ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF WILLIAM RALPH WILSON, III

APPELLANT

APPELLATE CASE NO. 2018-001843

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial judge abuse his discretion by admitting evidence of allegations of sexual misconduct that were denied by Appellant and not the subject of a conviction in violation of Rule 403, SCRE, since the probative value was substantially outweighed by the danger of unfair prejudice given that the evidence was hearsay and wholly unreliable?

STATEMENT OF THE CASE

On May 4, 2017, the Attorney General filed a petition seeking to involuntarily commit Appellant pursuant to the Sexually Violent Predator Act (SVPA). R. * (Petition). The trial commenced on September 4, 2018 before the Honorable Walton J. McLeod, and a jury. Tr. 1. James G. Bogle, Jr. represented the state, and Benjamin A. Stitely represented Appellant. Tr. 1.

On September 5, 2018, the jury found Appellant was a sexually violent predator under the SVPA. Tr. 197, ll. 9-18. Judge McLeod ordered Appellant be committed to the Department of Mental Health for long-term control, care, and treatment. R. * (Order of Commitment).

This appeal follows.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the circuit court and will not be reversed absent an abuse of discretion." In the Matter of Ettel, 377 S.C. 558, 561, 660 S.E.2d 285, 287 (Ct. App. 2008) (citing In the Matter of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003)).

ARGUMENT

In this sexually violent predator case, the trial judge abused his discretion by admitting evidence of allegations of sexual misconduct that were denied by Appellant and not the subject of a conviction in violation of Rule 403, SCRE, since the probative value was substantially outweighed by the danger of unfair prejudice given that the evidence was hearsay and wholly unreliable.

How the Issue was Presented Below

Appellant moved pretrial to prohibit the state's expert witness, Dr. Donna Schwartz Maddox, from testifying about the details of any allegations not resulting in a conviction, and which were specifically denied by Appellant, pursuant to Rule 403, SCRE. Tr. 28, l. 8 – 29, l. 21. Appellant, who was a youth minister at a church in Lexington County, pled guilty to two counts of lewd act upon a child on September 9, 2010 for conduct that occurred between 2007 and 2009 when he was twenty-eight and twenty-nine years old. Tr. 77, ll. 3-5; Tr. 79, ll. 1-2; Tr. 84, l. 21 – 85, l. 3. The first conviction alleged Appellant touched the inner thigh of a boy who was between the ages of twelve and fourteen. Tr. 80, ll. 5-19. The second conviction alleged Appellant touched the inner thigh of another boy who was thirteen years old. Tr. 81, l. 18 – 82, l. 2. Appellant admitted he committed this conduct when he was interviewed by Dr. Maddox. Tr. 80, ll. 24-25. However, he denied committing any of the other conduct alleged by other youths at the church.[1] Tr. 95, ll. 9-15.

[1] Appellant was arrested on several other warrants that were ultimately dismissed after he pled guilty. Three warrants were for lewd act upon a child, each alleging Appellant touched the inner thigh of a thirteen year old boy. Two additional warrants were for disseminating obscene material to a minor, specifically a "sex toy" and "pornographic movies" to a fourteen year old boy. Tr. 85, l. 4 – 87, l. 3.

Counsel for Appellant argued that the probative value of this evidence was outweighed by the danger of unfair prejudice because the allegations, which again are not the subject of a conviction and were denied by Appellant, are unreliable. Counsel emphasized that Appellant was not indicted for the alleged conduct, meaning a grand jury never found probable cause supported the existence of the allegations. Tr. 34, ll. 22 – 35, l. 24. Moreover, counsel argued he would not be able to put forth any defense to the charges since he would not be able to cross-examine the individuals who made the accusations. Tr. 35, l. 25 – 36, l. 23. He asserted:

> Dr. Maddox never interviewed these individuals and my client has denied the conduct so **I think it's patently unfair and far more prejudicial than probative to let her get into allegations which he has denied.** And without bringing those witnesses to come forward and testify, yes, they happened, I don't think it's a fair portrayal of my client.

Tr. 36, ll. 17-23 (emphasis added).

He later continued:

> That's great that someone made a statement [concerning the alleged sexual misconduct]. I could make a statement, Judge, but **there has to be an element of reliability** which has never been tested and I think that's what's important. At least if you had indicted it, it had been to the grand jury, there's that probable cause determination. We never even get that far in these cases. **At this point, they could be, as my favorite, inchoate hunches or without any reasonable certainty whatsoever.**
>
> Its kind of putting him behind the eight ball. I can't call them [the accusers] to question them about it because that would not be appropriate at this time. The doctor didn't speak to them and now, once again, because they couldn't convict him criminally they're trying to convict him civilly for things they should have convicted him criminally for if that was the State's intent, if the State could have done it back then and they can't prove that they could have. **They [the state] can't even prove they . . . had enough evidence to go forward and seek an indictment.**

Tr. 37, l. 18 – 38, l. 14 (emphasis added).

The state asserted the evidence was admissible pursuant to Rule 703, SCRE, which states the facts or data upon which an expert bases an opinion need not be admissible in evidence if of

a type reasonably relied upon by experts in the field. Because Dr. Maddox relied on the allegations in forming her opinion, and such alleged conduct is reasonably relied upon by experts in her field, the assistant attorney general argued the accusations made by other teenagers at the church were admissible despite not being the subject of a conviction. Tr. 30, l. 20 – 31, l. 2. He stated Dr. Maddox would testify that she is "looking for a pattern of behavior of other allegations made against him [Appellant]" in addition to his two lewd act convictions. Tr. 31, ll. 3-14.

In support of his position, the assistant attorney general cited to In the Matter of Ettel, 377 S.C. 558, 561, 660 S.E.2d 285, 287 (Ct. App. 2008), where this Court held evidence of prior sexual offenses, which had not resulted in any convictions, and an unrelated murder conviction were relevant and admissible because the expert relied upon this evidence in assessing Ettel's need for treatment. Tr. 31, l. 15 – 32, l. 3. He also cited to In the Matter of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003) for the proposition that "past criminal history is directly relevant to proving whether or not a person fits the definition of a sexual violent predator." Tr. 32, ll. 4-16.

The trial judge ultimately denied the motion. He ruled Dr. Maddox would be allowed to testify "regarding any unadjudicated matters involving sexual offenses," including evidence obtained from warrants and voluntary statements. Tr. 38, l. 20 – 39, l. 4. While refusing to exclude the evidence, the judge emphasized that Appellant would be able to cross-examine Dr. Maddox concerning this evidence. Tr. 39, ll. 2-4.

Dr. Maddox's Testimony Before the Jury

During her testimony, Dr. Maddox, who was the only witness for the state, went into detail about the specific allegations made by other thirteen and fourteen year old boys at the church where Appellant was a youth minister. She learned of these allegations from statements obtained from the boys and their parents along with police reports and warrants. Dr. Maddox

admitted Appellant denied all these accusations, except for the conduct that is the subject of his two lewd act convictions. Tr. 95, ll. 9-15. Specifically, she testified Appellant was accused by a fourteen year old boy of purchasing a "sex toy" for the teenager and "showing him a video on how to use it." Tr. 86, ll. 9-13; Tr. 94, ll. 1-8. She also said another fourteen year old claimed Appellant "watched pornographic movies" with the child on his laptop computer. Tr. 86, ll. 18-23; Tr. 94, ll. 22-25. There were several allegations from other thirteen and fourteen year old boys that Appellant touched their inner thigh or "fondled" them as well as had "sexually explicit conversations" with them. Tr. 85, l. 4 – 89, l. 22; Tr. 91, l. 9 – 93, l. 25. Dr. Maddox concluded Appellant "has had a pattern of . . . accusations from young males." Tr. 84, ll. 3-8.

Based on these allegations, which again Appellant had consistently denied committing and were not the subject of any convictions, Dr. Maddox diagnosed Appellant with pedophilic disorder, which requires the child be less than thirteen. However, she claimed she should have diagnosed him with "an unspecified paraphilic disorder" because "based on his history" he is aroused by younger males ages twelve through fourteen. Tr. 99, l. 9 – 100, l. 11.

Despite admitting Appellant had a 7.9 percent chance of reoffending in the next five years based on the actuarial risk assessment tool she utilized, Dr. Maddox opined Appellant meets the criteria to be considered a sexually violent predator and is likely to commit acts of sexual violence if he is not confined for long term control, care, and treatment. Tr. 108, l. 3 – 112, l. 14.

Discussion

The trial judge abused his discretion by allowing Dr. Maddox to discuss the details of the allegations made by other teenagers at the church where Appellant was a youth minister, which were specifically denied by Appellant and not the subject of a conviction, since the probative

value of this evidence was substantially outweighed by the danger of unfair prejudice given that it was wholly unreliable and based solely on hearsay.

"Generally, all relevant evidence is admissible." In the Matter of Ettel, 377 S.C. 558, 561, 660 S.E.2d 285, 287 (Ct. App. 2008) (citing Rule 402, SCRE); See State v. Pittman, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). "Evidence is relevant if it tends to establish or make more or less probable the matter in controversy." Id. (citing Rule 401, SCRE). "However, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value." Id. (citing Rule 403, SCRE).

In In the Matter of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), which the state relied upon heavily at trial, Ettel argued the trial judge erred by permitting an expert to testify at his commitment trial regarding his prior sexually related offenses that did not result in convictions and to a prior murder conviction asserting the prejudicial nature of this evidence substantially outweighed its probative value. Id. at 559, 660 S.E.2d at 286. Ettel was convicted of first degree criminal sexual conduct and assault and battery of a high and aggravated nature. Id. After the circuit court found probable cause to believe Ettel was a sexually violent predator, it ordered Ettel undergo a psychiatric evaluation. During his interview with the court appointed forensic psychiatrist, *Ettel admitted to three sexual offenses that did not result in any convictions.* Id. at 560, 660 S.E.2d at 286-287.

Before trial, the judge denied Ettel's motion to exclude any testimony regarding these sexual offenses as well as evidence regarding Ettel's prior murder conviction. Id. at 560, 660 S.E.2d at 287. At trial, the expert psychiatrist discussed the disputed evidence to support her conclusion that Ettel suffered from the mental abnormality of paraphilia, not otherwise specified, and had a history of extreme violence, which made it likely he would engage in acts of sexual

violence if not confined for long term control, care, and treatment. Id. at 560-561, 660 S.E.2d at 287.

This Court held the trial judge properly admitted the expert's testimony regarding Ettel's prior sexual offenses not the subject of any convictions as well as his prior murder conviction. The Court concluded the evidence was relevant because the expert relied on the sexual offenses and the murder conviction "in evaluating Ettel's need for and likelihood of success in treatment as well as his ability to control his behavior in the future." Id. at 562, 660 S.E.2d at 288. This Court further held the possibility of unfair prejudice did not substantially outweigh the probative value of the testimony. Id. at 563, 660 S.E.2d at 288. In so holding, this Court asserted:

> Regarding its probative value, Dr. Crawford [the expert] used the information to develop her "opinion in terms of [Ettel] not being able to control his behavior" and to diagnose Ettel with paraphilia. As for the testimony's possible prejudice, **the prior sexual offenses not resulting in convictions as well as the murder conviction were not the only sources of Dr. Crawford's diagnosis. Dr. Crawford testified that even without considering this evidence, her opinion as to whether Ettel had a mental abnormality or personality disorder would not change.** Dr. Crawford stated she additionally relied on, among other sources, Ettel's past criminal sexual conduct conviction, Ettel's statements during her extensive clinical forensic interviews with him, interviews with individuals close to Ettel, administrative records, Ettel's prior psychological evaluation, and his record while in a sex offender treatment program.

Id. (emphasis added).

This case is easily distinguishable from Ettel. In Ettel, the murder offense was the subject of a conviction and Ettel admitted during his interview with the expert that he committed the three sexual offenses, which ensured the reliability of the evidence challenged at trial and on appeal. Here, Appellant denied committing any of the sexual misconduct alleged in the warrants, statements, and police reports that Dr. Maddox was permitted to discuss over Appellant's objection. Appellant only admitted to committing the conduct to which he pled guilty to in 2010. Moreover, Dr. Maddox performed no independent investigation into the truth

of the accusations. Consequently, there was absolutely no evidence that these allegations were reliable. Because of the obvious lack of reliability of this evidence, it had no probative value and should have been excluded by the trial judge pursuant to Rule 403, SCRE.

Moreover, unlike the expert in Ettel who relied on other sources besides the challenged evidence and maintained her opinion would have been the same regardless of this evidence, Dr. Maddox relied solely on the alleged sexual misconduct and the two related lewd act convictions in reaching her conclusion that Appellant suffers from pedophilic disorder and "an unspecified paraphilic disorder" as well as her overall opinion that Appellant meets the criteria of a sexually violent predator and needs to be confined for long term control, care, and treatment. See Id. at 563, 660 S.E.2d at 288. She maintained that based on Appellant's history, which included the unverified and unreliable allegations made by the teenagers at the church where he was a youth minister, Appellant is aroused by younger males ages twelve through fourteen. Because Dr. Maddox relied heavily upon these accusations in forming her opinion and conclusions, any probative value of evidence was substantially outweighed by the danger of unfair prejudice. Consequently, the evidence should have been excluded by the trial judge pursuant to Rule 403, SCRE.

Additionally, while Rule 703, SCRE, allows some hearsay to be admitted through an expert, it does not suspend all operation of the hearsay rules and the trial judge must evaluate the proposed evidence for reliability. 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."). All expert testimony must pass the reliability test when the trial court conducts its initial gatekeeping function. Watson at 449, 699 S.E.2d at 177.

The assistant attorney general relied on the Ettel line of cases to argue that hearsay is always admissible if the expert states that she relied on such evidence in reaching her conclusions. See Ettel, 377 S.C. at 562, 660 S.E.2d at 287 ("These offenses can include both convictions and offenses not resulting in convictions as long as they are relevant to the determination of whether a person is a sexually violent predator."); see also In the Matter of Chandler, 382 S.C. 250, 676 S.E.2d 676 (2009); White v. State, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007). Watson was decided in 2010, after the principal cases discussing this type of evidence in the SVP context were decided. Watson emphasizes the trial court's gatekeeping role and the reliability requirement.

Rule 703 cannot be a limitless exception to the hearsay rule that circumvents the reliability requirement in SVP cases. In Watson, testimony about a known physical phenomenon—electromagnetic interference—was held unreliable from an electrical engineer as it related to cruise control systems. Watson, 389 S.C. at 449-453, 389 S.E.2d at 177-179. The engineer had no experience with cruise control systems. Id. Our Supreme Court reversed, holding that the trial court should have exercised its gatekeeping role to prevent admission of this evidence. Id. Similar to Watson, Dr. Maddox's complete lack of independent investigation or verification, along with the fact that Appellant denied the allegations and they were not the subject of a conviction, makes the hearsay evidence unreliable and inadmissible. It should have been excluded pursuant to Rule 403.

Respectfully, this Court should reverse Appellant's commitment and remand for a new trial.

CONCLUSION

Based on the foregoing argument, this Court should reverse Appellant's commitment and remand this matter for a new trial.

Respectfully Submitted,

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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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 has been served upon William Ralph Wilson, III, at 4546 Broad River Road, Columbia, SC 29210, this 2nd day of August, 2019.

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2019.

Scott Leverette (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.