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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable William H. Seals, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JOSEPH CURTIS, JR.

APPELLANT

APPELLATE CASE NO. 2023-000285

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

Federal Cases

Other Jurisdictions

Rules

STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial court err in allowing the Attorney General to introduce four instances of uncharged conduct, including salacious details, through its hired expert in violation of the rules prohibiting hearsay?

STATEMENT OF THE CASE

The Attorney General petitioned for appellant's commitment under the Sexually Violent Predator Act and on February 7, 2023, he was tried in Horry County before the Honorable William Seals and a jury. Tr. 1. Suzanne J. Shaw and Chris Runyan represented the Attorney General. Tr. 1. Kindle Kay Johnson represented appellant. Tr. 1. The jury found appellant met the definition of an SVP and Judge Seals ordered him committed. Tr. 504, l. 13 – 22. This appeal follows.

STANDARD OF REVIEW

The evidentiary issues raised in this appeal are reviewed under the abuse of discretion standard. Matter of Bilton, 432 S.C. 157, 161-62, 851 S.E.2d 442, 444 (Ct. App. 2020).

ARGUMENT

In this sexually violent predator case, the trial court erred in allowing the Attorney General to introduce four instances of uncharged conduct, including salacious details, through its hired expert in violation of the rules prohibiting hearsay.

Introduction

The court-appointed DMH expert in this SVP case did not diagnose appellant with any mental abnormality or personality disorder, concluding that he was simply a criminal. Tr. 407, l. 2 – 12. The Attorney General's hired expert diagnosed appellant with "other specified personality disorder" with antisocial and narcissistic traits in addition to exhibitionism. Tr. 205, l. 4 – 8. To support her claim that appellant had this disorder, the expert used four separate instances where appellant was "investigated" or a "suspect," but was never charged, including two sexual allegations against children. Tr. 192, l. 3 – 17. The Attorney General's use of their expert as a conduit for this hearsay stretched Rule 703 past its breaking point.

Factual and Procedural Background

The court-appointed expert from the Department of Mental Health, Dr. Marie Gehle ("Gehle"), concluded that appellant did not meet the definition of a sexually violent predator. Tr. 381, l. 8 – 12. "Because I didn't make a diagnosis of a mental abnormality, my opinion was that he was not a sexually violent predator per the statute." Tr. 381, l. 13 -18. Dr. Gehle stressed the narrow focus of her evaluation was to determine whether appellant met the criteria for commitment and not to recommend treatment or what a defendant should do to not commit further crimes "in the community." Tr. 382, l. 9 – 16. She held firm to this opinion after listening to the testimony of the Attorney General's hired expert, Dr. Emily Gottfried ("Gottfried") from MUSC. Tr. 381, l. 22 – 382, l. 20.

The Attorney General hired Dr. Gottfried to evaluate appellant after Dr. Gehle issued her opinion. Tr. 175, l. 11 – 21. Tr. 236, l. 15 – 20. The Attorney General pays MUSC $5,600.00 to perform these evaluations. Tr. 237, l. 15 – 237, l. 18. Dr. Gottfried said MUSC had "an agreement" with the Attorney General ("not a contract") for the state to "send us independent evaluations when they choose to, I guess." Tr. 236, l. 15 – 20.

Dr. Gottfried diagnosed appellant with "other specified personality disorder with both antisocial and narcissistic traits. . . ." Tr. 205, l. 4 – 8. She also diagnosed appellant with "exhibitionistic disorder." Tr. 205, l. 4 – 8. Reading from the DSM, Dr. Gottfried explained to the jury that a diagnosis of "other" is used when the person does not meet the criteria for any specific disorder, but the clinician determines the person has symptoms of a personality disorder and "clinically significant distress or impairment in social, occupational, or other important areas of functioning. . . ." Tr. 206, l. 6 – 22.

She explained that antisocial personality disorder ("ASPD") is "marked by a pervasive pattern of the disregard for the rights and the wishes of other people." Tr. 208, l. 7 – 14. "So it's characterized by people who don't necessarily follow the rules of society." Tr. 208, l. 7 – 14. "So that could be getting a lot of arrests, so they don't conform with the laws of society." Tr. 208, l. 7 – 14. She said these individuals lack empathy, are irresponsible, impulsive, aggressive, and irritable. Tr. 208, l. 15 – 17. Appellant lacked evidence of conduct disorder prior to age fifteen so Dr. Gottfried could not diagnose him with ASPD. Tr. 208, l. 18 – 209, l. 12.

When asked if not for the lack of conduct disorder whether appellant met the criteria for ASPD, Dr. Gottfried said he did, explaining, "He has a lot of arrests. He's repeatedly performed acts that are grounds for arrest. He has a criminal history spanning from at least 1989 to 2012, 2013." Tr. 209, l. 13 – 21. As for the addition of narcissistic traits to her diagnosis, she said

appellant "had a marked sense of entitlement; that he exploited other people; that he lacked empathy, and that he was arrogant." Tr. 210, l. 5 – 211, l. 3. As for her diagnosis of exhibitionism, Dr. Gottfried admitted on cross-examination that "exhibitionism offenses related to exposing your genitals are not considered sexually violent offense[s]. . . ." Tr. 323, l. 3 – 16.

Dr. Gehle said she had testified approximately 150 times in SVP cases and performed about 325 SVP evaluations. Tr. 360, l. 19 – 361, l. 11. Tr. 369, l. 14 – 18. Most of time she testified for the State. Tr. 361, l. 9 – 11. She was employed as a chief psychologist for DMH and was "Court-appointed as a neutral party." Tr.361, l. 18 – 362, l. 18.

She did not see evidence of a personality disorder. Tr. 406, l. 4 – 407, l. 1. People with personality disorders are readily apparent in the interview: "It comes out right away, and it will be repeated throughout the interview." Tr. 406, l. 4 – 407, l. 1. These subjects' personality disorders affect "the way they see the world" and they do not "even realize that not everybody sees the world that way" and are unable to hide their attitudes and reactions. Tr. 406, l. 4 – 407, l. 1. Dr. Gehle agreed that appellant had "repeated criminal behavior," which can be a symptom of ASPD, "but that doesn't make it a disorder, to have a criminal history." Tr. 407, l. 2 – 12. She said, "And if all criminal behavior and all sexual, you know, criminal behavior was due to a mental health problem, we would probably have hospitals instead of prisons. But there's criminal behavior that is not called mental illness." Tr. 407, l. 2 – 12.

Prior to trial appellant filed a motion in limine to prohibit the State "from using its expert as a conduit for inadmissible hearsay." R. ___ (Respondent's Motions in Limine). Appellant's motion argued that Rules 702 and 703 do "not eliminate the Court's gatekeeping role to ensure that unreliable hearsay or specific details that have not been admitted or verified are transmitted to the jury . . . ." R. ___ (Respondent's Motions in Limine). Appellant also asked for such

hearsay to be excluded because it demonstrated to the jury that the expert relied upon them as truthful. R. ___ (Respondent's Motions in Limine).

During the pretrial motions hearings, appellant told Judge Seals that she felt the issue concerning uncharged conduct was better left until after another, lengthier hearing. Tr. 10, l. 3 – 5. The Attorney General responded that precedent allowed the use of unconvicted conduct if used by an expert, citing In the Matter of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), White v. State, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007), and In the Matter of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008).

The next day, Judge Seals heard further argument on appellant's motion. Tr. 161, l. 16 – 166, l. 5. The Attorney General again cited Ettel and Corley arguing that unconvicted conduct was proper in SVP cases. Tr. 161, l. 16 – 166, l. 5. Appellant argued that the unconvicted charges were hearsay and should not be admitted. Tr. 161, l. 16 – 166, l. 5. When asked by the trial judge for the state's position on hearsay, the Attorney General responded that "if the expert relies on it in informing their opinion, it need not be admissible and hearsay can come in." Tr. 161, l. 16 – 166, l. 5.

Appellant argued that Rule 703 had reasonable limits and investigations that did not result in an arrest were unreasonable. Tr. 161, l. 16 – 166, l. 5. The judge ruled that because the expert used the uncharged conduct, they were admissible. Tr. 161, l. 16 – 166, l. 5. Appellant renewed the objection when the Attorney General asked Dr. Gottfried to go through appellant's criminal history. Tr. 187, l. 3 – 8. At a bench conference after another objection by appellant where defense counsel asked for a continuing objection, Judge Seals said, "When you hear hearsay, object. Just go ahead and object. . . . But the charges, we have already discussed that. I've ruled on that." Tr. 197, l. 18 – 24.

The Attorney General asked Dr. Gottfried to address appellant's criminal history in "chronological order." Tr. 187, l. 3 – 5. During her recitation, Dr. Gottfried discussed both accusations that resulted in convictions and some that did not. Tr. 187, l. 12 – 197, l. 24. Appellant's convictions included a drug offense in New Jersey in 1989 for angel dust; assault and battery with intent to kill; two charges for possession of marijuana; a seatbelt violation; two counts of contributing to the delinquency of a minor; and third-degree criminal sexual conduct, kidnapping, and incest (all arising from the same facts). Tr. 187, l. 12 – 197, l. 24. The third-degree CSC, kidnapping, and incest were the predicate convictions for the SVP commitment and were the result of appellant raping his twenty-year-old niece. Tr. 195, l. 3 – 18. Dr. Gottfried told the jury about a charge that was dismissed for second-degree CSC with a minor and lewd act that was dismissed because "the reported victim wasn't cooperative with the prosecution." Tr. 191, l. 6 – 20.

Dr. Gottfried also told the jury about the following uncharged conduct that is the subject of this appeal. She said appellant "wasn't charged, but I had a police report out of Orangeburg from 2002 where he was listed as a suspect in case of criminal sexual conduct with a minor." Tr. 192, l. 3 – 17. She told the jury the details of this incident—that there were two minor victims "who had ripped hymens" and that appellant was dating their mother. Tr. 192, l. 5 – 193, l. 10. Dr. Gottfried then was unclear on whether the mother or the father reported the allegations saying she had "them mixed up in my head" and then said she was "not going to testify as to who the reporter was." Tr. 193, l. 5 – 10.

She told the jury that appellant was "investigated" in 2004 for simple assault and battery because of an altercation at work. Tr. 193, l. 11 – 19. The next incident was another investigation for domestic violence in 2005 that did not result in charges. Tr. 193, l. 20 – 23. The

final incident was an allegation of harassment by a girlfriend in 2006. Tr. 194, l. 20 – 25. In contrast with Dr. Gottfried's testimony, Dr. Gehle said she uses charges to score actuarial recidivist measures, but does not consider them in forming a diagnosis, considering them as "not proven." Tr. 394, l. 11 – 396, l. 11.

Legal Discussion

The trial court erred in admitting these four instances of uncharged conduct. In a criminal case, these statements would have been excluded as classic testimonial hearsay. See Crawford v. Washington, 541 U.S. 36 (2004). Even in the realm of SVP cases where some hearsay has been allowed through experts that would never see the courtroom in a criminal case, the hearsay in this case goes too far. See In the Matter of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003); In the Matter of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008); In re Manigo, 389 S.C. 96, 697 S.E.2d 629 (Ct. App. 2010).

For a statement to be hearsay, it must be made by the declarant out of court and offered for the truth of the matter asserted. Rule 801(c), SCRE. Dr. Gottfried was not the declarant in these cases. Nor was she the person who heard the statement from the declarant. The declarants were the people who reported these accusations. Dr. Gottfried then gave the police's version of the declarants' statements to the jury.

These statements were offered for the truth of the matter asserted. Dr. Gottfried told the jury these allegations mattered to her diagnosis of the ASPD component of her diagnosis. Tr. 209, l. 13 – 21. She said appellant had "repeatedly performed acts that are grounds for arrest." Tr. 209, l. 19. This statement was the same as telling the jury these acts were true. For the jury to believe Dr. Gottfried that a pattern existed that could result in her diagnosis they could not also believe that she relied on false accusations.

Rule 703, SCRE does not stretch so far as to allow this violation of the rules prohibiting hearsay. See State v. Jenkins, 436 S.C. 362, 872 S.E.2d 620 (2022). In Jenkins, the Court stated, "This Court and our court of appeals have made it clear that—in South Carolina—Rule 703 allows admissibility of otherwise inadmissible evidence only in limited circumstances. In other words, the mere fact an expert relies on inadmissible evidence does not make the evidence admissible." Id. The Jenkins Court essentially required a Rule 403 balancing test of facts relied upon by an expert when the hearsay statements could serve two purposes. Id.

The South Carolina SVP cases most frequently relied upon by the Attorney General do not go as far as the hearsay admitted in this case. Corley dealt with prior convictions. See Corley at 204-07, 577 S.E.2d at 452-54. The SVP defendant in Corley offered to stipulate to his prior convictions to avoid their details being discussed by the expert. Id. The Court held that it was proper for the expert to talk about the details of the convictions because the defendant's past criminal history was relevant to the elements of the statute and evaluating his risk. Id. While that assessment of relevance can be also urged here (or in any case), the salient point is that Corley only discussed admission of the details of the defendant's convictions.

Ettel allowed testimony about offenses that did not result in convictions, but the important distinguishing factor is that the defendant admitted to the offenses during his interview with the expert. Ettel at 560, 660 S.E.2d at 286. Ettel also was not a hearsay case, but a Rule 403, SCRE case. Id. Manigo was a hearsay case, but there the expert relied on a statement made by the SVP defendant to another doctor about discussing his prior sex offenses. Manigo at 105, 697 S.E.2d at 633. The questioned statement was whether the defendant told the doctor about all of his sex offenses. Id. Unlike in Manigo, the jury here heard about ripped hymens, fights with co-workers, and domestic violence.

Other jurisdictions refuse to allow such wide-ranging forays into uncharged conduct based on hearsay. Virginia does not allow experts to testify about the underlying details of other offenses considered by the expert if the details are inadmissible hearsay. Commonwealth v. Wynn, 671 S.E.2d 137, 139-142 (Va. 2009). The Virginia Supreme Court upheld the exclusion of details of children's allegations other than the victim from Wynn's two convictions. Id. The state argued that the details were admissible because the expert relied on them, but the Wynn court rejected that argument. Id.

In a case cited with approval by this Court in In the Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), the New York Court of Appeals examined the admission of hearsay in an SVP trial. State v. Floyd Y., 979 N.Y.S.2d 240 (2005). The court determined that it was necessary to strike a balance between allowing enough evidence for the jury to assess the expert's methods versus allowing the expert to become a conduit for otherwise inadmissible hearsay. Id. The court determined that any hearsay must first be reliable and then pass a Rule 403 balancing test. Id. This Court in Bilton used a reliability analysis to determine that the hearsay evidence regarding a PPG test was inadmissible. Bilton at 164-66, 851 S.E.2d at 445-46.

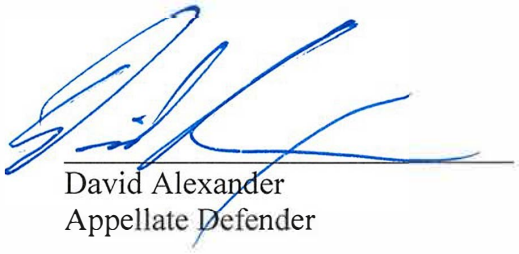
The hearsay details of uncharged allegations did not meet the reliability threshold for admissibility in this case. The fact that police talked to the declarants does not make their statements inherently reliable (as is the rationale in Crawford). Police interviews that were not followed by charges craves the inference that these statements were of dubious reliability. Appellant had no real means to test the substance of the allegations. The trial court did not judge reliability and accepted the Attorney General's simplistic analysis that if the expert relied on something, it was inadmissible. Jenkins teaches that such reasoning violates the trial court's gatekeeping responsibility.

These hearsay accusations were not reliable and were too remote from the judicial fact-finding process to be admitted as evidence before a jury. The error cannot be harmless in this case because these allegations were supposedly necessary to support the diagnosis of a personality disorder, which is an element the Attorney General must meet to commit a defendant under the SVP Act. The diagnosis here was weak—"other." The diagnosis was contested by the court-appointed, very experienced evaluator from DMH. Appellant was not diagnosed with pedophilia and the jury should not have heard about any of these accusations, especially the "ripped hymens" of two minors.

The Attorney General began her closing argument by telling the jury that they should believe Dr. Gottfried over Dr. Gehle because she "took into account all of the information that she was given. Dr. Gehle did not do this." Tr. 464, l. 19 – 21. She continued, "You heard [Dr. Gehle] say on cross-examination today that any unconvicted conduct, she did not treat as truth. She disregarded it. That, ladies and gentlemen, is exactly why she did not make the diagnoses that Dr. Gottfried did." Tr. 464, l. 22 – 25. This Court should reverse.

CONCLUSION

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



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This 25th day of October, 2023.