot of feelings of guilt and hopelessness and was very hyper-vigilant, very easily startled in my office and was very emotionally distressed and that progressed and got worse over time after the disclosure was made.

App. 453, l. 12 – 454, l. 1. The solicitor then asked Roseborough whether "the circumstances of [Minor's] disclosure" were "consistent with the disclosure of sexual abuse." App. 454, ll. 2 – 5. Defense counsel immediately objected, and the jury was sent out. App. 454, ll. 6 – 8.

Outside the presence of the jury, defense counsel objected to Roseborough testifying to Minor's demeanor being consistent or inconsistent with sexual abuse because it amounted to a comment on her credibility which violated State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). App. 454, l. 11 – 456, l. 15. The assistant solicitor responded that Kromah dealt with the interviewer making a "compelling finding" which was distinguishable from his question regarding consistency or inconsistency with sexual abuse. App. 458, ll. 13 – 19. The court sustained defense counsel's objection. App. 458, l. 20 – 459, l. 8.

When the jury returned to the courtroom the assistant solicitor began questioning Roseborough about delayed disclosure. Roseborough was asked how common delayed disclosure was and the following occurred:

> It is incredibly common. With incestuous cases, it happens quite a lot. As I said, it's one of the major tenants of the Child Sexual Abuse Accommodation Syndrome because it happens so often. You have to remember we're not talking about a stranger rape and even those don't get reported as we all know that those numbers are incredibly low based on what actually occurs. But for many reasons people don't report that and these kinds of sexual abuse cases, they have the person who is the perpetrator has spent time grooming the child, getting the child to accept the behavior –
>
> [Defense counsel]: Objection, Your Honor.
>
> The Court: I sustain the objection.

App. 461, l. 24 – 462, l. 12. After this, the assistant solicitor asked specifically about Roseborough's experience with Minor and asked if Roseborough could identify specific factors in Minor's situation that could have led to her delaying disclosure. Roseborough answered:

> Well, there were several. One was because she didn't think anybody would believe her. That was the first one. That she didn't believe that people would believe who this person was, was actually abusing her. One of the major ones that she –
>
> [Defense counsel]: Your Honor, I'm going to object.
>
> The Court: I sustain the objection.

App. 463, ll. 9 – 20. The jury was then sent out of the courtroom and the assistant solicitor argued: "I don't think there is any prohibition on her explaining factors she observed in [Minor's] situation that would be consistent with her delaying her report." App. 463, l. 22 – 464, l. 3. After further argument on the issue the trial judge again sustained the objection. App. 464, l. 4 – 465, l. 5. However, the trial judge ruled that the assistant solicitor would be allowed to

"ask questions about typical responses that may cause delayed reporting," but would not be allowed to use the word "consistent." App. 469, l. 3 – 472, l. 8.

When the jury returned to the courtroom, the following exchange took place:

> KIM ROSBOROUGH BY SOLICITOR ANTHONY
>
> Q. Ms. Roseborough, I'm gonna [sic] back up just a little bit and try to move forward.
>
> You were testifying about delayed disclosures with child abuse.
>
> A. Yes.
>
> Q. And could you tell the jury if there are any typical factors that might lead a child to delayed disclosing?
>
> A. Yes. What might have a child have delayed disclosure would be things like not believing that someone would believe him or her. A lot of times they, when we interview children or talk to kids after a disclosure has been made, they will say that they did not believe anyone would believe them either because of the content of their disclosure or because of who the perpetrator was.
>
> A lot of times the perpetrator may be someone that they know through other ways and that other people know and would not believe on the surface that, that could be true so that would be a reason that they might not would tell. Other reasons for delayed disclosure center around the fear of the unkonw[n], what is going to happen next.
>
> A lot of kids, especially teenagers, are savvy enough to understand that there might be police involvement, a police report. There might be court. They would have to make their statement to numerous people. That they would have to be talked to and interviewed by professionals. And when you think that people wouldn't believe you, that's a really hard thing to do.
>
> If the perpetrator is someone that other people know or is involved with your family, you are also very or maybe concerned about what is going to happen to that person or how people are going to react if you say that is the person offended against you. In some cases that I've worked on, there may be freindships involved in these kinds of situations. There may be – they may have friends that are involved with that family or with that offender that they

may not want to put that family through, and their family through, what they know what might happen if they make a disclosure.

Q. And based on your work with Minor are any of those typical factors present in her situation?

A. Yes, they are.

Q. And which factors are present?

A. Well, there are numerous factors present. The first one was that not being believed because of the position –

[Defense counsel]: *Your Honor, I [am] going to object.*

The Court: *Yeah. I sustain the objection.*

BY SOLICITOR ANTHONY:

Q. Okay. The first factor is not being believed. What else? Without going into the reason why she might not be believed, what else would – well, insofar as she might not be believed, without specifically saying what would be pertinent to [Minor's] case, what factors might a child consider in delaying a disclosure because of a fear of not being believed?

A. If they felt like their disclosure was going to hurt someone that they really cared about or were very close to.

Q. And then aside from the fear of not being believed, what other typical factors were present in [Minor's] case that might lead to a delayed disclosure?

A. That she was afraid that it would hurt her friendship.

[Defense counsel]: *Objection, Your Honor.*

The Court: *Yeah. I sustain the objection.*
Disregard that question and answer.

BY SOLICITOR ANTHONY:

Q. Would that be a typical factor?

A. That their disclosure might hurt someone? Absolutely.

Q. And what else was present in regards to her?

A. Generally threats and being told to not tell, to keeping it a secret.

[Defense counsel]: *Your Honor, I'm going to object. I believe those questions –*

The Court: *I sustain the objection. I thought we were going to keep it as to typical; not specific.*

Solicitor Anthony: Well, -

The Court: *Well I've ruled.*

Solicitor Anthony: Okay. I'm sorry.

App. 472, l. 14 – 475, l. 14 (emphasis added).

On direct appeal, Petitioner's appellate counsel argued that the trial court erred in admitting Roseborough's testimony because it was improper bolstering and violated the holding of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). App. 666 – 670.

The Court of Appeals found that Petitioner's direct appeal arguments were preserved because the grounds for trial counsel's objection was apparent from the context. State v. Berry, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015); App. 712 – 723. The Court of Appeals then relied on State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) in holding that the trial court did not err because "Roseborough's testimony did not impermissibly vouch for or bolster [Minor's] testimony." State v. Berry, 413 S.C. 118, 130, 775 S.E.2d 51, 57 (Ct. App. 2015).

This Court, however, found that trial counsel's objection to Roseborough's testimony did not preserve the issue, therefore it was not properly before the Court of Appeals. State v. Berry, 418 S.C. 500, 795 S.E.2d 26 (2016); App. 786 – 789. This Court considered Roseborough's testimony as consisting of three distinct parts: (1) the demeanor of the Minor, (2) the

explanations given regarding delayed disclosure, and, (3) the testimony regarding Minor's supposed suffering from post-traumatic stress disorder. Id. at 502, 795 S.E.2d at 27. Because trial counsel's objections to the testimony regarding Minor's demeanor and delayed disclosure were sustained, and trial counsel did not move to strike, request a curative instruction, or for a mistrial, this Court found that trial counsel's objection was unpreserved. Id. at 504, 795 S.E.2d at 28.

At Petitioner's PCR hearing, trial counsel acknowledged that she failed to move for a mistrial, curative instruction, or to strike any of Roseborough's testimony after her objections were sustained. App. 899, ll. 21 – 24. Counsel said that she generally would not move to strike because she did not want to highlight the testimony to the jury. App. 899, l. 25 – 900, l. 8. Counsel stubbornly stated: "I was under the belief and sort of still am that the objections were sufficient to preserve it for the record." App. 900, ll. 9 – 10. Counsel admitted, however, that her failure to move to strike resulted in this Court finding the issue unpreserved and that she would "probably" start moving to strike in the future as a result of this Court's opinion in Petitioner's direct appeal. App. 906, ll. 3 – 25.

The PCR judge found that trial counsel was not deficient because she "attempted to preserve the issues regarding Roseborough's testimony for appeal by objecting contemporaneously to Roseborough's testimony and renewed her objections at the close of the State's case." App. 959. The judge further found that trial counsel gave a valid strategic reason when she claimed that she did not move to strike because she did not want to highlight the testimony to the jury. App. 959. Additionally, the judge found that Petitioner failed to show prejudice because the Court of Appeals ruled against Petitioner on the merits of this issue and he

did not show that this Court would have reached a different conclusion even if trial counsel's objections had been preserved for appellate review. App. 959.

Discussion

The PCR judge erred in finding that trial counsel was not ineffective for failing to adequately preserve her meritorious objections for appellate review. In order to prove ineffective assistance of counsel, Petitioner must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

"Appellate courts have recognized that an issue will not be preserved for review where the trial court sustains a party's objection to improper testimony and the party does not subsequently move to strike the testimony or for a mistrial." State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) (internal emphasis omitted). The reasoning for this rule is

that when a party's objection has been sustained, he has received what he asked for, and without a motion to strike or for a mistrial he cannot complain on appeal. Id.

"Moreover, as the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review." Wilson, 389 S.C. at 583, 698 S.E.2d at 864; see also State v. George, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996) (holding that defense counsel's objection to improper cross-examination of a defense witness was not preserved for review when the objection was sustained, counsel's motion for a mistrial was denied, but counsel did not object to the trial judge's curative instruction); State v. Penland, 275 S.C. 537, 538-539, 273 S.E.2d 765, 766 (1981) (holding that defense counsel's sustained objection to solicitor's improper closing argument was not preserved for appellate review when counsel did not contemporaneously move for a mistrial and did not object to the trial judge's curative instruction); State v. Harry, 321 S.C. 273, 280-281, 468 S.E.2d 76, 80-81 (Ct. App. 1996) (holding that defense counsel's objection to solicitor's closing argument was not preserved for review because counsel did not move to strike the argument); State v. Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996) (holding that defense counsel's sustained objection to prejudicial testimony was not persevered for appellate review because he did not object to the curative instruction).

In this case, trial counsel's objections to Roseborough's testimony, based on improper bolstering under Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), were sustained. However, as seen, the assistant solicitor continued to elicit improper testimony from Roseborough on multiple occasions after the initial sustained objection. Each time when trial counsel objected, her objection was sustained. The problem however was that immediately preceding each of

counsel's objections, significant improper testimony was introduced before the jury. Therefore, it was imperative for counsel to have moved to strike the improper testimony, requested a curative instruction or moved for a mistrial.

Trial counsel testified at the PCR hearing that she did not move to strike because she did not want the testimony to be highlighted for the jury. However, counsel also claimed that despite this Court's opinion which clearly found her objections were not preserved for appellate review, she *still* believed that her objections were preserved. This seems to indicate that counsel was unaware of the numerous cases holding that in order to preserve a sustained objection for appellate review, counsel must move to strike the offending testimony, request and accept a curative instruction, object to the curative instruction if not satisfied with it, or move for a mistrial. Trial counsel's failure to do any of these things was deficient performance because she failed to preserve her meritorious objections for appellate review.

Furthermore, the assistant solicitor continued to successfully elicit testimony which the trial judge had already ruled was inadmissible. This resulted in the jury hearing improper bolstering testimony which the assistant solicitor knew to be improper. There was no valid trial strategy in trial counsel's failure to move for a mistrial after the assistant solicitor continued to elicit this improper testimony. It was apparent the trial judge agreed that what the solicitor was eliciting was improper and had counsel moved for a mistrial, one may well have been granted.

Petitioner was prejudiced by trial counsel's deficiency in failing to preserve her meritorious objections for appellate review. "Whether an offer of improper evidence requires a reversal depends upon the character and importance of the evidence offered and the good or bad faith of counsel . . ." State v. White, 371 S.C. 439, 447, 639 S.E.2d 160, 164 (Ct. App. 2006).

The assistant solicitor here continuously and repeatedly elicited testimony from Roseborough that the trial judge had already ruled was inadmissible. That was not acting in good faith.

Roseborough's improper testimony was especially problematic because she was Minor's personal counselor for several years. Not only did Roseborough counsel Minor throughout the course of her parents' divorce, she also counseled Minor during and after she made her allegations against Petitioner. Furthermore, Roseborough testified that she counseled Minor specifically about her allegations of sexual abuse and Roseborough was testifying in the context of "treating" Minor for her trauma, which purportedly stemmed from the allegations of abuse. It was improper for a social worker who was actively "treating" the alleged victim of sexual abuse to testify regarding the specific aspects of that treatment in a criminal trial because this would be perceived by the jury as an expert witness vouching for the credibility of Minor.

This Court warned in State v. Anderson, 413 S.C. 212, 218-219, 776 S.E.2d 76, 79 (2015), that when calling child abuse experts: "The better practice . . . is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility." Anderson dealt with a "forensic interviewer" who had interviewed an alleged minor victim *after* the child had made the allegations. Even there, this Court cautioned the bar against the risk that impermissible vouching would occur.

Here, the error was even worse. Roseborough was not merely a forensic interviewer who conducted a one-time interview with Minor after she made the allegations against Petitioner. Rather she "treated" Minor and counseled her over a period of multiple years – including the time frame *during and after* the alleged abuse. Roseborough's testimony was improper which

was why the trial judge sustained many of trial counsel's objections to Roseborough's testimony. However, because trial counsel did not take any additional action to strike the inadmissible testimony or move for a mistrial, she failed to preserve the issues for appellate review. This Court has already clearly held that counsel failed to preserve these issues. The PCR judge erred in finding that trial counsel was not ineffective. See State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015); State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013).

2.

The PCR judge erred in finding that appellate counsel was not ineffective for failing to properly raise trial counsel's objection to the state's expert not being qualified to diagnose the alleged victim with post-traumatic stress disorder where this Court held that appellate counsel made a different argument on appeal than that which was argued below and therefore did not rule on the merits.

Relevant Facts

During the assistant solicitor's questioning of the state's expert witness, Roseborough, the following exchange took place:

> Q. [A]re there any typical symptoms of trauma that are exhibited by people who have been – by children who have been sexually assaulted?
>
> A. Yes.
>
> Q. Okay. And what are those?
>
> A. There are certain symptoms of trauma that must be present in order to diagnose someone with a traumatic response or post traumatic stress disorder, and those include certain things – there are certain categories and the way that it is written in the Diagnostic Statistical Manual, you have to have a certain number under each category. The first category is that there has to have been some type of traumatic event where someone was harmed or felt like that they were in danger in some way and that that caused them a significant amount of distress.
>
> [Defense counsel]: Your Honor, I'm going to object.
> May we approach at this point?

App. 475, l. 15 – 476, l. 8.

After a sidebar was held, Roseborough's testimony continued. She testified that some of the specific symptoms typically observed in children who have been sexually assaulted included hyper-vigilance, intrusive thoughts, angry outbursts, feelings of detachment, depression, anxiety,

lack of sleep, and loss of appetite. App. 476, ll. 10 – 25. Roseborough then testified that she observed many, if not all, of these exact symptoms in Minor during her "treatment" of Minor. App. 477, l. 1 – 479, l. 7. After Roseborough detailed the symptoms that she personally observed in Minor, the following occurred:

> Q. In your field is there a condition that once you see a certain set of these symptoms you attribute to a person, a diagnosis you give to a person based on an accumulation of these symptoms?
>
> A. Yes. Yes.
>
> Q. Okay. What is that?
>
> A. It is very important that if you start seeing these symptoms as a therapist, and the person is having problems functioning, you want to address it as quickly as possible if medication is needed because of the likelihood of self harm and the depression becoming more severe and more chronic.
>
> *When I was treating her, the symptoms that she was exhibiting met the criteria for post traumatic stress disorder, and because it was so severe I was worried about Minor and her functioning and just how depressed she had gotten and whether she might engage in more self injury, so I referred her to a psychiatrist at the time to assess her for the possibility of that person making a diagnosis and then being able to treat her with medication to help with her symptoms.*
>
> Q. *And did you form an opinion as to whether [Minor] suffered from post traumatic stress disorder?*
>
> A. *Yes. That was my opinion when I referred her.*
>
> Q. And when you say or when the people in your field say somebody has post traumatic stress disorder, what does that mean has happened?
>
> A. It means that they fit a certain number of criteria that is listed in the Diagnostic Statistical Manual that would indicate that they have that condition, and the first one is that an event occurred that was traumatizing to that person that made them feel for their sense of safety, and that they felt helpless and they felt like it was something that was out of their control.

App. 479, l. 8 – 480, l. 15 (emphasis added). Roseborough went on to say that sexual abuse is a typical event that could lead to a person developing post-traumatic stress disorder. App. 480, l. 25 – 481, l. 9. Roseborough testified that she "treated" Minor specifically for sexual abuse for a year and a half. App. 481, l. 10 – 482, l. 21. Over additional objection by defense counsel, Roseborough stated that the most devastating and traumatizing aspect of Minor's situation was losing her friend, Petitioner's daughter. App. 482, l. 22 – 483, l. 10.

Later in the trial, defense counsel put her objection at the sidebar conference on the record. Counsel argued that when Roseborough was testifying regarding her diagnosis of Minor as suffering from post-traumatic stress disorder, counsel objected on the grounds that Roseborough was not qualified to make such a diagnosis because she was a social worker and not a medical doctor. App. 522, ll. 3 – 16. The trial judge then stated: "[I]n the sidebar I determined that you don't have to be an M.D., to diagnose post traumatic stress disorder; that her qualifications were broad enough to encompass that." App. 522, l. 17 – 523, l. 1.

The entirety of appellate counsel's argument on appeal regarding Roseborough's testimony was as follows:

> There can be no other conclusion than that this testimony prejudiced Berry. While "an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *Kromah* at 357, 737 S.E.2d at 499. Furthermore, allowing Ms. Roseborough to testify that Minor developed PTSD due to the trauma of sexual abuse tells the jury that an expert finds Minor credible, which is precisely what the *Kromah* case forbids an expert to do. In this case, where no physical evidence exists linking the Defendant to the crime, the jury's decision comes down solely to the veracity of Minor. Ms. Roseborough was the only expert witness for the State. Qualification "as an expert clothes the witness with an air of authority that does not attach to 'ordinary' witnesses." *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (Pleicones, J. dissenting).

Berry should be granted a new trial given the prejudicial nature of Ms. Roseborough's expert testimony.

App. 669 – 670.

The state argued in its brief to the Court of Appeals, that appellate counsel's argument was not preserved for review because trial counsel's Kromah objections were sustained, and trial counsel's only objection regarding the testimony regarding PTSD was based on Roseborough's qualifications and had nothing to do with bolstering Minor's testimony. App. 687 – 688.

The Court of Appeals found that appellate counsel's argument was proper because trial counsel's objection to the testimony regarding PTSD was apparent from the context, i.e. trial counsel had just previously objected extensively under Kromah. App. 718 – 721. The Court of Appeals ruled against Petitioner on the merits of the issue, but it did not address any issue regarding Roseborough's qualifications to testify regarding PTSD. App. 721 – 723.

Appellate counsel argued in both her petition for rehearing in the Court of Appeals and in her petition for a writ of certiorari in this Court that the Court of Appeals opinion was inconsistent with State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), and State v. Anderson, 413, S.C. 212, 776 S.E.2d 76 (2015). Appellate counsel did not argue in either of these petitions that Roseborough was not qualified to testify Minor suffered from PTSD as trial counsel had argued below. App. 724 – 730; app. 742 – 755.

In affirming the Court of Appeals, this Court found that appellate counsel's arguments against Roseborough's testimony regarding PTSD and symptoms of trauma were different from trial counsel's arguments and therefore were procedurally barred. State v. Berry, 418 S.C. 500, 795 S.E.2d 26 (2016); App. 786 – 789. Specifically, this Court found that the only objection trial counsel made regarding Roseborough's testimony regarding PTSD was that Roseborough was

not qualified to address PTSD. Appellate counsel never raised this argument on appeal. App. 786 – 789. Therefore, this Court refused to address the merits of appellate counsel's arguments and affirmed Petitioner's conviction.

Petitioner's appellate counsel testified at the PCR hearing. She said that her argument on appeal was that all Roseborough's testimony at trial was bolstering Minor's credibility, including the discussion about PTSD, and therefore it was prejudicial to Petitioner. App. 929, ll. 5 – 18. The PCR judge found that appellate counsel "raised all of the meritorious grounds preserved for appeal" and that Petitioner failed to show prejudice. App. 960.

Discussion

This Court ruled that Petitioner's appellate counsel made a different argument on appeal than what his trial counsel argued regarding Roseborough's testimony about post-traumatic stress disorder. As this Court stated in its opinion on direct appeal: "[T]he record clearly shows that the only objection made to that portion of Roseborough's testimony was based upon her qualifications to diagnose PTSD." State v. Berry, 418 S.C. 500, 504, 795 S.E.2d 26, 28 (2016). Therefore, Petitioner's appellate counsel was deficient in failing to argue the same grounds on appeal that was argued below.

Although Roseborough never technically diagnosed Minor with PTSD, she clearly stated that it was her opinion that Minor was suffering from PTSD. App. 480, ll. 3 – 5. Interestingly, immediately prior to Roseborough giving this opinion she stated that she "reffered [Minor] to a psychiatrist . . . to assess her for the possibility of that person making a diagnosis and then being able to treat her with medication to help with her symptoms." App. 479, l. 24 – 480, l. 2. This was an implicit acknowledgement by Roseborough herself that she was in fact not qualified to make a diagnosis of PTSD and that a psychiatrist would need to make that determination.

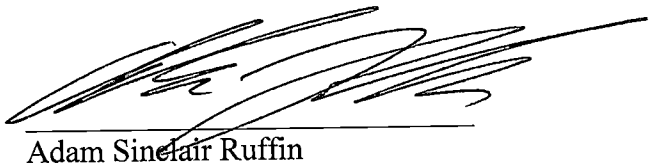
Roseborough's statement that her opinion was that Minor was suffering from PTSD could be interpreted in no other way by the jury than that she had diagnosed Minor with PTSD.

While the Court of Appeals addressed the issue of a social worker's qualification to diagnose a person with PTSD in State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997), this Court has never directly addressed this question, and this Court's review was not sought in Henry because the appellant chose to seek PCR relief instead. In Henry, the Court of Appeals held that the social worker in that case was qualified to diagnose the alleged victim with PTSD. Id. at 278, 495 S.E.2d at 469. Importantly, the Henry Court noted that the social worker in question had worked with an organization that specialized in PTSD for five years before entering private practice. Furthermore, the social worker in Henry stated that PTSD was "her specialty" and that she conducted workshops specifically on PTSD. Id. at 277, 495 S.E.2d at 468. The Court of Appeals in Henry also placed significant emphasis on Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988), a civil case from the Court of Appeals which upheld a trial judge's decision to allow two licensed clinical social workers to give opinions regarding the plaintiff's psychiatric disorders.

Although Roseborough was a licensed social worker and had a significant amount of experience in working with children who had claimed to have been abused, she never testified that she was specifically trained regarding PTSD or that she had any ability to diagnose or treat someone with it. Because of this, trial counsel made a valid objection to Roseborough's qualifications in this area. Appellate counsel's failure to argue the same objection on appeal constituted a waiver of trial counsel's objection and therefore, this Court found the issue procedurally barred. Petitioner received ineffective assistance of appellate counsel by her failure to make the same argument on appeal that was made in the lower court.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Union County

Honorable Thomas A. Russo, Circuit Court Judge

STEPHEN DOUGLAS BERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Stephen Douglas Berry, #188112, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 26th day of February, 2020.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028