STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County
The Honorable Stephen H. John, Circuit Court Judge
Appellate Case No. 2017-001334

IN THE MATTER OF THE CARE AND TREATMENT
OF TARL BRADFORD ROLLINGS,

Appellant,

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court did not abuse its discretion in precluding Appellant's cross-examination of the State's expert witness about her compensation in the state of Florida, which was based solely on a newspaper article published in 2013.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In July 2015, Appellant Tarl Bradford Rollings pled guilty to one count of lewd act on a minor, arising from the molestation of a nine year old female, and was sentenced to five years incarceration, suspended to two years and three years probation. 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 three mental abnormalities, and determined he met the statutory criteria for commitment as a sexually violent predator. The case was called for a jury trial on June 5, 2017, before the Honorable Stephen H. John, Circuit Court Judge.

The court appointed evaluator, Amy C. Swan, Psy.D., was qualified as an expert in psychology and 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, as well as conducting a two hour and twenty-five minutes interview with Appellant. (Trial Transcript [TT], pp. 76-85; Record on appeal [R.], pp. 76-85).

Based on the records she reviewed, Dr. Swan determined Appellant pled guilty in July 1999 to one count of lewd act upon a child, and one count of criminal sexual conduct upon a minor second degree, involving the molestation of two thirteen year old females. He was sentenced to ten years incarceration, suspended to time served and five years probation. He violated his probation and served time in prison, but almost immediately reoffended sexually

upon his release in 2006. (TT, pp. 86-98, State's Exhibits 2 and 3; R., pp. 86-98, 241, 244). During her interview with Appellant, he initially denied any sexual misconduct with either of the victims, but then admitted performing oral sex on one of the minor females, claiming she wanted him to kiss her and then told him to go with her to the bedroom. (TT, p. 90; R., p. 90).

Appellant was also convicted in 2000 for contributing to the delinquency of a minor. He picked a minor female up from her home in the middle of the night without her parents' permission and kept her out for approximately three hours, during which time they smoked marijuana. He was sentenced to three years incarceration, suspended to time served and five years probation, and he ultimately served three years after he violated his probation. During the interview with Dr. Swan, Appellant denied picking the female up from her home, stating she was walking with her boyfriend and he offered them a ride. (TT, pp 91-92; R., pp._91-92).

In 2006, an arrest warrant was issued charging Appellant with one count of assault with intent to commit criminal sexual conduct, first degree, involving allegations by a nine year old male. Appellant was arrested on the warrant in 2015, but the charge was dismissed. Appellant denied any involvement with the boy, stating the whole family was "trash." (TT, pp. 96-99; R., pp. 96-99).

In 2011, Appellant was charged with one count of criminal sexual conduct with a minor first degree and one count of lewd act on a minor, involving allegations made by a nine year old female. The criminal sexual conduct charge was nolle prossed when Appellant pled guilty to the lewd act charge. He was sentenced to five years, suspended to two years and three years probation. He denied doing anything to the child, claiming the child's family lied on him because they did not like him and wanted him out of the neighborhood (TT, pp. 93-95, State's Exhibit 4; R., pp. 93-95).

Dr. Swan testified she found several significant things about Appellant's criminal history, including the fact his crimes were primarily sexual offenses, which is a "really common pattern in pedophilies." He also repeatedly violated probation, which is one of "the most robust predictors that an individual will commit a sexual crime." The fact he was placed in state custody at an early age due to sexually abusing his younger siblings was also an important consideration. In spite of his history, Appellant denied having any sexual interest in prepubescent or pubescent children, but did admit having a foot fetish since his teenage years. (TT, p. 101; R., p. 101).

Dr. Swan also looked at any sex offender treatment Appellant may have had in order to determine if it had been sufficient to reduce his risk to reoffend sexually. She found he had sex offender treatment while he was incarcerated between 2002 and 2004, but he had some difficulty controlling his sexual urges and was ambivalent while in treatment. The staff was concerned he used his religious faith to convince others he had changed, but the staff did not think he was highly invested in treatment because he would go to the commissary rather than attend group sessions. (TT, pp. 103-104; R., pp. 103-104).

According to the treatment records, Appellant was angry and defensive at times, and he accused staff of being prejudiced against him. He tended to rationalize what he did, and rigidly used his religious beliefs to excuse his issues. Appellant had difficulty receiving feedback from other residents, and would verbally attack them. (TT, pp. 104-105; R., pp. 104-105).

Appellant also told Dr. Swan he had more sex offender treatment after he was released from prison in November 2004. However, he reoffended by January 2006. (TT, p. 105; R., pp. 105).

Dr. Swan also found it significant Appellant was convicted in 2004 for violating the Sex

Offender Registry law. She stated such conduct shows noncompliance with supervision, which impacts the risk to reoffend analysis. (TT, p. 106; R., p. 106).

Based on her analysis of his history and the interview with him, Dr. Swan diagnosed Appellant with three mental abnormalities: pedophilic disorder; other specified paraphilic disorder – hebephilia; and fetishistic disorder. She considered his past sex offender treatment, his static and dynamic risk factors for reoffending, and his previous failures while under supervision in reaching a conclusion regarding his risk to reoffend sexually. Based on all the information she considered, Dr. Swan opined to a reasonable degree of psychological certainty that Appellant's mental abnormalities cause him significant difficulty controlling his sexually deviant behavior, and he is likely to reoffend sexually if not confined for long term control, care and treatment. (TT, pp. 107-122; R., pp. 107-122).

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. 237-239, Order of Commitment filed September 20, 2016; R., pp. 237-239). This appeal followed.

ARGUMENT

The circuit court did not abuse its discretion in precluding Appellant's cross-examination of the State's expert witness about her compensation in the state of Florida, which was based solely on a newspaper article published in 2013.

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. Appellant's argument has no merit.

A. Standard of Review

The admission or exclusion of evidence in general is within the sound discretion of the trial court, and reversal based on the admission or exclusion of evidence is not warranted absent a showing of both error and resulting prejudice. Fields v. Reg'l. Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506, 509 (2005). The trial court has considerable latitude in allowing cross-examination regarding a witness' credibility, but may impose reasonable limits based on concerns regarding, *inter alia*, interrogation that is only marginally relevant. State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, 524 (2000). Appellate courts "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." State v. Hawes, Op. No. 2014-002288, 2018 WL 1309539, at *7 (S.C. Ct. App. Mar. 14, 2018) (*quoting* State v. Gracely, 399 S.C. 363, 731 S.E.2d 880, 884 [2012]); Johnson, 525 S.E.2d at 524 (same).

B. Cross-examination for Bias

"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.

On direct examination, Dr. Swan testified she had worked directly with sex offenders in treatment for twenty-nine years, and during that time she had conducted 875 sexually violent predator evaluations, as well as over 400 sex offenders in other legal contexts. She further testified she was the first psychotherapist hired in 1999 by the State of Florida to provide treatment in that state's sexually predator program, and she had been doing evaluations in that field for approximately eighteen years. During her years of conducting sexually violent predator evaluations, she had testified both on behalf of and against individuals she evaluated.[1] (TT, pp. 79-80; R., pp. 79-80).

After Dr. Swan testified regarding her findings and conclusion that Appellant has three mental abnormalities that make him likely to commit further acts of sexual violence if not confined for long term, control, care and treatment, Appellant asked her if she had ever testified for any individual she evaluated in South Carolina, and she replied her contract with the Department of Mental Health (DMH) precludes her taking such cases. Appellant then asked Dr. Swan about her financial arrangements with DMH for the SVP evaluations. She stated she receives a flat fee of $1900 for an annual review evaluation, and $4000 for a pre-commitment evaluation. The fee covers all travel time and expenses when she comes from Florida to South Carolina to conduct the evaluation and testify if necessary. (TT, pp. 123-124; R., pp. 123-124). Dr. Swan testified she has conducted 875 pre-commitment evaluations total, with at least 20 sexually violent predator evaluations in South Carolina. She further testified she did find the person being evaluated did not meet the criteria for commitment in several South Carolina cases, and was able to name a few. (TT, 124-127; R., pp. 124-127).

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[1]In an effort to denigrate Dr. Swan's qualifications and testimony, Appellant refers to her discussion of her Florida credentials as "bragging." Under Appellant's analysis, any highly qualified expert who testifies about her qualifications and years of experience is "bragging."

Toward the end of Dr. Swan's cross-examination, Appellant asked if she was familiar with an article published in a Florida newspaper in 2013. The State objected, and the court heard the testimony *in camera*. (TT, pp.142-143; R., pp. 142-143).

Appellant asked Dr. Swan if she earned $2.2 million between 2000 and 2013 doing predator evaluations for the State of Florida as reported in the newspaper article. She agreed the paper said she did, but she could not verify the accuracy of the figures included in the article. She stated quite candidly she never added up the figures, and the reporter who wrote the story never identified or gave her documents or other evidence supporting the allegations in his article. (TT, pp. 143-144; R., pp. 143-144). To her credit, and in spite of Appellant casting aspersions on her intent and character, Dr. Swan did not try to bluff her way through the issue, but gave a very reasonable answer when asked to remember her income over a thirteen year period, **three years after** she earned it.

The matter was further complicated by Dr. Swan's testimony that her income between 2000 and 2005 included "a whole range of work of criminal forensic work" in addition to the sexually predator work. Her income from other sources clearly **should not** be included in the totals shown in the newspaper article, which purported to show Dr. Swan earned all her money between 2000 and 2013 from doing only sexually violent predator evaluations, while only her work from 2005-2013 primarily revolved around sexually violent predator evaluations. Appellant presented nothing indicating the article accurately reflected her income, or that it did not include her income from other sources.[2] In reality, as the circuit court found, Appellant failed to lay a proper foundation for the hearsay ridden news article, which cited no sources, and

[2]It appears the article was very one-sided, played fast and loose with the facts, and was intended to cause problems for the Florida Sexually Violent Predator program.

Appellant neither sought nor provided any documentation to support the article's allegations.[3]

There is no disagreement regarding a party's right to fully cross-examine an adverse expert witness for bias, however, the scope of that cross-examination can be restricted. Appellant relies heavily on Yoho v. Thomason, 345 S.C. 361, 548 S.E.2d 584 (2001), as support for allowing him to cross-examine Dr. Swan about the newspaper article. The situation in Yoho is so different from this case, its precedential value is minimal at best.

In Yoho, the plaintiff was in an automobile accident, and the defendant's insurance company paid out the policy limits. Plaintiff's underinsured motorist coverage through her insurance company, Nationwide, then took over the defense, and wanted to call a doctor who had a long standing employment relationship with the Nationwide, to testify about the plaintiff's injuries. In analyzing whether it would be appropriate for the plaintiff to cross-examine the doctor about his on-going relationship with Nationwide, the Supreme Court stated:

> A majority of jurisdictions addressing this issue apply a "substantial connection" analysis to determine whether an expert's connection to a defendant's insurer is sufficiently probative to outweigh the prejudice to the defendant resulting from the jury's knowledge that the defendant carries liability insurance. *See, e.g., Bonser v. Shainholtz,* 3 P.3d 422 (Colo.2000) (expert's relationship with insurance Trust was admissible to show bias where expert was a co-founder and previous board member of Trust, and expert believed dentists insured by Trust were better quality than other dentists); *Mills v. Grotheer,* 957 P.2d 540 (Okla.1998) (insufficient connection between expert and insurer to justify admission where expert was merely a policyholder).
>
> We adopt the substantial connection analysis and conclude **the connection between Dr. Brannon and Nationwide was sufficient to justify admitting**

[3]It should be noted Appellant bore the burden of providing sufficient foundation if he wanted to cross-examine Dr. Swan about the article's allegations. Rather than providing that foundation, however, he tried to blindside Dr. Swan with a document several years old discussing income she purported earned over a significant period of time before the article was published. Then, when she was understandably unable to remember the income she earned over that period of time, Appellant uses disparaging phrases and words such as "unconvincingly claimed complete ignorance about her finances and income," "claimed to have 'no clue' about her income, and she was "quick to minimize her profits." (Brief of Appellant, p. 11).

> **evidence of their relationship to demonstrate Dr. Brannon's possible bias in favor of Nationwide. Dr. Brannon was not merely being paid an expert's fee in this matter. Instead, he maintained an employment relationship with Nationwide and other insurance companies. Dr. Brannon consulted for Nationwide in other cases and gave lectures to Nationwide's agents and adjusters.** Ten to twenty percent of Dr. Brannon's practice consisted of reviewing records for insurance companies, including Nationwide. Further, Dr. Brannon's yearly salary was based in part on his insurance consulting work. The trial court erred in refusing to allow Yoho to cross-examine Dr. Brannon about his relationship with Nationwide.

Id., at 536-536.

Dr. Swan has no employee type relationship with DMH, she works with DMH solely on a contractual basis with an established flat fee arrangement ($1900 per annual review evaluations and $4000 per pre-commitment evaluation, which covered all her time, travel and expenses), and the fee does not depend on the results of her evaluations. Her financial arrangement with DMH was the only arrangement relevant in this case, because there is no evidence her financial arrangement with Florida, whatever that arrangement might be (another important piece of evidence Appellant never bothered to explore prior to trial instead of relying on a news article), impacted her work in South Carolina in any way.

Allowing Appellant to bring in unverified evidence of Dr. Swan's Florida income through nothing more than a news article based on pure hearsay would allow the introduction of totally irrelevant and unreliable information. Rather than indicate Dr. Swan's bias, the information would do no more than serve to confuse the jury.[4]

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[4]Appellant asserts the circuit court gave an incorrect jury charge regarding consideration of payments to witnesses, but acknowledges this issue is not properly before this Court for appellate review. (Brief of Appellant, pp. 14-15). This red herring is intended to distract from the circuit court's sound reasoning in precluding cross-examination regarding Dr. Swan's Florida income, and preempt a harmless error argument. While the State contends the circuit court did not err, given the evidence in the records regarding Appellant's criminal history and mental status, there was overwhelming evidence to support Dr. Swan's opinions, and precluding Appellant from inserting irrelevant information at trial did not prejudice him in any way.

Appellant cross-examined Dr. Swan extensively about her work for the State of South Carolina, and certainly implied her results were based on the fees she received. He was also free to make that argument in closing. Her South Carolina income was the only issue relevant to her work on South Carolina cases, and the circuit court properly restricted Appellant's cross-examination of Dr. Swan to that issue. There was no abuse of discretion, and the jury verdict finding Appellant is a sexually violent predator should be affirmed.

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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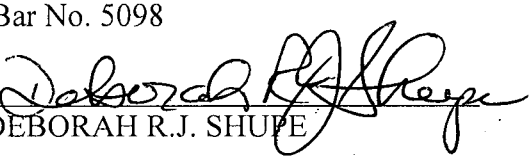
BY: 
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July 13, 2018

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief 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."

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