

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF FRANK SAUNDERS,

APPELLANT

ORIGINAL

RECEIVED

MAY 19 2017

SC Court of Appeals

APPELLATE CASE NO 2016-002005

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in sustaining the State's objection and preventing appellant from cross-examining the State's expert witness about her compensation and financial bias to testify favorably for the State?

STATEMENT OF THE CASE

On September 19, 2016, appellant Frank Saunders was tried in Dorchester County before the Honorable Diane S. Goodstein and a jury to determine whether he was a sexually violent predator. Tr. 1. James G. Bogle, Jr. represented the State. Tr. 1. James K. Falk represented appellant. Tr. 1. The jury found appellant was a sexually violent predator. Tr. 383, 1. 8 – 384, 1. 2. On September 20, 2016, Judge Goodstein signed a written Order of Commitment. R. ___ (Order of Commitment). This appeal follows.

ARGUMENT

The trial court erred in sustaining the State’s objection and preventing appellant from cross-examining the State’s expert witness about her compensation and financial bias to testify favorably for the State.

Appellant was in the middle of cross-examining the State’s sole witness about her compensation for performing sexually violent predator commitment evaluations when the Attorney General objected. Tr. 305, l. 20 – 310, l. 18. Before appellant’s question that drew an objection, Dr. Amy Swan (“Swan”) told the Dorchester County jury that the \$2.2 million she had received from the State of Florida for performing SVP evaluations “figures out to be a hundred and—about \$145,000 a year **which is a pretty average salary for a psychologist.**” Tr. 310, ll. 7 – 9 (emphasis added).

Appellant then asked whether Dr. Swan included the money she made from Florida with the money she received from performing evaluations for the State and in private practice and the Attorney General objected on the basis of relevancy. Tr. 310, ll. 10 – 18. The Attorney General stated, “Objection as to relevancy. I think we are getting pretty far afield right now.” Tr. 310, ll. 17 – 18. Trial counsel responded, “I think I can talk about—I think I am fair to cross-examination her regarding bias and financial incentive to provide an evaluation.” Tr. 310, ll. 19 – 21. The trial judge held a bench conference, after which appellant asked no further questions of Dr. Swan about her compensation or the possibility of bias because of her ongoing revenue stream from state governments for performing SVP evaluations and testifying at commitment trials. Tr. 310, l. 22 – 312, l. 24.

The trial judge erred in preventing further cross-examination. Rule 608(c) of the South Carolina Rules of Evidence provides, “Bias, prejudice or any motive to misrepresent may be shown

to impeach the witness either by examination of the witness or by evidence otherwise adduced.” Rule 608(c), SCRE. See also U.S. Const. amend. VI; Davis v. Alaska, 415 U.S. 308 (1991). The Attorney General attempted to frame the issue as one of relevance, but a witness’s credibility and bias is always relevant, especially in an SVP trial. Rule 401 defines relevant evidence as “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.

In this case, Dr. Swan’s expert opinion that appellant is a sexually violent predator is the fact “of consequence to the determination of the action.” Id. Dr. Swan was the State’s only witness and any evidence that cast doubt on her opinion was relevant. See also United States v. Parker, 79 F.3d 550, (4th Cir. 2015) (stating that “exposure of a witness’ motivation in testifying is a proper and important function of cross-examination.”); United States v. Abel, 469 U.S. 45, 50-51 (1984) (citing Federal Rule 401 as supporting its reasoning that exposure of a witness’s bias is relevant evidence).

In accordance with Rule 608, appellant cited Dr. Swan’s bias and financial incentive as the reason for his cross-examination. “Considerable latitude is allowed in the cross-examination of an adverse witness for bias.” State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). In Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001), the trial court erred in prohibiting cross-examination of a doctor for financial bias. The lawsuit stemmed from a car wreck and the only issue was the extent of the plaintiff’s injuries. Id. at 363, 548 S.E.2d at 585. The defense intended to call a doctor who had a significant business and consulting relationship with the defendant’s insurer, Nationwide. Id. The plaintiff wanted to cross-examine the doctor on the extent of his financial dealings with Nationwide. Id. at 364, 548 S.E.2d at 585. The Supreme

Court reversed because the trial judge refused to permit cross-examination for the doctor's financial bias. Id. at 365-66, 548 S.E.2d at 585-86.

Just like in Yoho, appellant was in the process of showing Dr. Swan's continuing relationships with governments seeking commitment of SVPs as the source of her income and her bias to provide favorable testimony for the State. Appellant elicited that Dr. Swan had performed multiple evaluations in South Carolina and routinely recommended commitment. Tr. 300, l. 9 – 305, l. 19. Dr. Swan minimized the \$4,000 per evaluation she makes because "that includes the trial and the travel." Tr. 305, ll. 23 – 25. She made \$1,900 for every annual review. Tr. 306, ll. 4 – 7. Appellant then questioned Dr. Swan about her work in Florida and how she was compensated, but she testified that she did not have "a clue" how many evaluations she performed in Florida, but perhaps it was about equal to amount of work she performed in South Carolina. Tr. 306, l. 11 – 307, l. 21.

Dr. Swan then testified that she maintained a private practice in Fort Lauderdale, but work performed for private attorneys was only ten percent of her work. Tr. 308, l. 7 – 309, l. 18. Appellant then questioned her about an article in a Florida newspaper reporting that she made \$2.2 million from Florida. Tr. 309, l. 19 – 310, l. 9. Dr. Swan deflected this large sum by claiming it only amounted to an "average" salary of \$145,000 when the trial court halted appellant's cross-examination after the State's objection. Tr. 310, ll. 5 – 25. Appellant was unable to link together the money Dr. Swan made from Florida and South Carolina and dispute her claim of making an "average" salary. Appellant was unable to ask Dr. Swan about amounts she made in other states, such as Missouri, where she testified she was licensed. Tr. 168, ll. 14 – 15.

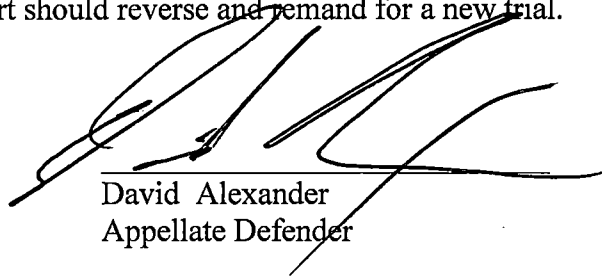
The important point to make was that Dr. Swan had built a national reputation as a "hired gun" who had made millions of dollars testifying for governments through the years. She testified

that she was paid the same amount regardless of whether she recommended commitment. Tr. 313, l. 22 – 314, l. 1. But what is obvious to attorneys who routinely deal with expert witnesses is not so immediately obvious to jurors—that experts hope to receive continued referrals from attorneys who are happy with their opinions and testimony. Dr. Swan’s financial incentive to testify favorably for the State in this case was not \$4,000, but all of the future cases for which she would be paid \$4,000 in South Carolina and all of the future cases in other states where she might extend her practice. Appellant attempted to make this point in closing argument, but the point lacked force because of the court’s limitation of his cross-examination. Tr. 361, l. 22 – 362, l. 3.

Dr. Swan’s opinion was the only expert opinion provided to the jury that appellant was a sexually violent predator. The trial judge charged the jury that they could believe the testimony of a witness in its entirety or reject the witness’s testimony in its entirety. Tr. 371, ll. 19 – 21. Had the jury heard the extent of Dr. Swan’s financial bias and the future revenue stream she could expect to receive, it is far more likely that they would have rejected Dr. Swan as a biased expert. The trial judge erred in preventing further cross-examination for financial bias and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for a new trial.

A handwritten signature in black ink, appearing to read 'DAVID ALEXANDER', is written over a horizontal line. The signature is stylized and somewhat cursive.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2017.