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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CLARENDON COUNTY
COURT OF COMMON PLEAS

THE HONORABLE BRIAN M. GIBBONS, CIRCUIT COURT JUDGE

DOCKET NO. 2024-002086

In the Matter of the Care and Treatment of Alonza V. Gibson, Jr., Appellant

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FINAL BRIEF OF APPELLANT

Kindle K. Johnson
S.C. Bar No. 72926
K. Johnson Law Firm
223 E Main St, Suite 500
Rock Hill, SC 29730
803.329.1900

ATTORNEY FOR THE APPELLANT

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II. Did the trial court err in overruling the Appellant's objection and refusing to issue a curative instruction, such that the trial was infected with unfairness and the Appellant was denied due process, when the State's closing argument improperly suggested that hearsay allegations including those from dismissed charges and unconvicted offenses were substantiated when the underlying hearsay allegations were used by expert witnesses solely for the purposes of conducting psychological evaluations.

STATEMENT OF THE CASE

This matter concerns a civil commitment proceeding initiated by the State of South Carolina against Mr. Alonza Gibson ("Appellant") pursuant to S.C. Code § 44-48-10, *et seq*. of the South Carolina Sexually Violent Predator Act. On or about December 21, 2022, the State filed a petition seeking to commit Mr. Gibson as a sexually violent predator. The circuit court found probable cause and ordered Mr. Gibson to undergo a full psychological evaluation. He complied and the matter was set for trial.

Beginning on December 2, 2024, a jury trial took place in the Clarendon Court of Common Pleas. The Honorable Brian Gibbons presided. Mr. Gibson was represented by Kindle Kay Johnson of K. Johnson Law Firm ("Appellant") and the State was represented by Christopher Runyan of the South Carolina Attorney General's Office ("State"). (R. p. 2.)

On December 4, 2024, following deliberations, the jury unanimously found beyond a reasonable doubt that Mr. Gibson is a sexually violent predator. Based upon the jury's verdict, the court issued an order committing Mr. Gibson to a secure treatment facility. (R. p. 304, line 1-p. 305, line 15.)

This appeal follows.

ARGUMENT

I. Did the trial court in a sexually violent predator trial commit abuse of discretion by allowing the State's expert to present highly prejudicial and minimally probative hearsay testimony detailing multiple unproven, denied, and in some cases expunged or dismissed allegations of Appellant's purported violent and sexual criminal misconduct simply because the hearsay allegations were relied on to form the expert's opinion?

A. Relevant Facts

This matter was brought pursuant to a sexually violent predator petition filed against Appellant Alonza Gibson ("Appellant") in Clarendon County, South Carolina. Appellant had one qualifying sexually violent offense for Criminal Sexual Conduct Third Degree to which he pleaded guilty on September 12, 2013, in Clarendon County, South Carolina. (R. p. 217, lines 21-24; R. p. 103, line 10-p. 105, line 16; R. pp. 318-320).

During the case, Dr. Emily Gottfried conducted an independent forensic evaluation of Appellant of at the behest of the State. (R. p. 82, line 1- p. 84, line 21.) Pursuant to her evaluation, Dr. Gottfried diagnosed Mr. Gibson with sexual sadism disorder and other specified personality disorder with antisocial and psychopathic traits, and opined that he met the criteria to be considered a sexually violent predator. (R. p. 124, line 13; R. p. 125, line 14; R. p. 126, lines 11-22; R. p. 148, lines 1-7; R. p. 157, lines 19; R. p. 162, line 4.)

During Appellant's trial, Dr. Gottfried testified at length about his criminal history. As part of her testimony, Dr. Gottfried detailed hearsay statements and descriptions of separate criminal incidents purportedly involving Appellant. Several of these incidents included charges that were later dismissed or expunged, and in each case, denied by Appellant. Dr. Gottfried had no personal knowledge of any of Appellant's offenses, and acknowledged that some of the information may not have been accurate. (R. p. 166, line 25- p. 167, line 17.) Nonetheless, over Appellant

objections, Dr. Gottfried was permitted to testify to the hearsay details because the information was used to make her clinical diagnoses and form her opinion as to whether Appellant met the criteria of a sexually violent predator. (R. p. 169, line 18-p. 170, line 18; R. p. 93, line 2-p. 94, line 19; R. p. 100, lines 2-15; R. p. 103, line 12- p. 104, line 9; R. p. 106, lines 11-23.)

In particular, Dr. Gottfried testified about the following incidents:

2013 Qualifying Sexually Violent Offense and Partially Dismissed Offenses: In 2013, Appellant pleaded guilty to the sexually violent offense of Criminal Sexual Conduct Third Degree in Clarendon County, South Carolina. He also pleaded guilty to Assault and Battery Second Degree and Threatening the Life of a Public Official. Charges for Criminal Sexual Conduct First Degree, Kidnapping, Strong Armed Robbery, and Assault and Battery First Degree were dismissed.

Dr. Gottfried testified:

> [O]fficers were dispatched to Clarendon Memorial Hospital emergency department where a 17-year-old reported that she had been raped. She reported that she had been sitting under a tree at about 1:30 in the morning. A male stranger -- reported to be Mr. Gibson -- approached her, started talking to her, agreed to buy her a pack of cigarettes. At some point, they walk to an abandoned building where he pulled up her shirt, a fight ensued. Specifically it was reported that he struck her in the eye. When she tried to fight back, he choked her causing her to lose consciousness for some period of time. He attempted to remove her clothing and vaginally raped her. He covered her mouth during that because she was reportedly screaming.

(R. p. 105, line 19 – p. 106, line 25).

Appellant denied the allegations during his evaluation with Dr. Gottfried. She admitted in testimony, "He said this victim lied and said that he raped her. They had gotten into a physical altercation, but that she called rape, and they couldn't prove it, which was confusing because he

pled guilty to this as a sexual offense, but wasn't clear in explaining that discrepancy." (R. p. 104, line 10 – p. 107, line 10).

2022 Partially Dismissed Offenses: In 2022, Appellant pleaded guilty to Assault and Battery Second Degree in Lexington County, South Carolina. Charges for Criminal Sexual Conduct First Degree and Domestic Violence of a High and Aggravated Nature were dismissed.

Dr. Gottfried recounted:

> This was a 41-year-old woman who reported that she got assaulted by her boyfriend of, I think she said, one to one-and-a-half months. She was walking, and he came up behind her, presented a knife, pushed her into a parking lot. Again, presented the knife, hit her with a closed fist, threw her to the ground, physically assaulted her while she was on the ground, vaginally raped her while she was on the ground. At the hospital, the records indicated that she had lacerations to her head. Her face was swollen… a laceration to her eye"

(R. p. 108, lines 11–25). When asked directly whether Mr. Gibson admitted to the allegations, Dr. Gottfried responded, "He denied that. He denied the sexual assault. I believe he admitted to the physical fight with the person." (R. p. 194, lines 6–11).

2019 Partially Dismissed Offenses: In 2019, Appellant pleaded guilty to Assault and Battery First Degree in Sumter County. Charges for Burglary First Degree and other additional assault charges were dismissed.

Of these offenses, Dr. Gottfried testified, "Mr. Gibson was convicted for having an altercation with a 73-year-old woman at her house. She had visible injuries to her face, knots… swelling on her forehead. It was reported that she was profusely bleeding out of her nose." (R. p. 97, line 10 – p. 98, line 14).

2009 Dismissed Offenses: In 2009, Appellant was arrested for Criminal Sexual Conduct First Degree, Kidnapping, and Assault and Battery of a High and Aggravated Nature in Manning, South Carolina. All charges were later dismissed and expunged.

Dr. Gottfried testified:

> It was reported to police… that Mr. Gibson went to [the victim's] house and said somebody was looking for her. They started walking down the street, and he struck her on the side of the face with a wrench. She lost consciousness for some period of time. When she came to, he reportedly dragged her into a yard and pulled down her pants and raped her vaginally, anally, and orally… He said that if she told anyone, he would get his father's gun and shoot her, and then he fled the scene. She was transported to the hospital and had a rape kit completed.

(R. p. 98, line 20 – p. 104, line 9).

Dr. Gottfried admitted that during her evaluation of Appellant, he denied the misconduct allegations, including the sexual assaults. (R. p. 194, lines 3–11; R. p. 104, line 10- p. 107, line 10.) He also denied the incidents when evaluated by the South Carolina Department of Mental Health expert, Dr. Marie Gehle. (R. p. 217, line 11 – p. 218, line 6.)

B. Discussion

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. All relevant evidence is admissible unless otherwise provide for by law. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision based on emotion, character, or speculation, rather than the facts properly before the jury. State v.

Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001); Matter of Campbell, 427 S.C. 183, 193, 830 S.E.2d 14, 19 (2019); State v. Cartwright, 425 S.C. 81, 91, 819 S.E.2d 756, 761 (2018)).

South Carolina courts have looked at that admissibility of unconvicted conduct in sexually violent predator cases. In In the Matter of Ettel, a trial judge permitted an expert to testify in an SVP commitment proceeding about Ettel's prior unconvicted sexual offenses, over his objection. 377 S.C. 558, 559, 660 S.E.2d 285, 286 (Ct. App. 2008)). On appeal, this Court found that the details of prior, unconvicted sexual offenses were properly admitted by the trial court because they were relevant to the expert's diagnosis and opinion. Id. at 562, 660 S.E.2d at 288. This Court further held that the possibility of unfair prejudice did not substantially outweigh the probative value of the testimony. Id. at 563, 660 S.E.2d at 288.

The facts in the current case warrant a different resolution. Like Ettel, Appellant's prior offenses were also not convictions, some of them having even been expunged. However, the appellant in Ettel admitted to his prior unconvicted offenses; as such, there was an inherent assurance of the reliability of the underlying hearsay statements. In this case, Appellant denied the sexually violent allegations that were published to the jury. As such, the hearsay allegations against Appellant lacked the same reliability as the ones in Ettel. Without reliability, the challenged evidence had no relevance or probative value.

The State argued that the hearsay against Appellant was admissible under Rules 702 and 703 of the South Carolina Rules of Evidence. "The admission of expert testimony is governed by Rule 702, SCRE, which provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Expert testimony may be used to help the jury to determine a fact in issue

based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." See also, Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010)). Moreover, pursuant to Rule 703, SCRE, an expert witness is permitted to base an opinion on facts not within his firsthand knowledge so long as it is the type of information that is reasonably relied upon in the field to make opinions. State v. Hutto, 325 S.C. 221, 481 S.E.2d 432 (1997). Nonetheless, as articulated in Watson, even in circumstances where 702 and 703 applies, the trial court must still evaluate the proposed evidence for reliability. See Watson at 446, 699 S.E.2d 175 (citations omitted). ("Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.")

In this case, Dr. Gottfried went beyond what Rules 702 and 703 allow. Instead of briefly explaining the materials that informed her evaluation, she recited detailed out-of-court statements to the jury. She repeated serious allegations—including vaginal, anal, and oral rape; assault with a wrench; and choking to unconsciousness.[1] (R. p. 105, line 19 – p. 106, line 25; R. p. 194, lines 6–11; R. p. 97, line 10 – p. 98, line 14; R. p. 98, line 20 – p. 104, line 9.) These statements were denied by Appellant, were not introduced through witnesses, were not tested through cross-examination, and were presented solely under the justification that they contributed to her clinical opinion. (R. p. 169, line 18-p. 170, line 18; R. p. 93, line 2-p. 94, line 19; R. p. 100, lines 2-15; R. p. 103, line 12- p. 104, line 9; R. p. 106, lines 11-23.) As such, the evidence had limited probative value because it was denied, unverified, and for the most part, did not culminate in sexually violent convictions. Given that, the trial court abused its discretion by allowing the

[1] The record shows that the details of Appellant's only qualifying conviction, a 2013 conviction for Criminal Sexual Conduct Third Degree, were that he struck his victim, choked her to unconsciousness and vaginally penetrated her. (R. p. 105, line 19 – p. 106, line 25; R. p. 217 lines 21-24; R. p. 104, line 10-p. 105, line 16; R. pp. 319-320).

hearsay testimony. The impact of Dr. Gottfried's hearsay testimony was substantial, and caused Appellant to experience significant prejudice. Accordingly, this Court should reverse the trial court's commitment order and remand the case for a new trial.

II. Did the trial court err in overruling the Appellant's objection and refusing to issue a curative instruction, such that the trial was infected with unfairness and the Appellant was denied due process, when the State's closing argument improperly suggested that hearsay allegations including those from dismissed charges and unconvicted offenses were substantiated when the underlying hearsay allegations were used by expert witnesses solely for the purposes of conducting psychological evaluations.

A. Relevant Facts

Prior to this case being submitted to the jury, both parties made closing arguments pursuant to SCRCP, Rule 43(j). Mr. Runyan made the final rebuttal closing argument ("closing") for the State. In his closing, Mr. Runyan referenced Appellant's prior unconvicted sexual offense history, as testified to by the expert witnesses. He stated in part, "[Ms. Johnson] told you in these charges there was no evidence -- no evidence that he did these things, ***but there was evidence.*** Dr. Gottfried and Dr. Gehle talked about the records they reviewed, the law enforcement records, the incident reports, victim statements that they reviewed, where they got the details from, and they talked to us about them. ***They didn't just make them up.*** They came from those records that these doctors used, and typically use, and relied on in these high-stake evaluations." (emphasis added) (R. p. 281, lines 10-20.)

Ms. Johnson objected, arguing that Mr. Runyan's comments indicated that the past accusations against Appellant, ones that had been dismissed and never led to a conviction, were substantiated by evidence. And in so doing, Mr. Runyan made the accusations seem more reliable

and trustworthy than they really were. This mislead the jury into giving those unproven claims more weight than they deserved. Ms. Johnson asked the court to issue curative instructions. (R. p. 283, line 9- p. 284, line 15.)

Mr. Runyan denied giving the impression that the records were reliable. He argued that both expert witnesses, Dr. Gehle and Dr. Gottfried, had reviewed the records to form their opinion. He pointed out that professionals in the field typically used those types of records, which included law enforcement, school, and mental health records, to help form their opinions. He also argued that Ms. Johnson had opened the door for his comments. (R. p. 284, line 18-p. 285, line 17.)

Ms. Johnson countered that the issue was not that the experts had used these records; but that Mr. Runyan's comments gave the impression that the accusations in the records were true, even though those records were never entered into evidence and didn't involve actual convictions. She insisted that the statements effectually amounted to bolstering the hearsay, thus giving the jury the impression that the records were valid and could be trusted.

The court, after some discussion, overruled Ms. Johnson's objection, agreeing with Mr. Runyan's point that the experts had already testified about relying on these records. (R. p. 285, line 24-p. 286, line 14.) Nonetheless, the court allowed Ms. Johnson to submit a potential curative instruction. She offered the following curative instruction for the court's consideration:

> You may have heard testimony about criminal records. The only evidence you are to consider is the evidence before you. Hearsay testimony about records does not, in and of itself, validate a record or make it reliable.

(R. p. 287, lines 4-9.)

Mr. Runyan objected to the instruction, claiming that it incorrectly commented on the facts. *(R. p. 287, lines 4-16.)* The court then offered the following modification:

> You may have heard testimony about criminal records. The only evidence you are to consider is before you. Hearsay testimony about records does not, in and of itself, validate a record or make it reliable.

(R. p. 289, lines 8-12.) Again, Mr. Runyan objected, arguing that the instruction told the jury to ignore what the experts said about the criminal records. (R. p. 289, lines 12-16.)

The court attempted another modification, before ultimately deciding not to give the curative instruction. (R. p. 289, lines 17-24.) The court further declined to allow Ms. Johnson more time to craft an alternative curative charge, but confirmed that the issue was protected for the record. (R. p. 289, line 23- p. 290, l. 15.)

B. Discussion

The South Carolina Supreme Court has found that while prosecutors are expected to advocate zealously for the State, their arguments during closing must be confined to evidence in the record and the reasonable inferences drawn therefrom. See Fortune v. State, 428 S.C. 545, 552, 837 S.E.2d 37, 41 (2019) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935). A prosecutor may vehemently argue, but the argument must remain tethered to the trial evidence. State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023). Prosecutors may not insert their personal beliefs or vouch for the credibility of a witness, as doing so improperly influences the jury. Id. See also Fortune v. State, 428 S.C. 545, 552, 837 S.E.2d 37, 41 (2019) (finding that a solicitor's improper comments about presenting the truth while accusing the defense of "manipulating" and "obscuring" the truth, were unsupported by evidence and so infected the trial with unfairness that it denied the defendant due process, warranting a new trial.)

Here, Mr. Runyan was essentially acting as a prosecutor for the State. As such, he was beholden to the same limitations of a prosecutor, including that his comments must be limited to the evidence in the record and reasonable inferences drawn therefrom.

As argued above, an expert witness may state an opinion based on facts not within his firsthand knowledge; however, the expert testimony does not itself establish that the out-of-court allegations are true.

As the record shows, the hearsay statements relied on by the experts in this case were not asserted for the truth of the matter and no direct evidence had been submitted to validate the prior unconvicted offenses. Upon questioning and objection, the State did not argue that the testimony was being offered for the truth of the matter asserted. Instead, it was made clear that the hearsay testimony was admissible because it helped Dr. Gottfried identify patterns, score risk assessments, make a diagnosis, and reach her opinion of Appellant's eligibility as a sexually violent predator. (R. p. 169, line 18-p. 170, line 18; R. p. 93, line 2-p. 94, line 19; R. p. 100, lines 2-15; R. p. 103, line 12- p. 104, line 9; R. p. 106, lines 11-23.) Moreover, neither Dr. Gottfried nor Dr. Gehle authenticated the underlying statements, and the statements were not admitted through direct evidence or subjected to cross-examination. Dr. Gottfried herself admitted that she had no personal knowledge of any of Appellant's offenses, and that some of the hearsay information may have been inaccurate. (R. p. 166, line 25- p. 167, line 17.) Accordingly, there was no evidence in the record that proved the truth of the challenged hearsay misconduct allegations.

Nonetheless, the State's closing argument treated these statements as though their truth was confirmed by the fact that experts had reviewed them. By stating that there "was evidence" and that the doctors "didn't just make them up," the State gave the impression that the contents of those records were validated, reliable and should be believed.

The Appellant's objection noted this distinction. Ms. Johnson did not dispute that the experts relied on various records of Appellant's alleged misconduct; rather that the State's comments suggested those records were themselves credible. She emphasized that the charges had been dismissed and that there was no evidence any victim testified or pursued prosecution in the underlying offenses.

Additionally, contrary to Mr. Runyan's assertion, Ms. Johnson had not opened the door to the challenged comments by arguing in her closing that there was "no evidence" of the allegations. This claim mischaracterized the Appellant's closing argument. In her close, Ms. Johnson explicitly acknowledged evidence of one of Appellant's convictions. She also conceded that the experts had testified about Appellant's other prior allegations for which he had never been convicted. Her argument focused on the fact that Appellant had **not been convicted** as a result of the accusations, and thus the records were unreliable. Ms. Johnson never suggested there was "no evidence."[2] (R.

[2] The record reflects that Ms. Johnson did not deny the existence of evidence in her closing argument:

> The truth is all the evidence before you says that he has a personality disorder, so I would submit that is not even something you have to debate.
> ….
> **In 2009, he had some charges, I believe, like assault and battery of a high and aggravated nature, kidnapping, sexual conduct first degree, all of them dismissed. Not guilty on any of them. It wasn't even that it was taken to a jury. They were just dismissed.** In 2022, domestic violence: Dismissed. Criminal sexual conduct: Dismissed. Nolle prossed is another way to say dismissed, basically. All he ended up with is assault and battery second with no mention of a sexual offense. So we're here today, really, because of allegations. We're here today because my client was once upon a time -- twice upon a time accused and, yet, we're supposed to undo what a prosecutor [p. 270] thought was appropriate then to dismiss the charges? They're gone. And that means that, as far as we know, ***there was no evidence that a victim pursued*** them. ***There was no evidence that any of those so-called victims testified under oath and accused my client***. What the evidence shows is that those charges were dropped, and they were dismissed. **So, really, in all of his life, he has had one sexually violent conviction -- just one. Even then, he got released from jail, and he has not had one sexually violent conviction since then.**
>
> (emphasis added) (R. p. 267, lines 9-12.) (R. p. 269, line 10- p. 270, line 10.)

p. 269, line 10–p. 270, line 10.) Rather, she argued that the evidence did not support a finding beyond a reasonable doubt. As such her comments did not open the door to a rebuttal that suggested the underlying hearsay records were credible or should be treated as reliable proof.

Curative Instruction

The court's decision not to issue a clarifying jury instruction was also in error. Under State v. Cartwright, an expert may discuss general behavioral characteristics without vouching for a victim's credibility, provided that no implication is made regarding the truth of specific allegations (425 S.C. 81, 96, 819 S.E.2d 756, 763 (2018). However, when a party crosses that line and implies the existence of evidence supporting those hearsay statements or dismissed charges, the court must take steps to limit unfair prejudice.

Here, after the State's comments during closing argument, Ms. Johnson requested a narrowly tailored instruction to clarify that records referenced by experts were not evidence themselves and that reliance on those records did not validate their truth. The trial court reviewed her proposed language but refused to issue an instruction, stating that doing so might cause jurors to disregard expert testimony entirely. This reasoning misapplies the law. A curative instruction could have clarified the distinction between an expert's reliance on certain records and whether the records, or statements therein, were in and of themselves evidence. Failing to provide that instruction allowed the jury to misinterpret the experts' use of hearsay as proof of its truth. The result was inherently unfair to the Appellant.

Prejudice and Harm

Because the trial court allowed testimony of the prior unconvicted offenses and unverified allegations of sexually violent conduct to be admitted, Appellant suffered unfair prejudice. The

harm was compounded when the State implied that the unadjudicated allegations were substantiated. This infected the trial to such a high degree of unfairness that it amounted to a denial of the Appellant's right to due process. See Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) ("A review of a solicitor's closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."); See also Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019) ("To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial."). The trial court's failure to intervene or cure the prejudice left Appellant without the fair and impartial proceeding to which he was entitled. Therefore, Appellant's commitment as a sexually violent predator should be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court's commitment order and require that Appellant be released; or in the alternative, Appellant requests that this case be remanded for a new trial.

Respectfully Submitted,

s/Kindle K. Johnson

KINDLE K. JOHNSON
S.C. Bar No. 72926
K. JOHNSON LAW FIRM
223 E Main St, Suite 500
Rock Hill, SC 29730
803.329.1900

October 2, 2025

ATTORNEY FOR APPELLANT