STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lancaster County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2016-UP-198 (S.C. Ct. App. filed May 11, 2016)
2012-CP-29-1549

IN THE MATTER OF THE CARE AND TREATMENT OF
KENNETH CAMPBELL,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of Kenneth Campbell, Appellant.

Appellate Case No. 2014-001931

Appeal From Lancaster County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2016-UP-198
Submitted February 1, 2016 – Filed May 11, 2016

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *In re Care and Treatment of Corley*, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); S.C. Code Ann. § 44-48-30(1) (Supp. 2015) (defining a sexually violent predator (SVP) as an individual 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. § 44-48-100(A) (Supp. 2015) ("The court or jury must determine whether, beyond a reasonable doubt, the person is a [SVP]."); *In re Care and Treatment of Ettel*, 377 S.C. 558, 561, 660 S.E.2d 285, 287 (Ct. App. 2008) ("Generally, all relevant evidence is admissible." (citing Rule 402, SCRE)); *id.* ("Evidence is relevant if it tends to establish or make more or less probable the matter in controversy." (citing Rule 401, SCRE)); *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) ("Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent.").[1]

AFFIRMED.[2]

WILLIAMS, LOCKEMY, and MCDONALD, JJ., concur.

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[1] To the extent Campbell argues Rule 403, SCRE, as a basis for this appeal: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("Furthermore, a party may not argue one ground at trial and an alternate ground on appeal."); *State v. Brockmeyer*, 406 S.C. 324, 354-55, 751 S.E.2d 645, 661 (2013) (holding an appellant's argument that the trial court erred in admitting a photograph because it suggested a decision on an improper basis in violation of Rule 403, SCRE, was not preserved for appellate review when the appellant only objected to the photograph's relevance at trial).

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

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

IN THE MATTER OF THE CARE AND TREATMENT OF KENNETH CAMPBELL,

APPELLANT.

APPELLATE CASE NO. 2014-001931

Appeal from Lancaster County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2016-UP-198

PETITION FOR REHEARING

On May 11, 2016, this Court affirmed Appellant's commitment as a sexually violent predator. In the Matter of the Care and Treatment of Kenneth Campbell, 2016-UP-198 (S.C. Ct. App. filed May 11, 2016). This case was decided without argument. Id. Pursuant to Rule 221, SCACR, Appellant files this petition for rehearing regarding several points overlooked and/or misapprehended by this Court in arriving at its conclusion.

Preservation

In the body of the opinion, this Court cited two cases with parenthetical explanations for the admissibility of "relevant" evidence. Additionally, a parenthetical made reference to Rule 401, SCRE, the rule defining relevant evidence. In a footnote, this Court appeared to opine that to the

extent Appellant argued Rule 403, SCRE, required exclusion of the evidence, such an argument was not preserved. By citing State v. Brockmeyer, 406 S.C. 324, 354-355, 751 S.E.2d 645, 661 (2013) for the proposition that an argument based on Rule 403, SCRE, was not preserved for appellate review when appellant only objected to the evidence's relevance at trial, it appears this Court is of the opinion that Appellant's objection at trial was to relevance only and any argument on appeal concerning the evidence's unfairly prejudicial impact was unpreserved. Appellant respectfully requests this Court grant rehearing as to this finding and determine the issue is preserved for review as to relevance and as to whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

The interplay between Rules 401, 402, and 403 of the South Carolina Rules of Evidence is undeniable based on the language of the rules alone. 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 the balancing of those two. This Court's opinion indicating in a footnote that consideration of the danger of unfair prejudiced posed by the evidence was unpreserved failed to acknowledge this undisputable link between relevance and the danger of unfair prejudice when a judge determines the admissibility of evidence. Examining the relevance of evidence must not, and cannot, occur in a vacuum.

Importantly, when trial counsel objected to the evidence based on "relevancy," the judge understood the objection to go to the danger of the unfair prejudice the evidence posed as well. This is clear from the judge's ruling: "I would overrule the objection under State v. Cheeseboro." R. 113, ll. 7-8; R. 113, ll. 12-13. In State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), the South Carolina Supreme Court examined multiple issues on appeal. Of those issues presented, several concerned whether danger of unfair prejudice substantially outweighed the probative value of the proffered evidence. For example, the Court examined the applicability of Rule 403, SCRE, to evidence offered pursuant to Rule 404(b), SCRE. Cheeseboro, 346, S.C. at 547, 552 S.E.2d at 311. As another example, the Court considered whether letters written by Cheeseboro to an individual identified as Virgil Howard were relevant, and if relevant, whether the letters were unfairly prejudicial. Id. at 548, 552 S.E.2d at 311-312. The Court also held the admission of a rap song allegedly written by Cheeseboro while awaiting trial was erroneous because the "minimal probative value of this document [was] far outweighed by its unfair prejudicial impact." Id. at 550, 552 S.E.2d at 313. Therefore, in light of the judge's reference to Cheeseboro, supra, the judge likely understood the objection to encompass not merely relevance, but a weighing of the probative value of the evidence against the danger of unfair prejudice posed by the evidence.

Due to the undeniable link among Rules 401, 402, and 403 of the South Carolina Rules of Evidence and the judge's reference to Cheeseboro, supra, Appellant respectfully requests this Court rehear its determination that Appellant's argument on appeal concerning Rule 403 as a basis to exclude the evidence was not preserved for review.

Exclusion of evidence required

In this trial pursuant to the Sexually Violent Predator Act (SVPA), the only issue before the jury was whether Appellant suffered from a mental abnormality or personality disorder that made

him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. See S.C. Code Ann. § 44-48-30(1)(b).

To support the state's position, the state's expert opined that Appellant had "been convicted of a sexual[ly] violent offense," had "a mental abnormality or personality disorder that ma[de] him likely to engage in acts of sexual violence if not confined to the facility." R. 67, lines 14-17.

The court-appointed expert, Dr. Marie Gale, also diagnosed Appellant with pedophilic disorder, sexually attracted to females, not exclusive type. R. 85, lines 19-22. Based upon Dr. Gale's review of Appellant's background, the records, her interview of Appellant, and the relevant testing, Dr. Gale concluded that Appellant did not meet the criteria of a sexually violent predator. Appellant was not likely to reoffend. R. 96, lines 7-23. According to Dr. Gale, there was insufficient evidence to conclude that Appellant's abnormality made him likely to engage in acts of sexual violence in the future. R. 96, line 24 – R. 97, line 3.

On re-cross examination, the state's attorney questioned whether Dr. Gale had ever "gotten any of these [pre-commitment evaluations] wrong?" R. 112, line 3. The attorney then asked if Dr. Gale remembered "the case of Michael Thomas." R. 112, line 5. When Dr. Gale responded she did not, the state's attorney presented her with a document. R. 112, lines 6-9. Per the document, Dr. Gale had opined that Michael Thomas did not meet the criteria of a sexually violent predator. R. 112, ll. 18-20. The document was dated August 9, 2012. R. 113, line 1. The state's attorney handed Dr. Gale an arrest warrant that was dated March 15, 2014. R. 113, lines 2-3. The warrant was for Michael Darnell Thomas for "rape." R. 113, lines 15-20. The warrant further stated Thomas was identified by his DNA through CODIS. R. 113, lines 21-24.

The state's attorney persisted in her line of questioning regarding an arrest warrant against an individual whose case was unrelated entirely to the proceedings against Appellant. R. 113, line 25 – R. 114, line 8.

> Q. Okay. But what is the offense he has been charged with that's on the warrant?
>
> A. Criminal sexual conduct in the first degree.
>
> Q. And again, the warrant was dated less than two years since you issued that report.
>
> A. Yes.
>
> Q. Okay. And based on your evaluation you felt that he did not meet the criteria as a sexually violent predator.
>
> A. Yes, apparently.
>
> Q. And based on the information you have another woman has been raped; is that correct?
>
> A. Excuse me?
>
> Q. And based on the information you have another woman has now been raped; is that correct?

R. 114, lines 9-22. Appellant objected to the last question because it called for a conclusion. The state argued the answer was based "on the information that's in front of her." Appellant noted that all the parties had was an arrest warrant. Thereafter, the judge sustained the objection. R. 114, line 23 – R. 115, line 4.

In her closing argument, the state's attorney urged the jury to disbelieve the court-appointed expert's opinion because the expert "ha[d] been wrong before." R. 136, line 6. The state argued that Dr. Gale conducted only one test and that was the reason why the state sent the case to MUSC, which occurred only in "very, very serious" cases. R. 141, lines 23-24; R. 142, lines 11-13. The state capitalized on the jury's fear by telling the jurors that the ultimate question to decide was

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whether the jurors, as members of the community, were "really satisfied that a pedophile should be released out into this community." R. 135, line 19 – R. 136, line 3. While telling the jury she was not trying to instill fear, the state left the jury with this:

> You have a person who on more than one occasion who [*sic*] has sexually assaulted children. He takes no accountability to what he's done and he hasn't had sex offender treatment and he's refused it when it has been offered. He's going to go live in a house where people are going to allow him to be around children. You heard the testimony. What do you think is going to happen?

R. 142, lines 15-22.

The state's attorney's line of questioning of Dr. Gale was improper and should have been stopped. The trial judge erred in permitting the state's attorney to continue questioning the court's appointed expert regarding a completely unrelated case. The starting point for analyzing the admissibility of evidence is determining whether the evidence is relevant. Such an inquiry necessitates an analysis of what probative value, if any, the evidence offers. "'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). 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 the 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).

In the present case, the jury was tasked with deciding whether Appellant was a sexually violent predator as that term is defined by South Carolina's statutory scheme. South Carolina defines 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." S.C. Code Ann. § 44-48-30(1). The only dispute between Appellant and the state was whether his mental abnormality or personality disorder made him likely to engage in acts of sexual violence if not confined.

Evaluating the evidence offered by the state in this context demonstrates the low probative value of the evidence and the **absolute irrelevance** of the evidence to the ultimate issue in the case. Whether *another* individual had been arrested for a sex crime following a release had no bearing on whether Appellant was likely to engage in acts of sexual violence. Quite simply, the court-appointed expert's opinion regarding Michael Thomas several years prior to Appellant's trial and the arrest warrant issued for someone with the same name had no tendency to prove or disprove the ultimate issue in Appellant's case – whether *Appellant* was likely to engage in acts of sexual violence if not confined.

What the court-appointed expert opined regarding Thomas and the subsequent unsubstantiated allegations against someone with the same name had no tendency to make the existence of any fact of consequence in Appellant's case more or less probable. The state maintained the evidence shed light on the ability of the court-appointed expert to make a determination of whether a person was likely to re-offend. However, in light of the fact that the state could produce only an arrest warrant, not a conviction, the warrant for Thomas's arrest served no legitimate purpose. The state failed to offer evidence that the arrest warrant was for the same person allegedly evaluated by Dr. Gale some years earlier. Certainly, the mere accusation against someone with the same name as Thomas could not be used to show that Thomas had, in fact, re-offended. Further, the mere accusation against someone with the same name as Thomas could not be used to show that Appellant would re-offend. The state never challenged the qualifications of

Dr. Gale; thus, the state's use of Dr. Gale's opinion in Thomas's case and the arrest warrant for Thomas was not a challenge to Dr. Gale's methodology or ability to conduct an examination pursuant to SVPA.

Evaluating the probative value of the evidence demonstrates it complete irrelevance to the issue before the jury. To the extent this Court continues to require parsing of Rules 401, 402, and 403 of the South Carolina Rules of Evidence, the state's attorney's line of questioning regarding an evaluation of Thomas and a subsequent arrest warrant for someone of the same name was not relevant and should have been excluded.

Appellant respectfully requests this Court acknowledge the undeniable link among Rules 401, 402, and 403 of the South Carolina Rules of Evidence and hold that trial counsel's objection to the relevance of the evidence and the trial judge's overruling of the evidence in reliance on Cheeseboro, supra, necessitates consideration of the danger of unfair prejudice posed by the evidence presented and the weighing of that danger against the probative value of the evidence. The danger of unfair prejudice here is considerable.

"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)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S.

172, 180 (1997). "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).

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, SCRE.

Applying this analytical framework to the present case reveals that balancing of the low probative value of the impeachment evidence offered by the state, the extreme danger of unfair prejudice posed by the evidence necessitated the exclusion of the state's irrelevant line of cross-examination of the court-appointed expert regarding the arrest of an individual who was not the Appellant and whose case was completely unrelated to Appellant's proceedings.

The danger of unfair prejudice inherent in the evidence is extreme. A trial under the SVPA is an emotionally charged environment due to the nature of the proceeding – an examination of an individual's past criminal sexual conduct and concern about whether the individual will re-offend if not confined. Perhaps no other trial could place greater emotional stress on a jury. Examining the danger of unfair prejudice of the state's line of cross-examining the court-appointed expert in the context of an SVPA trial evinces no doubt of the severe danger of unfair prejudice posed by the evidence.

The state impeached the court-appointed expert with evidence that an individual previously determined by the expert not to satisfy the criteria of the SVPA had been accused of re-offending by raping a woman. No doubt this evidence was calculated to play on the emotions of the jury and did

in fact play on the emotions of the jury. The jury's greatest fear would be to release someone who re-offended. The state's cross-examination capitalized on the inherent fear of the proceedings and heightened the jury's fear by suggesting the expert had been wrong previously in her evaluation and the expert's error resulted in the rape of a woman. Further, the state capitalized on this fear in her closing argument when she argued the court-appointed expert had been wrong before resulting in the release of an individual who subsequently raped a woman.

The danger of unfair prejudice of the evidence was not merely the damage it had on Appellant's case; rather, the evidence encouraged the jury to render its verdict based upon fear. Without question, fear is an improper basis for a jury verdict. Balancing the very low probative value offered by the evidence against the extremely high danger of unfair prejudice requires the exclusion of the state's line of cross-examination of the court-appointed expert. Accusations of sexual misconduct made against an individual unrelated to Appellant's case failed to have any tendency to make the existence of any fact of consequence in Appellant's case more or less probable. Simply put, the evidence was irrelevant to the ultimate issue before the jury. The evidence served only to heighten the jury's fear and encourage the jury to render a verdict based upon emotion – fear.

Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based on the points specifically articulated as overlooked and/or misapprehended by this Court in arriving at his conclusion.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 26th day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

R. Knox McMahon, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF

KENNETH CAMPBELL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Kenneth Campbell, at SC Dept of Mental Health - SVP Program, 7901 Farrow Road, Columbia, SC 29203, this 26th day of May, 2016.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day
of May, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

In the Matter of the Care and Treatment of Kenneth Campbell, Appellant.

Appellate Case No. 2014-001931

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

FILED
June 28, 2016

cc:
Alan McCrory Wilson, Esquire
Deborah R.J. Shupe, Esquire
Susan Barber Hackett, Esquire