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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2011-199686

IN THE MATTER OF THE CARE AND TREATMENT
OF VINCENT NEAL WAY Petitioner/Respondent

v.

THE STATE OF SOUTH CAROLINA, Respondent/Petitioner

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

I. The Court of Appeals correctly affirmed the trial court's decision allowing the State to question Way regarding his evaluation by Dr. Martin.[1]

II. The Court of Appeals correctly ruled any possible error in allowing the State to raise an adverse inference in closing argument related to Way's failure to call Dr. Martin to testify is harmless.[2]

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[1] The State has cross-appealed the Court of Appeals finding on this issue because the Court addressed issues never raised before and never raised to the Court of Appeals instead of addressing the issue presented to it by Way. The State submits the Court of Appeals correctly affirmed the decision of the trial court but its analysis is incorrect.

[2] The State has cross-appealed the Court of Appeals finding of error, arguing the State should be allowed to raise an adverse inference during its closing argument. The State, therefore, does no concede error, but if error is found the State submits it is harmless.

STATEMENT OF THE CASE

In 1993, Way pled guilty to committing a lewd act upon a minor. (T.60; R.12). The victim was Way's 13 year-old niece, who was staying with Way. She reported Way placed his hand insider her underwear and fondled her while she was on the couch. He kissed her thigh, then laid on her and began "humping her." (T.63; R.15).

While on probation from his 1993 conviction, Way pled guilty in 1995 to contributing to the delinquency of a minor. (T.66; R.18). Way allowed another 13-year-old girl to stay at his home. (T.114; R.44).

In 1997, while still on probation from the prior charges, Way again pled guilty to committing a lewd act upon a minor. (T.64; R.16). The charges arose in 1995 when Way met a third 13-year-old girl. He provided her marijuana and, once she was under the influence of the drug, had sexual intercourse with her. (T.65; R.17).

The two convictions for committing a lewd act upon a minor were the qualifying offenses which brought Way for review pursuant to the South Carolina Sexually Violent Predator Act ("SVP Act"). The Multi-Disciplinary Team ("MDT") reviewed Way'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 Way met the criteria for commitment, and referred the case for civil commitment proceedings.

The circuit court found probable cause existed to believe Way met the criteria as a SVP and ordered an evaluation to be performed by Dr. Donna Schwartz-Watts. Dr. Schwartz-Watts diagnosed Way as having a sexual disorder, not otherwise specified based on his history with the 13-year-old girls, and amnesia based on an injury he

sustained in 1994. (T.83-84; R.35-36). Further, she concluded he was more likely than not to re-offend based on his history, and his mental abnormalities created a propensity for him to commit future sexually violent offenses. (T.86; R.38). Finally, she indicated he had difficulty controlling his behavior. (T.87; R.39).

Way proceeded to trial before a jury and the Honorable Deadra L. Jefferson. At trial, Dr. Schwartz-Watts testified consistent with her report that Way had a mental abnormality of sexual disorder, not otherwise specified, and amnesia. She further testified regarding his three prior convictions.

The State also presented the testimony of Alicia Reece, the victim in Way's 1993 lewd act conviction. She testified the abuse was not a one-time event, but it occurred on multiple occasions between the ages of 10 and 13. She testified the acts occurred at his house, in the movie theater, and at her parent's house; all while other people were present or capable of discovering the acts being committed. (T.147-148; R.58-59).

Finally, Way testified at trial. The State asked Way whether he was transported to Dr. Tom Martin for a second evaluation. He indicated he did see Dr. Martin and was evaluated. (T.237-238; R.78-79). Dr. Martin, however, was not called by Way to testify at trial. Way also admitted he re-offended while on probation for the original committing a lewd act offense, and there were locations he should avoid such as grocery stores during the day and state fairs to avoid coming into contact with 13 year-old girls. (T.236; 239-241; R.77; 80-82).

The jury found Way was a sexually violent predator as defined by section 44-48-30 of the South Carolina Code. Judge Jefferson signed an order committing Way to the Department of Mental Health for his long term control, care, and treatment. The Court of

Appeals affirmed the commitment by opinion filed June 8, 2011. After the Court of Appeals denied both parties' Petitions for Rehearing, the Court substituted an opinion on August 24, 2011. See In the Matter of the Care and Treatment of Vincent N. Way, Op. No. 2011-UP-268 (Filed June 8, 2011, Refiled August 24, 2011). This Court granted the State's Petition for Writ of Certiorari on December 20, 2012. This Court granted Way's Petition for Certiorari on Questions II and III.

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court's decision allowing the State to question Way regarding his evaluation by Dr. Martin.

The Court of Appeals correctly affirmed the trial court's decision allowing the State to question Way regarding his evaluation by Dr. Martin. While the Court of Appeals incorrectly addressed the issue pursuant to the South Carolina Rules of Evidence and not the issue raised by Way pursuant to the South Carolina Rules of Civil Procedure, the Court did reach the correct conclusion that the State should be entitled to question Way on whether he was taken for an evaluation by Dr. Martin.

The Court of Appeals began its discussion of the issue as follows:

> The State argues that it was allowed to cross-examine Way regarding his retained expert pursuant to the SVP Act. In his assertion of error, Way cites to Rule 26(b)(4)(B), SCRCP, and argues that he was "not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed."

(App. 4). While acknowledging the only issue raised by Way was whether the cross-examination was appropriate under Rule 26(b)(4)(B), SCRCP, the Court of Appeals continued by finding: "However, this issue should be properly addressed according to the South Carolina Rules of Evidence and established precedent." (App. 4).

The Court of Appeals then considered the Rules of Evidence, Rule 402 and 403, SCRE. The Court of Appeals correctly concluded the testimony was relevant and not unfairly prejudicial. Analyzing the issue under the Rules of Evidence, the Court correctly determined the trial court did not abuse its discretion in allowing the State to ask Way if he was transported to Dr. Martin's Office for an evaluation. The State further submits the

proper admission of the evidence under the South Carolina Rules of Evidence is the law of the case because it was not appealed by Way. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

On the merits of the issue actually raised by Way to the Court of Appeals and in his Brief of Petitioner to this Court, his reliance on Rule 26(b)(4)(B), SCRCP, is misplaced. Rule 26(b)(4)(B) 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, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed.

First, it should be noted the State was not seeing facts known or opinions held by Dr. Martin. The State merely sought to disclose the fact Way was evaluated by Dr. Martin. As a result, the portion related to retained experts is not applicable in this case because the State never sought discovery of Dr. Martin's findings.

Second, Way clearly retained Dr. Martin to conduct the evaluation pursuant to the Sexually Violent Predator Act (the SVP Act), and Dr. Martin was not "consulted informally" or "consulted and not retained or specially employed" as alleged by Way. In his Brief, Way cites a portion of the SVP Act, Section 44-48-90 of the South Carolina Code (Supp. 2008), related to obtaining an independent evaluation. While the portion cited does indicate the court is to "assist" an indigent person in obtaining the expert, the

cited portion excludes the most relevant provision of the statute. The section states in full relevant part:

> If a person is subjected to an examination under this chapter, the person may retain a qualified expert of his own choosing to perform the examination. All examiners are permitted to have reasonable access to the person for the purpose of the examination, as well as access to all relevant medical, psychological, criminal offense, and disciplinary records and reports. In the case of an indigent person who would like an expert of his own choosing, the court must determine whether the services are necessary. If the court determines that the services are necessary and the expert's requested compensation for the services is reasonable, the court must assist the person in obtaining the expert to perform an examination or participate in the trial on the person's behalf.

S.C. Code Ann. § 44-48-90 (Supp. 2008) (emphasis added). The section makes it clear, the expert the court assists the indigent person in obtaining is a retained expert and not one consulted informally or consulted but not retained.

As a result, the portion of Rule 26(b)(4)(B), stating: "A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed" is not applicable in this case when Dr. Martin was a retained expert under section 44-48-90. Way's decision not to call Dr. Martin to testify did not change the fact he was retained under the statute and did not classify him as "consulted informally." The circuit court correctly found the State was entitled to learn about and to examine Way regarding his expert because Dr. Martin was a "retained" expert under the express provisions of the SVP Act. (T.203; R.71).

Additionally, there was nothing improper about the questioning of Way by the State. The State did not seek details of the evaluation, any information reported to counsel or Way, any materials created by Dr. Martin or counsel in anticipation of trial,

nor any incriminating statements Way made to Dr. Martin. (T.237-238; R.78-79). As a result, the questions did not violate the traditional work product doctrine, the Fifth Amendment privilege against self-incrimination, nor attorney-client privilege. See State v. Jones, 383 S.C. 535, 545, 681 S.E.2d 580, 585 (2009).

Therefore, even though the Court of Appeals correctly determined there was no error in allowing cross-examination of Way regarding his visit to his retained expert, this Court should find the Court of Appeals failed to properly address the issue raised by Way, and instead addressed an issue of its own creation. Way's argument, as raised in his brief to the Court of Appeals and to this Court, is without merit. As a result, this Court should vacate the Court of Appeals opinion as to this issue and affirm the trial court's ruling on the merits of the issue as raised by Way.

II. The Court of Appeals correctly ruled any possible error in allowing the State to raise an adverse inference in closing argument related to Way's failure to call Dr. Martin to testify is harmless.

The Court of Appeals correctly found if the State's closing argument raising an adverse inference from the failure of Way to call Dr. Martin to testify was error, then the error was harmless and did not impact the jury's verdict.[3] As the State has maintained, it was not error for it to comment on the failure to call Dr. Martin. Any error, in light of the totality of the record, is harmless and did not impact the jury's verdict.

First, the State resubmits it was not error for the State to argue an adverse inference was created by Way's failure to call his retained expert. This Court has found an adverse inference is created when a party fails to call a witness within his control, such as an agent, employee, relation, or associate of the party. The inference does not apply if the witness is equally accessible to the other party. See Davis v. Sparks, 235 S.C. 326, 333-334, 111 S.E.2d 545, 549 (1959).

In the instant case, Dr. Martin was clearly within Way's control as he was a retained expert. The Court of Appeals clearly erred in finding Dr. Martin was not within the control of Way. Further, Dr. Martin was not equally accessible to the State. The State could not obtain any opinions or findings of Dr. Martin under Rule 26(b)(4)(B), SCRCP, as he was a retained expert not expected to testify. As a result, he and his opinions were not equally accessible to the State.

Further, Dr. Schwartz-Watts' testimony established all material issues necessary to the State's case-in-chief. Thus, the State could not show a "substantial need" to call

[3] Again, the State does not concede error and stands on its Brief of Petitioner alleging the State had the right in this civil case to argue the adverse inference created by Way's failure to call his retained expert to testify on his behalf.

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); 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). Additionally, assuming Dr. Martin essentially agreed with Dr. Schwartz-Watts' conclusions, his testimony would be cumulative. Therefore, there was no error in allowing the State to argue the adverse inference and the issue should be affirmed on this additional sustaining ground. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal.").

Even if it was error for the court to allow the State to argue the adverse inference arising from Way's failure to call Dr. Martin, the issue was entirely harmless. "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." In re Care and Treatment of Harvey, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003) (quoting State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). Further, the Mitchell Court explained: "Error is harmless when it "could not reasonably have affected the result of the trial." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

The State provided ample evidence demonstrating Way met the definition of a sexually violent predator. A sexually violent predator is defined as a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person 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)(a) & (b) (Supp. 2008). The Act defines "[l]ikely to engage in acts of sexual violence" to mean the person's "propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44–48–30(9) (Supp. 2008).

The State demonstrated Way's prior criminal history satisfying the qualifying offense. The State then presented the testimony of Dr. Schwartz-Watts to discuss Way's mental abnormality and the likelihood of his reoffending. (R.9-19; 26-39). Further, Way's past criminal behavior demonstrates his propensity to reoffend sexually. (R.12-17; 36-39). Finally, the testimony of the victim of his prior crime detailing the circumstances of that crime, including it taking place in public places and areas where others are present, provided substantive evidence of his propensity to commit acts of sexual violence such that Way is a danger to the health and safety of others. (R.58-61). As a result, the mention of the failure of Dr. Martin to testify could not reasonably have affected the result of the trial. Accordingly, this Court should affirm the trial court's decision allowing the State to argue the adverse inference, or, in the alternative, affirm the Court of Appeals finding any error was entirely harmless.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted Way's commitment to the SVP program be affirmed.

Respectfully submitted,

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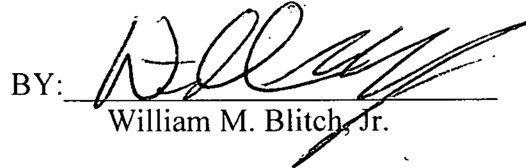

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July 24, 2013

STATE OF SOUTH CAROLINA

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IN THE MATTER OF THE CARE AND TREATMENT OF VINCENT NEAL WAY — Petitioner/Respondent

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PROOF OF SERVICE

I, ELLEN R. DuBOIS, certify that I have served the within Brief of Respondent by depositing two copies of the same 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.
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