

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO LEXINGTON COUNTY
William P. Keesley, Trial Judge
Brooks P. Goldsmith, PCR Judge

Appellate Case No. 2016-000242

RECEIVED

Apr 23 2020

SC Court of Appeals

Michael Ray Elders,

Petitioner,

v.

State of South Carolina

Respondent.

RESPONDENT'S PETITION FOR REHEARING

Through an unpublished decision issued on April 8, 2020, this Court erased Petitioner's convictions of first-degree criminal-sexual conduct (CSC) with a minor and lewd act on a minor and remanded the case for a new trial because trial counsel failed to object to the forensic interviewer testifying Minor received evidence-based therapy. *Elders v. State*, Op. No. 2020-UP-093 (S.C. Ct. App. filed Apr. 8, 2020). The Court misconstrued the meaning of evidence-based therapy, and, in doing so, erroneously found this statement vouched for Minor's credibility and constituted improper bolstering.

1. The Court misconstrued the meaning of evidence-based therapy

The Court found the forensic interviewer's testimony that Minor received evidence-based therapy vouched for Minor's credibility—conveyed to the jury she believed Minor was telling the

truth about the sexual assault—which constituted improper bolstering. The Court found, “The forensic investigator’s statement conveyed to the jury that she had ‘evidence’ to back up Minor’s claim that Petitioner sexually abused her.” *Elders*, 2020-UP-093 at 3. However, the Court misconstrued the meaning of evidence-based therapy and its impact on trial counsel’s trial strategy. Because the Court misconstrued the meaning of evidence-based therapy in finding the statement vouched for Minor’s credibility, the Court erroneously found trial counsel deficient for not objecting.

The interviewer’s testimony that Minor received evidence-based therapy is a neutral statement conveying Minor underwent mental health treatment—psychotherapy. The National Institute of Mental Health (NIMH) defines psychotherapy as a “term for a variety of treatment techniques that aim to help a person identify and change troubling emotions, thoughts, and behavior.” The National Institute of Mental Health, *Psychotherapies*, MENTAL HEALTH INFO., <https://www.nimh.nih.gov/health/topics/psychotherapies/index.shtml> (last revised November 2016) (last visited April 23, 2020). The NIMH explains:

Different therapies are often variations on an established approach There is no formal approval process for psychotherapies as there is for the use of medications in medicine. For many therapies, however, *research* involving large numbers of patients has provided *evidence that treatment is effective for specific disorders*. These “*evidence-based therapies*” have been *shown in research to reduce symptoms* of depression, anxiety, and other disorders.

Id. (emphasis added). Another enlightening example of “evidence based” practices can be found in the definitions of the Office of Pretrial Intervention Coordinator Diversion Program Data and Reporting. S.C. Code Ann. 17-22-1110. Subsection 17-22-1110(2) provides “‘Evidence-based practices’ means supervision policies, procedures, and practices *that scientific research demonstrates reduce* recidivism among individuals on probation, parole, or post-correctional

supervision.” (emphasis added). Evidence-based practices are based on scientific research that show the practices are helpful in reducing recidivism, just as evidence-based therapy is based on scientific research shown to reduce symptoms of mental health disorders.

Here, the forensic interviewer testified Minor received evidence-based therapy. Based on the correct definition of evidence-based therapy shown above, this testimony simply conveyed that Minor received therapy shown by scientific research to be effective in mitigating the symptoms of a mental health disorder. Presenting the jury the label associated with the type of therapy recommended by the interviewer did not convey any opinion regarding veracity nor did it provide an opinion which bolstered or inferred additional evidence existed. Instead, the label was the proper scientific term for the type of therapy Minor received. This testimony did not vouch for Minor’s credibility and improperly bolster Minor’s testimony that Petitioner sexually assaulted her; rather, this testimony showed that Minor received treatment for mental health issues. Because the statement did not vouch for or bolster Minor’s testimony, there was no reason for trial counsel to object, and he should not have been found deficient.

Additionally, for not having a reason to object based on the label of the therapy, the fact Minor was referred for mental health treatment was capitalized on by trial counsel as part of his trial strategy. Trial counsel’s strategy was to attack Minor’s credibility and show that she had been coached. The forensic interviewer testifying that Minor received mental health treatment—evidence-based therapy—played into Counsel’s strategy and arguments. Minor was so confused by what actually happened and what her mother told her happened, she no longer knew what was the truth and what was a lie, or, as trial counsel argued, “This entire case started on a lie. . . . [Minor] didn’t know the details because she had made it up. Her mother told her to. She’s

sitting here looking over my shoulder at her mother the whole time she's testifying. She didn't say much at all." (App. 372-75).

The interviewer's testimony did not vouch for and improperly bolster Minor's testimony, and it played into trial counsel's overarching trial strategy. As such, Counsel cannot be deficient for failing to object to permissible testimony that arguably benefitted his trial strategy. Based on the foregoing, trial counsel was not deficient for failing to object to the forensic interviewer's testimony that Minor received evidence-based therapy because evidence-based therapy is a neutral term describing the treatment Minor received, not why she needed the treatment.

To properly apply the law, the Court needed to understand the correct meaning of evidence-based therapy. Here, the Court misinterpreted evidence-based therapy, a medical phrase, in finding the interviewer's testimony vouched for Minor's testimony. Because evidence-based therapy is a neutral term describing the treatment, not why Minor needed treatment, the Court should grant the petition for rehearing, vacate its original opinion, and affirm the PCR court.

2. No prejudice resulted from trial counsel's alleged deficiency of failing to object to the interviewer testifying Minor received evidence-based therapy because the testimony did not vouch for Minor's credibility or harm trial counsel's strategy that Minor had been coached

The Court found trial counsel's alleged deficiency of failing to object to the forensic interviewer's testimony that she "recommended 'evidence based' therapy for Minor bolstered Minor's testimony in such a way that if the testimony had been objected to, there is a reasonable probability that the outcome of the trial would have been different." *Elders*, 2020-UP-093 at 3. The Court further found, "The forensic investigator's statement conveyed to the jury that she had 'evidence' to back up Minor's claim that Petitioner sexually abused her." *Id.* The Court misconstrued the meaning of evidence-based therapy and misapplied the prejudice analysis.

As explained above, evidence-based therapy is a neutral term describing the type of therapy Minor received, not the reason she needed therapy. Further, the interviewer testified it was not her

job to determine whether Minor was telling the truth, and she made no determination of Minor's truthfulness. (App. 205). The forensic interviewer stating Minor received therapy shown by scientific research to be effective at reducing mental health symptoms—evidence-based therapy—is a far-cry from the prejudicial improper bolstering testimony in *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018).

“In assessing prejudice under *Strickland*, the question *is not* whether a court can be certain counsel's performance had no effect on the outcome” *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). “Instead, *Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Id.* (quoting *Strickland*, 466 U.S. at 696). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112.

The prejudicial improper bolstering testimony in *Thompson*, was the forensic interviewer testifying, “I would feel comfortable in this case saying that *it's among the most compelling interviews that I've conducted*” 423 S.C. at 242, 814 S.E.2d at 491. The *Thompson* court concluded this testimony was “patently inadmissible, and there was no strategic reason for trial counsel not to object,” because it clearly vouched for Minor's credibility. *Id.* at 245, 814 S.E.2d at 492.

The prejudicial impact of the instant statement is clearly distinguishable from the statement in *Thompson*. First, because evidence-based therapy is a neutral statement describing the type of therapy Minor received, not that there was evidence Minor needed therapy as the Court misconstrued, the statement, correctly defined, did not convey the interviewer's opinion as to Minor's credibility; therefore, it was not inadmissible. Second, the fact that Minor received evidence-based therapy played into trial counsel's strategy. Trial counsel attacked Minor's credibility arguing she had been coached and no longer knew what was the truth and what was a

lie. Finally, the State never mentioned this term in its closing argument. Based on the foregoing, no prejudice resulted from trial counsel's alleged deficiency because the statement was admissible, it played into trial counsel's trial strategy, and was not harped on by the State in closing. Therefore the Court should grant the petition for rehearing, vacate its original opinion, and affirm the PCR court.

Respectfully submitted,

s/ Samuel L. Key _____

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April 23, 2020

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO LEXINGTON COUNTY

William P. Keesley, Trial Judge
Brooks P. Goldsmith, PCR Judge

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PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of Respondent's Petition for Rehearing has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Taylor D. Gilliam, Esquire
tgilliam@sccid.sc.gov

This 23 day of April, 2020.

s/ Samuel L. Key _____
SAMUEL L. KEY
Assistant Attorney General

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(803) 734-3737
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From: Samuel Key
To: ["tgilliam@sccid.sc.gov"](mailto:tgilliam@sccid.sc.gov)
Cc: ["jorr@sccourts.org"](mailto:jorr@sccourts.org)
Subject: Elders v. State Petitioner for Rehearing
Date: Thursday, April 23, 2020 12:46:00 PM
Attachments: [Elders v. State Pet. for Rehearing.PDF](#)

Taylor,

Attached please find the State's petition for rehearing in Elders v. State, 2016-000242. I plan on e-filing this with the Court of Appeals today.

Thanks,

Samuel L. Key
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SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

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SC Court of Appeals

April 23, 2020

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Michael Ray Elders v. State of South Carolina
Appellate Case No. 2016-000242

Dear Ms. Kitchings:

Enclosed please find Respondent's Petition for Rehearing in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

s/Samuel L. Key

Samuel L. Key
Assistant Attorney General
SC Bar No. 103206

SK/ch

cc: Taylor D. Gilliam, Esquire (by email only)