

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Calhoun County

Honorable Maite Murphy, Circuit Court Judge
—————

JOHN EDWARD HAYNES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001640
—————

PETITION FOR WRIT OF CERTIORARI
—————

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ISSUE PRESENTED

Did the PCR court err by ruling defense counsel was not ineffective where counsel failed to object to the cross-examination of defense witness, Dr. Harari, which elicited his opinion that the alleged victim was the victim of sexual abuse and that she originally denied Petitioner abused her in an effort to protect Petitioner since this testimony constituted improper bolstering opinion testimony that the alleged victim's subsequent claim that Petitioner sexually abused her was actually true, and where defense counsel admitted in retrospect that he should have objected to this inadmissible testimony?

STATEMENT OF THE CASE

In October 2008, at the age of fifteen, JW¹ gave birth to her first child. App. 246, ll. 1-8. A year later, shortly after turning seventeen, JW gave birth to her second child. App. 247, ll. 1-6. South Carolina DSS received a report about JW and opened an investigation into the paternity of her two minor children. App. 359, ll. 9-13; App. 365, l. 23-App. 365, l. 1.

JW initially told authorities that a friend from school, Deondre Goodwine, was the father of her children. App. 250, ll. 9-25; App. 366, ll. 11-15. After DNA testing proved that Goodwine was not the father of the two children, JW claimed someone named Marcus House was the father. App. 265, ll. 9-12. It was later determined that Marcus House was a made-up name that JW gave authorities to avoid naming Petitioner as the father. App. 277, ll. 1-5. DSS eventually obtained a DNA test that indicated that Petitioner was the father of JW's children. App. 372, ll. 1-19.

JW told her DSS caseworker that if Petitioner was the father of her children it was "no one else's business." App. 361, ll. 17-20. She further stated that she loved Petitioner, wanted to have his children, and had "gone in on him". App. 361. JW told authorities that Petitioner was in jail for "nothing," that he "didn't do anything to her" and that "she approached him." App. 362, ll. 5-10. She repeatedly told authorities that Petitioner did not know anything occurred and did not do anything because he was drunk and unconscious. App. 363, ll. 15-20. While JW did eventually state that Petitioner had abused her she told Dr. Marc Harari, the individual who conducted the psychological evaluation, that she made the sexual abuse allegation because she thought she would be in trouble if she admitted seducing her stepfather. App. 350, ll. 6-11.

¹ "JW" are the initials of the named alleged victim in this matter. She was a minor at the time of the incident but an adult at the time of trial.

The DSS case eventually led to the Calhoun County Sheriff's office opening an investigation into allegations of sexual abuse of JW by her stepfather, Petitioner. App. 300, ll. 1-3. As the result of a Schmerber² motion, law enforcement collected Petitioner's DNA for comparison to JW's two minor children. App. 33-34. The DNA test results indicated that Petitioner was the father of JW's children. App. 331.

Petitioner was indicted by a Calhoun County grand jury for two counts of criminal sexual conduct with a minor, second degree, and one count of incest, during the May 2010 term. App. 614-618. The state, represented by Sarah Ford and Benjamin Bell, called the case to trial on February 25-28, 2013, before the Honorable Diane S. Goodstein and a jury. App. 36. Prior to the start of trial, the state elected to proceed on only one count of criminal sexual conduct with a minor as well as the incest charge. App. 184, ll. 1-5. Petitioner was represented by Mark Wise and Robert Mellard. App. 36.

At trial JW testified that the sexual conduct began when she was thirteen and Petitioner would get into the bathtub with her saying he was "showing her how to wash." App. 243, ll. 12-21. She stated he would touch her breasts and genitals, and eventually forced her to have sex with him when she was fifteen years old. App. 244, ll. 7-19. The alleged abuse from Petitioner stopped while JW was pregnant with her first child and then she stated it started again shortly after she gave birth. App. 246, ll. 9-12. JW stated that she did not tell anyone what was happening because Petitioner had told her no one would believe her. App. 245, ll. 11-22. She also testified that Petitioner threatened to kill her, her mother, and the children if she said

² Pursuant to Schmerber v. California, 384 U.S. 757 (1966), the circuit court may issue an order that allows the State to procure evidence from a person's body if the State can establish probable cause for the acquisition of such evidence.

anything and he purportedly showed her a shotgun he kept in the home. App. 249, l. 14 – App. 250, l. 4.

On cross-examination JW was asked about statements she made to Eula Clark, the DSS agent who was assigned to her case. App. 252, ll. 19-23. JW stated she did not remember telling Clark that she wanted a baby because all her friends had babies, that she loved her stepfather, that she seduced him while he was drunk, and that he was not even aware that they had sex. App. 253, l. 15 -App. 254, l. 4; App. 263 ll. 1-6; App. 265, ll. 15-18; App. 266-268.

The state next presented evidence that Petitioner was married to JW's mother and that they had lived as a family since JW was a young child. App. 282, ll. 10-24; App. 285, ll. 16-23. The state called Agent Webb from SLED who testified that the DNA test results indicated a greater than 99.99% probability that Petitioner was the father of JW's children. App. 331. Agent Webb opined that based on those results Petitioner was the father of JW's two minor children. App. 329-331. The state rested after the testimony from Agent Webb. App. 337.

Trial counsel for Petitioner called Dr. Marc Harari to testify to the statements JW made to him during a psychological evaluation. Dr. Harari was not offered or qualified as an expert during trial. Dr. Harari testified that JW told him she had seduced Petitioner when he was under the influence of alcohol to have sex with her and that she believed Petitioner was entirely unaware of the sexual contact that occurred. App. 349, l. 20-App. 350, l. 2. JW also told Dr. Harari that she made the sexual abuse allegation because she thought she would be in trouble if she admitted seducing her stepfather. Further, she stated during the evaluation that she loved Petitioner and wanted to have his children. App. 350, ll. 3-19.

On cross-examination the state questioned Dr. Harari about his experience in treating victims of childhood sexual abuse, establishing that he had been doing evaluations for DJJ in that

field since 2000 and had dealt with hundreds of cases. App. 351, ll. 2-13. Dr. Harari was asked to define “recantation” and then explain how family dynamics can influence a recantation, to which defense counsel objected. App. 351, ll. 14-25. After a bench conference the state continued the cross-examination of Dr. Harari during which the following exchange occurred:

Q. And after receiving that information and interviewing JW what was your diagnosis of her and I guess your conclusion regarding your interview?

A. From the accumulation of information I received my diagnosis was she was sexually abused.

Q. Can you expand on that, Doctor?

A. One of the things I assessed for JW was her credibility regarding how realistic she was being with me in terms of her presentation, you know, the facts of what her story was, and on the psychological inventory there are many test within that that assess validity, meaning is the person exaggerating symptoms or is a person minimizing symptoms, engaging in unrealistic response pattern. JW was, based on her surveys, was giving a very unrealistic response pattern, being very protective, very defensive. Based on the facts of the case and her IQ which was in the borderline range, to concoct such, it didn't seem reasonable or possible for her to concoct such an action to be forced upon her.

Q. So, in other words, Doctor, *for JW to have concocted this seduction of her stepfather John Haynes is impossible to you?*

A. *Very far, extremely farfetched.*

...

Q. Just to make sure I understand, Doctor, *it was your diagnosis following your evaluation of JW that she was a victim of childhood sexual abuse, correct?*

A. *Yes.*

Q. And that *she was minimizing what happened to her?*

A. *Yes.*

Q. *In an effort to protect John Haynes?*

A. *Yes.*

Q. *And that based on the tests that you gave her, including her IQ test, that her explanation was highly unlikely?*

A. *Yes.*

App. 352, l. 14-App. 353, l. 14; App. 354, l. 19-App. 355 l. 7 (emphasis added). Defense counsel never raised an objection to this line of questioning or to Dr. Harari's responses.

Defense counsel next called DSS Agent Eula Clark to testify that JW had made statements to her similar to what JW had told Dr. Harari. Clark also stated that JW claimed she said Petitioner raped her because she thought that is what everyone wanted to hear. App. 357-363. Clark testified that she told JW a judge would not believe her story that JW approached Petitioner and he did not know that anything sexual had occurred. App. 368, ll. 1-25.

On cross-examination the state asked Clark about the DSS case involving JW and Petitioner. Notably, the state was able to elicit testimony that another paternity test had been performed with the results showing a 99.99% probability that Petitioner was the father of JW's two children. App. 369-372.

The final witness for the defense was Dr. Amanda Salas. Dr. Salas was called to testify regarding "automatism," a term which refers to the performance of actions without conscious thought or intention. The state objected to the testimony by Dr. Salas, characterizing the testimony as referring to "sleep sex or sex somnia." App. 380, ll. 2-8. Defense counsel argued that the defense was not "sex somnia" but "automatism" which is where a person can do an act unconsciously. App. 383-384. The defense argued that there were consistent statements from JW that she took advantage of Petitioner and he was not aware of what was happening, making the testimony regarding "automatism" relevant. App. 384, ll. 8-21.

The court proffered the testimony of Dr. Salas and found that although Dr. Salas may be an expert in certain areas of psychiatry, she was not an expert in “automatism.” Therefore, the testimony of Dr. Salas that supported Petitioner’s defense that he was not aware of the acts that he performed was not allowed before the jury. App. 379-418.

The jury found Petitioner guilty as charged. App. 479. Petitioner was sentenced to twenty years imprisonment on the criminal sexual conduct with a minor, second degree charge³, and ten years imprisonment, suspended upon the service of five years, the balance suspended to probation⁴, on the incest charge. The sentences were to run consecutively. App. 489-491.

Petitioner filed a direct appeal which was perfected by Appellate Defender David Alexander. The South Carolina Court of Appeals affirmed Petitioner’s conviction on May 6, 2015 in an unpublished opinion. See State v. Haynes, Op. No. 2015-UP-228 (S.C. Ct. App. Filed May 6, 2015); App. 508-509. Petitioner filed the current PCR application on December 28, 2015. App. 495-507.

The state filed a return and partial motion to dismiss on August 2, 2017. App. 508-518. An evidentiary hearing was convened before the Honorable Maite Murphy on February 28, 2019. The state was represented by Benjamin Limbaugh. Petitioner was represented by Johnathan Waller. App. 524. Petitioner, Mark Wise, and Douglas Mellard testified at the

³ The court made a specific finding that the sexual intercourse was nonconsensual which raised the criminal sexual conduct charge from a “serious” to a “most serious” offense under South Carolina law. The court further ruled that Petitioner would be required to register as a sex offender upon his release from prison and that he would be subject to lifetime GPS monitoring. App. 490, ll. 1-10.

⁴ As part of the probationary sentence Petitioner was ordered to complete a sex offender treatment program. He was also ordered to have no contact with any minor children until the completion of such a program and to have no contact at all with JW. App. 491, ll. 8-14.

hearing. App. 525. Among the issues raised at the hearing was the failure of Counsel Wise to object to the bolstering testimony by Dr. Harari. App. 580.

Counsel Wise testified that the main defense in Petitioner's case were the statements by JW that she had, on more than one occasion, engaged in sex acts with Petitioner while he was asleep and/or drunk and that he did not know anything had occurred. App. 571, ll. 2-9. Wise testified he could not recall his exact reason for calling Dr. Harari to the stand but stated Dr. Harari had information he thought was helpful to Petitioner. App. 579, ll. 21-24. When asked if he had a reason for not objecting when the state asked Dr. Harari if he believed JW, Counsel Wise testified there was no strategy for not objecting. However, Counsel Wise admitted, if he were to do it again, he would object to the bolstering opinion testimony. App. 580, l. 6-App. 581, l. 3.

At the end of the hearing PCR Counsel Waller moved to amend Petitioner's PCR application to include the claim that counsel was ineffective for failing to object to the victim bolstering during the testimony of Dr. Harari. App. 597, ll. 12-16. The state objected to the amendment arguing it was not given proper notice to prepare. App. 597, l. 25-App. 598, l. 3. PCR Counsel Waller argued there was no objection made by the state during the hearing to the testimony concerning the failure to object and that pursuant to Rule 15(b), SCRCP, the pleadings are allowed to be amended to conform to the evidence presented. App. 598, ll. 13-18. The court allowed the amendment, as evidence was presented on the issue, and stated that it would take the case under advisement. App. 599, ll. 4-6.

An order of dismissal was filed on August 15, 2019. App. 601-613. The PCR court found that pursuant to the test in Strickland v. Washington⁵ Petitioner had failed to establish any

⁵ 466 U.S. 668 (1984)

claims of ineffective assistance of counsel. App. 610. Despite the judge allowing the amendment to the PCR pleadings, no mention of Counsel Wise's failure to object to the bolstering testimony of Dr. Harari was included in the order of dismissal.

This Petition for Writ of Certiorari follows.

ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective where counsel failed to object to the cross-examination of defense witness, Dr. Harari, which elicited his opinion that the alleged victim was the victim of sexual abuse and that she originally denied Petitioner abused her in an effort to protect Petitioner since this testimony constituted improper bolstering opinion testimony that the alleged victim's subsequent claim that Petitioner sexually abused her was actually true, and where defense counsel admitted in retrospect that he should have objected to this inadmissible testimony.

As a threshold matter, the PCR court erred by not addressing the bolstering issue properly raised during the PCR hearing. The failure of the PCR court to make any findings of fact or conclusions of law regarding a duly raised ineffective assistance of counsel claim was error. See, Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court has remanded numerous other PCR cases to the circuit court where a PCR court failed to make adequate findings of fact and conclusions of law. In McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991) this Court remanded the case to the circuit court after finding that the PCR court's conclusions regarding ineffective assistance of counsel were insufficient for appellate review and failed to meet the standards set forth in S.C. Code Ann. § 17-27-80. See also McCulloch v. State, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) (admonishing all those involved in future PCR matters to be meticulous in preparing and reviewing proposed orders so that the final order sets forth the required findings and reasons for those findings). Bryson v. State, 328 S.C. 236, 236-237, 493 S.E.2d 500 (1997) (remanding the matter back to the PCR judge to "make specific finds of fact and conclusions of law as to each

issue *raised by petitioner in his post-conviction relief application and at the hearing thereon*") (emphasis added).

As noted above, the failure of Counsel Wise to object to the bolstering testimony by Dr. Harari was properly raised at the post-conviction relief hearing but inexplicably was not included in the order of dismissal. While no Rule 59, SCRPC, motion was filed on behalf of Petitioner to amend the insubstantial order, to not address the merits of this issue or remand the matter back to the PCR court would be "fundamentally contrary to the interests of justice." Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016) (holding that although Petitioner's claim was procedurally barred due to failure to file a motion to reconsider, dismissing the writ of certiorari would be fundamentally contrary to the interests of justice).

Turning to the merits of Petitioner's claim of ineffective assistance of counsel, a fair reading of the record shows that the testimony elicited by the state during the cross examination of Dr. Harari improperly bolstered JW's credibility. Both this Court and the Court of Appeals have ruled in multiple cases, over last four decades, that such testimony is highly improper. In State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), the defendant was charged with sexually assaulting a minor. The state asked the victim's treating psychiatrist if they were "of the impression" that the victim's symptoms were "genuine," to which the psychiatrist responded affirmatively. Id. at 393, 377 S.E.2d at 302. Defense counsel objected and asked for a mistrial, the judge instead gave a curative instruction. Id. In analyzing the actions of the trial court this Court concluded that the solicitor's questions improperly invited the psychiatrist to give an opinion as to the victim's credibility. Id. at 394, 377 S.E.2d at 302.

In 2017, this Court opined in Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017), that the law after Dawkins was "clear that no witness may give an opinion as to whether

the victim is telling the truth.” Specifically, this Court held that “reasonably competent trial counsel should know to object...to testimony that indicates the witness believes the victim, but does not serve some other valid purpose. *When the testimony directly conveys the witness’s opinion that the victim is telling the truth, it is obviously improper bolstering.*” Id. at 325, 806 S.E.2d at 718 (emphasis added).

In State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000), the Court of Appeals ruled that testimony by the minor victim’s counselor improperly vouched for the victim’s credibility. The counselor testified that nothing the victim had said would lead him to believe that the victim was not being truthful. Id. at 568, S.E.2d at 308. The counselor further testified that when a child says they have been sexually abused, the child is telling the truth 95% of the time. Id. at 569, S.E.2d at 308. In holding the counselor’s testimony improperly bolstered the victim’s credibility, the Dempsey court quoted the Supreme Court of Oregon which said in State v. Milbradt, 305 Or. 621, 756 P.2d 620, 624 (1988), “We have said before, and we will say it again, this time with emphasis – no psychotherapist may render an opinion on whether a witness is credible in any trial in this state. *The assessment of credibility is for the trier of fact and not for psychotherapists.*” (Emphasis added).

In order to prove trial counsel was ineffective, an applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Ard, 372 S.C. at 331, 642 S.E.2d at 596 (citing Strickland, 466 U.S. at 687, 104 S. Ct. 2052; Rhodes v. State, 349 S.C. 25, 30–31, 561 S.E.2d 606, 609 (2002)). The proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases. McHam v. State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (quoting Butler v. State, 286 S.C.

441, 442, 334 S.E.2d 813, 814 (1985)). In analyzing the prejudice prong of Strickland, a “reasonable probability” is a probability sufficient to undermine confidence in the outcome of the trial. Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 250, 353 (2016).

The testimony that Dr. Harari gave on cross-examination was blatant bolstering. He stated unequivocally that JW’s original statements to him were fabricated to protect Petitioner. Further, he offered his diagnosis that JW had indeed been sexually abused. His testimony indicated to the jury that JW’s trial testimony that detailed the abuse was truthful and should be believed. The failure of Counsel Wise to object to the improper bolstering testimony was deficient performance under the first prong of Strickland.

Petitioner’s defense at trial was that he was unaware the sexual acts took place and therefore lacked the requisite intent to be criminally responsible. This defense relied heavily on the statements JW gave to Dr. Harari and to DSS case agent Clark. While it may have been reasonable to call Dr. Harari to rebut JW’s trial testimony, Counsel Wise should have objected when Dr. Harari gave his opinion about the validity of the statements JW’s made to him during the psychological evaluation or about whether she was being truthful.

The testimony by Dr. Harari went to the heart of Petitioner’s defense. Without such testimony it was reasonable to contend that the jury could have chosen to believe JW’s original statements, that she had sex with Petitioner without his knowledge, instead of believing JW’s trial testimony. The bolstering testimony by Dr. Harari was particularly damaging when combined with the fact that the trial court barred Petitioner from calling his “automatism” expert to testify before the jury. Thus, Petitioner was prejudiced by counsel’s failure to object to the improper bolstering testimony that effectively eviscerated the defense asserted at trial.

Dr. Harari's testimony invaded the province of the jury to decide whether JW was being truthful when she testified at trial or whether she was truthful when she originally spoke with DSS and Dr. Harari. The conflicting statements JW gave went to her credibility and to the heart of Petitioner's defense. It is reasonable to conclude that without the testimony, the trial could have had a different result. Therefore, Petitioner has shown the requisite prejudice under the second prong of Strickland.

CONCLUSION

Based on the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on these issues or, in the alternative, remand this matter back to the PCR Court to make specific finds of fact and conclusions of law on the properly raised bolstering claim.

s/Jessica M. Saxon

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of May, 2020.