

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Charleston County
On Certiorari to the Court of Appeals
The Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2012-210606

IN THE MATTER OF THE CARE AND TREATMENT
OF GILBERT GONZALEZ,

RECEIVED

MAY 23 2013

S.C. Supreme Court

Petitioner,

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE PRESENTED

The circuit court properly allowed the State to argue the jury could draw a negative inference from Petitioner's failure to present testimony from his independent expert.

STATEMENT OF THE CASE

Respondent concurs with Petitioner's procedural Statement of the Case.

STATEMENT OF FACTS

In 1985, Appellant Gilbert Gonzalez (“Gonzalez”) (aka Gilbert Zubia), pled guilty to committing a lewd act on a minor arising from an incident involving a four year old girl and an eight year old girl. He approached the girls in a store parking lot and asked to see their underwear. When the girls refused, Gonzalez pulled up the four year old girl’s skirt, put his hand inside her underwear and fondled her vaginal area. (Record on Appeal [R.], p. 233).

In 1986, Gonzalez pled guilty to one count of first degree criminal sexual conduct with a minor, and one count of lewd act on a minor, and was sentenced to consecutive incarceration terms of thirty years and ten years, respectively. The criminal sexual conduct charge arose from the sexual assault of a six year old girl. Gonzalez was working at the girl’s home when he lured her into the garage and performed oral sex on her. He also rubbed his penis on her vaginal area until he ejaculated. (R., pp. 232-233).

The lewd act charge arose from the sexual assault of a five year old girl. Gonzalez lured her into a truck and fondled her vaginal area. This offense occurred while Gonzalez was out on bond on the 1985 lewd act charge, and one day before he was scheduled to appear in court for sentencing on that charge. (R., p. 233).

Pursuant to the South Carolina Sexually Violent Predator Act (“SVP Act”), the Multi-Disciplinary Team (“MDT”) reviewed Gonzalez’s case prior to his release from incarceration, found probable cause to believe he met the criteria for civil commitment and referred the case to the Prosecutor’s Review Committee (“PRC”) for further review. The PRC also found probable cause to believe Gonzalez met the criteria for commitment, and

referred the case for civil commitment proceedings. (R., p. 231).

On February 24, 2006, Respondent State of South Carolina (the “State”) commenced a civil commitment proceeding in the Charleston County Court of Common Pleas. The circuit court found probable cause to believe Gonzalez is a sexually violent predator, and appointed Pamela Crawford, M.D. (“Dr. Crawford”) to perform a mental evaluation.

Dr. Crawford concluded Gonzalez suffers from the mental abnormality of pedophilia, and met the criteria for civil commitment under the SVP Act. On October 3, 2006, the circuit court granted Gonzalez’s request for an independent evaluation by Thomas Martin, M.D., and ordered compensation up to \$5000 for the evaluation and trial assistance. (R., p. 298).

On or about December 5, 2006, Gonzalez moved for financial assistance to hire a second expert to perform another independent evaluation and participate at trial. Gonzalez indicated Dr. Martin performed the previously ordered evaluation on October 19, 2006, and then simply stated “Dr. Martin informed [Gonzalez’s] counsel that he will not be able to testify on [Gonzalez’s] behalf.” (R., pp. 300-301). The State objected to the request for a second evaluation, arguing it was an attempt to “doctor shop” because Dr. Martin’s evaluation was not favorable to Gonzalez. (R., pp. 303-306) After a hearing, the circuit court denied the motion “with leave to renew the request if there is some compelling reason why the expert originally approved by the court will not participate in the respondent’s trial.” (R., p. 308).

Gonzalez moved for reconsideration of the circuit court’s order, arguing his counsel needed access to expert advice and consultation in preparing for trial and challenging Dr.

Crawford's opinion. (R., pp. 309-310). The State again opposed the requested relief, noting Gonzalez's counsel had indicated Dr. Martin might be available for trial if the State agreed to limit his cross-examination to only Dr. Crawford's methodology and testing, and therefore, Gonzalez failed to present any "compelling reason" Dr. Martin was unavailable for trial. (R., pp. 314-318), The circuit court denied the motion, finding Gonzalez's motion did not assert anything more than what was argued on the original motion. (R., pp. 312-313).¹

The matter was called for a jury trial on February 9, 2009, before the Honorable Deadra L. Jefferson, Circuit Court Judge.² Prior to trial, the circuit court denied Gonzalez' renewed motion for assistance in obtaining a second expert, finding the SVP Act plainly provided for funding one expert, and the court did not have authority to overrule the previous court order on the issue. (R. pp. 7-8).

Dr. Crawford testified regarding the information she considered during the course of evaluating Gonzalez, including two interviews with Gonzalez and the facts of his offenses. She stated Gonzalez only admitted committing one of his three known offenses, and he indicated he believed it happened because his girlfriend put "a spell" on him. (R., pp. 16-32).

Dr. Crawford concluded Gonzalez has the mental abnormality of pedophilia, sexually attracted to females, nonexclusive, as well as antisocial personality disorder. She testified Gonzalez's pedophilia and antisocial personality disorder made him a high risk to

¹The State submitted its Reply before receiving the Order denying the motion.

²Two earlier trials ended in mistrials when the juries were unable to reach unanimous verdicts.

sexually re-offend against very young children, and he needed to be confined for long term control, care and treatment. She stated outpatient treatment would not be appropriate because Gonzalez did not believe he needed any treatment. (R., pp. 39-56).

At the conclusion of the State's case, Gonzalez's counsel inquired about the State's intention to argue a negative inference from his failure to call an expert witness. When the State indicated it did intend to make such an inference, the circuit court ruled the State could ask Gonzalez if he had been evaluated by another expert, and then argue to the jury regarding a negative inference from Gonzalez's failure to call the expert as a witness at trial. (R., pp. 59-64).

Gonzalez testified he had a religious experience while incarcerated, and he repented of his prior conduct. He stated his religious experience made him sorry for his conduct against children, and he would not harm another child. He presented numerous certificates he earned while incarcerated, and testified he took courses and obtained a college degree. (R., pp. 70-107).

On cross-examination, Gonzalez stated he did not commit two of the crimes to which he pled guilty, and reiterated his belief whatever crimes he committed were due to a "spirit overtaking" him. Over counsel's objection, he also testified Dr. Martin evaluated him in October 2006, after Dr. Crawford issued her report recommending civil commitment. (R., pp. 109-132).

Gonzalez's girlfriend testified she met him while he was incarcerated, and they got involved after Gonzalez helped her son. She stated he is a very trustworthy person, and within the context of her visiting him in prison, she believed he was a very truthful person.

(R., pp. 138-141, 144, 149). On cross-examination, she admitted she had never observed Gonzalez in the community, but only in prison visiting rooms guarded by correctional officers. (R., pp. 153-156).

During closing arguments, over Gonzalez's objection, the State referenced Gonzalez's testimony that Dr. Martin independently evaluated him, and then argued the jury could infer Dr. Martin's testimony would be adverse to Gonzalez because Dr. Martin did not testify at the trial. (R., pp. 185-186). Gonzalez's counsel then argued the State had the burden of proof, and could have called Dr. Martin to testify if his testimony would have benefitted the State's case. (R., pp. 190-204).

The circuit court charged the jury to consider only competent evidence presented, and gave extensive charges regarding the jury's determination of witness credibility and the State's burden of proof. (R., pp. 209-220). Gonzalez did not object to the court's charges as given, but simply renewed his previous objections. (R., p.220).

The jury found Gonzalez is a sexually violent predator as defined by the SVP Act. (R., p. 221). The circuit court denied Gonzalez's motion for judgment notwithstanding the verdict, and ordered Gonzalez be committed to the Department of Mental Health for long term control, care and treatment. (R., pp. 222-230, 319). This appeal followed.

By opinion filed January 4, 2012, the South Carolina Court of Appeals affirmed the circuit court rulings, and denied the Petition for Rehearing on March 2, 2012. (Appendix, pp. 1-2, 15). By Order dated December 20, 2012, this Court granted the Gonzalez's Petition for Writ of Certiorari to the Court of Appeals only as to the closing argument negative inference issue.

ARGUMENT

The circuit court properly allowed the State to argue the jury could draw a negative inference from Appellant's failure to present testimony from his independent expert.

Gonzalez contends the circuit court erred in allowing the State to ask him about Dr. Martin's independent evaluation, and then argue the jury could draw a negative inference from his failure to present Dr. Martin's testimony at trial. On appeal, he submits this impermissibly shifted the burden of proof to him. As a threshold matter, the issue raised on appeal is not preserved for appellate review. Further, Gonzalez again attempts to impose criminal law principles on a civil commitment proceeding under the SVP Act.

In the circuit court, Gonzalez asserted the State asking him about Dr. Martin, and commenting on his failure to call Dr. Martin as a witness, violated the discovery rules regarding "consulting" experts, and the prejudice to Gonzalez outweighed the probative value. The circuit court found the discovery rules did not apply because Dr. Martin was a "retained" expert under the express provisions of the SVP Act.³ The court then ruled the case was no different from any other civil case in which a party can argue a negative inference from another party's failure to call a witness, and therefore, the State could comment in closing arguments on Gonzalez's failure to present Dr. Martin at trial. (R., pp. 59-65).

³Rule 26(b)(4)(B), SCRCP, provides "[a] party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial." A party is not required to disclose or produce an expert only "consulted informally, or consulted and not retained or specially employed." *Id.* (emphasis added). The SVP Act provides that a person subject to a court ordered evaluation "may retain a qualified expert of his own choosing" to conduct an examination. S.C. Code §44-48-90 (Supp. 2008) (emphasis added).

After the jury verdict, Gonzalez moved for a new trial on two specific grounds: 1) the court's failure to give a good character jury charge; and 2) allowing the State to tell the jury they could draw a negative inference from his failure to present Dr. Martin as a witness. (R., p. 25). The court denied the motion, finding the evidence elicited regarding Dr. Martin was more probative than prejudicial, and both parties argued in closing about the absence of witnesses and evidence. (R., pp. 228-230).

Gonzalez **never** argued to the circuit court that allowing the evidence and argument improperly shifted the State's burden of proof to him. Therefore, the issue is not preserved for review by the appellate courts. *See State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263 (1995) (a party may not argue one ground below and then argue different ground on appeal); *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989) (issue not preserved for appeal where one ground is raised below and another ground is raised on appeal); *see also State v. Perez*, 334 S.C. 563, 514 S.E.2d 754 (1999) (issue may not be raised for first time on appeal, but must have been raised to and ruled on by trial judge to be preserved for appellate review).

Even if the issue is preserved for review, however, the State submits Gonzalez's assertion is meritless. Gonzalez makes nothing more than a conclusory contention that the same constitutional rights and rules of evidence applicable to criminal cases should also apply in SVP cases, and then states that allowing the State to argue the negative inference from the absence of Dr. Martin's testimony shifted the burden of proof from the State to him.⁴ (Brief of Appellant, pp. 9-10, 11).

⁴It is undisputed the circuit court accurately and adequately charged the jury regarding the State's burden of proof beyond a reasonable doubt. (R., pp. 214-216).

The SVP Act does bestow on individuals subject to it some of the rights normally associated with criminal prosecutions, but it is not intended to be punitive in nature and merely sets forth a civil process for the commitment and treatment of sexually violent predators. See In Re: Care and Treatment of Matthews, 345 S.C. 638, 550 S.E.2d 311, 316 (2001) (the SVP Act is a civil, non-punitive scheme); In Re: Care and Treatment of Canupp 380 S.C. 611, 671 S.E.2d 614, 617 (Ct. App. 2008); In Re: Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118, 121 (Ct. App. 2007). The SVP Act's inclusion of certain specific rights normally associated with criminal cases does not make proceedings thereunder criminal in nature, or entitle the person to other rights not delineated therein.⁵ See Canupp, 671 S.E.2d at 617 (unlike criminal cases, there is no constitutional right to decline to testify in civil commitment proceedings); see also In Re: Care and Treatment of Manigo, 398 S.C. 149, 728 S.E.2d 32, 36 (2012) (same) (citing Canupp). Notwithstanding Gonzalez's effort to impose inapplicable criminal law principles on SVP Act proceedings, the State was simply allowed to solicit evidence and argue inferences like any party in a civil case.

If a party fails to present an available witness on a material issue, and the witness is within his control, the jury may infer the witness' testimony would not have been favorable to the party. Duckworth v. First National Bank, 254 S.C. 563, 176 S.E.2d 297, 304 (1970).

⁵As a matter of statutory construction, the fact the Legislature only included specific aspects of criminal law in the SVP Act clearly indicates it did **not** intend for non-specified criminal law components to apply in SVP proceedings. See Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651, 655 (2002) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'") (quoting Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 582 [2000]).

In this context, “control” means the witness is in such relationship to the party it is likely his presence could be procured. *Id.* It is always proper for an attorney in argument to the jury to point out the failure of a party to call a witness. Holmes v. Black River Elec. Co-op., Inc., 274 S.C. 252, 262 S.E.2d 875, 879 (1980); State v. Hammond, 270 S.C. 347, 242 S.E.2d 411, 416 (1978) (failure to call a witness is proper argument); *see also* Douglas v. State, 332 S.C. 67, 504 S.E.2d 207, 309 (1998) (When defendant presents evidence at trial, and there are available witnesses who are or should be cognizant of material facts, it is not improper for the prosecutor to comment on defendant’s failure to produce them.).

In Hoverter v. Dir., Patuxent Institution, 231 Md. 608, 188 A.2d 696 (1963), an individual appealed an order civilly committing him, contending the State was improperly allowed to comment to the jury about his failure to produce a psychiatrist who examined him at State expense. The Court of Appeals found no error, noting the individual requested the examination and voluntarily took the stand at trial. Citing the “well settled rule” that failure of a party to produce an available witness on a material issue gives rise to an inference the testimony would be unfavorable, the Court held the issue was a legitimate subject for comment in argument to the jury. *Id.* at 696-697; *see also* Gray v. Dir., Patuxent Institution, 245 Md. 80, 224 A.2d 879 (1966) (same) (citing Hoverter).

By court order, the circuit court authorized Gonzalez to **retain** Dr. Martin to perform an independent mental evaluation, and Dr. Martin in fact performed the evaluation pursuant to the court order. Contrary to Gonzalez’s assertion Dr. Martin was unavailable as a witness for him, as evidenced by documents filed in the circuit court when he sought a second expert, Dr. Martin **was available** to testify and assist counsel in trial preparation. He simply would

not testify favorably for Gonzalez, and the State refused to voluntarily limit Dr. Martin's cross-examination if Gonzalez called him as a witness. (R., pp. 300, 303, 309, 314). As the circuit court noted, a witness is not unavailable simply because his testimony would not be beneficial to the party.⁶ (R., p. 62).

Dr. Crawford's testimony established all material issues necessary to the State's case-in-chief. Thus, the State could not show a "substantial need" to call Dr. Martin as a witness, or that an inability to compel his testimony would present "undue hardship" to the State. *See State v. Jones*, 383 S.C. 535, 681 S.E.2d 580, 586 (2009) (State must show "substantial need" and "undue hardship" in order to compel a defendant's non-testifying expert as a witness). Further, assuming Dr. Martin essentially agreed with Dr. Crawford's conclusions, his testimony would be cumulative, and the State would no doubt be accused of unfairness and attempting to "gild the lily" if it called Dr. Martin as a witness for the State. *McGee v. Bruce Hospital System*, 321 S.C. 340, 468 S.E.2d 633, 638 (1996) (fairness is an important consideration in determining whether a party can compel the testimony of an expert employed by the opposing party, and the traditional limitations excluding prejudicial, misleading or cumulative evidence apply).

Given the fact Dr. Martin was retained as an expert for Gonzalez and paid for his services pursuant to a court order, he was within Gonzalez's control for purposes of testifying

⁶Gonzalez's contention Dr. Martin "refused to testify" is contradicted by the record. Rather, the record indicates Gonzalez sought to "expert shop" after Dr. Martin advised counsel his opinion was not favorable to Gonzalez. Gonzalez's reason for not calling Dr. Martin is starkly revealed by his attempt to limit the State's cross-examination of Dr. Martin. In addition, as the circuit court pointed out at trial, Gonzalez could have compelled Dr. Martin's testimony by subpoena. The simple fact is Dr. Martin's testimony would not be favorable to Gonzalez.

at trial. Gonzalez did not even attempt to present Dr. Martin as a witness, and the State was entitled to argue the jury could infer from his absence that Dr. Martin's testimony would be adverse to Gonzalez. Therefore, the Court of Appeals properly affirmed the circuit court ruling on this issue.

CONCLUSION

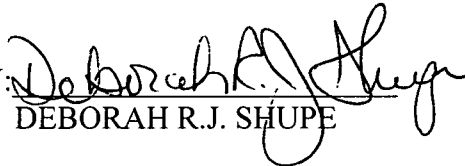
Based on the foregoing, Respondent respectfully submits the Court of Appeals opinion should be affirmed.

Respectfully submitted,

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May 23, 2013

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IN THE MATTER OF THE CARE AND TREATMENT
OF GILBERT GONZALEZ,

Petitioner,

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Brief of Respondent on Petitioner by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 23th day of May, 2013.



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