

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

Honorable D. Garrison Hill, Trial Judge
Honorable Perry H. Gravely, PCR Judge

Appellate Case No. 2016-000283

RECEIVED

MAR 11 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

Petitioner,

v.

FREDERICK R. CHAPPELL,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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CERTIFICATE OF COUNSEL

Counsel for the State certifies that the State filed a petition for rehearing on January 15, 2020, and that the Court of Appeals finally ruled upon that petition by denying it in an order filed on February 10, 2020.

STATEMENT OF ISSUE ON CERTIORARI

The State's Issue Presented

Did the Court of Appeals err in finding Chappell met his burden in proving that trial counsel was constitutionally ineffective for failing to object to testimony from a blind expert in child abuse dynamics when Chappell has not shown he suffered prejudice from the expert's testimony in light of the evidence of his guilt?

STATEMENT OF THE CASE

During its December of 2010 term, the Greenville County Grand Jury indicted Chappell for committing a lewd act upon a child (2010-GS-23-7901) and first-degree criminal sexual conduct with a minor (2010-GS-23-7902). Susannah C. Ross, Esquire, (trial counsel) represented Chappell, and Assistant Solicitor L. Mark Moyer of the Thirteenth Circuit Solicitor's Office prosecuted the case. On August 6, 2012, through August 7, 2012, Chappell proceeded to a jury trial with the Honorable D. Garrison Hill (trial court) presiding.

At trial, one of the State's witnesses was Shauna Galloway-Williams, who testified as a blind expert. App. 178. She testified she was the executive director of the Julie Valentine Center, a child abuse and sexual assault recovery center that provides services including education, prevention, and investigation, and treatment related to the abuse and sexual assaults of children. App. 178-79. Others at the Center forensically interviewed the victim, but the blind expert did not take part in those. App. 179. She testified about her background, education, and training, stating that it was her understanding that the purpose of her testimony was to explain to the jury information about the dynamics of the sexual abuse of children. App. 180-82. Trial counsel objected on the ground of relevancy because the witness did not have any experience with this case, after the witness testified she had not watched the video recording of the forensic interview of the victim. App. 184. The trial court overruled the objection and qualified the witness as an expert. App. 184. While the expert was being questioned by the State, the following exchange occurred:

Q: Okay. Do children lie?

A: Yes.

Q: Okay. Do children lie about things like—of a sexual nature or abuse? And can you tell us the dynamics of lying and sexual abuse.

A: Children lie. Adults lie. But children are not sophisticated liars. And what I mean by that is they really—you know, children, generally, lie to keep themselves out of trouble, you know. If you ask them if they ate the cookie and they have crumbs on their face, and they say, no, I didn't eat the cookie, that kind of lie.

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

App. 189-90.

During its closing argument, the State argued that the evidence before the jury was the video recording of the forensic interview of the victim and the testimony of multiple witnesses. App. 234. The State argued the blind expert's testimony support the victim's credibility because the expert's testimony confirmed that “[c]hildren just don't have the language to be able to explain something—a seven-year-old child does not have an understanding of sexual things . . .” and analogized a child's inability to explain what Chappell had done to her to a person with no knowledge of space travel being suddenly transported to the moon and then being asked to describe the experience to astronauts, saying, “[t]hey just don't have the words.” App. 240-41. The State emphasized the high degree of specificity in the victim's explanation of the abuse she suffered at Chappell's hands by reiterating that the victim had described the positions she and Chappell were in, described the circular motion of Chappell's tongue as he performed oral sex on her, and described her wiping Chappell's ejaculate off of her; the State argued the victim was

credible because “[o]nly someone who has gone through that . . . as a seven-year-old could come up with details like that.” App. 241-43.

At the conclusion of trial, the jury found Chappell guilty as indicted. The trial court sentenced Chappell to imprisonment for life for first-degree criminal sexual conduct with a minor and for a concurrent term of fifteen years for committing a lewd act upon a child.

Trial counsel filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins (appellate counsel) of the South Carolina Commission on Indigent Defense perfected the appeal on Chappell’s behalf. Assistant Attorney General Christina J. Catoe of the South Carolina Attorney General’s Office represented the State. Appellate counsel argued the trial court erred in allowing the blind expert in sex abuse dynamics to testify generally about child sex abuse dynamics despite having no personal knowledge of the minor victim in this case and because the expert’s testimony was irrelevant. The South Carolina Court of Appeals affirmed in an unpublished opinion. State v. Chappell, Op. No. 2014-UP-272 (S.C. Ct. App. filed June 30, 2014) (per curiam). The remittitur was issued on July 16, 2014.

On November 5, 2014, Chappell filed an application for post-conviction relief (2014-CP-23-6036), alleging that trial counsel was constitutionally ineffective for failing to object to the blind expert’s testimony on the basis that the testimony “constituted improper vouching.” The State filed its return on April 17, 2015, and requested an evidentiary hearing be convened regarding the allegation. The PCR hearing was held at the Greenville County Courthouse on December 17, 2015, with the Honorable Perry H. Gravely (PCR court) presiding. Chappell was represented by Brian P. Johnson, Esquire, (PCR counsel) and Assistant Attorney General Karen C. Ratigan of the South Carolina Attorney General’s Office represented the State. At the hearing,

PCR counsel described Chappell's allegation by noting for the PCR court that trial counsel had objected to the blind expert's testimony "but there was not an objection made for improper vouching" App. 290. Chappell testified he felt an objection would have made a difference in his trial. App. 296. In response to questioning from the PCR court, Chappell testified the blind expert testified at trial that she had never spoken to the victim and that he was not aware of any instance at trial in which the expert gave an opinion as to whether the victim was telling the truth. App. 297. PCR counsel confirmed that he, also, did not believe that the blind expert had done so. App. 297-98.

Trial counsel testified at the PCR hearing that she had tried multiple cases for criminal sexual conduct and that she was "very familiar with vouching and those objections." App. 302. She testified she did not believe that the blind expert's testimony consisted of vouching. App. 303. She also testified she still did not see anything in the testimony, upon her review of the trial transcript in preparation for the PCR hearing, which constituted improper vouching. App. 303.

After the conclusion of the hearing, the PCR court denied the application and dismissed it with prejudice in an Order of Dismissal issued on January 14, 2016. The PCR court found the relevant testimony from the blind expert did not constitute vouching statements, citing State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (S.C. Ct. App. 2015), and that Chappell failed to prove that he suffered prejudice from trial counsel's failure to object to the testimony. App. 310-11.

PCR counsel filed a timely notice of appeal. Chappell filed his petition for a writ of certiorari on October 3, 2016, arguing trial counsel erred in failing to object to the blind expert's testimony on the ground that it constituted vouching because the testimony impermissibly bolstered the credibility of the minor victim and the State's case against Chappell. Chappell filed

its return to the petition for a writ of certiorari on March 23, 2017, arguing the PCR court properly found Chappell had not met his burden in showing trial counsel was constitutionally ineffective because the testimony did not serve as a comment upon the minor victim's credibility. The Court of Appeals granted Chappell's petition for a writ of certiorari. Chappell v. Sate, S.C. Ct. App. Order filed May 2, 2018.¹

Chappell filed its brief on June 28, 2018, and the State filed its return on October 29, 2018. After hearing oral argument on November 5, 2019, the Court of Appeals issued its opinion, reversing the PCR court and finding trial counsel was constitutionally ineffective because the blind expert's testimony "improperly vouched for and bolstered the victim's credibility" and "the outcome of [Chappell's] trial hinged on the jury's assessment of the victim's credibility. The State filed a petition for rehearing on January 15, 2020, asking the Court of Appeals to reconsider its finding that Chappell demonstrated he suffered prejudice from trial counsel's failure to object to the blind expert's testimony in light of the evidence of Chappell's guilt and to reconsider its alternating references to the testimony as both "vouching" and "bolstering". The Court of Appeals denied the petition for rehearing on February 10, 2020. This petition for a writ of certiorari follows.

¹ The South Carolina Supreme Court transferred the case to the Court of Appeals, pursuant to Rule 243(l), SCACR, on October 30, 2017.

STANDARD OF REVIEW

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

ARGUMENT

The Court of Appeals erred in finding Chappell met his burden in proving that there is a reasonable likelihood the outcome of trial would have been different had trial counsel objected to testimony from the blind expert in child abuse dynamics because it did not consider all of the evidence of Chappell's guilt.

The Court of Appeals erred in reversing the PCR court and finding Chappell demonstrated that trial counsel's failure to object to the blind expert's testimony on the basis that it constituted improper vouching because the Court of Appeals did not consider the minimal effect the blind expert's testimony likely had on the jury's verdict, but relied instead upon the conclusion that our appellate courts have found prejudice in each instance in which a witness gave testimony that constituted improper bolstering and the State either presented no physical evidence or relied solely upon the victim's testimony to establish a defendant's guilt. Supp. App. 67-68. A court evaluating a claim in a post-conviction relief proceeding that a defendant's counsel was constitutionally ineffective by "consider[ing] the totality of the evidence before the judge or jury" Strickland v. Washington, 466 U.S. 668, 695-96 (1984).

In Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017), this Court analyzed the prejudice suffered by Briggs after a witness at trial provided improper bolstering testimony by considering other evidence of Briggs' guilt admitted at trial, including Briggs' half-hearted denials to law enforcement of having sexually abused the victim and his statement that he would not deny committing the abuse because the detectives "[knew] better", incriminating phone calls that Briggs' made while in jail, and testimony from two jailhouse informants that Briggs made incriminating statements to them or in their presence. Id. at 333-34, 806 S.E.2d 722-23. This Court noted that the PCR court compared the effect of the evidence of Briggs' guilt with the likely harm to Briggs' defense caused by a witness's improper bolstering, demonstrating this

Court's recognition of the importance of a proper prejudice analysis. Id. at 334, 806 S.E.2d at 723. Similarly, in Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018), this Court analyzed the effect of an expert witness's improper bolstering by considering the fact that the witness's testimony was that the victim's disclosure was among the most compelling the witness had seen through approximately one thousand interviews of children and the fact that the State emphasized the expert witness's testimony three times in its closing argument, as well as noting that a physician testified at trial that the victim displayed physical signs of having been sexually abused. Id. at 247-50, 814 S.E.2d at 493-95.

The Court of Appeals should have, but did not, follow Strickland and this Court's practice of evaluating prejudice by considering the evidence before the jury during Chappell's trial when evaluating whether Chappell has met his burden in establishing that there is reasonable likelihood the jury would have acquitted absent the relevant testimony from the blind expert. The Court of Appeals, in failing to conduct a proper prejudice analysis, overlooked evidence of Chappell's guilt and erroneously found that "the only evidence against Chappell was the victim's uncorroborated testimony." Supp. App. 67-68. The victim, of course, testified at trial about Chappell's abusing her sexually, which included her testimony that Chappell fondled her genitalia, had her masturbate him, ejaculated onto her, filmed the sex acts using his mobile phone, and warned her not to tell anyone. App. 115-29. Petitioner acknowledges the import of the victim's testimony at trial to the State's case, but it is simply not true that the jury had before it no evidence of Chappell's guilt except the victim's testimony. The victim's mother testified at trial about her discovering the victim lying down while the victim's sister—also a minor—had the victim's panties pulled to the side and was near the victim's genitalia, leading the mother to

question the victim about improper touching. App. 146. The mother's testimony corroborated the victim's disclosure that improper touching had occurred at the victim's grandmother's home. App. 146-47. The jury watched a video recording of the forensic interview of the victim, which was admitted over trial counsel's objection, and heard testimony from the interviewer about the interview protocol she used with the victim. App. 162-69. The blind expert testified regarding delayed disclosure and typical behaviors exhibited by children who have been sexually abused. App. 186-96. When given a hypothetical scenario about two minor siblings lying with their faces near each other's genitalia while their panties are pulled to the side, the blind expert testified that that described hypothetical behavior was "concerning" App. 198.

The victim's mother's testimony corroborated the victim's testimony by showing that the victim had consistently maintained that Chappell carried out the abusive acts at the victim's grandmother's home and established the fact that the victim had begun engaging in inappropriate sexual activity with her sister. The recording of the forensic interview likely corroborated for the jury the victim's testimony by showing its consistency over time and the genuineness of her allegations when elicited through recognized forensic technique. The blind expert's testimony likely corroborated for the jury the victim's allegations by confirming the alarming nature of the victim's acts with her sister and the typicality of the fact that the victim's disclosure was delayed. The Court of Appeals gave no thought to this evidence in its discussion regarding prejudice. As a consequence, the Court of Appeals failed to recognize the minimal effect the blind expert's statement would have had on the jury's verdict compared to the other evidence of Chappell's guilt.

Chappell did not argue at the PCR hearing or before the Court of Appeals in reliance

upon the prejudice standard articulated in Strickland; instead, Chappell argued on appeal using a harmless error standard articulated in cases before our courts on direct appeal. The Court of Appeals cited in its opinion cases applying that same standard when analyzing prejudice. The Court of Appeals likely analyzed prejudice without using the proper prejudice standard, and this Court should reverse in light of the proper prejudice standard. Compare Strickland, at 695-96 (requiring a court conducting a prejudice inquiry to ask “if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.”), and Briggs, at 333, 806 S.E.2d at 722 (instructing that an applicant for post-conviction relief “must demonstrate a ‘reasonable probability’ the result of the trial would have been different if [trial counsel] had not committed the errors A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.”) (quotations and citation omitted), and Thompson, at 239, 814 S.E.2d at 489 (“[A]s part of the prejudice analysis, . . . the reviewing court must . . . consider the strength of the State’s case apart from the inadmissible evidence to which trial counsel deficiently failed to object.”), with State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) (considering whether the trial court’s admission of an expert’s report was harmless error).

This Court should consider the evidence of Chappell’s guilt, which will make it clear that the blind expert’s testimony likely had minimal effect on the jury’s verdict, particularly when the State argued in closing, in reliance upon the testimony, not that that children do not lie about sexual abuse, but that the minor victim would not have had an understanding of sexual activity sophisticated enough to provide the details produced in the forensic interview. The Court of Appeals erred in its prejudice finding, and this Court should reverse.

CONCLUSION

The Court of Appeals erred in finding Chappell established trial counsel was constitutionally ineffective because it did not conduct a proper prejudice analysis and ignored the evidence of Chappell's guilt that was admitted at trial. Based on the foregoing argument, the State prays that this Court grant this petition for a writ of certiorari and allow briefing on the issue raised herein.

Respectfully submitted,

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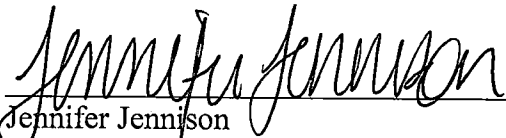
RESPONDENT,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari to the Court of Appeals and Supplemental Appendix has been served upon opposing counsel by hand delivering two copies via interagency mail to:

Wanda H. Carter, Esquire
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This 11th day of March, 2020.



Jennifer Jennison
Administrative Coordinator for Petitioner