STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO FLORENCE COUNTY

Michael G. Nettles, Trial Judge
William H. Seals, Jr., Post-Conviction Relief Judge

Appellate Case No. 2020–000752

LEONARD BROCKINGTON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Whether the PCR court erred in denying relief, where trial counsel admitted he failed to object to two impermissible questions asked of a forensic interviewer that bolstered the credibility of a minor in a circumstantial evidence case, where trial counsel denied that the failure to object was part of a trial strategy, and where the PCR court incorrectly and retroactively applied South Carolina law that was not in effect at the time of Petitioner's trial?

Respondent's Counterstatement of Issue on Certiorari

Whether the PCR court properly found Counsel was not constitutionally deficient for his failure to object to the State's questions and Dr. Benedetto's testimony where Counsel's opening statement opened the door to Dr. Benedetto's testimony, and therefore, the testimony was not impermissible bolstering testimony?

STATEMENT OF THE CASE

In March 2012, the Florence County Grand Jury indicted Petitioner for one count of first-degree criminal sexual conduct (CSC) with a minor and one count of lewd act on a minor (2012-GS-21-0447). Henry M. Anderson, Jr. (Counsel), of the Anderson Law Firm, PA represented Petitioner. Assistant Solicitors Patricia S. Parr and Robert N. Wells of the Twelfth Circuit Solicitors Office prosecuted the case. Petitioner's case proceeded to a jury trial before the Honorable Michael G. Nettles on April 21–24, 2014.

Petitioner was charged with committing first-degree CSC with a minor and lewd act on his then-girlfriend's six-year-old daughter (Minor). At trial, Minor was nine-years old. (App. 192). Minor's parents were divorced, and she lived with her mother (Mother). (App. 123-24). Minor's father (Father) lived in Charlotte, North Carolina, and was remarried. (App. 124). Petitioner and Mother were dating at the time of the incident. (App. 125).

In the fall of 2011, Minor disclosed to a friend that Petitioner had sexually abused her. (App. 97). Minor's friend reported the disclosure to her parents, who then called a neighbor who was friends with Mother. (App. 98-99). The neighbor called Mother and told her of Minor's disclosure. (App. 112).

Mother told the neighbor she was not sure if Minor was being truthful and assured the neighbor she would look into the matter. (App. 112). However, on a visitation with Father, Minor disclosed the allegations to him. (App. 127). Father called the police and the Department of Social Services (DSS). (App. 128). Upon receiving this information, DSS removed Minor from Mother's custody and granted custody to Father. (App. 173-74). Until Minor's forensic interview, Minor only disclosed inappropriate touching. However, during her forensic interview, Minor claimed Petitioner made her perform oral-sex on him. (App. 175). Minor testified at trial, and the video of

the forensic interview was introduced and played for the jury.

The jury did not reach a verdict on the first-degree CSC with a minor charge; however, the jury convicted Petitioner of lewd act. (App. 388). Judge Nettles sentenced Petitioner to fifteen years' imprisonment for lewd act. (App. 392-93). Petitioner appealed.

Appellate Defender David Alexander perfected Petitioner's appeal by filing an *Anders*[1] brief to the Court of Appeals. The following issue was briefed to the court of appeals for *Anders* review:

> Whether the admission of the video of the complainant's forensic interview violated [Petitioner's] right to confront the witnesses against him?

The Court of Appeals dismissed the appeal on October 5, 2016. *State v. Brockington*, Op. No. 2016-UP-416 (S.C. Ct. App. filed Oct. 5, 2016). The case was remitted back to the circuit court on October 28, 2016.

Petitioner commenced this PCR action on April 13, 2015. In his original PCR application, Petitioner alleged:

I. Ineffective assistance of counsel:
   a. Counsel failed to provide the discovery to Petitioner;
   b. Insufficient evidence;
   c. Counsel's representation was grossly negligent;
   d. Conflict of interest; and
   e. Petitioner was not allowed to plead guilty.

The State submitted its return on August 18, 2016. Thereafter, an evidentiary hearing into the matter was held on March 4, 2019. At the conclusion of the PCR hearing, PCR counsel moved to add the following allegations based upon the evidence presented:

   f. Petitioner did not have an opportunity to testify at trial;
   g. Petitioner did not have an opportunity to view Minor's forensic interview before trial;

[1] *Anders v. California*, 386 U.S. 738 (1967).

h. Counsel admitted he should have called witnesses at trial; and
i. Counsel failed to object to Dr. Alicia Bennedetto's impermissible bolstering testimony at page 227 of the transcript.

An evidentiary hearing convened on March 4, 2019, at the Florence County Courthouse before the Honorable Craig D. Brown. Petitioner was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Samuel L. Key represented the State. Petitioner and his former trial counsel testified at the hearing. After hearing the testimony presented at the PCR hearing and a full review of the record, Judge Brown issued an order on April 29, 2020, denying relief on all grounds and dismissing the action with prejudice. Petitioner appealed.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is any probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Appellate court's give great deference to a PCR court's credibility findings because appellate court's lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found Counsel was not constitutionally deficient for his failure to object to the State's questions and Dr. Benedetto's testimony because Counsel's opening statement opened the door to Dr. Benedetto's testimony, and therefore, the testimony was not impermissible bolstering testimony.

On appeal, Petitioner argues the PCR court erred in denying relief, where trial counsel admitted he failed to object to two impermissible questions asked of a forensic interviewer that bolstered the credibility of a minor in a circumstantial evidence case. Petitioner additionally argues the PCR court retroactively applied case law and standards not in place at the time of Petitioner's trial. However, the PCR court properly found counsel was not constitutionally ineffective because the testimony at issue was permissible because Counsel opened the door to the testimony in his opening argument, which was part of a reasonable trial strategy. Certiorari should be denied.

At trial, the State called Doctor Alicia Benedetto, who performed the forensic interview on Victim. On direct-examination, the State asked Dr. Benedetto:

> Q: Was there anything about [Minor's] disclosure that caused you to believe it was the result of third-party influence?
>
> A: No. That is something we would very carefully explore to make sure that there doesn't appear to be influence of either a parent or some other source, or motivation by the child. Nothing that she stated to me supported that.
>
> Q: And was there anything in her disclosure that was affected in any way by suggestibility or coaching?
>
> A: Well, you know, that is a question obviously for the jury to determine. As far as things that we look for in the interview; for example, is the child able to correct the interviewer when the interviewer maybe gets something wrong, and [Minor] was able to do that sort of thing. . . .

(App. 227).

Petitioner argues Counsel was ineffective for failing to object arguing the testimony is

objectionable as eliciting improper bolstering testimony. However, a closer view of our Supreme Court's analysis in *Briggs shows* this testimony was proper, as Counsel opened the door in his opening statement, making the testimony admissible. 421 S.C. 316, 806 S.E.2d 713.

In *Briggs*, our Supreme Court was asked whether trial counsel's failure to object to a similar line of questioning of a forensic interviewer constituted ineffective assistance of counsel. 421 S.C. at 325-27, 713 S.E.2d at 718-19. The forensic interviewer testified she did not find any evidence suggesting the victim had been coached. *Id.* at 326, 806 S.E.2d at 718. The Court stated, "This testimony was ***arguably*** offered for the purpose of conveying the witness's opinion about the credibility of the victim, and thus ***could*** be improper bolstering." *Id.* (emphasis added). However, the *Briggs* Court also reasoned:

> Under certain circumstances, it may be proper for the State to ask an expert about coaching. For example, if defense counsel accused the child's mother or father in opening statement or on cross-examination of coaching the child to make an accusation they knew to be untrue, such a line of questioning to an expert could be admissible.
>
> One can even envision a scenario in which ***coaching is implied, or otherwise becomes an issue without such a direct accusation***. Under ***any*** of those circumstances, where the testimony is offered to address coaching as a disputed issue, it may be reasonable for counsel to decide not to object.

Id. (emphasis added). The Court ultimately declined to hold trial counsel's failure to object to the line of questioning deficient because trial counsel himself made whether someone coached the victim to make a false accusation an issue in the case. *Id.* at 327, 806 S.E.2d at 719.

In the instant case, in opening argument, Counsel argued:

> [Minor] went to a counselor in North Carolina. She went to that counselor for a year, and over that year's time [Minor] refused to talk about this. Wouldn't talk about it or bring it up. So the counselor was changed and she went to another counselor, and now she is ready to testify about this.

(App. 91). Counsel also argued:

> [Y]ou will also hear that [Father] didn't have custody before this happened, and he has custody now. You will hear [Father] was paying some [e]leven [h]undred [d]ollars a month for child support but he's not paying any child support now.

(App. 91-92).

On cross-examination, before Dr. Benedetto's testimony, Father admitted that prior to Minor's allegations in September 2011, Mother advised him Minor was acting out and stated she felt Minor needed counseling. (App. 138). Father also admitted Applicant spoke to him on the phone regarding Minor's behavior. (App. 139). Father then stated Minor saw a counselor in North Carolina for about a year and would not speak about the incident "[u]nder no pressure." (App. 139). Then, Father moved Minor to a counselor in Columbia, South Carolina. (App. 139). Counsel then elicited through Father that Minor saw the Columbia counselor "for preparation of trial testimony." (App. 140). Father admitted he brought Minor to the courtroom two times prior to trial, and Minor was given a trial notebook to take home. (App. 140-41).

On cross-examination, before Dr. Benedetto's testimony, Minor admitted Heather Smith, her second counselor, talked to her about coming to court and gave her homework to work on. (App. 209). Minor also admitted she went to the courthouse more than once and practiced her testimony with the solicitor prosecuting the case before trial. (App. 210-11).

Before Dr. Benedetto testified, as stated above, Counsel argued in opening Minor went to a counselor for a year and would not speak of the incident until she was taken to a different counselor. Counsel also argued Father gained custody of Minor and ceased paying child support because of Minor's allegations. Counsel elicited on cross-examination of Father that Minor would not speak to the initial counselor because she was "[u]nder no pressure." (App. 139). Further,

Minor admitted to practicing her testimony at least two times with the solicitor prosecuting the case.

Petitioner argues the post-conviction relief court erred by relying on *Briggs* in its analysis because Petitioner's case was tried a decade before the *Briggs* decision; however, this argument is misplaced as the *Briggs* Court simply held that in the proper case, the longstanding rule that a party cannot take advantage of any error by counsel because it is invited error can allow for the admission of otherwise inadmissible evidence by an expert witness. 421 S.C. at 326, 806 S.E.2d at 718; s*ee State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (a party "'cannot complain of an error which his own conduct has induced"') (citation omitted); *State v. Washington*, 315 S.C. 108, 432 S.E.2d 448 (1993); *State v. Logan*, 279 S.C. 345, 306 S.E.2d 622 (1983); *Wilson v. Lindler*, 995 F.2d 1256 (4th Cir. 1993); *Drayton v. Evatt*, 312 S.C. 4, 10-11, 430 S.E.2d 517, 521 (1993). It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence. *State v. Young*, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct.App.2005) *cert. granted*, Jan. 2007; *See also State v. White*, 361 S.C. 407, 415–16, 605 S.E.2d 540, 544 (2004) (ruling expert could testify that she believed the victim in this case because defendant opened the door by cross-examining expert about other cases in which she did not believe victim), In other words, otherwise inadmissible evidence may be properly admitted when opposing counsel "opens the door" to that evidence. *State v. Simmons*, 430 S.C. 1, 841 S.E. 845 (2020); *Bowman v. State*, 422 S.C. 19, 809 S.E.2d 232 (2018); *State v. Page*, 378 S.C. 476, 663 S.E.2d 357 (S.C. Ct. App. 2008). Indeed, conduct that would otherwise be improper may be excused under the "invited reply" doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense. *Bowman v. State*, 422 S.C. 19, 809 S.E.2d 232 (2018); *Vaughn v. State*, 362 S.C. 163, 607 S.E.2d 72 (2004).

Here, it is clear from Counsel's testimony his strategy was to attack Minor's inconsistent statements to show the jury she was not a credible witness because the case against Petitioner hinged on Minor's credibility. Counsel's trial strategy created a situation "in which coaching is implied, or otherwise becomes an issue . . . ." *Briggs*, 421 S.C. at 326, 806 S.E.2d at 718. Counsel's opening statement implied that both the father and the "second counselor" were responsible for fabricated charges against Petitioner. This is consistent with Counsel's testimony at the evidentiary hearing regarding his assessment of the victim's credibility and from whence the charges arose. (App. 439-40; 445-46). Counsel's opening statement thereby "opened the door" for the prosecution to present evidence that would otherwise be inadmissible.

Although Counsel did not articulate a reason for failing to object to the State's questions and Dr. Benedetto's testimony, Counsel was not deficient because Counsel's opening statement opened the door to Dr. Benedetto's testimony, and therefore, the testimony was not impermissible bolstering testimony. Counsel cannot be found deficient for failing to object to admissible testimony. *See e.g. Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (finding trial counsel was not deficient for failing to object to a proper charge pursuant to *Allen v. United States*, 164 U.S. 492 (1896)). Because the testimony was admissible, Petitioner cannot show how Counsel's failure to object was deficient. Further, Petitioner cannot show any prejudice from Counsel's alleged deficiency because any objection Counsel made to this admissible testimony would not have been sustained. Accordingly, the PCR did not err and certiorari should be denied.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant Certiorari, the State requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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