IN THE
COURT OF APPEALS OF INDIANA

CAUSE NO. 31A01-1703-PC-547

Lawrence Nunley, #198710

Appellant/Petitioner,

vs.

State of Indiana,

Appellee/Defendant.

Appeal from the Superior Court
Of Harrison County

Trial Cause: 31D01-1009-PC-011

The Honorable
Joseph Claypool
Presiding Judge

REPLY BRIEF OF APPELLANT

Lawrence E. Nunley
DOC #198710
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REPLY ARGUMENT I

A. The State's Waiver

The State begins by incorrectly stating Nunley's position, stating "Nunley incorrectly claims he is entitled to post-conviction relief...." (Appellee's Brief, p. 18). Nunley has never stated that he is entitled to post-conviction relief because of the State's waiver. Nunley's position is that the State has waived its arguments by failing to assert them in the trial court. This does not necessarily entitle Nunley to relief. It simply bars the State's assertions from being considered.

The State contends that "The State's answers were sufficient to put Nunley's claims at issue and require him to carry his burden of proof and persuasion below." (Appellee's brief, p. 19). The State then quotes to *Evolga v. State*, 722 N.E.2d 370, 374 (Ind. Ct. App. 2000) as saying "[T]he State's general denial of the facts alleged by Evolga was enough to trigger the need to hold an evidentiary hearing." *Evolga* deals with the summary disposition of a petition for post-conviction relief, not the appeal. Nunley does not contend that the State did not have the right to defend during the hearing. Nunley contends that the State failed to present evidence or argument and, therefore, has abandoned its right to defend against Nunley's assertions.

Finally, the State asserts that it has the right to defend the trial court's findings of fact and conclusions of law. (Appellee's Brief, p. 19). The State baldly suggests that this right is wholly unfettered – that the State has an absolute right to defend the denial of any post-conviction petition on appeal, regardless of what has transpired in the lower courts. The State also seems to contend that it can raise new arguments for the first time on appeal. This suggestion arises from the fact that the State has advanced arguments that were not brought during the post-conviction proceedings in any manner. These arguments were neither argued by

the State nor articulated in the findings of fact and conclusions of law that the State purports to defend.

Allowing such arguments to be validly considered violates the principles of Due Process and Fundamental Fairness because it creates an unlevel playing field. The State's arguments, or even the reasoning of the post-conviction court, would not limit the State's position. Rather, the State could use the lens of hindsight to create new arguments, presented to this Court for the first time, to cover-up mistakes made in the lower court. An Appellant could not anticipate such arguments because they are new. Thus, appeal by ambush would become the norm, and the already difficult standard on appeal would be further exacerbated by the advancement of new arguments – arguments that could wholly contravene the State's previous position.

Nunley contends that the parties should be bound by the same set of rules, and he asks this court to issue a ruling consistent with this goal.

B. Impeachment of A.Y.

The State faults Nunley for not identifying the alleged inconsistencies between A.Y.'s deposition and her trial testimony. However, Nunley did identify the inconsistencies to both the trial court and in the Statement of Facts of the Brief of Appellant. On page 9 of the Brief of Appellant, Nunley included:

> 7 Ms. Schultz was queried about A.Y.'s testimony. Ms. Schultz testified that there was no medical, forensic, or scientific evidence implicating Mr. Nunley in the alleged criminal activity. Ms. Schultz further testified that the only inculpatory evidence against Mr. Nunley was A.Y.'s testimony.
> 8 Therefore, Ms. Schultz testified that she viewed A.Y. as a critical witness and that she held that view going into trial.
> 9 Ms. Schultz conducted a deposition of A.Y. but she did not use the deposition to impeach A.Y. at trial. However, Ms. Schultz testified at the evidentiary hearing that she had an obligation to impeach A.Y. since she was a critical witness. Ms. Schultz also admitted that A.Y. did not testify consistently with her deposition testimony.

10 Although Ms. Schultz could not recall whether or not she impeached A.Y., the trial record unequivocally demonstrates that she did not impeach A.Y. (R. 417-500). For instance, A.Y. testified during her deposition that [], her mother told her what to remember and what to say to the police. (DA 215). Then she denied that her mother told her what to say. (DA 215). A.Y. testified during her deposition that she spent the night with Nunley lots of times, but that this was the first time she had done so without her mother. (DA 206-207). A.Y. also said that the only thing she could remember was Nunley licked her pee pee and she screamed. A.Y. did not remember seeing or touching Nunley's genitalia. (DA 218-21, 223, 231, 238, 239). A.Y. could not remember what she wrote down on a piece of paper. (DA 213, 239).She also testified during her deposition that Nunley did not hurt her.(DA 240). The deposition testimony differs from A.Y.'s trial testimony. (R. 417-500). Other inconsistencies regarding the details of the events also arise between the deposition and trial testimonies.

11 Discrepancies exist about: (1) the time of day A. Y. arrived at Mr. Nunley's residence (DA 207-208, 210, 211, 229-230, 233, Pretrial Hearing 29, R. 459-461); (2) who was at Mr. Nunley's home when A.Y. arrived (DA 207, 208, 210, 229, 230, 231, 233; R. 427, 428, 459, 460, 461, 498); (3) the reason A.Y. ended up in Mr. Nunley's bedroom (Pretrial Hearing 23, 32; R. 430, 463-465); what was written on the note (DA 213, 231, 239; Pretrial Hearing, p. 36-39, 86; R. 435, 441-443, 448-451, 477, 479-480).

12 In her deposition, A.Y. repeatedly denies knowledge of Nunley doing anything but licking her vagina once and making her watch a bad movie. (DA 218-221, 224, 231, 238, 239). She could not remember seeing or touching Mr. Nunley's penis. (DA 231, 238, 239).

In ¶ 11 and ¶ 12, Nunley identified the specific discrepancies, replete with page citations. The State faults Nunley for failing to analyze these discrepancies. (Appellee's Brief, p. 19). Then The State next advances a disingenuous argument that the discrepancies between the deposition testimony and the trial testimony are not necessarily impeaching. (Appellee's Brief pp. 19-22.

On cross examination, Detective Wibbels conceded that A.Y. had made some contradictory statements, "but the meat and potatoes are the same though. (Tr. 774). In closing argument, the prosecutor said "Detective Wibbels, I think, put it right on when he said 'the meat

and the potatoes were always the same.' Ladies and gentlemen, the meat and potatoes is, 'He made me suck on his weenie-bob. He licked my pee-pee.'" (R. 797) In rebuttal closing argument, the prosecutor told the jury:

> You'd remember like Detective Wibbels said, and how he tends to put thins in plain speech, you'd remember the meat and potatoes. All that other stuff, you're not gonna remember. The meat and potatoes. "He made me suck on his weenie-bob, and he made me lick his pee-pee(sic)." Did that ever change? April 14th, 2007, April 18th 2008, November 14th 2008, last Friday. Ms. Schultz talked about, Anne was in here.

(R. 813).

A.Y. testified at a pretrial hearing that Nunley licked her "pee-pee" and made her suck his "weenie-bob." (R. 26). However, less than two months before trial, A.Y. indicated throughout her deposition that she could not recall performing oral sex on Nunley, or even seeing his penis. (DA 218-221, 231-232, 238-239).

So, to answer the prosecutor's question to the jury, "Yes, that did change." The prosecutor and the police agree that the "meat and potatoes" if it happened, the meat and potatoes of the story will stay the same. In this case, the story changed repeatedly. Due to the nature of the deposition questions, it would have been natural for A.Y. to recall that she had performed oral sex on Nunley if that had actually occurred.

The State contends that "little would be gained by proving A.Y. had said she did not remember Nunley's penis on the day she gave her deposition, because the child's reluctance to describe Nunley's penis is not a straightforward sign of fabrication." (Appellee's Brief, p. 21). The State asks this Court to substitute the State's judgment (or its own) for that of the jury. The State does not argue that the jury could not have chosen to disbelieve A.Y.'s story because she

failed to recall the "meat and potatoes" of her own story. That is not the role of this court. The role of this court is to assess whether or not the jury could have disbelieved A.Y. if they had been told about the discrepancies in her testimony. The jury could have, especially when one considers that the prosecution made such a point that, if it happened, you'd remember the "meat and potatoes." (Tr. 774, 797, 813). Moreover, A.Y. stated that she was told what to say and what to remember. (DA. 215).

Finally, the State speculates that competent counsel might rightly have concluded that Nunley's proposed course" impeachment might be "unwise." (Appellee's Brief, pp. 21-22). Schultz did not testify that she made such a strategic decision. In fact, Schultz believed that she had an obligation to point out inconsistencies in A.Y.'s testimony. (PC Vol. II, p. 28). She also admits that not impeaching A.Y. was a mistake. (App. Vol. III 35) ~~(DA ____)~~ Thus, the conclusion of the post-conviction court contravenes the evidence and precedent. As one federal court put it, "It is not the roles of a reviewing court to engage in post hoc rationalization for an attorney's actions "by constructing strategic defenses that counsel does not offer." Or engage in Monday morning quarterbacking. *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990). Our Supreme Court has similarly found that "even if a decision is hypothetically a reasonable strategic choice, it may nevertheless constitute ineffective assistance if the purported choice is actually "made due to unacceptable ignorance of the law or some other egregious failure rising to the level of deficient attorney performance. *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014), (Section III(C)).

Schultz informed the jury "This whole case, the whole issue revolves around whether she's a credible witness, whether you can believe her or not. And, as I said, if you believe her, then he should be found guilty. If you don't believe her, then he should be found not guilty." (R. 45). Ms. Schultz affirmed during her post-conviction testimony that A.Y. was a critical witness

and that her strategy was to persuade the jury that her story was fabricated. (PC Vol. II, p. 26, 28) Thus, impeaching A.Y. was critical to successfully defending Mr. Nunley. (PC Vol. II, p. 26, 28). If the jury had the opportunity to consider A.Y.'s inconsistent deposition testimony and pretrial statements, they likely would not have believed A.Y.'s testimony. This is particularly true of the testimony relating to Count 2.

"In cases which turn largely on questions of credibility… '[t]he jury's estimate of the truthfulness and reliability of a witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.'" *State v. Bowens*, 722 N.E.2d 368, 370 (Ind. Ct. App. 2000), *quoting Lewis v. State*, 629 N.E.2d 934, 937-938 (Ind. Ct. App. 1994).

C. Failing to Object to A.Y.'s Written Testimony

The State agrees that A.Y. wrote down the most critical portion of her testimony and that the trial court entered these papers to be admitted into evidence because they were "essentially testimony." (R. 445) (Appellee's Brief, p. 23). The State then argues that T.R. 611 permits the court to do this. The State cites to no authority in which similar circumstances occur. Rather, the State cites to *Arrieta v. State*, 878 N.E.2d 1238, 1241 (Ind. 2008), and *People v. Tran*, 47 Ca. App. 4th 759, 54 Cal. Reptr. 2d 905, (1996). (Appellee's Brief, pp.23-24). These cases deal with interpreters and are not analogous. A.Y. was capable of testifying and articulating her story to the jury. She had testified about the incident before. There was no reason she could not do it during the trial. Moreover, there were other methods available, such as closed-circuit television, which would have protected Nunley's right to confrontation while removing A.Y. from the courtroom to testify in a more comfortable setting.

The State wrongly asserts that Schultz testified that "this process was no more improper than allowing a witness to testify in the form of a drawing or diagram." The State cites to pages 18-19. However, page 18 is the conclusion of the July 14, 2016 hearing and page 19 is the cover page of the January 12, 2017 hearing. Neither of these pages contain any testimony from Schultz. Schultz was not in attendance for the July 14, 2016 hearing.

In any event, the State mischaracterizes the statement. The passage the State refers to appears in the transcript as follows:

> Q. Okay. Prior to this trial, had you ever seen a witness be permitted to write down a portion of their testimony?
>
> A. I don't – I don't recall ever having been – having seen that happen. I know that in some occasions people will draw diagrams or pictures of what they're testifying about, but as far as actually writing down their testimony instead of stating it to the jury, I have never seen that happen before. Before or since.
>
> Q. Did you find that odd?
>
> A. Yeah, I think it's pretty odd. Different anyway.
>
> Q. Do you thin that it placed undue emphasis on a portion of her testimony?
>
> A. Well, if you think about it from the prospective (sic) that the jury is allowed to take the exhibits and the Judge uses that as an exhibit, then I would think that it perhaps could because what I had seen so many times in trials is if a jury has a question about something, you don't want to replay a witness's testimony – just one witnesses' testimony and put additional emphasis on that part of the testimony. So it would seem to me that if you're showing that to the jury, you are putting more emphasis on that specific piece of testimony that the witness gave as opposed to everything else that was admitted during the trial.

(PC, Vol. II, pp. 30-31)

The State's argument regarding T.R. 611 should not even be considered. The State did not take this position or make such an argument to the trial court. Moreover, the State has purported to be "defending" the post-conviction court's order of denial. The findings of fact and

conclusions of law do not justify the denial of this issue as being based on T.R. 611. Rather, the post-conviction court concluded "Schultz's specific instances of not objecting to items or testimony entered into evidence are not in essence error, and are the result of her judgment as counsel at the time." (App. Vol. III, p. 82 ¶ 11). This conclusion is belied by the evidence.

Schultz did not articulate any strategic or tactical reason for failing to object. Ms. Schultz testified that the written testimony placed undue emphasis on the most critical portion of A.Y.'s testimony. The trial record reveals that Ms. Schultz interposed an objection to the jurors' being allowed to rewatch the Comfort House video outside of the courtroom on the grounds that it placed undue emphasis on the importance of the testimony over other evidence. (R. 615). The then presiding judge sustained the objection with a lengthy explanation, stating that the law prohibits the jury from rehearing testimony without a specific request and then only when there is a dispute about the testimony. (R. 616-618).

The then presiding judge's comments on this topic indicate that a properly interposed objection would have been sustained.

A.Y.'s written testimony placed undue emphasis on the most critical part of her testimony against Mr. Nunley because it was available to the jurors during deliberations. The written testimony was further emphasized by the manner in which it was admitted into evidenced during the trial. Finally, the written testimony presented the juror with a near reenactment of the way in which A.Y. was said to have initially revealed the alleged molestation to her parents.

The written testimony undoubtedly impacted the jurors decision regarding guilt. Absent this testimony there is a reasonable possibility of a different result. When one considers this

issue in conjunction with the impeachment evidence that the jurors did not have the opportunity to consider, there is an even stronger possibility of a different result.

D. Separation of Witnesses Violation

The State, once again, mischaracterizes Nunley's argument. The State claims that "Nunley errs by claiming the deputy prosecutor's presence during A.Y.'s lunch at the trial court's request was a violation of the order." (Appellee's Brief, p. 26). This is not Nunley's claim. Rather, Nunley claims that A.Y.'s being permitted to have lunch with her parents, who were also witnesses in the case, violated the separation of witnesses order.

The State faults Nunley for not providing record citations for his assertions. During her testimony, A.Y. became distressed and started crying. (R. 443). She was refusing to answer questions about the alleged incident. (R. 443). The trial was recessed for lunch. (R. 445). After lunch, A.Y. wrote and read a portion of her testimony. (R. 450). She wrote, "He made me suck on his weenie-bob". She also wrote "He licked my pee pee." After writing this portion of her testimony, she read it out loud to the jury. These items were admitted into evidence and provided to the jury during deliberations. A.Y. testified without any crying or incidents.

The prosecutor's facilitation of the separation of witnesses order does not provide reasonable assurance that there was no collusion between the witnesses. On the contrary, it would seem from the way in which A.Y.'s testimony unfolded, that she was provided with appropriate answers during the recess.

Ms. Schultz did not have a strategic reason for not objecting to the violation of the separation of witnesses order.

A properly interposed objection would have been sustained. At a minimum, the jury should have been instructed that A.Y. had interacted with Tonya and Richard during the recess

in violation of the separation of witnesses order. However, the jury remained unaware of this fact, and counsel failed to advance an argument regarding witness collusion despite the circumstantial evidence supporting such a claim.

E. Failure to Object to State's Exhibit 2

The State asserts that A.Y. had identified the DVD by its Title and print imagery. (Appellee's Brief, p. 28). This is not accurate. The record is devoid of any mention to the Title of the DVD by A.Y. When asked about the DVD, A.Y. testified "I had it memorized but I don't remember it now." (R. 469). When asked if she remembered what she saw on the outside of the DVD, she said, "Huh uh, I don't..., I gotta look at the CD one more time." (R. 469). A.Y.'s testimony is insufficient to authenticate the DVD. *See, e.g., Valdez v. State*, 2016 Ind. App. LEXIS 249, P15 (exhibits properly excluded where defendant produced no evidence that these documents were what he said they were).

Thus, under the Indiana Rules of Evidence, a properly interposed objection would have been sustained. Since the DVD is the only tangible evidence of Count V is the DVD. Mr. Nunley was undoubtedly prejudiced by the admission of this inculpatory evidence. This is especially true considering the inconsistencies in A.Y.'s statements.

F. Failure to Object to Vouching Testimony

Detective Wibbels vouched for the credibility of A.Y. when he testified that he did not feel that A.Y. had been coached and that he believed her. (R. 686-687, 688-689, 711).

Vouching testimony is clearly inadmissible under the Indiana Rules of Evidence. Ind. Evidence Rule 704(b); *Farris v. State*, 818 N.E.2d 63 (Ind. Ct. App. 2005); *Powell v. State*, 714 N.E.2d 624 (Ind. 1999); *Dietrick v. State*, 641 N.E.2d 679 (Ind. Ct. App. 1994).

If Ms. Schultz had interposed an objection to this testimony the trial could would/should have sustained the objection. Clearly, this testimony was inadmissible. It is equally clear that the prejudicial effect of a police officer testifying that because of their experience they are able to tell when someone is telling them the truth and then vouching for the veracity of A.Y. was prejudicial to Mr. Nunley and had the effect of bolstering A.Y.'s credibility so that it could not be effectively attacked on cross-examination.

Ms. Schultz testified that she did not have a strategic reason to allow such testimony.

Ms. Schultz's performance was deficient for failing to object, and Mr. Nunley was prejudiced by the bolstering testimony of Detective Wibbels.

ARGUMENT II

A. *Appellate Counsel's Failure to Raise Issues Well*

The State faults Nunley for assuming that this Court will look at the original argument presented by McGovern. Nunley believes that this argument is a valid issue of law, but that McGovern failed by failing to cite to relevant Supreme Court authority. The facts presented in the original argument were presumed because Nunley's argument merely attempts to show what else McGovern should have argued in relation to what was already argued. In other words, Nunley's arguments are in addition to, not in place of, the arguments presented.

A. Nunley's Sentence

Nunley claims appellate counsel was ineffective for failing to raise sentencing arguments on direct appeal. Nunley has asked this Court to consider that the episodic nature of the crimes alleged. The State claims that Nunley admits to sexually abusing A.Y. (Appellee's Brief, p. 41). This is not true. Nunley has always and continues to maintain his innocence.

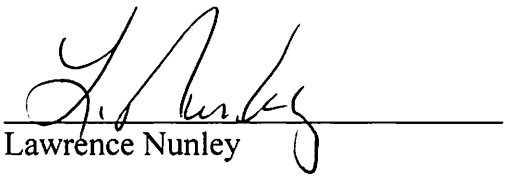
The State refers to Nunley's "deplorable character". (Appellee's Brief p. 42). The State cites to Nunley's refusal to cooperate with the presentence investigation report without context. Nunley was told by his attorney that she would assist him with filling out the papers. She never did. When the probation officer came to see Nunley he said, "No one asked me anything about my life before convicting me for something I didn't do. How would answering the questions be of any benefit to me now?" Nunley maintains his innocence and felt it best to remain silent. There is no obligation to participate in the presentence investigation. Next, the State cites to the abuse of K.S. (Appellee's Brief, p. 42). These accusations are uncharged conduct that have never been tested under the law. The State's attempt to present them as factual is little more than a smear campaign meant to play on the emotions of this court. As to the misconduct in the jail. The entire pod received a write up for alcohol found in the cell of another inmates' (Aaron Cherry). Again, these allegations have never been substantiated or explained.

If the allegations are believed, Mr. Nunley did not harm A.Y. in a manner more than is inherent in the criminal offenses. The underlying criminal acts are as follows: (1) that Mr. Nunley licked A.Y.'s vagina, and (2) that Mr. Nunley made A.Y. suck his penis. (R. 450, 472, 497). There is nothing inherent in the commission of these crimes that is more severe or harmful than what is inherent in the commission of the offenses themselves. In *Fointno v. State*, 487 N.E.2d 140 (Ind. 1986) the Supreme Court of Indiana held that a sentence was manifestly unreasonable given the defendant's lack of criminal history and that the defendant did not brutalize the victim, "except as is inherent in the commission of the crimes." *Id.* at 148. In so holding, the Indiana Supreme Court declared that *"a rational sentencing scheme should punish more severely those who brutalize the victims of their crimes." Id.* (emphasis added).

CONCLUSION

For all of the foregoing reasons, the judgment of the post-conviction court should be reversed and this matter should be remanded for a new trial. In the alternative, this matter should be remanded with instructions to resentence Mr. Nunley to concurrent terms

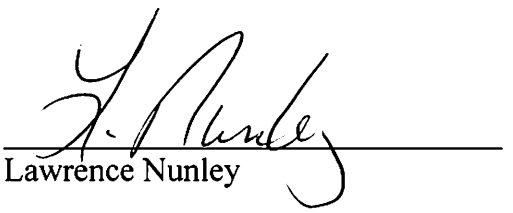
Respectfully submitted,



Lawrence Nunley

WORD COUNT

I, Lawrence Nunley, hereby verify that the foregoing Reply Brief of Appellant is less than 7,000 words; to wit: 4,184 words, according to the electronic word count feature in *Microsoft Word*.



Lawrence Nunley

CERTIFICATE OF SERVICE

I verify that on the 27th day of December, 2017, I filed the foregoing Brief of Appellant with the Indiana Court of Appeals by depositing the same in the **United States Mail,** first-class postage prepaid and affixed properly addressed as follows: Indiana Court of Appeals, 217 State House, Indianapolis, Indiana 46204

I also certify that on the 27th day of December, 2017, I served a true and accurate copy of the foregoing Brief of Appellant upon the Appellee by depositing the same in the **United States Mail**, first-class postage prepaid and affixed, properly addressed as follows:

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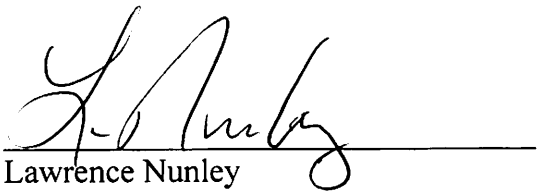

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