STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2017-UP-137 (S.C. Ct. App. Filed Apr. 5, 2017)
Indictment No. 2013-CP-23-1543
Appellate Case No. 2014- 001735

IN THE MATTER OF THE CARE AND
TREATMENT OF CALVIN JOE MILLER,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
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In the Matter of the Care and Treatment of Calvin Joe Miller, Appellant.

Appellate Case No. 2014-001735

Appeal From Greenville County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2017-UP-137
Submitted January 1, 2017 – Filed April 5, 2017

AFFIRMED

Appellate Defender Laura Ruth Baer, 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 Ettel*, 377 S.C. 558, 561, 660 S.E.2d 285, 287 (Ct. App. 2008) ("The admission of evidence is within the discretion of the [trial] court and will not be reversed absent an abuse of discretion."); *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011))); *In re Corley*, 353 S.C. 202, 205-06, 577 S.E.2d 451, 453 (2003) ("In the context of a criminal case, we have noted that while evidence of other crimes is generally inadmissible to show criminal propensity or to demonstrate that the accused is a bad individual, evidence of other crimes is admissible if necessary to establish a material fact or element of the crime charged."); *Ettel*, 377 S.C. at 562-63, 660 S.E.2d at 288 (allowing introduction of prior murder conviction "because [the expert] relied on [it] in evaluating Ettel's need for and likelihood of success in treatment as well as his ability to control his behavior in the future").

AFFIRMED.[1]

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

IN THE MATTER OF THE CARE AND
TREATMENT OF CALVIN JOE MILLER,

APPELLANT

APPELLATE CASE NO 2014- 001735

Appeal from Greenville County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2017-UP-137

PETITION FOR REHEARING

On April 5, 2017, this Court affirmed Appellant Calvin Joe Miller's commitment as a sexually violent predator. Miller respectfully petitions this Court for a rehearing of its Opinion No. 2017-UP-137, pursuant to Rule 221(a), SCACR. Miller respectfully avers that the following points were overlooked or misapprehended by the Court:

An expert's consideration of information in their evaluation does not make it automatically relevant and substantially more probtaive than prejudical such that it shoul be admissible before a jury. Rather, the trial judge must consider both the relevance of the information and balance the probative value versus the danger of unfair prejudice. Rule 401, 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 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Here, the trial judge committed an error of law in admitting Miller's prior charges and convictions for non-sexual conduct in his sexual violent predator commitment trial based solely on the fact that it was considered by the expert in rendering her opinion. The admission of such evidence in these proceedings presents a substantial danger that the jury would find in favor of commitment based upon a general criminal propensity rather than because it found that the state proved beyond a reasonable doubt that Miller was *likely* to engage in acts of *sexual violence* if he was not confined.

As this Court will recall, this case involved yet another SVP commitment trial for a man who pled guilty to his charge, who had no disciplinary problems in prison, and who the court-appointed evaluator found not be a sexually violent predator.[1] R. 25, l. 16 – 29, l. 3; R. 128, l. 23 – 130, l. 3; R. 159, l. 19 – 160, l. 10; R. 162, ll. 6-18. Miller's conviction for lewd act qualified as a

[1] Dr. Kimberly Harrison, formerly a chief psychologist at the Department of Mental Health, was the original court-appointed evaluator assigned to Miller's case. R. 142, l. 7 – 148, l. 8. Dr. Harrison diagnosed Miller with pedophilia, but found that there was not sufficient data to render any other diagnosis with any degree of certainty. Specifically, she did not find that Miller demonstrated a "pervasive lifelong pattern of antisociality" to diagnose him with a personality disorder. R. 153, l. 14 – 156, l. 6. Testing indicated that Miller had a low-moderate degree of risk for sexual reoffending. Dr. Harrison found that a significant number of other risk factors that might elevate that risk were not applicable to Miller. R. 156, l. 17 – 160, l. 10. Unlike the state's hired-gun, Dr. Knight, who placed additional significance of Miller's non-sexual criminal history, Dr. Harrison noted that those were already a factor in the Static-99's risk score. R. 160, ll. 11-17. Thus, Dr. Harrison testified that Miller did not meet the criteria for commitment under the SVP Act. R. 162, ll. 15-18. Based on his diagnosis and risk level, she could not say that he is "likely to engage in acts of sexual violence." R. 162, ll. 1-5. She testified: "[T]he [SVP] statute specifies that this Act in intended for an extremely dangerous group of sex offenders, and I don't believe -- based on all the other evaluations that I have done under this Act, I don't believe that Mr. Miller falls into that small, but extremely dangerous group." R. 162, ll. 6-14.

sexually violent offense and he suffered from the mental abnormality of pedophilia. Thus, the only element of the "sexually violent predator" definition that was in dispute at trial was whether Miller's pedophilia 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); S.C. Code Ann. § 44-48-100(A).

Miller was previously convicted in North Carolina in 1996 of one count of incident liberties with a child, arising from a 1994 incident. R. 29, l. 4 – 31, l. 4. The admissibility of that prior sexual offense conviction was not in dispute. Rather, the basis of Miller's appeal is the trial court's admission of testimony regarding the following non-sexual charges and convictions: 1992 charges for breaking and entering and larceny, both of which were dismissed; 1995 and 2009 convictions for criminal domestic violence; 2005 conviction for possession of marijuana; and 1999, 2003, and 2005 convictions for failure to register as a sex offender. R. 31, l. 5 – 36, l. 17.

As discussed more fully in the brief and reply brief of appellant, there is no case that stands for the proposition that non-sexual offenses or convictions are automatically relevant to whether an individual is a sexually violent predator. See In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003) (finding no error in admission of prior ABHAN conviction that was sexual in nature in SVP trial); White v. State, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007) (finding error in failure to consider past unadjudicated sexual offenses at SVP probable cause hearing but specifying that the Court was "not stating past convictions and prior offenses not resulting in convictions that have no bearing on whether a person is a sexually violent predator should be admissible."). The concern at an SVP trial is with the likelihood to commit **sexual** violence, not just violence generally. See S.C. CODE ANN. § 44-48-30(9)) (defining "[l]ikely to engage in acts of **sexual** violence" as "the person's propensity to commit acts of **sexual** violence is of such a degree as to

pose a menace to the health and safety of others." (emphasis added)); In re Harvey, 355 S.C. 53, 61 n.7, 584 S.E.2d 893, 897 n.7 (2003) (reiterating that "the purpose of the requirements in the SVP Act is to ensure that these involuntary commitment procedures are "**only** used to control a 'limited subclass of dangerous persons' and **not to broadly subject any dangerous person to what may be indefinite terms.**" (emphasis in original)).

In affirming Miller's commitment, this Court cited In re Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), which affirmed the admission of the appellant's prior murder conviction, finding it relevant "because [the expert] relied on [it] in evaluating Ettel's need for and likelihood of success in treatment as well as his ability to control his behavior in the future." Ettel is distinguishable from the present case in that the state had successfully moved to exclude evidence regarding the likelihood of success in treatment from Miller's SVP trial. See R. 32, ll. 13-24. Further, contrary to the trial judge's statement in this case, there was evidence that Ettel's prior murder conviction was sexually motivated:

> In 1962, Ettel was convicted in Michigan of murdering his girlfriend's mother with a pair of sewing scissors. Dr. Crawford testified the arresting officers told her the mother's shirt was pulled above the mother's head, and Ettel allegedly told the officers he tried to sexually assault the mother before he killed the mother. No incident report was available for Dr. Crawford to substantiate the officers' testimony.

377 S.C. at 560 n.2, 660 S.E.2d at 287 n.2; R. 33, ll. 4-7. Additionally, with respect to the relevance of the murder conviction in Ettel, the Court noted "the crime's **level of violence**" and cited the expert's testimony that "[w]hether or not [the murder] was a sexual crime... it goes to [Ettel's] propensity to commit further **violent crimes**." Id. at 563, 660 S.E.2d at 288 (emphasis added). Further, the doctor noted that the possible sexual motivation behind the crime "would aid in her diagnosis." Id.

In the present case, there was no testimony that the disputed charges and offenses had any sexual motivation or that they were violent in nature. The state's expert, Dr. Susan Knight, testified that the prior charges and convictions were considered in the evaluation because "[i]t gives me an idea of any other criminal behavior they may have been involved in, the nature of that behavior. It can also go to diagnosis, things like that." R. 35, ll. 2-9. She later cited the charges as part of the basis of her antisocial personality disorder diagnosis of Miller. R. 36, ll. 6-17; R. 88, l. 13 – 89, l. 4; R. 138, l. 5 – 139, l. 5. The non-sexual offenses were also taken into account in the Static-99 assessment, the score from which corresponds to a risk level for reoffending, and which was administered by both experts.[2] R. 47, ll. 8-13; R. 160, ll. 11-17. On cross-examination, Dr. Knight admitted that she did not review any records regarding the failure to register offenses. Thus, she was unaware of any underlying facts related to the infractions.[3] R. 134, l. 16 – 135, l. 9.

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2 The experts agreed that the risk to reoffend sexually based on the Static-99 test was 12% over the next 5 years and 18% over the next ten years. R. 45, l. 6 – 47, l. 13; R. 156, l. 17 – 162, l. 18; R. 176, l. 8 – 177, l. 16. Obviously troubled by the low statistic, Assistant Attorney General Bogel posed a question to the defense expert, Dr. Kimberly Harrison, regarding whether she would get on her plane to fly back home if she found out it had a twelve percent chance of crashing. R. 177, ll. 9-16. The implication was that *any* risk to reoffend is too high. However, the SVP Act requires a finding that the person is "*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.

3 The only of the disputed prior charges and convictions that were potentially relevant to the jury's analysis were the three convictions for failure to register as a sex offender. However, even their admission was likely improper under Rule 403, SCRE, in light of the expert's lack of knowledge regarding anything more than their existence. Both S.C. CODE ANN. § 23-3-470 and N.C. GEN. STAT. ANN. § 14-208.11 provide a myriad of possible conduct that could serve as the basis for a failure to register charge. Thus, it cannot be assumed that such a conviction is the result of some nefarious purpose by the accused. While Respondent cited the failure of the assistant attorney general or expert to "dwell" on the offenses, the lack of any testimony regarding the underlying facts left the jury to speculate the worst.

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Assuming *arguendo* that the prior non-sexual offenses were relevant to the anti-social personality disorder diagnosis, they should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice. "Even if admissible under Rule 703[, SCRE] or Rule 705, [SCRE,] . . . the determination of whether an expert may testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE." State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999); see also United States v. Gillis, 773 F.2d 549, 554 (4th Cir. 1985) ("In determining whether to allow an expert to testify to the facts underlying an opinion, the court must inquire whether, under Fed.R.Evid. 403, the testimony should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice."). Rule 403, SCRE, provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...."

"Probative" means "[t]ending to prove or disprove." State v. Gray, 408 S.C. 601, 6090, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative 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. "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. "The more essential the evidence, the greater its probative value." Id. (quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007)). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." Id. The probative value of the evidence must be balanced against "the danger of unfair prejudice." Rule 403, SCRE. "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 decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998).

The Rule 403, SCRE, analysis in State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002), and In re Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), seem to have led the trial court, and respectfully this Court, to an improper analysis of probative value versus unfair prejudice in SVP cases. In Gaster, our Supreme Court affirmed the SVP court's admission of a 1998 motion filed by Gaster titled "Motion for Ruling on the Legal Age of Sexual Consent in South Carolina."[4] 349 S.C. at 556, 564 S.E.2d at 93. The Gaster Court ruled that the motion was relevant because Dr. Watts used the motion in evaluating appellant's need for and probability of success in treatment, which were facts relevant to determining appellant's need for commitment. Id. at 557, 564 S.E.2d at 93. With respect to the Rule 403 analysis, the Court ruled:

> [T]he possibility of unfair prejudice did not substantially outweigh the probative value of the motion. As for its probative value, Dr. Watts felt the motion was significant in her evaluation because it indicated appellant's need for and probability of success in treatment. Regarding possible prejudice to appellant, the motion was not the only source Dr. Watts used to evaluate appellant. Dr. Watts used many sources besides the motion to find that appellant suffered from the sexual disorders of sadism and paraphilia. Because the motion was relevant and its probative value outweighed any prejudicial effect on appellant, the trial court properly admitted the motion within its discretion.

Id. at 557, 564 S.E.2d at 94 (internal citations omitted).

In Ettel, the Court of Appeals panel conducted a similarly misguided Rule 403 analysis regarding the prior murder conviction. 377 S.C. at 563, 660 S.E.3d at 288. Regarding probative value, the Court found that "Dr. Crawford used the information to develop her 'opinion in terms of [Ettel] not being able to control his behavior' and to diagnose Ettel with paraphilia." Id. In

[4] Gaster testified he filed the motion in an attempt to have the proper age of consent in South Carolina clarified, and not because he was intending to pursue minors. State v. Gaster, 349 S.C. 545, 556, 564 S.E.2d 87, 93. In the motion, Gaster stated he did "not want to be arrested or harassed by the police if a woman 14 years of age or older chooses him as a sexual partner." Id. at 557, 564 S.E.2d at 93. Gaster testified he made that statement in an effort to show he had standing to bring the suit. Id.

discussing prejudiced, the Court again focused on the impact to the doctor's analysis rather than the impact upon the jury. The Court noted that the prior charges and conviction were "not the only sources of Dr. Crawford's diagnosis" and that Dr. Crawford testified that her diagnosis would have stayed the same even without consideration of the disputed evidence. Id.

In both cases the analysis is contradictory, as it finds that the objected to evidence was "significant" to the evaluation for the purposes of determining probative value but notes the use of many other sources of information underlying the diagnoses for the purpose of determining prejudice. In so far as other factors were considered in addition to the objectionable information, such would appear to weigh against admission because its reference was less necessary to explain the related diagnosis. Moreover, the Courts evaluated prejudice from the wrong perspective, failing to look at whether the admission of the evidence tended to suggest to the jury that it render its decision on an improper basis. In this case, reference to Miller's non-sexual offenses presented a substantial danger that the jury would find in favor of commitment based upon a general criminal propensity rather than because it found that the state proved beyond a reasonable doubt that Miller was *likely* to engage in acts of *sexual violence* if he was not confined.

To be clear, Appellant is not suggesting that the non-sexual charges and convictions could not be considered by the evaluators. Rather, he is arguing that the evaluators should not have discussed them during their testimony in front of the jury. Automatic admission of such testimony promotes a serious danger that the State will seek to bolster feeble evidence of a person's risk to reoffend sexually by introducing evidence of the person's prior, non-sexual conduct, as it did in the present case. Our Supreme Court has emphasized that "[a] civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence,

is an extraordinary remedy." In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015). Thus, the Court wrote: "Although this Court has repeatedly held the Act constitutional, we decline to construe it in a manner which would lessen the State's burden of proof. The General Assembly has carefully written our SVP Act to lay out exactly what is required to establish that someone is a sexually violent predator; the State must prove, beyond a reasonable doubt that the individual is *presently* a sexually violent predator." Id. (additional emphasis added)).

Respectfully, this Court erred in failing to reverse the trial court's application of our case law as automatically permitting admission of a person's entire criminal record, including charges and convictions of both a sexual and non-sexual nature, merely if considered by an expert witness. The trial court was required instead to make a twofold inquiry. First, were the charges and convictions relevant to the determination of whether Miller was a sexually violent predator? Second, was the probative value of the offenses outweighed by the danger of unfair prejudice? See Ettel, 377 S.C. at 563, 660 S.E.2d at 288; Rule 401, SCRE; Rule 403, SCRE. In this case, the SVP trial judge misconstrued the consideration of the information by the expert as the only relevant question and improperly admitted the evidence of the non-sexual charges and convictions. Miller is accordingly entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Calvin Joe Miller respectfully requests that the Opinion of the Court of Appeals be withdrawn and that this Court reverse his commitment.

Respectfully Submitted,

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of April, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable R. Lawton McIntosh, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF CALVIN JOE MILLER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a 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 Calvin Joe Miller, at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 13th day of April, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 13th day of April, 2017.

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

The South Carolina Court of Appeals

In the Matter of the Care and Treatment of Calvin Joe Miller, Appellant.

Appellate Case No. 2014-001735

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

cc:

Alan McCrory Wilson, Esquire
Deborah R.J. Shupe, Esquire
Laura Ruth Baer, Esquire

FILED

May 19, 2017