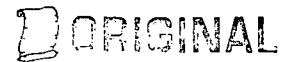


STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Kristi Lea Harrington, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF CRAIG ALLEN CARROLL,

APPELLANT

RECEIVED

JAN 29 2018

APPELLATE CASE NO 2017-000972

SC Court of Appeals

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's motion for a directed verdict, where in order to commit Appellant as a sexually violent predator ("SVP"), the State relied on the diagnosis of biastophilia, a disorder not listed in the Diagnostic and Statistical Manual for Mental Disorders?

STATEMENT OF THE CASE

On April 10 and 12, 2017, Craig Allen Carroll appeared before the Honorable Kristi Harrington and a jury for a trial under the South Carolina Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10, *et seq.* Carroll was represented by James K. Falk, and the State was represented by James G. Bogle, Jr. Tr. 2.

The jury heard testimony from the court-appointed evaluator, Dr. Marie Gehle; Carroll; and Carroll's mother, Lisa O'Connell. The State introduced a certified copy of an indictment against Carroll for criminal sexual conduct with a minor in the second degree. Tr. 106, l. 12 – Tr. 107, l. 7; R. __ (Indictment and Sentencing Sheet). According to the sentencing sheet, Carroll was convicted in Berkeley County on August 14, 2014. Id.

The jury concluded that Carroll was a sexually violent predator. Tr. 255, l. 22 – Tr. 256, l. 9. Judge Harrington ordered Carroll be committed to the Department of Mental Health for his long-term control, care, and treatment.

Carroll filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

Court-Appointed Expert Dr. Marie Gehle

Beginning in 2001, Dr. Gehle transitioned to a new job and “started doing solely pre commitment evaluations to determine whether somebody meets the criteria of a sexually violent predator.” Tr. 84, ll. 12 – 16. For Carroll’s trial, she was qualified as an expert witness “in the area of forensic psychology to give opinion testimony in that area.” Tr. 87, ll. 9 – 14. Dr. Gehle was “appointed by the Court to be the evaluator and to give an opinion as to whether Mr. Carroll meets the criteria of a sexually violent predator.” Tr. 87, ll. 19 – 24.

According to Dr. Gehle, in order for somebody to meet the definition of a sexually violent predator, “they have to be convicted of a qualifying sexually violent offense, they have to have a mental abnormality or personality disorder that makes them likely to commit acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.” Tr. 133, l. 17 – Tr. 134, l. 3.

Dr. Gehle interviewed Carroll for four and a half hours. Tr. 89, l. 21 – Tr. 90, l. 3. She diagnosed him with antisocial personality disorder. Tr. 93, ll. 4 – 6. According to Dr. Gehle, the diagnostic criteria for antisocial personality disorder include:

[A] pervasive pattern, and disregard for, and violation of the rights of others occurring since age 15 years as indicated by three or more of the following

[F]ailure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.

Number two is deceitfulness as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.

Number three is impulsivity or failure to plan ahead.

Number four is irritability and aggressiveness as indicated by repeated physical fights or assaults.

Number five is reckless disregard for safety of self or others.

Number six is consistent irresponsibility as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.

Number seven is lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated, or [stolen] from another.

So those are the seven criteria there.

Tr. 93, l. 21 – Tr. 94, l. 23.

Dr. Gehle listed a few additional requirements from the Diagnostic and Statistical Manual for Mental Disorders (DSM), including age. Tr. 94, l. 23 – Tr. 95, l. 9. She went through Carroll's criminal history and compared various incidents to the above criteria. When asked about his past conduct, Carroll admitted that he was "a pretty bad kid, that he had a lot of behavior problems." Tr. 104, l. 21 – Tr. 105, l. 16.

Dr. Gehle also diagnosed Carroll with "other specified paraphilic disorder biastophilia," an alleged mental abnormality. Tr. 115, l. 17 – Tr. 117, l. 8. Biastophilia was defined as "sexual arousal towards engaging in sexual acts with nonconsenting persons." Tr. 117, ll. 5 – 8. Dr. Gehle indicated that she could not diagnose Carroll with a pedophile disorder, because the majority of his behavior which she believed to have qualified for that diagnosis occurred before he turned sixteen years old. Tr. 117, l. 9 – Tr. 118, l. 6. Therefore, she relied on a disorder not listed in the DSM.

"Other specified paraphilic disorder, biastophilia" is not listed in the DSM. Tr. 119, ll. 5 – 17. Only "seven or eight" paraphilias are listed. Tr. 120, ll. 14 – 16. When asked how she could diagnose a disorder that was not in the book, she replied: "[T]here are hundreds of

paraphilias. Like I said, a paraphilia is really anything that is outside of what is considered normal sexual behavior. So it's anything that is deviant, deviating from normal." Tr. 119, ll. 18 – 24.

In order to measure Carroll's likelihood of re-offending, Dr. Gehle relied on the Static 99R, an "actuarial risk assessment." Tr. 122, ll. 17 – 22. According to Dr. Gehle, the scores range from negative three to twelve, but "the scores really top out at eight." Tr. 125, ll. 6 – 12. Carroll scored a seven. Tr. 125, ll. 13 – 15. Dr. Gehle claimed that Carroll, therefore, is considered "high risk." Tr. 125, ll. 16 – 23. She testified that twenty-seven percent of people with a score of seven re-offend within five years. *Id.*

Dr. Gehle concluded her direct examination by reiterating that she diagnosed Carroll with both a mental abnormality and a personality disorder. Tr. 128, ll. 6 – 25. As a result, she alleged, Carroll is predisposed "to commit acts of sexual violence if he's not confined to long-term control, care, and treatment." Tr. 129, ll. 1 – 13. Additionally, she claimed that "he's dangerous and likely to commit future sex offenses if he's not confined to long-term control, care, and treatment." Tr. 129, ll. 14 – 23. She also stated that the propensity which she established also poses a "menace" to the health and safety of others, and that Carroll has "significant difficulty" controlling his behavior. Tr. 129, l. 24 – Tr. 130, l. 11. As a result, she opined that Carroll meets the definition of a sexually violent predator. Tr. 131, l. 20 – Tr. 132, l. 1.

Craig Carroll

After the State rested, Carroll took the stand. He denied having sex with sleeping people; he explained to the jury, just as he explained to Dr. Gehle, that he woke his partners up to have

sex. Tr. 175, l. 20 – Tr. 176, l. 11. He completely denied being sexually aroused to having sex with people who are asleep:

I stated [to Dr. Gehle] that I had woken my partners up to sex, not that I had sex with them while they were asleep. That never happened.

I'm pretty sure that anybody would be offended by that kind of behavior. I don't think anybody would allow me to do that and not cause some type of a rift in our relationship. So that's not what happened. What happened is, I woke them up and we proceed to have consensual sexual intercourse.

Tr. 175, l. 20 – Tr. 176, l. 11.

Carroll's mother, Lisa O'Connell, indicated that Carroll would be able to live with her in the event that he was released. Tr. 192, ll. 7 – 20. Carroll would be able to work with his uncle, hanging drywall. Id. She would be able to help him with money and transportation to counseling. Tr. 193, ll. 3 – 19.

The trial court allowed Counsel to reserve "all motions and matters" after the State rested, so the directed verdict motion was made after Carroll's mother testified.. Tr. 171, ll. 17 – 20; Tr. 200 ll. 3 – 5. Counsel sought a directed verdict because the State failed to prove that Carroll suffered from a mental disease or defect, largely due in part to Dr. Gehle's reliance on a disorder that is not listed in the DSM. Tr. 200, ll. 6 – 15.

The trial court denied Counsel's motion. Tr. 201, l. 14 – Tr. 203, l. 16.

ARGUMENT

The trial court erred in denying Appellant's motion for a directed verdict, where in order to commit Appellant as a sexually violent predator ("SVP"), the State relied on the diagnosis of biastophilia, a disorder not listed in the Diagnostic and Statistical Manual for Mental Disorders.

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, 23, 774 S.E.2d 462, 466 (2015).

An expert's opinion must be reliable. Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); see also Rule 702, SCRE. Expert testimony is "also subject to attack for relevancy and prejudice." State v. Council, 335 S.C. 1, 19-20, 515 S.E.2d 508, 517-18 (1999). Trial judges must determine whether Rule 403, SCRE, bars admission of the expert's testimony. Id. at 20, 515 S.E.2d at 518; State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999) ("Even if admissible under Rule 703, [SCRE] or Rule 705, [SCRE,] however, the determination of whether an expert may testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE.").

On cross-examination, Counsel for Carroll asked Dr. Gehle to read from a portion of the DSM that indicated the criteria used by the book's editors for listing paraphilic disorders:

These disorders have traditionally been selected for specific listing and assignment of explicit diagnostic criteria in [the] DSM for two main reasons. They are relatively common in relation to other paraphilic disorders and some of them entail actions for their satisfaction that because of their noxiousness or potential harm to others are classed as criminal offenses."

Tr. 142, l. 8 – Tr. 144, l. 5.

Dr. Gehle agreed with the assessment that the DSM offered two main factors used to determine which paraphilic disorders were listed: commonality and the risk of harm to other people. Tr. 144, ll. 11 – 17. Following the eight paraphilic disorders that are outright listed, the DSM names two others: “[o]ther specified paraphilic disorder and unspecified paraphilic disorder.” Tr. 144, l. 18 – Tr. 145, l. 10.

Dr. Gehle agreed with the assertion that biastophilia was neither defined nor listed in the fifth edition of the DSM. Tr. 151, l. 16 – Tr. 152, l. 1. None of the categorical definitions or examples specifically discussed biastophilia. Tr. 153, l. 4 – Tr. 155, l. 20. Dr. Gehle admitted that she was unable to quantify her diagnosis of biastophilia. Tr. 156, l. 15 – Tr. 158, l. 16.

Rule 702, SCRE, provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” In State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), our Supreme Court held that “[w]hen admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” “Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord.” State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In State v. White, our Supreme Court made clear that “[t]he familiar tenet of evidence law that a continuing challenge to evidence goes to ‘weight, not admissibility’ has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability.” 382 S.C. at 273, 676 S.E.2d at 688. Thus, the Court ruled that both scientific and nonscientific expert

testimony must satisfy Rule 702, SCRE, both in terms of expert qualifications and reliability of the subject matter. Id. However, the Court recognized that “the foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach” and did not provide a “formulaic approach” to be followed in determining the reliability of non-scientific expert testimony. Id. at 274, 676 S.E.2d at 688-89.

In Jamison v. Morris, 385 S.C. 215, 219, 684 S.E.2d 168, 170-71 (2009), our Supreme Court reversed a civil verdict of negligence against one of the co-defendants, MiniMart, finding that the trial court erroneously admitted expert testimony predicated on unreliable evidence. Minimart was alleged to have sold alcohol to the underage driver of a vehicle that was in a single-car accident that rendered the passenger, Louis Jamison, a quadriplegic. 385 S.C. at 219, 684 S.E.2d at 170. The trial judge allowed the State’s expert to give testimony of the driver’s blood alcohol level at the time of the crash based upon a SLED test that was unreliable due to the absence of a chain of custody. Id. at 226-29, 684 S.E.2d at 173-75. The Jamison Court ruled that “an expert cannot testify to an opinion predicated on an unreliable test.” Id. at 228, 684 S.E.2d at 175.

Rule 703, SCRE, provides: “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” It certainly cannot be reasonable for an expert to rely upon erroneous and incomplete information in forming his opinions or inferences.

Dr. Gehle’s diagnosis is impossible to critique. Since there is no listed definition in the DSM, each evaluator in the SVP program intuitively arrives at a diagnosis based on a subjective

host of factors. Jurors in Carroll's case who were confronted with the diagnosis of biastophilia were forced to assess the accuracy, reliability, and validity of Dr. Gehle's subjective diagnosis with no agreed upon definition for other specified paraphilic disorder biastophilia. There was no way to evaluate Dr. Gehle's expert opinion against objectively accepted criteria sets approved by the American Psychiatric Association, the group which publishes the DSM.

Jurors lack training and expertise in psychology and have almost no basis to challenge the expert's interpretation. With no ability to review or assess the expert's opinion, all involved parties must simply assume that an expert witness is speaking the truth.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Williams, 303 S.C. 274, 400 S.E.2d 131 (1991); State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct.App.1997). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

Dr. Gehle's testimony entailed a diagnosis of a disorder not listed in the DSM. Carroll's resulting commitment, based on this unreliable testimony, should be reversed.

CONCLUSION

Based on the foregoing, this Court should reverse Appellant Craig Allen Carroll's
commitment.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of January, 2018.

STATE OF SOUTH CAROLINA

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Honorable Kristi Lea Harrington, Circuit Court Judge

IN THE MATTER OF THE CARE AND
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CERTIFICATE OF SERVICE

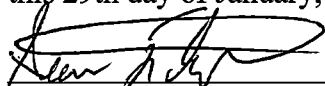
The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Craig Allen Carroll, #, at Correct Care, 1700 St. Andrews Terrace, Bdlg A, Columbia, SC 29210, this 29th day of January, 2018.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of January, 2018.



(L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.