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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF ROBERT POWELL,

APPELLANT

APPELLATE CASE NO. 2018-000426

FINAL BRIEF OF APPELLANT

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1.

Whether the trial court erred in admitting evidence of other bad acts in appellant's SVP trial where the other bad acts were not sexual in nature and did not result in a conviction, and where the bad acts were not proved by clear and convincing evidence?

2.

Whether the trial court erred in appellant's SVP trial when it held the probative value of appellant's prior convictions was not outweighed by the danger of unfair prejudice, where the offenses were neither sexual nor violent?

STATEMENT OF THE CASE

Appellant was tried before the Honorable Carmen T. Mullen and a jury pursuant to the Sexually Violent Predator Act from February 26 – 28, 2018, in Beaufort County. R. 1. James Falk represented appellant and James Bogle represented the state. R. 1. The jury found appellant was a sexually violent predator. R. 529, ll. 17-21. The court signed an order of commitment. R. 541.

This appeal follows.

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)). "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.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

"The admissibility of an expert's testimony is within the trial judge's sound discretion, whose decision will not be reversed absent an abuse of discretion." *In re Manigo*, 389 S.C. 96, 106, 697 S.E.2d 629, 633–34 (Ct. App. 2010), *aff'd,* 398 S.C. 149, 728 S.E.2d 32 (2012).

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, . . . determine whether the proffered evidence is relevant." *State v. Clasby,* 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009); *see State v. Wallace,* 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *See State v. Gillian,* 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); *see also* Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .").

STATEMENT OF FACTS

In 2006, appellant pleaded guilty to three counts of first degree criminal sexual conduct with a minor and admitted to molesting three children, aged three to eleven. R. 327, l. 14 – 329, l. 12; R. 335, ll. 7-10. He was sentenced to twelve years imprisonment. R. 329, ll. 13-19. After completing his sentence, appellant was tried pursuant to the Sexually Violent Predator (SVP) Act from February 26 – 28, 2018.

Penile plethysmograph testing

Dr. Marie Gehle, the chief psychologist at SCDMH, spent "a hundred percent of [her] time doing pre-commitment evaluations under the Sexually Violent Predator Act." R. 402, ll. 6-9; R. 403, l. 25 – 404, l. 3. She was qualified as an expert in forensic psychology without objection. R. 405, ll. 1-4. At the time of appellant's trial, Gehle estimated she had performed approximately one hundred and forty-five pre-commitment SVP evaluations and eighty-five annual review SVP evaluations. R. 404, ll. 6-14.

Dr. Gehle was not retained by appellant, but was appointed by the court to evaluate him as a "neutral party." R. 405, ll. 18-25. Dr. Gehle opined that appellant **did not** meet the definition of a sexually violent predator. R. 424, l. 25 – 425, l. 4. Thereafter, the state sought a second opinion from Dr. Emily Gottfried, an assistant professor at MUSC who had performed a total of fourteen SVP evaluations. R. 214, ll. 15-19; R. 216, ll. 11-14; R. 374, ll. 9-15.

Both doctors agreed that appellant has pedophilic disorder.[1] R. 358, ll. 1-4; R. 408, ll. 12-13. Both doctors agreed that the "Static 99-R" was "the most accurate approach to estimate and predict who is going to reoffend sexually," and that appellant's score on that measure placed him at a "below average risk" to reoffend in the next five years. R. 408, l. 22 – 401, l. 12; R. 428, ll.

[1] Both doctors also diagnosed appellant with severe stimulant use disorder based on past cocaine use. R. 358, ll. 6-10; R. 431, l. 22 – 432, l. 1.

18-19; R. 429, ll. 2-3; R. 348, ll. 13-14; R. 350, ll. 3-13; R. 375, ll. 14-22. However, Gottfried's opinion was that appellant met "the definition for being a sexually violent predator." R. 360, ll. 20-25. In a pretrial hearing, Gottfried said her opinion was based in part on his penile plethysmograph (PPG) test, which measures blood flow to the penis as evidence of sexual arousal. R. 130, ll. 16-20. Without the PPG test, Gottfried said she would not have opined whether appellant met the SVP criteria. R. 235, l. 24 – 236, l. 4; R. 226, ll. 5-11.

After hearing extensive testimony on the matter, the trial judge found the PPG test inadmissible because the court was unsure the test was reliable. R. 286, ll. 16-18. The court explained, "[T]his has not been subject to peer review. I mean it hasn't . . . it is not accepted—generally accepted in the scientific community or in the psychological community. It's just not." R. 291, l. 25 – 292, l. 1; R. 285, ll. 21-25.

Despite the PPG test being ruled inadmissible because its reliability was not established, and despite Gottfried's testimony that she would not have opined that appellant was a sexually violent predator absent the PPG test, Gottfried still told the jury her opinion that appellant met the definition of a sexually violent predator. R. 360, ll. 20-25.

Other bad acts and prior convictions

It appears appellant was convicted of a number of misdemeanors from the 1980's and 1990's, specifically: DUI, unlawful carrying of a pistol, and driving left of a center lane in 1985; criminal domestic violence in 1988; and simple possession of marijuana in 1995. R. 539; R. 264, l. 24 – 265, l. 11. Appellant was also charged in 1979 for grand larceny of a motor vehicle and in 1991 for fraudulent check, although these charges were nolle prossed. R. 539; R. 261, l. 20 – 262. l. 2; R. 324, l. 22 – 325, l. 4.

Counsel filed a motion in limine to exclude evidence of appellant's prior criminal history and arguments were heard. R. 539; R. 261, l. 20 – 262. l. 2; R. 264, l. 24 – 265, l. 11. Counsel argued evidence of these prior offenses was not relevant, was "more prejudicial than probative," and asked the court as "gatekeeper" to exclude it. R. 261, ll. 20-24; R. 265, ll. 8-11.

The court heard from Gottfried about how the prior acts might be relevant. Gottfried said: "I guess at least two of the measures that I use, you have to count up the number of charges and the convictions that they had, criminal versatility, so you look at, like, the different kinds of crime that they committed because all of that is related to psychopathy or future reoffending or dangerousness." R. 267, ll. 1-6. "So it factors into my opinion that way." R. 267, ll. 6-7. "Past behavior kind of predicts—it's the best predictor of future behavior." R. 267, ll. 9-10.

According to Gottfried, the "only thing [she] found significant" about appellant's nolle prossed charges was in scoring a "psychopathy checklist." R. 378, l. 19 – 379, l. 12. However, Gottfried testified that appellant "is not a psychopath," and counsel observed, "If she's talking about that's relevant on the psychopathy measure, he wasn't a psychopath." R. 348, ll. 8-10; R. 262, l. 24 – 263, l. 1.

Gottfried said she measured "criminal versatility. So the different types of crime. People might be more risky or might have more personality characteristics if they commit lots of different crimes versus, like, just one kind of crime." R. 321, ll. 13-17. "I look just to see, like, just following the rules in the community in general." R. 321, ll. 19-20. Gottfried said she considered criminal charges that did not result in convictions when forming her opinion. R. 322, ll. 10-14. "[E]specially in terms of past sexual offenses. And then so if they reoffend, you can also see, like, how violent it would be if they have a lot of violent offenses." R. 267, ll. 12-15.

When asked if she would consider any of appellant's prior offenses violent, Gottfried replied: "Probably just the domestic violence one." R. 267, ll. 16-18.

However, according to Gottfried, she did not know anything about the underlying facts of the nonsexual offenses. R. 379, ll. 13-15. Gottfried said she did not have access to the police reports due to their staleness. R. 379, ll. 15-16. Gottfried related what she knew of the charges was: "**Just from the NCICs and then whatever he remembered when I asked him about them**." R. 268, ll. 13-14 (emphasis added). "**So not a lot because they were pretty old**." R. 268, l. 16 (emphasis added). Gottfried said of the offenses that she did not know "whether or not they were particularly violent." R. 268, ll. 17-19. Gottfried did not say what she learned about the offenses from appellant, and she never said that appellant told her he committed the nonsexual offenses.

There was no testimony that appellant's nonsexual prior criminal history was used by Gottfried to diagnose appellant with a mental abnormality or personality disorder. Here, the diagnosis relevant to SVP status was pedophilia, and appellant's nonsexual prior criminal history was not used by Gottfried in forming her opinion that appellant had pedophilia. R. 358, l. 16 – 360, l. 12.

The only testimony regarding diagnostic use of appellant's nonsexual, nonviolent criminal history was that it was used in scoring a psychopathy checklist, but neither doctor diagnosed appellant with psychopathy.

Appellant's counsel argued appellant's nonsexual, nonviolent, remote criminal history should be excluded from the trial because the purpose of the trial was to "find out the risk to reoffend crimes of sexual violence in the future. So past performance versus predicting a future performance here I think can be prejudicial here because we're not worried about whether he's

going to steal a car or write a bad check." R. 269, ll. 7-12 (emphasis added). Counsel objected when the state attempted to introduce appellant's nonsexual criminal history. R. 322, l. 16 – 323, l. 9. The state argued that "the *Edel* [sic] case" . . . "talked about stuff that were not resulting in convictions, including stuff that wasn't even sexual. It all came in." R. 323, ll. 10-15. The court ruled appellant's entire prior criminal history was admissible "because [Gottfried] said it was the basis for her opinion," and found the evidence relevant and more probative than prejudicial. R. 323, ll. 16-17; R. 324, ll. 1-2.

Gottfried then told the jury: "In 1979, he had been charged with grand larceny of a motor vehicle, and that was—that finding—or the outcome of that was continued without finding. Let's see. And then in 1985, he was charged with driving under the influence, driving left of center, and unlawful carrying of pistol." R. 324, l. 22 – 325, l. 1. "In 1988, he was charged with criminal domestic violence. In 1991, he was charged with having a fraudulent check. In 1995, he was charged with simple possession of marijuana." R. 325, ll. 2-4.

After deliberating for three hours, the jury returned a verdict finding appellant to be a sexually violent predator. R. 526, l. 16; R. 528, l. 25 – 529, l. 4; R. 529, ll. 17-21.

This appeal follows.

ARGUMENT

1.

The trial court erred in admitting evidence of other bad acts in appellant's SVP trial where the other bad acts were not sexual in nature and did not result in a conviction, and where the bad acts were not proved by clear and convincing evidence.

The state did not prove appellant's 1979 grand larceny of a motor vehicle or 1991 fraudulent check—charges that were dismissed by nolle prosequi—by clear and convincing evidence. Their admission was error.

The state made no offer of proof regarding appellant's nolle prossed other bad acts[2] and the acts are not sexual in nature. Evidence of other bad acts that are not subject of a conviction must be proved by "clear and convincing evidence" to be admissible. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).

Gottfried said that: "Past behavior kind of predicts—it's the best predictor of future behavior." R. 267, ll. 9-10. Rule 404(b), SCRE provides in relevant part that: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." South Carolina has a long tradition of disallowing bad act evidence to prove criminal propensity. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

A trial pursuant to the SVP Act is a civil proceeding rather than a criminal case. *Care & Treatment of Canupp*, 380 S.C. 611, 618, 671 S.E.2d 614, 617 (Ct. App. 2008). However, the state is required to prove other bad acts by clear and convincing evidence in a civil case, and it

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[2] When the terms "other bad acts" and "prior bad acts" are used herein, appellant is referring to prior nonsexual offenses in his criminal history. Appellant does not dispute the admissibility of three convictions for criminal sexual conduct with a minor in the first degree—which provided the requisite prior conviction for a sexually violent offense under the SVP Act.

did not do so here. In *Citizens Bank of Darlington v. McDonald*, 202 S.C. 244, 24 S.E.2d 369 (1943), the South Carolina Supreme Court recognized that *Lyle* is applicable in civil cases. In the civil case of *Judy v. Judy*, 384 S.C. 634, 642, 682 S.E.2d 836, 840 (Ct. App. 2009), this Court explained, "Where the other bad acts are not the subject of conviction, they must be proven by clear and convincing evidence."

Here, the state did not show by clear and convincing evidence that appellant committed the nolle prossed offenses. Gottfried said she knew very little about the charges, and there was no evidence that appellant admitted to her that he committed the nolle prossed offenses. According to Gottfried, she did not know anything about the underlying facts of the offenses. R. 379, ll. 13-15.

Appellant's counsel argued, "Everything is relevant at some point of view, but as the gatekeeper, you've got to decide—what's going to be more prejudicial." R. 265, ll. 8-11. "[T]he trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010). *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (gatekeeping obligation of trial court applies to all expert testimony).

"The trial court must examine the substance of the testimony to determine if it is **reliable**, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge." *Watson*, 389 S.C. at 449, 699 S.E.2d at 177 (emphasis added). Here, the trial court erred in admitting other bad act evidence against appellant, since the state did not present clear and convincing evidence of the bad acts—rendering the evidence unreliable.

This unreliable nonsexual character evidence was not relevant to whether appellant had a "propensity to commit acts of sexual violence [ ] of such a degree as to pose a menace to the health and safety of others" that qualified him as SVP pursuant to S.C. Code Ann. § 44-48-30(9).

Moreover, any probative value of these other bad acts was substantially outweighed by the danger of unfair prejudice. Counsel moved that the court exclude appellant's other bad acts as "more prejudicial than probative." R. 261, l. 21 – 262, l. 2. Rule 403, SCRE, provides: "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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Evidence is unfairly prejudicial if it has an "undue tendency to suggest decision on an improper basis, such as an emotional one." *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). Counsel correctly noted that the other bad act evidence was unfairly prejudicial because the jury was not there to determine "whether or not [appellant is] going to steal a car or write a bad check." R. 269, ll. 9-12.

In *Care and Treatment of Ettel*, 377 S.C. 558, 562, 660 S.E.2d 285, 288 (Ct. App. 2008), this Court held Ettel's prior **sexually-related** offenses were properly admitted in his SVP trial, even though they did not result in convictions, where Ettel **admitted** to the evaluating psychiatrist that he committed the sexual offenses. This Court also held Ettel's prior murder conviction admissible where the murder, which appeared to be sexually motivated, was "relevant due to the crime's level of violence." *Id.* at 563, 660 S.E.2d at 288.

This Court found the possibility of unfair prejudice did not outweigh the probative value of the prior bad acts since the psychiatrist used the information to diagnose Ettel with paraphilia

and render an opinion about Ettel's ability to control his behavior and his propensity to commit further violent crimes. *Id.*

Here, Gottfried said she considered criminal history relevant to "psychopathy or future reoffending or dangerousness." R. 267, ll. 1-6. Yet, unlike the expert in *Ettel*, Dr. Gottfried did not use appellant's prior bad acts to diagnose appellant—she said he was "not a psychopath." R. 348, ll. 8-10. Although appellant was diagnosed with pedophilic disorder, the nonsexual prior bad acts were not used in making this diagnosis. Here, unlike in *Ettel*, **there was no testimony that appellant's nonsexual, nonviolent, remote criminal history was used to diagnose him with the mental abnormality or personality disorder requisite for SVP commitment**.

The trial court's reliance on *Ettel* in appellant's case was misplaced, since appellant's prior bad acts were not sexual in nature and were not used in forming any expert opinion that appellant had the underlying mental abnormality or personality disorder that qualified him as SVP pursuant to S.C. Code Ann. § 44-48-30.

The court erred when it admitted evidence that appellant was charged with grand larceny of a motor vehicle in 1979 and a fraudulent check in 1991—charges that were dismissed by nolle prosequi—since they were not proven by clear and convincing evidence. Moreover, any probative value of these nonsexual, nonviolent, and remote bad acts was substantially outweighed by the danger of unfair prejudice and confusion of the issues, since the offenses were neither sexual nor violent. Rule 403, SCRE.

2.

The trial court erred when it held the probative value of appellant's prior convictions was not outweighed by the danger of unfair prejudice, where the offenses were neither sexual nor violent.

The state admitted evidence appellant had prior convictions: in 1985 for DUI, unlawful carrying of a pistol, and driving left of a center lane; in 1998 for CDV; and in 1995 for simple possession of marijuana. "The acid test of admissibility is the logical relevancy of the other crimes." *State v. Cutro*, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Appellant incorporates the prior argument from Issue 1, above.

Gottfried admitted she did not know anything about the underlying facts of the nonsexual offenses. R. 379, ll. 13-15. There was no showing the nonsexual convictions involved physical violence. Appellant's misdemeanor convictions in the 1980's and 1990's were neither sexual nor violent. Although the CDV could have involved violence, no information about the nature of the offense was provided to the court.

Despite Gottfried's assertion: "Past behavior kind of predicts—it's the best predictor of future behavior," Rule 404, SCRE and *Lyle*[3] prohibit bad act evidence to show criminal propensity. The admission of these nonsexual bad acts was improper character evidence.

As discussed in Issue 1, above, the prior bad act evidence here was not used to diagnose appellant with the requisite mental abnormality or personality disorder, such as in *Ettel*, 377 S.C. at 563, 660 S.E.2d at 288. In *Ettel*, all of the offenses were sexual in nature except for the murder, which was violent, unlike the offenses in the case at hand. Gottfried did not use this information to form her diagnosis that appellant has pedophilic disorder.

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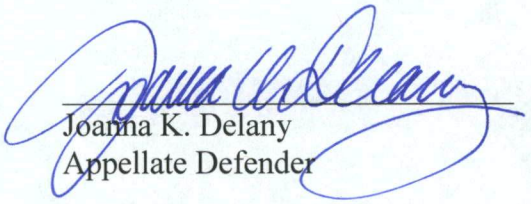
[3] *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

Appellant submits it was improper for the jury to consider acts as minor as crossing the center line in 1985 when it decided whether to commit him as a sexually violent predator in 2018.

The trial court's admission of nonsexual prior bad act evidence against appellant confused the issues as to whether the jury should commit appellant because he had committed nonsexual offenses in the past and unfairly prejudiced appellant by appealing for a verdict on an improper basis. Rule 403, SCRE.

CONCLUSION

Based on the foregoing arguments, this Court should reverse appellant's commitment and remand this case for a new trial.



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This 18th day of June, 2019.

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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, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 18, 2019

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