

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Donald B. Hocker, Circuit Court Judge

RECEIVED
MAY 19 2017
SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF DAVID A. WARD,

APPELLANT

APPELLATE CASE NO 2016-001151

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this SVP case, whether the trial court erred in permitting the State's expert to tell the jury the substance of hearsay statements by alleged victims and police officers who did not testify at appellant's trial?

STATEMENT OF THE CASE

On May 26, 2015, the State filed a petition to commit appellant pursuant to the Sexually Violent Predator Act. R. 344. Appellant's qualifying conviction was a guilty plea for third degree criminal sexual conduct with a minor. R. 345. On March 21, 2016, appellant was tried in Laurens County before the Honorable Donald B. Hocker and a jury. R. 1. Christopher A. Morrow represented the State. R. 1. Joshua S. Nasrollahi represented appellant. R. 1. The jury convicted appellant. R. 318, ll. 13 – 17. On April 27, 2016, the court heard argument on appellant's post-trial motions. R. 323. On April 29, 2016, Judge Hocker denied appellant's motions in a written order. R. 339. This appeal follows.

ARGUMENT

In this SVP case, the trial court erred in permitting the State's expert to tell the jury the substance of hearsay statements by alleged victims and police officers who did not testify at appellant's trial.

Before trial, appellant moved in limine to prevent hearsay testimony from materials examined by the experts to be introduced before the jury. R. 35, ll. 16 – 19. Appellant sought to prevent the State's expert from informing the jury about details from incident reports, warrants, witness statements and other hearsay sources. R. 35, ll. 16 – 24. Appellant argued that the State would attempt to “backdoor hearsay information.” R. 35, ll. 16 – 24. The defense cited In the Matter of Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003) and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) in support of his argument that not all hearsay was automatically admissible through an expert witness. R. 36, ll. 2 – 4.

The State argued appellant's prior offenses were important for the expert to demonstrate a pattern of behavior indicating Ward could not control his pedophilia. R. 38, ll. 9 – 15. The Attorney General cited In the Matter of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008) and In the Matter of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003) and argued these cases expressly allowed the introduction of hearsay details through an expert in an SVP case. R. 34, l. 16 – 35, l. 9. The defense distinguished Ettel and Corley case as addressing issues of relevancy, not hearsay. R. 44, l. 24 – 45, l. 8. The trial judge took the matter under advisement because he wanted to conduct further research. R. 42, l. 24 – 43, l. 1.

After a lunch recess, the court heard further argument and indicated its intention to admit the testimony. R. 44, l. 10 – 49, l. 11. The trial judge cited Jones v. Doe, 372 S.C. 53, 640 S.E.2d 514 (Ct. App. 2006) for the principle that in “expert may testify to evidence even though

it is inadmissible under the hearsay rule.” R. 47, ll. 13 – 16. The court stated his intention to give a limiting instruction that the jury was not to consider the hearsay allegations for the truth of the matter asserted, but only as information relied upon by the expert. R. 47, ll. 7 – 48, l. 11. The defense objected, arguing that such a curative instruction that would confuse the jury. R. 49, l. 15 – 51, l. 12. After further argument, Judge Hocker ultimately decided to hear a proffer of the expert’s testimony. R. 49, l. 15 – 54, l. 25.

After the lawyers gave their opening statements, the State proffered the testimony of its expert, Dr. Amy Swan (“Swan”). R. 73, ll. 3 – 19. During the proffer, Dr. Swan read directly from witness statements regarding appellant’s prior ABHAN conviction. R. 76, l. 1 – 77, l. 2. She read allegations that appellant touched a girl’s breasts, raped her; and orally and anally sodomized her. R. 76, l. 2 – 77, l. 2. Concerning appellant’s third-degree CSC conviction, Dr. Swan repeated a girl’s allegations that appellant touched her breasts and vagina. R. 78, l. 9 – 79, l. 8. During cross-examination, Dr. Swan admitted she had done nothing to verify the accuracy of the allegations upon which she relied and that the reports frequently contained double and triple hearsay. R. 94, l. 18 – 104, l. 20.

After the proffer, the trial judge ruled that the expert could only give a summary of the information she reviewed to form her opinion. R. 126, ll. 12 – 18. Judge Hocker ruled Dr. Swan could not read directly from the hearsay documents. R. 126, ll. 12 – 18. The trial judge stated, “I just don’t want the interviews to be read verbatim.” R. 126, ll. 12 – 18. Trial counsel renewed his pretrial objections when Dr. Swann testified before the jury. R. 141, ll. 14 – 20. At the end of Dr. Swan’s testimony, the court gave the following curative instruction: “Any facts that were stated related to the three criminal charges are not admitted into evidence for its truth of the

matter asserted, but received only for the limited purpose of informing you, the jury, as to some of the basis for Dr. Swan's opinion." R. 245, ll. 4 – 10.

The trial court erred in allowing Dr. Swan to summarize hearsay allegations for the jury. 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 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 if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge."). Dr. Swan admitted she did nothing to verify the accuracy of the information provided to her by the Attorney General. Despite the trial judge's curative instruction, the jury necessarily had to believe the truth of these allegations because it was clear that Dr. Swan believed them and relied upon them.

Dr. Swan's summary and reliance on the hearsay reports regarding appellant's ABHAN conviction were the crucial difference in the case. Dr. Marie Gehle ("Gehle") was the court's appointed expert and the defense called her as an expert witness. R. 248, ll. 8 – 13. She was employed by the South Carolina Department of Mental Health. R. 246, ll. 10 – 12. Her only job is performing precommitment evaluations. R. 246, ll. 13 – 17. Unlike Dr. Swan, she received a salary from the Department of Mental Health and was not paid per evaluation. R. 248, ll. 14 – 16. Dr. Gehle was qualified without objection. R. 250, ll. 16 – 23.

Dr. Gehle testified that it was important for her to look at "not just accusations, but what's been proven." R. 253, l. 21 – 254, l. 2. Dr. Gehle was unable to arrive at a diagnosis. R. 255, ll. 11 – 13. She testified, "but unlike Dr. Swann, I – I was really hung up on those earlier charges. And they were assault and battery of a high and aggravated nature, ABHANS. They're

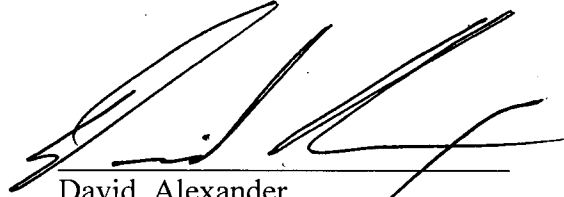
misdemeanors.” R. 255, ll. 14 – 20. In stark contrast to Dr. Swan, Dr. Gehle researched the charges but could not discover whether the court had determined the offenses were sexual in nature. R. 255, l. 14 – 256, l. 11. Dr. Gehle stated because “there’s such high stakes and liberty interests” in these cases that she relies “on what’s been proven in court or what the person had reported.” R. 256, ll. 12 – 20. Dr. Gehle emphasized that the trial judge wrote on the sentencing sheet that appellant should not be placed on a sex offender registry. R. 258, ll. 10 – 20.

Appellant correctly argued that Harvey prevents the admission of the hearsay in this case. In Harvey, the State admitted a log book of incidents from the group home where Harvey lived. Harvey at 58, 584 S.E.2d at 895. The State’s expert reviewed the log and testified that items concerned her, but ultimately stated she did not base her diagnosis on the log. Id. The State gained the log book’s admission under the business records exception to the hearsay rule. Id. at 61-63, 584 S.E.2d at 897-98.

The Court ruled the admission of the log book was error and reversed. Id. The Court found that the log book did not meet the business records exception because it was highly subjective and offered judgments about Harvey. Id. While the business records exception is not at issue in this case, the hearsay admitted has exactly the same problem as in Harvey. The witness and alleged victim statements used by Dr. Swan are the subjective opinions of what happened. The jury necessarily believed these hearsay reports because it had to credit Dr. Swan’s opinion instead of Dr. Gehle’s. The reliance on the unsubstantiated hearsay was the sole difference between the two experts’ opinion. Had the trial judge ruled this evidence inadmissible, appellant would not have been committed. This Court should reverse.

CONCLUSION

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

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for David A. Ward states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Donald B. Hocker, which was held on April 27, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

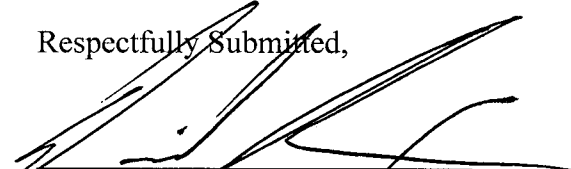
WHEREFORE, He asks the Court to relieve him as counsel for David A. Ward.

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SC Court of Appeals

Respectfully Submitted,




David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 19th day of May, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 19, 2017.



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