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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF TRACY FABIAN,

APPELLANT

APPELLATE CASE NO. 2022-001302

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial judge abuse her discretion by admitting evidence of allegations of sexual misconduct that were denied by Appellant as well as evidence of the related criminal charges which were either dismissed by the prosecutor or the subject of a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), since the evidence was not admissible pursuant to Rule 703, SCRE, and its admission violated Rule 403, SCRE, given that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the evidence was hearsay, unsubstantiated, and wholly unreliable?

STATEMENT OF THE CASE

The state filed a petition seeking to involuntarily commit Appellant pursuant to the Sexually Violent Predator Act (SVPA). The commitment trial commenced on August 29, 2022 before the Honorable Diane S. Goodstein, and a jury. Tr. 1. Suzanne Shaw represented the state. Tr. 1. James Falk represented Appellant. Tr. 1.

On August 31, 2022, the jury found Appellant was a sexually violent predator under the SVPA. Tr. II 237, ll. 18-24. Judge Goodstein ordered Appellant be committed to the Department of Mental Health for long term control, care, and treatment. R. * (Amended Order of Commitment).

This appeal follows.

STATEMENT OF FACTS

Appellant pled guilty in 1994 to first degree criminal sexual conduct with a minor and kidnapping and was sentenced to thirty years imprisonment. Tr. II 48, ll. 2-13; R. * (Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2). Appellant admitted to committing a sexual battery on an eight year old girl in 1993. Tr. II 57, l. 16 – 59, l. 2. He was released from incarceration in 2010. Tr. II 61, ll. 13-16.

In 2014, Appellant was charged with two counts of first degree criminal sexual conduct with a minor. The underlying allegations were that Appellant digitally penetrated a five year old girl and a six year old girl, who were the daughters of his friends, in the backseat of his car while Appellant's then girlfriend was present. Tr. II 62, ll. 10-24; R. * (Plaintiff's Exhibit No. 3 and Plaintiff's Exhibit No. 4). On another occasion, Appellant allegedly digitally penetrated the six year old girl while the child was lying in bed between Appellant and his then girlfriend. Tr. II 62, ll. 19-24. In relation to these allegations, Appellant pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to two counts of first degree assault and battery and was sentenced to 551 days' time served. He was released from jail in September 2015. Tr. II 63, ll. 1-13.

Appellant denied committing these alleged offenses. Tr. II 179, ll. 1-7. He explained that he was originally offered a probationary sentence in exchange for pleading guilty but refused the offer and insisted on proceeding to trial. However, two days later, the solicitor offered to allow Appellant to plead in exchange for a time served sentence. Appellant accepted the offer because it allowed him to "go home" that day. He also did not know he was pleading to "sexually related" offenses. Tr. II 180, l. 1 – 181, l. 19. His understanding of an Alford plea was "you're not pleading guilty but you feel like if you go to trial you could be found guilty." Tr. II 181, l. 20 – 182, l. 1.

In 2017, Appellant was charged with first degree criminal sexual conduct with a minor and third degree criminal sexual conduct with a minor. Tr. II. 63, l. 25 – 64, l. 4; R. * (Plaintiff's Exhibit No. 5 and Plaintiff's Exhibit No. 6). The underlying allegations were that Appellant fondled the penis of an eight year old boy and performed oral sex on a five year old boy. The boys were the sons of Appellant's friend. Tr. II 64, ll. 9-19. Appellant pled pursuant to Alford to third degree criminal sexual conduct with a minor and was sentenced to ten years suspended upon the service of seven years' imprisonment and thirty months' probation. The first degree criminal sexual conduct with a minor charge was dismissed. Tr. II. 64, ll. 16-19; R. * (Plaintiff's Exhibit No. 5 and Plaintiff's Exhibit No. 6).

Appellant also denied committing these offenses. He explained that he chose to plead again pursuant to Alford because his attorney advised him that the jury would "sympathize with the alleged victim" and "listen to whatever he says." Consequently, Appellant accepted the favorable plea offer. Tr. II 182, ll. 6-15.

After his release from incarceration in 2021, Appellant was on "intensive probation with a curfew and an ankle monitor." He had to report to his probation agent every week and attend sex offender counseling. He was also working at a local chicken plant in Sumter. Tr. II. 182, l. 25 – 184, l. 22. However, four months after Appellant's release, the state filed a petition seeking to involuntarily commit him as a sexually violent predator pursuant to the SVPA. Tr. II 137, ll. 16-19. Appellant was taken into custody to await his commitment trial.

Dr. Marie Gehle, a clinical psychologist at the Department of Mental Health, was court ordered to evaluate Appellant. Tr. II 45, ll. 3-5. Dr. Gehle was qualified as an expert in clinical forensic psychology and "sex offender evaluations" without objection. Tr. II 43, ll. 11-17. Based on her evaluation, she opined that Appellant suffered from "pedophilic disorder, sexually

attracted to both male and female, nonexclusive type." She explained that pedophilic disorder is "a deviant sexual interest in prepubescent children" and nonexclusive type means there is evidence Appellant is also attracted to adults. Tr. II 88, ll. 11-14; Tr. II 89, ll. 17-24. Dr. Gehle also diagnosed Appellant with "narcissistic personality disorder with antisocial traits" and "severe alcohol use disorder in sustained remission in a controlled environment." Tr. II 89, l. 13 – 90, l. 6. Dr. Gehle opined Appellant's mental abnormality and personality disorder predispose him to commit acts of sexual violence and that he is likely to reoffend. Tr. II 107, l. 15 – 108, l. 19.

Appellant testified that he received counseling while he was incarcerated which helped him recognize his "cognitive distortions," such as believing the child he offended in 1993 "was a willing participant." He knows she was not a willing participant and as an adult, he "should never have let it happen." Tr. II 171, l. 22 – 172, l. 21. He also learned through counseling about the negative affects his conduct may have had on the child. Tr. II 171, ll. 10-21. Appellant believes his chance of reoffending is zero. He knows himself better than anyone else and does not believe he will ever offend again. Tr. II. 185, ll. 3-15.

The jury ultimately found Appellant met the criteria to be committed as a sexually violent predator. Tr. II 237, ll. 18-24.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the circuit court and will not be reversed absent an abuse of discretion." In the Matter of Ettel, 377 S.C. 558, 561, 660 S.E.2d 285, 287 (Ct. App. 2008) (citing In the Matter of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." In the Matter of Bilton, 432 S.C. 157, 162, 851 S.E.2d 442, 444 (Ct. App. 2020) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted).

ARGUMENT

The trial judge abused her discretion by admitting evidence of allegations of sexual misconduct that were denied by Appellant as well as evidence of the related criminal charges which were either dismissed by the prosecutor or the subject of a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), since the evidence was not admissible pursuant to Rule 703, SCRE, and its admission violated Rule 403, SCRE, given that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the evidence was hearsay, unsubstantiated, and wholly unreliable.

Relevant Facts

Appellant moved pretrial to exclude Dr. Marie Gehle, an expert clinical psychologist, from testifying about any and all hearsay statements contained in "police charges, incident reports, witness statements, or victim statements." Tr. 82, ll. 4-8. Defense counsel argued such evidence is "beyond the scope of what [Rule] 703 allows an expert witness to testify to." Tr. 82, ll. 4-10. Counsel asserted that while such information may be relevant to supporting Dr. Gehle's diagnosis, "it is highly prejudicial and without any independent confirmation as to the truth of the statements." In support of his argument, counsel cited our Supreme Court's recent opinion in State v. Jenkins, 436 S.C. 362, 872 S.E.2d 620 (2022), and this Court's recent unpublished opinion In the Matter of the Care and Treatment of William Ralph Wilson, III, 2022-UP-087 (S.C. Ct. App. filed March 2, 2022).

The assistant attorney general argued that pursuant to Rule 703, SCRE, Dr. Gehle "can rely on hearsay evidence . . . that is otherwise inadmissible as long as it . . . comports with her professional standards . . . As long as it is something that is standardly used in the field for such purposes." Tr. 84, l. 20 – 85, l. 2. Citing to In the Matter of Corley, 353 S.C. 202, 205, 577

S.E.2d 451, 453 (2003), In the Matter of Ettel, 377 S.C. 558, 561, 660 S.E.2d 285, 287 (Ct. App. 2008), and White v. State, 375 S.C. 1, 649 S.E.2d 172 (2007), the attorney general maintained that "our Supreme Court has said that hearsay that an expert relies upon in the course of her evaluation is admissible regardless of how prejudicial it is." Tr. 83, ll. 1-7.

In response, defense counsel argued that this Court emphasized in In the Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (2020), that Rule 703, SCRE, cannot be used "to allow unregulated hearsay testimony [to] come in through the expert." There must be some form of "independent confirmation" of the underlying allegations, such as an admission by the individual sought to be civilly committed. Tr. 86, l. 7 – 87, l. 12. Counsel explained that Appellant pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to the two most recent set of charges and has never admitted to committing any of the alleged underlying conduct. Counsel insisted that it was the trial judge's "discretionary call of whether or not [the hearsay evidence is] more probative than prejudicial or vice versa" and that this Court's unpublished opinion in Wilson in which the Court distinguished Ettel, White, and In re Manigo, 389 S.C. 96, 697 S.E.2d 629 (Ct. App. 2010) is "persuasive," although not "binding precedent." Tr. 91, ll. 6-23; Tr. 86, ll. 7-18.

During later discussions, defense counsel again argued that the underlying allegations of the charges to which Appellant pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) should not be admitted because Dr. Gehle conducted "no independent confirmation" of the truth of the allegations. As discussed above, Appellant was indicted for two counts of criminal sexual conduct with a minor in 2014 and was permitted to plead to two counts of first degree assault and battery pursuant to Alford in exchange for a time served sentence. Counsel contended that perhaps the state agreed to this because "they didn't think they could make their case because maybe they had a bad case." Unless the state is able to present evidence corroborating the

allegations, such as testimony from other witnesses, defense counsel argued Dr. Gehle should not be permitted to discuss the charges or the underlying allegations because it would "be highly prejudicial." He concluded, "[T]here's no proof . . . that it happened. There's an allegation that it happened." Tr. 102, l. 25 – 103, l. 17.

The trial judge ruled that she would permit Dr. Gehle to discuss the offenses to which Appellant pled pursuant to Alford and the underlying allegations of these offenses. The judge emphasized that before pleading pursuant to Alford, Appellant "had to tell the [plea] judge . . . that he believed based on his view of the evidence and his understanding, he believed that he would be convicted and he wanted to take advantage of the deal, but he did not want to straight up admit it." The judge also stressed that the plea judge could not accept the plea without finding it was "supported by a factual basis" and the allegations contained in the indictments constituted "the factual basis." Tr. 103, l. 18 – 104, l. 16.

Before Dr. Gehle testified before the jury concerning the underlying allegations of the offenses to which Appellant pled pursuant to Alford and the charge that was dismissed, defense counsel renewed his objection. He argued the evidence was hearsay, not relevant, and cited Rule 403, SCRE. Tr. II 61, l. 17 – 62, l. 6; Tr. II 63, l. 25 – 64, l. 8. Counsel also renewed his objection when the state sought to admit Plaintiff's Exhibit Nos. 3-6, which were the indictments and sentence sheets for the charges in which Appellant pled pursuant to Alford in 2015 and 2019 and the indictment for first degree criminal sexual conduct with a minor that was dismissed in 2019. Tr. II 47, l. 21 – 53, l. 4.

Discussion

The trial judge abused her discretion by admitting evidence of Appellant's criminal charges from 2014 and 2017 which were either dismissed by the prosecutor or the subject of a

plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) as well as the underlying allegations supporting these charges, since the evidence was not admissible pursuant to Rule 703, SCRE, and its admission violated Rule 403, SCRE, given that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the evidence was hearsay, unsubstantiated, and wholly unreliable.

"Generally, all relevant evidence is admissible." In the Matter of Ettel, 377 S.C. 558, 561, 660 S.E.2d 285, 287 (Ct. App. 2008) (citing Rule 402, SCRE); See State v. Pittman, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). "Evidence is relevant if it tends to establish or make more or less probable the matter in controversy." Id. (citing Rule 401, SCRE). "However, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value." Id. (citing Rule 403, SCRE).

In In the Matter of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), which the state relied upon at trial, Ettel argued the trial judge erred by permitting an expert to testify at his commitment trial regarding his prior sexually related offenses that did not result in convictions and to a prior murder conviction asserting the prejudicial nature of this evidence substantially outweighed its probative value. Id. at 559, 660 S.E.2d at 286. Ettel was convicted of first degree criminal sexual conduct and assault and battery of a high and aggravated nature. Id. After the circuit court found probable cause to believe Ettel was a sexually violent predator, it ordered Ettel undergo a psychiatric evaluation. During his interview with the court appointed forensic psychiatrist, Ettel admitted to three sexual offenses that did not result in any convictions. Id. at 560, 660 S.E.2d at 286-287.

Before trial, the judge denied Ettel's motion to exclude any testimony regarding these sexual offenses as well as evidence regarding Ettel's prior murder conviction. Id. at 560, 660

S.E.2d at 287. At trial, the expert psychiatrist discussed the disputed evidence to support her conclusion that Ettel suffered from the mental abnormality of paraphilia, not otherwise specified, and had a history of extreme violence, which made it likely he would engage in acts of sexual violence if not confined for long term control, care, and treatment. Id. at 560-561, 660 S.E.2d at 287.

This Court held the trial judge properly admitted the expert's testimony regarding Ettel's prior sexual offenses not the subject of any convictions as well as his prior murder conviction. The Court concluded the evidence was relevant because the expert relied on the sexual offenses and the murder conviction "in evaluating Ettel's need for and likelihood of success in treatment as well as his ability to control his behavior in the future." Id. at 562, 660 S.E.2d at 288. This Court further held the possibility of unfair prejudice did not substantially outweigh the probative value of the testimony. Id. at 563, 660 S.E.2d at 288. In so holding, this Court asserted:

> Regarding its probative value, Dr. Crawford [the expert] used the information to develop her "opinion in terms of [Ettel] not being able to control his behavior" and to diagnose Ettel with paraphilia. As for the testimony's possible prejudice, the prior sexual offenses not resulting in convictions as well as the murder conviction were not the only sources of Dr. Crawford's diagnosis. Dr. Crawford testified that even without considering this evidence, her opinion as to whether Ettel had a mental abnormality or personality disorder would not change. Dr. Crawford stated she additionally relied on, among other sources, Ettel's past criminal sexual conduct conviction, Ettel's statements during her extensive clinical forensic interviews with him, interviews with individuals close to Ettel, administrative records, Ettel's prior psychological evaluation, and his record while in a sex offender treatment program.

Id.

This case is easily distinguishable from Ettel. In Ettel, the murder offense was the subject of a conviction and Ettel admitted during his interview with the expert that he committed the three sexual offenses, which ensured the reliability of the evidence challenged at trial and on appeal. In this case, Appellant denied committing the conduct alleged to have occurred in March

2014 and September 2015 that Dr. Gehle was permitted to discuss in detail over Appellant's objection. Additionally, while Appellant pled pursuant to Alford to first degree assault and battery and later to third degree criminal sexual conduct with a minor as part of separate plea deals, Appellant vehemently maintained his innocence while doing so. Appellant explained during his commitment trial that he accepted the favorable plea offer in September 2015 while still maintaining his innocence because it guaranteed he would "go home" that day and the offer in March 2019 based solely on the advice of his then counsel.

Moreover, Dr. Gehle admitted during the trial that she conducted no independent investigation into the truth of the accusations. Tr. II 123, ll. 9-18. She merely learned of the accusations from police reports and statements and assumed they were true. Consequently, there was absolutely no evidence that these allegations were reliable. Dr. Gehle's testimony relaying the contents of the incident reports and statements to the jury in graphic detail had an undue tendency to suggest a verdict on an improper basis, namely assuming the truth of these out of court statements. Because of the obvious lack of reliability of this evidence, it had no probative value and should have been excluded by the trial judge pursuant to Rule 403, SCRE.

Additionally, while Rule 703, SCRE, allows some hearsay to be admitted through an expert, it does not suspend all operation of the hearsay rules and the trial judge must evaluate the proposed evidence for reliability.[1] In Watson v. Ford Motor Co., 389 S.C. 434, 449, 699 S.E.2d 169, 177 (2010), our Supreme Court exclaimed, "The trial court must examine the substance of the testimony to determine it if is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge." Consequently, all expert testimony *must* pass the

[1] Rule 703 states, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

reliability test when the trial court conducts its initial gatekeeping function. Furthermore, in In the Matter of Bilton, 432 S.C. 157, 166-67, 851 S.E.2d 442, 446 (2020), this Court explained that "due process does not allow an expert to serve as a 'conduit' for hearsay without some baseline showing that the hearsay is reliable." See also State v. Jenkins, 436 S.C. 362, 872 S.E.2d 620 (2022).

During Appellant's commitment trial, the assistant attorney general relied on the Ettel line of cases to argue that hearsay is *always* admissible if the expert states that she relied on such evidence in reaching her conclusions. See Ettel, 377 S.C. at 562, 660 S.E.2d at 287 ("These offenses can include both convictions and offenses not resulting in convictions as long as they are relevant to the determination of whether a person is a sexually violent predator."); see also In the Matter of Chandler, 382 S.C. 250, 676 S.E.2d 676 (2009); White v. State, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007). Watson was decided in 2010 and Bilton in 2020, both after the principal cases discussing this type of evidence in the SVP context were decided. Watson emphasizes the trial court's gatekeeping role and the reliability requirement and Bilton makes clear that there must be a "baseline showing" of reliability before hearsay evidence may be admitted through an expert witness.

Based on these more recent cases it is apparent that Rule 703 is not a limitless exception to the hearsay rule that circumvents the reliability requirement in SVP cases. Dr. Gehle's complete lack of independent investigation or verification, along with the fact that Appellant denied the allegations, makes the hearsay evidence unreliable and inadmissible. It should have been excluded pursuant to Rule 403.

Respectfully, this Court should reverse Appellant's commitment and remand for a new trial.

CONCLUSION

Based on the foregoing argument, this Court should reverse Appellant's commitment as a sexually violent predator and remand for a new trial.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of August, 2023.