

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF WILLIAM J. WILDE,

APPELLANT

APPELLATE CASE NO. 2013-000531

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing the expert to testify as to the details of the sexual assault as described by the non-testifying victim which were hearsay as they went beyond time and place and violated Rule 801(d)(1)(D), SCRE?

STATEMENT OF THE CASE

In March 1998, Wilde appeared in circuit court and entered a guilty plea to committing a lewd act on a child under the age of sixteen. Judge Rawl sentenced Appellant Wilde to ten years suspended to twenty-four months probation. In November 2004, Wilde entered a guilty plea to committing a lewd act on a minor under the age of sixteen and was sentenced to fifteen years incarceration.

In 2012, prior to his release from the Department of Corrections, Wilde was referred to the Multi-Disciplinary Team who determined that probable cause existed that Wilde was a sexually violent predator.

Dr. Marie Gehle, Chief Psychologist with the Department of Mental Health, was ordered by the trial court to complete an evaluation of Wilde. R. 82, ll. 13 – 25; R. 86, ll. 9-10. Dr. Gehle determined that Wilde suffered from pedophilia that predisposed him to commit sexually violent offenses which posed a menace to the health and safety of children. R. 104, ll. 16 – R. 106, ll. 25.

On October 15-16, 2012, Wilde proceeded to trial before the Honorable J. Mark Hayes, II, and a jury to determine if he were a sexually violent predator. Wilde was represented by Ray E. Thompson and Darryl L. Bush. The state was represented by Lloyd V. Flores, Jr. The jury found that Wilde was a sexually violent predator pursuant to S.C. Code Section 44-48-30.

On October 17, 2012, Judge Hayes signed the order committing Way to the Department of Mental Health for long term control, care and treatment. Wilde's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

According to the testimony of the expert, Dr. Marie Gehle, Wilde was convicted via guilty plea in 1998 to committing a lewd act on a child under the age of sixteen which occurred on May 30, 1997. Wilde was sentenced to ten years suspended to twenty-four months probation. R. 95, ll. 23 – R. 96, ll. 23.

The incident involved Wilde's eight year old biological son who said that while he was on an overnight visit with Wilde, the child awoke to Wilde allegedly fondling the child's penis. Defense counsel objected on the ground of hearsay. The judge allowed the testimony to continue, and instructed counsel that he could cross-examine the witness on those questions. R. 97, ll. 1 – 12.

The testimony continued with Dr. Gehle stating that the child awoke to his penis being fondled by Wilde who stopped when the child awoke. The child also stated that Wilde told him he better not tell anyone. R. 97, ll. 13 – 19.

Wilde pled guilty in 2004 to committing a lewd act on a child under the age of sixteen which occurred April 15, 2001, and February 7, 2002. Wilde was sentenced to fifteen years incarceration. The child was the four year old daughter of Wilde's stepdaughter. Dr. Gehle testified that the child reported that while she was visiting Wilde, Wilde fondled her genitals and licked her genitals. R. 97, ll. 23 – R. 99, ll. 23.

In a pretrial proffer of Dr. Gehle's testimony, she described two twenty-six year old offenses from North Carolina in 1986 where the charges of indecent liberties with a child were dismissed. R. 6, ll. 19 – R. 7, ll. 25; R. 30, ll. 14 – 25. The doctor related that the child was the nine year old niece of Wilde's wife. The child said that Wilde fondled her vagina and breasts on numerous occasions, and that the incidents occurred while she was lying on

the sofa in the early morning. Defense counsel objected to the hearsay which the judge allowed because it was a proffer. R. 31, ll. 1 – 25. The judge did exclude the two 1986 offenses from being admitted as they were highly prejudicial and the prejudice outweighed the probative value. R. 55, ll. 17 – R. 56, ll. 19.

The judge, earlier in a pretrial motion, stated: “Experts can base their opinion on information that’s hearsay upon hearsay, and it can base their opinion on information that would not be admitted directly in a court of law to prove the facts of, of, what’s trying to be established. I think expert opinions have, in my words, a more liberal use of information in forming their opinions.” R. 20, ll. 1 – 14.

Defense counsel, in describing the sources of Dr. Gehle’s of information that she relied on, argued to the court that she relied on police reports and one two hour and thirty minute interview with Wilde. There was no indication that she had actual communication with anyone other than Wilde. R. 19, ll.20 – 25.

Dr. Gehle admitted that in her interview with Wilde, he denied committing all of the offenses. R. 32, ll. 4 – 11. She also admitted that she did not have any other interviews with anyone other than Wilde. R. 33, ll. 21 – R. 34, ll. 1.

Dr. Gehle diagnosed Wilde as suffering from pedophilia, meaning he was attracted to prepubescent children. He was also attracted to adults as he had been married several times. In her opinion, he met the legal criteria to be a sexually violent predator, and needed to be confined in a secure facility for long term control, care, and treatment. R. 104, ll. 16 – R. 108, ll. 2.

ARGUMENT

The trial court erred in allowing the expert to testify as to the details of the sexual assault as described by the non-testifying victim which were hearsay as they went beyond time and place and violated Rule 801(d)(1)(D), SCRE.

Rule 801, SCRE, provides that hearsay is a statement, other than one made by the declarant while testifying at the trial offered in evidence to prove the truth of the matter asserted. Rule 802, SCRE, provides that hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.

Rule 801(d) (1) (D), SCRE. This Rule of Evidence, that sexual assault victim's prior consistent statements limited to time and place of alleged incident are not hearsay, if victim testifies at trial and is subject to cross-examination, allows other witnesses to testify that victim complained of assault, but only as to time and place; it specifically circumscribes such testimony by excluding details or particulars. State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002); citing Rule 801(d) (1) (D), SCRE; Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002).

In Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013), the Court of Appeals reversed the trial court and granted Vail's PCR because trial counsel's failure to object to the hearsay testimony concerning the alleged sexual relationship between the victim and the defendant in this criminal sexual conduct with a minor case which was inadmissible, constituted deficient performance and fell below professional norms. The Court wrote:

In a CSC case, the testimony of a witness regarding the victim's out-of-court statement is not hearsay when the declarant testifies at the trial and is subject to cross examination concerning the statement, and the statement is consistent with the declarant's testimony in a CSC case or attempted CSC case where the declarant is the alleged victim and the statement is limited **to the time and place of the incident.**

The Court then wrote that “any other details or particulars including the perpetrator’s identity, must be excluded.”

Rule 703, SCRE, provides that the facts and data relied on by an expert upon which he based his opinion need not be admissible in evidence if of a type reasonably relied upon by experts in the particular filed in forming opinions. The facts and data may be those perceived by or made known to the expert at or before the hearing.

Rule 705, SCRE, provides that the expert may testify in terms of opinion or inference without first testifying to the underlying facts or data, unless the court requires otherwise. The expert in any event may be required to disclose the underlying facts or data on cross-examination.

Rule 403, SCRE which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The child did not testify in Wilde’s SVP case. There was no evidence the child testified at the guilty plea. The expert admitted that she did not speak with the child nor any other witnesses other than Wilde who denied committing the incidents.” R. 33, ll. 21 – R. 34, ll. 1. Allowing the details, which were hearsay, was extremely prejudicial to Wilde.

In Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), the United States Supreme Court held that the Confrontation Clause did not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification-made for the purpose of proving a particular fact- through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. The Court wrote that “surrogate testimony of that order does not meet the constitutional requirement.”

This same principle applied to Wilde's case as the expert had never talked with the child, and relied only on police reports which had not been validated.

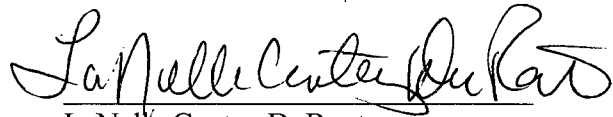
After the expert testified as to the description by the eight year old child of the details of the 1997 offense, defense counsel objected. R. 97, ll. 1-12. The expert then testified that the four year old child in the 2004 conviction and her mother had said that Wilde fondled her genitals and licked her there. Defense counsel did not object. R. 97, ll. 23 – R. 99, ll. 23. However, it would have been futile for counsel to object as the judge had already ruled that this type of hearsay evidence was admissible.

The expert in Wilde's case should have been allowed to testify only as to what the child said about the time and place of the alleged incident. The expert's testimony violated Rule 801(d)(1)(D) because it was hearsay. If the details are prejudicial in a criminal case, then they are just as prejudicial in an SVP trial which is a hybrid of criminal and civil. All the state needed to meet the elements of the SVP statute were the convictions of a sexually violent offense.

CONCLUSION

Based on the above, the order of the trial court committing Wilde to the SVP Program should be reversed, and Wilde released. In the alternative, his case should be remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name.

LaNelle Cantey DuRant
Appellate Defender

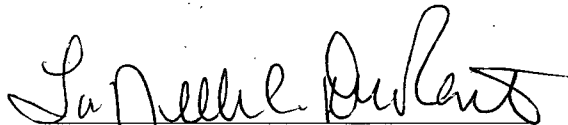
ATTORNEY FOR APPELLANT

This 31st day of March, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 31st, 2014

A handwritten signature in black ink, reading "LaNelle C. DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

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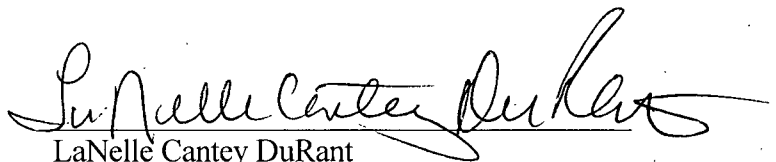
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of March, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of March, 2014.

Marla Vando (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.