

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

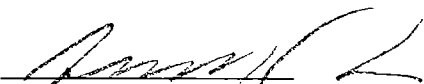
2017-CP-04-279

Andrew Antonio Clemons, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Andrew Antonio Clemons appeals the Honorable R. Scott Sprouse's Order of Dismissal filed June 8, 2020, and Order Denying Applicant's Motion to Alter or Amend filed June 16, 2020.

This 24 day of June, 2020.


Susannah Ross, Attorney at Law
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Attorney for Appellant

Other Counsel of Record:
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JUN 29 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON)	IN THE TENTH CIRCUIT
)	
ANDREW ANTONIO CLEMONS)	
APPLICANT,)	MOTION TO ALTER OR AMEND
)	
VS.)	
)	
THE STATE OF SOUTH CAROLINA)	
RESPONDENT.)	CASE NO: 2017-CP-04-279
)	

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRPC, to alter or amend the judgment of this Court filed on June 8, 2020, to grant post-conviction relief (PCR) as outlined in the attached proposed order which was submitted to the court on March 20, 2020. See Exhibit 1. The Applicant argues that each allegation set forth in the Amended Application filed February 13, 2020, standing alone, amounted to ineffective assistance of counsel resulting in undue prejudice; furthermore, petitioner argues that if each allegation did not meet that standard, cumulative error prejudiced the Applicant to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 386 S.E.2d 624, 625 (1989).

The Applicant takes issue with a number of findings of fact and conclusions of law set forth in its Order of Dismissal. The order fails to reflect the testimony presented at the PCR hearing and incorrectly interprets the law. The Order incorrectly states that the case did not hinge on the victim's credibility so that the Applicant failed to meet his burden as to the allegations of improper bolstering and vouching. The stated reasoning for this finding was that there was other evidence of sexual battery from State's witness Dr. Carter; Dr. Carter testified that the victim's hymen was abnormal due to an absence of

hymeneal tissue consistent with a penetrating injury. Furthermore, the victim's sister testified that she saw the child come out of the bedroom followed by the Applicant, and there were also forensic videos of the victim and her sister submitted at trial. See Order pp.27, 33, & 39. This misstates the case law regarding vouching and bolstering and ignores the facts presented in this case. (See *Briggs v. State*, 806 S.E.2d 713 (S.C. 2017)(Despite the fact that Briggs did not strongly deny the accusations and instead told detectives he was "sick and needed help", and the fact that two jailhouse informants testified Briggs admitted the offenses, the Supreme Court upheld the PCR court's determination that Briggs was prejudiced.) Dr. Syed, who was the alleged victim's regular pediatrician with over twenty years experience and training to recognize signs of physical and sexual abuse, testified at the PCR hearing that she performed a physical examination of the child and noted that the child's hymen was intact. It was undisputed that the applicant had no contact with the victim after this examination. This intervening exam occurred after the child's report of abuse and two months before Dr. Carter's exam.

The Order misstates the Applicant's arguments as to trial counsel's failure to make proper objections to Dr. Carter's testimony. It finds that trial counsel was not ineffective for stipulating to Dr. Carter's testimony, because Dr. Carter had expert qualifications. The issue was not whether Dr. Carter was an expert, the issue is that the victim had an intact hymen two months before Dr. Carter's examination; therefore, Dr. Carter's findings were irrelevant and misleading, and were more prejudicial than probative.

Even if Dr. Carter's testimony was permissible, the failure of trial counsel to call Dr. Syed as a witness was clearly prejudicial. Trial counsel never mentioned Dr. Syed's examination during the Applicant's trial, and Dr. Syed testified at the PCR hearing that

trial counsel never even contacted her or issued her a subpoena in the case. There was also no testimony by Dr. Carter at the Applicant's trial concerning Dr. Syed's prior examination and finding that the child's hymen was intact and normal. The undisputed evidence was Applicant had had no contact with the child in over a year, so this normal exam goes directly to the admissibility of Dr. Carter's testimony and reliability of her opinions. While trial counsel argued Dr. Carter's testimony was irrelevant because it found sexual battery when the child had never alleged battery against the Applicant, the transcript clearly shows that trial counsel never mentions Dr. Syed's examination.

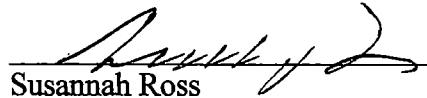
The Applicant takes issue with the Order's finding that trial counsel was not ineffective for failing to object to Dr. Carter's testimony because the allegation of abuse and an abnormal vaginal exam is like one and one is two. Citing *State v. Wilkins*, the Order says that an expert may testify to the ultimate issue. *State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670, 672 (S.C. App. 1991). See Order p. 38. However, that case is distinguishable because it does not involve bolstering and vouching, which our appellate courts have repeatedly found to be reversible error. See, e.g., *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015); *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011). *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (S.C. 2017). Appellate counsel testified at the PCR hearing that he found Dr. Carter's testimony to be problematic, and he would have argued on appeal that her testimony constituted vouching and bolstering if the issue had been preserved by trial counsel. Order p. 49.

Finally, the Order states that the Applicant failed to show prejudice from trial counsel's failure to call Dr. Syed to testify or offer her records indicating that the child's hymen was normal at trial because "her testimony was not particularly helpful to the defense". The Applicant takes issue with this finding in light of the evidence and testimony presented by Dr. Syed at the PCR hearing and believes the citation of *Dempsey v. State* to be misplaced. *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (S.C. 2005). The Order seems to be saying that despite Dr. Syed's twenty years experience as a pediatrician and training to recognize signs of physical and sexual abuse, she would not be qualified as an expert in child sexual assault examinations. Whether or not this is true, it is irrelevant. Dr. Syed's value as a witness was not to give an opinion as to whether CSC had occurred, she checked the child's vagina two months before the expert in child sexual assault examinations and noted that the child's hymen was normal and intact.

CONCLUSION

For the foregoing reasons, the Applicant requests this Court to alter its Order of Dismissal and grant Applicant relief.

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
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(864) 242-0029

This 9 day of June, 2020.

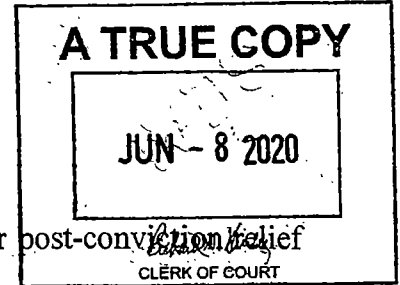
STATE OF SOUTH CAROLINA)
 COUNTY OF ANDERSON)
 Andrew Antonio Clemons, #266944,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2017-CP-04-279

JUN 11 11:53:50 AM
 ANDERSON COUNTY, SC
 CLERK OF COURT

ORDER OF DISMISSAL



This matter comes before this Court by way of an application for post-conviction relief filed on February 10, 2017, by Andrew Antonio Clemons (Applicant). The State (Respondent) filed its return on May 15, 2017, in which it moved for the summary dismissal of one of Applicant's claims, moved for a more definite statement, and requested that the PCR court convene an evidentiary hearing in order to resolve some claims raised in the application. On June 1, 2017, Applicant filed an amended application incorporating the claims raised in the application and pleading new claims. On February 13, 2020, Applicant filed a second amended application, incorporating and adding supporting details to the previous applications. On Wednesday, February 19, 2020, an evidentiary hearing in this matter was convened before the undersigned. Susannah C. Ross, Esquire, represented Applicant, who was physically present. Assistant Attorney General Taylor Z. Smith, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf and called as witnesses Elizbieta Weronika Syed, M.D., and Assistant Solicitors Kristin W. Reeves and Lauren Davis Price, both of the Tenth Circuit Solicitor's Office. Respondent also called Reeves and Price as witnesses, as well as Chief Appellate Defender Robert M. Dudek (appellate counsel) of the South Carolina Commission on Indigent Defense. Following a thorough review of the

record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application for post-conviction relief.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. During its December of 2011 term, the Anderson County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2011-GS-04-1977). During its April of 2013 term, the Grand Jury indicted Applicant for committing a lewd act upon a child (2013-GS-04-569). Applicant was represented by G. Scott Thomason, Esquire (trial counsel), and Assistant Solicitors Reeves and Price prosecuted the case.¹ On May 13, 2013, through May 15, 2013, Applicant proceeded to a jury trial with the Honorable R. Lawton McIntosh (trial court) presiding, during which Applicant was tried in his absence. At the conclusion of trial, the jury convicted Applicant as indicted. The trial court sentenced Applicant but sealed the sentence as Applicant was not present for sentencing. On September 12, 2013, the parties appeared again before the trial court for sentencing. The trial court sentenced Applicant to imprisonment for twenty-five years for first-degree criminal sexual conduct with a minor and fifteen years for committing a lewd act upon a minor, with both sentences running concurrently, and with credit for time served.

Trial counsel filed a timely notice of appeal. Appellate counsel perfected the appeal on Applicant's behalf. Assistant Attorney General Christina Catoe Bigelow of the South Carolina Attorney General's Office represented Respondent. Appellate counsel argued on appeal that the trial court erred by allowing the State's expert witness to testify that the minor victim's injuries

¹ Trial counsel was not a witness at the PCR hearing, having passed away in 2017.

were consistent with penetration because the victim testified that no penetration had occurred, making the expert's testimony speculative and inadmissible under Rule 403, SCRE. The South Carolina Court of Appeals affirmed in an unpublished opinion. State v. Clemons, Op. No. 2015-UP-557 (S.C. Ct. App. filed December 16, 2016) (per curiam), cert. denied, State v. Clemons, S.C. Sup. Ct. Order dated December 1, 2016. The remittitur was issued on December 6, 2016.

CURRENT PROCEEDING

On February 10, 2017, Applicant filed an application for post-conviction relief,² in which he alleged that he was being held in custody unlawfully based on the following grounds:

1. Applicant received the ineffective assistance of trial counsel:
 - a. "Counsel was inadequate for denying [Applicant] effective assistance guarantee under the sixth amendment";
 - b. "Counsel was inadequate for failing to object or raise the issue of abuse of discretion when judge denied motion for an continuance to allow [Applicant] to appear in court";
 - c. "Counsel was inadequate in allowing the indictment to be amended without the grand jury or jury, because the language in the indictment must be specific";
 - d. "Counsel was inadequate and performance was deficient because counsel helped the State bolster their case against his client during his opening and closing arguments";
 - e. "Counsel was inadequate for allowing the [Applicant's] fifth amendment right to remain silent, right to be protected against double jeopardy, and the rights to the confrontational clause to be violated and this was unduly prejudicial";
 - f. "Counsel was inadequate and failed to impeach the testimonies of the State's witnesses because of their inconsistencies based upon the Rules of Evidence Rule#608 Truthfulness vs. untruth";
 - g. "Counsel as inadequate for making statement pertaining to the facts of this case to the jury about witness statements, irrelevant evidence or exhibits that were presented when the [Applicant] was unable or present to defend himself against the allegations";
 - h. "Counsel was inadequate for failing to subject the State to an adversarial testing or failed to present a defense";
 - i. "Counsel was inadequate for failing to consult with his client, failed to properly investigate, failed to give sound advice";

² This initial filing was filed by Applicant as a pro se litigant; the two amended applications were filed by Applicant's PCR counsel.

- j. "Counsel was inadequate for making the statement to the jury that his client certainly should be found guilty on the charge of criminal sexual conduct in the 1st degree with a minor without any actual proof of DNA physical evidence or biological material, and this was unduly prejudicial"; and
 - k. "Counsel was inadequate for his failure to seek DNA testing or expert testimony on behalf of the [Applicant] to rebut their expert testimony"; and
2. Applicant received the ineffective assistance of appellate counsel:
- a. "Appellate counsel was inadequate for failing to raise the issue that trial counsel was ineffective for failing to properly investigate, present an defense, or seek DNA testing";
 - b. "Appellate counsel was also inadequate for depriving the [Applicant] of the right to receive effective assistance under the sixth amendment of the United States";
 - c. "Appellate counsel was inadequate and deficient with his performance for sending me a letter that it is his decision what issue or issues to present to the Court of Appeals";
 - d. "Appellate counsel was inadequate for failing to raise obvious and significant issues that were much stronger than what was raise during an critical stage of [Applicant's] appeal";
 - e. "Appellate counsel was inadequate for depriving the [Applicant] of his due process rights, and his equal protection of the law under the fourteenth amendment of the United States. Which states no State shall deprive any person of life, liberty, or property without proper due process of law";
 - f. "Appellate counsel was inadequate for failing to consult with the [Applicant], failed to communicate the interest of his constitutional rights, and this was unduly prejudicial";
 - g. "Appellate counsel was inadequate for having an conflict of interest between his former counsel or the interest of his own representation of the [Applicant]";
 - h. "Appellate counsel was inadequate for filing a frivolous issue on direct appeal. The issue clearly had no merit and had no reasonable argument on the [Applicant's] offenses. Clearly having no basis in law"; and
 - i. "Appellate counsel was inadequate for being an friend of the Court as opposed to being an adversary. Counsel helped the State bolster their case against his client"; and
3. Applicant is actually innocent.

On June 1, 2017, Applicant filed an amended application, incorporating the claims raised in the application and asserting additionally that Applicant was entitled to post-conviction relief because:

1. Applicant received the ineffective assistance of counsel because trial counsel:
 - a. Failed to investigate;
 - b. Keep Applicant informed of plea negotiations;
 - c. Failed to make adequate objections and arguments to preserve the record for direct appeal;
 - d. Failed to make reasonable arguments in Applicant's defense; and
 - e. Failed to inform Applicant of the full nature of the allegations against him; and
2. Applicant's due process rights were violated because:
 - a. The State bolstered and vouched for its witness;
 - b. The trial court gave an improper corroboration instruction;
 - c. Applicant was afforded the ineffective assistance of counsel; and
 - d. The trial in Applicant's absence amounted to a total breakdown in the adversarial process.

On February 13, 2020, Applicant filed an amended application, incorporating the claims raised in the amended application and application and clarifying that Applicant was entitled to post-conviction relief because:

1. Applicant received the ineffective assistance of counsel because trial counsel:
 - a. Failed to properly move for a continuance or object to a trial in Applicant's absence;
 - b. Failed to effectively object to the admission of the recording from the forensic interview of the minor victim;
 - c. Failed to object to the State's question of a DSS investigator as to whether the allegations against Applicant were valid;
 - d. Failed to object to testimony from the DSS investigator that, after an extensive investigation and staffing, the witness indicated Applicant for sex abuse;
 - e. Failed to object to testimony from the law enforcement detective that she identified Applicant as a suspect;
 - f. Failed to object to the investigator's testimony that Applicant did not show up for interviews with law enforcement, which the State argued in closing corroborated Applicant's guilt;
 - g. Stipulated to the expertise in child sexual assault cases of the State's witness;
 - h. Failing to object or making the wrong objection to the admission of the photographs of hymens, the State's expert's testifying as to the ultimate issue, and the State's expert's vouching and bolstering by testifying that "one plus one is two";
 - i. Told the jury to find Applicant guilty;
 - j. Failed to make reasonable arguments, such as:

- i. “[W]hy didn’t State produce evidence of pornographic DVDs through reference to them by mother or during search of home”;
 - ii. “[I]n house where sister thought child with no pants was suspicious how could penetration injury and blood go unnoticed”; and
 - iii. “[W]hy first pediatrician Dr. Syad did not think there was any penetration because and noted hymen intact and crescent moon shaped or that maybe the examination caused injury”;
- k. Failed to take exception or move for a mistrial when the trial court gave the jury an improper corroboration charge;
 - l. Failed to present medical records showing that the minor victim’s hymen was intact when she was subject to a medical examination on January 28, 2011 in light of the testimony from the State’s expert that the hymen was absent on April 4, 2011, and the indictments’ specifying that the sexual battery occurred between December 1, 2009, and August 31, 2010; and
2. Applicant received the ineffective assistance of counsel because appellate counsel:
 - a. Failed to argue on appeal that the testimony of the State’s expert witness constituted bolstering; and
 3. Applicant’s due process rights were violated when:
 - a. The State vouched for and bolstered its witness;
 - b. The trial court gave the jury an improper corroboration instruction;
 - c. Applicant was afforded the ineffective assistance of counsel; and
 - d. The trial in Applicant’s absence constituted a total breakdown in the adversarial process.

At the start of the evidentiary hearing before the undersigned on February 19, 2020, Respondent requested that Applicant specify for the record the grounds upon which he would move forward. Applicant specified that he would be moving forward only upon the grounds specifically articulated in the second amended application for post-conviction relief filed on February 13, 2020. This Court finds that all allegations other than these have been waived by Applicant and they will not be addressed in this order.

Testimony at PCR Hearing

Applicant called Dr. Syed as a witness at the PCR hearing. She testified she is a physician practicing in the field of pediatrics. She testified she reviewed the minor victim’s medical

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records in advance of the hearing. She testified she conducted a medical examination on the victim. She testified she wrote in her notes from the examination that the victim's genitalia appeared normal but noted that the examination was conducted one year after the sexual battery took place, according to information given to her by the victim's mother. She testified she would not have taken any swabs of the victim's genitalia or done anything similar since the assault happened so far before she conducted her examination. She testified the victim's hymen was present, and that an intact hymen can be present in variations. She testified the victim's hymen did not necessarily indicate that penetration of the victim's vagina had occurred, and testified the smooth border of the victim's hymen had indicated that the victim had not suffered any sexual trauma at the time. She testified a physical examination cannot rule out the existence of sexual abuse on a patient. She testified the victim's hymen was "intact", and that there was some space in the hymen but that it was too small for full penetration to have occurred. She testified she told the victim's mother after the conclusion of the examination that the mother should send the child to a special clinic or psychologist for sexual abuse counselling. She testified she did not specifically ask about the abuse. Based upon her testimony, Applicant's Exhibit One was admitted into evidence. This Exhibit is the witness's notes from her examination of the minor victim.

On cross-examination, she testified she participated in a sexual abuse clinic while in medical school in 1995, and that this training lasted for approximately two or three months. She testified she does not have any certification in the area of sexual trauma or sex abuse but that she did not need any such certification as such areas are within the normal part of medical practice. She testified she has dealt with at least fifty cases of sex abuse with female patients during her career, constituting about five or six cases per year. She testified she had never been qualified in

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court as an expert in the field of sexual abuse or sexual trauma. She testified she had never been qualified in court as a medical expert. She testified as to the procedures she used in conducting her examination of the minor victim, testifying that she used a flashlight to look for bruises, lacerations, and the like, and that she spent minutes examining the victim's hymen. She testified her conclusion was that she could not rule out that sexual abuse had occurred and that no physical evidence, such as bruises or marks, were visible during her examination because it was conducted so long after the incident supposedly happened.

On redirect, she testified a smooth border on a hymen is a normal variation of a hymen.

Applicant testified on his own behalf. He testified he did not come to court for his trial because he was scared and because trial counsel "did not defend him", and wanted Applicant to plead guilty and accept a plea offer of five years. He testified trial counsel did not advise him that he could be tried in his absence or what would happen if Applicant did not appear at trial.

Applicant testified he wanted Dr. Syed to testify on his behalf at trial, but that no witnesses testified for the defense. He testified trial counsel did not let him know what was happening in his case, and that Applicant was therefore unable to produce witnesses and evidence that would have aided his defense.

He testified trial counsel moved for a continuance but that the trial court denied the motion.

He testified that trial counsel allowed the indictment to be amended, which "let a whole new charge come in" that he had no notice of and which caused him to "sound bad." He testified the indictment stemmed from an allegation that he had engaged in oral sex with the victim. He testified he thinks the State added the allegation in because the solicitors did not have proof that

he committed criminal sexual conduct with a minor, and that he thinks trial counsel should have objected to the amendment.

Referring to the trial transcript, Applicant testified to objections and arguments made.

On cross-examination, Applicant testified he was not in court for his trial because he stayed at home due to his feeling like trial counsel was not trying to help Applicant or defend him. He affirmed that he did not attend trial because he was scared at what the outcome would be. He testified he did not receive a bond card informing Applicant of his trial date.

Applicant called Reeves as a witness. She testified she provided discovery to trial counsel, which included Dr. Syed's notes from her examination of the victim and the DSS records. She affirmed that a plea offer form in Applicant's possession looks like something the State would have offered during Applicant's case.

Respondent also called Reeves as a witness. She testified trial counsel was a well-known visitor to the county jail because he was always visiting and communicating with Applicant. She testified she spoke with trial counsel about Applicant's case on multiple occasions.

She testified two hearings were held in the case the week before trial, and that Judge McIntosh presiding over those hearings as well as Applicant's trial. She testified those hearings would have occurred on May 7, 2013, and May 9, 2013, in Anderson County. As to the subject of those hearings, she testified the State wanted to introduce into evidence at trial recordings of the forensic interviews of the minor victim and the victim's sister. She testified other issues were dealt with at the hearings, including redactions, and the testimony and qualifications of the State's expert witness. She testified she wanted to introduce into evidence photographs that the expert witness, a physician, had taken of the victim's hymen and to compare them to photographs of a "normal" hymen. She testified the parties addressed the issue of whether

Applicant had been showing pornography to the victim and whether that could be the subject of testimony at trial; she testified trial counsel objected to that. She testified the parties discussed State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), which she believed limited the State's ability to offer a forensic interviewer as a witness at trial. She testified trial counsel objected to the indictment for committing a lewd act upon a child because he did not think it was proper to proceed to trial on both indictments; the trial court decided that the State could proceed to trial on both because lewd act was not a lesser-included offense of first-degree criminal sexual conduct. She testified trial counsel objected throughout the hearings regarding the evidence the State intended to introduce at trial. She testified Applicant was present for both of the pre-trial hearings. She testified that the parties discussed throughout the hearings that the trial would begin the following week, and that the parties conducted the pre-trial hearings the week before trial so that they could get straight to trial the following week. She testified the transcript from Applicant's trial on May 13, 2013, reflects that the parties began jury selection immediately upon the start of proceedings.

She testified that, on the morning of May 13, 2013, Applicant was physically present at trial when the parties were going through jury qualification. She testified there was a break in proceedings immediately before the parties picked the jury and that Applicant went missing from the courthouse at that time. She testified she, trial counsel, and the trial court went into chambers to discuss going forward in Applicant's absence. She testified trial counsel requested that the proceedings be continued so that he could attempt to find Applicant. She testified the trial court denied that request, and stated he was finding Applicant was waiving his right to be present for trial by not returning to the courtroom. She testified the discussion about Applicant's absence occurred partly on the record and partly off. She testified the Thirteenth Circuit Solicitor's Office

mails out bond cards to all defendants unless the defendants are in jail. She testified the bond cards notify defendants of the date and time of their hearings and that they can be tried in their absence if they fail to appear for trial. She also testified that trial counsel informed the trial court at the time of Applicant's absence that Applicant was aware that he was supposed to be in court for trial.

She testified she moved to admit into evidence at trial video recordings of the forensic interview of the minor victim and the victim's sister, who was also a minor. She affirmed that trial counsel had the opportunity to cross-examine the children at trial.

When asked about her questioning of the DSS investigator at trial, she testified that a DSS report had been made by someone. The reporter alleged that the victim's mother knew of the sexual abuse but had failed to report it herself. She testified she intended to question the DSS investigator about the other allegations—that the victim's mother was not a good mother—at trial. She testified she was not attempting to imply to the jury that she had outside information of Applicant's guilt of which the jury was not aware. She testified trial counsel would have had those DSS records through discovery. She testified, by asking the DSS investigator about the process of the investigation, that referrals to DSS come from law enforcement. She wanted the investigator to testify regarding who she arrested and charged in the case.

She testified she referred during her closing argument to the law enforcement investigator's testimony that Applicant did not show up to interviews with the investigator. She testified she thought that there was a case stating that this argument was proper because Applicant had been given an opportunity to share his side of the story to police but chose not to do so. She testified that Applicant had not yet been arrested at the time of the relevant phone conversations and missed appointments between Applicant and the investigator.

She testified she provided trial counsel with a letter stating that the State would offer Dr. Carter as an expert witness at trial, and she testified the parties had discussed the issue with the trial court the week before trial began. She testified the parties discussed whether the witness could be qualified as an expert, that the trial court was not familiar with Dr. Carter and was skeptical of whether it would have been proper to qualify her as an expert, leading Reeves to go through the factors showing that Dr. Carter was a proper person to testify as an expert. She testified they had an in camera hearing regarding Dr. Carter's qualifications at trial due to the trial court's skepticism about the witness's qualifications. She testified that, during the hearing, Dr. Carter testified about being a blind witness and not knowing what statements the minor victim had made.

She testified the parties discussed the photographs of the victim in a pretrial hearing on and off the record. She showed the photographs of the victim's hymen and of a "normal" hymen to the trial court and trial counsel. She testified the trial court was skeptical of offering the photographs to the jury, and the parties argued about whether the photographs would aid the jury in its fact-finding. She testified trial counsel objected to the admission of the photographs in a pre-trial hearing and during trial. She testified Dr. Carter used the photographs to explain the medical difference between a normal and abnormal hymen.

She testified regarding trial counsel's statement during his closing argument that the jury should find Applicant guilty. She testified trial counsel also stated during his argument that the State had not proven that Applicant was guilty of first-degree criminal sexual conduct with a minor. She noted that the court reporter included a notation in the transcript indicating that the error was in trial counsel's argument, and not stemming from the court reporter.

Applicant cross-examined Reeves at the hearing. She testified she handed up case law at trial to show that the corroboration charge given at the State's request was proper at the time of Applicant's trial.

She testified she did not remember specifically what objection trial counsel made to the photographs of hymens but believes it was based on speculation, Rule 403, SCRE, and that they would inflame the passions of the jury. She testified she did not remember whether trial counsel objected on the basis that there had been an examination of the minor victim conducted before the photographs were taken.

She testified Applicant had been out of the victim's home between January and April of 2011 after having been asked to leave by the victim's mother following the victim's disclosure of abuse.

She agreed that when trial counsel stood up to introduce himself prior to jury selection, as reflected in the transcript, Applicant was not present at that time. She testified she had a distinct memory of Applicant's being at trial on May 13, 2013, and then leaving during the proceedings. She testified that this explains why the trial court did not question trial counsel further about Applicant's absence.

She testified she interviewed Dr. Syed before trial, and that Dr. Syed told her that she had had no training concerning sexual assault victims, which is why Reeves did not call Dr. Syed as a witness at trial.

Respondent called Price as a witness at the PCR hearing. She testified she had only recently begun to work at the Thirteenth Circuit Solicitor's Office when Applicant's case was coming up for trial. She testified Applicant had been present for jury qualifications and exemptions at trial, that everyone took a break before jury selection began, and that trial counsel

was unable to locate Applicant at the end of the break. She testified the parties discussed Applicant's absence in chambers, that trial counsel was given time to find Applicant, and that trial counsel told the State and the trial court approximately twenty minutes later that he could not find Applicant.

Telfia Johnson, the victim's mother, testified at the PCR hearing. She testified she was present in the room when Dr. Syed conducted an examination of the victim following the victim's disclosure of abuse. She testified Dr. Syed looked at the victim's hymen for approximately ten or fifteen seconds only. Applicant questioned Johnson on cross-examination at the PCR hearing. She testified she talked to DSS after she took the victim to Dr. Syed's office after the victim's sister told her what had happened between Applicant and the victim. She testified Dr. Syed told her that she could not rule the occurrence of sexual abuse in or out based upon her examination of the victim. She testified she told the DSS caseworker that Dr. Syed did not conduct a thorough examination of the victim, and she admitted that the DSS records do not reflect that she did this and that she did not testify to this at trial. She testified Applicant was not living in her home when she took the victim to be examined by Dr. Syed because he was in prison at the time. She testified she did not allow the victim to be around Applicant once the victim disclosed the sexual abuse.

Respondent called appellate counsel as a witness at the PCR hearing. He testified he raised the issue during Applicant's direct appeal of whether the trial court erred in allowing Dr. Carter to testify regarding Applicant's alleged penetration of the victim when the victim testified at trial that no penetration had occurred. He argued Dr. Carter's testimony should have been kept out pursuant to Rule 403, SCRE.

He testified as to his process in selecting issues for briefing. He testified he reads through transcripts and notes all objections, motions, and rulings during trial. Then, he goes back through them to decide which issues are meritorious and which are not. He testified he must be convinced that issues are "winning issues" for him to file a merits brief.

He testified he raised the issue regarding Dr. Carter because trial counsel objected to the testimony on the ground of Rule 403. He did not believe that the bolstering issue was preserved, so he did not raise it. He testified the problem with the bolstering argument is that the victim's testimony was that there had been no penetration, which contradicted the victim's testimony rather than bolstering it. He thought the better argument was that Dr. Carter contradicted the victim's testimony rather than supposed it. In his opinion, without any evidence of penetration, the jury should not have convicted Applicant of first-degree criminal sexual conduct with a minor.

Applicant cross-examined appellate counsel. He agreed that Dr. Carter's testimony that she was more concerned after watching the recording of the forensic interview of the victim would have constituted bolstering more than the testimony he addressed in his brief and that trial counsel did not object on the ground of bolstering. He testified that, if a bolstering objection had been preserved on the ground of vouching, he probably would have raised that issue on appeal because Dr. Carter was an expert witness who was vouching for the victim's testimony.

Respondent questioned appellate counsel again on redirect. He testified the issue he raised on appeal was the strongest issue available and that he could not have raised a vouching or bolstering issue because trial counsel did not object on that basis. He agreed the testimony about penetration was not vouching or bolstering because it contradicted the victim's testimony. He testified no objection to Dr. Carter's testimony on page 210 of the transcript was preserved.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that

“there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Trial counsel was constitutionally ineffective for failing to properly move for a continuance or object to a trial in Applicant’s absence.

Applicant argues trial counsel was constitutionally ineffective for failing to move for a continuance and object to a trial in Applicant’s absence when Applicant was not present for trial.

This Court finds Applicant has failed to show trial counsel’s performance was deficient for supposedly failing to move for a continuance when Applicant was not present for trial. Trial

RSS

counsel did move for a continuance. Tran. 30. Indeed, Applicant admitted this explicitly at the PCR hearing. The testimony from Reeves and Price at the PCR hearing indicated trial counsel requested a continuance when the parties were in the trial court's chambers. The trial court denied trial counsel's motion, finding he had not established good cause for the motion. Tran. 30. This Court finds Applicant was present for pre-trial hearings conducted the week before his trial began in earnest on May 13, 2013, and that Applicant was present in the courtroom for trial initially on May 13, 2013. Although the transcript from proceedings on May 13, 2013, appears to be silent as to whether Applicant made any appearance for trial that morning, the testimony from Reeves and Price places Applicant there and shows that Applicant left the courtroom and did not return after a break before jury selection. Reeves and Price also testified at the PCR hearing that they and the trial court and trial counsel discussed openly in the pre-trial hearings held the week before May 13, 2013, that trial would begin in earnest on that date. Applicant's assertions that he was not present are not credible on this point, whereas the testimony from both Reeves and Price is credible. Trial courts are afforded deference in rulings upon motions for a continuance. See Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006) (instructing that reversals of a trial court's denial of a motion for a continuance are about as rare as the proverbial hens' teeth) (quoting State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)). The testimony from Reeves and Price also establishes that trial counsel informed the trial court that his attempts to reach Applicant to get him to return to trial were unsuccessful. It is therefore not surprising that the trial court denied trial counsel's motion for a continuance.

This Court finds trial counsel's performance was not deficient due to his failure to object to a trial in Applicant's absence. In City of Aiken v. Koontz, the South Carolina Court of Appeals explained that a defendant can waive his right to be present at trial if he received notice

RSS

of his right to be present and was warned that the trial would proceed in his absence. Id., 368 S.C. 542, 547, 629 S.E.2d 686, 689 (S.C. Ct. App. 2006) (citations omitted). “In some circumstances, a defendant may be presumed to waive or forfeit the right to be present by misbehaving in the courtroom or by voluntarily remaining away from trial.” State v. Patterson, 367 S.C. 219, 230, 625 S.E.2d 239, 244-45 (2006) (finding the trial court did not err in refusing to allow Patterson to waive his presence when his only reason for desiring to be absent was his belief that he had the right to waive his presence). Notice to a defendant of the term of court for which a trial is set constitutes sufficient notice to enable him to effectively waive his right to be present. Koontz, at 547, 629 S.E.2d at 689 (citations omitted). In this case, the trial court stated that Applicant “knew that this case was going forward today if he wasn’t [in court].” Tran. 36. Trial counsel informed the trial court that he talked to Applicant on May 12, 2013, and again on May 13, 2013, that Applicant had talked with someone at trial counsel’s office on the morning of May 13, 2013, that Applicant claimed he was five minutes away, and that trial counsel felt he had satisfied his obligation “to chase [Applicant] down” Tran. 30, 36. Trial counsel informed the trial court that all indications he had received indicated that Applicant would be present for court and that trial counsel did not have an explanation for Applicant’s absence. Tran. 30. The State informed the trial court that the Thirteenth Circuit Solicitor’s Office mailed a bond card to Applicant, warning him that he would be tried in his absence if he did not appear for court. Tran. 31. The parties did not enter the bond card into evidence, but the State put on the record the contents thereof. Tran. 31. Additionally, Reeves testified at the PCR hearing that the card and bond sheet mailed to Applicant included notice that the trial would begin on May 13, 2013. Applicant claimed at the PCR hearing that he did not receive a bond card in the mail.

RSS

Applicant's assertion that he did not know that he could be tried in his absence if he did not attend his trial on May 13, 2013, notwithstanding, this Court finds Applicant received notice of his right to be present from trial counsel and the State, and was warned that trial would be held in his absence if he failed to appear. This Court incorporates its previous findings as to Applicant's initial presence and later absence at trial on May 13, 2013, and his presence at hearings held the week before. This Court also finds Applicant's assertion that he lacked notice is not credible and that the testimony of Reeves and Price that Applicant was afforded notice is credible in light of Applicant's testimony at the PCR hearing that he did not attend trial because he was scared because he expected to be convicted due to his belief that trial counsel was unprepared and unwilling to defend him in court.

This Court finds the information available to trial counsel on May 13, 2013, indicated that Applicant knew of his right to be present for trial and that the trial would continue in his absence if he was not present. Therefore, trial counsel would have had no basis on which to object to the trial in Applicant's absence. The credible testimony of Reeves and Price that Applicant was initially present on May 13, 2013, but left during a break in the proceedings, and the testimony of Applicant that he was not present for trial because he feared its outcome reinforces this finding.

This Court finds Applicant has failed to demonstrate he suffered prejudice from trial counsel's failure to object to a trial in Applicant's absence. Applicant has not demonstrated that he did not voluntarily waive his right to be present for trial, that he would have supplied trial counsel with any helpful information during the course of trial, that he would have testified had he been present for his trial, nor has he established that there is a reasonable probability the outcome of trial would have been different had trial counsel objected to the trial in Applicant's

absence. During his closing argument, trial counsel noted that Applicant likely would not have testified even if he had been present for trial. Tran. 261. Additionally, trial counsel spoke to the jury about Applicant's absence throughout trial in mitigation and the trial court instructed the jury that it could not consider in its deliberations the fact that Applicant was not present. Tran. 272. And the trial court admonished the jury at the beginning of trial that it could not hold Applicant's absence from trial against him. Tran. 39.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to move for a continuance at Applicant's trial because trial counsel did so move and Applicant has failed to show any deficiency in trial counsel's performance with respect to a continuance. This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object to a trial in Applicant's absence because Applicant has failed to show any deficiency in his attorney's performance and any resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to effectively object to the admission of the recording from the forensic interview of the minor victim.

Applicant argues trial counsel was constitutionally ineffective for failing to object to the admission of a recording of the forensic interview of the minor victim. An out-of-court statement of a child is admissible in a proceeding in a court of general sessions if:

- (1) [T]he statement was given in response to questioning conducted during an investigative interview of the child;
- (2) [A]n audio and visual recording of the statement is preserved . . . ;
- (3) [T]he child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
- (4) [T]he court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness."

S.C. Code Ann. § 17-23-175(A).

The State offered into evidence the recordings of the forensic interviews of the minor victim and her minor sister. Tran. 173. The forensic interviewer who conducted the interviews of the two children testified at trial regarding the process she used when questioning the two. Tran. 168-73. The minor victim testified at trial and was questioned by trial counsel on cross-examination. Tran. 73-95. The victim's minor sister also testified and was cross-examined by trial counsel. Tran. 96-103. Trial counsel objected to the admission of these recordings on the grounds that they were cumulative to the testimony of the witnesses at trial, they violated the best evidence rule, and that they vouched for and bolstered the victim's credibility. Tran. 173-76. The State argued the recordings were admissible according to Section 17-23-175(A), and trial court overruled trial counsel's objections. Tran. 173-74, 176.

This Court finds Applicant has failed to show any deficiency in trial counsel's performance related to his objecting to the admission of the recordings. Contrary to Applicant's assertions, trial counsel did object on multiple grounds to the admission of the two recordings. According to Section 17-23-175(A), the recordings were admissible because all of the prerequisites for admission were met at trial. There simply was no reasonable basis upon which Applicant could make any further objection, and Applicant has not put forth a basis upon which the admission of the recordings likely could have been prevented by trial counsel. Trial counsel's performance fell within the range of professional competence required of defense attorneys.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective with regard to making proper objections to the admission of the recordings of the forensic interviews of the minor victim and her minor sister because Applicant has failed to show any deficiency in his attorney's performance. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object to the State's questioning of a witness who was a DSS investigator as to whether the allegations against Applicant were valid.

The State called Megan Overton as a witness at trial. Tran. 112. The witness had been a child protective service investigator with the South Carolina Department of Social Services in February of 2011. Tran. 112-13. The witness received a DSS referral regarding the minor victim on February 18, 2011. Tran. 113. The witness conducted an investigation that culminated in her referring the matter to law enforcement. Tran. 114. As part of her investigation, she visited the victim's home and spoke with the parties involved, including the victim and the victim's mother. Tran. 114-15. She testified Applicant did not have any contact with the victim's family while she was conducting her investigation. Tran. 116. During the State's questioning of the witness on direct examination, the following exchange occurred:

- Q: And were -- all of the allegations that initially came in, did those prove or turn out to be valid?
- A: Well, which ones are you talking, like ---
- Q: When you received this report or this referral from the intake, did you have any concerns or anything that you later found through your investigation that were untrue?
- A: Not the allegations concerning [the victim].

Tran. 116.

Trial counsel did not object on any ground during the above-quoted exchange. Applicant argues trial counsel was constitutionally ineffective for failing to do so.

This Court finds Applicant has failed to show any deficiency in trial counsel's performance due to his not objecting to this above-quoted exchange. In State v. Weaver, the South Carolina Court of Appeals found no error in the admission of a law enforcement witness's testimony that he did not perform a gunshot residue test on anyone at a crime scene because "[a]ll the evidence led to [the defendant]." Id., 361 S.C. 73, 85-86, 602 S.E.2d 786, 792-93 (S.C. Ct. App. 2004), aff'd, State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The Court of

Appeals noted there were multiple reasons there was no error in the admission of the testimony, including that the witness did not repeat statements made to him by others at the crime scene but testified regarding conclusions he made based upon what his investigation had revealed, the witness's testimony was responsive to cross-examination from Weaver about the witness's failure to perform gunshot residue tests on everyone at the crime scene, the witness's testimony did not refer to any specific statements identifying Weaver as the perpetrator, the witness's testimony was cumulative to other testimony admitted at trial, and an eyewitness identified Applicant at trial as the shooter. *Id.* (citations omitted). In State v. Thompson, the South Carolina Court of Appeals found testimony from law enforcement witnesses that, after receiving a tip from a bystander, they discovered Thompson and other evidence after Thompson's father consented to a search of the house was admissible because the testimony explained and outlined the officers' investigation and their reasons for going to Thompson's home. *Id.*, 352 S.C. 552, 556-559, 575 S.E.2d 77, 79-82 (S.C. Ct. App. 2003) (citations omitted). In this case, the witness's testimony served as an explanation for the witness's not abandoning the investigation because she did not find that the allegations made in the DSS case, not the criminal case, were unfounded. The witness did not comment upon Applicant's guilt in the criminal case, but instead provided an explanation of her investigation without providing hearsay.

This Court finds Applicant has failed to show any prejudice due to trial counsel's not objecting to the exchange between the State and Overton. The case did not hinge on the victim's credibility because Dr. Carter provided physical evidence. Dr. Carter testified the victim's hymen was abnormal because there was an absence of hymeneal tissue. Tran. 203. She concluded that the results of her examination were consistent with a penetrating injury. Tran. 204. Additionally, the victim's sister saw the victim coming out of the bedroom followed by

Applicant. The jury also viewed the forensic interview of the minor victim and her sister, as well as heard testimony from both at trial. In light of this other evidence, Applicant has failed to show there is a reasonable likelihood the outcome of his trial would have been different had trial counsel objected to the DSS investigator's statement that she did not find that the allegations concerning Applicant in the DSS case were untrue.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object to the State's questions of Overton as to whether the allegations against Applicant were valid because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object to testimony from the DSS investigator that, after an extensive investigation and staffing, the witness indicated Applicant for sex abuse.

Applicant argues trial counsel was constitutionally ineffective for failing to object when the following exchange occurred, without objection, between the State and Overton immediately after the exchange quoted in the previous section:

- Q: And at the end of your investigation period, what, if anything, did you do?
A: At the end of the investigation, we staffed – I staffed my case with a supervisor. And through that we came to the decision that we were going to indicate [Applicant] for sex abuse.

Tran. 116.

This Court finds Applicant has failed to show any deficiency in trial counsel's performance due to his not objecting to this above-quoted exchange. In State v. Weaver, the South Carolina Court of Appeals found no error in the admission of a law enforcement witness's testimony that he did not perform a gunshot residue test on anyone at a crime scene because "[a]ll the evidence led to [the defendant]." Id., 361 S.C. 73, 85-86, 602 S.E.2d 786, 792-93 (S.C.

Ct. App. 2004), aff'd, State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The Court of Appeals noted there were multiple reasons there was no error in the admission of the testimony, including that the witness did not repeat statements made to him by others at the crime scene but testified regarding conclusions he made based upon what his investigation had revealed, the witness's testimony was responsive to cross-examination from Weaver about the witness's failure to perform gunshot residue tests on everyone at the crime scene, the witness's testimony did not refer to any specific statements identifying Weaver as the perpetrator, the witness's testimony was cumulative to other testimony admitted at trial, and an eyewitness identified Applicant at trial as the shooter. Id. (citations omitted). In State v. Thompson, the South Carolina Court of Appeals found testimony from law enforcement witnesses that, after receiving a tip from a bystander, they discovered Thompson and other evidence after Thompson's father consented to a search of the house was admissible because the testimony explained and outlined the officers' investigation and their reasons for going to Thompson's home. Id., 352 S.C. 552, 556-559, 575 S.E.2d 77, 79-82 (S.C. Ct. App. 2003) (citations omitted). In this case, the witness's testimony served as an explanation for the witness's referring the matter to law enforcement at the conclusion of her DSS investigation. The witness did not comment upon Applicant's guilt, but instead provided an explanation of her investigation without providing hearsay.

This Court finds Applicant has failed to show any prejudice resulting from trial counsel's not objecting to the exchange between the State and Overton. At the start of the trial, the trial court informed the jury that the indictments did not constitute evidence of Applicant's guilt and that they did not raise any presumption that Applicant was guilty; rather, the court explained that the indictments were "simply the mechanisms by which the State of South Carolina [brought] the

RSS

Defendant before a jury such as yourselves for a trial and a determination of guilt or innocence.” Tran. 223. The trial court also instructed the jury properly regarding the presumption of Applicant’s innocence, the State’s burden of proving Applicant’s guilt beyond a reasonable doubt, and the jury’s role as the sole finder of fact. The witness’s testimony about her indicating Applicant for sexual abuse after the conclusion of her investigation was similar to the nature of the allegations found in the indictments, serving as information about the process by which Applicant was investigated, indicted, and brought into court for trial.

Furthermore, the case did not hinge on the victim’s credibility because Dr. Carter provided physical evidence. Dr. Carter testified the victim’s hymen was abnormal because there was an absence of hymeneal tissue. Tran. 203. She concluded that the results of her examination were consistent with a penetrating injury. Tran. 204. Additionally, the victim’s sister saw the victim coming out of the bedroom followed by Applicant. The jury also viewed the forensic interview of the minor victim and her sister, as well as heard testimony from both at trial. In light of this other evidence, Applicant has failed to show there is a reasonable likelihood the outcome of his trial would have been different had trial counsel objected to the DSS investigator’s statement that she did not find that the allegations concerning Applicant in the DSS case were untrue.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object when the DSS investigator testified she “indicate[d] Applicant for sex abuse” after concluding her investigation because Applicant has failed to show any deficiency in his attorney’s performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object to the law enforcement detective's testimony that Applicant did not show up for interviews, which the State argued in closing corroborated Applicant's guilt.

Applicant argues trial counsel was constitutionally ineffective for failing to object to the testimony of the law enforcement investigator's testimony that Applicant did not show up for interviews because the State argued in closing that Applicant's failure to keep the appointments corroborated Applicant's guilt. Melissa Partain testified at trial that she was a detective who investigated child and elder abuse crimes for the Anderson Police Department during the investigation into Applicant. Tran. 117-18. She testified she did not interview the victim, but the victim disclosed during a forensic interview that she had been sexually abused. Tran. 118-20. She testified she determined, through her investigation, that the abuse likely occurred in Anderson County in 2009 and 2010. Tran. 120. She was aware that a forensic interview of the minor victim's minor sister was conducted to ascertain whether the sister had been sexually abused as well and whether she had witnesses any abuse against the victim. Tran. 120. She testified she was aware that a medical examination of the victim was performed by Dr. Sallie Carter. Tran. 120-21. As part of the detective's investigation, she interviewed the victim's mother. Tran. 121. Based upon her investigation, she identified Applicant as a suspect. Tran. 121. She testified she tried to speak to Applicant by going to Applicant's father's home, attempting to locate Applicant through Applicant's family members, and calling Applicant on the phone. Tran. 121. She testified she talked with Applicant "and tried to set up interview times, which the dates we set up or the times we set up. [Applicant] never showed up." Tran. 121.

During its closing argument, the State argued the victim was remembering details about Applicant's abusing her to the best of her ability, and that the victim's testimony was corroborated by other evidence, including: the victim's mother's confirming that Applicant and the victim were both living in her home during the time frame in which the victim claimed the

abuse occurred; the victim's sister's testifying she saw, upon entering the home, the victim running out of Applicant's bedroom wearing no pants with Applicant trailing behind; the victim's denying that the incident described by her sister had happened when the sister told the girls' mother about the incident; the victim's mother's testimony that the victim's denials of the incident did not make sense; and the victim's mother's testimony about the family's structure, the layout of the home, and the arrangement of the people in the home matched the testimony of the victim and the victim's sister about those facts. Tran. 246-48. The State noted the detective had tried to speak with Applicant, who failed to keep his appointments. Tran. 250. The State then argued that "all of those details corroborated what [the victim] told in her original telling of what happened to her." Tran. 250.

"It is impermissible for the prosecution to comment, directly or indirectly, upon the defendant's failure to testify. However, improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant. The defendant bears the burden of demonstrating the improper comment deprived him of a fair trial." Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (finding that the solicitor's comments were a comment on the evidence presented to the jury and on the defendant's failure to testify) (citations omitted). The South Carolina Supreme Court also held in Johnson that, even assuming that the solicitor's comment had been improper, the trial court's instruction to the jury that it was not to use the defendant's failure to testify at trial against him was sufficiently curative. Id. at 188, 480 S.E.2d at 735-36.

The South Carolina Court of Appeals considered whether comments made by the State during closing argument denied a defendant the right to a fair trial in State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (S.C. Ct. App. 2001). Id., overruled on other grounds by State v. Gentry,

363 S.C. 93, 610 S.E.2d 494 (2005). In Hamilton, the State argued the defendant took the stand and admitted his guilt after going through a jury trial when he could have pleaded guilty at the start of the week and also said, “[L]adies and gentlemen, you put me here as a representative of your system of justice, a representative of your community, and I wouldn’t bring in to you a borderline case.” Id., at 359-60, 543 S.E.2d at 594-95. The Court of Appeals found the comments “highly inappropriate and constitutionally impermissible.” Id. at 362, 543 S.E.2d at 596. It evaluated the comments by giving the test that the State’s closing:

Must be carefully tailored so it does not appeal to the personal biases of the jurors. Further, the argument may not be calculated to arouse the jurors’ passions or prejudices and its content should stay within the record and its reasonable inferences. Moreover, the State cannot, through evidence or argument, comment upon a defendant’s exercise of a constitutional right.

Id. (citations omitted).

The Court of Appeals went on to find that, though the comments were not permissible, they did not so infect the trial with unfairness that Hamilton’s due process rights were violated. Id. at 365, 543 S.E.2d at 596. The South Carolina Supreme Court recently affirmed that this is the proper test for judging whether a defendant’s due process rights were violated by comments made by the State during closing argument. Fortune v. State, 428 S.C. 545, 837 S.E.2d 37, 44 (2019) (citations omitted) (finding the State’s closing argument was improper when the State commented, among other things, that the solicitor’s job is to tell the truth but the job of defense attorneys is to “manipulate the truth” and “do whatever they have to – without regard for the truth – to get a not guilty verdict.”).

This Court finds Applicant has failed to show trial counsel’s performance was deficient due to his failure to object when the detective testified that Applicant did not keep his appointments with her. Reeves testified at the PCR hearing that the detective’s calls with and attempts to interview Applicant occurred before he had been arrested or indicted. As such, the

witness's testimony should not be understood as a comment upon Applicant's right to remain silent, but rather as a comment on his unwillingness to meet with her during her investigation. Similarly, the State's reference in its closing argument to Applicant's failure to keep the appointments should not be understood as a comment on Applicant's right to remain silent. Instead, the focus of the comments, when viewed in context of the State's argument overall, shows that the State was focusing on the facts corroborating the victim's story.

This Court finds Applicant has failed to show he suffered any prejudice from trial counsel's failure to object to the detective's testimony or the State's referencing it during closing argument. Trial counsel spoke to the jury about Applicant's absence throughout trial in mitigation and the trial court instructed the jury that it could not consider in its deliberations the fact that Applicant was not present. Tran. 272. And the trial court admonished the jury at the beginning of trial that it could not hold Applicant's absence from trial against him. Tran. 39. In light of these facts and the other evidence of Applicant's guilt admitted at trial, Applicant has not shown there is a reasonable likelihood the outcome of trial would have been different had trial counsel objected to the comments. Neither has Applicant shown that the testimony from the witness and the argument from the State in closing so infected the trial with unfairness that a new trial is required.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object when the detective testified Applicant did not keep his appointments with her because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object to testimony from the law enforcement detective that she identified Applicant as a suspect.

RSS

Applicant argues trial counsel was constitutionally ineffective for failing to object when the following exchange occurred, without objection, between the State and the detective Melissa Partain:

- Q: Okay. Through all of the investigation that you were involved in, were you able to identify a suspect in this case?
- A: We did. After extensive investigation, follow-up and interviews, we finally came up with [Applicant]”

Tran. 121.

This Court finds Applicant has failed to show any deficiency in trial counsel’s performance due to his not objecting to this above-quoted exchange. In State v. Weaver, the South Carolina Court of Appeals found no error in the admission of a law enforcement witness’s testimony that he did not perform a gunshot residue test on anyone at a crime scene because “[a]ll the evidence led to [the defendant].” Id., 361 S.C. 73, 85-86, 602 S.E.2d 786, 792-93 (S.C. Ct. App. 2004), aff’d, State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The Court of Appeals noted there were multiple reasons there was no error in the admission of the testimony, including that the witness did not repeat statements made to him by others at the crime scene but testified regarding conclusions he made based upon what his investigation had revealed, the witness’s testimony was responsive to cross-examination from Weaver about the witness’s failure to perform gunshot residue tests on everyone at the crime scene, the witness’s testimony did not refer to any specific statements identifying Weaver as the perpetrator, the witness’s testimony was cumulative to other testimony admitted at trial, and an eyewitness identified Applicant at trial as the shooter. Id. (citations omitted). In State v. Thompson, the South Carolina Court of Appeals found testimony from law enforcement witnesses that, after receiving a tip from a bystander, they discovered Thompson and other evidence after Thompson’s father consented to a search of the house was admissible because the testimony explained and outlined

the officers' investigation and their reasons for going to Thompson's home. *Id.*, 352 S.C. 552, 556-559, 575 S.E.2d 77, 79-82 (S.C. Ct. App. 2003) (citations omitted). In this case, the witness's testimony served as an explanation for the witness's charging Applicant for sexually abusing the victim. For example, moments after providing the testimony identified by Applicant, the witness affirmed that, as a result of her investigation, she brought charges against Applicant. Tran. 121-22. The witness did not comment upon Applicant's guilt, but instead provided an explanation of her investigation without providing hearsay. Reeves's testimony from the PCR hearing indicated she asked the question of the witness because she wanted the investigator to testify as to who she arrested and charged.

This Court finds Applicant has failed to show any prejudice resulting from trial counsel's not objecting to the exchange between the State and the detective. At the start of the trial, the trial court informed the jury that the indictments did not constitute evidence of Applicant's guilt and that they did not raise any presumption that Applicant was guilty; rather, the court explained that the indictments were "simply the mechanisms by which the State of South Carolina [brought] the Defendant before a jury such as yourselves for a trial and a determination of guilt or innocence." Tran. 223. The trial court also instructed the jury properly regarding the presumption of Applicant's innocence, the State's burden of proving Applicant's guilt beyond a reasonable doubt, and the jury's role as the sole finder of fact. The witness's testimony about her indicating Applicant for sexual abuse after the conclusion of her investigation was similar to the nature of the allegations found in the indictments, serving as information about the process by which Applicant was investigated, indicted, and brought into court for trial.

Furthermore, the case did not hinge on the victim's credibility because Dr. Carter provided physical evidence. Dr. Carter testified the victim's hymen was abnormal because there

was an absence of hymeneal tissue. Tran. 203. She concluded that the results of her examination were consistent with a penetrating injury. Tran. 204. Additionally, the victim's sister saw the victim coming out of the bedroom followed by Applicant. The jury also viewed the forensic interview of the minor victim and her sister, as well as heard testimony from both at trial. In light of this other evidence, Applicant has failed to show there is a reasonable likelihood the outcome of his trial would have been different had trial counsel objected to the detective's statement that she identified Applicant as the suspect in her criminal investigation and charged him with the offenses for which he was on trial.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object when the detective testified she identified Applicant as the suspect in the criminal investigation because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for stipulating to the State's witness's expertise in child sexual assault cases.

Applicant argues trial counsel was constitutionally ineffective for stipulating that Sallie Carter, M.D., was qualified to testify as an expert witness during Applicant's trial. Dr. Carter, who performed an examination of the minor victim on April 4, 2011, testified at trial as an expert in child sexual assault examinations. Tran. 187-216. A witness may be qualified as an expert in a particular area based upon his knowledge, skill, experience, training, or education. Watson v. Ford Motor Co., 389 S.C. 434, 447, 699 S.E.2d 169, 175-76 (finding the trial court erred in qualifying a witness as an expert in the training and operation of cruise control and brakes and allowing the witness to testify as to cruise control diagnosis when the witness had no knowledge, skill, experience, training, or education related to cruise control systems specifically) (citing Rule

702, SCRE). The test for whether a witness should be qualified as an expert is one that is dependent upon the witness's reference to the subject. Id., at 447, 699 S.E.2d at 176 (citing Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004)).

This Court finds Applicant has failed to demonstrate any deficiency in trial counsel's performance with regard to this claim. Applicant has presented no evidence as to the lack of the witness's qualifications. Dr. Carter testified at trial that she was a physician at the Anderson-Oconee-Pickens Child and Adolescent Mental Health Center. Tran. 133. She had been conducting child sexual abuse examinations for the Foothills Sexual Trauma Center for ten years leading up to trial. She had an undergraduate degree in psychology from Mercer University, a master's degree from Yale Divinity School, and a doctorate of medicine from the Medical College of Georgia in Augusta. She had had an internship at Emory University Affiliated Hospitals and a pediatric residency at the Yale New Haven Hospital in Connecticut. She testified she had been in private practice for approximately twelve years in Anderson County in the field of pediatrics. She had been the director of the newborn nurse, treating approximately one thousand patients annually. She testified she had conducted vaginal examinations on female children, including those who were allegedly the victims of sexual assault. She testified she had also worked at the Anderson-Oconee-Pickens Department of Mental Health. She worked for ten years at the Child Advocacy Center, where she conducted genital exams on children at a rate of about fifty per year. She testified she had participated in basic and advanced trainings in conducting sexual abuse and sexual assault examinations. She testified she had been qualified as an expert in child sexual assault exams on between thirty-five and fifty different occasions. After Dr. Carter so testified, trial counsel stipulated that she was an expert in the field of child sexual assault examinations. Tran. 137. Furthermore, Reeve's testimony about her notifying trial

counsel of Dr. Carter's qualifications and their discussions thereto shows that trial counsel would have been well aware of the witness's qualifications at the time of trial.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for stipulating that Dr. Carter was qualified to testify as an expert witness at trial because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object or making the wrong objection to the admission of the photographs of hymens, the State's expert's testifying as to the ultimate issue, and the State's expert's vouching and bolstering by testifying that "one plus one is two".

Applicant argues trial counsel was constitutionally ineffective for failing to object or for making the wrong objection to the admission of the photographs of hymens. At trial, the State moved to admit a photograph of the victim's vagina and hymen. Tran. 197. Trial counsel unsuccessfully objected, noting that his basis had been stated previously. Tran. 198. The State moved to admit a photograph of a vagina of another child, which depicted a normal vagina for purpose of comparison. Tran. 199. Trial counsel unsuccessfully objected on the ground of relevance and Rule 403, SCRE. Tran. 199. At the PCR hearing, Reeves testified she and trial counsel discussed the admissibility of the photographs on and off the record. She testified trial counsel objected to their admission not only at trial, but also during the pre-trial hearings that occurred the week before trial began. She did not remember specifically upon what grounds trial counsel opposed the admission of the photographs pre-trial, but believes they were speculation, Rule 403, and that they would inflame the passions of the jury. She did not remember whether trial counsel objected on the basis that an examination had been conducted by a physician prior to the date on which the photograph of the victim's hymen had been taken.

Applicant argues trial counsel should have objected to the admission of the photographs on the ground that they lacked probative value when Dr. Syed examined the victim on an earlier date than that on which the photograph was taken and concluded that the victim's hymen was intact. This Court finds Applicant has failed to show trial counsel's performance was deficient due to his not objecting on this ground. For whatever reason, trial counsel did not call Dr. Syed as a witness and it does not appear from the record that he intended to call her as a witness at trial. Notwithstanding the issues with Dr. Syed's testimony, as addressed later herein, trial counsel could not have raised this objection without calling Dr. Syed as a witness. Additionally, as noted later, Dr. Syed's testimony was not particularly helpful to the defense. And, Dr. Syed's testimony did not remove the probative value in the photograph taken by Dr. Carter of the victim's hymen. Dr. Syed did not take a photograph of the victim's hymen during her examination and testified the victim's mother informed her that the abuse or disclosure had occurred about one year before the victim's visit to Dr. Syed, which would have placed it within the date range noted in the indictment. As such, the photographs were probative.

During a break in the proceedings at trial, Dr. Carter watched the recording of the forensic interview of the minor at the request of the trial court. Afterwards, the State asked if the witness saw the victim's type of injury to be consistent with the victim's allegations based upon her examination of the victim and her review of the recording. Tran. 205. Trial counsel objected that the victim's allegations were "that there was not penetration basically." Tran. 205. The trial court overruled trial counsel's objection. Tran. 205. Dr. Carter answered the question by testifying:

[A]fter listening to the interview, I was more concerned because what you – what the child – although the child did not have perhaps the language and give the detail that would completely describe how the injury occurred, the child did draw a picture of a person who groomed her for sexual activity or sexual abuse.

Tran. 206.

Dr. Carter went on to testify (without objection) as follows about her conclusions based upon her viewing of the recording of the forensic interview:

The child reported that there was sexually explicit material played at least some of the time when the individual was involving her in sexual activity. And she indicated that this happened a number of times. And she indicated that it was at his invitation that she get under the blanket with him, that she do this. She indicated that he had taken her pants down, you know. So together with an abnormal genital exam, to me in my professional opinion, that's like saying one and one is two or two and two is four. I wasn't there. I didn't see it. But I have a lot of experience in this area.

Tran. 210.

Applicant argues trial counsel was constitutionally ineffective for failing to object to Dr. Carter's testimony on the ground that she was improperly testifying as to an ultimate issue. An expert witness can express an opinion about the ultimate issue in a case. State v. Wilkins, 305 S.C. 272, 276, 407 S.E.2d 670, 672 (S.C. Ct. App. 1991) (citations omitted). Questions of and testimony from an expert witness about the state of mind of a defendant is not admissible. Id. (citations omitted). An opinion may be offered on an ultimate issue only where the expert witness is otherwise qualified to do so. State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (finding the trial erred in allowing an expert in crime scene processing and fingerprint identification to testify as to the location of the victim and the position of his body at the time of the shooting because that testimony went to the defendant's claim that he was acting in self-defense at the time of the shooting) (citing Wilkins). This Court finds the witness's testimony was not objectionable on the ground that it constituted testimony as to the ultimate issue. The testimony does not address the ultimate issue of whether Applicant sexually abused the victim. Instead, the witness's testimony, when viewed in the larger context, concerns her ability to determine whether penetration had occurred based upon the lack of information about the

victim's allegations at the time of her examination. And certainly the testimony was not outside the scope of the witness's expertise.

Applicant argues trial counsel was constitutionally ineffective for failing to object that Dr. Carter's testimony improperly vouched for and bolstered the victim's credibility. This Court finds Applicant has failed to demonstrate he suffered prejudice from trial counsel's failure to object to Dr. Carter's testimony that one plus one is two and two plus two is four. This case was not a classic swearing contest between the victim and Applicant. In this case, there was physical evidence, admitted through the photograph of the victim's hymen and through Dr. Carter's testimony, that the victim had been sexually abused. The jury heard testimony from both the victim and her sister. Additionally, Dr. Carter had already given her opinion that the victim had been penetrated even before she watched the video recording of the forensic interview of the victim; the video did not change her medical opinion as to the victim's injury.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object or for making the wrong objection to the admission of the photographs of hymens because Applicant has failed to show any deficiency in his attorney's performance. This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object to Dr. Carter's testimony on the ground that she was improperly testifying as to an ultimate issue because Applicant has failed to show any deficiency in his attorney's performance. This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object that Dr. Carter's testimony improperly vouched for and bolstered the victim's credibility because Applicant has failed to show any prejudice resulting from trial counsel's failure to raise the objection. These claims are denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for telling the jury to find Applicant guilty.

Applicant argues trial counsel was constitutionally ineffective for telling the jury to find Applicant guilty. During his closing argument, trial counsel told the jury that it was his job to defend Applicant and that he would do that to the best of his ability. Tran. 260. Trial counsel informed the jury that Applicant was asserting his innocence by pleading not guilty and having a trial. Tran. 261. Trial counsel argued that there were many inconsistencies in the State's case. Tran. 261. Trial counsel argued the State did not have evidence to prove that Applicant was guilty of first-degree criminal sexual conduct because they could not prove that penetration had occurred. Tran. 262, 265. Trial counsel argued the fact that the minor victim testified that Applicant engaged in oral sex with her but did not mention oral sex in the recording from her forensic interview should cause the jury to have a reasonable doubt as to Applicant's guilt. Tran. 263-64. Trial counsel argued the victim's sister's seeing the victim running across the room, followed by Applicant, did not show that Applicant had abused the victim because the sister said that Applicant and the victim were "both giggling" Tran. 265. Trial counsel argued that he did not "think they've proved criminal sexual conduct in the first degree." Tran. 267. He argued Applicant was cloaked in a "shroud of innocence." Tran. 267-68. He argued the jury had to find guilt "beyond any reasonable doubt" in order to convict Applicant. Tran. 270. He then argued that Applicant "should certainly be found guilty [sic] on the criminal sexual conduct. And I think that is enough to shed reasonable doubt on the charge of lewd act." Tran. 270.

This Court finds Applicant has failed to demonstrate that trial counsel's performance was deficient in his closing argument for saying that Applicant "should certainly be found guilty [sic] on the criminal sexual conduct . . ." and that there is a reasonable likelihood the outcome of trial would have been different had counsel not made the statement. When considering whether a defense attorney's performance was deficient, the PCR court is to measure its "reasonableness

under prevailing professional norms.” Cherry, at 117, 386 S.E.2d at 625. Applicant has failed to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, at 697. Although it certainly would have been more appropriate for trial court to ask the jury to find Applicant “not guilty” in the final paragraph of his closing argument, it appears that trial counsel’s statement was a slip of the tongue and not a genuine request that the jury convict his own client. The court reporter’s inclusion of “[sic]” indicates it was obvious to him or her that trial counsel did not actually mean to ask the jury to find his client guilty, and it was be reasonable for the jury to reach the same conclusion, especially when trial counsel’s statement followed a long argument advocating Applicant’s innocence and the insufficiency of the evidence. Reeve’s testimony at the PCR hearing indicates she noticed the statement at the conclusion of trial counsel’s closing argument and likewise did not interpret it as a genuine request that the jury convict trial counsel’s client. The slip of trial counsel’s tongue may have been unfortunate, but a one-off slip from a defense attorney, when viewed in the context of all statements made by that attorney during the course of a closing argument, does not cause that attorney’s performance to fall outside the “wide range” of professional competence required of him. See Strickland, at 690 (instructing that the PCR court is to determine the proficiency of a defense attorney’s performance by questioning whether, “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney).

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for making a single statement asking the jury to find Applicant guilty of first-degree criminal sexual conduct with a minor because Applicant has failed to show any deficiency in his

attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to make reasonable arguments.

Applicant argues trial counsel was constitutionally ineffective for failing to make certain arguments, which Applicant identifies as (1) "why didn't State produce evidence of pornographic DVDs through reference to them by mother or during search of home", (2) in house where sister thought child with no pants was suspicious how could penetration injury and blood go unnoticed", and (3) "why first pediatrician Dr. Syad did not think there was any penetration because and noted hymen intact and crescent moon shaped or that maybe the examination caused injury".

During his closing argument, trial counsel argued, among other things, that the State's indicting Applicant with committing a lewd act upon a child so close to trial indicated the State did not believe it had sufficient evidence to prove the element of penetration required for the jury to convicted Applicant of first-degree criminal sexual conduct with a minor, that the victim made her first allegation that she had had oral sex with Applicant only weeks before trial despite having previous opportunities to do so called into question her credibility, that Dr. Carter's testimony was too speculative to constitute evidence of Applicant's guilt, that there were inconsistencies in the stories of the victim and the victim's sister, that the victim did not testify that she had been penetrated by Applicant. Tran. 261-70. This court finds Applicant has failed to show that the arguments he suggests now had more merit at the time than those put up by trial counsel at trial. Trial counsel's arguments were reasonable, and it is not the place of this Court to second-guess reasonable and strategic decisions made by trial counsel with regard to strategy.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for making the arguments he did instead of those put forth by Applicant now because

Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to take exception or move for a mistrial when the trial court gave the jury an improper corroboration charge.

Applicant argues trial counsel was constitutionally ineffective for not taking exception or moving for a mistrial when the trial court instructed the jury that the minor victim's testimony did not need to be corroborated. The trial court's charge was as follows: I charge you that the testimony of the victim need not be corroborated in prosecutions under this code section which is § 16-3-655. Tran. 285.

The South Carolina Supreme Court held in State v. Rayfield that a trial court did not err in charging the jury that the victim's testimony did not need to be corroborated by quoting South Carolina Code Section 16-3-675. Id. 369 S.C. 106, 115-16, 631 S.E.2d 244, 249 (2006), overruled by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Section 16-3-675 provides that "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 . . .," which includes the offense for which Applicant was tried and convicted. The Supreme Court in Rayfield held that a trial court did not have to instruct the jury on the statute, but that a court that does so should not unduly emphasize the single charge and should ensure that the jury instructions as a whole comport with the law. Id., at 117-18, 631 S.E.2d at 250. The trial court in Rayfield instructed the jury that the jury was the sole judge of the facts of the case, that the court was prohibited from commenting upon the facts of the case, and that the jury could "believe one witness as against several witnesses or several witnesses as against one witness" Id. at 118, 631 S.E.2d at 250. At the time of Applicant's trial in 2013, though, Rayfield was in effect and had not yet been overruled by Stukes. As such, the jury charge was proper at the time of Applicant's trial, and Applicant has failed to show any basis

upon which trial counsel could have objected thereto in light of Section 16-3-675. Furthermore, it would not be reasonable to have expected trial counsel to object to the charge in anticipation that it would be found improper by the Supreme Court years later, as the Court has explained that it "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted). Therefore, Applicant has failed to demonstrate any deficiency in trial counsel's performance with respect to this jury charge.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object to the trial court's jury instruction that the victim's testimony did not have to be corroborated because the instruction was proper and Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to present medical records showing that the minor victim's hymen was intact when she was subject to a medical examination on January 28, 2011 in light of the testimony from the State's expert that the hymen was absent on April 4, 2011, and the indictments' specifying that the sexual battery occurred between December 1, 2009, and August 31, 2010.

Applicant argues trial counsel was constitutionally ineffective for failing to present medical records from Dr. Syed's examination of the victim in order to show that the victim's hymen was intact at the time of the examination.

This Court finds Applicant has failed to show any deficiency in trial counsel's performance with respect to his failure to offer the records from Dr. Syed's examination into evidence or call Dr. Syed as a witness at trial. Applicant failed to show Dr. Syed had the proper qualifications to testify as an expert in child sexual assault examinations. Dr. Syed also testified at the PCR hearing that the victim's hymen was intact but that she could not rule out the possibility that the victim had been sexually abused. She testified she suggested, after concluding

her examination of the minor, that the victim's mother take her to sexual abuse counselling with a psychologist. She testified at the PCR hearing that she conducted her examination of the victim approximately one year after the abuse occurred, which would mean that there would be little significance to the fact that the dates of abuse alleged in the indictment predate the victim's appointment with Dr. Syed. Applicant has failed to show that trial counsel should have had the records and Dr. Syed at trial because her testimony was not particularly helpful to the defense.

This Court finds Applicant has failed to show any prejudice resulting from trial counsel's failure to offer the records from Dr. Syed's examination into evidence or call Dr. Syed as a witness at trial. As an initial matter, Applicant failed to show Dr. Syed had the proper qualifications to testify as an expert in child sexual assault examinations. This Court could only speculate as to the prejudice in the records' not being in evidence at trial without hearing proper expert testimony. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). As such, Applicant has failed to establish the value that Dr. Syed's records and testimony would have had at trial. Applicant has further failed to establish the result of trial would have been different had Dr. Syed testified at trial about her medical notes and examination of the victim. If Dr. Syed had testified at trial, the jury would have heard of the relative lack in her qualifications to diagnose sexual assault injuries as compared to those of Dr. Sallie Carter. The jury would have heard that Dr. Syed conducted her examination of the victim's hymen with her naked eye and would have taken note that Dr. Carter's opinion was accompanied by a photograph comparison of hymens, whereas Dr. Syed's diagnosis was supported only by her testimony. The State would have been able to call into question Dr. Syed's credibility in light of the discrepancies between her testimony about her examination of the victim and the testimony of the victim's mother and in

light of the discrepancy between her statements to Keeves and Price about her experience and training in treating sexual assault patients, which contradicted her testimony at the PCR hearing.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to present medical records from Dr. Syed's examination of the victim in order to show that the victim's hymen was intact at the time of the examination because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Appellate counsel was constitutionally ineffective for failing to argue on appeal that the testimony of the State's expert witness constituted bolstering.

Applicant argues appellate counsel was constitutionally ineffective for failing to argue on appeal the trial court erred in allowing the Dr. Carter, the State's expert witness, to bolster the victim's credibility.

As noted earlier in this order, trial counsel stipulated that Dr. Carter was an expert in child sexual assault examinations. During an in camera hearing regarding the admissibility of the witness's testimony and the admissibility of photographs of hymens taken by the witness, the witness testified she had conducted an examination of the victim on April 4, 2011. Tran. 138. She testified she inspected the victim's genitalia using a colposcope, a device that magnified and recorded its subject so that the witness could view the genitalia in "a lot higher resolution than the naked eye." Tran. 139-40. She testified there was an abnormality with the victim's hymen because the victim had "an absent posterior hymen." Tran. 140. She described the absence of a hymen as "significant" in light of the victim's age. Tran. 141. She explained that, although there can be variations in the form and appearance of hymens, "[n]early everybody has one." Tran. 142. Despite seeing thousands of newborns every year, about half of which were female, the witness had never personally seen a child born without a hymen or seen it recorded in medical

literature. Tran. 142. She clarified that she was not saying that the victim did not have an absent hymen; instead, she "said it was an absent posterior hymen." Tran. 142. She testified this particular sort of injury was typical after the patient has suffered a penetrating injury. Tran. 142-43. The witness compared a photograph she took of the victim's hymen with a photograph of different child of similar age, lying in the same position as the victim in the other photograph, and taken with the same colposcope; she described that photograph of one of a "normal hymen." Tran. 144-45.

Trial counsel objected to the witness's testimony on the ground that the witness was testifying as to her medical opinion about the state of the victim's hymen and the possible causes therefor while the minor victim testified Applicant did not penetrate her. Tran. 145-46. The trial court noted he agreed with trial counsel's characterization of the victim's testimony to the extent that she testified that Applicant did not penetrate her vagina or anus. Tran. 146. The State's position was that Dr. Carter identified a penetrating injury to the victim's hymen, which was not explainable outside of the victim's being abused by Applicant due to there being no other reported injury to the victim. Tran. 147. The trial court asked the witness if she could state to a reasonable degree of medical certainty that "some type of intrusion" caused the victim's hymen not to be present during her examination of the victim. Tran. 148. The witness answered, "Yes, something caused the hymen not to be present. And that would be certainly consistent with a penetrating type of injury." Tran. 148. The witness agreed when the trial court asked if her position was that the victim's lack of hymen was abnormal and could have been caused by penetration even though the witness did not know to a reasonable degree of medical certainty that Applicant caused the injury to the victim's hymen by penetrating her. Tran. 149. The witness testified other accidents and injuries can cause the hymen to be absent in a child. Tran. 149-50.

Trial counsel argued there was no evidence that Applicant injured the victim's hymen. Tran. 150. The State argued the victim's statements during the forensic interview that Applicant tried to stick his penis between her "butt" while she was lying face down were ambiguous and could mean that Applicant was trying to penetrate the victim's vagina rather than her anus. Tran. 154. The State noted the victim testified that she did not remember anything Applicant did to her hurting but argued the victim may have not understood that she was being penetrated due to her young age at the time of the abuse. Tran. 155.

Appellate counsel unsuccessfully argued on appeal that the trial court erred by allowing the State's expert witness to testify that the minor victim's injuries were consistent with penetration because the victim testified that no penetration had occurred, making the expert's testimony speculative and inadmissible under Rule 403, SCRE. Appellate counsel testified at the PCR hearing that, when Dr. Carter testified she became more convinced of penetration and concerned after she watched the recording of the forensic interview of the victim, the objection from trial counsel was that the witness was giving speculative testimony about an assumption that the victim had been penetrated, which was contradicted by the victim's own testimony. Tran. 205. Appellate counsel's testimony at the PCR hearing indicated he believed the issue raised in his brief, based upon the objection from trial counsel, was a stronger issue as to the relevant testimony from Dr. Carter because it was an issue that went to the State's supposed failure to present evidence of all the elements of first-degree criminal sexual conduct. In his words, if there was no evidence at trial that Applicant had penetrated the victim, the jury would not have been able to convict him.

Applicant argued at the PCR hearing that there was another issue that appellate counsel should have raised on appeal instead of the issue he did raise. While testifying before the jury at

trial, Dr. Carter testified that the victim reported to her that her abuser abused her multiple times “in the presence of pornographic media.” Tran. 206. Trial counsel objected and the jury was excused for argument on the objection. Tran. 206-07. Trial counsel argued the witness was inappropriately characterizing the movies she watched with Applicant as “pornographic” based upon the victim’s statement and testimony about the content thereof. Tran. 207-08. The trial court overruled the objection, and the witness’s testimony before the jury continued. Tran. 208-09. At that point, Dr. Carter testified (without further objection) as follows about her conclusions based upon her viewing of the recording of the forensic interview:

The child reported that there was sexually explicit material played at least some of the time when the individual was involving her in sexual activity. And she indicated that this happened a number of times. And she indicated that it was at his invitation that she get under the blanket with him, that she do this. She indicated that he had taken her pants down, you know. So together with an abnormal genital exam, to me in my professional opinion, that’s like saying one and one is two or two and two is four. I wasn’t there. I didn’t see it. But I have a lot of experience in this area.

Tran. 210.

At the PCR hearing, Applicant identified this as testimony constituting vouching or bolstering on the part of the expert witness. When questioned about the above-quoted testimony from Dr. Carter, appellate counsel testified, if it had been preserved for appellate review, he would have argued on appeal that the testimony constituted vouching or bolstering instead of the issue that he did raise. He based that testimony upon his view that this area of law has been developing over the past few years in this State’s appellate courts.

Generally, in analyzing a claim of the ineffective assistance of appellate counsel, the reviewing court applies the Strickland test just as it would when analyzing a claim of the ineffective assistance of trial counsel. Southerland, at 616, 524 S.E.2d at 836. Thus, in this case, the reviewing court is to ask (1) whether appellate counsel’s performance was deficient and (2)

whether the applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Although an appellate attorney is required to provide his client with the effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, at 754.

A moving party must contemporaneously object when evidence with which he takes issue is offered for admission before the jury. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (citations omitted). The party seeking to prevent the admission of the evidence must challenge the admission upon the same legal basis in order to preserve the objection for appellate review. Id. It must be clear that the party is presenting the argument upon the same ground. Id. The objection should have enough specificity to bring into focus the nature of the alleged error so that it permits the trial court to reasonably understand the objection and alleged error. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). An issue will not be preserved for appellate review if the substance of the objection at trial does not comport with the specific issue raised on appeal. State v. Dickman, 341 S.C. 293, 295 S.E.2d 268, 269 (2000).

This Court finds Applicant has failed to show appellate counsel was constitutionally ineffective for arguing the issue in his brief instead of arguing that Dr. Carter's testimony bolstered the victim's credibility. Appellate counsel correctly noted during his testimony at the PCR hearing that the issue of supposed bolstering on the part of Dr. Carter was not raised by trial counsel, indicating the issue was likely not preserved for appeal. Since appellate counsel could not have argued the bolstering or vouching issue on appeal due to its not being preserved, he is not ineffective for failing to raise that issue over the issue he did raise, which was preserved. In articulating the reason for raising the issue he briefed and not the vouching or bolstering issue that Applicant suggested at the PCR hearing as a better issue, appellate counsel articulated a valid and reasonable strategy that should not now be second-guessed.

This Court finds Applicant has failed to demonstrate appellate counsel was constitutionally ineffective for raising the issue in his brief rather than raising the issue of whether the trial court erred in allowing Dr. Carter to supposedly vouch for or bolster the minor victim's credibility because Applicant has failed to show appellate counsel's choice of issue was deficient when the issue Applicant argues should have been raised was not preserved for appellate review and appellate counsel has articulated a valid, reasonable, and strategic decision for choosing the issue he raised in his brief. This claim is denied and dismissed with prejudice.

Applicant's due process rights were violated because the State vouched for and bolstered the credibility of the minor victim, the trial court improperly instructed the jury that the victim's testimony did not need to be corroborated, Applicant was afforded the ineffective assistance of counsel by trial and appellate counsel, and the trial in Applicant's absence constituted a total breakdown in the adversarial process.

Applicant argues that his due process were violated in multiple respects. This Court finds Applicant's issues are not proper grounds for post-conviction relief as he could have raised most of them on direct appeal or at trial. Post-conviction relief is not a substitute for remedies incident to the proceedings in the trial court or on direct appeal. S.C. Code Ann. § 17-27-20(B). Because

an application for post-conviction relief is not a substitute for a direct appeal of trial court error, and because of the modern simplification of criminal jurisdiction jurisprudence in South Carolina, the overwhelming majority of cognizable claims fall under the broad umbrella of “ineffective assistance of counsel,” a contention under the Sixth Amendment to the Constitution of the United States. See Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (“Allegations of trial court error are not cognizable on PCR.”) (citing Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999)); but see Fortune v. State, 428 S.C. 545, 837 S.E.2d 37, 44 (2019) (instructing that, in some circumstances, an applicant may argue a claim for post-conviction relief based on constitutional violations other than a violation of his Sixth Amendment right to counsel due to the ineffective assistance of counsel. The Supreme Court found Fortune’s was “one of those cases” because the State argued in closing that, among other things, a solicitor’s job is to find the truth, unlike the job of a normal lawyer, and that a defense attorney’s job is to manipulate the truth, shroud the truth, and confuse jurors). Errors that could have been reviewed on direct appeal cannot be asserted for the first time in a post-conviction relief proceeding. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) (citing Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975)). The allegation regarding Applicant’s indictment does not support a cognizable claim for post-conviction relief under any of the statutory grounds.

This Court had dispensed with Applicant’s claims of the ineffective assistance of counsel elsewhere in this order, and this Court incorporates those findings here and reaffirms that Applicant is not entitled to relief on those grounds. This Court finds the claim that the trial court erred could have been raised on direct appeal, but appellate counsel did not do so nor did Applicant allege in this action that appellate counsel should have done so. As such, that claim is

2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

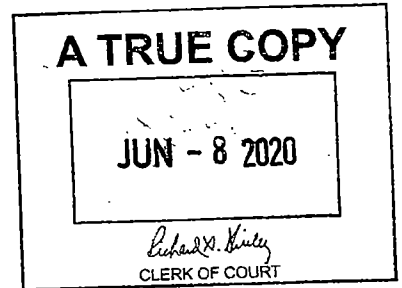
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APPROVED FOR SIGNATURE

AND IT IS SO ORDERED this 4th day of May, 2020.



R. SCOTT SPROUSE
Chief Judge for Administrative Purposes
Tenth Judicial Circuit

Walhalla, South Carolina



STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)
)
Andrew Clemons,)
)
Plaintiff,)
)
v.)
)
State of South Carolina,)
)
Defendant.)
_____)

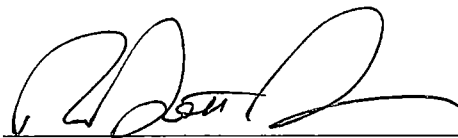
IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-04-00279

ORDER DENYING APPLICANT'S MOTION
FOR RECONSIDERATION

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Applicant's Motion, pursuant to Rule 59, SCRCP,¹ is DENIED.

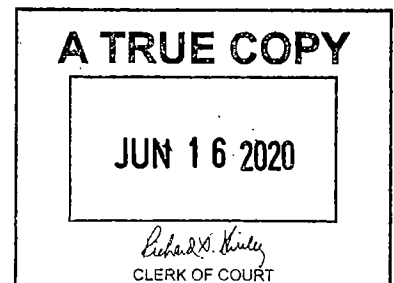
AND, IT IS SO ORDERED.



R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina
June 12, 2020

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Anderson, SC COC. CP/GS



¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.