

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County
The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-001409

RECEIVED
APR 04 2017
SC Court of Appeals

THE STATE,

Respondent,

v.

ALEXANDER CARMICHAEL HUCKABEE, III,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On March 15, 2017, this Court issued a published opinion in which it affirmed Appellant's conviction for unlawful conduct toward a child, but reversed his convictions for homicide by child abuse (HCA), inflicting great bodily injury upon a child, and first-degree criminal sexual conduct (CSC) with a minor. State v. Huckabee, Op. No. 5473 (S.C. Ct. App. filed March 15, 2017). In reversing the listed convictions, this Court concluded the trial court erred in allowing testimony from SLED Agent Paul LaRosa, a witness proffered as an expert in criminal profiling because the witness's testimony should have been excluded under Rule 403, SCRE. Specifically, the Court found the statements suggested guilt on an improper basis and as such the danger of unfair prejudice outweighed the possible probative value of his testimony because criminal profiling evidence is never probative of guilt. Furthermore, the Court

concluded the error in admitting the statements was not harmless because there was no direct evidence of Appellant's guilt and the most "damning" part of the expert's testimony—analysis that the perpetrator of the crimes was an adult male between the ages of twenty-five and forty—effectively excluded the possibility that Victim's mother, Atelia Hunt, committed the crimes. However, the Court rejected Appellant's contentions that Appellant's third statement to police was involuntary for alleged coercion or the three-day lapse between Miranda¹ warnings and a later custodial interrogation. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because the State believes: (1) this Court failed to apply the abuse of discretion standard in reviewing the trial judge's ruling and in neglecting to determine whether that discretion was abused in holding the probative value of Agent LaRosa's testimony was not **substantially** outweighed by the danger of unfair prejudice; (2) the Court misapprehended the facts by concluding Agent LaRosa's testimony suggested Appellant's guilt on an improper basis; and (3) the Court inconsistently applied the harmless error doctrine to Appellant's convictions. Accordingly, Respondent petitions for rehearing on the Rule 403, SCRE issues, and asks the Court to reinstate Appellant's convictions and sentences on HCA, inflicting great bodily injury upon a child, and first-degree CSC with a minor.

Abuse of Discretion Standard of Review

The State notes this Court failed to apply a deferential abuse of discretion standard when reviewing the trial judge's ruling on the admissibility of Agent LaRosa's testimony. The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v.

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

In the instant case, the Court failed to give deference to the trial judge's ruling. Instead, it performed its own analysis of the probative value of Agent LaRosa's testimony. This Court has been emphatic in awarding a trial judge great deference in Rule 403 analyses. See State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (2008). The Court has specifically stated "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence," and cautioned that "[i]f judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 339, 665 S.E.2d at 207.

In its opinion, the Court cites to the trial judge's Rule 403 analysis for its proposition that Agent LaRosa's testimony was a criminal profile submitted for the purpose of demonstrating Appellant possessed the characteristics of a "typical offender" and as such possessed no probative value. However, the Court failed to recognize this analysis was performed on Agent LaRosa's proffered testimony, and based on this same analysis the trial judge limited his statements to those he deemed relevant to the determination of Appellant's guilt. The trial judge imposed several limitations on Agent LaRosa's testimony: (1) he could not testify that Appellant was the only male with the degree of access required to inflict the injuries; and (2) he could only testify about his analysis of the victim's wounds and the infliction of the wounds, and to go

beyond that would exceed his “area of expertise” and unfairly prejudice Appellant. (R.p.456, line 8–R.p.457, line 12). These limitations were critical aspects of the trial judge’s ruling designed to exclude non-probative evidence from the jury. Accordingly, the Court erred in failing to consider this in its analysis.

Moreover, the Court’s opinion indicates it determined the “danger of unfair prejudice outweighed any possible probative value” instead of determining whether the danger of unfair prejudice substantially outweighed the possible probative value of Agent LaRosa’s statements as required by Rule 403. In State v. Collins, 409 S.C. 524 763 S.E.2d 22 the South Carolina Supreme Court found this Court erred in overturning a trial judge’s Rule 403 analysis regarding the admission of the victim’s pre-autopsy photographs depicting his “gruesome” injuries inflicted by the defendant’s dogs. Noting that appellate review of a trial judge’s Rule 403 analysis is a “highly deferential standard of review,” the South Carolina Supreme Court found this Court’s analysis improper because: (1) the Court determined the evidence was prejudicial, rather than evaluating whether the danger of unfair prejudice substantially outweighed the probative value of the evidence; and (2) there were no witnesses, and therefore the pre-autopsy photographs were necessary in determining the defendant’s guilt of the charged offenses. Here, similar to Collins, the Court failed to determine whether the danger of prejudice from Agent LaRosa’s testimony **substantially** outweighed its probative value.

Accordingly, the Court erred in failing to consider whether the unfair prejudice of admitting Agent LaRosa’s testimony substantially outweighed its probative value and in ignoring the deferential abuse of discretion standard applied by our appellate courts.

Admissibility of Criminal Profiling Evidence in South Carolina

On the merits, the Court misapprehended the scope and purpose of Agent LaRosa's testimony. In reaching its ruling, this Court concluded: (1) criminal profiling constitutes propensity evidence and never possesses any probative value; (2) other jurisdictions have condemned criminal profiling evidence as propensity evidence; (3) the South Carolina Supreme Court "indirectly addressed" profiling evidence in Underwood v. State, 309 S.C. 560, 563-64, 425 S.E.2d 20, 22-23 (1992), in which it found a defendant's trial counsel was not ineffective for failing to object to this testimony because it was not offered to identify the defendant as the offender; and (4) Underwood is distinguishable from the instant case because LaRosa's testimony "could lead a reasonable juror to no other inference than" Appellant inflicted the burns on Victim and therefore had a propensity to commit the sexual battery resulting in her death, a fact reflected in the trial judge's Rule 403 analysis.

The State notes the Court failed to consider standing South Carolina law when it found "criminal profiling . . . has no place in a trial to determine the guilt of a specific individual." The South Carolina Supreme Court has recognized the propriety of such evidence in some situations. In Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992), the court found trial counsel was not ineffective in failing to object to an expert witness's testimony about the "common profile" of people who sexually abuse children. The witness testified:

A person who wants to have sex with or to accomplish penile-vagina penetration with a child may be one of two kinds of people. **He** may be a person who is so wound up in **his** own needs or so angry that **he** doesn't care how much it hurts the child at all. In that case, you can have a very violent rape. You can have significant damage to the child which requires a surgical repair.

That is not - that is - a lot of people feel that that's the common kind of sexual abuse of children. That's not true.

Very prominently, people who want to become sexually involved with children are people who want and need the children to like them, to trust them, and to come back for more.

If you hurt a child very badly, that child is going-another adult is going to find out more likely. The child isn't going to come back, and you will be discovered. Therefore, many people who want to be sexually involved with children are careful of the children with whom they become sexually involved.

Id. at 563, 425 S.E.2d at 22 (emphasis added).

The court noted the witness “was testifying as to the common behavior of sexual abusers of children and how this behavior might manifest itself in the physical injuries of children” to explain why she found only a small tear in the hymen of one of the victims and such a small tear is compatible with partial penial penetration and “consistent with sexual abuse.” Id. The court also noted such testimony was analogous to “battered or shaken child syndrome” prosecutions, as such cases involve testimony based upon “physical findings to support an inference that a child’s injuries were not accidental” and emphasized the witness “did not offer the testimony to set out personality or character traits which [the defendant] possessed in order to identify him as the offender.” Id. at 563–64, 425 S.E.2d at 22–23.

In State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999), the South Carolina Supreme Court found a trial judge erred in failing to grant defendant’s motion for a new trial based on after-discovered evidence. Around the time of the victim’s death, two other murders had taken place involving victims of similar age and build killed in similar manners. Id. at 620–21, 513 S.E.2d at 99–100. Defendant learned about these other murders and their similarities after his trial, and sought to introduce evidence that the three murders were all perpetrated by the same person and such person could not have been him because the third murder occurred after he was in police custody. Id. At the motion hearing, the defendant presented the testimony of three expert

witnesses, including one qualified in “crime scene analysis and criminal personality profiling.” The expert witness “profiled the killer of these three women as a white male in his mid-20’s to mid-30’s, with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of childhood abuse, and knowledge of the area.” Notably, the defendant did not fit that profile. Id. The trial judge denied the motion, finding that information about the murders was available to the public at the time of trial. The court found the trial judge erred in failing to grant the new trial, noting the three experts, particularly the criminal profiler, provided testimony tending to exonerate that could not have been discovered by his attorneys because the similarities between the crimes were not apparent at the time of trial. Id. at 621–22, 513 S.E.2d at 100.

These two cases demonstrate South Carolina generally allows criminal profiling testimony to be used as evidence in a criminal trial. In Spann, the more recent of the two decisions, the South Carolina Supreme Court embraced the use of broad criminal profiling testimony and found it, along with testimonies from a forensic pathologist and forensic psychiatrist, justified granting the defendant a new trial. Notably, the profiling testimony focused on the characteristics of the alleged perpetrator, noting the killer was likely a “white male in his mid-20’s to mid-30’s,” similar to Agent LaRosa’s profile of the attacker, whom he believed was likely a male between the ages of twenty-five and forty. See id. at 621, 513 S.E.2d at 100.

In Underwood, similar to the instant case, the expert avoided broad personality characteristic comparisons between the defendant and “typical” abusers of children. Instead, both the Underwood expert and Agent LaRosa used the physical evidence found on the bodies of the victims to craft their profiles. Moreover, Agent LaRosa’s testimony was more restrained

than the Underwood expert's: Agent LaRosa testified the person who assaulted Victim was **likely** male because an overwhelming percentage of sexual assaults are committed by men but admitted it was possible a female committed the crimes, whereas the Underwood expert omitted such cautionary language from her testimony and used male pronouns when describing her profile.

With the exception of Underwood, the Court cites to cases from other jurisdictions² where the ruling courts noted criminal profiles were used for the sole purpose of showing the defendants fit the profile of a typical offender of such crime. At best, those cases are merely persuasive authority from outside this jurisdiction. More importantly, however, those cases are wholly distinguishable from the instant case because they involved experts providing general criminal profiles unrelated to the actual evidence of the defendants' guilt. A prime example of this is the Court's reliance on Sanders v. State, 303 S.E.2d 13 (GA. 1983), in which the Supreme Court of Georgia condemned criminal profiling testimony. The expert in Sanders was a clinical psychologist with no background in crime scene analysis. Id. at 16. Further, he implicated the defendant's character by describing a profile of typical battering parents and openly compared the defendant's personality characteristics to that profile. Id. at 18. The court held that unless a defendant has placed her character in issue or has raised a defense involving battering parent syndrome, the prosecution could not introduce evidence of the syndrome or a defendant's personality traits **"as its foundation for demonstrating the defendant has the characteristics of a typical battering parent."** Id.

Agent LaRosa did not present a profile of the "typical" person who would abuse a child; quite the reverse, his profile described the specific person who committed the crimes and was

² In its opinion, the Court cites to United States v. Jones, 913 F.2d 174 (4th Cir. 1990); State v. Clements, 770 P.2d 447 (Kan. 1989); Commonwealth v. Day, 569 N.E.2d 397 (Mass. 1991). All three cases involve expert witnesses who provide criminal profiling testimony of the "types" of individuals whom generally commit the crimes charged.

founded upon his analysis of Victim's injuries. Notably, LaRosa testified before the jury that his deductions were based on his "crime reconstruction" experience, the photographs of Victim's body, and the autopsy report. (R.p.475, line 8–R.p.476, line 2).

In its opinion, this Court claims the State presented the profiling evidence to answer the question, "How could anyone do this to a child?" and the only practical reason for the State to present the answer to said question would be "to suggest that Appellant fit the profile of a person who would inflict this type of abuse" and, accordingly, must have been the person who committed the crimes against Victim. However, the Court ignores the numerous statements on the record which indicate the State did not submit this evidence to suggest Appellant fit the profile of a member of some class of people who **would** inflict this type of abuse, but rather Appellant matched the physical characteristics of the specific individual who **committed** this abuse.

In its opinion, the Court concedes Agent LaRosa's testimony was "necessary to explain how Victim's cigarette burns were inflicted" and that testimony was "based on Agent LaRosa's experience as a crime scene reconstructionist." Yet, the Court suggests the remainder of Agent LaRosa's testimony was rooted in vague, general profiling despite all evidence to the contrary. The State explained to the trial judge that Agent LaRosa's testimony was rooted in his role of "being a crime scene reconstructionist." (R.p.450, line 23, R.p.451, line 16). This is further evidenced in Agent LaRosa's stated explanations for how he reached his conclusions. Why did Agent LaRosa testify the perpetrator of the crime was between the ages of twenty-five and forty? Because the photographs and autopsy report indicated Victim was completely overpowered and unable to move while burning cigarettes were applied to her vagina and buttocks, and only an adult in their physical prime would be capable of performing such a task. Why did he indicate

the perpetrator was likely male? Because the cigarette burns indicated the assault was sexual in nature, and his research showed that somewhere between ninety and ninety-nine percent of sexual assaults are perpetrated by men, percentages based on statistical data collected on the subject. (R.p.475, line 8–R.p.478, line 8).

Accordingly, the Court erred in finding the trial judge erred in admitting Agent LaRosa’s testimony. Agent LaRosa’s testimony was based on the physical evidence in the case and highly probative of Appellant’s guilt.

Harmless Error

The State also asserts the Court failed to consistently apply its harmless error analysis to Appellant’s HCA conviction. Section 16-3-85(A) of the South Carolina Code (2015) states a person is guilty of homicide by child abuse if said person:

- (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or
- (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(emphasis added). Section 16-3-85(B)(1) defines child abuse or neglect as “an act or omission by a person which causes harm to the child’s physical health or welfare.”

In its opinion, the Court found admission of Agent LaRosa’s testimony was harmless error in Appellant’s unlawful conduct toward a child conviction because: (1) Dr. Schandl explained Victim’s deteriorating health would have been patently obvious to Appellant; (2) Appellant admitted on direct examination he should have done something to help victim and in his testimony admitted he did not know Victim was as sick as she was, which “necessarily implied” he knew Victim was sick to some extent; and (3) Appellant admitted he was afraid DSS

would take his son away if he sought medical help for Victim. Thus, the Court concluded the overwhelming evidence indicated he placed victim at unreasonable risk of harm pursuant to Section 63-5-70(A).

The Court failed to apply this same reasoning to Appellant's HCA conviction, as this same evidence shows Appellant was guilty of neglect amounting to an extreme indifference towards Victim's life. Appellant failed to obtain medical attention for Victim despite witnessing Victim's rapidly deteriorating health. In addition to the testimony cited by the Court, Appellant admitted during trial and during his police interviews he was "guilty of neglect" and to witnessing Victim's seizures—what he referred to as "little episodes"—leading up to Victim's death. (R.p.242, lines 4–13; R.p.253, lines 5–8).

Notably, he claimed one of Victim's seizures was so extreme he had to grab her mouth to prevent her from "swallow[ing] her tongue." (R.p.526, line 22–R.p.527, line 6). Moreover, he admitted: (1) he witnessed at least one of the seizures the day of her death and shortly thereafter heard Victim making "grunting" noises; and (2) he dissuaded Hunt from seeking medical care for Victim by telling her a doctor would call DSS and inform the agency of the "marks" on Victim. (R.p.540, line 12–R.p.544, line 6; R.p.564, line 7–R.p.565, line 3; R.p.569, lines 12–24). Dr. Schandl testified these seizures, and other ailments Appellant described witnessing including lethargy, loss of appetite, and difficulty walking were symptomatic of the infection that ultimately killed Victim. (R.p.97, line 1–R.p.98, line 24; R.p.252, line 15–R.p.253, line 20). Despite this plenitude of observed maladies, Appellant never sought medical care for Victim.

Accordingly, this Court erred in failing to find any perceived error in admitting Agent LaRosa's testimony was harmless as to Appellants HCA conviction.


Conclusion

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, on the abuse of discretion, Rule 403, SCRE, and harmless error issues, and requests this Court reinstate Appellant's convictions and sentences for HCA, inflicting great bodily injury upon a child, and first-degree CSC with a minor.

Respectfully submitted,

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April 4, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appellate Case No. 2013-001409

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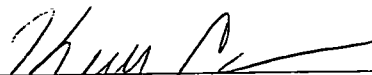
PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

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

This 4th day of April, 2017.



KEELY CARTER
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ALAN WILSON
ATTORNEY GENERAL

April 4, 2017

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The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. Alexander C. Huckabee, III – Appellate Case No. 2013-001409

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
Bar Number 100231

WFS/
Enclosures

cc: John H. Strom, Esquire
Victim Services