

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Ralph F. Cothran, Circuit Court Judge
Appellate Case No. 2016-000606

IN THE MATTER OF THE CARE AND TREATMENT
OF MICHAEL KAMINSKI,

APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly allowed the State's expert witness to testify about a DSS investigation because the expert witness considered the facts of the investigation in reaching her conclusions regarding Appellant's diagnosis and risk to reoffend, and the circuit court's restriction of the testimony lessened any prejudice to Appellant. (Appellant's Issues I and II).¹

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In 2009, Appellant Michael Kaminski pled guilty but mentally ill to two counts of lewd act on a child, arising from the molestation of an eight year old male.¹ Prior to Appellant's 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. (Petition Pursuant to the Sexually Violent Predator Act [SVPA Petition], with Exhibits, filed 12/8/2014; Supp. Record on Appeal [R.], pp.1- 99).

The court appointed evaluator concluded Appellant had two mental abnormalities and an impulse control disorder, and determined he met the statutory criteria for commitment as a sexually violent predator. The case was called for a jury trial on February 29, 2016, before the Honorable Ralph F. Cothran, Circuit Court Judge.

Dr. Amy C. Swan, Psy.D., the court appointed evaluator, was qualified as an expert in psychology. She testified her evaluation of Appellant included reviewing police reports, arrest warrants, court documents, indictments, information from the Department of Corrections (SCDC), information from the South Carolina Law Enforcement Division (SLED), victim's statements, information from the Department of Social Services (DSS), and conducting a four hour and fifteen minute interview with Appellant. She further testified reviewing all the documentation and interviewing the person were necessary to determine if there was a pattern of behavior indicating a mental abnormality and/or personality disorder. (Trial Transcript [TT], pp.101-103; R., pp. 69-71).

Dr. Swan considered the facts of Appellant's lewd act convictions, as well as his other convictions and other allegations against him, to determine if there was a pattern of behavior on

¹Appellant also had previous convictions for second degree arson, which were in part sexually motivated.

which to base a diagnosis. Based on her review of the documentation and the interview with Appellant, Dr. Swan diagnosed him with pedophilic disorder, sexually attracted to male and females, non-exclusive type, which is a sexual attraction to prepubescent children and young adolescents, and it will not change over the course of a person's lifetime. (TT, p. 99-117, 133-149; R., pp. 67-85, 101-117).

Dr. Swan also diagnosed Appellant with other specified paraphilic disorder, non-consent, which is a sexual arousal to non-consensual or coercive sex, and pyrophilia², which is a sexual arousal to fire, and pyromania, which is an urge to set fire without a sexual motivation. Dr. Swan testified "having multiple pedophilia or multiple sexual disorders" makes Appellant more likely to reoffend. (TT, p. 149-150; R., pp. 117-118).

Dr. Swan identified multiple dynamic risk factors for sexual reoffending Appellant could change through treatment, including sexual preoccupation, lifestyle impulsivity, and poor problem solving. As part of her evaluation protocol, Dr. Swan also scored an actuarial based risk assessment tool, the Static-99R, which is based on static factors, such as the number of convictions, which Appellant cannot change. Appellant scored a six on the Static-99R, which is in the moderate-high risk to reoffend range. Dr. Swan testified the Static-99R generally underestimates risk because it is based on individuals who are either arrested or convicted within five or ten years, and less than ten percent of sex crimes result in arrest and/or conviction. (TT, 150-157; R., pp. 118-125).

In determining whether Appellant had a pattern of deviant sexual impulses, Dr. Swan indicated it is standard practice for professionals in her field to look at situations where a social services agency opens an investigation, even if it did not result in an arrest or conviction for a

² The transcript refers to "pyromaniaaraphilia," but Dr. Swan's diagnosis was pyrophilia.

sexual crime. She testified DSS investigated Appellant in connection with an alleged incident involving a four year old boy, but did not testify about the specific allegations investigated. She stated the alleged incident occurred a few months prior to the lewd acts for which Appellant was convicted, but Appellant was never charged in connection with the incident. During her interview of Appellant, he denied the allegations, and stated the boy's female babysitter committed the alleged acts. Due to the nature and timeframe of the events, Dr. Swan used the DSS information in conjunction with other factors to determine whether Appellant demonstrated a pattern of interest in prepubescent children. (TT, pp. 133-136; R., pp. 101-104).

Dr. Swan testified Appellant received no sex offender treatment while incarcerated, but he told her during the interview he had tried to be placed in the sexually violent predator treatment program during his incarceration, which SCDC could not do. In spite of his stated attempt to participate in a sex offender treatment program, Appellant told Dr. Swan his risk of reoffending was "zero." (TT, pp. 158-163; R., pp. 126-131).

Dr. Swan testified to a reasonable degree of psychological certainty Appellant has a pedophilic disorder, and other specified paraphilia involving non-consent encounters and fire motivation. She stated the presence of both disorders increases his risk to reoffend sexually if not confined for long term control, care and treatment, and out-patient treatment "would absolutely not be sufficient for him." (TT, pp. 164-167; R., pp. 132-135).

The jury found beyond a reasonable doubt Appellant is a sexually violent predator, and the circuit court committed him to the custody of the Department of Mental Health for long term control, care and treatment. (TT, p. 299, Amended Order of Commitment filed March 9, 2016; R., pp. 267, 273). This appeal followed.

ARGUMENT

The circuit court properly allowed the State's expert witness to testify about a DSS investigation because the expert witness considered the facts of the investigation in reaching her conclusions regarding Appellant's diagnosis and risk to reoffend, and the circuit court's restriction of the testimony lessened any prejudice to Appellant. (Appellant's Issues I and II).

Appellant contends the circuit court erred in allowing Dr. Swan to testify about the substance of a DSS investigation involving Appellant, arguing the testimony was inadmissible hearsay. He further contends the circuit court erred in finding the testimony at issue was not unduly prejudicial. To the contrary, the circuit court carefully considered the expert's proffered testimony, including her testimony regarding how she used the DSS information in forming her opinion, and then restricted the substance of the testimony to statements Appellant made about the information, which limited the prejudice to Appellant.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Brewer, 411 S.C. 401, 768 S.E.2d 656, 658 (2015). The trial judge has broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146, 148 (1991) (*citing* State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 [1983]).

Qualified experts are allowed to give an opinion based on their "knowledge, skill, experience, training, or education." Rule 702, SCRE. In reaching their opinions, an expert may use facts or data reasonably relied upon by experts in the particular field, regardless of whether those facts or data would be admissible. Rule 703, SCRE.

A. Hearsay

Hearsay is an out of court statement offered to prove the matter asserted, but admissions by a party opponent are not hearsay. Rule 801(c), SCRE; Rule 801(d)(2), SCRE. Statements

made for the purpose of medical diagnosis or treatment are exceptions to the rule prohibiting hearsay. Rule 803(4), SCRE.

1. Admissions

Before ruling on the admissibility of Dr. Swan's testimony regarding the DSS investigation, the circuit court heard an extensive proffer of the testimony, and discussed in detail the purpose and scope of her testimony. The court found the content of the DSS documents regarding the substance of the allegations was hearsay, but statements Appellant made to Dr. Swan about the investigation were admissible. The court also restricted what Dr. Swan could say about the DSS investigation to statements Appellant made to her about it during the interview. (TT, pp. 61-132; R., pp. 29-100).

Dr. Swan then testified before the jury that experts in her field review and rely on social services agency investigations as part of an evaluation to determine if the person being evaluated has a mental abnormality or personality disorder, in part because less than ten percent of sexual crimes result in convictions. She stated she reviewed documents from a DSS investigation involving Appellant and a four year old boy, but in accordance with the court's restriction, she did not relate any of the specific allegations. She testified Appellant denied the allegations when she asked him during the interview, and blamed the child's babysitter for "touching" the boy sexually. She further testified Appellant was never charged in connection with the investigation.

Appellant's statements to Dr. Swan about the investigation were not hearsay under Rule 801(d)(2), SCRE. To the extent he acknowledged the investigation existed, the statements were admissions, and his other statements were a self-serving denial and an accusation against a third party. Accordingly, the circuit court properly determined his statements were admissible.

2. Medical Diagnosis

Assuming for argument only that all information regarding the DSS investigation, including Appellant's statements to Dr. Swan, was hearsay, the information was admissible as statements for purposes of medical diagnosis or treatment. Rule 803(4) provides statements made for purpose of medical diagnosis or treatment are not excluded by the hearsay rule.

In cases under the SVPA, the State must prove the existence of a mental abnormality or personality disorder, and a causal link between the individual's mental abnormality/personality disorder and his risk to reoffend sexually. S.C. Code Ann. § 44-48-30(1)(a)&(b)(Supp. 2016). To prove a causal link, experts are allowed access to all relevant medical, psychological, criminal offense, and disciplinary records and reports. In the Matter the Care and Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008) (*citing* S.C. Code Ann. § 44-48-90 [Supp. 2007]).

Contrary to Appellant's contention, the DSS investigation was directly relevant to Dr. Swan's diagnosis of pedophilia, as well as her assessment of Appellant's risk to reoffend. As Dr. Swan testified, mental health professionals consider unconvicted, and even uncharged, sexual offenses when assessing a risk to reoffend, because they may help identify a pattern of deviant behavior.

Rather than merely showing a risk to reoffend in general, the testimony at issue indicates a pattern of deviant behavior against prepubescent children. Dr. Swan testified about the significance of the DSS investigation to her diagnosis of Appellant and her assessment of his risk to reoffend sexually. The jury knew Appellant denied any improper conduct and he was never charged with a crime associated with the DSS investigation. Consequently, the jury was free to give the testimony significant weight, some weight, or no weight, in reaching a verdict.

B. Prejudice

Appellant contends the circuit court erred in admitting Dr. Swan's testimony about the DSS investigation because it lacked probative value and was unduly prejudicial. As discussed above, the DSS information was probative on the issue of Dr. Swan's diagnosis and risk assessment, and the circuit court limited the prejudicial impact of the testimony by restricting it to information Appellant provided during the interview with Dr. Swan.

Relevant evidence is evidence with a tendency to make the existence of any material fact more or less probable than it would be without the evidence. Rule 401, SCRE. All relevant evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice." Rule 402, SCRE; Rule 403, SCRE.

"Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Stephens, 398 S.C. 314, 728 S.E.2d 68, 71-72 (Ct. App. 2012) (*quoting State v. Lyles*, 379 S.C. 328, 665 S.E.2d 201, 206 [Ct.App.2008]). "All evidence is meant to be prejudicial; it is only **unfair** prejudice which must be [scrutinized under Rule 403]." State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424, 429 (Ct.App.1998) (emphasis added) (*quoting United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 [1st Cir.1989]). In determining whether the danger of unfair prejudice outweighs the probative value of evidence, the court must consider the entire record, and the determination will turn on the facts of each case. Lyles, 665 S.E.2d at 206 (*citing State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872, 876 [2007]).

Dr. Swan testified she primarily relied on the facts of Appellant's lewd act convictions, but the DSS information was relevant to her ultimate conclusions because it further indicated a pattern of deviant behavior, which was significant for purposes of diagnosis and risk assessment. *See Ettl*, 660 S.E.2d at 288 (prior uncharged sexual offenses were relevant because evaluator

relied on them in evaluating Ettel's need for and likelihood of success in treatment as well as his ability to control his behavior in the future) (*citing State v. Gaster*, 349 S.C. 545, 564 S.E.2d 87, 93 (2002) (admission of motion regarding the age of consent did not violate defendant's due process rights in SVPA action because it was relevant in evaluating defendant's need for and probability of success in treatment and was not unfairly prejudicial as it was one of several sources on which the expert based her opinion)).

Before ruling on the admissibility of the testimony, the circuit court heard Dr. Swan's proffered testimony in great length, and used sound discretion in limiting the testimony to avoid undue prejudice. As instructed by the circuit court, Dr. Swan did **not** testify about the substance of the allegations, and only related Appellant's statements about the investigation during the interview.

The circuit court did not abuse its discretion in finding the testimony at issue was admissible, and clearly exercised discretion in limiting the scope of the testimony. Therefore, the circuit court's ruling should be affirmed.

CONCLUSION

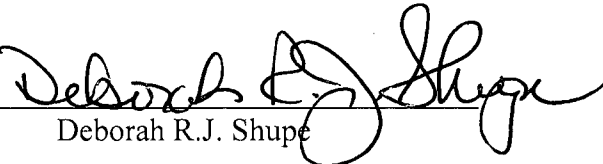
Based on the foregoing reasons, the State respectfully submits the judgment of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY:


Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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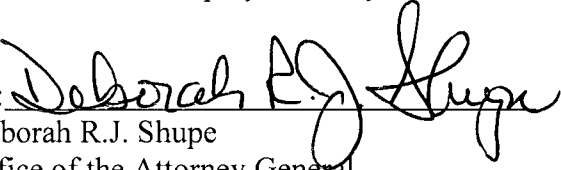
APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

BY: 
Deborah R.J. Shupe
Office of the Attorney General
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(803) 734-3727

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