STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

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

APPELLANT.

APPELLATE CASE NO 2019-001058

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial court err when, after initially deciding to exclude evidence of an arrest for criminal sexual conduct that did not result in a conviction, it reversed course after hearing the State's expert testify that the manual for an actuarial table required her to give appellant a "point" for this arrest, thereby allowing the procedures of a psychological test to overrule the rules of evidence?

STATEMENT OF THE CASE

The State petitioned to have appellant committed under South Carolina's sexually violent predator statute and on June 24, 2019, a trial was held in Lancaster County before the Honorable Brian R. Gibbons and a jury. R. 1. Jim Bogle represented the State and Geoff Dunn represented appellant. R. 1. The jury found appellant met the definition of a sexually violent predator and Judge Gibbons ordered him committed. R. 152, l. 21 – 155, l. 7. 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." (citation omitted)).

ARGUMENT

In this sexually violent predator case, the trial court erred when, after initially deciding to exclude evidence of an arrest for criminal sexual conduct that did not result in a conviction, it reversed course after hearing the State's expert testify that the manual for an actuarial table required her to give appellant a "point" for this arrest, thereby allowing the procedures of a psychological test to overrule the rules of evidence.

Judge Gibbons agreed pre-trial that evidence regarding an arrest for a sexual offense that was not the subject of a conviction should not be admitted. R. 27, l. 20 – 28, l. 12. Appellant moved in limine to exclude the evidence of two convictions for carjacking and manslaughter because they lacked any evidence of a "finding that sex was involved." R. 22, l. 19 – 23, l. 24. Appellant argued evidence regarding these two convictions should not be admitted under Rule 403, SCRE, because they were "more prejudicial than probative." R. 22; l. 19 – 23, l. 24. The trial court disagreed and ruled that evidence of those two convictions was admissible. R. 27, ll. 10 – 18.

Appellant then followed his Rule 403 motion regarding the prior convictions with a motion regarding an arrest that was not the subject of a conviction. R. 27, l. 19 – 28, l. 1. The State argued that the same arguments it made concerning the admissibility of the convictions applied to an arrest, telling the court that a "pattern of conduct is what we're looking for here." R. 28, ll. 3 – 9. Judge Gibbons ruled, "I'm going to let the convictions come in, I'm not going to let arrests come in, so you win that one. Respondent's motion to exclude is granted on that." R. 28, ll. 10 – 12.

After hearing another motion, the court took a recess. R. 28, l. 13 – 29, l. 25. When court resumed, the State asked for a "clarification" of the ruling excluding the arrest. R. 30, ll. 1

– 9. The State explained that its expert, Dr. Marie Gehle, used an actuarial instrument called the Static 99R to help her assess appellant's recidivism risk. R. 30, ll. 1 – 24. The State said, "So I guess what I'm asking for, Your Honor, is it happened, he got arrested for it, it did get nolle prossed, but the book that tells her how to score the Static 99R says include that and she did." R. 30, ll. 11 – 24. Judge Gibbons asked how many points appellant would have without the arrest. R. 30, l. 25 – 31, l. 2. The State explained it reduced appellant's score from a "three" down to a "two" which "is what an average sex offender gets." R. 31, ll. 3 – 7. The court indicated it needed to hear a proffer from Dr. Gehle. R. 31, ll. 8 – 11.

Dr. Gehle explained that appellant was arrested in 1993 (over 25 years ago) for first-degree CSC "for an assault against a female forcing her to perform oral sex, and that resulted in one charge and no convictions." R. 35, ll. 8 – 11. She explained that the "manual" for the Static 99R had "a little table" that resulted in giving appellant a point for the charge that was nolle prossed in 1997. R. 35, ll. 8 – 16. R. 34, ll. 4 – 8.

After Dr. Gehle's proffer, the State's attorney argued that he was "kind of on the spot here" because her opinion was partly based on the Static 99R score and "by the rules of that instrument you have to include the 1993 CSC charge even though it didn't result in a conviction." R. 37, ll. 5 – 16. Appellant argued that it was unfair to penalize individuals "for behavior that they're not convicted of and they didn't take responsibility for." R. 37, l. 18 – 38, l. 5. Appellant already had multiple crimes about which the jury would hear and "hearing anything else bad about him is prejudicial." R. 37, l. 18 – 38, l. 5.

Reversing himself, the judge then ruled with the State. R. 38, ll. 6 – 25. The trial court stated he was the "gatekeeper of all evidence which comes in, but you know, when in doubt let it in." R. 38, ll. 6 – 25. Finding that things doctors use in their diagnosis were "all subjective

stuff," the court found the arrest more probative than prejudicial and ruled the State could use it. R. 38, ll. 6 – 25.

Appellant renewed his objection during Dr. Gehle's direct examination, stating, "I renew my objection on the '93 arrest," but the objection was overruled. R. 64, ll. 13 – 19. Dr. Gehle first told the jury that the arrest was for first-degree CSC and was nolle prossed four years later. R. 64, l. 13 – 65, l. 4. She stated looking at the charge was important for her diagnosis of antisocial personality disorder, but said when someone is not convicted she did not "take it as conduct that he absolutely committed." R. 65, ll. 12 – 22. She was "looking for a pattern." R. 65, ll. 10 – 11. Dr. Gehle then told the jury that the alleged victim was an adult female. R. 65, l. 23 – 66, l. 1.

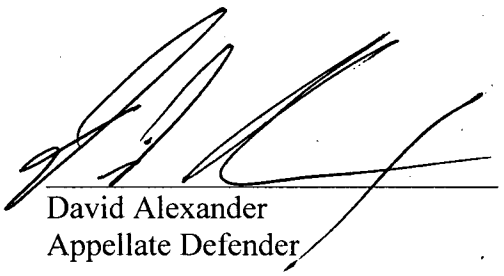
The trial judge erred in admitting evidence of this arrest under Rule 403, SCRE. Without a conviction or an admission by appellant, the arrest had almost no probative value. See Matter of Campbell, 427 S.C. 183, 193-94, 830 S.E.2d 14, 19-20 (2019). In Campbell, the Court recognized that an arrest warrant related to another sex offender evaluated by the expert "had very low probative value." Id. The Court emphasized how, using an "*arrest warrant alone*," the State claimed the expert had been wrong in her evaluation. Id. (emphasis in original). While here the arrest warrant was appellant's, Campbell correctly shows that arrests are not indicative of guilt and their probative value is negligible.

The trial judge agreed initially about the limited probative value of an arrest. The rules of a psychological instrument then were allowed to override the rules of evidence when the court reversed course and allowed the arrest after hearing about the Static 99R rulebook and its "little table."

Because of "the pattern" Dr. Gehle wanted to establish, the admission of this adult female victim was highly prejudicial. Of appellant's other four significant convictions, all of the women were also adult females. But all of that criminal activity occurred during a relatively short period of time during 2001-03. R. 68, l. 12 – 85, l. 7. The inadmissible CSC arrest from 1993 showed a "pattern" that extended over a much longer period of time. Appellant was over 60 years old and in poor health at the time of this trial, and but for this error, a jury could have reasonably concluded that he was unlikely to reoffend. R. 107, ll. 17 – 21. R. 108, ll. 5 – 22. This Court should reverse.

CONCLUSION

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



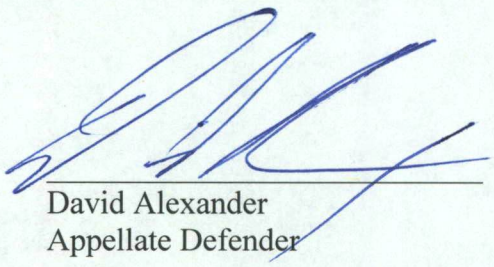
This 13th day of March, 2020.

David Alexander
Appellate Defender

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."



March 13, 2020.

David Alexander
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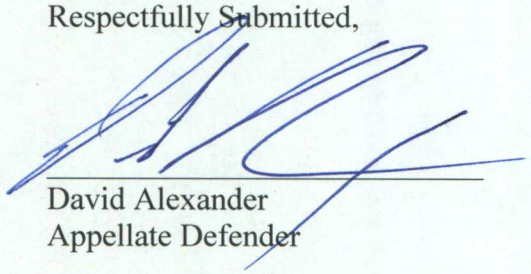
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Williams 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 Brian M. Gibbons, which was held on, 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 James Williams.

Respectfully Submitted,



This 13th day of March, 2020.

David Alexander
Appellate Defender

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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 June 24-25, 2019
(2) Hearing Transcript dated June 13, 2018
(3) State's Exhibit Nos. 1 and 2
(4) Defense Exhibit Nos 1 and 2

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

March 13, 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 James Williams, at Well Path, 4546 Broad River Road, Columbia, SC 29210, this 13th day of March, 2020.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of March, 2020.

(L.S)
Notary Public for South Carolina
My Commission Expires: 10/22/2024.