STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

Honorable Paul M. Burch, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF TIMOTHY SCHAEFER,

APPELLANT

APPELLATE CASE NO 2017-002320

FINAL BRIEF OF APPELLANT

TAYLOR D GILLIAM
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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Did the trial court err in failing to conduct the requisite analysis under Rule 401, SCRE, and Rule 403, SCRE, and admitting testimony regarding Appellant's prior and pending charges for alleged non-sexual conduct?

STATEMENT OF THE CASE

On February 11, 2016, the State filed a petition to involuntarily commit Appellant Timothy Wayne Schaefer pursuant to the South Carolina Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10, *et seq.* The immediate predicate conviction were guilty pleas for the following offenses: sexual exploitation of a minor, criminal solicitation of a minor, and contributing to the delinquency of a minor. R. 246 Appellant was sentenced to eight years' incarceration. Id.

On October 30 and 31, Timothy Wayne Schaefer appeared before the Honorable Paul M. Burch and a jury for a trial under the South Carolina Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10, *et seq.* Schaefer was represented by James K. Falk, and the State was represented by James G. Bogle, Jr. R. 1.[1]

The jury heard testimony from the court-appointed evaluator, Dr. Amy Swan, and Schaefer. The State introduced certified copies of indictment against Schaefer for sexual exploitation of a minor in the third degree and criminal solicitation of a minor. R. 87, ll. 2 – 11; R. 96, ll. 2 – 14; R. 374.

The jury concluded that Schaefer was a sexually violent predator. R. 236, l. 24 – 79, l. 8. Judge Burch ordered him be committed to the Department of Mental Health for his long-term control, care, and treatment. R. 239, ll. 6 – 9.

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

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[1] This matter, having taken place over the course of October 30 and 31, 2017, was transcribed by two different court reporters into two separate transcripts without continuing the pagination from the first day. For ease of reference, Trial Transcript I signifies October 30, 2017 and Trial Transcript II refers to October 31, 2017.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). 645, 653 (2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." In re Gonzalez, 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014) (internal quotations omitted).

ARGUMENT

The trial court erred in failing to conduct the requisite analysis under Rule 401, SCRE, and Rule 403, SCRE, and admitting testimony regarding Appellant's prior and pending charges for alleged non-sexual conduct.

Relevant facts

After the jury was selected but prior to opening statements, counsel for Appellant moved to suppress any mention by the State's only witness, Dr. Swan, of Appellant's prior charges. R. 12, l. 2 – R. 17, l. 21. Due to the uncertainty surrounding the disposition of the charges, counsel sought to prevent their mention. Id. There were at least five charges where the disposition was pending or the outcome was unknown. Id.

Trial counsel objected to the admission of testimony regarding Schaefer prior charges pending offenses, which included: 1997 "driving arrest," disposition unknown; 2001 check fraud charge, three counts, disposition unknown; 2005 forgery charges, disposition unknown; 2014 malicious injury to property, pending; and 2014 furnishing contraband, pending. R. 12, ll. 10 – 21. Counsel moved, under Rule 403 SCRE, to prevent Swan from remarking on these events:

> I think it is the Court's responsibility as the gatekeeping function as to control which type of evidence the jury is allowed to hear.
>
> I think under a … [SCRE] 403 type of analysis the Court has got to determine which information would be more prejudicial than probative. And then I think that charges that we don't know the disposition of, charges that are possibly pending, can't possibly be more probative than prejudicial.

R. 13, ll. 3 – 11. The State, in its response, indicated that Swan must be able go into "criminal convictions, criminal charges," because "the fact that you were arrested for something means you must have gotten into enough trouble, even though you weren't convicted of it, or even

charged where the disposition is unknown." R. 14, ll. 1 – 8. The State cited to three South Carolina opinions which can all be distinguished from the matter *sub judice*, In re the Care and Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), In re the Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451, (2003), and White v. State, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007). R. 14, l. 9 – 16, l. 11.

The State remarked that in assessing whether a person is a sexually violent predator, "prior **sexual history** is important." R. 15, ll. 17 – 21. (emphasis added). Therefore, some charges which may have been dropped "should have been [a] wake up call to [Appellant] to say, 'Hey, you can go to jail for this kind of stuff if you keep doing it,' and he kept doing it." R. 15, l. 22 – 31, l. 7. Therefore, the State alleged, offenses which were not sexual went to the diagnosis of antisocial personality disorder. Id.

Counsel for Appellant responded and noted the assumptions the State was making regarding charges which had an unknown disposition or were still pending:

> Without knowing some of the facts of this it's just too easy to conclude that there was something about this that should have created a wake up call.
>
> But my point is we don't have the dispositions on these charges. So I don't know if it was a case that [was *nolle prossed*] because … the witness didn't want to come forward or was [*nolle prossed*] because it wasn't a good case. I mean, **he's presupposing that he did do these things**.
>
> …
>
> I mean all [Swan is] going on is the fact that he was charged. And she [is] basing her relevance on the fact that he was charged **without knowing whether or not he was responsible for it in any way**, whether or not … the State couldn't make their case. … But without any proof … I think it's highly prejudicial.

R. 16, ll. 13 – 17, l. 17. (emphasis added). The trial judge overruled the objection. R. 17, ll. 18 – 21.

These prior and pending charges were not relevant to the jury's determination of whether Schaefer was "likely to engage in acts of **sexual violence** if not confined." S.C. Code Ann. § 44-48-30(1). (emphasis added). Further, even if they were relevant, there was substantial danger that the jury would find in favor of commitment based upon Schaefer's alleged general criminal propensity rather than based upon the requisite finding that Schaefer was a sexually violent predator beyond a reasonable doubt

Admittedly the SVP Act allows the experts evaluating the person under the Act to have "reasonable access to the person for the purpose of the examination, as well as access to all *relevant* medical, psychological, *criminal offense,* and disciplinary records and reports." S.C. Code Ann. § 44-48-90(C) (emphasis added). However, these offenses can include both convictions and offenses not resulting in convictions **if they are relevant to the determination of whether a person is a sexually violent predator.** See White v. State, 375 S.C. 1, 9, 649 S.E.2d 172, 176 (Ct. App. 2007) (emphasis added).

"Relevant evidence" is defined as "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; see also State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears."). "Evidence which is not relevant is not admissible." Rule 402, SCRE. "Evidence should be excluded if it is . . . irrelevant or unnecessary to substantiate the facts." State v. Stokes, 339 S.C. 154, 159, 528 S.E.2d 430, 432 (Ct. App. 2000) (quoting State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999). "Although relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE.

In In re the Care and Treatment of Corley, our Supreme Court noted that the SVP Act requires the State to prove beyond a reasonable doubt that a person is a sexually violent predator. 353 S.C. 202, 206, 577 S.E.2d 451, 453 (2003) (citing S.C. Code Ann. § 44-48-100). A sexually violent predator is defined as a person who: (a) has been convicted of a sexually violent offense; and (b) 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. Id. (citing S.C. Code Ann. § 44-48-30(1)(a) & (b)). The Court found that "past criminal history" is relevant to establishing section 44-48-30(1)(a) of the SVP Act. Id. The Court further found that "a person's dangerous propensities" are the focus of the SVP Act's requirement that the State prove that the person is "likely to engage in acts of sexual violence if not confined." Id. at 206-07, 577 S.E.2d at 453-54. The Court noted the SVP Act defines "[l]ikely to engage in acts of sexual violence" to mean "the person's propensity to commit acts of sexual violence **is of such a degree as to pose a menace to the health and safety of others**." Id. (citing S.C. Code Ann. § 44-48-30(9)) (emphasis added).

In Corley, the defendant was convicted in March 1993 of assault and battery of a high and aggravated nature (ABHAN) and sentenced to ten years. Then, in August 1993, he pled guilty to criminal sexual conduct (CSC) in the second degree and was sentenced to 14 years, concurrent. Id. at 204, 577 S.E.2d at 452. Corley argued that the underlying details of the offenses should not have been admitted due to his willingness to stipulate to the convictions. Id. However, the State used the details surrounding the conviction "to prove that appellant's likelihood to re-offend was based in part upon the fact that his previous offenses were similar to

one another." Id. at 207, 577 S.E.2d at 454. The State's expert testified that the similarity between the two offenses, including the age, race, and gender of the victims, "evinces a pattern of behavior which in turn indicates the person would be at an increased risk to commit future offenses." Id.

In White v. State, this Court considered whether the trial court properly excluded White's past unadjudicated sexual offenses at the SVP probable cause hearing. 375 S.C. 1, 7, 649 S.E.2d 172, 175 (Ct. App. 2007). This Court determined that the circuit court erred, and that it could have considered "any prior relevant offenses, which may be contained in the State's petition," which included both convictions and offenses not resulting in convictions. Id. at 8-9, 649 S.E.2d at 175-76. Instructive to this Court's analysis was the Kansas Supreme Court's decision in Matter of Hay, 953 P.2d 666, 677 (Kan. 1998), in which the court stated: "In assessing whether an individual is a sexually violent predator, *prior sexual history* is highly probative of his or her propensity for future violence." Id. at 9, 649 S.E.2d at 176 (emphasis added). Though finding that White's criminal sexual offenses not resulting in convictions were directly relevant to the circuit court's probable cause determination, this Court noted that its holding was "**not stating past convictions and prior offenses not resulting in convictions that have no bearing on whether a person is a sexually violent predator should be admissible.**" Id. at 10 n.3, 649 S.E.2d at 176-77 n.3. (emphasis added). Thus, White by implication suggests they are irrelevant.

The State pointed to In re the Care and Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), in support of its position that Schaefer's prior charges for nonsexual offenses were admissible. In Ettel, the trial court admitted testimony regarding three prior sexual offenses that Ettel admitted to during his SVP evaluation, but which did not result in convictions. 377

S.C. at 560-61, 660 S.E.2d at 286-87. It also admitted testimony regarding Ettel's prior murder conviction, which was alleged to involve an attempted sexual assault:

> In 1962, Ettel was convicted in Michigan of murdering his girlfriend's mother with a pair of sewing scissors. Dr. Crawford testified the arresting officers told her the mother's shirt was pulled above the mother's head, and Ettel allegedly told the officers he tried to sexually assault the mother before he killed the mother. No incident report was available for Dr. Crawford to substantiate the officers' testimony.

Id. at 560 n.2, 660 S.E.2d at 287 n.2.

This Court found that the trial court properly admitted the testimony regarding both the prior sexual offenses and the prior murder conviction, all of which "were relevant because Dr. Crawford relied on them 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 563, 660 S.E.2d at 288. This Court further found that the possibility of unfair prejudice did not substantially outweigh the probative value of the testimony. Id.

Here again, the nature of the prior charges and convictions in Ettel are distinguishable. In Ettel, the details of both the charges and convictions revealed that they were all at least potentially sexual in nature. Here, there was no testimony regarding any sexual motivation behind Schaefer's driving under the influence, fraudulent checks, possession of marijuana, forgery, driving too fast for conditions, shoplifting, or other charges which had an unknown disposition or were pending. R. 105, l. 15 – 108, l. 19. On cross-examination, Dr. Swan admitted that Appellant's prior arrest for driving under the influence was actually for driving under suspension. R. 165, l. 6 – 166, l. 5.

The expert in Ettel did testify that regardless of whether the murder was a sexual crime, "it goes to [Ettel's] propensity to commit further violent crimes." Id. at 563, 660 S.E.2d at 288. However, both White and the SVP Act itself make clear the concern at an SVP trial is with the

likelihood to commit **sexual** violence, not just violence generally. See 375 S.C. at 9, 649 S.E.2d at 176 (finding that there was no dispute that White's prior convictions satisfied the first prong of S.C. Code Ann. § 44-48-30(1) such that "the determinate factor is whether he suffers from a mental abnormality such that he is likely to commit acts of **sexual** violence in the future" (emphasis added)); S.C. Code Ann. § 44-48-30(9) (defining "[l]ikely to engage in acts of **sexual** violence" as "the person's propensity to commit acts of **sexual** violence is of such a degree as to pose a menace to the health and safety of others." (emphasis added)).

In the present case, Dr. Swan testified that a person's nonsexual charges are necessary to her evaluation because they allegedly increase "your risk for another crime apart from the sexual disorder." R. 107, ll. 16 – 24. Dr. Swan suggested that "[r]epeatedly performing acts that are grounds for arrest" is the definition of a criminal lifestyle in the Diagnostic and Statistical Manual 5. R. 108, l. 20 – 109, l. 11. Regarding Schaefer specifically, she agreed that these offenses were not the sole basis of her opinion, but found them "significant." R. 105, l. 10 – 106, l. 18.

She considered Schaefer's alleged criminal history in her determination that he had a pattern of antisocial traits, which was based on her findings that Schaefer lived a "criminal lifestyle." She also implied that Appellant was unwise and reiterated the State's theory that these arrests should have been "a wake up call." R. 83, l. 20 – 84, l. 9. Dr. Swan repeatedly opined as to what Appellant's thought process should have been and suggested some sort of negative animus surrounding nonsexual arrests to which the disposition was unknown.

She even went as far as to suggest that being arrested for a *sexual* crime increases an individual's risk for another sexual crime, thereby seemingly ignoring the possibility that charges could be dropped or a person found innocent. R. 82, l. 23 – 83, l. 19. It is unclear whether being arrested for a nonsexual crime increases an individual's risk to commit a sexual crime.

Ultimately, Dr. Swan diagnosed Schaefer with other specified personality disorder with anti-social features even though she previously, repeatedly, mentioned the definition of antisocial personality disorder in order to discuss his prior nonsexual arrests. R. 126, l. 18 – 127, l. 22. Notably, Dr. Swan's reliance on the criteria for antisocial personality disorder was flawed: she cited to the requirement that an individual repeatedly perform acts that are grounds for arrest. R. 127 l. 18 – 128, l. 7. The DSM 5, revised April 2012, does not contain such criteria.

A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy. In re Taft, 413 S.C. 16, 23, 774 S.E.2d 462, 466 (2015).

An expert's opinion must be reliable. Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); see also Rule 702, SCRE. Expert testimony is "also subject to attack for relevancy and prejudice." State v. Council, 335 S.C. 1, 19-20, 515 S.E.2d 508, 517-18 (1999). Trial judges must determine whether Rule 403, SCRE, bars admission of the expert's testimony. Id. at 20, 515 S.E.2d at 518; State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999) ("Even if admissible under Rule 703, [SCRE or Rule 705, [SCRE,] however, the determination of whether an expert may testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE.").

Rule 702, SCRE, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), our Supreme Court held that "[w]hen admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and

the underlying science is reliable." "Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In State v. White, our Supreme Court made clear that "[t]he familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." 382 S.C. at 273, 676 S.E.2d at 688. Thus, the Court ruled that both scientific and nonscientific expert testimony must satisfy Rule 702, SCRE, both in terms of expert qualifications and reliability of the subject matter. Id. However, the Court recognized that "the foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach" and did not provide a "formulaic approach" to be followed in determining the reliability of non-scientific expert testimony. Id. at 274, 676 S.E.2d at 688-89.

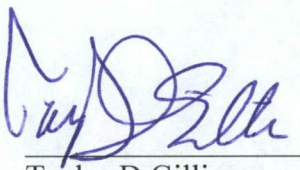
In Jamison v. Morris, 385 S.C. 215, 219, 684 S.E.2d 168, 170-71 (2009), our Supreme Court reversed a civil verdict of negligence against one of the co-defendants, MiniMart, finding that the trial court erroneously admitted expert testimony predicated on unreliable evidence. Minimart was alleged to have sold alcohol to the underage driver of a vehicle that was in a single-car accident that rendered the passenger, Louis Jamison, a quadriplegic. 385 S.C. at 219, 684 S.E.2d at 170. The trial judge allowed the State's expert to give testimony of the driver's blood alcohol level at the time of the crash based upon a SLED test that was unreliable due to the absence of a chain of custody. Id. at 226-29, 684 S.E.2d at 173-75. The Jamison Court ruled that "an expert cannot testify to an opinion predicated on an unreliable test." Id. at 228, 684 S.E.2d at175.

Rule 703, SCRE, provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." It certainly cannot be reasonable for an expert to rely upon erroneous and incomplete information in forming his opinions or inferences.

Therefore, the trial court erred when it failed to engage in the requisite analysis pursuant to Rule 401, SCRE and Rule 403, SCRE, and admitted testimony regarding Schaefer's charges to which there was no known disposition and that were nonsexual in nature. Appellant was committed based upon possibilities and the unknown. Schaefer is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, this Court should reverse Appellant Timothy Wayne Schaefer's commitment.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of March, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 29, 2019

Taylor D. Gilliam
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589