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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Honorable Michael S. Holt, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF WILEY L. CHAPMAN,

APPELLANT.

APPELLATE CASE NO. 2022-000956

INITIAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this Sexually Violent Predator case, did the trial court err in prohibiting appellant from cross-examining the Attorney General's hired expert about outpatient treatment for sex offenders that she provided?

STATEMENT OF THE CASE

The Attorney General instituted commitment proceedings against appellant Wiley Chapman under the Sexually Violent Predator ("SVP") Act and on June 6, 2022, appellant was tried in Chesterfield County before the Honorable Michael S. Holt and a jury. Tr. 1. Suzanne J. Shaw represented the Attorney General. Tr. 1. James K. Falk represented appellant. Tr. 1. The jury found appellant was an SVP and Judge Holt ordered him committed. Tr. 440, l. 12 – 441, l. 10. This appeal follows.

STANDARD OF REVIEW

"The scope of cross-examination is within the discretion of the trial judge, whose decision will not be reversed on appeal absent a showing of prejudice." State v. Pradubsri, 403 S.C. 270, 276, 743 S.E.2d 98, 101 (Ct. App. 2013) (reversing the trial judge's refusal to allow cross-examination regarding mandatory minimum sentences witness avoided to show bias). "Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002).

ARGUMENT

In this Sexually Violent Predator case, the trial court erred in prohibiting appellant from cross-examining the Attorney General's hired expert about outpatient treatment for sex offenders that she provided.

The key question in appellant's SVP trial was whether he was likely to sexually reoffend unless confined. The SVP Act defines a sexually violent predator as a person with a mental abnormality or personality disorder that makes them "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1)(b). In her opening statement, the Attorney General told the jury "that third element, likely to reoffend, is where you really need to focus your attention is what do you ultimately believe and I must prove that to you beyond a reasonable doubt." Tr. 98, l. 7 – 11.

The Department of Mental Health ("DMH") evaluator opined that appellant did not meet the definition of an SVP. Tr. 331, l. 22 – 25. Dr. Christopher Gillen ("Gillen") found that appellant had the required convictions and suffered from a personality disorder. Tr. 315, l. 2 – 317, l. 15. Dr. Gillen found appellant would meet the criteria for antisocial personality disorder except that no evidence of conduct disorder existed before age 15. Tr. 333, l. 17 – 334, l. 19. Dr. Gillen and the Attorney General's hired expert, agreed that appellant had "other specified personality disorder with antisocial traits." Tr. 156, l. 13 – 22. Tr. 315, l. 2 – 8.

But Dr. Gillen concluded that this personality disorder did not qualify appellant for commitment. Tr. 331, l. 14 – 21. He explained that while personality disorders are chronic and do not go away, they lessen in severity after a person reaches age 40. Tr. 326, l. 11 – 329, l. 12. Appellant was 56 years old at the time of his trial. Tr. 391, l. 8 – 9. Dr. Gillen found that appellant's personality disorder had lessened and that it was no longer "severely impacting his

emotional or volitional choices that he's making." Tr. 328, l. 22 – 329, l. 12. "He's making choices to not commit sexual offenses or sexually problematic behavior and he's been doing that now for over 30 years." Tr. 328, l. 22 – 329, l. 12. Appellant's impulsive behavior had decreased in the last twelve years. Tr. 328, l. 22 – 329, l. 12. Dr. Gillen said, "And so, again, this is all evidence that speaks against someone's personality disorder being a qualifying predisposing condition for civil commitment in an SVP case." Tr. 328, l. 22 – 329, l. 12.

The Attorney General hired Dr. Emily Gottfried ("Gottfried") for a second opinion after the DMH evaluator determined appellant was not an SVP. Tr. 115, l. 4 – 17. Dr. Gottfried was the director of the sexual behaviors clinic and lab at MUSC. Tr. 107, l. 16 – 18. Her clinic performs "evaluations of individuals who are either convicted of sexual offenses or been charged with sexual offenses. We provide treatment as well. So it's assessment, evaluation, and treatment." Tr. 107, l. 19 – 108, l. 3. She acknowledged that MUSC is compensated for second opinions and "routinely" performs them for the Attorney General, but denied that her salary was affected by her recommendation or that she had any incentive to find that people met the SVP definition. Tr. 112, l. 5 – 23.

Dr. Gottfried found an additional personality disorder than Dr. Gillen—paraphilic coercive disorder.[1] Tr. 165, l. 9 – 21. She described it as "sexual arousal to coercion." Tr. 165, l. 9 – 21. "So that's like sexualized power over another person. Not just a means to an end to have sex with somebody who doesn't want to have sex with you, it's the actual arousal to the acts of having that power over someone, that arousal to raping someone." Tr. 165, l. 17 – 21. Appellant's convictions involved raping the twenty-year-old sister of one of his cousin's girlfriends when he was also twenty years old; raping a fifteen-year-old girl that appellant said he

[1] This disorder is also referred to as "biastophilia." Tr. 315, l. 14 – 21.

was dating (appellant was 21); and raping a woman in her sixties during an attempted burglary (appellant was 25). Tr. 128, l. 4 – 129, l. 12. Tr. 131, l. 6 – 133, l. 5. Tr. 136, l. 21 – 139, l. 6.

Dr. Gillen disagreed with the state's expert's diagnosis of paraphilic coercive disorder. Tr. 317, l. 16 – 17. He explained that paraphilic coercive disorder was "explicitly excluded" from the DSM-5. Tr. 318, l. 1 – 319, l. 17. The authors of the DSM-5 "were concerned that such a diagnosis would pathologize, or a better way to put that is, make a mental illness of what is truly criminal behavior, the rapes. So they deliberately excluded that." Tr. 318, l. 19 – 25.

Dr. Gillen said he had made the coercive diagnosis in the past and did not agree that no such paraphilia existed, but he acknowledged the controversy around the diagnosis. Tr. 319, l. 9 – 17. He thought the controversy made it important to be "100 percent certain" about such a diagnosis and that the sexual offense was not "due to something else." Tr. 319, l. 9 – 17. He opined that appellant's rapes were not paraphilic. Tr. 319, l. 18 – 20. He said appellant was callous and, "Quite frankly, it sounds like he wanted what he wanted and he didn't care how he got it." Tr. 320, l. 21 – 321, l. 10. Appellant did not have "a specific deviant interest in rape." Tr. 321, l. 6 – 10. Appellant had no "rape kit," which Dr. Gillen explained were preparatory materials such as ropes and knives and is an indication of paraphilic motivation. Tr. 321, l. 11 – 17. Most of appellant's criminal behavior was nonsexual in nature. Tr. 321, l. 18 – 22. Dr. Gillen also found important that if the victims had consented, appellant would have been "content to go along with the consensual sex" and that he was not "aroused particularly by the fact that they were non-consenting." Tr. 322, l. 1 – 10. Appellant had a "very high sexual preoccupation." Tr. 322, l. 1 – 10.

Before the trial began, the Attorney General moved in limine to prohibit appellant from asking questions about sex offender treatment. Tr. 38, l. 12 – 44, l. 13. She argued that the type

of treatment was "really not a question the jury needs to be considering" and that hearing about treatment would confuse them. Tr. 38, l. 12 – 44, l. 13. Appellant argued that the question was whether he needed to be confined for treatment in a secure facility or whether he could receive outpatient treatment. Tr. 38, l. 12 – 44, l. 13. Defense counsel linked the question of outpatient treatment to the likelihood of reoffending and the definition of an SVP in the statute. Tr. 43, l. 1 – 4. The Attorney General argued that treatment is not a part of the commitment evaluation. Tr. 38, l. 12 – 44, l. 13. "It's not what kind of treatment does he need, where should it be. It's not that. It's either he's got it or he doesn't." Tr. 43, l. 16 – 20. The judge agreed it would confuse the jury and granted the Attorney General's motion. Tr. 43, l. 21 – 44, l. 7. Defense counsel indicated he would like to proffer Dr. Gottfried's testimony at the proper time. Tr. 44, l. 8 – 14.

The Attorney General opposed a proffer when defense counsel raised the issue after Dr. Gottfried's direct-examination. Tr. 199, l. 2 – 8. Defense counsel stated he needed to proffer his questions in order to preserve the record and the Attorney General responded, "No, Your Honor. I would not, I would not even consent to hear the proffer. Your Honor has ruled that we're not going to be discussing treatment or type, and that that is the Court's ruling and I don't think it is appropriate." Tr. 199, l. 4 – 8.

The Attorney General's opposition to the proffer came after defense counsel argued that she opened the door to questions about treatment during Dr. Gottfried's direct-examination. Tr. 196, l. 9 – 197, l. 3. Defense counsel correctly pointed out that on direct, Dr. Gottfried said she was on the board of directors for the Association for the Treatment of Sexual Abusers. Tr. 110, l. 7 – 14. As previously quoted, she told the jury that her clinic at MUSC provides treatment. Tr. 107, l. 19 – 108, l. 3. The court ruled that the door had not been opened, but allowed defense counsel to proffer his questions. Tr. 198, l. 15 – 200, l. 1. Tr. 217, l. 18 – 23.

Dr. Gottfried agreed that MUSC had begun "an intensive outpatient treatment program." Tr. 218, l. 18 – 21. A patient comes to MUSC for two days and has a full day of treatment. Tr. 218, l. 22 – 220, l. 7. The program then changed to group and individual treatment over ten weeks. Tr. 218, l. 22 – 220, l. 7. The treatment included talk therapy, biofeedback, behavioral techniques, and cognitive therapy. Tr. 218, l. 22 – 220, l. 7. She thought the program was successful and that it seemed "like it's going well." Tr. 218, l. 22 – 220, l. 7. Patients voluntarily participated in the program and were not necessarily under a court order. Tr. 218, l. 22 – 220, l. 7.

During the cross-examination of the DMH expert, Dr. Gillen, the Attorney General grilled him about the viability of appellant's plan to not reoffend if he were released. Tr. 363, l. 17 – 369, l. 9. She asked if appellant's plan to live with his brother was viable because his brother did not believe appellant committed any crimes. Tr. 363, l. 17 – 369, l. 9. She asked if a treatment program run by a sheriff that appellant said he would enter existed and Dr. Gillen confirmed it did not. Tr. 363, l. 17 – 369, l. 9. She asked Dr. Gillen if he had spoken to the probation department and confirmed that other than registering as a sex offender, appellant would "have absolutely no restraints." Tr. 363, l. 17 – 369, l. 9. She questioned Dr. Gillen about whether appellant could actually live at the address he gave SCDC as his discharge address. Tr. 363, l. 17 – 369, l. 9. She asked:

> So, let's move on—so we have an outpatient treatment program for release that doesn't exist. We have a brother who does not believe he even committed these offenses and will not hold him accountable. We have another alleged sister who won't even admit she's related to him. Do you think these are supportive and appropriate community supports?

Tr. 367, l. 18 – 24. After Dr. Gillen's answer acknowledging problems with appellant's release plans, the Attorney General asked, "And those are risk factors for re-offense, correct?" Tr. 368, l. 16.

The trial judge erred in accepting the Attorney General's argument that questions about treatment were not relevant and would confuse the jury. As the Attorney General's question about a deficient release plan being a factor for reoffending shows, the question of whether outpatient treatment was available bears directly on the element of whether a person is likely to reoffend if not confined. See S.C. Code Ann. § 44-48-30(b). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

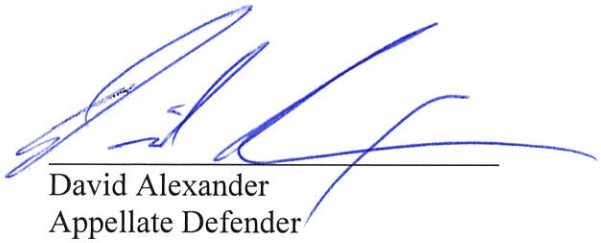
The availability of outpatient treatment for sex offenders makes it less likely that a defendant in an SVP case will reoffend unless confined for treatment. Dr. Gottfried expressed her belief during the proffer that outpatient treatment works. Appellant was entitled to tell the jury his plan for not reoffending. It was important for the jury to know that the Attorney General's hired expert provided outpatient treatment. This evidence bears directly on the question of whether a defendant is likely to reoffend, which the Attorney General told the jury in her opening was the central question in this case.

Our Supreme Court has called this the "third element" in an SVP case. See Matter of Snow, 425 S.C. 544, 549, 823 S.E.2d 467, 470 (2019). In Snow, the Court specifically credited the expert's belief that outpatient treatment for the defendant would not be sufficient because of his risk to women in the community. Id. at 551, 823 S.E.2d at 470. Not only is information about the availability of outpatient treatment relevant and admissible, the Attorney General

opened the door to this testimony both through its initial questioning of Dr. Gottfried and its intensive questioning about appellant's release plan. While appellant was able to ask Dr. Gillen whether outpatient treatment was available on re-direct, the jury needed to hear from about the "intensive" outpatient treatment program the state's hired expert ran. In this case with dueling experts, this error prejudiced appellant. This Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and remand for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of March, 2023.