STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

ORIGINAL

Honorable Carmen T. Mullen, Circuit Court Judge

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SEP 04 2019
SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF DAMEON MONTRELL BROWN,

APPELLANT

APPELLATE CASE NO 2018-001904

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial court err in allowing the State's expert witness to use what the judge described as the "loaded term" "psychopathy" to describe her diagnosis of appellant?

STATEMENT OF THE CASE

The Attorney General instituted indefinite confinement proceedings against appellant Dameon Montrell Brown pursuant to the sexually violent predator act and on October 15, 2018, appellant was tried before the Honorable Carmen T. Mullen and a jury. R. 1. James K. Falk represented appellant. R. 2. James G. Bogle, Jr. represented the Attorney General. R. 2. The jury found appellant met the definition of an SVP and Judge Mullen ordered him confined. R. 360-62. This appeal follows.

STANDARD OF REVIEW

The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); see also State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct.App.2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.").

ARGUMENT

In this sexually violent predator case, the trial court erred in allowing the State's expert witness to use what the judge described as the "loaded term" "psychopathy" to describe her diagnosis of appellant.

Prior to trial, appellant filed motions seeking to prohibit the State's expert from calling appellant a psychopath. R. 374. Appellant argued that using the term "psychopath" was prohibited because (1) the instrument used by Dr. Swan to use this term was not reliable, and (2) the term itself was unfairly prejudicial and not probative under Rule 403, SCRE. R. 68-71. Judge Mullen heard an extensive proffer before the trial from Dr. Swan regarding the admissibility of any mention of psychopathy. R. 71-131.

Dr. Swan used something called the Hare Psychopathy Checklist (PCL) which purportedly "assesses psychopathy." R. 76. She testified that it was "normed and standardized." R. 76. She admitted that psychopathy is not a psychological diagnosis, but claimed it helped describe appellant's risk to reoffend because it is a "supercharged version" of her diagnosis, antisocial personality disorder. R. 77.

Judge Mullen interrupted at the beginning of the proffer and asked Dr. Swan, "Is there any way to speak of it other than to call someone a term of psychopath?" R. 78. Dr. Swan boldly and flatly answered simply, "No." R. 78. The trial judge said, "There isn't?" and Dr. Swan replied, "There's not." R. 78. She told the court she could not "adequately convey what this person is without this term." R. 78. Instead, Dr. Swan later used highly specialized terms to adequately convey her clinical judgment when she said having psychopathy along with antisocial personality disorder and sexual deviance was "a double whammy." R. 81.

She testified that appellant was a psychopath because he scored a 34 on the PCL—four points over the cutoff. R. 95-96. Judge Mullen again interrupted the State's proffer and sought an answer as to why Dr. Swan needed to use "such a loaded term." R. 96-97. The judge compared the term "psychopath" to limitations on the admission of gang membership. R. 97-98. The State and Dr. Swan continued to insist that the term was necessary and Judge Mullen turned the questioning over to appellant's counsel. R. 97-98.

Appellant cross-examined Dr. Swan about the categories on the PCL and the subjective nature of scoring it. R. 102-113. One of the categories was "glibness/superficial charm." R. 102. Appellant got a score of one on this category because of his "macho presentation. R. 106. Another category was "stimulation/promptness to boredom." R. 107. Another was "criminal versatility." R. 108-09. Dr. Swan also found it important that when she asked appellant to rate himself on a scale from zero to ten and appellant gave himself a seven or eight, that was "a misperception" because of his criminal history. R. 119.

When asked what her error rate was on scoring the PCL, Dr. Swan said. "Well, there's no way to measure that." R. 116. When asked how the court could know her evaluation was accurate, Dr. Swan replied, "Well, you either accept my training or not."

Appellant correctly argued that testimony about psychopathy was inadmissible for two reasons. First, it was not sufficiently reliable to pass the gatekeeping rules for expert testimony under State v. White, 382, S.C. 265, 270, 676 S.E.2d 684, 686 (2009). Appellant also argued that the term psychopath was too prejudicial. The trial court ultimately ruled that Dr. Swan could testify about the PCL and found it reliable, but directed the State and Dr. Swan to limit its mention of the word psychopath before the jury. R. 131-32.

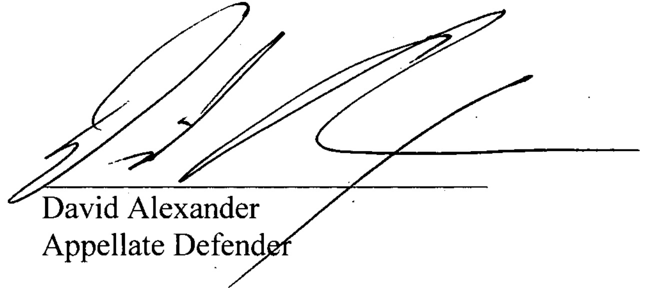
The trial court erred on both counts. Trial courts are required to establish whether: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact. Id. at 270, 676 S.E.2d at 686. The reliability of the proposed expert testimony is the central concern of Rule 702 admissibility. State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001).

As trial counsel argued, the PCL is comparable to the RATAC method found unscientific and subjective in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). Just like the forensic interviewer in Chavis, Dr. Swan could not tell the court her error rate. Also like Chavis, her quality control procedures were limited to following the PCL's protocols. "[E]vidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies." Id. at 108, 771 S.E.2d at 339. Dr. Swan had no error rate and the categories of the PCL, as demonstrated on cross-examination, are laughably subjective. The reliability requirement was not met and the court erred in allowing this testimony.

Furthermore, despite the court's recognition that "psychopath" was a "loaded" term, Dr. Swan and the attorney general used it before the jury. R. 215-223. Over objection and a motion for a mistrial, the court allowed Dr. Swan to testify that having psychopathy was a "supercharged version of antisocial personality disorder" and that individuals with psychopathy "are coldhearted and callous." The unfair prejudice from these terms far outweighed any probative value, especially as these conclusions were derived from unscientific methods. See State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) (describing proper Rul3 403 analysis); State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) (holding evidence designed to paint defendant as a pedophile was improper because of its prejudicial character). This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's confinement in the SVP facility and grant him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of September, 2019.

STATE OF SOUTH CAROLINA

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IN THE MATTER OF THE CARE AND
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APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dameon Montrell Brown states:

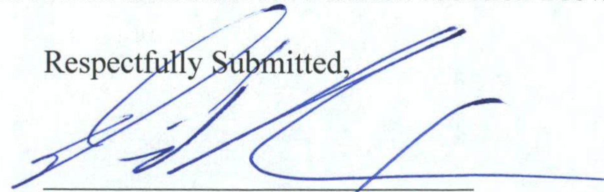
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Carmen T. Mullen, which was held on October 15 & 16, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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, He asks the Court to relieve him as counsel for Dameon Montrell Brown.

Respectfully Submitted,



David Alexander
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This 4th day of September, 2019.

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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 October 15-16, 2018
(2) Court's Exhibit No. 1 (Motion)
(3) Court's Exhibit No. 2 (Jury Note)
(4) State's Exhibit Nos. 1-3 (Sentencing Sheets and Indictments)

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

September 4, 2019

David Alexander
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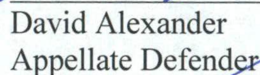
ATTORNEY FOR APPELLANT



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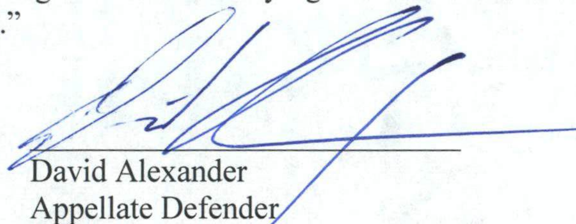
CERTIFICATE OF COUNSEL

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."

September 4, 2019.



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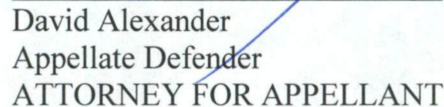
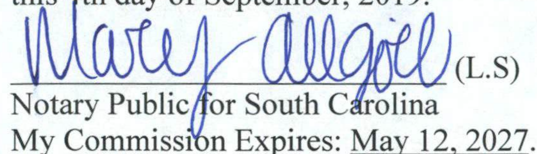
CERTIFICATE OF SERVICE

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 Dameon Montrell Brown, at 4546 Broad River Road, , Columbia, SC 29210, this 4th day of September, 2019.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 4th day of September, 2019.


(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.

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