STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable James R. Barber, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JAMES GIBSON,

APPELLANT

APPELLATE CASE NO. 2017-000610

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to qualify a defense witness in psychology who, among other qualifications, taught psychology classes at Clemson University and at the Citadel, solely on the basis that she was not a licensed psychologist which prevented her from opining that appellant was not a pedophile?

STATEMENT OF THE CASE

After appellant James Gibson served twenty-two (22) years in prison, the Attorney General sought his commitment into the Sexually Violent Predator facility. R. 4, ll. 2 – 9. R. 133, ll. 17 – 19. On February 23, 2017, appellant was tried in Orangeburg County before the Honorable James R. Barber and a jury. R. 1. Christopher Morrow represented the Attorney General. R. 1. James K. Falk represented appellant. R. 1. The jury convicted appellant of being a sexually violent predator and Judge Barber committed him to the SVP facility. R. 191, l. 3 – 192, l. 7. This appeal follows.

ARGUMENT

The trial court erred in refusing to qualify a defense witness in psychology who, among other qualifications, taught psychology classes at Clemson University and at the Citadel, solely on the basis that she was not a licensed psychologist which prevented her from opining that appellant was not a pedophile.

The Attorney General's sole witness in this sexually violent predator case was Dr. Marie Gehle. R. 29, ll. 3 – 15. Dr. Gehle testified she was a clinical psychologist. R. 29, ll. 16 – 17. She had a bachelor's degree in psychology, a master's degree in clinical psychology, and a doctorate in clinical psychology. R. 29, ll. 20 – 23. She was licensed by South Carolina in psychology. R. 29, ll. 18 – 19. R. 34, ll. 3 – 6. The trial judge qualified Dr. Gehle as an expert in forensic psychology. R. 32, l. 20 – 33, l. 25.

Dr. Gehle testified that appellant suffered from pedophilia and exhibitionistic disorder. R. 61, l. 16 – 64, l. 2. Based primarily on a test, Dr. Gehle said appellant also had "antisocial attitudes and behaviors," but did not suffer from antisocial personality disorder. R. 60, l. 4 – 61, l. 9. R. 77, ll. 16 – 20. Appellant's score on a recidivism actuarial scale indicated a 20.5% chance of reoffending within five years. R. 64, l. 19 – 66, l. 13. She testified that appellant needed to be confined in the SVP facility. R. 67, l. 16 – 68, l. 25.

On cross-examination, defense counsel asked her what evidence she had that appellant was still sexually interested in children now as opposed to his offenses twenty-two (22) years earlier. R. 74, l. 25 – 75, l. 2. Dr. Gehle responded, "Well, his interest in children today, I mean, **it's assumed that it still exists based** on his prior behavior because he's been incarcerated and there aren't children there. He's not had access to his preferred victim type and we know that

pedophilic disorder is a chronic disorder that remains over time." R. 75, ll. 3 – 8 (emphasis added).

Appellant testified that he was not sexually attracted to children and his prior offenses against children were the result of a terrible, abusive upbringing, substance abuse, and coming to terms with his own bisexuality. R. 140, l. 2 – 147, l. 5. Appellant explained that he was never sexually aroused during his offenses and after years of treatment, believed his conduct (which he called "terrible things") was a result of him "trying to understand what had happened to me as a child." R. 146, l. 23 – 147, l. 13. Appellant had a comprehensive plan to avoid any further offenses, including going to regular counseling, staying away from intoxicants, making progress in his field from journeyman electrician to certification, and his Christian faith. R. 147, l. 14 – 153, l. 6.

The Attorney General called Dr. Gehle in reply. R. 157, ll. 1 – 6. She repeated that her diagnosis did not change based on the evidence at trial. R. 157, ll. 1 – 17. She claimed that appellant's motivation and arousal did not matter during his offenses—only the fact of the offenses and his behavior mattered. R. 157, ll. 18 – 25.

Dr. Gehle was also responding to appellant's first witness, Dr. Charlotte Taylor. R. 91, ll. 3 – 10. After the Attorney General rested and the court heard mid-trial motions, Judge Barber said, "Again, before we get into it, this is the same parameters as is yesterday, is that correct?[1] This woman is not testifying as an expert, is that—" R. 91, ll. 6 – 8. Trial counsel stated his intention to offer Dr. Taylor as an expert in psychology and counseling and to elicit her opinion on whether appellant suffered from pedophilia. R. 91, ll. 13 – 19.

[1] From other references in the transcript, it appears Judge Barber was referring to another SVP trial, not appellant's trial.

The Attorney General objected. R. 91, l. 20 – 92, l. 8. The Attorney General argued that Dr. Taylor could not testify as a psychologist because she was not licensed as a psychologist, only as a professional counselor. R. 91, l. 20 – 92, l. 8. The Attorney General stated, "But I feel taking it to the field of psychology is not appropriate based on her licensure." R. 92, ll. 7 – 8. Appellant responded that licensing was not a "requirement for being able to testify as an expert in the State of South Carolina. It's just whether or not she has experience—" and the trial judge interrupted. R. 92, ll. 9 – 22. Judge Barber stated, "Field of science, you generally have to be licensed to—if you're going to testify as a professional engineer, a medical doctor, a nurse, they're licensed." R. 92, ll. 16 – 22. The court then compared offering Dr. Taylor, who had a doctorate and taught classes in psychology to a mental patient from a psychiatric hospital testifying as an expert because "they have the experience of having been exposed to all of this for twenty years." R. 92, l. 16 – 93, l. 13. The trial judge asked, "Can she practice psychology in South Carolina?" and then allowed appellant to proffer Dr. Taylor's qualifications. R. 93, ll. 9 – 15.

Dr. Taylor retired after eight and a half years at Clemson University teaching "graduate students of counseling and psychology." R. 93, ll. 22 – 25. She taught thirteen years at the Citadel and as an adjunct at South Carolina and South Carolina State. R. 94, ll. 1 – 3. She taught courses in psycho diagnostics, which is how to use the DSM-V. R. 94, ll. 5 – 10. She also taught psycho pharmatrophics, which covered medications prescribed to treat personality disorders based on diagnoses from the DSM-V. R. 94, ll. 11 – 16. She taught psychopathology, which she defined as "the psychology of pathological diseases and illness, mental disorders." R. 94, ll. 17 – 22.

Dr. Taylor received her undergraduate degree in psychology with a minor in education from Jacksonville University in Florida. R. 94, l. 23 – 95, l. 19. She earned a master's degree in counseling from the Citadel. R. 94, l. 23 – 95, l. 19. She earned a doctorate with "a major in counseling with a minor in psychology" from the University of Memphis. R. 94, l. 23 – 95, l. 19. She had been qualified "[m]any times" as an expert witness in South Carolina courts, usually testifying for victims as a counselor and psychologist. R. 96, ll. 4 – 21. The Attorney General's voir dire of Dr. Taylor focused almost exclusively on her lack of a license to practice psychology. R. 97, l. 3 – 98, l. 5. Without hearing any further argument from the Attorney General, Judge Barber ruled:

> She's not going to testify as a psychologist in this case. **She's not licensed as a psychologist.** She's not trained as a psychologist. She's not a practicing psychologist. She is a counselor in education, which she has taken some psychology courses and maybe has taught some courses that are psychology related. **But she is not a professional psychologist. She's not a licensed psychologist and she won't be qualified as a witness as a psychologist.**

R. 98, ll. 8 – 16 (emphasis added). After hearing a proffer of Dr. Taylor's testimony, the court interrupted, "Let me tell you something. Let's stick to what we have here." R. 104, ll. 6 – 7. Judge Barber then addressed trial counsel, "This lady, and in my opinion, you to some extent, may have some problems if you're promoting this lady as a psychologist who can testify at a trial as an expert, when she's not licensed. Is not a psychologist at all." R. 104, ll. 9 – 14. The court reiterated his ruling, "Again, my ruling is she cannot testify as a psychologist and offer any opinion as a psychologist because she's not licensed as a psychologist." R. 104, ll. 19 – 24.

The trial court erred in ruling that Dr. Taylor could not be qualified as an expert in psychology because she was not licensed. See J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 635 S.E.2d 97 (2006). In Baggerly, the trial judge excluded testimony from an engineering expert because he was not licensed in South Carolina. Id. The Court held this was error,

because the licensing statute's purpose was to protect consumers and did not encompass testifying as an expert witness. Id. The Court also held that Rule 702, SCRE controlled and was governed by the licensing statute. Id.

The Court reiterated the holding of Baggerly in Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008). The Court again emphasized the primacy of Rule 702 over licensing requirements: "Baggerly properly recognizes that local licensing requirements are arguably inconsistent with Rule 702's operational framework for expert testimony." Id. "Rule 702 does not contain a set of mandatory qualifications that a witness must meet in order to be qualified as an expert." Id. "Instead, Rule 702 recognizes that there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence." Id. Importantly for this case, the Court wrote "that **a trial court's decision to refuse to qualify a person as an expert based solely on the failure to meet a licensing requirement arguable impairs the truth-seeking function of courts.**" Id. (emphasis added).

The trial court was unaware of this legal principle and believed that licensing controlled qualification. The court even included engineers in his list of experts who must be licensed despite Baggerly's decision expressly dealing with engineers. Dr. Taylor's qualifications were impressive and she taught psychology courses at the leading universities in this state. The court erred in accepting the Attorney General's argument that she could not be qualified as a psychologist because of her lack of a license. See State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011) (citing Fields and Baggerly and holding that a solicitor who intimidated a defense social

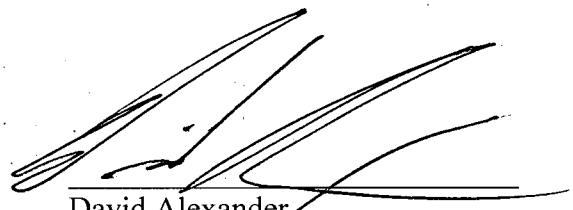
worker from offering expert testimony because she was not licensed constituted prosecutorial misconduct).

While Dr. Taylor testified as a counselor, as seen in her proffer, her inability to testify about psychology severely prejudiced appellant's case. Dr. Taylor testified during the proffer that, in her opinion, appellant "is not a pedophile." R. 103, ll. 1 – 21. She explained that appellant was "[n]ever was a pedophile." R. 102, ll. 17 – 25. Not all people who molest children are pedophiles with a sexual interest in children. R. 102, ll. 17 – 103, l. 25. Appellant was developmentally delayed and his offenses could be explained by the abuse he suffered as a child and gender and sexual identity issues. R. 102, ll. 17 – 103, l. 25. Dr. Taylor said, "He's not interested in children." R. 102, ll. 17 – 103, l. 25.

The jury never heard this important testimony from an expert qualified in psychology and was left with only Dr. Gehle's opinion regarding pedophilia. Dr. Gehle's opinion that appellant still suffered from pedophilia was only based on appellant's actions, not on his motivations which bears directly on both the existence of a personality disorder and appellant's ability to control his impulses. Had the jury heard Dr. Taylor's testimony that appellant was not a pedophile, the result of this case likely would have been different. This Court should reverse.

CONCLUSION

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



David Alexander
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ATTORNEY FOR APPELLANT

This 29th day of May, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

May 29, 2018.

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