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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Anderson County

Alexander S. Macaulay, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF
DEWEY CHADWICK,

APPELLANT

APPELLATE CASE NO. 2014-002139

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting irrelevant and unfairly prejudicial evidence that Appellant allegedly admitted he had sex with animals since this testimony was merely used to inflame the jury and likely led the jury to render a decision on an improper basis?

STATEMENT OF THE CASE

On March 12, 2013, Nicole T. Wetherton, an attorney with the South Carolina Office of Attorney General, filed a petition pursuant to the Sexually Violent Predator Act (SVPA) alleging that Appellant was a sexually violent predator. R. 300-305. The trial commenced on October 6, 2014 before the Honorable Alexander S. Macaulay, and a jury. Nichole Wetherton represented the state, and Hugh Welborn represented Appellant. R. 1.

On October 7, 2014, the jury found Appellant was a sexually violent predator under the SVPA. R. 275, l. 24 – 276, l. 23; R. 369. Judge Macaulay ordered Appellant be committed to the Department of Mental Health for long-term control, care, and treatment. R. 281, l. 20 – 282, l. 5; R. 370.

This appeal follows.

ARGUMENT

The court erred by admitting irrelevant and unfairly prejudicial evidence that Appellant allegedly admitted he had sex with animals since this testimony was merely used to inflame the jury and likely led the jury to render a decision on an improper basis.

Relevant Facts

Appellant, who was sixty-six years old at the time of trial, was convicted of lewd act upon a child on March 3, 1987, two additional counts of lewd act upon a child on September 13, 2005, and criminal solicitation of a minor on October 11, 2012. R. 283-299; See R. 155, ll. 9-11. Thus, it was undisputed that Appellant had been convicted of a sexually violent offense as defined by the SVPA.[1] He was sentenced to five years imprisonment suspended upon the service of five years' probation for the 1987 conviction, ten years imprisonment suspended upon the service of eighty-nine days time-served and five years' probation for the 2005 convictions, and three years imprisonment for the 2012 conviction. R. 283-299.

Over objection, the state's expert, Dr. Ana Gomez, testified about the allegations surrounding Appellant's previous convictions as well as uncharged conduct Appellant allegedly admitted to during his evaluation. R. 97, l. 4 – 104, l. 21; R. 108, l. 3 – 109, l. 18. Part of this uncharged conduct was Appellant's alleged admission that he engaged in sexual acts with numerous animals. According to Gomez, Appellant allegedly said he had had sex with five or six cows, twenty-five or thirty dogs, and a goat over the period of several years. R. 110, ll. 5-22. Gomez found this alleged admission significant because it indicates "sexually deviant or sexually unhealthy behavior." R. 110, l. 23 – 111, l. 1. Moreover, the

[1] See S.C. Code Ann. § 44-48-30(2) (listing offenses defined as sexually violent offenses under the SVPA).

state's expert discussed Appellant's probation violation from 2009 and the allegations surrounding the basis for the revocation. R. 105, ll. 7-14.

Thereafter, Gomez opined that Appellant met "the diagnosis for a pedophilic disorder, non-exclusive type, sexually attracted to females." She testified, "Pedophilia is a disorder of sexual interests where the person is sexually attracted to children who have not yet gone through puberty." R. 128, l. 19 – 129, l. 3. She further described pedophilia as a mental abnormality relevant to a determination of whether a person is a sexually violent predator and opined that Appellant's "diagnosis of pedophilic disorder causes him difficulty in controlling his behavior." R. 129, l. 4 – 130, l. 17. Moreover, Gomez testified that she also diagnosed Appellant with zoophilia, which "is when the person has thoughts of sex with animals." She maintained this diagnosis was based on Appellant's "report of thoughts regarding animals and the behaviors he carried out." R. 130, l. 18 – 131, l. 13.

Lastly, Gomez opined Appellant has the propensity to commit future sexually violent offenses and that he has difficulty controlling his sexual behavior. She concluded he meets the legal criteria of a sexually violent predator.[2] R. 132, l. 1 – 133, l. 10.

Dr. Gomez rendered this opinion despite admitting that **Appellant scored a zero** on the Static-99R, which is a risk assessment instrument used by experts in the field. A score of zero indicates Appellant is in "the low risk group for sexually reoffending." R. 116, ll. 22-24. Individuals in this low risk group have a 7.2 percent rate of reoffending in the next five years and 12.5 percent rate of reoffending in the next ten years. R. 144, l. 16 – 145, l. 5.

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[2] See S.C. Code Ann. § 44-48-30(1) defining a sexually violent predator as a person who "has been convicted of a sexually violent offense" and "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."

Appellant called Dr. Kimberly Harrison, a court appointed expert, to testify. Dr. Harrison likewise opined that Appellant "meets the criteria for pedophilia, being sexually attracted to children." R. 198, ll. 12-14. She also maintained that his admission to having sex with animals "would make him eligible for a diagnosis of zoophilia." However, Harrison said she did not have that information when she completed her evaluation and thus "did not provide that diagnosis." R. 199, ll. 3-12. She testified that it is "not unusual or surprising" that a person with one paraphilia, such as pedophilia, also has another paraphilia, "such as a sexual attraction or sexual behavior with animals." Thus, Harrison concluded that this new information about Appellant's admission to having sex with animals did not change her overall opinion. R. 199, ll. 13-23.

Like Dr. Gomez, Dr. Harrison conducted the Static-99R and concluded that Appellant had a score of zero, which placed him in the low risk group for sexually reoffending. R. 210, l. 24 – 212, l. 21. She explained, "[I]f you took a hundred sex offenders that had the same score as Mr. Chadwick [Appellant], about five of them reoffended over the course of five years. And about nine out of those one hundred reoffended within ten years." R. 212, l. 21 – 213, l. 1.

Additionally, Dr. Harrison explained that one of the main risk factors used to determine an individual's risk of reoffending is an antisocial orientation, "meaning does this person have a history of chronic rule breaking, different types of criminal offenses." R. 202, ll. 4-15. She maintained that a person who has nonsexual criminal convictions tends to be irresponsible and impulsive. R. 202, ll. 15-22. Harrison noted there was nothing in Appellant's history to "suggest that he has [an] antisocial orientation." R. 203, ll. 3-13.

Lastly, Dr. Harrison opined that Appellant **does not** meet the criteria to be committed as a sexually violent predator and does not fall into the group of "extremely dangerous" sex offenders that the SVPA is designed to treat. R. 217, l. 8 – 218, l. 18.

Objection and Ruling

During the state's opening statement, the assistant attorney general told the jury that Appellant admitted to having "sex with cows, twenty to twenty-five female dogs, and a goat." Appellant's counsel immediately objected and argued, "That is not part of this particular offense that he's - - ." R. 49, ll. 17-23. The court interrupted counsel and instructed the assistant attorney general to "stay within the record as it's going to be established." At Appellant's counsel's request, the court instructed the jury that "opening statements are not argument and they're not anything more than just an outline of what is to be produced. It's not evidence or anything of that nature . . ." R. 49, l. 24 – 51, l. 3.

Once opening statements were over, Appellant's counsel requested to make a motion outside the presence of the jury, and the jury was excused from the courtroom. Counsel argued that Appellant's alleged admission to having sex with animals, which is conduct that he has never been charged with nor convicted of, is irrelevant and unduly prejudicial. R. 59, l. 12 – 61, l. 9. The assistant attorney general argued in return that the alleged admission was relied on by Dr. Gomez when she rendered her opinion and was thus relevant. R. 63, ll. 8-18. She explained further that Gomez diagnosed Appellant with zoophilia, which is a mental abnormality and considered deviant behavior. R. 63, l. 23 – 64, l. 2.

In reply, Appellant's counsel argued, "We're not here for the jury to go home and talk about well, maybe my guy [Appellant] did some bad things to animals. We're here

about pedophilia. That's what he is diagnosed with." Counsel further argued, "And going into these other lurid allegations of sex with animals and that sort of stuff is candidly going to be highly prejudicial to this jury. I can't imagine that they wouldn't let that inflame their passions in some way." R. 65, l. 16 – 67, l. 3.

The court ultimately found that the evidence of Appellant's alleged admission of having sex with animals was admissible. The court cited to S.C. Code Ann. § 44-48-30(2)(k), which indicates that "buggery, as provided in Section 16-15-120" is a sexually violent offense under the SVPA. The court explained that S.C. Code Ann. § 16-15-120 reads, "Whoever shall commit the abominable crime of buggery, whether with mankind or **with beast**, shall on conviction be guilty of a felony and shall be imprisoned." (emphasis added). Thus, the court found that Appellant's alleged uncharged conduct of having sex with animals was relevant under the SVPA because it constituted a sexually violent offense. R. 96, ll. 6-12.

Moreover, Judge Macaulay noted that uncharged conduct and the underlying allegations related to uncharged conduct is admissible in SVP cases under In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003) and In re White, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007). Thus, the fact that Appellant's admission to having sex with animals was uncharged criminal conduct did not affect the admissibility of the evidence. R. 93, l. 22 – 94, l. 13. The court further found pursuant to White and Corley that the probative value of the evidence related to Appellant's admission exceeded any prejudicial effect to Appellant. R. 95, l. 25 – 96, l. 14.

Discussion

Generally, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means 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. However, even relevant evidence must "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. Thus, consideration of whether evidence is relevant and admissible requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and a balancing of the two.

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014) (internal citation omitted) (alteration in original). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "Unfair prejudice does

not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)) (internal quotation marks omitted). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003) (internal citation omitted).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403.

Here, evidence that Appellant allegedly engaged in sexual acts with animals was not relevant to the determination of whether he met the criteria of a sexually violent predator under the SVPA. The focus of the trial was on Appellant's diagnosis as a pedophile and whether he posed a risk to minors if he was not committed to the Department of Mental Health. Not only was the evidence of his alleged admission to having sex with animals not relevant, it was also highly prejudicial and should have been excluded under Rule 403. The main effect of this evidence was to inflame the jury and likely caused the jury to reach a decision on an improper basis. The prejudicial evidence of Appellant's alleged admission likely tipped the scales in favor of a finding that Appellant was a sexually violent predator, especially in light of the evidence that

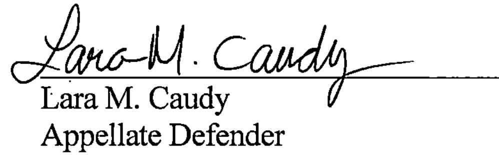
Appellant scored a zero on the Static-99R placing him in a "low risk group for sexually reoffending" and Dr. Harrison's opinion that Appellant does not meet the criteria to be committed as a sexually violent predator under the SVPA. See R. 116, ll. 22-24 and R. 217, l. 8 – 218, l. 18.

Respectfully, this Court should find the trial court erred by admitting this irrelevant and unduly prejudicial evidence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse the order of the trial count committing him to the Department of Mental Health for his long term control, care, and treatment and remand for a new trial.

Respectfully submitted,



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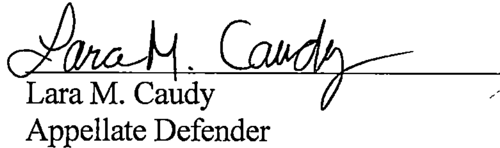
December 3, 2015

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 3, 2015



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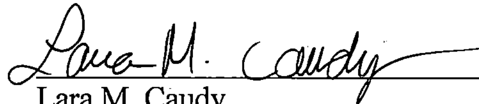
CERTIFICATE OF SERVICE

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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of December, 2015.



Lara M. Caudy
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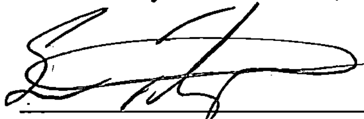
this 3rd day of December, 2015.



____________________(L.S.)
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