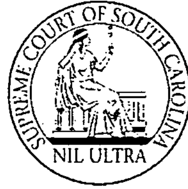

The Supreme Court of South Carolina

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December 2, 2014

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: In the Matter of the C&T of Vincent Neal Way
Lower Court Case No. 2007CP1002613
Appellate Case No. 2011-199686

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

Cc: William M. Blitch, Jr., Esquire
LaNelle Cantey DuRant, Esquire

The Supreme Court of South Carolina

In the Matter of the Care and Treatment of Vincent Neal Way, Petitioner/Respondent,

v.

The State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-199686
Lower Court Case No. 2007-CP-1002613

ORDER

The State's petition for rehearing is denied. This Court does, however, substitute the attached, amended majority and concurring opinions previously filed in this matter. The substantive changes are to the legal analysis regarding the dismissal of certiorari as to the State in section III(B) of the original majority opinion and in footnote 3 of the original concurring opinion.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
November 12, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Vincent Neal Way, Petitioner/Respondent,

v.

The State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-199686

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 27444
Heard November 20, 2013 – Re-Filed November 12, 2014

AFFIRMED AS MODIFIED IN PART; CERTIORARI DISMISSED IN PART AS IMPROVIDENTLY GRANTED

Appellate Defender LaNelle Cantey Durant, of Columbia, for Petitioner/Respondent.

Attorney General Alan Wilson and Assistant Attorney General William M. Blitch, both of Columbia, for Respondent/Petitioner.

JUSTICE BEATTY: A jury found Vincent Neal Way met the definition of a sexually violent predator (SVP) under South Carolina's SVP Act, S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2013). The circuit court ordered Way to begin involuntary civil commitment for long-term control, care, and treatment in the SVP treatment program administered by the South Carolina Department of Mental Health. Way appealed, and the Court of Appeals affirmed. *In re the Care & Treatment of Way*, Op. No. 2011-UP-268 (S.C. Ct. App. filed Aug. 24, 2011). This Court granted cross petitions for a writ of certiorari filed by Way and the State. As to Way's appeal, we affirm as modified, and we dismiss the State's petition for a writ of certiorari as improvidently granted.

I. FACTS

In 1993, Way pled guilty to committing a lewd act on a minor. The victim was Way's 13-year-old niece, who was spending the night with Way (who was then about 28 years old) and his wife. The victim reported that Way put his hand inside her clothing while she was sleeping on the couch and fondled her, kissed her thigh, and then laid on her and "began humping her." Way was sentenced to ten years in prison, suspended upon the service of eighteen months in prison and five years of probation.

In 1995, while on probation, Way pled guilty to contributing to the delinquency of a minor. In that matter, Way allowed two girls who were runaways, one 13 and one 15, to spend the night at his home without notifying the police.

While still on probation in 1997, Way pled guilty to committing a lewd act upon a minor. The victim was a 13-year-old girl, who reported that Way met her at a boat dock in 1995 and gave her marijuana, then had sexual intercourse with her. Way was sentenced to fifteen years in prison for this offense.

In 2007, prior to his release from prison, Way was referred to the multidisciplinary team, which determined there was probable cause to believe Way met the statutory definition of an SVP.[1] The multidisciplinary team referred Way's

---

[1] An SVP 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. 2013).

case to the prosecutor's review committee, which filed a petition with the circuit court for civil commitment proceedings. The circuit court concluded probable cause existed and ordered a mental evaluation of Way to be performed by Dr. Donna Schwartz-Watts. Dr. Schwartz-Watts performed an evaluation and was the State's expert. Way also obtained an independent mental evaluation by an expert of his own choosing, Dr. Tom Martin.

At the civil commitment proceeding in 2009, Dr. Schwartz-Watts testified that she believed Way suffered from a mental abnormality or personality disorder as defined by the SVP Act. Specifically, she diagnosed him as having a sexual disorder, not otherwise specified, based on his prior sexual history with several 13-year-old girls. She also diagnosed Way as having amnesia (for events prior to 1994) based on a head injury he sustained in a car accident in 1994. She found, however, that any memory loss was not due to brain damage because testing revealed Way has "a high average IQ."

Dr. Schwartz-Watts stated her evaluation indicated Way was likely to re-offend. In particular, she noted his subsequent offenses occurred while he was still on probation and the incidents occurred in places where others were present, which showed Way had an inability to control his impulses.

Just before Way testified, Way's counsel renewed a motion to preclude the State from mentioning the fact that Way had seen an expert of his own choosing, Dr. Martin, who would not be testifying. Counsel acknowledged Way saw Dr. Martin and was evaluated, but stated the doctor did not make a report of his findings.

The circuit court observed that one can always comment about a witness who is not called, and that it is done every day in criminal and civil cases. Way's counsel countered that the inference usually applies to fact witnesses, whereas here, they consulted an expert for an evaluation in accordance with a statute that made the funds available for a second evaluation. The court disagreed, stating the statute merely creates a right. The court explained, "I don't think there is anything that precludes the State from asking him, did you demand to be evaluated, to have an independent evaluation, and was that evaluation done? I think that ends the inquiry."

During cross-examination, the State asked Way if, "in preparation for this hearing, you were transported . . . from the jail to Columbia to see a Dr. Martin to be evaluated for these proceedings," and Way confirmed that he was transported to

see a doctor and that he was asked questions and had evaluations, but he did not recall any specifics.

In closing argument, the State made the following additional reference to Dr. Martin and invoked what is commonly called the "missing witness rule," arguing the jury could infer the absence of Dr. Martin indicated that his testimony would have been adverse to Way:

> Now on cross-examination I asked the respondent, did you go to be evaluated by Dr. Martin pursuant to this case?
>
> . . . .
>
> Now Dr. Martin is not here. And the question, I think the inference you can draw from that is would Dr. Martin's testimony, if he was here, be adverse to the respondent? So, that's where we are.

At the conclusion of the evidence, the jury found Way met the definition of an SVP, and the circuit court ordered him to be civilly committed for long-term control, care and treatment. Way appealed, and the Court of Appeals affirmed. This Court granted cross-petitions for certiorari by Way and the State regarding the State's cross-examination of Way and its closing argument.

II. STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law." *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012). "The scope of cross-examination rests largely in the discretion of the trial court." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009) (citation omitted). Likewise, "[a] trial court is allowed broad discretion in dealing with the range and propriety of closing argument to the jury." *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct. App. 2006).

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). To warrant reversal, an appealing party must demonstrate not only error in the court's ruling, but also resulting prejudice. *Id.* at 390, 529 S.E.2d at 539; *see also Duncan*, 385 S.C. at 133, 682 S.E.2d at 884 (stating reversal requires a showing of both a manifest abuse of discretion and prejudice).

III. LAW/ANALYSIS

The pertinent issues before the Court of Appeals concerned (1) the cross-examination of Way, during which the State asked Way whether he had another evaluation performed by Dr. Martin; and (2) the State's closing argument, in which it argued an adverse inference could be taken by the jury from Dr. Martin's absence at trial. The Court of Appeals "agree[d] with the trial court's decision to allow the State to cross-examine Way regarding a second mental evaluation, [but] h[e]ld it was improper for the State to imply a negative inference regarding the absence of Way's expert witness before the jury." *In re the Care & Treatment of Way*, Op. No. 2011-UP-268 (S.C. Ct. App. filed Aug. 24, 2011), slip op. at 4. However, the Court of Appeals affirmed on the basis of harmless error. *Id.* at 6.

A. Way's Appeal

In his appeal, Way challenges the propriety of both the State's cross-examination of Way and its invocation of the missing witness rule in closing argument.

We disagree with the Court of Appeals to the extent it found it did not constitute error for the State to question Way about Dr. Martin. The Court of Appeals found this issue should properly be addressed according to the South Carolina Rules of Evidence (SCRE) and established precedent. *Id.* at 4. The court noted all relevant evidence is generally admissible under Rule 402, SCRE, yet relevant evidence may be excluded under Rule 403, SCRE if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* The court also cited precedent for the proposition that a trial judge has wide latitude in the admissibility of evidence, and that an appellate court reviews such rulings based on an abuse of discretion standard. *Id.* (citing, *inter alia*, *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010)).

While the Court of Appeals was correct that the admission of this testimony is governed by the SCRE and our case law, for the reasons discussed in another decision issued by this Court, *In re the Care & Treatment of Gonzalez*, Op. No. 27443 (S.C. Sup. Ct. filed Sept. 3, 2014) (Shearouse Adv. Sh. No. 35 at 31), we find the probative value of questioning Way about his retention of a non-testifying psychiatric expert was substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). As a

result, we conclude the State should not have been allowed to cross-examine Way about his retention of his non-testifying expert witness, Dr. Martin.

We further conclude that it was error to allow the State to assert during closing argument that the jury could infer the missing witness's testimony would have been adverse to Way's case. The Court of Appeals found it was error because when a party lacks control over the retained expert witness, an adverse inference is improper. *Way*, No. 2011-UP-268, slip op. at 5. As we explained in *Gonzalez*, we believe invocation of the missing witness rule should be limited to fact witnesses, and it should not be invoked as to medical, psychological, psychiatric, or similar medical expert *opinion* witnesses. The application of an adverse inference as to these types of experts allows a jury to simply *speculate* as to what the expert might have said. In our view, an adverse inference is not appropriate regarding the opinions held by medical, psychological, psychiatric, or similar medical experts, as the condition of a party is based upon numerous complex factors that do not readily lend themselves to being reduced to a discrete, adverse inference, as compared to a fact witness.

That being said, however, we must next examine whether the errors as to the State's cross-examination and closing argument constitute reversible error under a harmless error analysis. "Error is harmless where it could not have reasonably affected the result of the trial." *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009). "Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result." *Id.* (citing *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)). "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." *Id.* (citation omitted).

In this case, the Court of Appeals held any error was harmless beyond a reasonable doubt, stating "[e]vidence of Way's prior sexual criminal history, the testimony of the State's expert witness, and the testimony of the victim of Way's 1993 [] offense provided relevant and substantive evidence to support the jury's determination." *Way*, No. 2011-UP-268, slip op. at 6.

During cross-examination, the State asked Way if he had seen Dr. Martin for an evaluation, and during cross and closing the State never referred to Dr. Martin as Way's expert or mentioned that Way had retained Dr. Martin for an independent evaluation but then did not call him as a witness, so there was only limited information elicited at trial in this regard. All of the information regarding Dr. Martin's role as Way's expert was confined to the colloquy among the parties and the circuit court. In addition, Way was not prevented from rebutting the adverse

inference if he deemed it necessary. *See Dansbury v. State*, 1 A.3d 507, 522 (Md. Ct. Spec. App. 2010) ("Where a party raises the missing witness rule during closing argument, its use is just that—an argument. . . . Furthermore, the opposing side also has an opportunity to refute the argument and counter with reasons why the inference is inappropriate." (alteration in original) (citation omitted)). Consequently, we agree with the Court of Appeals that any error could not have reasonably affected the outcome here.

B. The State's Appeal

The State has also filed a cross-petition for a writ of certiorari in this case. However, we now dismiss the writ of certiorari as to the State as improvidently granted.

IV. CONCLUSION

Based on the foregoing, the decision of the Court of Appeals is affirmed as modified as to Way's appeal, and we dismiss the writ of certiorari as to the State.

AFFIRMED AS MODIFIED IN PART; CERTIORARI DISMISSED IN PART AS IMPROVIDENTLY GRANTED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that it was error for the trial judge to permit the State to invoke the missing witness rule[2] for the reasons set forth in my concurrence *In the Matter of Gonzalez*, Op. No. 27443 S.C. ___, ___ S.E.2d ___, 2014 WL (S.C. Sup. Ct. filed September 3, 2014) (Pleicones, J., concurring). I also agree the error was harmless.[3] I therefore concur in result only and would affirm the Court of Appeals' decision as modified.

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[2] I disagree with the majority's discussion of Rule 403. As I understand the majority's opinion in *Gonzalez*, the missing witness rule can *never* be invoked for opinion witnesses. Therefore, a Rule 403 analysis is unnecessary. Likewise, I would find the majority's distinction between the invocation of the rule on cross-examination or during closing argument unnecessary.

[3] Unlike the majority, I do not base my harmless error finding on the fact that Way could have rebutted the adverse inference if he deemed it necessary.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In The Matter Of The Care And Treatment of Vincent N. Way, Appellant.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2011-UP-268
Submitted April 1, 2011 – Filed June 8, 2011

AFFIRMED

Appellate Defender Lanelle C. Durant, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General William M. Blitch, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia, for Respondent.

PER CURIAM: Vince Neal Way appeals the trial court's order committing him to the Department of Mental Health for long term control, care, and treatment after a jury found that Way satisfied the definition of a sexually violent predator pursuant to the Sexually Violent Predator Act (SVP Act), S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2010). Way argues the trial court erred (1) in allowing the State to present evidence of a 1995 criminal sexual conduct (CSC) charge that was later dismissed because DNA evidence proved that he was not guilty; (2) in allowing the victim of his 1993 CSC conviction to testify; and (3) in allowing the State to question him regarding whether he retained an expert to conduct a second mental evaluation. Further, Way asserts the trial court erred when it allowed the State to tell the jury that it could infer the absence of Way's retained expert meant that the expert's testimony would have been adverse to his case.

Because we find the trial court made no reversible error, we affirm.[1]

I. Evidence of a Prior Conviction

Way asserts the trial court erred in allowing the State to present evidence of the 1995 CSC charge that was later dismissed because DNA evidence proved that he was not guilty. Way states the probative value of that evidence was substantially outweighed by the danger of unfair prejudice. He alleges the jury was led to believe he was guilty of the CSC charge when, in fact, he pled guilty to a lesser charge. However, Way's argument is based on an erroneous interpretation of the sequence of events and testimony at trial. Despite the trial court's ruling that this evidence was admissible, the State ultimately abandoned the introduction of this evidence. Therefore, we find no reversible error in the trial court's ruling.

The admission of evidence is within the sound discretion of the court and will not be reversed absent a showing of abuse of discretion. In re Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); see also State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."). "The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion." State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000).

"Generally, all relevant evidence is admissible." State v. Pittman, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007); see also Rule 402, SCRE. Evidence is relevant if it has "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; State v. Livingston, 327 S.C. 17, 19-20, 488 S.E.2d 313, 314 (1997). On the other hand, relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).

Under the SVP Act, 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. 2010). "Mental abnormality" is defined as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. § 44-48-30(3) (Supp. 2010). The phrase "likely to engage in acts of sexual violence" is defined as a "propensity to commit acts of sexual violence . . . 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. 2010).

In 1993, Way pled guilty to committing a lewd act upon a minor and was sentenced to ten years' imprisonment, suspended upon service of 18 months' imprisonment plus five years' probation. In 1995, while on probation, Way was arrested for CSC and pled guilty to contributing to the delinquency of a minor. In 1997, while on probation from the prior convictions, Way pled guilty to committing a lewd act upon a minor and was sentenced to 15 years' imprisonment.

At Way's civil commitment proceeding, the State sought to admit testimony from the State's retained psychiatrist regarding the 1995 CSC charge to show Way had a dangerous propensity to commit violent sexual acts. Way objected to the admission of the 1995 CSC charge as it had later been determined that he did not commit the crime. The court overruled the objection, stating that the testimony was more probative than prejudicial, that it was relevant, and that it

helped to form the foundation of the expert witness's opinion. Nevertheless, when direct examination continued, the State only questioned the witness regarding Way's "contributing to the delinquency" plea. The State never mentioned in the jury's presence that Way was indicted for CSC. Therefore, no prejudice occurred to Way as a result of the trial court's ruling that allowed the State to question the witness regarding the CSC charge. The only mention of anything sexual in nature regarding the CSC charge was during cross-examination by Way's own trial counsel. Hence, Way cannot complain on appeal regarding the introduction of testimony that he elicited. Gissel v. Hart, 382 S.C. 235, 243, 676 S.E.2d 320, 324 (2009); see also Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (stating a party may not complain on appeal of an error that his own conduct produced). Because we find that no error occurred in the admission of evidence, we affirm the trial court's ruling.

II. Testimony of a Prior Victim of CSC

Way argues the trial court erred in allowing the victim of his 1993 CSC conviction to testify. Way contends that because he pled guilty to the charge and stipulated that the offense was a qualifying offense under the SVP Act, and because the forensic psychiatrist had already testified to the events surrounding the conviction, the victim's testimony served only to bolster the expert testimony. We disagree.

"Under the SVP Act, the State bears the burden of proving beyond a reasonable doubt that a person is a sexually violent predator." In re Corley, 353 S.C. at 206, 577 S.E.2d at 453; see also S.C. Code Ann. § 44-48-100(A)(2010) ("The court or jury must determine whether, beyond a reasonable doubt, the person is a sexually violent predator."). In Corley, appellant moved to prevent the details of his prior convictions, including a CSC conviction, from being admitted into evidence. Appellant admitted to the convictions but stated that "the details surrounding his prior offenses were not necessary and admission of the information would be prejudicial." Id. at 204, 577 S.E.2d at 452. The State's expert and appellant's expert testified regarding appellant's mental abnormality and personality disorder that made it likely that he would engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

The State was allowed to admit the details of the defendant's prior sexual offenses that triggered the SVP Act in order to establish that he was a sexually violent predator. Our supreme court stated that "[p]ast criminal history is therefore directly relevant to establishing section 44-48-30(1)(a) [of the SVP Act, defining a sexually violent predator as a person who has been convicted of a sexually violent offense]. As such, the State was not required to accept appellant's stipulation." Id. at 206, 577 S.E.2d at 453.

In this case, Way moved to exclude testimony from the victim of his 1993 offense. The trial court granted the motion in part and denied it in part. The trial court stated,

> But the specifics of the offense were not admissible. They're extremely prejudicial, and they're not probative . . . She can testify as to the time period that it took place, where it took place, and in whose presence it took place. Because that goes to his lack of judgment in terms of him doing it in the presence of her brother. And the length of time goes to his propensity, and that would be the only extent to which testimony can be elicited.

The victim proceeded to testify but unlike Corley, evidence was not admitted that revealed the details of the offense. The victim merely stated the time frame, location and who was present during the abuse. We believe allowing this evidence did not constitute error in that it was cumulative testimony that served to establish Way met the requirements of a sexually violent predator under the Act. Yet assuming arguendo that is was admitted in error, the error does not warrant reversal.

"In order for an error to warrant reversal, the error must result in prejudice to the appellant." State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005); see also State v. Wyatt, 317 S.C. 370, 372, 453 S.E.2d 890, 891 (1995) (stating that error without prejudice does not warrant reversal). "[A]dmission of evidence is largely within the discretion of the trial judge and in order to constitute reversible error in the admission thereof, the accused must be prejudiced thereby; and the burden is upon him to satisfy this court that there was prejudicial error." State v. Motley, 251 S.C. 568, 575, 164 S.E.2d 569, 572 (1968). "We have held that error, if any, in the admission of certain testimony was not prejudicial where similar testimony has been received without proper objection." Id. at 575, 164 S.E.2d at 572.

The testimony given by Way's 1993 CSC victim was not prejudicial or harmful to him because similar testimony had already been received without proper objection. Prior to the victim's testimony, not only did the State's expert witness testify regarding the time and place of the 1993 offense, she testified regarding details of the offense without objection from Way. Accordingly, the trial court did not err in allowing the victim to testify and its ruling is affirmed.

III. Testimony Regarding Way's Second Evaluation

Way argues the trial court erred in allowing the State to question him regarding whether he retained an expert to conduct a second mental evaluation. Further, he asserts the trial court erred when it allowed the State to tell the jury that it could infer the absence of Way's retained expert meant that the expert's testimony would have been adverse to his case. While we agree with the trial court's decision to allow the State to cross-examine Way regarding a second mental evaluation, we hold it was improper for the State to imply a negative inference regarding the absence of Way's expert witness before the jury.

A. Way's Retained Expert

The State argues that it was allowed to cross-examine Way regarding his retained expert pursuant to the SVP Act, but does not cite to any authority that would allow the admission of this evidence at trial. 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."

Though arguments were made pursuant to the SVP Act and the South Carolina Rules of Civil Procedure, this issue should be properly addressed according to the South Carolina Rules of Evidence and established precedent. As mentioned above, generally, all relevant evidence is admissible. Rule 402, SCRE; Pittman, 373 S.C. at 578, 647 S.E.2d at 170. Yet, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Rule 403, SCRE; State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 94 (2002). Accordingly, "a trial judge has wide latitude concerning the admissibility of evidence." State v. Torres, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010); State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). Likewise, "[t]he appellate court reviews a trial

judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." Torres, 390 S.C. at 625, 703 S.E.2d at 230.

Because the trial court limited the State to questions the court determined to be relevant pursuant to the rules of evidence, it did not err in allowing the State to question Way regarding his retained expert. Therefore, we hold there was no abuse of discretion, and the trial court's ruling is affirmed.

B. Negative Inference Instruction

Way argues the trial court erred in allowing the State to tell the jury it could infer that the absence of Way's retained expert meant that his testimony would have been adverse to Way's case. He asserts the State had equal access to the witness and could have called upon him to testify as well. The State cites to Duckworth v. First National Bank, 254 S.C. 563, 576, 176 S.E.2d 297, 304 (1970), to support its assertion that it was proper during closing argument, to state the jury could conclude the testimony of the absent witness would have been negative and that it did not have equal access as the witness was in Way's control. The trial court overruled Way's objection and allowed the State to argue to the jury it could infer the absence of Way's expert witness meant that the testimony would have been negative. While we hold this was error, it does not rise to the level of reversible error.

In Duckworth, our Supreme Court stated:

> It is a well settled rule that if a party knows of the existence of an available witness on a material issue and such witness is within his control and if without satisfactory explanation he fails to call him, the jury may draw the inference that the testimony of the witness would not have been favorable to such party. This inference is especially applicable where the relationship of employer-employee exists between the parties.

Id. at 576, 176 S.E.2d at 304.

"Generally, the rule is applied when the uncalled witness is an agent, employee, relation, or associate of the party failing to call him, or within some degree of control of said party." Davis v. Sparks, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959). Further, "in the absence of explanation, the failure or refusal of a party to produce a witness may create an adverse inference," where the party has knowledge of the witness, has the power to produce the witness and the witness "is not equally accessible to his opponent, and is such as he would naturally produce if the witness were favorable to him." Wright v. Hiester Constr. Co., 389 S.C. 504, 525, 698 S.E.2d 822, 833 (Ct. App. 2010). However, where a party lacks "control" over the potential witness, an instruction of an adverse inference based on the witness's absence is improper. Davis, 235 S.C. at 333, 111 S.E.2d at 549.

In this case, there is no indication that Way had control over the retained expert witness. The witness was hired and paid under the provisions of the SVP Act and was not an employee, relation, or associate of Way. The State could have called the expert witness, whose absence it sought to emphasize, to testify. Consequently, it was error to allow the State to argue to the jury during its closing, "Dr. Martin is not here . . . I think the inference you can draw from that is would Dr. Martin's testimony, if he was here, be adverse to the respondent?"

Although improper, we hold this error did not rise to the level of reversible error. Evidence of Way's prior sexual criminal history, the testimony of the State's expert witness, and the testimony of the victim of Way's 1993 CSC offense provided relevant and substantive evidence to support the jury's determination. In light of the entire record and testimony at trial, Way has not proven that this statement prejudiced his case. See Barrett, 299 S.C. at 488, 386 S.E.2d at 244 ("Whether trial errors are harmless depends upon the circumstances of the particular case. The materiality and prejudicial character of the error must be determined from its relationship to the entire case."); see also State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("Error is harmless when it could not reasonably have affected the result of the trial.") (internal quotation marks and citation omitted).

AFFIRMED.

WILLIAMS, GEATHERS, and LOCKEMY, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.