

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

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S.C. SUPREME COURT

MICHAEL RAY ELDERS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2020-000891

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's Issue Presented on Certiorari

Did the Court of Appeals erroneously conclude Counsel was constitutionally ineffective for failing to object to the forensic interviewer's statement that Minor received evidence-based therapy in finding the statement "conveyed to the jury that [the interviewer] has 'evidence' to back up Minor's claim that [Elders] sexually abused her," and therefore, constituted improper bolstering testimony where (a) evidence-based therapy is a medical term meaning therapy that has been scientifically tested and shown to help reduce symptoms; (b) the forensic interviewer's recommendation helped Counsel's trial strategy; and (c) the forensic interviewer stated several times it was not her job to determine if Minor was telling the truth?

Respondent's Question Presented

Whether the Court of Appeals correctly determined that Minor's credibility was bolstered by testimony from the forensic investigator that Minor received evidence-based therapy and that trial counsel provided ineffective assistance by failing to object?

STATEMENT OF THE CASE

Mr. Elders was indicted by a Lexington County grand jury in October 2009 for criminal sexual conduct with a minor in the first degree. App. 540 – 541. He was subsequently indicted in February 2011 for allegedly committing a lewd act. App. 543 – 544. He proceeded to trial before the Honorable William P. Keesley and a jury on February 28, 2011. William Rast, Jr. represented Mr. Elders, and Debra Moore served as the assistant solicitor. The jury found Mr. Elders guilty as indicted on the two above offenses and not guilty on an additional lewd act charge. App. 417 l. 13 – App. 418 l. 9. Judge Keesley sentenced him to thirty years on the criminal sexual conduct charge and fifteen years concurrent on the lewd act charge. App. 424 ll. 17 – 24.

Mr. Elders filed an application for post-conviction relief on or about August 2, 2012. App. 427. The state made its Return on or about March 15, 2013. App. 433 – 438. Through counsel, supplemental grounds for post-conviction relief were filed on or about April 19, 2013. Supplemental Appendix 2 – 3.

An evidentiary hearing was held before the Honorable Edgar Dickson on August 14, 2013. App. 439. Tristan Shaffer represented Mr. Elders, and Walt Whitmire appeared on behalf of the state. Trial counsel testified at the hearing. After proposed orders were submitted to the PCR judge, an Order of Dismissal was filed on May 2, 2014. App. 503 – 515; Supp. App. 1.

Mr. Elders filed a second application for post-conviction relief on November 7, 2014. App. 516. It contained an allegation that PCR counsel did not file a notice of appeal from Judge Dickson's Order of Dismissal. App. 518. The state made its Return on March 17, 2015. App. 524 – 527.

A hearing was held before the Honorable Brooks P. Goldsmith on April 23, 2015. App. 529. Walt Whitmire again represented the state, and Anna Good represented Mr. Elders. The state consented to relief under State v. Austin, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 531 ll. 8 – 21. An order granting belated appellate review subject to Austin was signed on January 4, 2015. App. 539.

The Court of Appeals reversed the PCR court in an unpublished opinion earlier this year. Elders v. State, Op. No. 2020-UP-093 (S.C. Ct. App. Filed Apr. 8, 2020). The state sought rehearing, and the Court of Appeals denied rehearing on May 22, 2020. The state filed its Petition for Writ of Certiorari on June 30, 2020.

This Return follows.

ARGUMENT

The Court of Appeals correctly determined that Minor’s credibility was bolstered by testimony from the forensic investigator that Minor received evidence-based therapy and that trial counsel provided ineffective assistance by failing to object.

Relevant facts

The testimony of the forensic interview in this case, Lysa Miller-Dupre, was offered by the state without objection. The Court of Appeals correctly held that trial counsel should have objected to the improper testimony. Miller-Dupre’s testimony immediately followed Minor’s testimony at Mr. Elders’ trial. While serving as a forensic interviewer at the Dickerson Center for Children, Miller-Dupre interviewed Minor. App. 192 ll. 6 – 19. Without objection, she was qualified as an expert in forensic interviewing and child abuse assessment. App. 194 ll. 4 – 10. She advised the jury that she interviewed Minor on July 6, 2009. App. 198 ll. 18 – 22. Minor was ten years old at the time. Id. When the state sought to introduce the DVD of the interview, trial counsel did not object. App. 200 l. 14 – App. 201 ll. 16. Nonetheless, the trial judge excused the jury and admitted that he had a “lingering degree of discomfort” about the DVD. Id. The interview was ultimately admitted as the state’s first exhibit.

After the jury was brought back into the courtroom and before the DVD was played, Miller-Dupre responded in the negative when asked if any part of Minor’s disclosure was the product of third party influence, suggestibility, or coaching. App. 202 l. 25 – App. 203 l. 6. The last question asked before the interview was shown to the jury was:

Q: And what, if any, recommendations did you make following her disclosures?

A: She was recommended for evidence based therapy at the Dickerson Center.

App. 203 ll. 7 – 10.

Miller-Dupre had previously described the Dickerson Center as “an advocacy center where forensic interviews are conducted for children who are suspected or reported of possibly having been abused sexually or physically.” App. 192 ll. 10 – 14.

During cross-examination, Miller-Dupre reiterated that it was not her job to determine whether Minor was telling the truth or lying. App. 205 ll. 5 – 8. She also repeated the recommendation for therapy. App. 208 ll. 8 – 12. Notably, on redirect, when reminded that it was not her job to determine whether Minor was telling the truth, Miller-Dupre was asked if she found Minor’s disclosure problematic. She responded in the negative. App. 209 ll. 12 – 16. During closing arguments, the state revisited much of Miller-Dupre’s testimony, reiterating that she did not find Minor’s testimony problematic. App. 386 ll. 3 – 11.

At the first PCR evidentiary hearing, trial counsel testified that he was retained to represent Mr. Elders. App. 456 l. 25 – App. 457 l. 1. He noted that Mr. Elders maintained his innocence during the entirety of the case. App. 458 ll. 2 – 8. He described the matter as one mainly involving credibility. App. 458 ll. 14 – 21. Trial counsel admitted he did not consult with any investigators or experts during trial preparation. App. 460 ll. 11 – 15.

Regarding the evidence-based therapy remark and the statement that Miller-Dupre did not find Minor’s disclosure problematic, trial counsel admitted that such comments could make the jury think the forensic interviewer believed Minor. App. 466 ll. 18 – 21. Trial counsel admitted that the solicitor’s use of these statements during closing argument harmed Mr. Elders’ case. App. 469 ll. 6 – 14.

Discussion

The state posits that because evidence-based therapy is “a neutral statement conveying Minor underwent mental health treatment—psychotherapy,” Miller-Dupre’s testimony was proper. Petition 10. Respondent craves reference to the portion of the trial wherein the jury was provided the definition of psychotherapy from the National Institute of Mental Health or the statutory definition as discussed in the state’s Petition. The Court of Appeals did not hold that evidence-based therapy is ineffective to reduce symptoms; the efficacy of such approaches is not the subject of this appeal. The issue in dispute, as found in the Court of Appeals opinion, is whether trial counsel provided ineffective assistance of counsel by failing to object to the improper bolstering testimony by the forensic interviewer. Neither the jury, trial judge, nor trial counsel appear to have been provided the definition of evidence-based therapy during the course of Respondent’s trial. Further, the state contends that the Court of Appeals “erred in misconstruing evidence-based therapy.” Petition 12. However, the definition was never provided during Mr. Elders’ trial. It is unclear whether the state was even aware of the definition at the time of trial. Miller-Dupre was not asked, on direct or cross-examination, what evidence-based therapy entails. Therefore, reliance on the definitions post-trial is misplaced.

A more relevant discussion regarding counsel’s failure to object and how the Court of Appeals correctly held that Mr. Elders received ineffective assistance of counsel can be found below. The state avers that Minor received evidence-based therapy treatment for “mental health issues.” Petition 11. No such testimony was presented to the trial court. On the other hand, the word “evidence” was mentioned to the jury multiple times throughout the trial. Evidence is “[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact.” Black's Law Dictionary (11th ed. 2019).

In Mr. Elders’ trial, the jury heard from the state’s third witness, an expert forensic interviewer, that Minor was recommended for evidence-based therapy at a center where interviews are conducted with children who are suspected to be victims of sexual abuse. The jury was also instructed by the trial judge that they were to “decide the cases based on the evidence.” App. 59 ll. 12 – 17. Jurors were asked whether they could decide the case based on the law and evidence. App. 82 ll. 9 – 17. As part of the jurors’ oath, they were required to decide the case based on the evidence and the law. App. 120 ll. 1 – 6. The trial judge explained how the state’s role was to present evidence in order to meet its burden and that evidence comes from witnesses and exhibits. App. 155 ll. 14 – 20; App. 156 ll. 16 – 21; App. 157 ll. 9 – 14. After closing arguments, the trial judge advised the jury that they alone “determine the truth of the evidence, its effect, its value, and its weight.” App. 394 ll. 19 – 25.

These repeated references to evidence, coupled with Miller-Dupre’s testimony, caused the jury to interpret the remark that Minor received evidence-based therapy as a tacit conclusion that Miller-Dupre believed Minor. As the Court of Appeals noted, “[t]he forensic investigator’s statement conveyed to the jury that she had ‘evidence’ to back up Minor’s claim that [Mr. Elders] sexually abused her.” Elders v. State, Op. No. 2020-UP-093 (S.C. Ct. App. Filed Apr. 8, 2020). Trial counsel should have objected based on the recognition that the law at the time was that such comments were improper.

The Court of Appeals correctly held that “trial counsel was deficient for failing to object to the forensic investigator’s statement that she recommended Minor for ‘evidence based’ therapy.” Id. The Court’s opinion also accurately concluded “by characterizing the type of therapy Minor received as ‘evidence based,’ Miller-Dupre bolstered Minor’s contention that she

was sexually assaulted by Mr. Elders.” Id. Trial counsel should have objected to many of Miller-Dupre’s statements, including the evidence-based therapy remark.

This Court has held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); see State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's...opinion testimony improperly bolstered the Victim's credibility").

In Dawkins, this 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, 377 S.E.2d 298 (1989). In that case, the solicitor asked Dr. Banks, a psychiatrist who had treated the alleged victim, “Based on your examination and your observations of Pamela, are you of the impression that her symptoms are genuine?”, and the response was in the affirmative. Id. at 393, 377 S.E.2d at 302. Rather than ruling on Dawkins’ subsequent motion for a mistrial, the trial judge gave a curative instruction. Id. This Court stated that “[a]lthough it was improper for the prosecutor to pose the question, it was not of such magnitude to effect the outcome of the trial.” Id. at 394, 377 S.E.2d at 302.

In State v. Jennings, this Court reversed two convictions of committing a lewd act upon a minor following the trial court’s erroneous admission of a forensic interviewer’s written reports which improperly vouched for the minor children’s credibility. 394 S.C. 473, 716 S.E.2d 91 (2011). The written reports were created by forensic interviewer Shauna Galloway-Williams and contained sections called “Regarding Allegations of Abuse” and “Conclusion of Interview” that bolstered the minors’ credibility and averred that the children provided “a compelling disclosure

of abuse.” Id. at 476-7, 716 S.E.2d at 93. This Court held that the reports allowed the forensic interviewer to improperly vouch for the children’s veracity:

In each report, the forensic interviewer stated that during the interviews, each child had “provide[d] a compelling disclosure of abuse by [appellant].” The forensic interviewer further concluded that each of the children provided details consistent with the background information received from their mother, the police report, and the other children. **There is no other way to interpret the language used in the reports other than to mean the forensic interviewed believed the children were being truthful.** We therefore find the trial court erred in allowing the State to introduce the reports.

Id. at 480, 716 S.E.2d at 94. (emphasis added). This Court held that conclusions in the reports improperly vouched for the children's veracity and, thus, the trial court abused its discretion by admitting the reports into evidence. This Court further held the error was *not* harmless because there was no physical evidence presented at trial and, therefore, the children's credibility was the sole issue in the case. Id. at 94- 95, 716 S.E.2d at 480.

Recent opinions at both appellate courts reflect a trend of disallowing testimony similar to Miller-Dupre’s. In Chappell v. State, the Court of Appeals held that trial counsel was ineffective for failing to object when the state’s expert witness gave improper bolstering testimony. 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019) (rehearing denied) (petition for certiorari pending). Although the expert forensic interviewer in that case neither treated the minor nor saw the video of the interview, she testified “Children don’t often lie about sexual abuse incidents.” Id.at 73-4, 837 S.E.2d at 499. Chappell cited numerous cases, many of which have been discussed above, all revolving around improper bolstering by a witness who interviewed or treated the complaining witness. Id. at 75-6, 837 S.E.2d at 500. Chappell also referred to State v. Cartwright for the notion that an independent’s expert testimony was not improper bolstering because she testified in general terms and “never interviewed the victims and never stated she believed the victims were telling the truth.” Id. at 77, 837 S.E.2d at 501

(citing Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018)). The Court of Appeals noted that the expert’s statement “not only had the effect of improper bolstering the victim’s credibility; it also improperly invaded the province of the jury to determine the only issue in this case: whether Chappell sexually abused the victim.” Id. at 78, 837 S.E.2d at 501.

Briggs v. State is another example of a PCR case wherein trial counsel failed to object to improper bolstering. 421 S.C. 316, 806 S.E.2d 713 (2017). This Court in Briggs remarked upon the numerous recent cases discussing “the permissible limits of a forensic interviewer’s testimony in the context of the prohibition against improper bolstering.” Id. at 322, 806 S.E.2d at 716. In particular, this Court relied on State v. Smith for “the central point of the prohibition against improper bolstering: a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim.” Id. at 323, 806 S.E.2d at 717 (citing Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010)). The expert’s testimony in Briggs, at least in part, “clearly conveyed to the jury that she believed the victim.” Id. at 327, 806 S.E.2d at 719. Much like Miller-Dupre, the expert in Briggs “invaded the province of the jury and testified she had already made [the] determination” that Minor was telling the truth. Id. at 328, 806 S.E.2d at 720.

Trial counsel’s failure to object prejudiced Mr. Elders. The state suggests that the improper remarks by the forensic interviewer in Thompson v. State were allegedly more egregious than Miller-Dupre’s testimony, that Thompson can be distinguished. 423 S.C. 235, 814 S.E.2d 487 (2018). However, the Court of Appeals referred to Thompson for the standard of review and the notion that no witness may give an opinion that the victim is telling the truth. The witness in Thompson conveyed to the jury that the victim was telling the truth about the abuse. Id. at 245, 814 S.E.2d at 492. The same is present, albeit with different language.

Testimony that varies from the expert's in Thompson can still be improper, and the Court of Appeals correctly held that Miller-Dupre's remarks should have merited an objection.

In State v. Jennings, this Court defined an error as harmless "when it could not have reasonably affected the result of the trial." 394 S.C. 473, 716 S.E.2d 91 (2011). In Jennings, "[t]he only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts." Id. "Because the children's credibility was the most critical determination" in that case, the admission of written reports was not harmless. Id. Similarly, State v. Stukes, a case that "hinged on credibility," was not "amenable to a harmless error analysis." 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016).

Trial counsel described this case as one that is mainly about credibility. Failure to object to the "evidence based therapy" comment from one of the state's expert witnesses constituted ineffective assistance of counsel. The Court of Appeals correctly held that this remark prejudiced Mr. Elders in that it undermined confidence in the outcome of the case.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that certiorari be denied.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of August, 2020.