STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
William H. Seals, Jr., Circuit Court Judge

2015-CP-21-1086

Leonard E. Brockington, # 359727,

Appellant,

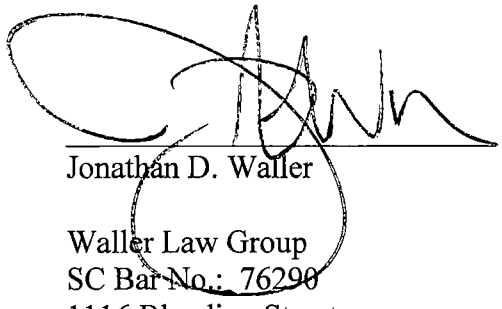
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Leonard E. Brockington, # 359727, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed April 29, 2020, issued by the Honorable William H. Seals, Jr., Presiding Judge, Twelfth Judicial Circuit.



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STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Leonard Brockington, #359727, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-21-1086 **ORDER OF DISMISSAL**

This matter is before the Court pursuant to a post-conviction relief (PCR) action commenced by Leonard Brockington (Applicant) on April 13, 2015. In his PCR application, Applicant alleged various allegations of ineffective assistance of trial counsel. The State submitted its return on August 18, 2016.

An evidentiary hearing convened on March 4, 2019, at the Florence County Courthouse before the undersigned. Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Samuel L. Key represented the State. Applicant and his former trial counsel testified at the hearing. After hearing the testimony presented at the PCR hearing and a full review of the record, the Court finds, as explained below, Applicant's allegations are without merit, denies relief, and dismisses the action with prejudice.

I. FACTS & PROCEDURAL HISTORY

In March 2012, the Florence County Grand Jury indicted Applicant for one count of first-degree criminal sexual conduct (CSC) with a minor and one count of lewd act on a minor (2012-GS-21-0447). Henry M. Anderson, Jr. (Counsel), of the Anderson Law Firm, PA represented Applicant. Assistant Solicitors Patricia S. Parr and Robert N. Wells prosecuted the case. Applicant's case proceeded to a jury trial before Judge Michael G. Nettles on April 21–24, 2014.

Applicant was charged with committing first-degree CSC with a minor and lewd act on his then-girlfriend's six-year-old daughter (Minor). At trial, Minor was nine-years old. (Tr. 192). Minor's parents were divorced, and she lived with her mother (Mother). (Tr. 123-24). Minor's father (Father) lived in Charlotte, North Carolina, and was remarried. (Tr. 124). Applicant and Mother were dating at the time of the incident. (Tr. 125).

In the fall of 2011, Minor disclosed to a friend that Applicant had sexually abused her. (Tr. 97). Minor's friend reported the disclosure to her parents, who then called a neighbor who was friends with Mother. (Tr. 98-99). The neighbor called Mother and told her of Minor's disclosure. (Tr. 112).

Mother told the neighbor she was not sure if Minor was being truthful and assured the neighbor she would look into the matter. (Tr. 112). However, on a visitation with Father, Minor disclosed the allegations to him. (Tr. 127). Father called the police and the Department of Social Services (DSS). (Tr. 128). Upon receiving this information, DSS removed Minor from Mother's custody and granted custody to Father. (Tr. 173-74). Until Minor's forensic interview, Minor only disclosed inappropriate touching. However, during her forensic interview, Minor claimed Applicant made her perform oral-sex on him. (Tr. 175). Minor testified at trial, and the video of the forensic interview was introduced and played for the jury.

The jury did not reach a verdict on the first-degree CSC with a minor charge; however, the jury convicted Applicant of lewd act. (Tr. 388). Judge Nettles sentenced Applicant to fifteen years' imprisonment for lewd act. (Tr. 392-93). Applicant appealed.

Appellate Defender David Alexander perfected Applicant's appeal by filing an *Anders*[1] brief to the Court of Appeals. The following issue was briefed to the court of appeals for *Anders* review:

> Whether the admission of the video of the complainant's forensic interview violated [Applicant's] right to confront the witnesses against him?

The Court of Appeals dismissed the appeal on October 5, 2016. *State v. Brockington*, Op. No. 2016-UP-416 (S.C. Ct. App. filed Oct. 5, 2016). The case was remitted back to the circuit court on October 28, 2016.

Applicant commenced this PCR action on April 13, 2015. In his original PCR application, Applicant alleged:

1. Ineffective assistance of counsel:
    a. Counsel failed to provide the discovery to Applicant;
    b. Insufficient evidence;
    c. Counsel's representation was grossly negligent;
    d. Conflict of interest; and
    e. Applicant was not allowed to plead guilty.

The State submitted its return on August 18, 2016. Thereafter, an evidentiary hearing into the matter was held on March 4, 2019. At the conclusion of the PCR hearing, PCR counsel moved to add the following allegations based upon the evidence presented:

    f. Applicant did not have an opportunity to testify at trial;
    g. Applicant did not have an opportunity to view Minor's forensic interview before trial;
    h. Counsel admitted he should have called witnesses at trial; and
    i. Counsel failed to object to Dr. Alicia Bennedetto's impermissible bolstering testimony at page 227 of the transcript.

[1] *Anders v. California*, 386 U.S. 738 (1967).

II. PCR TESTIMONY

Applicant's Testimony

Applicant testified he was in a relationship with Mother, and Minor was six-years-old at the time of the incident. Applicant recalled Minor's parents split-up when their children were four and two. Applicant testified Minor displayed some sexual behavior that alarmed him, so he contacted his ex-girlfriend, Michelle Cooper, who worked for DSS to ask her advice on what to do. Applicant testified he also asked Mother about the behavior. Applicant testified these events happened about a month or two before Minor made the criminal allegations against him. Applicant testified once Minor made the disclosures, he hired Counsel at Cooper's recommendation. Applicant testified Counsel was able to get him released on bond.

Applicant testified he and Counsel discussed Applicant's version of events. Applicant stated he waited two-and-a-half years for trial, and he lost his job due to his arrest. Applicant testified he asked Counsel to investigate based on what Applicant told him occurred. Applicant asked Counsel to investigate Mother because she had chlamydia, and he had gotten tested around the time of the alleged incident. Applicant stated Counsel never got the medical records from his test. However, Applicant stated he has now seen the test results which turned out to be negative, and he agreed the test results would not have helped his defense at trial. Applicant testified he never saw Minor's forensic interview until the day of trial because Counsel never provided a copy to him.

Applicant testified he was involved in a DSS case against Mother in which DSS claimed Mother was an unfit parent. Applicant testified he was not living in the house with Minor and Mother but had his own residence. Applicant stated he was named in the DSS case against Mother but DSS never investigated him, and he never talked to the DSS caseworker or saw her until the

day of court for the DSS case. Applicant stated he was provided some papers regarding the DSS action, but he did not know exactly what it was. Applicant testified he and Counsel talked about the DSS paperwork, and Counsel represented him at the DSS hearing so Counsel could know what information DSS had about Applicant.

Applicant stated he met with Counsel quite a few times, and Counsel told Applicant he did not mind seeing him, but there was nothing Counsel could tell him during that time. Applicant did not understand why Counsel could not find out anything about his case. Applicant testified Counsel told him and his family the State did not have any evidence against Applicant, and the case probably would not go to trial. Counsel then called Applicant notifying him he was going to trial. Applicant stated he met with Counsel probably eight to ten times.

Applicant testified Counsel told him Counsel knew a lady Counsel would hire to testify or consult with as to why a child Minor's age would make these allegations. However, Applicant did not know if Counsel actually did that, and Applicant did not know her name. Applicant testified he understood her to be an expert of some kind. Applicant testified he never received the discovery in his case, but Counsel told him the only thing the State had was a video of Minor. Applicant stated Counsel described what was on the video, but Applicant never actually saw it. Applicant stated he asked for copy of the video but never received one. Applicant stated that when the video was played for the jury, there was more on the video than he expected.

Applicant recalled the defense strategy was that he did not do what was alleged and he did not know anything about the allegations. Applicant asked Counsel to investigate some witnesses, but Counsel did not want to lose the last closing argument. Applicant stated Counsel told him jurors listen more to the last person who talks. Applicant told Counsel that he coached little league baseball, had been around children all his life, and no one ever said anything like these allegations

about him before. Applicant was unaware if Counsel ever contacted any potential witnesses. Applicant stated he wanted Cooper's children to testify at trial. However, Applicant stated he hired Counsel to defend him, and he was fine with Counsel's decision to preserve last closing argument. Applicant did acknowledge he was not convicted of first-degree CSC with a minor, and he stated he understood he could be retried for first-degree CSC with a minor if PCR was granted.

Counsel's Testimony

Counsel testified he was retained to represent Applicant in the criminal matter, and he also represented Applicant at the DSS proceedings. Counsel testified he met with Applicant often, more than twelve-to-fifteen times. Counsel recalled the only evidence the State had was Minor, and the State had nothing to corroborate her testimony. Counsel testified he did not think Applicant was guilty—Counsel did not think Applicant just one day decided to start molesting children. Counsel testified Minor's testimony was inconsistent—she gave two or three statements and then did not want to talk about the incident at all. Counsel recalled the case lingered because Minor did not want to testify. Counsel stated the defense strategy the entire time was to emphasize that Minor's inconsistent statements and testimony were the State's only evidence.

Counsel testified he cross-examined Minor on the inconsistencies; specifically, she gave another statement in testimony she had never said before—not to law enforcement, her father, or during the forensic interview. Counsel testified he did ask Minor some questions, but he did not want to hammer the young child in front of the jury. Counsel recalled the video of the forensic interview was played at trial, but certain portions were redacted from the original video. Counsel successfully argued certain portions of the video should be redacted. Counsel testified he provided all written discovery to Applicant, but he was unsure whether he and Applicant ever viewed the forensic interview together. Counsel recalled Applicant telling him about some potential witnesses, and he met with some of those witnesses. Counsel stated that in hindsight, he would have called

witnesses at trial, but during trial he did not call any witnesses because he thought the trial was going well. However, Counsel stated he was able to bring out much of the information the defense witnesses would have testified to without having to call them.

Counsel testified he felt he successfully defended Applicant on the CSC charge because the jury could not reach a verdict on that charge. Counsel testified he felt as though the jury would convict Applicant of both crimes or not at all, and he tried to highlight Minor's inconsistencies throughout trial. Counsel testified Applicant asked him to look into the medical records, but Minor did not have an STD and never indicated she and Applicant ever had intercourse. Counsel stated the medical records would not have shown anything useful for the defense, and Counsel did not believe the records would have been helpful.

Counsel testified he talked to a woman he knows with expertise in child sexual abuse cases. She explained to Counsel Applicant's alleged behavior is not something that just starts at a certain age. Counsel testified he received all the discovery and reviewed it with Applicant. Counsel testified his notes indicate he sent letters to Applicant with the discovery and notified Applicant of particular areas he wanted Applicant to review.

Counsel testified he did not seek to hire an expert, but, rather, he chose to show Mother did not believe the allegations and did not think Applicant had done anything. Counsel stated he tried to show Father simply took Minor's word, filed a custody action, and got custody. Counsel explained he tried to show Father had a lot to gain from the allegations because Father did not have to pay child support anymore, and he got custody. Further, Minor's stepmother did not take the allegations seriously, and Counsel highlighted this at trial.

Counsel stated he has tried child-sex cases before. However, there were recent developments in the law regarding child-sex cases around the time of Applicant's trial, and he filed

motions arguing the interview did not show Minor was telling the truth. Counsel stated he did not have a strategy for not objecting to Dr. Bennedetto's testimony that she did not believe Minor was influenced by a third-party or coaching.

III. DISCUSSION

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the evidence and witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014).

1. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "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.

"In assessing prejudice under *Strickland*, the question ***is not*** whether a court can be certain counsel's performance had no effect on the outcome . . . ." *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). "Instead, *Strickland* asks whether it is 'reasonably likely' the result

would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

Applicant alleges Counsel was ineffective because: (a) Counsel failed to provide the discovery to Applicant; (b) insufficient evidence; (c) Counsel's representation was grossly negligent; (d) conflict of interest; (e) Applicant was not allowed to plead guilty; (f) Applicant did not have an opportunity to testify at trial; (g) Applicant did not have an opportunity to view Minor's forensic interview before trial; (h) Counsel admitted he should have called witnesses at trial; and (i) Counsel failed to object to Dr. Alicia Bennedetto's impermissible bolstering testimony at page 227 of the transcript. For the reasons discussed below, the Court concludes Counsel was not constitutionally ineffective.

a. Counsel failed to provide discovery to Applicant

Applicant asserts Counsel was ineffective for failing to provide him with all the discovery of his case. Applicant asserts he never received a copy of the discovery, and he specifically asked Counsel for a copy of Minor's forensic interview; however, Counsel never showed him or provided a copy of the forensic interview. Based on the testimony presented at the PCR hearing, the Court finds this allegation without merit.

As stated above, Applicant testified Counsel never provided him with the discovery in his case. However, Counsel testified he provided Applicant with all the written discovery of the case, and Counsel's notes indicated he sent Applicant the discovery with a letter notifying Applicant of certain portions of the discovery he wished to discuss with Applicant. The Court finds credible Counsel's testimony he provided Applicant with all written discovery in the case.

Applicant testified he never saw Minor's forensic interview until the day of trial because Counsel never provided a copy of the video to Applicant. However, Applicant testified Counsel

told him the State's only evidence in the case was Minor's testimony and Minor's forensic interview. Further, Applicant testified Counsel described to him the forensic interview, but when the video was shown to the jury at trial, the video contained more than what Applicant expected it to. Counsel testified he was unsure whether he and Applicant actually viewed the forensic interview together.

Applicant's own testimony shows that he was aware of the forensic interview before trial, and Counsel described to Applicant what was on the video. Counsel's conduct of notifying Applicant of the forensic interview's existence and describing what the forensic interview portrayed to Applicant was not deficient.

Applicant has failed to show prejudice resulted from Counsel's alleged deficiency in failing to show or provide Applicant a copy of the forensic interview. The transcript shows Counsel vigorously attacked the admissibility of the forensic interview pretrial. (Tr. 49–53; 60–69). While the trial court ultimately ruled the video was admissible, the trial court ruled certain portions of the video were inadmissible and had to be redacted—the forensic interviewer's recap of Minor's testimony was impermissible bolstering, and Minor's drawing of a picture was irrelevant. (Tr. 65–66). Counsel clearly had a trial strategy for attacking the admissibility of the forensic interview, and Applicant has failed to show how Counsel's alleged deficiency of not showing or providing a copy of the forensic interview to Applicant prejudiced him.

Because Counsel reasonably notified and described the forensic interview to Applicant, Counsel was not deficient. Further, Applicant has failed to show prejudice resulted from Counsel's alleged deficiency because the transcript shows Counsel had a valid trial strategy for attacking the admissibility of the video and was partially successful because inadmissible portions of the video

were redacted. Therefore, Counsel was not constitutionally ineffective and this allegation is denied and dismissed with prejudice.

b. Insufficient evidence

Applicant's insufficient evidence allegation is without merit. Subsection 17-27-20(A)(6) of the South Carolina Code provides in pertinent part, "[T]his section ***shall not*** be construed to permit collateral attack on the ground that the ***evidence was insufficient to support a conviction.***" (emphasis added). Because Applicant's allegation of insufficient evidence is not a cognizable claim for PCR, the Court denies this allegation and dismisses it with prejudice.

c. Counsel's representation was grossly negligent

The Court interprets this allegation as a general allegation of ineffective assistance of counsel, and the Court's discussion of this allegation can be found throughout Section 1 of this order.

d. Conflict of interest

Applicant presented no evidence at the PCR hearing to support his conflict of interest allegation. Because there was no evidence presented to support this allegation, the Court finds this allegation was waived and dismisses it with prejudice.

e. Applicant was not allowed to plead guilty

Applicant asserts trial counsel was ineffective because Applicant was never allowed the opportunity to plead guilty. The Court disagrees.

As stated above, Applicant testified that when he met with Counsel, Counsel told him he did not think the case would go to trial because the State's only evidence was Minor's testimony and the forensic interview. However, Applicant learned the State was calling the case to trial. There was no evidence presented at the PCR hearing that the State ever made a plea offer for Applicant to plead guilty, or if Applicant ever requested Counsel to enter into plea negotiations with the

State. Therefore, Applicant has failed to show Counsel was deficient because Applicant never requested Applicant enter into plea negotiations.

Applicant has failed to show prejudice resulted from his inability to plead guilty because he never testified he would have chosen to plead guilty rather than proceed to trial. Additionally, if Applicant had chosen to plead guilty to his charges without negotiation or recommendation, the least amount of time he could have received was twenty-five years for first degree CSC with a minor. *See* S.C. Code Ann. § 16-3-655(D)(1) ("A person convicted of a violation of [first-degree CSC with a minor] is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum of twenty-five years . . . ."). However, the jury was unable to reach a verdict as to that charge. Applicant received fifteen years for lewd act, which is less than the minimum he could have received if he had pleaded guilty to his charges. Therefore, this Court is not convinced Applicant would have chosen to plead guilty rather than proceed to trial on his charges.

Based on the foregoing, Applicant has failed to show Counsel was constitutionally ineffective. Therefore, this allegation is denied and dismissed with prejudice.

f. Applicant did not have the opportunity to testify at trial

Applicant asserts Counsel was ineffective because Applicant did not have the opportunity to testify at trial. The Court disagrees.

Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No 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 688-689. "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 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action

or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

Applicant testified Counsel did not want to lose the last closing argument because Counsel believed jurors listen more closely to the last person who talks. However, Applicant never testified Counsel refused to let him testify. To the contrary, Applicant stated he hired Counsel to defend him, and he was fine with Counsel's decision not to put up a defense. Applicant has failed to meet his burden of proof as to deficiency because Counsel never refused to let Applicant testify. Further, Applicant has failed to show prejudice because he agreed with Counsel's strategy of not presenting a defense. Therefore, Counsel was not constitutionally ineffective, and this allegation is denied and dismissed with prejudice.

g. Applicant did not have an opportunity to view Minor's forensic interview before trial

Applicant asserts Counsel was ineffective because Applicant did not have the opportunity to view the video of Minor's forensic interview before trial. The Court has addressed this allegation above in section 1(a) of this order.

h. Counsel admitted he should have called witnesses at trial

Applicant asserts trial counsel was ineffective for failing to call available witnesses in Applicant's defense at trial. In support of this allegation, Applicant relies on Counsel's testimony that, in hindsight, he should have called defense witnesses. The Court disagrees.

Applicant has failed to show Counsel's strategy for not calling the witnesses at trial was unreasonable, and therefore the Court finds Counsel was not deficient. In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

While Counsel testified that in hindsight, he should have called witnesses at trial, Counsel testified he felt he successfully defended Applicant on the first-degree CSC charge because the jury could not reach a verdict on that charge. Counsel reasoned the jury would either convict Applicant of both charges or not at all because both charges hinged on Minor's credibility. However, the jury convicted Applicant of lewd act. This Court finds Counsel was not deficient for failing to call the available witnesses because he felt he attacked Minor's inconsistent statements enough to receive a favorable result. Indeed, Counsel's strategy did produce a favorable result on the more serious charge, and this Court finds Counsel's strategy at the time of trial reasonable.

Further, the only testimony presented at the PCR hearing was from Applicant and Counsel. As such, Applicant has failed to meet his burden of proof regarding prejudice because Applicant did not call any other witness or otherwise introduce the witnesses' testimony for this Court's review. *See Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (stating to support a claim that trial counsel was ineffective for failing to call potential witnesses, "a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony" because "[t]he applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice"). Therefore, anything the witnesses would have testified to had they been called at trial is mere speculation because they did not testify at the PCR hearing.

Applicant has failed to prove Counsel was deficient for failing to call the available witnesses at trial because Counsel articulated a reasonable strategy for not doing so at the time of trial—he felt he attacked Minor's inconsistent statements enough to receive a favorable verdict.

Applicant has further failed to show prejudice because none of the witnesses who could have testified at trial testified at the PCR hearing. Accordingly, this Court denies relief on this allegation and dismisses it with prejudice.

i. Counsel failed to object to Dr. Alicia Bennedetto's impermissible bolstering testimony at page 227 of the transcript

Applicant asserts trial counsel was ineffective for failing to object to Dr. Benedetto's impermissible bolstering testimony. The Court disagrees.

"[A] forensic interviewer may not be permitted to give testimony that improperly bolsters the credibility of the victim." *Briggs v. State*, 421 S.C. 316, 323, 806 S.E.2d 713, 717 (2017). "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Id.* at 324, 806 S.E.2d at 717.

On direct-examination, the State asked Dr. Benedetto:

> Q: Was there anything about [Minor's] disclosure that caused you to believe it was the result of third-party influence?
> A: No. That is something we would very carefully explore to make sure that there doesn't appear to be influence of either a parent or some other source, or motivation by the child. Nothing that she stated to me supported that.
> Q: And was there anything in her disclosure that was affected in any way by suggestibility or coaching?
> A: Well, you know, that is a question obviously for the jury to determine. As far as things that we look for in the interview; for example, is the child able to correct the interviewer when the interviewer maybe gets something wrong, and [Minor] was able to do that sort of thing. . . .

(Tr. 227). At first glance, this line of questioning by the State seems objectionable as eliciting improper bolstering testimony. However, a closer view of our Supreme Court's analysis in *Briggs* is necessary in deciding this issue. 421 S.C. 316, 806 S.E.2d 713.

In *Briggs*, our Supreme Court was asked whether trial counsel's failure to object to a similar line of questioning of a forensic interviewer constituted ineffective assistance of counsel. 421 S.C.

at 325-27, 713 S.E.2d at 718-19. The forensic interviewer testified she did not find any evidence suggesting the victim had been coached. *Id.* at 326, 806 S.E.2d at 718. The Court stated, "This testimony was ***arguably*** offered for the purpose of conveying the witness's opinion about the credibility of the victim, and thus ***could*** be improper bolstering." *Id.* (emphasis added). However, the *Briggs* Court also reasoned:

> Under certain circumstances, it may be proper for the State to ask an expert about coaching. For example, if defense counsel accused the child's mother or father in opening statement or on cross-examination of coaching the child to make an accusation they knew to be untrue, such a line of questioning to an expert could be admissible.
>
> One can even envision a scenario in which ***coaching is implied, or otherwise becomes an issue without such a direct accusation.*** Under ***any*** of those circumstances, where the testimony is offered to address coaching as a disputed issue, it may be reasonable for counsel to decide not to object.

Id. (emphasis added). The Court ultimately declined to hold trial counsel's failure to object to the line of questioning deficient because trial counsel himself made whether someone coached the victim to make a false accusation an issue in the case. *Id.* at 327, 806 S.E.2d at 719.

In the instant case, in opening argument, Counsel argued:

> [Minor] went to a counselor in North Carolina. She went to that counselor for a year, and over that year's time [Minor] refused to talk about this. Wouldn't talk about it or bring it up. So the counselor was changed and she went to another counselor, and now she is ready to testify about this.

(Tr. 91). Counsel also argued:

> [Y]ou will also hear that [Father] didn't have custody before this happened, and he has custody now. You will hear [Father] was paying some [e]leven [h]undred [d]ollars a month for child support but he's not paying any child support now.

(Tr. 91-92).

On cross-examination, before Dr. Benedetto's testimony, Father admitted that prior to Minor's allegations in September 2011, Mother advised him Minor was acting out and stated she felt Minor needed counseling. (Tr. 138). Father also admitted Applicant spoke to him on the phone regarding Minor's behavior. (Tr. 139). Father then stated Minor saw a counselor in North Carolina for about a year and would not speak about the incident "[u]nder no pressure." (Tr. 139). Then, Father moved Minor to a counselor in Columbia, South Carolina. (Tr. 139). Counsel then elicited through Father that Minor saw the Columbia counselor "for preparation of trial testimony." (Tr. 140). Father admitted he brought Minor to the courtroom two times prior to trial, and Minor was given a trial notebook to take home. (Tr. 140-41).

On cross-examination, before Dr. Benedetto's testimony, Minor admitted Heather Smith, her second counselor, talked to her about coming to court and gave her homework to work on. (Tr. 209). Minor also admitted she went to the courthouse more than once and practiced her testimony with the solicitor prosecuting the case before trial. (Tr. 210-11).

Before Dr. Benedetto testified, as stated above, Counsel argued in opening Minor went to a counselor for a year and would not speak of the incident until she was taken to a different counselor. Counsel also argued Father gained custody of Minor and ceased paying child support because of Minor's allegations. Counsel elicited on cross-examination of Father that Minor would not speak to the initial counselor because she was "[u]nder no pressure." (Tr. 139). Further, Minor admitted to practicing her testimony at least two times with the solicitor prosecuting the case.

This Court finds Counsel's trial strategy created a situation "in which coaching is implied, or otherwise becomes an issue . . . ." *Briggs*, 421 S.C. at 326, 806 S.E.2d at 718. While Counsel did not articulate a reason for failing to object to the State's questions and Dr. Benedetto's testimony, this Court finds Counsel was not deficient because, as our Supreme Court found in

Briggs, Dr. Benedetto's testimony was not impermissible bolstering testimony. Counsel cannot be found deficient for failing to object to admissible testimony. *See e.g. Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (finding trial counsel was not deficient for failing to object to a proper charge pursuant to *Allen v. United States*, 164 U.S. 492 (1896)).

Applicant does not argue Counsel's trial strategy which opened the door to Dr. Bennedetto's testimony regarding coaching was unreasonable; however, it is clear from Counsel's testimony his strategy was to attack Minor's inconsistent statements to show the jury she was not a credible witness because the case against Applicant hinged on Minor's credibility. This Court finds Counsel's strategy to imply Minor had been influenced by Father and coached by the second counselor and the prosecuting solicitor reasonable. This strategy's reasonableness is evinced by the jury's inability to convict Applicant of first-degree CSC with a minor. Because Counsel was not deficient for failing to object to the questioning he reasonably opened the door to, he was not constitutionally ineffective.

CONCLUSION

The Court finds Counsel's representation was not constitutionally ineffective. Therefore, based on the foregoing, the Court denies relief on the allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a

notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appeal.

THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED.

WILLIAM H. SEALS, JR.
Presiding Judge
Twelfth Judicial Circuit

April 23, 2020.

FILED
2020 APR 29 PM 4:18
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.