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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

Opinion No. 2024-UP-243

IN THE MATTER OF THE CARE AND
TREATMENT OF JAMES GREGORY YOUNGER,

APPELLANT.

APPELLATE CASE NO. 2021-000537

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, James G. Younger petitions for rehearing on both issues raised to this Court. The fundamental error in the Court's reasoning is accepting the Attorney General's argument that the double hearsay was admissible because the expert said she relied on it. Almost all factual testimony in an SVP case is based on hearsay and comes in through experts. But even in an SVP case, there must be some limit. As our Supreme Court has made clear, the gates are not wide open to all hearsay just because an expert blesses it.

Appellant's Issue One – Hearsay[1]

This Court appears to have correctly rejected that the Attorney General's argument and the trial judge's holding that the statements introduced through Dr. Gottfried were not hearsay because the statements were not offered for the truth of the matter asserted. This Court also appears to have correctly rejected the lower court's holding that the statements were admissible under the medical diagnosis exception. Having rejected the trial judge's holdings, this Court then erred in applying a deferential standard of review.

The trial judge concluded that the statements were not hearsay because they were offered to bolster the expert's conclusions. Rule 703 does not convert hearsay into non-hearsay. It allows some otherwise inadmissible hearsay if necessary to show how an expert reached her conclusion. Rule 703, SCRE. "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." State v. Jenkins, 436 S.C. 362, 382, 872 S.E.2d 620, 630 (2022). "In other words, the mere fact an expert relies on inadmissible evidence does not make the evidence admissible." Id.

This Court erred in not realizing, as stated in Jenkins, that Rule 703 has limits. The Opinion cites old SVP cases that were distinguished by appellant and did not go nearly as far as the hearsay admitted here. 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). 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

[1] The Court's Opinion addressed appellant's issues in reverse order.

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. Manigo did not involve lurid details of sexual assaults derived from hearsay. Id. This Court erred in finding these cases governed the hearsay in this case.

This Court also did not address appellant's argument based on the Supreme Court of Virginia's decision in 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. Nor did this Court address appellant's argument based on State v. Floyd Y., 979 N.Y.S.2d 240 (2005). Had the Court examined the reasoning of these cases, it would have concluded the hearsay was inadmissible.

The hearsay details of uncharged, out-of-state allegations did not meet the reliability threshold for admissibility in this case. The statements were made in response to a "hotline," which decreases their reliability. The fact that police talked to the declarants does not make their

statements inherently reliable, which was the arbitrary line drawn by the trial court. 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, even though he denied many of them to Gottfried.

Appellant's Issue Two – Rule 403

This Court erred in its Rule 403 analysis. It correctly found that the testimony was "graphic," but then found that the mention was "relatively brief." The unfair prejudice of evidence is not measured by its brevity. This Court appears to have accepted the Attorney General's argument that the evidence was not harmful based on a calculation of the percentage of pages it is discussed in the transcript. Br. Resp. at 24. Our courts have never used such an analysis.

The details of the North Carolina "hotline" allegations had limited probative value. Had the allegations become the subject of convictions—or even criminal charges—the probative value would be higher. The North Carolina authorities did not seek formal charges. None of the details had been subjected to any kind of adversarial testing. The probative value was that the expert relied on them to establish a pattern of behavior, but as Dr. Gehle testified, relying on allegations that are not the subject of a conviction has limited value. Many of the allegations were remote, including one from Younger's high school girlfriend.

The unfair prejudice was enormous. The jury heard tale after hearsay tale describing offensive sexual acts. The jury repeatedly heard that Younger drugged and raped women over decades in North Carolina. The singular unfairness here is that many of these women, as both experts said, had consensual sex with Younger. This case is not one involving pedophilia where

consent is not an issue. Sexual practices that some may find offensive or deviant are not illegal if engaged in by consenting adults.

Younger may have had valid defenses of consent to many of these accusations. Some of them may never have happened. Many of them were old or remote. The North Carolina authorities declined to prosecute most of them. No assessment of the declarants' credibility was made by any jury. No admissions were present in this case, unlike in Ettel. The unfair prejudice here is the lack of any ability by Younger to utilize the justice system to defend himself or analyze the uncharged allegations. The manifest prejudice is the jury hearing an expert take as fact that he sexually assaulted nineteen women.

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ATTORNEY FOR APPELLANT

This 18th day of July, 2024.

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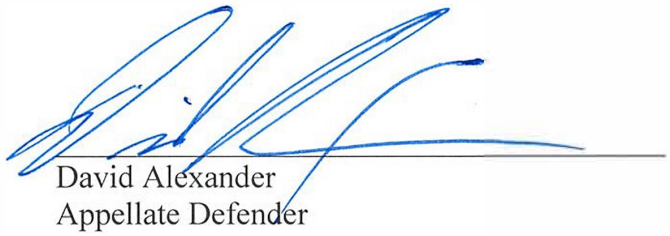
APPELLANT.

APPELLATE CASE NO. 2021-000537

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on James G. Younger, #, at 4546 Broad River Road, , Columbia, SC 29210, this 18th day of July, 2024.



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ATTORNEY FOR APPELLANT

From: Pollard, Shelby
To: dshupe@scag.gov; Grace Sommer
Cc: Alexander, David
Subject: Petition for Rehearing - In the Matter of James G. Younger - 2021-000537
Date: Thursday, July 18, 2024 4:17:00 PM
Attachments: Cover Letter to Deborah R.J. Shupe - In the Matter of Younger - 7.18.24.pdf
Petition for Rehearing - In the Matter of James G. Younger - 2021-000537.pdf

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Good Afternoon,

Attached for service in the above-referenced case is the Petition for Rehearing. This will be filed today, July 18, 2024, with the Court of Appeals via email filing.

Thank you,
Shelby

Shelby Pollard
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