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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Sumter County
Honorable George M. McFaddin, Circuit Court Judge

Opinion No. 2024-UP-243 (S.C. Ct. App. Filed July 3, 2024)

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

PETITIONER.

APPELLATE CASE NO. 2024-001514

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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TABLE OF CONTENTS

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 13, 2024.

QUESTIONS PRESENTED

1.

In this sexually violent predator case, did the Court of Appeals err in affirming the trial court's decision to allow the Attorney General's expert to talk about the details of accusations of sexual offenses women made against petitioner in North Carolina, including events for which petitioner was not charged with any crime, in violation of the rules prohibiting hearsay?

2.

Was the same testimony by the Attorney General's expert regarding the North Carolina accusations prohibited by Rule 403, SCRE, because the unfair prejudice outweighed the limited probative value?

STATEMENT OF THE CASE

The Attorney General sought petitioner James Gregory Younger's commitment as a sexually violent predator and on April 19, 2021, petitioner was tried before the Honorable George M. McFaddin and a jury. R. 78. A hearing was held on pretrial motions on March 30, 2021. R. 1. James G. Bogle, Jr. represented the Attorney General and James K. Falk represented petitioner. R. 1. The jury found petitioner was an SVP. R. 484, l. 10 – 24.

The Court of Appeals affirmed petitioner's commitment without oral argument in an unpublished Opinion. In the Matter of Younger, Op. No. 2024-UP-243 (S.C. Ct. App. July 3, 2024). The panel at the Court of Appeals consisted of Judges Thomas, McDonald, and Verdin. Id. The petition for rehearing was denied and Younger now seeks certiorari in this Court.

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

1.

In this sexually violent predator case, the Court of Appeals erred in affirming the trial court's decision to allow the Attorney General's expert to talk about the details of accusations of sexual offenses women made against petitioner in North Carolina, including events for which petitioner was not charged with any crime, in violation of the rules prohibiting hearsay.

Reason for Granting the Writ

This Court should grant certiorari to determine whether any limits exist on hearsay admitted through an expert witness in a sexually violent predator trial. The Attorney General used its expert witness to admit details of uncharged accusations provided by women to law enforcement in response to a "hotline" set up by the North Carolina authorities. The Attorney General has repeatedly asserted, based on two Court of Appeals Opinions,[1] that Rule 703 allows any hearsay as long as an expert can utter the magic words that the hearsay explains the expert's opinion. This Court needs to determine whether the Attorney General has stretched Rule 703 past its breaking point.

Factual and Procedural Background

Dr. Marie Gehle ("Gehle") from the Department of Mental Health was appointed by the court to conduct the initial evaluation of petitioner James Younger ("Younger") for the sexually violent predator program. R. Tr. 20, l. 25 – 21, l. 7. Dr. Gehle concluded that Younger did not meet the definition of a sexually violent predator. R. 21, l. 8 – 13.

[1] In re Care & Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008); In re Care and Treatment of Manigo, 389 S.C. 96, 697 S.E.2d 629 (Ct. App. 2010).

After reaching this conclusion, the Attorney General sent Dr. Gehle a large volume of additional information concerning accusations against Younger in North Carolina. R. 21, l. 19 – 22, l. 15. R. 33, l. 16 – 24. Dr. Gehle reviewed the North Carolina information, interviewed Younger again, and issued an amended report stating that her conclusion that Younger was not a sexually violent predator had not changed. R. 22, l. 7-15. R. 25, l. 3 – 8.

The Attorney General hired a new expert to assess Younger, Dr. Emily Gottfried ("Gottfried"). R. 46, l. 20 – 47, l. 4. She concluded Younger met the definition of a sexually violent predator. R. 59, l. 1 – 4. When asked whether she would have reached this conclusion without having the North Carolina information, she said "it's difficult to tell." R. 63, l. 7 – 64, l. 3. She said, "But I think with that additional information that really developed this really striking pattern of similarities. R. 63, l. 14 – 16.

The trial court considered the admissibility of these North Carolina statements in a hearing held approximately three weeks before Younger's commitment trial. R. 1. Petitioner filed a written motion to exclude information about North Carolina's investigation of Younger on February 26, 2021, and the Attorney General filed a return. R. 490. R. 512. After extensive arguments and proffered testimony from both Dr. Gehle and Dr. Gottfried, Judge McFaddin issued an Order denying the motion to exclude a week before trial, on April 13, 2021. R. 527.

When Dr. Gottfried testified at the pretrial hearing, she said she reviewed three pending indictments for sexual offenses in Guilford County, North Carolina and one pending indictment in Randolph County, North Carolina. R. 54, l. 1 – 15. The Attorney General then asked her:

> Q. Okay. Now, the other cases, the many women who wrote letters or brought charges or talked to police or what have you, what are you looking for when you see all of these reports? And can you give us a guesstimate as to how many there were? Going back how many years?

> A. Yeah. So I was counting through them conservatively including the victim in the Sumter County case that he was convicted of criminal sexual conduct in the third, and then the 2005 dismissed case that came back in 2019, if you include all of those at least eighteen women reported that he either drugged them, raped them, strangled them, um, took videos or photos of them when they were unconscious.

R. 54, l. 20 – 55, l. 7. Dr. Gottfried said it was important for her to look at accounts of conduct that did not result in a criminal charge. R. 55, l. 22 – 25.

Younger argued in his written motion and before the proffered testimony at the hearing that, *inter alia*, the statements by the North Carolina accusers was inadmissible on hearsay and Rule 403 grounds. R. 490. R. 6, l. 15 – 8, l. 20. Petitioner drew a difference between the kind of hearsay an expert can rely on in forming their opinion and what can be presented to a jury, arguing that it must first be reliable, citing In the Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020). The Attorney General argued that the details of the North Carolina police reports were not hearsay because they was not being offered for the truth of the matter asserted or that the details were admissible under the exception for statements made for the purposes of medical diagnosis. R. 15, l. 9 – 21. The trial judge took the matter under advisement at the end of the hearing. R. 70, l. 2 – 76, l. 12. The written Order entered by the court adopted the Attorney General's argument that the statements were not hearsay and, alternatively, were covered by the Rule 803(4), SCRE, medical diagnosis exception. R. 527.

At trial, petitioner renewed his motion regarding the North Carolina accusations and the trial judge reiterated his prior ruling. R. 89, l. 11 – 16. Petitioner renewed his objection when Dr. Gottfried began talking about the indicted conduct in North Carolina. R. 139, l. 10 – 22. After she testified about the indicted conduct in North Carolina, the Attorney General asked, "Did they [North Carolina] set up a hotline for people to call in about Mr. Younger if they knew anything

about him?" and Dr. Gottfried replied affirmatively. R. 159, l. 2 – 5. Petitioner objected and the court allowed the Attorney General to attempt to lay a foundation. R. 159, l. 6 – 160, l. 9.

Dr. Gottfried said she had access to calls and letters from the North Carolina hotline and agreed that in "some cases or many of the cases, criminal charges were not brought." R. 159, l. 6 – 160, l. 9. After the Attorney General asked whether there were "some 18 different incidents" petitioner again objected and the jury was excused. R. 160, l. 8 – 21.

The Attorney General explained that there were "a number of calls made to the hotline or letters written, women complaining about forced sex or being drugged or being choked." R. 162, l. 20 – 23. The trial judge initially ruled that the statements would not be admitted because they were too far afield and had "not even [been] touched by law enforcement in terms of an investigation or arrest or questioning. . . ." R. 164, l. 2 – 7. The Attorney General urged the court to hear a proffer of Dr. Gottfried's testimony and, afterwards, changed his mind to allow any statement as long as law enforcement "got involved, issued a report, talked to somebody, I'll allow that in. A non-law enforcement related hotline call does not come in." R. 177, l. 8 – 19. Dr. Gottfried, during the proffer, was able to show that many of the hotline calls resulted in some kind of police activity. R. 166, l. 18 – 175, l. 11. Petitioner reiterated that the statements were not reliable, argued that if they were good cases, North Carolina would have brought charges, and said they were hearsay and double hearsay. R. 175, l. 13 – 176, l. 4. The judge agreed to strike any mention of the "hotline" and allowed petitioner a continuing objection, which was stipulated by the Attorney General "to each of these 19 people." R. 178, l. 18 – 180, l. 8.

When the jury returned, the Attorney General told Dr. Gottfried that he wanted her to only refer to incidents that were the subject of North Carolina police reports. R. 181, l. 10 – 14. She recounted a long list of accusations with lurid details that were told by women to the North

Carolina police that were not the subject of an arrest or any pending charge against Younger. R. 181, l. 15 – 190, l. 8. She told the jury that Younger's high school girlfriend "reported that he had drugged and raped her." R. 181, l. 10 – 19. She said that a woman who was engaged to Younger in 1998 said that "during sex, he would choke her, slap her, pull her hair, tie her up, hold her down, he tried to photograph and tape her during sex." R. 182, l. 5 – 10. This information came from an interview by the Archdale Police Department. R. 182, l. 5 – 10.

Another woman told police that Younger slipped Valium into her sushi and had sex with her. R. 183, l. 1 – 9. A woman told police that he drugged her wine and had nonconsensual anal sex with her. R. 183, l. 10 – 18. A police report said that a college classmate of Younger's said that he sexually assaulted her despite her pleas to stop and covered her face with a pillow and grabbed her throat. R. 183, l. 19 – 184, l. 1. Another woman told police that after going out with Younger, the next day she didn't remember anything and that Younger apologized to her for sticking his hand down her pants. R. 184, l. 11 – 18.

Gottfried continued to recite horrific and lurid allegations made to the police by different women, including drugging, choking, vaginal rape, and anal rape. R. 184, l. 6 – 189, l. 4. When the recitation of what the declarants told the police was finished, the Attorney General confirmed that the count was "19 separate people, including some—the ones you've already talked about." R. 189, l. 5 – 8. Dr. Gottfried called it "a really striking pattern of having willing consenting sex partners that he was raping and drugging and/or strangling." R. 189, l. 15 – 190, l. 3.

The Court of Appeals' Decision

The Court of Appeals switched the issues on appeal in its Opinion. In the Matter of Younger, Op. No. 2024-UP-243 (S.C. Ct. App. July 3, 2024) (treating the Rule 703 hearsay issue as Issue 2 and the Rule 403 issue as Issue 1). On the Rule 703 hearsay issue, the Court ruled that

the testimony was admissible to explain the expert's decision. The Court impliedly rejected the Attorney General's argument and the trial judge's decision that the statements were not hearsay because they had not been offered for the truth of the matter asserted and the medical diagnosis exception. However, the Court applied a deferential standard of review to a legal conclusion not made by the trial judge.

Legal Discussion

The reading by Dr. Gottfried of details of lurid accusations made against petitioner in out-of-state police reports that never resulted in a criminal charge was rank hearsay that never should have been admitted. The trial court erred in adopting the Attorney General's rationale that these statements were not offered for the truth of the matter asserted or that the exception for medical diagnosis applied and the Court of Appeals erred in finding that Rule 703 can be stretched far enough to allow this hearsay. 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 women whose accusations were taken down by the police. Dr. Gottfried then gave the police's version of the declarant's statements to the jury.

Despite the Attorney General's contentions regarding patterns or "data points," these statements were offered for the truth of the matter asserted. Dr. Gottfried could not diagnose a pattern based on untrue statements. For the jury to believe Dr. Gottfried that a pattern existed, they must also believe the underlying details that made up the pattern. Otherwise, there is no pattern.

Nor does the exception in Rule 803(4), SCRE for statements made for purposes of medical diagnosis or treatment apply. These statements were made to police officers, not medical providers. Even statements made to medical providers regarding sexual assaults have limits and the medical providers cannot be used as conduits for "glaringly inadmissible hearsay." State v. Simmons, 423 S.C. 552, 565, 816 S.E.2d 566, 573 (2018). But policemen—especially years after the fact—are not medical providers under any sense of this exception.

Nor does Rule 703, SCRE, 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 nearly 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 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.

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 the Court of Appeals in Bilton, 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. 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, 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. Petitioner had no real means to test the substance of the allegations, even though he denied many of them to Gottfried.

Finally, it does not appear at all settled that using even the fact of uncharged conduct is a best practice in the esoteric field of SVP evaluations. The court-appointed expert from DMH, Dr. Gehle, testified that her practice was "not to consider allegations." R. 325, l. 1 – 25. "To me, convictions and verified information is what is necessary." R. 325, l. 1 – 25. She pointed out that police reports often come "from a perspective of trying to prove that somebody committed conduct and so they're written in a way that makes it seem more true than maybe it would be." R. 325, l. 1 – 25. These hearsay statements were not reliable and were too remote from the judicial fact-finding process to be admitted as evidence before a jury. An expert can review anything under the sun, but such review does not magically convert rank hearsay into admissible evidence. In this "battle of the experts" case where Dr. Gehle opined petitioner did not meet the SVP definition, the error cannot be harmless and this Court should grant certiorari and reverse.

2.

Alternatively, the same testimony by the Attorney General's expert regarding the North Carolina accusations is prohibited by Rule 403, SCRE, because the unfair prejudice outweighed the limited probative value.

Rule 403 does not allow the volume of unfairly prejudicial details from uncharged conduct that was admitted in Younger's trial. Rule 403 requires the balancing of unfair prejudice against probative value. Rule 403, SCRE. See State v. Huckabee, 419 S.C. 414, 798 S.E.2d 584 (Ct. App. 2017). The trial judge and the Court of Appeals erred in finding the balance weighed in the State's favor. Jenkins requires a Rule 403 analysis when admitting Rule 703 hearsay. Jenkins at 382-83, 872 S.E.2d at 630-31.

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. The Court of Appeals held the references were "brief," but agreed the testimony was "graphic." As this Court recently held in a graphic photographs case, viewing horrific photos in a long murder trial can result in unfair prejudice

sufficient for reversal. State v. Nelson, 440 S.C. 413, 891 S.E.2d 508 (2023). Younger's 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. This Court should grant certiorari and reverse.

CONCLUSION

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

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This 9th day of October, 2024.