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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

R. Knox McMahon, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF

KENNETH CAMPBELL,

APPELLANT

APPELLATE CASE NO. 2014-001931

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by allowing the state to impeach the court's expert with irrelevant and unfairly prejudicial information that a person in an unrelated case she had recommended be released was arrested for rape where there was no evidence the person had been convicted?

STATEMENT OF THE CASE

On November 1, 2012, Lloyd V. Flores Jr., an attorney with the South Carolina Office of Attorney General, filed a petition pursuant to the Sexually Violent Predator Act (SVPA) alleging that Appellant was a sexually violent predator. R. 160. The trial commenced on September 8, 2014 before the Honorable R. Knox McMahon and a jury. Nichole Wetherton represented the state, and Charles Brooks represented Appellant. R. 1. The jury found Appellant was a sexually violent predator under the SVPA. R. 153, lines 16-25; R. 166. Judge McMahon ordered Appellant be committed to the Department of Mental Health for long-term control, care, and treatment. R. 157, lines 2-12; R. 167.

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

ARGUMENT

The trial judge erred by allowing the state to impeach the court's expert with irrelevant and unfairly prejudicial information that a person in an unrelated case she had recommended be released was arrested for rape where there was no evidence the person had been convicted.

Relevant facts

It was undisputed that Appellant had been convicted of criminal sexual conduct with a minor in the first degree on April 7, 2003 and lewd act on a child on April 24, 2003. Thus, it was undisputed that Appellant had been convicted of a sexually violent offense as defined by the SVPA.[1] Appellant was sentenced to twelve years' imprisonment concerning the lewd act conviction and to twenty years' imprisonment, which was suspended upon the service of twelve years' imprisonment and three years of probation for the criminal sexual conduct conviction. The sentences were to be served concurrently. The state's expert testified regarding the allegations surrounding those convictions as revealed in the incident reports. R. 41, line 19 – R. 46, line 11; R. 158; R. 159. Additionally, over objection, the state's expert testified about the details of an allegation made against Appellant that did not result in a conviction. R. 47, line 8 – R. 48, line 21. The state's expert even testified about Appellant's prior non-sexual convictions. R. 48, line 22 – R. 49, line 9.

Thereafter, the state's expert opined that Appellant had a "pedophilic disorder, a non-exclusive type, sexually attracted to both." R. 65, lines 3-4. The state's expert described pedophilia as a mental abnormality relevant to a determination of whether a

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[1] See S.C. Code Ann. § 44-48-30 (2)(listing offenses defined as sexually violent offenses under the SVPA).

person is a sexually violent predator. R. 65, lines 5-8. Further, the state's expert opined that Appellant's pedophilia caused "him serious difficulty in controlling his behavior." R. 66, lines 3-5. She further believed that the diagnosis made "him likely to engage in acts of sexual violence if not confined in a facility." R. 67, lines 6-8. Finally, the state's expert opined that Appellant had "been convicted of a sexual[ly] violent offense," had "a mental abnormality or personality disorder that ma[de] him likely to engage in acts of sexual violence if not confined to the facility." R. 67, lines 14-17.[2] Dr. Gomez rendered this opinion despite being forced to admit that Appellant's risk factor was a three based on the testing she conducted indicating he was in the low to moderate risk group for re-offending. R. 53, lines 13-25.

The court-appointed expert, Dr. Marie Gale, had conducted more than 160 evaluations pursuant to the SVPA, in stark contrast to the state's expert, who had become "acquainted with this type of case" only two years before her testimony, had testified as an expert witness only twelve times, and testified as an expert in SVP cases only twice. R. 36, lines 3-23; R. 81, line 23 – R. 82, line 4. In fact, Dr. Gale's "full-time job" was to conduct evaluations pursuant to the SVPA. Dr. Gale, as an employee of the Department of Mental Health, was very familiar with the SVP program due to the Department's role as the administrator of the program pursuant to the statute. R. 110, line 15 – R. 111, line 7. Like the state's expert, Dr. Gale also diagnosed Appellant with pedophilic disorder, sexually attracted to females, not exclusive type. R. 85, lines 19-22. Based on Appellant's

[2] Cf. S.C. Code Ann. § 44-48-30(1) defining a sexually violent predator as a person who has been convicted of a sexually violent offense and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

performance on the Static 99r, Dr. Gale determined Appellant's risk assessment was a two, which placed him the low moderate risk category. R. 86, line 1 – R. 87, line 23. Based upon Dr. Gale's review of Appellant's background, the records, her interview of Appellant, and the relevant testing, Dr. Gale concluded that Appellant did not meet the criteria of a sexually violent predator. Appellant was not likely to reoffend. R. 96, lines 7-23. According to Dr. Gale, there was insufficient evidence to conclude that Appellant's abnormality made him likely to engage in acts of sexual violence in the future. R. 96, line 24 – R. 97, line 3.

On re-cross examination, the following exchange occurred between the state's attorney and Dr. Gale, the court- appointed expert:

> Q. Mr. Brooks said that you do a lot of these pre-commitment evaluations; is that correct?
>
> A. That's correct.
>
> Q. Have you ever gotten any of these ever wrong?
>
> A. I don't know.
>
> Q. Do you remember the case of Michael Thomas?
>
> A. No.
>
> Q. Okay.
>
> [The witness is handed a document]
>
> A. This was conducted, or completed, I guess in August of 2012, so I don't know that I can remember the case specifically.
>
> Q. Well, that's fine. Can you turn to the last page?
>
> A. Yes.
>
> Q. Did you sign that report?

A. Yes.

Q. Okay. And what is the last sentence of the report?

A. "As such it is my opinion that Michael Thomas does not meet criteria to be considered a sexually violent predator as defined by the SVP Act."

[The witness is handed a document]

Q. I'll let you see that, please. And for the record what was the date of the report that you authored?

A. August 9th of 2012.

Q. Okay. And what is the date of that warrant?

A. March 15, 2014.

Q. Okay.

R. 111, line 25 – R. 113, line 3. Thereafter, Appellant objected to the line of cross-examination: "Unless counsel has a conviction I would object to the relevancy." R. 113, lines 7-8. The state responded that the questions went "to the reliability of her reports. He very quickly reoffended after she authored that report." R. 113, lines 9-11. Judge McMahon overruled the objection. R. 113, lines 12-13. Thus, the cross-examination continued:

Q. And who is that warrant for?

A. Michael Darnell Thomas.

Q. Okay. And according to the allegations, isn't it argued that the defendant had raped the individual, that's why they got the warrant for him?

A. Yes.

Q. And doesn't the warrant also indicate that his DNA was a direct hit on CODIS, it was a match?

A. It says the defendant was identified by his DNA through CODIS, so yes.

R. 113, lines 15-24.

Although Judge McMahon sustained Appellant's objection to testimony regarding a news article, the state's attorney persisted in her line of questioning regarding an arrest warrant against an individual whose case was unrelated entirely to the proceedings against Appellant. R. 113, line 25 – R. 114, line 8.

> Q. Okay. But what is the offense he has been charged with that's on the warrant?
>
> A. Criminal sexual conduct in the first degree.
>
> Q. And again, the warrant was dated less than two years since you issued that report.
>
> A. Yes.
>
> Q. Okay. And based on your evaluation you felt that he did not meet the criteria as a sexually violent predator.
>
> A. Yes, apparently.
>
> Q. And based on the information you have another woman has been raped; is that correct?
>
> A. Excuse me?
>
> Q. And based on the information you have another woman has now been raped; is that correct?

R. 114, lines 9-22. Appellant objected to the last question because it called for a conclusion. The state argued the answer was based "on the information that's in front of her." Appellant noted that all the parties had was an arrest warrant. Thereafter, the judge sustained the objection. R. 114, line 23 – R. 115, line 4.

In addition to the court-appointed expert testifying in favor of Appellant not being committed under the SVPA, Appellant testified about his plans upon release, including

living with his sister, and performing automotive work in a machine shop. R. 117, lines 1-5; R. 118, lines 3-4. The owner of the machine shop, Everett Auten, testified that he had worked with Appellant previously and had a job waiting for Appellant upon his release. R. 128, lines 7-16.

In her closing argument, the state argued that if the jury did not find Appellant was a sexually violent predator and allowed him to be released, then Appellant was "going to hurt another kid." R. 136, lines 7-8. The state urged the jury to disbelieve the court-appointed expert's opinion because the expert "ha[d] been wrong before." R. 136, line 6. The state argued that Dr. Gale conducted only one test and that was the reason why the state sent the case to MUSC, which occurred only in "very, very serious" cases. R. 141, lines 23-24; R. 142, lines 11-13. The state capitalized on the jury's fear by telling the jurors that the ultimate question to decide was whether the jurors, as members of the community, were "really satisfied that a pedophile should be released out into this community." R. 135, line 19 – R. 136, line 3. While telling the jury she was not trying to instill fear, the state left the jury with this:

> You have a person who on more than one occasion who [*sic*] has sexually assaulted children. He takes no accountability to what he's done and he hasn't had sex offender treatment and he's refused it when it has been offered. He's going to go live in a house where people are going to allow him to be around children. You heard the testimony. What do you think is going to happen?

R. 142, lines 15-22.

Discussion

Generally, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would

be without the evidence. Rule 401, SCRE. However, even relevant evidence must "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. Thus, consideration of whether evidence is relevant and admissible requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two. The links among Rules 401, 402, and 403 are undeniable.

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States

Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Applying this analytical framework to the present case reveals that balancing of the low probative value of the impeachment evidence offered by the state, the extreme danger of unfair prejudice posed by the evidence necessitated the exclusion of the state's irrelevant line of cross-examination of the court-appointed expert regarding the arrest of an individual who was not the Appellant and whose case was completely unrelated to Appellant's proceedings. The starting point for determining the relevancy, probative value, and danger of unfair prejudice is with the ultimate issue before the jury.

In the present case, the jury was tasked with deciding whether Appellant was a sexually violent predator as that term is defined by South Carolina's statutory scheme. South Carolina defines a sexually violent predator as a person who has been convicted of a sexually violent offense and "suffers from a mental abnormality or personality disorder that

makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1). It was undisputed that Appellant had been convicted of a sexually violent offense. It was undisputed that Appellant suffered from pedophilia, a mental abnormality or personality disorder. The only dispute between Appellant and the state was whether his mental abnormality or personality disorder made him likely to engage in acts of sexual violence if not confined.

Evaluating the evidence offered by the state in this context demonstrates the low probative value of the evidence and the absolute irrelevance of the evidence to the ultimate issue in the case. Whether another individual had been arrested for a sex crime following a release had no bearing on whether Appellant was likely to engage in acts of sexual violence. Quite simply, the court-appointed expert's opinion regarding Michael Thomas several years prior to Appellant's trial and the arrest warrant issued for Thomas had no tendency to prove or disprove the ultimate issue in Appellant's case – whether *Appellant* was likely to engage in acts of sexual violence if not confined.

What the court-appointed expert opined regarding Thomas and the subsequent unsubstantiated allegations against Thomas had no tendency to make the existence of any fact of consequence in Appellant's case more or less probable. The state maintained the evidence shed light on the ability of the court-appointed expert to make a determination of whether a person was likely to re-offend. However, in light of the fact that the state could produce only an arrest warrant, not a conviction, the warrant for Thomas's arrest served no legitimate purpose. Certainly, the mere accusation against Thomas could not be used to show that Thomas had, in fact, re-offended. Further, the mere accusation against Thomas

could not be used to show that Appellant would re-offend. The state never challenged the qualifications of Dr. Gale; thus, the state's use of Dr. Gale's opinion in Thomas's case and the arrest warrant for Thomas was not a challenge to Dr. Gale's methodology or ability to conduct an examination pursuant to SVPA.

The danger of unfair prejudice inherent in the evidence is extreme. A trial under the SVPA is an emotionally charged environment due to the nature of the proceeding – an examination of an individual's past criminal sexual conduct and concern about whether the individual will re-offend if not confined. Perhaps no other trial could place greater emotional stress on a jury. Examining the danger of unfair prejudice of the state's line of cross-examining the court-appointed expert in the context of an SVPA trial evinces no doubt of the severe danger of unfair prejudice posed by the evidence.

The state impeached the court-appointed expert with evidence that an individual previously determined by the expert not to satisfy the criteria of the SVPA had been accused of re-offending by raping a woman. No doubt this evidence was calculated to play on the emotions of the jury and did in fact play on the emotions of the jury. The jury's greatest fear would be to release someone who re-offended. The state's cross-examination capitalized on the inherent fear of the proceedings and heightened the jury's fear by suggesting the expert had been wrong previously in her evaluation and the expert's error resulted in the rape of a woman. Further, the state capitalized on this fear in her closing argument when she argued the court-appointed expert had been wrong before resulting in the release of an individual who subsequently raped a woman.

The danger of unfair prejudice of the evidence was not merely the damage it had on Appellant's case; rather, the evidence encouraged the jury to render its verdict based upon

fear. Without question, fear is an improper basis for a jury verdict. Balancing the very low probative value offered by the evidence against the extremely high danger of unfair prejudice requires the exclusion of the state's line of cross-examination of the court-appointed expert. Accusations of sexual misconduct made against an individual unrelated to Appellant's case failed to have any tendency to make the existence of any fact of consequence in Appellant's case more or less probable. Simply put, the evidence was irrelevant to the ultimate issue before the jury. The evidence served only to heighten the jury's fear and encourage the jury to render a verdict based upon emotion – fear.

CONCLUSION

Appellant respectfully requests this Court reverse the order of the trial court committing him to the SVP program and remand for a new trial.

Respectfully submitted,

Susan B. Hackett

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Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of August, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

August 13, 2015

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IN THE MATTER OF THE CARE AND TREATMENT OF

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant 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, this 13th day of August, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.