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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

NATHANIEL MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000069

REPLY BRIEF OF PETITIONER

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ARGUMENTS IN REPLY

1. **The PCR judge erred in finding that Petitioner was not prejudiced by trial counsels' failure to object to the testimony of the forensic interviewer who improperly bolstered the testimony of a minor witness when the minor witness testified that Petitioner spanked the deceased on the morning of her death and the prosecutor argued in closing to the jury that the spanking was a part of the sequence of events that caused death, that the jury either had to believe the minor witness or believe Petitioner, and Petitioner's description of the spanking was in sharp contrast to the description by the minor witness.**

The minor witness, NG, who was four at the time of the death of her two-year old sister [PG] and six at the time of trial, testified that Petitioner spanked PG " . . . hard and harder and she died." (App. p. 121, lines 7-12). After NG testified the State called Dr. Allison DeFelice. (App. p. 485, lines 22-25). Dr. DeFelice conducted a forensic interview with NG. (App. p. 491, lines 5-18). The doctor was qualified, without objection, as an expert in child psychology and forensic interviewing. (App. p. 488, lines 7-11). As discussed in the brief of petitioner, the doctor improperly vouched for or bolstered the testimony of NG.

The prosecutor asked Dr. DeFelice, in the presence of the jury, "But during the course of that interview, did you see any coaching or deception on the part of the child?" (App. p. 491, lines 22-24). Dr. DeFelice answered, "No, none." (App. p. 491, line 25). De DeFelice was next asked, "And was her account of what had happened as it was given to you, not what it was, consistent from what she had said from the outset?" (App. p. 492, lines 1-3). Dr. DeFelice answered, "Yes." (App. p. 492, line 4). Trial counsel failed to object to the prosecutor's questioning.

Dr. DeFelice interviewed NG again in April of 2002, at the request of the State. (App. p. 492, lines 20-25). In the presence of the jury Dr. DeFelice testified:

> You referred her back to me with three principal questions, the first being a question of competency, which has to do with whether or not a child demonstrates an understanding of the truth versus a lie and the importance of telling the truth, also whether or not, you know, two years later whether or not NH had memories about

> the events surrounding her sister's death, and thirdly, how emotionally she was functioning and what the potential impact would be of rendering testimony in front of the defendant.

(App. p. 493, lines 4-14). Again, trial counsel failed to object to the prosecutor's questioning. The PCR judge correctly found trial counsel ineffective for failing to object to the testimony of Dr. DeFelice as bolstering. The PCR judge erred in refusing to find that prejudice resulted from the deficient performance.

Trial counsel's failure to object to the improper bolstering of the testimony from the minor witness had a specific impact on the jury's credibility determination of NG's testimony. NG's credibility was critical because the prosecutor argued to the jury in closing that they had to either believe NG or believe Petitioner stating, " . . . either NG [minor witness] is telling you the truth, because if you believe Nathaniel Mitchell, she's making up this story" and, "She was beaten on the bed by that man, so either he's [Petitioner] telling the truth or she [NG] is, but somebody is not." (App. p. 1006, line 21 – p. 1007, p. 1008 lines 1-3). While death did not result from Petitioner spanking his foster daughter with a belt, the State argued in closing that the spanking, as testified by NG, was part of the shaking and actions that did cause the death telling the jury, "By the time she got in there, and we don't speculate and we don't have to prove the order in which he beat this child, we don't have to prove that, Ladies and Gentlemen, saw him beating her with the belt. She was naked on the bed and he was spanking her with the belt. Was he shaking her as he beat her, or had he already shaken her and continued to beat her?" (App. p. 1006, lines 2-14).

Respondent writes, "Given Petitioner's own admission to spanking P.G. and the substantial scientific evidence of shaken baby syndrome, Petitioner has failed to meet his burden of proving he was prejudiced by counsels/ failure to object to DeFelice's testimony." (BOR p. 23). First, Petitioner's testimony about the spanking was in sharp contrast to the testimony of NG. Petitioner

admitted spanking PG and her brother, HG, in the bathroom, not the bedroom as testified by NG. Petitioner testified that he "popped" both Minor and her brother [HG] on the butt with a belt for playing in the potty. (App. p. 807, line 4 – p. 808, lines 1-9). Petitioner testified that after the spanking he cleaned the children and the potty and the children ran out. (App. p. 808, lines 10-19). Petitioner testified that next, "Well, at that time H.G. backed up in the door and said, 'Papa, look.'" (App. p. 808, lines 21-22). Petitioner testified that he saw PG laying face down on the floor in the hallway and not moving. (App. p. 808, line 24 – p. 809, lines 1-13). Petitioner picked PG up and carried her back to the bedroom where she "stiffened up." (App. p. 809, line 15 – p. 810, lines 1-18). NG, on the other hand, , testified that Petitioner spanked PG " . . . hard and harder and she died." (App. p. 121, lines 7-12). Respondent's admission to the spanking does not make the improper bolstering non-prejudicial when the two versions are so different.

Second, the evidence of "shaken baby syndrome" was challenged at trial. The defense experts at trial and at the hearing on the motion for new trial both testified that the injuries that caused death were not caused by so called "shaken baby syndrome." (App. p. 582, lines 1-16; p. 1274, lines 15-24). PCR counsel asked trial counsel, "And if you would have been successful in making an objection and essentially shutting down her testimony, how do you think that would have impacted the case?" (App. p. 1485, lines 8-10). Trial counsel Coggiola answered, "It would have had a huge impact on the case as that was the – you know, I mean to have the scientific evidence being sort of the battle of the scientists, which you're going to have in these kinds of cases, the jury would have to make their own determination on that, but for the other evidence to be the witness of one child, it would make a huge impact." (App. p. 1485, lines 11-17). Petitioner demonstrated prejudice.

Trial counsel's failure to object to the improper bolstering of the testimony from the minor witness had a specific impact on the jury's credibility determination of NG's testimony. See Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In Briggs v. State, 421 S.C. 316, 333, 806 S.E.2d 713, 722 (2017), the South Carolina Supreme Court wrote, "To satisfy the second prong of Strickland—the prejudice prong—Briggs must demonstrate a 'reasonable probability' the result of the trial would have been different if Singleton had not committed the errors we discussed above. Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016). 'A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.' Id." There is a reasonable likelihood that if counsel had objected and the trial judge had properly excluded the improper bolstering testimony by Dr. DeFelice, the result of the trial would have been different. NG's credibility was an important factor for the jury and stressed during the prosecutor's closing argument. The State's evidence was not overwhelming. The State's expert testimony in regard to so called "shaken baby syndrome" was properly challenged making NG's credibility all the more critical. The PCR judge erred in refusing to find prejudice.

2. **There was no reasonable inference in the record to support the prosecutor's improper assertion in closing argument that Petitioner's wife, Sonya Mitchell, who could not testify at trial because she died while the case was pending, knew Petitioner abused their foster child.**

During the State's closing argument the prosecutor told the jury:

> What was Sonya Mitchell's reaction? Sonya Mitchell had wanted these children, think about it. In a normal relationship without an abuser in the household, if someone calls up their wife and says so and so stiffens up, your reaction is I'm coming right away, get a blanket and meet me – because Sonya Mitchell knew. She had seen those bruises and she knew where they came from. She rushed home and that part of his story alone says it all. He took her to the hospital, but unfortunately for him, he picked the wrong hospital.

(App. p. 1019, lines 2-13). Trial counsel testified at the PCR hearing that there was no evidence to support the prosecutor's assertion that Petitioner's wife knew he was an abuser. (App. p. 1476, lines 11-20). To the contrary, trial counsel testified that Sonya Mitchell "was absolutely supportive of Nathaniel from the time I met her shortly after his arrest until she died." (App. p. 1476, lines 9-10). Trial counsel admitted that she should have objected to the improper comments by the prosecutor. (App. p. 1477, lines 4-9; 10-12; p. 1478, lines 13-18).

In State v. Holcomb, 426 S.C. 557, 565–66, 827 S.E.2d 367, 371–72 (Ct. App. 2019), the South Carolina Court of Appeals, discussing improper closing arguments in a direct appeal case, wrote:

> The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion. State v. Penland, 275 S.C. 537, 539, 273 S.E.2d 765, 766 (1981). "On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial [court]'s instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003). The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 169, 106

> S.Ct. 2464, 91 L.Ed.2d 144 (1986). "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996).
>
> "A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors." Rudd, 355 S.C. at 548, 586 S.E.2d at 156. "Further, the argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Id. at 549, 586 S.E.2d at 156.

If counsel had objected, the judge could have given a curative instruction advising the jury to disregard the improper statements by the prosecutor. Trial counsel was ineffective in failing to object to the improper closing argument. Petitioner was prejudiced by the deficient performance. Discussing the prejudice resulting from the improper comments trial counsel testified:

> Because it's giving certainly the impression that the person closest to Nathaniel and living with him with these children was indicating that he was an abuser. And there was nothing – she couldn't be put on the stand. It was not part of the record. There was no evidence to support that. And of all the people, Sonya Mitchell would have been the one to know, and the jury could have assumed that it was therefore truthful.

(App. p. 1477, lines 17-24).

Respondent argues the comments were a reasonable inference from Petitioner's testimony at trial writing, "Here, Petitioner's own testimony was that he called his wife and told her only 'P.G. stiffened up,' which was enough to convince her, without any further details or conversation, to leave work and immediately return home. According to Petitioner himself, her only response was to tell him to wrap the child in a blanket and wait for her to arrive. When she did, according to Petitioner, she immediately took the child from him and went to the hospital." (BOR p. 26). A careful review of the testimony, however, fails to show an inference that Petitioner's wife did not trust him to take the child to the hospital or otherwise give the child proper care. Petitioner drove

them all to the hospital. There is nothing in the record from which it could be inferred that his wife knew about any alleged abuse by Petitioner.

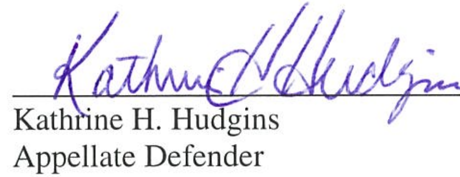
Petitioner testified that after he spanked PG and her brother, HG, for playing in the potty, he cleaned them up and the children left the bathroom. (App. p. 808, lines 1-19). Petitioner next testified that, "Well, at that time H.G. backed up in the door and said, 'Papa, look.'" (App. p. 808, lines 21-22). Petitioner testified that he saw PG laying face down on the floor in the hallway and not moving. (App. p. 808, line 24 – p. 809, lines 1-13). Petitioner picked PG up and carried her back to the bedroom where she "stiffened up." (App. p. 809, line 15 – p. 810, lines 1-18). Petitioner testified that he did not know what to do and called his wife at work. (App. p. 810, line 19 – p. 811, lines 1-11).

Petitioner testified, "I always called Sonya [his wife] if the kids got up with a cough or something. I always called her." (App. p. 811, lines 10-11). The wife told Petitioner to wrap the child in a blanket and have her ready to go. (App. p. 811, lines 21-22). Once his wife got home from work Petitioner testified that he put the child in her arms and Petitioner drove the wife, the child and the other two children to Richland Memorial Hospital. (App. p. 812, lines 1-15). On cross-examination Petitioner testified that his wife grabbed the baby and said, "get the other two kids and let's go." (App. p. 873, lines 14-15).

The prosecutor's comment that Petitioner's wife knew Petitioner abused the child is wholly unsupported by the record. Given the record as a whole, the comment so infected the trial with unfairness as to make Petitioner's conviction a denial of due process. There was not overwhelming evidence of guilt. Trial counsel was deficient in failing to object. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

CONCLUSION

Based on the above arguments, this Court should reverse the finding of the PCR court, find prejudicial ineffective assistance of counsel, reverse the convictions and remand for a new trial.



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This 18th day of April, 2022.