STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable R. Lawton McIntosh, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF HARLIN A. BEARDEN,

RESPONDENT.

APPELLATE CASE NO. 2019-000752

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in overruling appellant's objection to hearsay testimony concerning appellant's alleged discipline problems while incarcerated?

STATEMENT OF THE CASE

Before appellant's release from confinement, the Attorney General sought his indefinite commitment pursuant to the SVP Act and on March 25, 2019, a trial was held in Greenwood County before the Honorable R. Lawton McIntosh and a jury. R. 1. James G. Bogle represented the State and Wade Coleman Lawrimore represented appellant. R. 1. The jury found appellant met the SVP definition and the court ordered him committed. R. 266, l. 5 – 268, l. 24. This appeal follows.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

ARGUMENT

The trial court erred in overruling appellant's objection to hearsay testimony concerning appellant's alleged discipline problems while incarcerated.

This sexually violent predator case involved competing opinions from expert witnesses concerning whether appellant should be committed. The first psychologist to evaluate appellant was Dr. Marie Gehle from the Department of Mental Health. R. 202, ll. 23 – 25. Dr. Gehle did not recommend commitment. R. 209, ll. 5 – 23. She found no "mental abnormality or personality disorder that's relevant to sexually violent offending." R. 209, ll. 5 – 23.

The State sought a second opinion from MUSC's "Sexual Behaviors Clinic and Lab." R. 106, ll. 16 – 20. R. 184, l. 8 – 185, l. 10. The Attorney General has a contract with MUSC to give second opinions. R. 184, l. 8 – 185, l. 10. MUSC charges the Attorney General $2,000 for a review of the file. R. 184, l. 8 – 185, l. 10. If the Attorney General then asks for a full evaluation, MUSC receives an additional $2,500. R. 184, l. 8 – 185, l. 10. Dr. Emily Gottfried performed the initial file review and determined that the extra $2,500 and a full evaluation were necessary. R. 184, l. 8 – 185, l. 10. She opined appellant was an SVP and recommended commitment. R. 177, l. 23 – 179, l. 22.

Dr. Gottfried testified that appellant suffered from exhibitionistic disorder, antisocial personality disorder, adjustment disorder, and cannabis disorder. R. 167, l. 4 – 170, l. 11. She did not diagnose appellant with pedophilia. R. 170, l. 17 – 171, l. 7. Her testing did not show that appellant was a "psychopath." R. 161, ll. 8 – 15. On cross-examination, she agreed that, generally speaking, exhibitionistic disorder does not lead to commission of a sexually violent offense as defined by the SVP Act. R. 195, ll. 3 – 8. R. 192, l. 19 – 193, l. 19.

The State sought admission through Dr. Gottfried of allegations of conduct by appellant while incarcerated to support her diagnosis of exhibitionism. R. 113, l. 10 – 117, l. 13. Appellant moved pretrial to prohibit introduction of unreliable prior bad acts and objected during the trial based on hearsay grounds. R. 36, l. 8 – 39, l. 3. R. 114, ll. 4 – 25. Judge McIntosh excused the jury and heard extensive argument and a proffer concerning the hearsay. R. 114, l. 4 – 131, l. 21.

Specifically, the Attorney General wanted to admit through Dr. Gottfried allegations of sexual misconduct by appellant while in the Greenwood jail and at SCDC, including exposing his penis to corrections officers and masturbating. R. 114, l. 4 – 131, l. 21. The Attorney General relied on Rule 703, SCRE, concerning the bases of experts' opinions for admissibility. R. 114, l. 4 – 131, l. 21. Appellant maintained the specifics of the conduct were hearsay and inadmissible under any exception. R. 114, l. 4 – 131, l. 21.

After hearing the proffer, the trial judge agreed that the specific testimony was hearsay because Dr. Gottfried only relied on jail and prison accounts. R. 129, ll. 16 – 24. Dr. Gottfried asked the judge for clarification of what she could say and Judge McIntosh told her that her specific instances of conduct would not be allowed. R. 130, ll. 9 – 19. Dr. Gottfried replied, "So no dates and no specific information?" R. 130, ll. 20 – 21. Judge McIntosh said, "You can do dates or you can do a time period, which is fine, but if you start giving specific instances of this conduct, then I think we have problems from the evidentiary standpoint." R. 130, ll. 22 – 25.

Dr. Gottfried then asked if she could give examples of the conduct. R. 131, ll. 1 – 2. The court said, "She could do it as a general what I'm looking for is these examples, did he have, yes, he did." R. 131, ll. 3 – 5. In an effort to mitigate the damage of the court's ruling allowing examples of conduct, appellant stated that he preferred to allow Dr. Gottfried to testify about the

allegations so that he could cross-examine the witness. R. 131, ll. 15 – 18. The court agreed, telling the Attorney General he had "carte blanche." R. 131, ll. 19 – 21.

When the jury returned, Dr. Gottfried told them appellant had gotten into trouble while in a Georgia prison "for masturbating in front of a female correctional officer on two occasions. R. 145, ll. 13 – 21. While at the Greenwood jail, she told the jury that there "were about six instances of where he was observed by female correctional staff masturbating or stroking his penis or being naked in his cell and asking them to come talk to him." R. 147, ll. 10 – 20. She also said that appellant "was observed with his penis out of the food port masturbating to a female correctional officer." R. 147, ll. 10 – 20.

The trial judge erred in allowing "examples" of hearsay instead of hearsay. Calling a hearsay allegation an "example" does not make it admissible. "Rule 703 of the South Carolina Rules of Evidence allows an expert giving an opinion to rely on facts and data that are not admitted into evidence or even admissible into evidence if they are of a type reasonably relied upon by experts in the particular field. Rule 703, SCRE. The rule does not, however, make hearsay automatically admissible simply because it was relied upon by the expert." State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013).

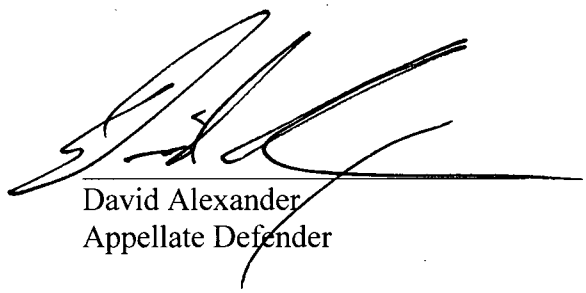
The Attorney General relied on In the Matter of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008) to argue that hearsay allegations are admissible if the expert states that she relies on them in making their conclusions. See Ettel at 562, 660 S.E.2d at 287 ("These offenses can include both convictions 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).

However, these cases were decided before 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."). Watson emphasizes the trial court's gatekeeping role and the reliability requirement. Appellant argued that the allegations were not reliable.

The trial judge initially recognized that Rule 703 is not a limitless exception to the hearsay rule that circumvents the reliability requirement in SVP cases. Unfortunately, the trial judge then erred in finding that examples of conduct were admissible. The admission of this lurid testimony was particularly prejudicial. Not only did the jury hear about offensive conduct, but it also caused appellant's witness, Dr. Gehle, to reverse herself on the stand and find appellant suffered from exhibitionistic disorder. R. 216, ll. 2 – 9. This Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, appellant's commitment should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of February, 2020.

STATE OF SOUTH CAROLINA

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IN THE MATTER OF THE CARE AND
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RESPONDENT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Harlin A. Bearden 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 R. Lawton McIntosh, which was held on March 25 - 27, 2019, 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 Harlin A. Bearden.

Respectfully Submitted,

This 5th day of February, 2020.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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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 March 25 and 27, 2019
(2) Court's Exhibit No. 4 (Respondent's Jury Charges)

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

February 5, 2020

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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."

February 5, 2020.

David Alexander
Appellate Defender

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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 have 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 Harlin A. Bearden, at Well Path, at 4546 Broad River Road, Columbia, SC 29210, this 5th day of February, 2020.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of February, 2020.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.