

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

 ORIGINAL

IN THE MATTER OF THE CARE AND
TREATMENT OF JUSTIN L. STEWART,

APPELLANT

APPELLATE CASE NO 2017-001269

RECEIVED
FEB 15 2018
SC Court of Appeals

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....3

CONCLUSION.....6

PETITION TO BE RELIEVED AS COUNSEL.....7

TABLE OF AUTHORITIES

Cases

Addington v. Texas, 441 U.S. 418, 425 S.Ct. 1804, 60 L.Ed.2d 323 (1979) 5

Care & Treatment of Ettel v. State, 377 S.C. 558, 562 S.E.2d 285 (Ct. App. 2008)..... 4

Matter of Chapman, 419 S.C. 172, 179 S.E.2d 843 (2017)..... 5

State v. Dickerson, 341 S.C. 391, 400 S.E.2d 119 (2000)..... 4

State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014)..... 4

United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007)..... 4

Vitek v. Jones, 445 U.S. 480, 491 S.Ct. 1254, 63 L.Ed.2d 552 (1980) 5

White v. State, 375 S.C. 1, 9 S.E.2d 172 (Ct. App. 2007)..... 3

Other Authorities

Black's Law Dictionary 1323 (9th ed.2009) 4

Rules

Rule 403, SCRE..... 4

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing a psychologist from the Department of Mental Health to testify in front of the jury about a charge and details of a charge against Appellant alleging criminal sexual conduct with a minor first degree when Appellant was nine years of age when the charge was diverted and did not result in an adjudication?

STATEMENT OF THE CASE

On May 30, 2017, in York County Appellant Stewart was tried before the Honorable John C. Hayes, III, and a jury pursuant to the Sexually Violent Predator Act [SVP]. Anna Rawl Browder represented Appellant at trial. James G. Bogle represented the State. The jury found that Appellant was a sexually violent predator. On May 31, 2017, Judge Hayes signed the Order of Commitment. A timely notice of intent to appeal was filed on June 2, 2017. This appeal follows.

ARGUMENT

The trial judge erred in allowing a psychologist from the Department of Mental Health to testify in front of the jury about a charge and details of a charge against Appellant alleging criminal sexual conduct with a minor first degree when Appellant was nine years of age when the charge was diverted and did not result in an adjudication.

Prior to trial Appellant moved to exclude evidence of and details about a charge made against Appellant alleging criminal sexual conduct with a minor first degree when Appellant was nine years of age. (R. p. 37, lines 5-13). Counsel for Appellant argued, “We would ask that the State and the State’s witnesses not be able to go into that charge, as, one, he was nine years old; two, it was dismissed, and I believe it would be prejudicial to the jury to bring that in.” (R. p. 37, lines 10-13). The judge took the matter of non-convictions under advisement. (R. p. 39, lines 20 – p. 40, lines 1-5). The judge later denied the motion to exclude. (R. p. 56. Lines 19 – p. 57, lines 1-9).

At trial Dr. Marie Gehle testified that when Appellant was nine years of age he was charged with criminal sexual conduct with a minor under age eleven, first degree. (R. p. 72, lines 15-18). Counsel for Appellant objected and the objection was overruled. (R. p. 72, lines 11-13). Dr. Gehle then testified that the alleged victim in the case was a four year old female. (R. p. 72, lines 18-19). According to Dr. Gehle, Appellant stated that he hunched the girl which the doctor interpreted as meaning simulated intercourse or humping. (R. p. 21-25). Dr. Gehle testified that the charge was diverted with a behavior contract. (R. p. 73, lines 10-13). The trial judge erred in admitting the testimony.

The fact that non-convictions may be relevant in an SVP case, see White v. State, 375 S.C. 1, 9, 649 S.E.2d 172, 176 (Ct.App.2007), and the fact that a doctor may rely on non-convictions in evaluating individuals, see Care & Treatment of Ettel v. State, 377 S.C. 558, 562, 660 S.E.2d

285, 287 (Ct. App. 2008), does not automatically render non-convictions admissible before a jury. The trial judge must still weigh any purported probative value in the non-conviction against unfair prejudice pursuant to Rule 403, SCRE. In the present case any probative value in the evidence of and details about a charge made against Appellant alleging criminal sexual conduct with a minor first degree when Appellant was nine years of age that resulted in a diversion rather than a juvenile adjudication is substantially outweighed by the danger of unfair prejudice.

Unfair prejudice means an undue tendency to suggest decision on an improper basis.” State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). As to probative value, in State v. Gray, 408, S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) the South Carolina Court of Appeals addressed Rule 403 with regard to photographs and defined probative value writing:

“Probative” means “[t]ending to prove or disprove.” *Black’s Law Dictionary* 1323 (9th ed.2009). “Probative value” is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. “[T]he more essential the evidence, the greater its probative value.” United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates.

408 S.C. at 609–10, 759 S.E.2d at 165 (Ct. App. 2014).

The State did not need the non-conviction to meet its burden of proof in this case, rendering the probative value minimal. While the State argued that Dr. Gehle relied on the non-conviction when he was nine in diagnosing anti-social personality disorder, she also relied on an assault and battery of a high and aggravated nature non-conviction when Appellant was thirteen.¹ The danger of unfair prejudice, however, is high. The jury heard that Appellant was charged with criminal

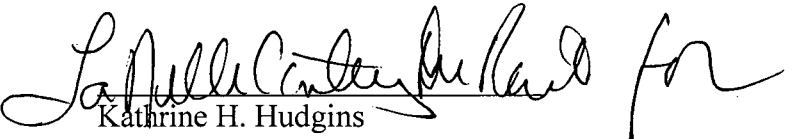
¹ While counsel initially objected pre-trial, (R. p. 37, line 14 – p. 38, lines 1), there was no objection to this non-conviction when Dr. Gehle testified in front of the jury. (R. p. 73, line 14 – p. 74, lines 1-10.

sexual conduct with a minor first degree involving a four year old female. The highly prejudicial testimony deprived Appellant of the right to a fair trial.

In Matter of Chapman, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017) the South Carolina Supreme Court wrote, “The United States Supreme Court “repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); accord Vitek v. Jones, 445 U.S. 480, 491–92, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (plurality opinion). Any possible probative value in the non-conviction testimony from when Appellant was nine years old was substantially outweighed by the danger of unfair prejudice resulting in a Due Process violation requiring a new trial.

CONCLUSION

Based on the above argument, this Court should reverse the commitment order and remand for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JUSTIN L. STEWART,

APPELLANT

RECEIVED
FEB 15 2018
SC Court of Appeals

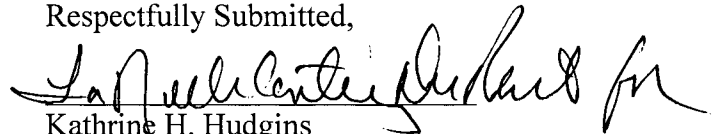
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Justin Stewart states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge John C. Hayes, which was held on May 30 - 31, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for Justin Stewart.

Respectfully Submitted,



Kathrine H. Hudgins

Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of February, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JUSTIN L. STEWART,

APPELLANT

RECEIVED

FEB 15 2018

SC Court of Appeals

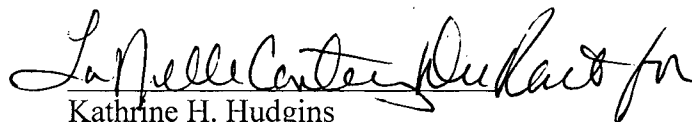
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Trial transcript dated May 30-31, 2017
- (2) Order of Commitment filed May 31, 2017

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

February 15, 2018


Kathrine H. Hudgins
Appellate Defender

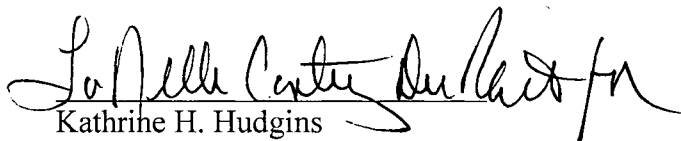
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

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."

February 15, 2018.



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

RECEIVED
FEB 15 2018
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

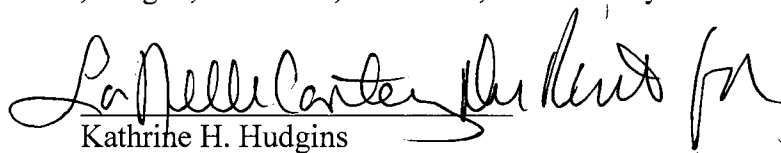
RECEIVED
FEB 15 2018
SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF JUSTIN L. STEWART,

APPELLANT

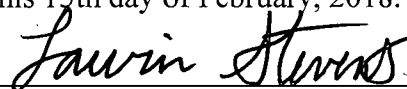
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders 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 Anders Brief of Appellant and Designation of Matter have been served on Justin Stewart, at Correct Care, 1700 St. Andrews Terrace, Bdlg A, Columbia, SC 29210, this 15th day of February, 2018.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of February, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.