

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Diane S. Goodstein, Circuit Court Judge
Appellate Case No. 2016-002005

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

Appellant,

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The circuit court did not rule on the State's objection to Appellant's cross-examination of the State's expert witness about her compensation in the state of Florida, and the issue is not preserved for appellate review.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In 2004, Appellant Frank Saunders was convicted of two counts of criminal sexual conduct with a minor in the first degree, and three counts of lewd act on a child. Prior to his release from prison, the State commenced a civil proceeding pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking his commitment for long term control, care and treatment as a sexually violent predator.

After the circuit court found probable cause to believe Appellant is a sexually violent predator and ordered an evaluation, the court appointed evaluator diagnosed Appellant with a sexual disorder, and determined he met the statutory criteria for commitment as a sexually violent predator. The case was called for a jury trial on September 19, 2016, before the Honorable Diane S. Goodstein, Circuit Court Judge.

The court appointed evaluator, Amy C. Swan, Psy.D., was qualified as an expert in forensic psychology. She testified her evaluation of Appellant included reviewing documents related to his offenses, such as victim statements, incident reports, arrest warrants, court documents, his prison records, and an interview with Appellant. (Trial Transcript [TT], pp. 180-181; R., pp. _____).

Dr. Swan testified Appellant's sex offenses spanned three decades (1974-2004), and involved multiple prepubescent children. She also stated Appellant told her he had masturbated to sexual fantasies regarding children a few months before she interviewed him in February 2016, so his pattern of sexual deviance toward prepubescent children exceeded forty years. (TT, pp. 181-194, 205-212; R., pp. _____).

Based on Appellant's history of sexual deviance toward children, his acting on his sexual deviance by molesting multiple prepubescent children, the results of actuarial and physiological

tests, his lack of sex offender treatment, and her interview with Appellant, Dr. Swan diagnosed Appellant with pedophilic disorder, attracted to both male and female prepubescent children. She testified to a reasonable degree of psychological certainty Appellant's mental disorder predisposes him to offend against children, and makes him likely to commit acts of sexual violence against children if not confined for treatment. (TT, pp. 206-233; R., pp. _____).

Appellant cross-examined Dr. Swan extensively regarding her evaluation methodology and the validity of the protocol she used. He also questioned her about the amount of compensation she receives to conduct sexual predator evaluations in South Carolina, how many times she has concluded the person being evaluated did not meet the criteria for civil commitment, and how much of her practice is devoted to sexual predator evaluations. (TT, pp. 243-309; R., pp. _____).

Appellant then asked Dr. Swan about the contents of a 2013 Fort Lauderdale newspaper article stating she received \$2.2 million from the state of Florida between 2000-2013 for conducting sexual predator evaluations. Dr. Swan verified the amount, and testified it averaged approximately \$145,000 a year, which was an average salary for a psychologist. When Appellant attempted to make a connection between Dr. Swan's South Carolina and Florida compensation, the State objected on relevancy grounds. After an off the record bench conference, Appellant returned to questioning Dr. Swan about her evaluation of Appellant. (TT, pp. 309-310; R., pp. _____).

The jury found beyond a reasonable doubt Appellant is a sexually violent predator, and the circuit court committed him to the South Carolina Department of Mental Health for long term control, care and treatment. (TT, pp. 383-384, Order of Commitment filed September 20, 2016; R., pp. _____). This appeal followed.

ARGUMENT

The circuit court did not rule on the State's objection to Appellant's cross-examination of the State's expert witness about her compensation in the state of Florida, and the issue is not preserved for appellate review.

Appellant contends the circuit court erred in sustaining the State's objection to his continuing cross-examination of Dr. Swan regarding compensation she earned from appearing as an expert witness in Florida. There is nothing in the record indicating the circuit court ever ruled on the State's objection, and the issue is not preserved for appellate review. Even if preserved, Appellant's argument has no merit.

A. Preservation

The transcript of record is the source of our information as to what occurred in the trial of the case below; its very object is to inform the Court authoritatively of the legal questions contested below and of the facts pertaining thereto. Where the exceptions charge that improper argument was made to the jury by counsel, such could not be considered on appeal where the record does not support the charge made. A question in respect to a point based on alleged facts not shown in the transcript of record cannot be considered.

S.C. State Highway Dep't v. Meredith, 241 S.C. 306, 128 S.E.2d 179, 181–82 (1962) (internal citations omitted). If the trial court does not rule on an issue, the issue is not preserved for appellate review. Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc. v. Alexander, 420 S.C. 251, 802 S.E.2d 632, 637 (Ct. App. 2017) (issues not preserved for appellate review because the trial court did not rule on them); *see also* State v. Stanko, 402 S.C. 252, 741 S.E.2d 708, 717 (2013) (preservation requires the losing party to both present the issues and obtain a ruling before the appellate court can address those issues); Shealy v. Aiken Cty., 341 S.C. 448, 460, 535 S.E.2d 438, 444–45 (2000) (same); Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122, 124 (1991) (same).

After the State objected to Appellant's additional questioning regarding Dr. Swan's Florida compensation, there was an off the record bench conference. The circuit court made no

ruling on the record, and Appellant never put anything on the record about what was discussed during the bench conference. Without any record regarding the bench conference discussion, Appellant simply makes the unsupported assertion the circuit court granted the State's objection, but it is equally possible Appellant acknowledged he had already presented evidence regarding Dr. Swan's compensation for sexual predator evaluations in South Carolina, and voluntarily decided not to pursue the Florida issue any further.

The speculation required in this case to draw any conclusion from an undocumented bench conference amply demonstrates the principles underlying issue preservation requirements. In the absence of a specific ruling by the circuit court, the issue Appellant raises in this appeal is not preserved for review by this Court.

B. Abuse of Discretion

Even if the issue was preserved for appellate review, and assuming for argument only that the circuit court sustained the State's objection, the court appropriately exercised discretion. Appellant argues Dr. Swan's testimony was relevant to demonstrate bias and a financial incentive to reach a conclusion for the State in sexual predator evaluations.

"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, SCRE. "The trial court shall exercise control over the mode and order of interrogation" and "[a] witness may be cross-examined on any matter relevant to any issue in the case." Rule 611, SCRE. The trial judge retains discretion to impose reasonable limits on the scope of cross-examination. State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315, 317 (2002).

During *voir dire* of Dr. Swan's expert qualifications, Appellant questioned her about the extent of her work for government entities in sexual predator cases, and pointedly asked her how

many times she had testified on behalf of alleged predators. (TT, pp. 166-171; R., pp. ____). After her direct testimony, Appellant extensively cross-examined Dr. Swan regarding the compensation she received for doing sexual predator evaluations in South Carolina, asked her about specific cases in which she had opined the individuals met the criteria for civil commitment, and brought out the fact Dr. Swan had received \$2.2 million over a decade for performing sexual predator evaluations in Florida. (TT, pp. 300-310; R., pp. ____). Thus, Appellant was able to present ample evidence regarding Dr. Swan's compensation, and at most, the circuit court appropriately prevented unnecessary and repetitive questioning.

Further, if the circuit court sustained the State's objection, Appellant was not prejudiced. Appellant argued in closing that Dr. Swan had a financial motivation to recommend commitment given the amount of money she received from Florida and South Carolina to perform the evaluations. (TT, pp. 359-362; R., pp. ____). Therefore, he was able to raise the potential of bias and financial motivation based on the testimony he elicited prior to the State's objection.

CONCLUSION

Based on the foregoing, Respondent submits the jury's verdict and Appellant's commitment for long term, control, care and treatment should be affirmed.

Respectfully submitted,

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for DEBORAH R.J. SHUPE

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August 31, 2017

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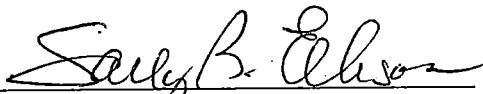
PROOF OF SERVICE

I, Sally Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

David Alexander
Assistant Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.

This 31st day of August, 2017.



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September 7, 2017

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V. Claire Allen
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RE: In the Matter of the Care and Treatment of Frank Saunders
Appellate Case No. 2016-002005

Dear Ms. Allen:

In response to your deficiency letter dated September 6, 2017, enclosed are an original and one copy of a corrected Initial Brief Respondent and Designation of Matter. By copy of this letter, I am providing counsel for the Appellant with corrected copies of Respondent's Brief.

Sincerely,

for Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

Enclosures

cc: David Alexander, Esquire (w/enclosures)
Victim Services