STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Anderson County
The Honorable Alexander S. Macaulay, Circuit Court Judge
Appellate Case No. 2014-002139

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

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly allowed the State's expert to testify about Appellant's deviant sexual behavior with animals, because Appellant's sexually deviant urges and conduct was relevant to the expert's opinion regarding Appellant's risk to reoffend sexually if not confined for long term control, care and treatment.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Prior to Appellant Dewey Chadwick's release from prison on a 2013 criminal solicitation of a minor conviction, Respondent State of South Carolina ("the State") filed a Petition pursuant to the Sexually Violent Predator Act (the "SVPA"), seeking Appellant's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on October 6, 2014, before the Honorable Alexander S. Macauley, Circuit Court Judge.

During opening statements, the State referenced testimony the jury would hear from the State's expert witness, including Appellant's admissions to the expert he molested children for which he was never charged, and had sex with animals. Appellant objected, and the State indicated the expert actually diagnosed another mental abnormality based on those admissions. The court instructed the State attorney to "stay with what you intend to prove -- what is it -- you would seek to have introduced." (Trial Transcript [TT], pp. 49-51; Record on Appeal [R.], pp. 49-51).

After opening statements, Appellant moved to exclude testimony regarding the details of Appellant's sexually violent convictions, as well as Appellant's admissions to the expert, on the grounds the evidence was irrelevant and unduly prejudicial. The State argued the details of Appellant's convictions and his admissions to the expert regarding additional victims and sex with animals was directly relevant to the expert's ultimate opinion regarding Appellant's risk to reoffend sexually. The court took the matter under advisement until the expert got to that part of her testimony. (TT, pp. 59-74; R., pp. 59-74).

The State then presented testimony from Ana Gomez, M.D., a board certified forensic psychiatrist, who was qualified as an expert in psychiatry and forensic psychiatry. The State retained Dr. Gomez to conduct an independent evaluation of Appellant after the court appointed evaluator did not recommend commitment. Dr. Gomez testified she evaluated Appellant using a protocol established by the Association for the Treatment of Sexual Abusers, and the Sexual Behaviors Clinic and Lab at the Medical University of South Carolina. (TT, pp. 74-83; R., pp. 74-83).

As part of the evaluation, Dr. Gomez reviewed records regarding Appellant's criminal history, interviewed Appellant for almost thirteen hours over four days, and conducted multiple tests, including psychological and physiological assessments. She indicated this was the type of information experts reasonably rely on for psychosexual evaluations. (TT, pp. 83-88; R., pp. 83-88).

Dr. Gomez testified Appellant was convicted of three lewd act on a minor charges and one criminal solicitation of a minor charge. She stated details of the offenses are important in rendering an opinion on a diagnosis and risk to reoffend. Appellant again objected to testimony regarding the specific facts of the convictions. (TT, pp. 88-91; R., pp. 88-91).

Appellant argued that even though he pled guilty to the charges, he did not "necessarily plead guilty to the actual allegations as set forth in the indictment," and allowing testimony regarding the underlying facts was unduly prejudicial. After reviewing applicable case law, the court overruled the objection, finding the probative value of testimony regarding the underlying facts of the offenses exceeded any prejudicial value. The court further found testimony regarding Appellant's admission of

sex with animals was admissible because buggery is a sexually violent offense under the SVPA, and the probative value outweighed the prejudicial effect. (TT, pp. 92-96; R., pp. 92-96).

Dr. Gomez testified Appellant pled guilty to one count of lewd act on a minor arising from an incident in 1986, which involved touching a nine year old female on her chest and genital areas and was witnessed by several people. Appellant told Dr. Gomez nothing happened and "he was set up." (TT, p. 97, State's Exhibit 1; R., pp. 97, 283-286).

In 2005, he pled guilty to two counts of lewd act on a minor arising from incidents in 2004 involving nine year old and seven year old sisters. He kissed the nine year old child on the mouth, unbuttoned her pants and rubbed her vagina. The child reported the conduct went on for a month, and Appellant threatened her if she told anyone. Appellant kissed the seven year old child on the mouth, and told her not to tell her mother. (TT, pp. 98-100, State's Exhibit 2; R., pp. 98-100, 287-295).

Appellant told Dr. Gomez he did not touch the younger child, who said she was going to lie on him. He admitted sexually touching the older child one time, after thinking about doing it for several months, and for several months after he did it, but said the child "kept sitting on his lap and rubbing against him." (TT, p. 100; R., p. 100).

In 2012, Appellant pled guilty to one count of criminal solicitation of a minor arising from an incident in 2011 (approximately four months after Appellant was released from prison on the lewd act convictions). Appellant called a thirteen year old female over to his car, offered her some cookies, gave her his phone number, and asked if he could touch her. At the time, he told the police he gave the child his phone number

because she asked for it. He told Dr. Gomez he gave his number to her so her grandmother could call him and he could tell on the child. He further stated the child came to him when she was ten years old and told him he could do anything to her he wanted, but he told her she was too young for him. (TT, pp. 102-104, State's Exhibit 3; R., pp. 102-104, 296-299).

Dr. Gomez testified it was significant Appellant reoffended so quickly after his release from prison on a sexual conviction, and after he participated in some sex offender treatment. She also found it significant that Appellant's probation was revoked in 2009 after he was seen talking to children, hugging them and offering them ice cream, which indicated continuing interest in children in the face of legal restrictions. (TT, pp. 104-108; R., pp. 104-108).

During the interview with Dr. Gomez, Appellant admitted committing sexual offenses against children for which he was never charged. The offenses started in the mid-1960s, when Appellant was approximately eighteen years old, and continued until the late 1980s. The youngest victim was five or six years old, and the oldest was fourteen or fifteen years old. The molestations included touching and attempted vaginal intercourse. Dr. Gomez testified this uncharged conduct was relevant for diagnostic purposes because it showed a longstanding pattern and Appellant's difficulty controlling his sexual behavior. (TT, pp. 108-110; R., pp. 108-110).

Appellant also told Dr. Gomez he had sexual activities with animals over a period of years, and had thoughts about the acts before doing them. She diagnosed him with zoophilia, and found this significant because it revealed additional sexually deviant thoughts and behavior. (TT, pp. 110-111, 130; R., pp. 110-111, 130).

Dr. Gomez testified Appellant minimized any sexual interests, but did state he had sexual thoughts of women and touching younger girls. She further stated Appellant participated in court ordered sex offender treatment between 2005 and 2008, but reoffended after completing the treatment, and during the interview, Appellant told her "he might have a little problem with sex offending." (TT, pp. 111-113; R., pp. 111-113).

Dr. Gomez identified six different assessment tools she used in Appellant's evaluation, all of which provided additional data points for her to consider in reaching a conclusion, but she stated none of the tools should be used alone. She testified about each tool individually, and related the results on each. She stated the results of each tool were considered in reaching her opinions regarding Appellant's mental abnormalities and risk to reoffend sexually. (TT, pp. 113-128; R., pp. 113-128).

Based on all the data she collected, Dr. Gomez concluded Appellant has the mental abnormalities of pedophilia, non-exclusive type, sexually attracted to female children, and zoophilia. She opined to a reasonable degree of medical certainty Appellant's mental abnormalities cause him serious difficulty in controlling his sexual behavior, and he is likely to commit future acts of sexual violence toward children if not confined for treatment. (TT, pp, 128-136; R., pp. 128-136).

Appellant presented Kimberly Harrison, PhD., as his expert witness. She was originally appointed by the circuit court as the evaluator in Appellant's case, and was

qualified as an expert in forensic psychology without objection. She stated she had completed 130 evaluations under the SVPA.[1] (TT, pp. 175-185; R., pp. 175-185).

Dr. Harrison testified she had the same records Dr. Gomez had in evaluating Appellant, and interviewed him for an hour and forty minutes. She also concluded Appellant has the mental abnormality of pedophilia, non-exclusive type, attracted to minor females. (TT, pp. 185-201; R., pp. 185-201).

In her evaluation, Dr. Harrison only used one risk assessment tool, the Static-99R, which consists of ten questions the evaluator answers primarily based on information in the records, such as prior sexual offenses and non-sexual offenses, and has a score range of negative three to twelve. Based on Dr. Harrison's answers, Appellant scored two on the Static-99R, which is in the low risk of reoffending category. Premised primarily on the Static-99R score, Dr. Harrison opined Appellant did have the relevant mental abnormality of pedophilia, but was not a risk to reoffend, so she did not recommend commitment. (TT, pp. 202-238; R., pp. 202-238).

In closing arguments, the State told the jury the zoophilia diagnosis was not presented "for the ick factor to kind of gross out a jury," but because "it shows a whole other level of sexual deviance or unhealthy sexual thinking," and gives the jury "an idea of what goes on inside [Appellant's] head and what are his thoughts and what his feelings are about sex." The State did not refer to the diagnosis or Appellant's admission regarding sex with animals again, and focused on the pedophilia diagnosis and Appellant's offense history involving children. The State further asked the jury to look

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[1]She admitted the vast majority of those evaluations were annual reviews by

at the entirety of the case, and to consider the thoroughness of the evaluations Dr. Gomez and Dr. Harrison conducted. (TT, pp. 244-252; R., pp. 244-252).

The jury found Appellant is a sexually violent predator beyond a reasonable doubt, and he was committed to the South Carolina Department of Mental Health for long term control, care and treatment. (TT, pp. 275-276, 281-282, Order of Commitment filed October 7, 2014; R., pp. 275-276, 281-282, 370). This appeal followed.

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people already committed as sexual predators. (TT, pp. 222-223; R., pp. 222-223).

ARGUMENT

The circuit court properly allowed the State's expert to testify about Appellant's deviant sexual behavior with animals, because Appellant's sexually deviant urges and conduct was relevant to the expert's opinion regarding Appellant's risk to reoffend sexually if not confined for long term control, care and treatment.

Appellant contends the circuit court erred in allowing the State's expert to testify about Appellant's deviant sexual behavior with animals.[2] He asserts the testimony was irrelevant to the issue of whether he posed a risk to minors if not confined for treatment, and was highly prejudicial

"'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. As a general rule, all relevant evidence is admissible unless the danger of unfair prejudice substantially outweighs the evidence's probative value. Rule 402, SCRE; Rule 403, SCRE.

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, which occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 495 (2013); In re The Care and Treatment of John Phillip Corley, 353 S.C. 202, 577 S.E.2d 451, 453 (2003) (same). The appellate court also reviews a trial court's decision regarding the comparative

probative value and prejudicial effect of evidence under Rule 403 for abuse of discretion, and should only reverse that decision in exceptional circumstances. State v. Collins, 409 S.C. 524, 763 S.E.2d 22, 28 (2014); *see also* State v. Williams, 409 S.C. 455, 761 S.E.2d 770, 775 (Ct. App. 2014)("'If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.'") (*quoting* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 207 [Ct. App. 2008]). In reviewing the trial court's decision, the appellate court must give great deference to the trial court's judgment, and should not invade the trial court's discretion when the evidence is highly probative, corroborative, and material in establishing the elements of a party's case. Collins, 763 S.E.2d at 27-28.

Evidence merely damaging to "a defendant's case is not a basis for excluding probative evidence" under Rule 403, because "[e]vidence that is highly probative invariably will be prejudicial to the defense." United States v. Udeozor, 515 F.3d 260, 264-65 (4th Cir. 2008). "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 decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)); *see also* State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119, 123 (2000); United States v. Mohr, 318 F.3d 613, 618 (4th Cir. 2003) (exclusion is appropriate when the trial judge believes the risk of exciting the jury to irrational behavior is disproportionate to the probative value of the offered evidence).

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[2]Appellant does not challenge on appeal the admission of testimony regarding the

In this case, the State had the burden to prove beyond a reasonable doubt Appellant had a mental abnormality or personality disorder, which made him likely to reoffend sexually if not confined for treatment. Any sexually deviant urges and behavior was directly relevant to determining both an appropriate diagnosis and the risk to reoffend. *See* Care and Treatment of James P. Ettel, 377 S.C. 558, 660 S.E.2d 285, 288 (Ct. App. 2008) (expert's testimony regarding person's prior uncharged sexual offenses and a murder conviction was admissible because the expert used the information to develop her opinion regarding the person's diagnosis and ability to control his behavior). The relevance is heightened when the person has multiple sexual disorders, and has acted on them in the past.

Dr. Gomez testified she considered Appellant's zoophilia in reaching her ultimate conclusions regarding his risk to reoffend. Significantly, however, she also testified about a multitude of other facts she considered, including; 1) Appellant committed numerous offenses against children over a substantial period of time; 2) he failed to stay away from children even as a condition of probation; 3) he minimized any current sexual interest, but admitted having continuing thoughts about touching young girls; 4) he changed his stories about his offenses several times; 5) he believed the victims were coming on to him; 6) he reoffended within months of being released from prison on a sexual offense; 7) he reoffended after receiving sex offender treatment; 8) he had a history of substance abuse, which tends to lower inhibitions; 9) he did not have a realistic plan to prevent reoffending if he was released; and 10) he told Dr. Gomez he "might have

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prior uncharged sex offenses against children he confessed to Dr. Gomez.

a little problem with sex offending." (TT, pp. 97-136; R., pp. 97-136). In light of all the factors Dr. Gomez considered, the testimony regarding Appellant's zoophilia was not unduly prejudicial. *See* Ettel, 660 S.E.2d at 288 (prior uncharged sex offenses and murder conviction were not the only basis for the expert's diagnosis and opinion).

Appellant argues "[t]he main effect of [the zoophilia] evidence was to inflame the jury and likely caused the jury to reach a decision on an improper basis." (Brief of Appellant, p.11). Overlooking the rank speculation of Appellant's conclusory argument, there is simply nothing in the record to support it. The only disputed issue in this case was Appellant's risk to reoffend if not confined for treatment, and the jury heard testimony from two experts who agreed Appellant has the mental abnormality of pedophilia, but disagreed on his risk to reoffend. Given the thoroughness of Dr. Gomez's evaluation compared to Dr. Harrison's cursory evaluation, it is far more likely the jury found Dr. Gomez, and her evaluation, much more credible.

The circuit court specifically found the probative value of the zoophilia testimony outweighed any prejudicial effect, and properly allowed the testimony.[3] The record supports the court's finding, and it should be affirmed.

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[3]The court based its ruling in part on its finding buggery was a sexually violent act as defined in the SVPA. Regardless of whether the conduct falls within the SVPA definitions, the State submits the evidence was relevant and admissible because Dr. Gomez relied on it in reaching her opinion.

CONCLUSION

Based on the foregoing, Respondent submits the jury verdict finding Appellant is a sexually violent predator beyond a reasonable doubt should be affirmed.

Respectfully submitted,

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December 2, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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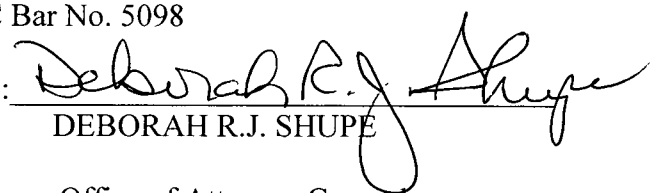
By: 
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December 2, 2015

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent by depositing a copy in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 2nd. day of December, 2015.

Sally B. Ellison

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