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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable James R. Barber, Circuit Court Judge

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SC Court of Appeals

IN THE MATTER OF THE CARE AND TREATMENT OF WAKE HUNT,

APPELLANT

APPELLATE CASE NO 2017-000585

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, whether the trial court erred in allowing the State's expert to discuss four uncharged allegations of abuse where such evidence was irrelevant, unfairly prejudicial, and lacked probative value?

STATEMENT OF THE CASE

After appellant Wake Hunt served his criminal sentence, the Attorney General initiated this civil commitment proceeding pursuant to South Carolina's Sexually Violent Predator Act and a trial was held on February 21, 2017. R. 1. The Honorable James Barber presided over the jury trial in Orangeburg County. R. 1. Christopher Andrew Morrow represented the State. R. 1. James Kristian Falk represented appellant. R. 1. The jury found appellant was a sexually violent predator. R. 245, ll. 11 – 14. Judge Barber ordered appellant committed. R. 247, ll. 11 – 14. This appeal follows.

ARGUMENT

In this sexually violent predator case, the trial court erred in allowing the State's expert to discuss four uncharged allegations of abuse where such evidence was irrelevant, unfairly prejudicial, and lacked probative value.

Dr. Amy Swan from Florida was the State's first and only witness. R. 61, l. 15 – 67, l. 11. Courts had qualified Dr. Swan as an expert witness in forensic psychology "[o]ver a thousand times." R. 65, ll. 20 – 23. She had been qualified as an expert in SVP cases "approximately two hundred and fifty times." R. 65, l. 24 – 66, l. 1. She could not recall ever not recommending commitment of an alleged SVP in South Carolina. R. 119, ll. 3 – 7. Defense counsel rattled off more than twelve names of alleged SVP cases where Dr. Swan recommended commitment and she agreed. R. 117, l. 5 – 119, l. 7.

Dr. Swan testified on direct examination that she was appointed by the court and paid by the Department of Mental Health. R. 72, ll. 12 – 18. When asked by the Attorney General whether she was paid differently if she did not recommend appellant's commitment, she told the jury, "I receive the same rate no matter what my decision with regard to the individual is." R. 72, ll. 19 – 22.

On cross-examination, Dr. Swan said she received $4,000.00 and made sure to tell the jury that amount included her travel from Florida and her hotel rooms. R. 142, ll. 14 – 18. Defense counsel began to confront Dr. Swan with a newspaper article from Florida and she interrupted, immediately recognizing the article. R. 142, l. 22 – 143, l. 12. She explained that over a fifteen-year period, she earned $2.2 million dollars performing SVP evaluations, which only equaled $145,000.00 a year. R. 143, ll. 1 – 12.

Defense counsel impeached Dr. Swan with her deliberate omission in her initial report of test results that contradicted her diagnosis of pedophilia. R. 129, l. 8 – 135, l. 8. Dr. Swan diagnosed petitioner with pedophilia and had a penile plethysmograph ("PPG") test administered by another psychologist. R. 94, l. 6 – 96, l. 11. The PPG only showed arousal to adult females in coercive situations and did not show arousal to children. R. 94, l. 6 – 96, l. 11. Dr. Swan claimed she thought the results were "a mistake" and "an outlier" and did not include them in her initial report. R. 94, l. 6 – 96, l. 11. She said including the contradictory results would not "be fair" to appellant because they "might have labeled him as a rapist." R. 94, l. 6 – 96, l. 11.

On cross-examination, she admitted the PPG directly contradicted her diagnosis. R. 130, ll. 17 – 19. Dr. Swan only included the PPG results in a second report at the direction of the Attorney General. R. 132, ll. 6 – 10. She could not remember when she had the conversation with the Attorney General telling her to write a second report including the PPG results. R. 132, l. 6 – 133, l. 19. In cross-examination, Dr. Swan again repeated that she was appointed by the Court. R. 130, ll. 11 – 16. She was not hired by the Attorney General to perform a second evaluation after the court-appointed evaluator did not recommend commitment. See S.C. Code Ann. § 44-48-90(C).

During her direct-examination, the Attorney General had Dr. Swan explain the treatment inside the SVP secure facility. R. 107, l. 1 – 109, l. 7. She was familiar with the private company that began managing SVPs in 2016, Correct Care Solutions, because "[t]hey're the same people that run the Florida program." R. 107, ll. 5 – 12. She said inmates at the SVP facility receive group treatment "approximately three times a week." R. 108, ll. 20 – 25. She offered on cross-examination that it would take SVP inmates an average of six years to complete treatment. R. 126, ll. 14 – 21.

The Attorney General had Dr. Swan give "a brief overview of the time line of Mr. Hunt's offense history." R. 76, l. 23 – 77, l. 11. She first explained appellant's arrests, convictions, and sentences. R. 76, l. 23 – 77, l. 11. Without any prompting by the Attorney General, she then said, "During the course of the evaluation, it was noted that there were potentially four male victims. He was not prosecuted for those victims." R. 77, ll. 9 – 11. Appellant immediately objected on relevancy grounds. R. 77, l. 12. The trial judge excused the jury and heard argument. R. 77, ll. 12 – 20.

The Attorney General cited In the Matter of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008) for the proposition that uncharged offenses are relevant if the expert relies on them in rendering her opinion. R. 77, l. 22 – 78, l. 10. Appellant responded that the Attorney General overstated the holding of Ettel and that Ettel did not state that such allegations are automatically admissible. R. 78, ll. 11 – 23. Appellant also argued that under Ettel, the court was required to analyze whether the evidence's probative value outweighed the danger of unfair prejudice. R. 78, ll. 11 – 23. See Rule 403, SCRE. The Attorney General replied that appellant admitted to Dr. Swan during his interview "that these occasions did occur" and the trial judge overruled appellant's objection. R. 79, ll. 1 – 12.

Dr. Swan testified that during her interview with appellant, he initially denied molesting the four boys, but then ultimately admitted abusing three of them. R. 90, ll. 9 – 21. Dr. Swan further levied the devastating claim that appellant admitted that he was "one hundred percent exclusively aroused by children," including boys, and that he still fantasized about having sexual intercourse with children. R. 92, ll. 1 – 17. She claimed appellant "said he masturbated to fantasies of children three times a day." R. 92, ll. 13 – 15.

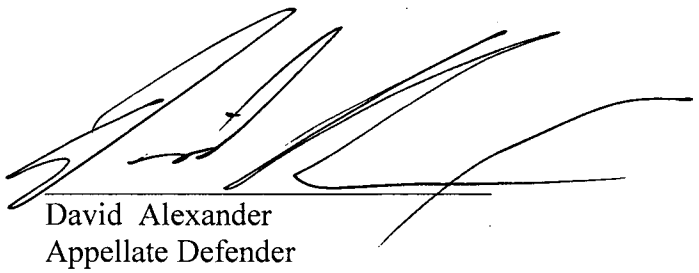
Appellant took the stand in his own defense. R. 199, ll. 8 – 14. He emphatically denied admitting to Dr. Swan that he still fantasized about his victims. R. 199, ll. 8 – 14. He emphatically denied that he thought about them in a sexual way and that he tried to think of them as a family member and realized he caused them pain. R. 199, ll. 8 – 15. Dr. Swan admitted that she reviewed appellant's prison records and appellant never received a single disciplinary infraction during his nineteen year incarceration. R. 123, l. 24 – 125, l. 17. A defense witness who taught the sex offender treatment program at the Allendale prison explained that masturbation is a disciplinary infraction. R. 171, l. 23 – 172, l. 1. Appellant, whose IQ is 76, said during his interview with Dr. Swan he "tried to tell her" that he did not understand some of her questions, but she "just kept writing stuff down." R. 194, ll. 17 – 22. R. 100, ll. 11 – 13.

The trial judge erred in allowing Dr. Swan to discuss uncharged offenses against males. As appellant argued, Ettel did not create an automatic rule of inclusion for uncharged offenses. Such a limitless exception would create a bypass around both our rules of relevance and the rules governing expert testimony. See Rules 401, 403, 404, 703. See also 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 it if is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge.").

The admission of this testimony that appellant had molested four boys in addition to the charged victims allowed Dr. Swan to call him "a prolific child molester" and claim that the treatment he received in prison was insufficient. R. 94, ll. 6 – 13. Given that Dr. Swan's credibility was successfully impeached by her intentional omission of PPG test results that contradicted her diagnosis, the trial court's error cannot be harmless. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and grant him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of January, 2018.

STATE OF SOUTH CAROLINA

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IN THE MATTER OF THE CARE AND TREATMENT OF WAKE HUNT,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Wake Hunt 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 James R. Barber, which was held on February 21 - 23, 2017, 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 Wake Hunt.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 11th day of January, 2018.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial Transcript;
(2) State's Exhibits No. 1 – 5;
(3) Defendant's Exhibit No. 1;
(4) Court's Exhibit No. 1

I certify that this designation contains no matter which is irrelevant to this appeal.

January 11, 2018

David Alexander
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ATTORNEY FOR APPELLANT

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."

January 11, 2018.

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