STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Edgar W. Dickson, Circuit Court Judge

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Jul 13 2020

S.C. SUPREME COURT

RODNEY C. BRYAN,

PETITIONER/RESPONDENT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2019-001887

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

I. Did the PCR court correctly grant Petitioner a belated direct appeal where the PCR court correctly determined appellate counsel provided ineffective assistance by failing to raise on appeal that Petitioner's failure to testify was not the product of a knowing, intelligent, and voluntary waiver?

II. Did trial counsel violate Petitioner's constitutional rights to the effective assistance of counsel and to plead not guilty when he conceded Petitioner's guilt to two of the five charges against him during his closing argument to the jury without Petitioner's express or implied consent?

III. Did trial counsel violate Petitioner's right to the effective assistance of counsel by failing to object to the state's expert witness improperly bolstering the testimony of the complaining witness, which prejudiced Petitioner where (1) the case hinged upon credibility due to the lack of physical evidence, (2) the state relied heavily upon the improper testimony during its closing argument, and (3) the error was compounded as it derived from a witness imbued with the imprimatur of being an expert?

IV. Did appellate counsel provide ineffective assistance by failing to raise on appeal that Petitioner's right to testify was violated, or in the alternative, did trial counsel provide ineffective assistance by failing to object to the violation of Petitioner's right to testify?

STATEMENT

On October 29, 2007, a Lexington County grand jury indicted Petitioner/Respondent (hereinafter Petitioner) for criminal domestic violence of a high and aggravated nature (CDVHAN), violation of an order of protection, kidnapping, and two counts of spousal sexual battery. App. 807-808; App. 810-811; App. 813-814; App. 816-819. On July 14-16, 2008, the state, represented by Shawn Graham and Emily Howard, called Petitioner to trial before the Honorable R. Knox McMahon and a jury. App. 1. Theo Williams represented Petitioner. App. 1. Ultimately, the jury found Petitioner guilty of CDVHAN, violation of an order of protection, kidnapping, and one count of spousal sexual battery. App. 434, ll. 1-15. On the second count of spousal sexual battery, the jury found Petitioner not guilty. App. 434, ll. 16-18; App. 816-817. Judge McMahon sentenced Petitioner to imprisonment for ten years for spousal sexual battery, ten years for CDVHAN, thirty days for violation of an order of protection, and twenty-five years for kidnapping. App. 448, l. 21-App. 449, l. 8; App. 809; App. 812; App. 815; App. 820. He ordered the sentences to be served concurrently. App. 449, l. 9.

Thereafter, Petitioner filed a notice of appeal. Robert Pachak represented Petitioner on appeal. App. 451. Pachak filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 451-460. In the brief, Pachak challenged the trial court's exclusion of Petitioner from the courtroom during the testimony of his two children. App. 451-460. On February 22, 2010, the Court of Appeals dismissed the appeal. App. 480-481; State v. Bryan, 2010-UP-136 (S.C. Ct. App. filed Feb. 22, 2010). In light of appellate counsel being relieved, Petitioner filed a pro se petition for rehearing. App. 482-483. On April 23, 2010, the Court of Appeals denied the petition for rehearing. App. 497-498. Thereafter, Petitioner filed a petition for writ of certiorari. App. 499-511. The South Carolina Supreme Court dismissed the petition. App. 513-514.

Remittitur was issued on May 28, 2010. App. 515. Petitioner then sought review in the United States Supreme Court. App. 516-528. The Court denied review on January 10, 2011. App. 569.

Petitioner filed for post-conviction relief (PCR) on February 17, 2011. App. 570-583. On August 15, 2013, the Honorable Edgar W. Dickson presided over a hearing concerning Petitioner's request for relief. App. 610. J. Walt Whitmire represented the state, and Petitioner represented himself. App. 610. Pursuant to the state's motion to reconvene, Judge Dickson presided over a second hearing on November 13, 2014. App. 697; App. 699, ll. 4-6. Thereafter, on October 8, 2015, Judge Dickson wrote to the parties, expressing his ruling. App. 739-740. He indicated he was denying relief to Petitioner except to the extent that Petitioner was entitled to a belated appeal. App. 739-740. Judge Dickson requested the state prepare the order. App. 739-740. By a formal order filed February 2, 2018, Judge Dickson found Petitioner was "entitled to a new appeal as a result of appellate counsel's deficient performance regarding his right to testify," but denied relief on all other grounds. App. 741-753. The state filed its motion to alter or amend judgment on February 12, 2018. App. 754-765. On October 19, 2019, Judge Dickson denied the state's motion. App. 804-805.

On November 6, 2019, Petitioner served his notice of Appeal. Then on November 13, 2019, the state served its notice of cross-appeal. This petition for writ of certiorari follows.[1]

[1] In accordance with White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), Petitioner submits this petition for writ of certiorari addressing the PCR court's grant of a belated direct appeal as well as other meritorious issues presented during the PCR hearing along with a brief addressing Petitioner's direct appeal issue.

ARGUMENT

I. The PCR court correctly granted Petitioner a belated direct appeal where the PCR court correctly determined appellate counsel provided ineffective assistance by failing to raise on appeal that Petitioner's failure to testify was not the product of a knowing, intelligent, and voluntary waiver.

"The appropriate scope of review" on appeal in PCR proceedings is whether "'any evidence of probative value is sufficient to uphold the PCR judge's findings." Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). All criminal defendants are entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Courts review claims of ineffective assistance of appellate counsel using the test announced in Strickland v. Washington, 466 U.S. 668 (1984). See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, the reviewing court asks whether appellate counsel's performance was deficient and whether the applicant was prejudiced by the deficient performance. Id. Even where appellate counsel filed an Anders brief, a reviewing court applies the Strickland test to claims of ineffective assistance of appellate counsel. Smith v. Robbins, 528 U.S. 259, 284 (2000); Bennett v. State, 383 S.C. 303, 309 n.6, 680 S.E.2d 273, 276 n.6 (2009).

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." Rock v. Arkansas, 483 U.S. 44, 51 (1987). Not only is the right to testify in one's defense essential to due process of law, but it is a found in one's right to call witnesses in his favor, the right to personally make his defense, and as a companion to the protection against being forced to testify against oneself. Id. at 51-52. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). In South Carolina, the preferred method

of advising a defendant of this right and determining whether the defendant makes a knowing and voluntary decision is an on-the-record discussion with the trial judge. See e.g., Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994); State v. Orr, 304 S.C. 185, 188, 403 S.E.2d 623, 624-625 (1991).

Ample evidence supports the PCR court's determination that appellate counsel provided ineffective assistance by failing to brief this meritorious issue. The trial transcript showed Petitioner did not knowingly, intelligently, and voluntarily waive his right to testify. The brief exchange on the matter occurred exclusively between the judge and trial counsel. The judge asked trial counsel if he, the trial judge, needed to "interview" Petitioner about his right to testify. App. 373, l. 25 – App. 374, l. 23. Trial counsel claimed that the judge did not need to interview Petitioner and that Petitioner would not testify. App. 374, ll. 5-7. No additional inquiry was made by the trial judge. Yet, appellate counsel failed to raise this issue on appeal.[2] As the PCR judge found, no reason for appellate counsel's failure to do so was provided.

The PCR judge recognized the quandary of requiring a PCR applicant to prove prejudice where there is no evidence that the applicant's failure to testify was the result of a knowing and voluntary waiver. App. 751. In the PCR judge's view, a court "engages in speculation" when trying to determine if a PCR applicant "would have fared better had he exercised the right he did not know he possessed." See App. 751-752 (citing Brown, 340 S.C. at 596-597, 533 S.E.2d at 311 (Finney, C.J., dissenting)). Although the PCR judge agreed that the remedy for the violation of Petitioner's constitutionally protected right was a new trial, the judge granted Petitioner a belated

[2] Petitioner acknowledges trial counsel did not object, which is ordinarily required to preserve this issue for review. See Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). However, the Supreme Court previously reviewed a denial of the right to testify when counsel posed no objection. State v. Rivera, 402 S.C. 225, 239-240, 741 S.E.2d 694, 701-72 (2013). Here, appellate counsel was ineffective for failing to raise the issue. In the alternative, trial counsel was ineffective for failing to object. See Issue IV, infra.

direct appeal due to the Supreme Court's requirement that a PCR applicant show prejudice resulting from the lack of record evidence that a waiver of the right was knowing and voluntary. App. 751 (discussing Brown v. State, 340 S.C. 590, 596-597, 533 S.E.2d 308, 311 (2000)). Due to the Supreme Court's determination in State v. Rivera, 402 S.C. 225, 247-248, 741 S.E.2d 694, 706 (2013) that a violation of a defendant's right to testify is structural error not subject to harmless error analysis, the PCR judge's apprehension in following the strictures of the prejudice analysis was quite sensible. But see Weaver v. Massachusetts, 137 S.Ct. 1899, 1911 (2017) (requiring a showing of prejudice for some public-trial violations raised on collateral review despite the violations being structural error on direct review). Petitioner respectfully requests this Court affirm the PCR judge's determination that he is entitled to a belated appeal on the issue presented.

II. In violation of Petitioner's constitutional rights to the effective assistance of counsel and to plead not guilty, trial counsel, without Petitioner's express or implied consent, conceded Petitioner's guilt to two of the five charges against him during his closing argument to the jury.

Relevant facts

During his closing argument, trial counsel told the jury it was "fairly evident that he did hit her." App. 400, ll. 18-19. He argued that hitting someone does not "make you guilty of two counts of sexual battery. It doesn't make you guilty of kidnapping. It doesn't make you guilty of violation of an order of protection. It doesn't make you guilty or CDVHAN." App. 400, ll. 19-24. However, he conceded, that "[i]t may make you guilty of [violating] an order of protection, and it may make you guilty of a criminal domestic violence, or a simple CDV." App. 400, l. 25 – App. 401, l. 2.

Later, trial counsel told the jurors they were "making a determination whether or not he committed sexual battery, and whether or not he committed kidnapping." App. 404, ll. 15-17. Importantly, trial counsel omitted any reference to the other two charges against Petitioner –

CDVHAN and violation of an order of protection. The reason for the omission was due to trial counsel's prior admission of Petitioner's guilt on those two charges. Little doubt as to what trial counsel intended to convey to the jury can exist in light of the remaining portions of counsel's closing argument:

> Now, I will tell you right now - - I'm going to save you some trouble. You're not even going to have to make a decision on this. **He's guilty of violation of the order of protection.** Why is he guilty? Because there is an order of protection. Now, he may say that he didn't get a copy of it, because as you'll see there are no initials that shows he got a copy of it. Well, he should have known. You know, he should have known. He was paying support, and he should have known.
>
> I'll tell you what else he's guilty of. **He's guilty of CDV.** He hit is wife. Now, if you think back about what those children said before all of the police got involved, all the DSS workers, all of these other people involved in this case, all they ever talked about was a black eye and a fight. Remember what Ms. Gies said.
>
> **So find him guilty of the CDV**. There is absolutely no evidence, obviously, that any of the children saw any of this sexual battery or not. Matter of fact, if you believe what she said, she said that she never said anything. I'm not getting into that, whether or not you have to say something if you don't want to do it, you know. Who cares about all that? That's not important.
>
> I will tell you now, that if you're looking for evidence in this case, **there's evidence of violation of CDV; and there's evidence of violation of an order of protection.** Don't make your decision based on whether or not you think my client is a nice guy, a crazy guy, a bad guy. Make your decision based on the evidence. That's all we have in this system. That's the power your have. That's the control you have.

App. 406, l. 11 – App. 407, l. 15 (emphasis added).

In the order denying relief, the PCR judge found that trial counsel "did not concede guilt, but rather conceded that [Petitioner] had previously pled guilty to a separate criminal domestic violence offense." App. 747. The PCR judge cited trial counsel's testimony that his "trial strategy was to concede that [Petitioner] had been convicted of criminal domestic violence," but not the one for which he was on trial. App. 747. According to trial counsel, he admitted Petitioner was guilty of "another CDV," not the one for which he stood trial. App. 747. The court found trial counsel

provided credible testimony, which was dispositive, because "he had a valid trial strategy." App. 747. These findings were not supported by the record where trial counsel's closing argument clearly referred to the charges presently before the jury and where the record showed the prior CDV was not admitted into evidence.[3]

Discussion

"[A] defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." McCoy v. Louisiana, 138 S.Ct. 1500, 1505 (2018). The Supreme Court explained that while the Sixth Amendment embodies the right to counsel, it does not require a defendant to surrender the entirety of his representation to counsel. Id. at 1508. "Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" Id. (quoting Gonzalez v. United States, 553 U.S. 242, 248 (2008)). "Some decisions, however, are reserved for the client – notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." Id. When presented

[3] Trial counsel moved to dismiss the charge of CDVHAN based upon double jeopardy in light of Petitioner having pled guilty to a charge of CDV arising out of the same facts and circumstances comprising the CDVHAN. App. 70, ll. 15-16; App. 74, ll. 10-17. After this motion was denied, trial counsel moved to suppress any evidence regarding the facts underlying the CDV charge. App. 173, ll. 1-10; App. 174, ll. 10-18. The trial judge allowed the evidence to be presented as long as the state did not discuss the CDV arrest and conviction. App. 176, l. 2 – App. 177, l. 1. Later, the state indicated a desire to inform the jury of Petitioner's arrest and detention in jail in order to explain why the complaining witness initially refused to cooperate with law enforcement, but agreed to provide evidence against Petitioner subsequently. App. 189, l. 6 – App. 191, l. 12. Trial counsel objected, arguing the state was introducing Petitioner's prior criminal history improperly. App. 191, l. 14 – App. 192, l. 17. The judge allowed the introduction of evidence that Petitioner was placed under arrest, but he agreed to exclude the reason for the arrest. App. 193, l. 21 – App. 196, l. 2. Trial counsel made clear that he did not want the jury to know of Petitioner's arrest for the prior CDV even when the trial judge offered to permit trial counsel to inform the jury thusly. App. 196, ll. 3-4. Thus, the PCR judge's finding was not based upon evidence in the record.

with the issue of who decides whether to admit guilt, the Court held "[a]utonomy to decide that the objective of the defense is to assert innocence belongs in this latter category." Id. The Court explained that "[j]ust as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial." Id. Succinctly put, "[t]hese are not strategic choices about how best to *achieve* a client's objections; they are choices about what the client's objectives in fact *are*." Id. (emphasis in original).

Further, the Supreme Court held that "[b]ecause a client's autonomy, not counsel's competence, is in issue," courts must not apply "ineffective-assistance-of-counsel jurisprudence." Id. at 1510-1511. Instead, the violation of a client's "protected autonomy right [is] complete when the court allow[s] counsel to usurp control of an issue within [the client]'s sole prerogative." Id. at 1511. "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind [the Court's] decisions have called 'structural'; when present, such an error is not subject to harmless-error review." Id. In deciding that counsel's admission of a client's guilt over the client's express objection is structural error, the Court explained that "[s]uch an admission blocks the defendant's right to make the fundamental choices about his own defense" "[a]nd the effects of the admission would be immeasurable, because the jury would almost certainly be swayed by a lawyer's concession of his client's guilt." Id.

Despite the clear guidance from the Supreme Court not coming until 2018, it has long been the rule in South Carolina that the decision to admit guilt lies with the client *alone*. Rule 1.2(a), RPC, Rule 407, SCACR (explaining that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered"); see also Florida

v. Nixon, 543 U.S. 175, 192 (2004) (in a capital trial, allowing counsel to concede guilt *only* if counsel consults with the defendant on the strategy and obtains consent or the defendant does not object); Brookhart v. Janis, 384 U.S. 1, 4-7 (1966) (holding defense counsel's agreement to a truncated trial was the equivalent of a guilty plea, which required the defendant's consent). Quite simply, trial counsel exceeded his authority in admitting Petitioner's guilt to the offense.

The right to have a jury determine whether an individual is guilty beyond a reasonable doubt is one of the most basic principles of our criminal justice system – and it is not new. Sandstrom v. Montana, 442 U.S. 510, 520 (1979). The right to a jury trial is not diminished or extinguished by what may be considered conclusive or compelling evidence of the individual's guilt. United States v. England, 347 F.2d 425, 430 (7th Cir. 1965). "When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." State v. Harbison, 337 S.E.2d 504, 507 (N.C. 1985).

Even prior to the Supreme Court's pronouncement in McCoy, numerous courts throughout the United States facing this issue determined trial counsel provided ineffective assistance when counsel conceded guilt without the client's consent. The North Carolina Supreme Court held that trial counsel provided deficient performance and prejudice was presumed "in every criminal case in which the defendant's counsel admit[ted] the defendant's guilt to the jury without the defendant's consent." Id. at 507-508.

Likewise, the Illinois Supreme Court held that trial counsel may not concede guilt unless the client consents where the stated strategic reason for doing so was to obtain a more lenient sentence. People v. Hattery, 488 N.E.2d 513, 519 (Ill. 1986). According to the Kansas Supreme Court, an attorney's concession that an accused was guilty was the equivalent of a guilty plea

and could not be made without the accused's consent. State v. Carter, 14 P.3d 1138, 1148 (Kan. 2000). Similarly, the Nevada Supreme Court ordered a new trial in a capital case where the trial attorney admitted the defendant's guilt during the guilt or innocence phase without the client's consent. Jones v. State, 877 P.2d 1052, 1057 (Nev. 1994). See also Cooke v. State, 977 A.2d 803, 842 (Del. 2009) (concluding counsel's pursuit of a guilty but mentally ill verdict over Cooke's protest deprived Cooke of his constitutional right to make the fundamental decisions regarding his case); People v. Bergerud, 223 P.3d 686, 699 (Colo. 2010) (stating that "[c]ounsel cannot concede the defendant's guilt to a crime over his express objection, thereby waiving his privilege against compulsory self-incrimination"); State v. Wiplinger, 343 N.W.2d 858, 861 (Minn. 1984) (holding trial counsel provided deficient performance if trial counsel admits a defendant's guilt without the defendant's consent and prejudice is presumed); State v. Anaya, 592 A.2d 1142, 1146 (N.H. 1991) (explaining that the decision to admit guilt "should remain inviolably personal to the defendant"); see also United States v. Williams, 632 F.3d 129, 132-133 (4th Cir. 2011) (holding a lawyer's stipulation as to weight and proof of a seized controlled substance violates a defendant's right to confrontation); United States v. Dago, 441 F.3d 1238, 1250 (10th Cir. 2006) (explaining that an admission by counsel of a client's guilt is a breakdown in the adversarial process).

Trial counsel provided ineffective assistance and violated Petitioner's right to plead not guilty by admitting Petitioner's guilt. During the PCR hearing, trial counsel denied admitting guilt to the charges for which Petitioner stood trial. However, the transcript belies trial counsel's testimony. The PCR judge's reliance on the testimony is not supported by the record. No evidence exists that Petitioner consented to trial counsel's concession – or even that the concessions was discussed with Petitioner. Therefore, trial counsel may not seek refuge in

claiming Petitioner consented or failed to object when presented with the proposed strategy. In accordance with McCoy, trial counsel's conduct violated Petitioner's autonomy and requires reversal of Petitioner's convictions.

III. In violation of Petitioner's right to the effective assistance of counsel, trial counsel failed to object to the state's expert witness improperly bolstering the testimony of the complaining witness, which prejudiced Petitioner where (1) the case hinged upon credibility due to the lack of physical evidence, (2) the state relied heavily upon the improper testimony during its closing argument, and (3) the error was compounded as it derived from a witness imbued with the imprimatur of being an expert.

Relevant facts

Without objection from trial counsel, the trial judge qualified Catherine Ross as an expert in the field of criminal domestic violence. App. 345, ll. 13-15; App. 345, l. 23; App. 346, ll. 1-18. Thereafter, Ross informed the jurors about the system of abusive behaviors, her particular concern for individuals who were choked during episodes of domestic violence due to the FBI's alleged declaration that such was the number one sign that a woman would be killed in the future, the effects of trauma and psychological bond, the dangers of a person leaving an abuser, reasons why a person would not seek help, and how the memories of abused individuals were like those of "prisoner[s] of war." App. 346, l. 23 – App. 354, l. 7.

Ross met the complaining witness on November 11, 2007, for "a[n] initial intake … at Sistercare." App. 354, ll. 8-12. Also, Ross was present when the complaining witness testified in court against Petitioner. App. 354, ll. 15-17. Importantly, Ross told the jurors that the complaining witness's "ability to remember or not remember" was "very, very consistent; very consistent" with "a woman who's been a victim of domestic violence." App. 354, ll. 18-22. Based upon Ross's

observations of the complaining witness while she testified, Ross claimed she was "re-traumatized again by having to relive all of these experiences." App. 354, ll. 23-25. Next, Ross asserted that the complaining witness's "actions in trying to leave that weekend" were "very consistent with a person who's been a victim of domestic violence" and there was nothing "whatsoever" inconsistent with what she did. App. 355, ll. 1-8. Her "failure to call the police, or go for help, or even talk to the police after the event" were "very consistent" "because part of the trauma is - - especially after being choked, being raped, she's in shock." App. 355, ll. 9-14. Ross claimed the complaining witness was "not really attuned to any of her surroundings. She doesn't know what to do; she's frozen. Her – her decision-making abilities at that point have been shut down." App. 355, ll. 117. The complaining witness's conduct when the police approached her was "very consistent" with a person "who's been a victim of domestic violence" and was explained by "very traumatic bonding or the Stockholm Syndrome." App. 355, ll. 21-24.

Similarly, the complaining witness's "decision" "to cooperate and tell the authorities what happened" after Petitioner's arrest was "very consistent" with an abused person and was "part of post-traumatic stress response." App. 356, ll. 1-6. In summary, Ross declared that was "nothing that was inconsistent" between the complaining witness's testimony and "a woman who's been a victim of domestic violence, who's been kidnapped by her spouse, or has been raped by her spouse." App. 356, ll. 13-17.

Well aware of the weaknesses in his case, the solicitor used Ross's claim that domestic violence was about "power and control" as his theme for his opening statement and closing argument. App. 99, ll. 14-19; App. 100, l. 4; App. 100, ll. 22-23; App. 101, ll. 8-10; App. 347, ll. 1-2; App. 347, ll. 8-9; App. 382, l. 19; App. 391, l. 4; App. 392, l. 6; App. 392, ll. 15-17. Further, the solicitor relied heavily upon Ross's testimony to bolster improperly the testimony of the

complaining witness. Recalling Ross's testimony about the four types of domestic violence – physical, psychological, sexual, and economic – the solicitor claimed the complaining witness "had all four of them." App. 382, l. 25 – App. 383, l. 3. To explain why the complaining witness only spoke to the police after her children were removed from the home, the solicitor recalled Ross's testimony yet again: "Dr. Ross told you that's why women talk. That's consistent with somebody who's been physically abused, kidnapped and held against their will by their spouse, raped by their husband." App. 386, ll. 15-18. According to the solicitor, Petitioner "isolated" the complaining witness, "just like Dr. Ross said." App. 387, ll. 15-16.

The solicitor argued:

> Sunday morning, Monday, Tuesday, Wednesday, why didn't she go to the police? Why didn't she ask for help? Why didn't she walk away when nobody else was home? Dr. Ross told you that was consistent with a woman who's been a victim of domestic violence, who's been kidnapped, who's been raped by their husband. That's consistent with somebody who has walked in those shoes. She tried to stand up to him, but what happens when you stand up to an abuser? This is what happens.

App. 390, ll. 8-16.

During the PCR hearing, Petitioner alleged trial counsel's failure to object to Ross's testimony permitted the state to present evidence that improperly bolstered the complaining witness. App. 618, ll. 8-13. Petitioner candidly admitted that while Ross described the complaining witness's testimony as "consistent with someone who was a victim of CDV," Ross did not use the words "credible" or "compelling." App. 661, ll. 10-22. Trial counsel indicated that he did not object to the solicitor's closing argument because "an objection would cause more attention to what they're saying than letting them just finish what the - - because it's not evidence." App. 689, l. 24 – App. 690, l. 9. At the conclusion of the hearing, the state argued Dr. Ross's "testimony did not rise to the level of bolstering." App. 694, l. 24 – App. 695, l. 4.

When the PCR hearing reconvened, trial counsel indicated that Petitioner's claim that he provided ineffective assistance by failing to object to Ross's testimony was "an interesting area." App. 718, ll. 10-11. Trial counsel opined that Petitioner was referring to "changes in the law." App. 718, ll. 11-12. It was trial counsel's contention that "the law has changed since he was convicted" and "now [the] Supreme Court has gone to efforts to make sure that experts cannot give opinions, cannot bolster, if you will, a witness's testimony." App. 718, ll. 17-21.

The PCR judge found that "Ross's testimony did not impermissibly bolster the victim." App. 744. The judge acknowledged that Ross "testified that the victim's symptoms were consistent with those of a woman who had been a victim of domestic violence" "and that some of her actions were consistent with a 'post-traumatic stress response.'" App. 744. However, because Ross "did not testify that she believed the victim, or that the victim had testified credibly," the PCR court found Ross's testimony was not improper and counsel's failure to object was not deficient performance. App. 744-745. Further, the PCR court found Petitioner did not suffer prejudice because trial counsel "testified credibly at the PCR hearing that his strategy was, in part, 'to indicate that [Petitioner] had already been convicted' of a separate, unrelated domestic violence offense, as a result of the very damaging video evidence against [Petitioner]." App. 745. "Because this strategy involved admitting that [Petitioner] had abused his wife in the past," the PCR court found "any improper vouching by Dr. Ross concerning that issue does not call into question the outcome of the proceeding in this case." App. 745.

Discussion

"To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained

prejudice as a result of counsel's deficient performance." Thompson v. State, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018) (citing Strickland v. Washington, 466 U.S. 668, 687-688 (1984)).

"It is axiomatic that the credibility of the testimony of the[] witnesses is for the jury." State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). The duty of determining the truthfulness of the testimony is "a matter exclusively for the jury." Id. Thus, witnesses may not comment on the veracity of other witnesses. Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding trial counsel provided deficient performance by failing to object to questioning that asked a witness to comment on the truthfulness or explain the testimony of another witness because such questioning is improper); see also State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (1988) (holding that "[i]t is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness"); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (holding that it is improper "[f]or an expert to comment on the veracity of a child's accusations of sexual abuse"); Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (holding a forensic interviewer's opinion testimony improperly bolstered a complaining witness's credibility); State v. McKerley, 397 S.C. 461, 463-467, 725 S.E.2d 139, 141-143 (Ct. App. 2012) (holding that a forensic interviewer's testimony about a compelling finding indicated belief in the complainant's truthfulness and was inadmissible).

In 1989 – almost two decades prior to Petitioner's trial – the South Carolina Supreme Court held that it was improper for the prosecution to ask an expert witness who had treated the alleged victim whether her symptoms were genuine. State v. Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989). In the years following Dawkins, the appellate courts of South Carolina repeatedly have reminded trial judges and trial lawyers that witnesses, even expert witnesses, may not comment on the credibility of other witnesses. See e.g., State v. Whaley, 305 S.C. 138,

143, 406 S.E.2d 369, 372 (1991) (holding expert eyewitness identification testimony is admissible, but warning that an expert may not "give his or her opinion of a particular witness' identification").[4]

The Court of Appeals held an expert in child sexual abuse improperly vouched for an alleged victim's credibility. State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000). The expert testified about "methods" he used to determine the alleged victim's credibility. Id. at 568, 532 S.E.2d at 308. The expert found no reason to believe the alleged victim was not telling the truth. Id. According to the expert, research showed that children who alleged sexual abuse were telling the through ninety-five to ninety-nine percent of the time. Id. at 569, 532 S.E.2d at 308.

Shortly after Petitioner's July 2008 trial, the Court of Appeals addressed a matter very similar to the one presented here. The Department of Social Services (DSS) filed an intervention action in 2006 alleging Father posed a threat of abuse or neglect to Children. S.C. Dept. of Social Services v. Lisa C., 380 S.C. 406, 409, 669 S.E.2d 647, 649 (2008). The trial focused on allegations of sexual abuse by Father as to one child. Id. DSS presented testimony from the

[4] See also State v. Chavis, 412 S.C. 101, 108-109, 771 S.E.2d 336, 340 (2015) (holding a witness's testimony that she recommended the alleged victim not be around Chavis for any reason improperly bolstered the testimony of the alleged victim because it could "only be interpreted as [the witness] believing Victim's claim that [Chavis] sexually abused her"); State v. Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013) (finding error to allow a forensic interviewer to say a minor child gave a "compelling finding" of abuse because it was "the equivalent" of the witness stating the minor child was "telling the truth"); State v. Jennings, 394 S.C. 473, 479-480, 716 S.E.2d 91, 94 (2011) (holding a forensic interviewer's reports that indicated the complaining witnesses provided a "compelling disclosure of abuse" improperly allowed the witness to comment on the veracity of the children because there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful"); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006) overruled on other grounds by 380 S.C. 499, 671 S.E.2d 606 (2009) (recognizing that improper bolstering testimony is inadmissible).

Director of Clinical Services for the Dickerson Center for Children. Id. Director had conducted a forensic interview with Child and informed the jury of Child's responses during the interview. Id. at 409-410, 669 S.E.2d at 649. The Court held the lower court erred in allowing Director to say "Child gave a 'consistent disclosure.'" Id. at 414, 669 S.E.2d at 651. "For a psychologist to comment on the veracity of a child's accusations of sexual abuse is improper." Id. at 414, 669 S.E.2d at 651-652. The Court explained that Director's testimony that "Child gave a consistent disclosure" left "little doubt [Director] found Child's testimony to be credible, and testimony to that effect is inadmissible." Id. at 415, 669 S.E.2d at 652. Further, the Court held the lower court erred when it allowed a pediatrician to say that the history provided by Mother when Child was examined was "convincing." Id. at 418, 669 S.E.2d at 653. The Court explained that "an expert is not to comment on the veracity of another witness," and that the pediatrician's testimony was an opinion on Mother's truthfulness regarding Child's medical history. Id.

The Supreme Court's decision in Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017) is instructive. The Court explained that "[a]fter Dawkins in 1989, certainly after Douglas in 2009 and Smith in 2010, reasonably competent trial counsel should know to object – absent a valid trial strategy – when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose." Briggs, 421 S.C. at 325, 806 S.E.2d at 718. "When the testimony directly conveys the witness's opinion that the victim is telling the truth, it is obviously improper bolstering." Id. The Court held Briggs' trial lawyer provided deficient performance by failing to object when the forensic interviewer told the jurors that her role was to determine whether the child knew the difference between the truth and a lie and that her purpose was to find out if something happened because these points "clearly conveyed to the jury that she believed the victim." Id. at 327-329, 806 S.E.2d at 719-720. Further, the Court

affirmed the PCR court's finding that Briggs' trial lawyer's failure to object resulted in prejudice because the case turned on the alleged victim's credibility. Id. at 334, 806 S.E.2d at 723.

The Supreme Court rejected the state's argument that in 2008, which was the same year as Petitioner's trial, a lawyer's failure to object to improper vouching testimony by forensic interviewer was not deficient because the lawyer "was without the 'pointed guidance' provided by appellate decisions" that similar testimony was improper bolstering. Thompson v. State, 423 S.C. 235, 243-245, 814 S.E.2d 487, 491-492 (2018). The Court held that "[w]ell before [Thompson]'s criminal trial, trial counsel was on notice that it was improper for a witness to vouch for the credibility of another witness." Id. at 244-245, 814 S.E.2d at 492.

One witness testified that the alleged victim's disclosures were "consistent with her own training and experience." Id. at 241, 814 S.E.2d at 490. This testimony improperly bolstered the alleged victim's testimony. Id. at 242, 814 S.E.2d at 490. Another witness diagnosed the alleged victim with post-traumatic stress disorder based upon the emotional distress and genuine grief shown. Id. The witness opined the interview was among the most compelling she had conducted due to the amount of detail provided and the emotional intensity the alleged victim was clearly experiencing. Id. at 490-491, 814 S.E.2d at 242. The Court held the "testimony most certainly served to directly enhance the credibility of Victim" and was used by the state during its closing to urge the jury to conclude the alleged victim was credible. Id. at 491, 814 S.E.2d at 243. Further, the Court held Petitioner established prejudice because the "overall strength of the properly admitted evidence of [Thompson]'s guilt [did] not overcome the individual impact of each instance of trial counsel's deficient performance." Id. at 492, 814 S.E.2d at 245. In making its prejudice conclusion, the Court noted the outcome of the trial hinged on credibility, the state relied heavily upon the improper bolstering testimony in closing,

and the compounded harm was created because the improper evidence was elicited from an expert witness. Id. at 494, 814 S.E.2d at 249-250. See also Chappell v. State, 429 S.C. 68, 79-80, 837 S.E.2d 496, 501-502 (Ct. App. 2019) (examining on collateral review the status of the law at the time of Chappell's trial, noting the state's concession at oral argument that there had been no change in the law, but simply an application of existing law to a new set of facts, and holding counsel "should have known to object when [a witness] testified, 'Children don't often lie about sexual abuse incidents' because the testimony conveyed to the jury that the alleged victim's allegations must be true).

Just as in Briggs, Thompson, and Chappell, trial counsel in the instant matter failed to object to improper bolstering testimony elicited from the state's expert witness. Despite trial counsel's claim that there was a change in the law subsequent to Petitioner's trial, the Supreme Court has made clear that in 2008, when Petitioner was tried, a reasonably competent lawyer would have known to object to an expert witness describing the testimony of another witness as "consistent" with that of an abused person. The PCR judge engaged in a game of semantics by finding the testimony was not improper because Ross did not use the words "credible" or "compelling." To the contrary, Ross's testimony was considerably more damaging because she repeatedly described the complaining witness's testimony before the jury as "very, very consistent" with a person who was abused. In essence, she told the jurors that the complaining witness was telling the truth. Trial counsel provided no strategic reason for failing to testify; however, the PCR court supplied him with one – his strategy of informing the jurors that Petitioner had already been convicted of an unrelated CDV. As discussed in Issue II, supra, the transcript belies trial counsel's claim because the jury never learned of Petitioner's conviction due to trial counsel's repeated objections.

Petitioner suffered significant prejudice due to Ross's improper testimony. The sole evidence against Petitioner was the testimony of his wife and two minor children, who testified outside of Petitioner's presence. While some inconsistencies among witnesses is to be expected, there were numerous and significant inconsistencies among wife and the two children. Further, the jury's doubt in wife's testimony was shown by its verdict of not guilty as to one count of spousal sexual battery. The solicitor's closing argument demonstrated how concerned he was with the weakness of his case, particularly, wife's testimony as he relied heavily upon Ross's testimony to urge the jury to believe wife. For each weakness or inconsistency in the evidence presented, the solicitor simply pointed to Ross to explain how wife's testimony was believable because it was "very, very consistent" with someone who was abused. The prejudice resulting from trial counsel's failure to object to Ross's testimony cannot be overstated.

IV. Appellate counsel provided ineffective assistance by failing to raise on appeal that Petitioner's right to testify was violated, or in the alternative, trial counsel provided ineffective assistance by failing to object to the violation of Petitioner's right to testify.

Relevant facts

Petitioner discussed his right to testify with trial counsel, but the discussion was superficial and failed to convey the information necessary in order for Petitioner to making a knowing and voluntary waiver of his right to testify. App. 638, l. 22 – App. 639, l. 2. Years later, when confronted with this failure, trial counsel claimed he talked to Petitioner about testifying prior to trial. App. 699, ll. 4-10; App. 700, ll. 14-16. Trial counsel claimed he informed Petitioner that it would not be a "good idea" for him to testify because he worried that a video recording in which Petitioner asked his wife what she wanted him to do "may have just come back to bite him" and he thought Petitioner "would get himself into trouble in regards to

how he would respond to questions." App. 700, l. 17 – App. 701, l. 7. According to trial counsel, the two "decided that [Petitioner] did not need to testify." App. 719, ll. 22-25.

During the trial, the judge likewise never advised him of his right to testify, questioned him regarding his understanding of his right to testify, or ensured that Petitioner knowingly, intelligently, and voluntarily waived his right. App. 639, ll. 3-25. Instead, the trial judge made a limited inquiry of trial counsel only. Trial counsel thought that while it may be "a better practice" for a trial judge to obtain a knowing and voluntary waiver of the right to testify from a criminal defendant on the record, "[s]ome judges do not." App. 720, ll. 6-15. Nevertheless, trial counsel claimed Petitioner was not "coerced, threatened in any way to make that decision not to testify." App. 720, ll. 22-24. Whether to place a waiver of the right to testify on the record was "left up to the judge's handling of the trial." App. 720, ll. 24-25.

During his PCR hearing, Petitioner informed the PCR judge that he wanted to testify. App. 640, ll. 11-19. As Petitioner explained, the primary evidence against him was testimony; therefore, "it would only make sense that [his] side of the story would come out." App. 640, ll. 21-22.

Concerned about the trial judge's failure to advise Petitioner of his right to testify and obtain an on-the-record waiver from Petitioner, the PCR judge concluded Petitioner was entitled to a belated appeal on whether he was denied his right to testify. App. 751-752. The PCR judge found the record was "unclear as to whether [Petitioner] knowingly and intelligently waived his right to testify" despite the colloquy between the trial judge and trial counsel on this subject. App. 751. As the judge found, trial counsel "merely stated to the trial judge that [Petitioner] did not want to testify and that the trial judge did not need to interview him." App. 751. Crediting Petitioner's testimony that "defense counsel did not fully discuss the right to testify with him"

and that he wanted to testify and discrediting trial counsel's claim otherwise, the PCR judge determined Petitioner was entitled to relief on this claim.

Discussion

To show ineffective assistance of counsel, the PCR applicant must demonstrate counsel's performance fell below an objective standard of reasonableness, and counsel's deficient performance prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687-688 (1984).[5] See also Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (explaining that the Strickland test is used to evaluate a claim of ineffective assistance of appellate counsel); Smith v. Robbins, 528 U.S. 259, 284 (2000) (holding that filing an Anders brief does not shield appellate counsel from a claim of ineffective assistance and that a reviewing court applies the Strickland test to claims of ineffective assistance of appellate counsel even where appellate counsel filed an Anders brief).

As previously discussed, the right to testify in one's defense is sacrosanct. State v. Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52 (1987)). The right permeates the Constitution as it can be found in the right to due process, the right to compel witnesses in one's favor, and the protection against self-incrimination. Id. at 242, 741 S.E.2d at 703 (quotations omitted). Thus, it is axiomatic that "[a] defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000).

[5] To the extent the state may argue that the claim of ineffective assistance of trial counsel is not preserved because the PCR judge analyzed the issue as one of ineffective assistance of appellate counsel, Petitioner relies upon the state's motion to alter or amend in which the state argued "[t]he claim raised and argued at the evidentiary hearings remained consistently a claim of ineffective assistance of trial counsel resulting [in] 'structural error,' i.e., failure to secure an on the record waiver." App. 786.

Thus, while "[a]n on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right," it is the preferred method to ensure the protection of this premier right. Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). In fact, the Supreme Court required "an on-the-record waiver of a constitutional right only in … death penalty cases" occurring prior to the abolition of *in favorem vitae*. Id. Although "the knowing and voluntary waiver required must be satisfied by a full record," "[t]his may be established by colloquy between the court and the defendant himself, between the court and defendant's counsel, or both." State v. Orr, 304 S.C. 185, 188, 403 S.E.2d 623, 624-625 (1991).

Previously, the Supreme Court has "acknowledge[d] there is no absolute rule as to whether a denial of a right to testify is properly analyzed as a constitutional error on direct appeal or as an ineffective assistance of counsel claim in the context of a PCR proceeding." Rivera, 402 S.C. at 240, 741 S.E.2d at 702. When the record on appeal is "adequately developed to permit full consideration" of the claim, the Court must review the issue during the direct appeal. Id. at 241, 741 S.E.2d at 702. Either the record is sufficiently developed to allow evaluation of the matter presented and appellate counsel was ineffective for failing to raise the issue or trial counsel was ineffective for failing to object to the trial judge's perfunctory discussion regarding Petitioner's right to testify.

Trial counsel's explanation at the PCR hearing that he advised Petitioner against testifying because he worried the testimony would be harmful "cannot serve as a basis for the trial court to prevent him from taking the stand." See id. at 243, 741 S.E.2d at 703. Additionally, "the logical relevancy" of Petitioner's testimony was "self-evident" as the state lacked any physical evidence against Petitioner and he would want to counter the testimony

against him with his own. See id. at 244, 741 S.E.2d at 704. Importantly, the Supreme Court held this type of error was "not amenable to harmless-error analysis and require[d] reversal without a particularized prejudice inquiry." Id. at 247, 741 S.E.2d at 706. Thus, "the error is structural in that it is so basic to a fair trial that [its] infraction can never be treated as harmless error." Id. at 249-250, 741 S.E.2d at 707.

Trial counsel provided ineffective assistance by failing to object to lack of evidence in the record establishing Petitioner knowingly and voluntarily waived his right to testify. In the alternative, to the extent the record showed Petitioner did not knowingly and voluntarily waive his right to testify, appellate counsel erred by failing to raise this issue on appeal. This structural error requires reversal.

CONCLUSION

As to Issue I, Petitioner respectfully requests this Court affirm the PCR court's determination that he is entitled to a belated direct appeal. As to Issues II and III, Petitioner respectfully requests this Court reverse the PCR court and hold that trial counsel provided ineffective assistance of counsel by failing to object to expert testimony that improperly bolstered the state's key witness and by admitting Petitioner's guilt. Finally, as to Issue IV, Petitioner respectfully requests this Court reverse the PCR court and hold either (1) that appellate counsel provided ineffective assistance by failing to raise on appeal that Petitioner's right to testify was violated, or (2) that trial counsel provided ineffective assistance by failing to object to the violation of Petitioner's right to testify.

s/*Susan B. Hackett*
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Appellate Defender
ATTORNEY FOR
PETITIONER/RESPONDENT

This 13th day of July, 2020.