

6

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2013-CP-02-01005
Appellate Case No. 2018-000527

In the Matter of the Care and Treatment of:

Richard D. Ridley..... Appellant

BRIEF OF APPELLANT

RECEIVED
JUL 11 2019
SC Court of Appeals

AIKEN & HIGHTOWER, PA

Annie Bea Hightower
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: bea@aikenandhightower.com
ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2013-CP-02-01005
Appellate Case No. 2018-000527

In the Matter of the Care and Treatment of:

Richard D. Ridley..... Appellant

BRIEF OF APPELLANT

AIKEN & HIGHTOWER, PA

Annie Bea Hightower
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: bea@aikenandhightower.com
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Issue on Appeal.....1

Statement of the Case/Facts.....1

Standard of Review.....2

Arguments

 I. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT APPELLANT SUFFERED FROM OTHER SPECIFIED PARAPHILIC DISORDER, NON-CONSENT OR BIASTOPHILIA WHEN THAT DIAGNOSIS IS SCIENTIFICALLY UNRELIABLE.....2

 A. The reliability standard for admissibility of scientific evidence.....2

 B. Publications and peer-reviewed studies concerning the relevant diagnosis conclude that the diagnosis is scientifically unreliable.....3

 1. DSM-5.....3

 2. The peer-reviewed literature.....4

 C. The cases decided on the admissibility of the diagnosis of other specified paraphilic disorder, non-consent, or biastophilia persuasively conclude that the diagnosis is scientifically unreliable.....6

Conclusion.....7

TABLE OF AUTHORITIES

CASES

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).....2,3

State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2000).....2

State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).....3

State v. Jason C., 26 N.Y.S.3d 423 (2016).....6,7

Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).....6

State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).....2

State v. Kareem M., 36 N.Y.S.3d 410.....6,7

STATUTES

S.C. Code §§ 44-48-19 et seq......1

COURT RULES

Rule 702 SCRE.....2

STATEMENT OF ISSUE ON APPEAL

- I. **DID THE TRIAL COURT ERR IN ADMITTING TESTIMONY THAT APPELLANT SUFFERED FROM OTHER SPECIFIED PARAPHILIC DISORDER, NON- CONSENT OR BIASTOPHILIA WHEN THAT DIAGNOSIS IS SCIENTIFICALLY UNRELIABLE?**

STATEMENT OF THE CASE/FACTS

This is a case arising under the Sexually Violent Predator Act (SVPA), S.C. Code §§ 44-48-10 et seq. The Appellant, Richard Ridley (Ridley) is civilly committed under the SVPA. Ridley filed a Petition for Release, and ultimately the issue of whether he was entitled to be release under the SVPA was tried on February 26 and 27 of 2018. Prior to the trial, Ridley filed a Motion in Limine seeking a ruling precluding the State from introducing evidence that he suffered from other specified paraphilic disorder, non-consent or biastophilia on the grounds that that diagnosis was scientifically unreliable. (Motion in Limine, R. pp. 373-466). The trial court denied the Motion in Limine, and the state was permitted to present evidence of other specified paraphilic disorder, non-consent or biastophilia. (R. pp. 35-56 and pp. 84-225). Ridley contends that this was error.

At the trial, the State was required to prove, inter alia, that Ridley suffered from a mental abnormality or personality disorder beyond a reasonable doubt. The State's expert, Gordon Brown, PhD (Brown), testified that Ridley suffered from the mental abnormality of other specified paraphilic disorder, non-consent or biastophilia and the personality disorder of anti-social personality disorder with narcissistic traits. (R. p. 119) The Verdict Form used at the trial merely asked the jury to return a general verdict on whether the State had met its burden. (R. P. 491) In other words, the Verdict Form (R. P. 4910 did not ask the jury to return special verdict findings on mental abnormality as opposed to personality disorder. The trial court's error in admitting the evidence of other specified paraphilic disorder, non-consent prejudiced Ridley because it permitted

the jury to sustain the State's case on the strength of evidence of the scientifically unreliable diagnosis of other specified paraphilic disorder, non-consent or biastophilia.

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.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2000). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law” Douglas, 369 S.C. at 429-430, 632 S.E.2d at 848.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT APPELLANT SUFFERED FROM OTHER SPECIFIED PARAPHILIC DISORDER, NON-CONSENT OR BIASTOPHILIA WHEN THAT DIAGNOSIS IS SCIENTIFICALLY UNRELIABLE.

A. The reliability standard for admissibility of scientific evidence.

“When 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.” State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 516 (1999). In assessing the reliability of scientific evidence, the trial court must consider “the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.” State v. Jones, 273 S.C. 723, 731, 259 S.E. 2d 120, 124 (1979). In applying the Jones standard, the trial court must look at several factors including:

- (1) the publications and peer review of the technique;
- (2) prior application of the method to the type of evidence involved in the case;
- (3) the quality control procedures used to ensure reliability;
- (4) the consistency of the method with recognized scientific laws and procedures.

Council, 335 S.C. at 19, 515 S.E.2d at 518; citing, State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

B. The publications and peer-reviewed studies concerning the relevant diagnosis conclude that the diagnosis is scientifically unreliable.

1. DSM-5

DSM-5 is a remarkable feat of assembling and compiling a representation of those psychological disorders that are generally accepted by the psychiatric community. “After World War II, DSM evolved through four major editions into a diagnostic classification system for psychiatrists, other physicians, and other mental health professionals that describe the essential features of the full range of mental disorders.” (DSM-5 at page 6, R. pp. 382-383) Also see the section in the Introduction of the DSM-5 at page 6 on the DSM-5 Revision Process (R. pp. 382-383).

In 1999, the APA launched an evaluation of the strengths and weaknesses of DSM based on emerging research that did not support the boundaries established for some mental disorders. This effort was coordinated with the World Health Organization (WHO) Division of Mental Health the World Psychiatric Association (WPA) and the National Institute of Mental Health (NIMH) in the form of several conferences, the proceedings of which were published in a 2002 monograph entitled A Research Agenda for the DSM-5. Thereafter, the task force of 28 members was approved in 2007, and appointments of more 130 workgroup members were approved in 2008. More than 400 additional workgroup advisors with no voting authority were also approved to participate in the process. An intensive 6-year process involved conducting literature reviews and secondary analyses, publishing research reports in scientific journals, developing draft diagnostic criteria, posting preliminary drafts on the DSM-5 website for public comment, presenting preliminary findings at professional meetings, performing field trials, and revising criteria and text. (DSM-5 at 6-7; App. pp. 1 and 2)

Through this rigorous process, the relevant scientific community of psychiatrists, psychologists, other physicians, and other mental health professionals rejected other specified paraphilic disorder, non-consent or biastophilia as a valid mental health diagnosis. (R. p. 443).

Ridley's counsel cross-examined Brown on the specific issue of whether other specified paraphilic disorder, non-consent or biastophilia was rejected by the committees and compilers that produced DSM-5. Brown engaged in significant circumlocution, but he was finally forced to admit that the diagnosis had been rejected by the expert committees and compilers that produced DSM-5. (R. pp. 175-183).

2. The peer-reviewed literature.

A review of the peer-reviewed literature shows that the diagnosis of other specified paraphilic disorder, non-consent or biastophilia is unreliable as having no reliable scientific basis. Summaries of the literature appear below:

"DSM-5 and Paraphilic Disorder" (First)

This article outlines issues which arose in adopting DSM-5's paraphilia section. The author notes that unlike other DSM sections, paraphilias are primarily diagnosed in forensic settings. There were three particularly contested DSM-5 paraphilia proposals: to add PCD¹ and a new named paraphilia called "Hypersexual Disorder" and to broaden the pedophilia diagnosis to include pubescent as well as prepubescent children. None of these proposals were adopted. The DSM-4 and 4-TR, according to the author had a "forensically significant editing error ... this error, a misplaced or, allow the diagnosis of a paraphilia to be based entirely on the presence of criminal sexual behavior, sidestepping the requirement that the behavior be a manifestation of a deviant sexual arousal pattern." (R. p. 388) The DSM-5 now generally has the deviant sexual arousal pattern as its centerpiece and places behaviors and fantasies in subsidiary roles.

Dr. First asserts the OSPD category is "intended to be used for presentations that do not meet the criteria for any specific DSM-5 disorder; for presentations of uncertain etiology with

¹ Other specified paraphilic disorder, non-consent is sometimes referred to as PCD or paraphilic coercive disorder.

respect to whether the condition is substance induced, due to another medical condition, or primary; and for presentations where there is insufficient information to make a more specific diagnosis.” (R. p. 391) “By virtue of their residual and often idiosyncratic nature cases diagnosed as [OSPD] ... [including PCD] are, by definition, outside what is generally accepted by the field and thus should be used in forensic contexts only with great caution.” (R. p. 392).

“Commentary: Inventing Diagnosis for Civil Commitment of Rapists” (Zander)

[This article was written prior to the adoption of the DSM-5 and thus in part analyzes the NOS category under the DSM-4 and 4-TR]. Non-consent is not a diagnosis under the “International Statistical Classification of Diseases and Related Health Problems” or “ICD 10.” (R. p. 397) Attempts to provide a PCD diagnosis and DSM-3- TR from 1983 to 1986 resulted in “vigorous opposition” from multiple organizations. (R. p. 398) It was understood by the 1980’s that rape “is a violent assault motivated by the rapist’s desire for power and domination rather than by sexual arousal.” (R. p. 398) The APA board rejected the proposal in 1986 by vote of 10 to 4. (R. p. 398) Two new proposals were included at that time in the DSM Appendix as conditions warranting further study, but the non-consent diagnosis was not. (R. p. 399)

The DSM-4-TR assigned “V-codes” applicable to sexual abuse involving “sexual coercion rape.” V-codes do not describe a mental disorder but rather problems which are “a focus of clinical attention.” (R. p. 399) (citations omitted) This is further evidence the DSM did not intend PCD to be diagnosed in the “NOS” category. While the vague standards of the NOS category may be appropriate in clinical settings that category should not be used in forensic settings because NOS diagnoses are “ad hoc inventions of individual diagnosticians. (R. p. 401) The non-consent diagnosis is not generally accepted in the field because “it is based on a construct that was deliberately rejected as unsupported by research in the behavioral sciences when it was considered

for inclusion in the manual of diagnosis that is based on professional consensus” (R. p.. 402) The author asserts that psychologists who use the non-consent diagnosis may be in violation of APA ethical standards because the diagnosis is not supported by established scientific and professional knowledge. (R. pp. 401-402) Some men may rape because of a paraphilia but more research needs to be done to allow the non-consent diagnosis to be used in forensic settings.

“Paraphilia NOS, Nonconsent, Not Ready for the Courtroom (Frances and First)

This article states that the “DSM-5 rejection of paraphilia coercive disorder as an official category was necessary because the rationale and the supporting evidence were so thin.” (R. p. 412) The article also states that “there is no research to guide how criteria set for paraphilia coercive disorder should be written and whether it could ever be reliably diagnosed.” (R. p. 412). “There was little interest (and very limited research) in the psychiatric status of rape until it became a convenient way to subject rapists to involuntary psychiatric commitment after their prison sentences had been served.” (R. p. 413). “Paraphilia NOS, non-consent, is not a legitimate mental disorder diagnosis and seems more an excuse for keeping dangerous sex offenders locked up.” (R. p. 413).

C. The cases decided on the admissibility of the diagnosis of other specified paraphilic disorder, non-consent or biastophilia persuasively conclude that the diagnosis is scientifically unreliable.

In 2016, two Supreme Court Justices in New York in separate lengthy opinions excluded evidence of diagnoses of other specified paraphilic disorder, non-consent or biastophilia in SVP cases. State v. Jason C., 26 N.Y.S.3d 423 (2016) (App. pp. 34-48) and State v. Kareem M., 36 N.Y.S.3d 410 (2016) (App. pp. 49-85) While both cases discussed the admissibility of the evidence under the Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923) criteria of general acceptance in the

scientific community, which is different from South Carolina's reliability standard, the analysis in these cases supports a finding of unreliability under South Carolina's reliability standard.

In Jason C., The New York Supreme Court, Kings County based its conclusion that the other specified paraphilic disorder, non-consent was inadmissible on several observations that go directly to the reliability of the science underlying this diagnosis. First, the court observed that there is no clear definition or criteria for this disorder. (R. p. 412). Second, the court observed that the diagnosis cannot be reliably distinguished from other motivations for rape such as anti-sociality or sexual sadism. (R.. p. 423) Third, the psychological studies of the diagnosis do not reflect a wide, significant, well-rounded body of research that supports the validity of the diagnosis. (R. p. 425) Fourth, the diagnosis has been repeatedly rejected for inclusion in the DSM. (R. pp. 428-429)

In Kareem M., the New York Supreme Court, New York County also based its conclusion excluding evidence of this disorder on points that support a finding of unreliability of the underlying science. This court also makes the points that this diagnosis was proposed for inclusion in the DSM and was rejected five times (R. p. 443) and that there are no studies indicating that the diagnosis is predictive of future behavior. (R. p. 443). The court also found that there had been no causal studies of why rape offenders offend and there have been no "field trials" that have examined how the disorder is diagnosed in practice. (R. p. 443). Finally, the court observed that rape has been historically considered a crime not a mental disorder. (R. p. 443)

CONCLUSION

For the foregoing reasons this Court should reverse and remand for a new trial with all evidence of other specified paraphilic disorder, non-consent or biastophilia excluded from evidence in the new trial.

Respectfully Submitted,

AIKEN & HIGHTOWER, PA

BY: *A. Beatty*

A. Bea Hightower

2231 Devine Street, Suite 201

Columbia, SC 29205

Cell: (803) 269-6591

Office: (803) 799-5205

ATTORNEYS FOR APPELLANT

Columbia, SC
July 11, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2013-CP-02-01005
Appellate Case No. 2018-000527


In the Matter of the Care and Treatment of:

Richard D. Ridley..... Appellant

CERTIFICATE RULE 211(b) SCACR

The undersigned counsel for the Appellant certifies that the within Reply Brief of Appellant complies with Rule 211 (b) SCACR .

Respectfully Submitted,



Annie Bea Hightower
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: bea@aikenandhightower.com
ATTORNEYS FOR APPELLANT

Columbia, SC
July 11, 2019

RECEIVED
JUL 11 2019
SC Court of Appeals