STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Ralph F. Cothran, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF MICHAEL KAMINSKI,

APPELLANT

APPELLATE CASE NO. 2016-000606

INITIAL BRIEF OF APPELLANT

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Did the trial judge err in holding that the reliability requirement of Rules 702 and 703 did not prevent the introduction through an expert witness of unsubstantiated hearsay accusations that appellant molested a four year old boy in this sexually violent predator case?

2.

Did the trial judge err in holding that the probative value of unsubstantiated hearsay accusations that appellant molested a four year old boy was not outweighed by its unfair prejudice?

STATEMENT OF THE CASE

On February 29, 2016, in Berkeley County, appellant was tried before the Honorable R. Ferrell Cothran and a jury pursuant to the Sexually Violent Predator Act. Tr. 1. James G. Bogle represented the State. Tr. 1. James K. Falk represented appellant. Tr. 1. The jury found that appellant was a sexually violent predator. Tr. 299, ll. 9 – 17. On March 3, 2016, Judge Cothran signed an Amended Order of Commitment. R. ___ (Amended Order of Commitment). This appeal follows.

ARGUMENT

1.

The trial judge erred in holding that the reliability requirement of Rules 702 and 703 did not prevent the introduction through an expert witness of unsubstantiated hearsay accusations that appellant molested a four year old boy in this sexually violent predator case.

Introduction

This case presents the question of whether there is any limit to what kinds of prior bad act hearsay evidence is admissible through an expert witness in a sexually violent predator case. South Carolina allows expert witnesses in SVP cases to testify about uncharged conduct under the guise of Rule 703 if the expert claims she reasonably relied upon the information to reach her decision. In the Matter of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008). Below, the State urged the trial judge that this exception to our hearsay rules had no limits and the question was only one of weight for the jury. Tr. 62, ll. 9 – 24. This position is at odds with the reliability requirement, which applies to all expert testimony. Watson v. Ford Motor Co., 389 S.C. 434, 449, 699 S.E.2d 169, 177 (2010) ("The trial court must examine the substance of the testimony to determine it if is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge."). Here, the trial judge erred in admitting unreliable hearsay testimony by the expert that the court's gatekeeping role should have excluded.

Factual and Procedural Background

The trial court appointed Dr. Amy Swan ("Swan") from Florida instead of a resident DMH evaluator because of a "backlog" of cases at DMH. Tr. 94, ll. 13 – 19. Dr. Swan said she had testified approximately twenty times in South Carolina. Tr. 98, ll. 17 – 18. She guessed that she had testified in a pre-commitment case five or six times. Tr. 98, ll. 23 – 25. Swan claimed

she did not know how many of those times she testified as a second opinion. Tr. 99, ll. 4 – 11. The court qualified Swan as an expert in psychology. Tr. 98, l. 10 – 99, l. 19.

During an extensive pre-trial hearing, appellant moved in limine to prevent Swan from testifying about a 2007 report of "suspected lewd acts upon a 4 year old male victim." Tr. 61, l. 16 – 62, l. 7. R. ___ (Defendant's Motion in Limine). Defense counsel described the accusation as "very speculative as to whether or not that ever happened." Tr. 61, ll. 16 – 22. The complaining witness—the child's mother—had mental defects and recanted her statement. Tr. 61, ll. 21 – 24. Trial counsel argued there were "real questions as to the reliability of that report" and that the court had to determine that it "actually did happen." Tr. 62, ll. 1 – 7.

In response, the Attorney General argued not that the accusation was reliable, but that Swan had relied upon it and that it was therefore admissible. Tr. l. 62 – 63, l. 13. The Attorney General candidly started, "**Now what weight she give them, probably not much because nothing was ever proven, nobody got convicted of it.**" Tr. 62, ll. 19 – 22 (emphasis added). Trial counsel responded that if Swan did not give it much weight, then it should be excluded. Tr. 62, l. 25 – 63, l. 2. Judge Cothran initially agreed, asking, "the simple fact that the allegation was made, is not substantiated how is that going to be admissible." Tr. 63, ll. 3 – 6. Again, the Attorney General did not respond with any argument that the accusation was true, just that it was admissible because such accusations are "part of the process [psychologist expert witnesses] do in these types of cases." Tr. 63, ll. 7 – 13.

Judge Cothran remained skeptical that "a totally unfounded charge with no basis at all and he doesn't even constitute probable cause to get a warrant" was admissible. Tr. 63, ll. 14 – 25. The State admitted no arrest was ever made and confirmed this fact with Swan. Tr. 64, ll. 6 – 17. Swan said appellant told her "that he got papers about this from the Department of Social

Services while he was in prison saying that they were going to put him on the central registry for life." Tr. 64, ll. 12 – 17. Swan added, "We're permitted to use charges where there's some credible information." Tr. 64, ll. 21 – 22.

Defense counsel disputed that appellant was on the registry. Tr. 65, ll. 4 – 9. He explained that the child's forensic interview "was problematic" and that the prosecution "was uncomfortable using the forensic interview probably because the child was led to the answers." Tr. 65, ll. 4 – 9. The Attorney General, the proponent of this evidence, then stated, "**We don't know though.**" Tr. 65, l. 10 (emphasis added).

Swan stated appellant "denied anything ever happened." Tr. 65, l. 15. Swan had looked at the DSS reports "that came from the child's mother" that appellant was sleeping in the same bed with the child. Tr. 66, ll. 16 – 20. Defense counsel attempted to explain the facts of the accusation but was interrupted by the Attorney General who said getting into the facts was not necessary because "we're not here to try that case." Tr. 66, l. 22 – 67, l. 14. The Attorney General continued to argue that it was admissible because experts in her field would use this information. Tr. 67, l. 10 – 68, l. 2. The Attorney General conceded it was a "small part" of Swan's analysis. Tr. 68, ll. 5 – 7. Swan said the accusation was "important because it's a pattern of behavior" and then proceeded to discuss other unsubstantiated claims of abuse by a solicitor where some the children were never even located. Tr. 69, ll. 1 – 3. The Attorney General later abandoned its efforts to introduce these other unsubstantiated claims by the solicitor with Judge Cothran commenting, "It's total speculation." Tr. 75, ll. 14 – 22.

The court dealt with other matters and then returned to the DSS investigation question. Tr. 81, ll. 4 – 17. Judge Cothran stated, "I don't know how relevant it is in her determination and how substantial or how substantiated those allegations were that would make

it relevant." Tr. 81, ll. 13 – 17. The State then proffered testimony from Swan. Tr. 81, l. 18 – 88, l. 5. The State did not ask Swan any questions about the facts of the accusation, only whether psychologists rely on such accusations. Tr. 81, l. 21 – 83, l. 2.

Defense counsel's first question was, "**Does it matter whether or not the events, the alleged events took place?**" Tr. 83, ll. 3 – 4 (emphasis added). Swan replied that "of course" it mattered and that "obviously" she does not give "as much weight to an allegation that has not resulted in a conviction," but then stated, "However, we know that less than ten percent of sexual crimes results in a conviction." Tr. 83, ll. 5 – 10.

In further questioning by defense counsel, Swan admitted appellant was never indicted for this accusation. Tr. 83, ll. 11 – 13. She admitted that the complaining witness (the mother) recanted her statement. Tr. 83, l. 16 – 84, l. 13. She admitted that appellant was the person who first filed a police report because he was concerned a babysitter had molested the child. Tr. 84, l. 14 – 85, l. 5. Swan admitted **she had not watched the child's forensic interview**, but merely read a summary. Tr. 85, l. 14 – 86, l. 3. The summary by the forensic interviewer said the child reported seeing appellant's "big wee wee" in the shower and that appellant kissed him on the buttocks and on the penis. Tr. 85, l. 23 – 86, l. 7. Swan agreed that no determination was ever made whether the forensic interview complied with the statutory requirements for admission in court. Tr. 86, ll. 15 – 19. When finally asked what "confidence level" Swan had that the incident took place, she replied, "**Well, I have some confidence that something happened.**" Tr. 87, ll. 15 – 18 (emphasis added). Trial counsel argued the accusation was "too speculative" and "way more prejudicial than probative." Tr. 88, ll. 4 – 5. Judge Cothran said he would conduct further research and decide on admissibility the next morning. Tr. 88, ll. 6 – 7.

The next morning, Judge Cothran said it was "hard to rule in the blind" and drew a distinction between something appellant admitted doing versus an allegation he denied. Tr. 92, ll. 10 – 22. The court stated he would not allow Swan to "bring up the facts of some hearsay issue." Tr. 92, ll. 10 – 22. The Attorney General stated he would attempt to lay a foundation for this incident. Tr. 92, ll. 23 – 24. The jury entered the courtroom and Swan's testimony began. Tr. 93, ll. 5 – 22.

When the Attorney General attempted to lay a foundation for the accusation before the jury, he first asked Swan whether she looked for "a pattern of behavior." Tr. 114, ll. 14 – 16. When the Attorney General asked if Swan had "access to information about any investigations of him regarding. . . ", appellant objected. Tr. 115, ll. 8 – 11. The Attorney General rephrased his question as a general one about whether it is important to look at other investigations of sexual abuse. Tr. 115, ll. 12 – 18. He continued to ask questions about whether there was a DSS investigation and whether a forensic interview was done. Tr. 116, l. 21 – 117, l. 22. Appellant objected and the jury was sent out of the courtroom. Tr. 117, l. 23 – 118, l. 5.

Defense counsel argued that the information was hearsay, was inadmissible under Rule 403, and was speculative. Tr. 118, l. 6 – 120, l. 2. Defense counsel further argued that the information was inadmissible because the forensic interview was so problematic that the solicitor's office declined to bring a case. Tr. 118, l. 6 – 120, l. 2. Swan had not even watched the video of the interview. Tr. 118, l. 6 – 120, l. 2. Again, the Attorney General proffered Swan's testimony. Tr. 120, l. 4 – 122, l. 24. Swan said that she "gave it some weight" because it demonstrated a pattern of behavior. Tr. 122, ll. 17 – 21. Defense counsel argued that it could only establish a pattern if the incident actually occurred and appealed to the court's "gate-

keeping function," drawing an analogy to the statute governing the admission of forensic interviews and argued the accusation was "extremely speculative." Tr. 123, l. 1 – 124, l. 10.

The Attorney General cited Ettel for the proposition that the offenses were admissible and appellant's arguments only concerned the weight of the evidence, which was for the jury to decide. Tr. 124, l. 14 – 125, l. 10. Appellant responded that the Court "did not say that it was always admissible" and the trial judge has discretion to exclude such testimony. Tr. 125, ll. 17 – 20. Judge Cothran cited State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and said that "just because an expert relies on it doesn't mean that you throw out all the hearsay rules."[1] Tr. 125, l. 21 – 126, l. 6.

The Attorney General proffered more testimony from Swan's interview with appellant during which appellant denied the accusations. Tr. 130, l. 9 – 131, l. 20. Swan stated the allegation was important because it showed "a pattern of behavior against prepubescent children." Tr. 131, ll. 1 – 9.

The trial judge then ruled he would allow Swan "to testify to what he said," that she had reports of prior instances, that Swan "asked him about it and he blamed the babysitter on it." Tr. 132, ll. 2 – 12. Judge Cothran limited the State from "getting into the details, which I think is hearsay." Tr. 132, ll. 2 – 12.

The jury returned and the Attorney General resumed questioning Swan about the accusation. Tr. 133, l. 11 – 136, l. 4. Swan told the jury that appellant had been accused of molesting a four year old boy. Tr. 133, l. 11 – 136, l. 4. She said she asked appellant about the accusation and appellant denied it and "he blamed the little boy's female babysitter for touching him sexually." Tr. 133, l. 11 – 136, l. 4. The Attorney General asked again whether appellant

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1 The transcript spells it "Cromer," but from the trial judge's comments it is clear he is referring to Kromah.

"blame[d] the thing on somebody else." Tr. 133, l. 11 – 136, l. 4. Swan then linked the accusation from March of 2007 with the crime to which appellant pled guilty in August 2007 and said, "It demonstrates a pattern of behavior interest in prepubescent children." Tr. 135, l. 11 – 136, l. 4.

Discussion

This unsubstantiated hearsay allegation which was never the result of an arrest and which appellant denied was not sufficiently reliable to be admitted under Rule 702 and Rule 703. See Rules 702, 703, SCRE. State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). All expert testimony must pass the reliability test when the trial court conducts its initial gatekeeping function. Watson at 449, 699 S.E.2d at 177. The trial court erred in allowing Swan to testify about this highly prejudicial accusation.

The Attorney General relied on the Ettel line of cases to argue that hearsay allegations of uncharged offense are always admissible if the expert states that she relies on them in making their conclusions. See Ettel at 562, 660 S.E.2d at 287 ("These offenses can include both convictions and offenses not resulting in convictions as long as they are relevant to the determination of whether a person is a sexually violent predator."). See also In the Matter of Chandler, 382 S.C. 250, 676 S.E.2d 676 (2009); White v. State, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007). Watson was decided in 2010, after the principal cases discussing this type of evidence in the SVP context were decided. Watson emphasizes the trial court's gatekeeping role and the reliability requirement.

Rule 703 cannot be a limitless exception to the hearsay rule that circumvents the reliability requirement in SVP cases. In Watson, testimony about a known physical phenomenon—electromagnetic interference—was held unreliable from an electrical engineer as

it related to cruise control systems. Watson at 449-53, 389 S.E.2d at 177-79. The engineer had no experience with cruise control systems. Id. The Supreme Court reversed, holding that the trial court should have exercised its gatekeeping role to prevent admission of this evidence. Id.

The same gatekeeping role applies in SVP cases and should have barred evidence of this accusation. Here, the complaining witness recanted. The solicitors declined to rely on a problematic forensic interview. No charges were ever sought. Appellant denied any abuse. Swan could only say that she had "some confidence" that "something happened." Tr. 87, ll. 15 – 18. This unreliable hearsay should not have been admitted.

In this Court's opinion in the SVP case White v. State, it relied extensively on a Kansas case to conclude that uncharged conduct was admissible in an SVP case. 375 S.C. at 9-10, 649 S.E.2d at 178, citing Matter of Hay, 953 P.2d 666 (Kan. 1998). However in Hay, unlike in White or in this case, the complaining victims from the uncharged conduct took the stand and testified for the state. Hay at 672. Here, Swan did not even bother to watch the forensic interview, but the solicitors did and declined to bring charges.

Under Rule 404(b), before evidence of prior bad acts can be admitted, the trial judge must decide that there is clear and convincing evidence they occurred. Rule 404(b), SCRE. While that standard has not been applied in an analysis under Rules 702 and 703, the reliability requirement does not allow wholly unsubstantiated claims to be admitted. The evidence in this case was too unreliable to be admitted under Rule 702 and Rule 703. The burden was on the State to prove this evidence was reliable and it made no effort to do so except have Swan state that she relied upon it. An expert's naked assertion that she has "some confidence that something happened" is simply not sufficient. This Court should reverse and emphasize that

while some uncharged conduct may be admissible through an expert in an SVP case, there are limits to what the law will allow.

2.

The trial judge erred in holding that the probative value of unsubstantiated hearsay accusations that appellant molested a four year old boy was not outweighed by its unfair prejudice.

In addition to its reliability problems, this evidence should have been excluded under Rule 403. See Rule 403, SCRE. Appellant incorporates the prior argument and recitation of the evidence and arguments from Issue 1, above. Appellant repeatedly argued that evidence of this accusation was far more unfairly prejudicial than probative under Rule 403. Tr. 118, l. 6 – 120, l. 2. Tr. 62, l. 25 – 63, l. 2. Tr. 66, l. 22 – 67, l. 9. Tr. 88, ll. 4 – 5. Trial counsel noted the Attorney General's concession that this accusation played a "small part" in Swan's analysis: "He said it's a small part. I'm saying it's a huge prejudice. I mean I think the prejudice [sic] is way outweighed by its prejudice clearly outweighs its probative value. They're already saying it's a small part of the investigation." Tr. 68, ll. 12 – 16.

Swan said that she "gave it some weight" because it demonstrated a pattern of behavior. Tr. 122, ll. 17 – 21. Swan agreed that she did not give the accusation "as much weight" as a conviction. Tr. 83, ll. 5 – 10. Swan claimed the evidence was important because it demonstrated a pattern of behavior. Tr. 122, ll. 17 – 21.

When conducting a Rule 403 analysis, a trial court must first determine the probative value of the evidence by asking what the evidence is being offered to prove. State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). Here, Swan said the accusation was important to prove a pattern of behavior. However, she said that such a pattern was not necessary for her to diagnose

appellant with pedophilia. Tr. 71, ll. 13 – 16. Swan said, "You don't have to have multiple victims to have pedophilia. All you have to do is the fantasies, urges or behaviors. You can have pedophilia and never have a hands-on victim." Tr. 71, ll. 13 – 16.

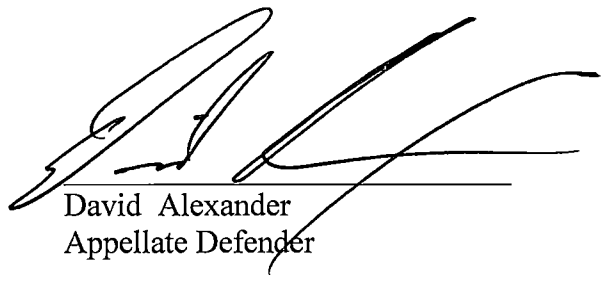
The jury obviously heard evidence that appellant had a "hands-on victim" otherwise he would never have qualified for prosecution under the SVP Act. Tr. 103, ll. 17 – 19. Under Swan's own admission, she did not need any other victims to diagnose appellant with pedophilia. She also used psychological testing to show that appellant was attracted to children. Tr. 136, l. 5 – 142, l. 16. The evidence of this unsubstantiated hearsay allegation had little probative value.

The unfair prejudice of this evidence is readily apparent. The jury heard that appellant was accused of molesting a four year old boy and that he blamed it on a babysitter. Tr. 134, ll. 6 – 22. But for this accusation, the jury would have only heard of the one victim, which appellant admitted and pled guilty to molesting. Exacerbating the unfair prejudice by leaving out the details, the jury was free to speculate that the abuse was much worse than what was alleged. The State used the accusation in its closing argument, telling the jury that appellant had not benefited from counseling, "Because just a little while later, he's in trouble, he's investigated in one case but then convicted for crimes committed a few months later in the cases you have before you." Tr. 268, ll. 2 – 5.

The jury struggled with whether to commit appellant. Tr. 286, l. 7 – 299, l. 17. They deliberated over three hours. Tr. 286, l. 7 – 299, l. 17. They asked multiple questions. Tr. 286, l. 7 – 299, l. 17. One of the questions stated, "We are in disagreement on more State confinement control for care." Tr. 292, ll. 19 – 25. In this close case, the error of admitting this accusation cannot be harmless. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and remand this case for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Berkeley County

Honorable Ralph F. Cothran, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF MICHAEL KAMINSKI,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter 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; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Michael Kaminski, at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 8th day of February, 2017.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of February, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.