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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF
VINCE NEAL WAY,

PETITIONER/RESPONDENT

V.

THE STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2011-199686

BRIEF OF PETITIONER

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ISSUES PRESENTED

1. Whether the Court of Appeals correctly affirmed the trial court in allowing the state to question Way regarding his retained expert.

2. Whether the Court of Appeals correctly ruled that the error of the state in arguing to the jury that it could infer that the absence of Way's expert meant that his testimony would have been negative did not rise to the level of reversible error.

STATEMENT

In April 1993, petitioner appeared before the Honorable C. Victor Pyle , Jr., and entered a guilty plea to committing a lewd act upon a child. Judge Pyle sentenced Way to ten years suspended to the service of eighteen months and five years probation. In May 1997, Way appeared before the Honorable John C. Hayes, III, and entered a guilty plea to committing a lewd act upon a child. Judge Hayes sentenced him to fifteen years.

In 2007, prior to his release from prison, he was referred to the Multi-Disciplinary Team which determined that probable cause existed to believe that he was a sexually violent predator.

A psychiatric evaluation was ordered by the trial court to be completed by Dr. Donna Schwartz-Watts, forensic psychiatrist. Dr. Schwartz-Watts determined that Way suffered from a mental abnormality that predisposed him to be likely to commit sexually violent offenses which posed a menace to the health and safety of others.

On February 2 – 3, 2009, Way proceeded to trial before the Honorable Deadra L. Jefferson and a jury to determine if he were a sexually violent predator. Way was represented by Alex Apostolou, and the state was represented by James Bogle, Assistant Attorney General. The jury found that Way was a sexually violent predator according to S.C. Code Section 44-48-30.

On February 3, 2009, Judge Jefferson signed the order committing Way to the Department of Mental Health for long term control, care and treatment. Way's attorney filed a notice of appeal. The Court of Appeals affirmed Way's commitment on June 8, 2011, and filed a substituted opinion on August 24, 2011. In the Matter of the Care and Treatment of Vincent N. Way, Op. No. 2011-UP-268 (filed June 8, 2011, Withdrawn and Refiled August 24, 2011). App. 1 – 6. Way's appellate attorney filed a petition for rehearing on June 23, 2011. App. 7 – 15. The Court of Appeals issued an Order on August 24, 2011 denying Way's petition for rehearing. App. 17. A petition for writ of

certiorari to the Court of Appeals was filed by Way and the State. On December 20, 2012, the Supreme Court granted certiorari on Questions II and III for Way, and granted the state's petition for writ of certiorari. This brief of petitioner follows.

ARGUMENT

I.

The Court of Appeals erred in affirming the trial court in allowing the state to question Way regarding his retained expert.

Vince Way was charged with touching inappropriately his thirteen year old niece who was spending the night in the home of Way and his wife. Way was about 28 year old at the time. The girl said he fondled her while she slept on the sofa by putting his hand inside her underwear. He was charged with committing a lewd act on a child. ROA. 13, ll. 21 – 25; ROA. 15, ll. 1 – 22.

In 1995, Way met a thirteen year old girl at a boat dock; gave her marijuana and then had sexual intercourse with her. He pled guilty in 1997 to lewd act on a child. ROA. 16, ll. 20 -25; ROA. 17, ll. 1 – 4. In that case, Way was in a relationship with the girl who said she had feelings for him, and cared for him. The girl said Way would stop when she said no. ROA. 47, ll. 8 – 25.

These two convictions constituted the qualifying convictions required by the Sexually Violent Predator Act found at S.C. Code Section 44-48-10 through 40. ROA. 17, ll. 5 – 11.

State's expert at the SVP trial, Dr. Schwartz-Watts, also considered a third incident in which Way was originally charged with criminal sexual conduct (CSC) with a thirteen year old girl but he pled guilty to contributing to the delinquency of a minor. ROA. 23, ll. 10 – 19. The incident happened in 1995 when Way allowed two girls, ages fifteen and thirteen, to spend the night at his home because they were runaways. ROA. 22, ll. 2 – 20; ROA. 27, ll. 2 – 12.

Dr. Schwartz-Watts stated that Way had a very complicated history as he was in a severe car accident in 1994 and had suffered a closed head injury. As a result, he has amnesia. He had no memory of events prior to 1994. He did not know his parents. ROA. 29, ll. 25; ROA. 30, ll. 1 – 18.

Dr. Schwartz-Watts had neuropsychological testing performed to determine if he had brain damage. ROA. 30, ll. 29 – 25. The testing indicated that his amnesia was real and that he was not faking, and that he had high average intelligence. ROA. 31, ll. 1 – 24.

Dr. Schwartz-Watts diagnosed Way as having a mental abnormality under the SVP Act that made him likely to re-offend in a manner that would put thirteen year old girls at risk. ROA. 38, ll. 1 – 25. She diagnosed him as having a sexual disorder, not otherwise specified, with a second diagnosis of amnesia. She testified that she had never seen a case like his. His sexual diagnosis meant that he had shown very poor judgment in his choice of sexual partners and sexual activity that had caused him "severe dysfunction." ROA. 35, ll. 9 – 25; ROA. 36, ll. 1 – 25; ROA. 37. ll. 1 – 3.

Way had asked for sex offender treatment while he was incarcerated and had received the first phase. The records indicated that he had asked to be moved up to the next phase. ROA. 28, ll. 17 – 25; ROA. 29, ll. 1 - 10. Dr. Schwartz-Watts declined to say where he should be treated but said he needed treatment. ROA. 39, 14 – 18. She said Way was a good candidate for outpatient treatment if "there were legal provisions that ordered him to do that." If there were a way to monitor the treatment, she would have recommended outpatient treatment for him instead of the SVP Program if he could have been on probation or parole. ROA. 40, ll. 7 – 25; ROA. 41, ll. 1 – 20.

In a pretrial motion, defense counsel asked the court to prohibit the state from mentioning at any point during the trial any second mental evaluation that Way may or may not have had. He argued that the state has the burden of proof and not the defendant. The state should not be able to mention any expert the defense may have had. ROA.6, ll. 4 – 25; ROA.7, ll. 1 – 2.

The state argued that they knew there was a court order providing that an independent expert evaluate Way. State's attorney said he should be able to ask Way when he testified if he had seen an expert and if the expert was at the trial. He argued that there was case law providing that there

was a "presumption" the absent witness would have testified adverse to the party who retained him. The judge said that in a civil case, an attorney was not allowed to talk about experts that have been consulted that were not being called as a witness. ROA.7, ll. 2 – 25. The judge declined to rule until she heard the case. ROA.8, ll. 1 – 7.

Just before Way testified, defense counsel renewed the motion to exclude any testimony about a second doctor or second evaluation that may have been consulted by the defense; who wrote no report; and who was not testifying. ROA.62, ll. 16 – 25; ROA.63, ll.1.

The state argued that defense received an order from the court to pay for Way to see Dr. Martin. Defense counsel said Way was sent to see Dr. Martin, but Dr. Martin did not provide any results of that visit. ROA.63, ll. 2 – 25.

The judge held that obtaining an independent expert as provided by the statute paid for by the state was different from retaining an expert under the civil rules which was more like an attorney/client privilege and more protected. Defense counsel argued that it was still attorney work product where he spoke to the doctor and decided his input was not necessary. ROA.64, ll. 2 – 25.

The judge said that the rules concern experts who are consulted but not called as witnesses. The statute provided for the independent evaluation of a defendant as a matter of right which was paid for by the state. The judge stated: "Our Supreme Court has been very clear that when a rule and statute conflict, the statute has supremacy, or it supersedes the rule." ROA.65, ll. 1 – 25.

Defense counsel argued that it was prejudicial to let the jury know about Dr. Martin because he had no idea what Dr. Martin's determination was, because Dr. Martin did not produce a report. The judge then said that "you can always comment about a witness that's not called." She continued to explain that it was done everyday in civil and criminal contexts because the

presumption was that the witness had something to say that was not beneficial to the party. ROA.65, ll. 19 – 25; ROA.66, ll. 1 – 25.

The state argued that Section 44-48-90 of the SVP statute provided that if an indigent person wanted an expert of his own choosing, then the court determined if it were necessary. If so, then the court must assist the person in obtaining the expert, and the court must approve the payment for services. ROA.68, ll. 4 – 24.

Defense counsel said he was relying on Rule 26 (b)(4)(B), of the South Carolina Rules of Civil Procedure which provides that a party was not required to disclose nor produce an expert who was only consulted informally or consulted and not retained. ROA.69, ll. 4 – 25; ROA.70, ll. 1 – 25.

The judge said the rule did not apply because the expert was retained as provided by the statute. The expert was not simply consulted informally, and the statute did not provide for an informal consultation. She said that the statute clearly provided for the retention of an expert. She said she was bound by the language of the statute, and this statute was silent as to whether it was admissible or not. Her opinion was that if the legislature wanted a prohibition, they would have added it. ROA.71, ll. 1 – 25; ROA.72, ll. 1 – 25; ROA.73, ll. 1 – 25; ROA.74, ll. 1 – 25.

She ruled that the state could ask Way if he was evaluated by a second doctor according to the statute and whether a report was generated. That was all the state could ask because any conversations defense counsel may have had with the doctor and Way's conversation with the doctor were privileged. ROA.75, ll. 1 – 25.

During his cross examination of Way, the state asked if Way had been transported to see Dr. Martin to be evaluated for this proceeding. Defense counsel objected and the judge overruled the objection. ROA.78, ll. 21 – 25; ROA.79, ll. 1 – 25.

S.C. Code Section 44-48-90 provides in part:

> In the case of an indigent person who would like an expert of his own choosing, the court must determine whether the services are necessary. If the court determines that the services are necessary and the expert's requested compensation for the services is reasonable, the court must assist the person in obtaining the expert to perform an examination or participate in the trial on the person's behalf.

The language of the statute was that the court would "assist the person in obtaining the expert to perform an examination or participate in the trial on the person's behalf." In reviewing the strict language of the statute, the Legislature wrote that the court would "**assist**" the person, and the court was only helping the person to obtain the expert for this occasion. Then the Legislature wrote that the expert would participate in the trial on the person's behalf. If the expert was not going to participate "on the person's behalf," then the person did not have to call the expert as a witness.

The state in Way's case could have called Dr. Martin as a witness as well. In State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009), the Supreme Court held that the state's subpoenaing the defendant's non-testifying consultative expert to testify on its behalf did not violate work product doctrine and did not violate attorney/client privilege, as state did not attempt to elicit any confidential communications between expert and defendant. Here, Dr. Martin was just as available to the state to call as a witness as he was to Way.

The Court of Appeals held that the trial court did not err in allowing the state to question Way regarding his retained expert since the trial court limited the state to questions relevant to the Rules of Evidence. App. 4. The Court of Appeals misapprehended this issue because Way was prejudiced when the judge allowed the state to question Way about his expert, Dr. Tom Martin. Way was prejudiced for following the language of the statute when the judge allowed the state to question Way about Dr. Martin.

In Estes v. Grav, 319 S.C. 551, 462 S.E.2d 561 (Ct. App. 1995), the Court of Appeals cited Rule 26(b)(4)(B), SCRCP as providing "that a party must show exceptional circumstances to discover facts known or opinions held by an expert retained or employed by the opposing party in anticipation of litigation, but who is not expected to testify

In following the reasoning of the Court of Appeals that the Rules of Evidence govern, Rule 403 prohibits relevant evidence from being admitted if its prejudicial value outweighs the probative. When the Court of Appeals ruled on Issue Two that the trial court erred in allowing the state to argue in its closing that the jury could infer that the absent expert's testimony would have been adverse to Way, then the inference is that it would have been prejudicial for the state to question Way about talking to an expert.

The trial judge's reasoning that since the statute was silent on the admission of evidence concerning an independent expert consulted by the person, that the Legislature would have included a prohibition was wide of the mark. Dr. Martin was not under the control of Way, in the manner of a child or employee.

ARGUMENT

II

The Court of Appeals correctly ruled that the state was not entitled to inform the jury during closing argument that it could infer the absence of Way's expert would have been adverse to Way, but the Court of Appeals erred in ruling that it was not reversible error.

After Way's testimony and before closing arguments, the state's attorney inquired if he could comment that an evaluation was done and that Dr. Martin's absence suggests that his testimony would be adverse to Way. The judge said he could always argue absent witnesses. Defense counsel argued that it was not established through testimony that the evaluation was tied to the SVP Act. The judge told the state they could argue within the evidence. ROA.83, ll. 12 – 25; ROA.84, ll. 1 – 25.

During his closing argument, the state argued to the jury that Dr. Martin was not present at the trial after he had seen Way. The state said the question for the jury was if Dr. Martin's testimony would be adverse to Way. ROA.92, ll. 8 – 19.

The Court of Appeals held that it was improper for the state to imply a negative inference regarding the absence of Way's expert witness, but the error did not rise to the level of reversible error. App. 5. The Court of Appeals was correct in holding that it was error for the trial court to allow the state to argue to the jury that it could infer that the absence of the expert meant that his testimony would have been negative to Way. However, the Court erred in holding that this did not rise to the level of reversible error because this was prejudicial to Way, and the state could have called Dr. Martin to testify as a witness.

The Court of Appeals cited the case of Davis v. Sparks, 235 S.C. 326, 111 S.E.2d 545 (1959), which held that the rule that if a party fails to call a witness he knows of on a material issue,

and the jury can draw in inference that the witness is adverse, usually applies when the uncalled witness is an agent, employee, relation or associate of the party failing to call him.

The expert consulted or retained by Way was not an associate, employee or relation of Way. Way did not have control over the expert. In Duckworth v. First National Bank, 254 S.C. 563, 176 S.E.2d 297 (1970), the Supreme Court held that if the party knows of an available witness on a material issue and such witness is within his control and if without satisfactory explanation he fails to call him, the jury may draw an inference that the testimony of the witness would not have been favorable to such party, and such inference is especially applicable where the relationship of employer-employee exists between the parties. The Court also held that if an inference is based upon the absence of a possible witness, it must appear that the witness is in "control" of the party and available.

The Supreme Court held in State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011), a harmless error analysis is contextual and specific to the circumstances of the case. In citing State v. Reeves, 301 S.C. 191, 193-194, 391 S.E.2d 241, 243 (1990), the Court wrote that "no definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case; error is harmless when it could not have reasonably affected the result of the trial.

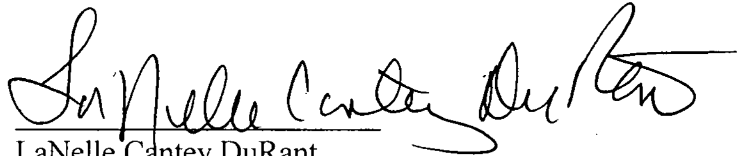
The error was not harmless because there is a reasonable probability that the jury may not have found Way to be a sexually violent predator if they had not known that Way's own expert would not testify in his behalf. This was prejudicial to Way because it made Way look bad to the jury.

In addition, since the Court of Appeals found that the evidence was admitted in error in the solicitor's closing argument, Issue Two was tainted since it concerned the same evidence regarding Way's expert, Dr. Martin.

CONCLUSION

Based on the above, the order of commitment of the trial court should be reversed.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER/RESPONDENT

This 23rd day of April, 2013

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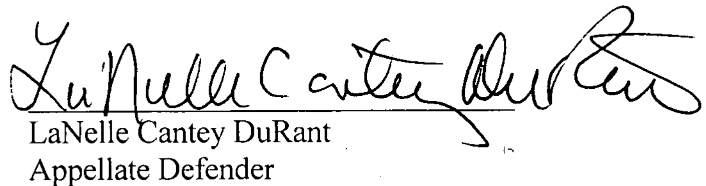
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of April, 2013.



LaNelle Cantey DuRant
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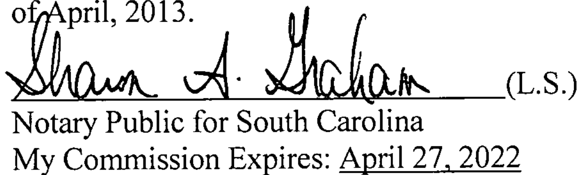
(L.S.)

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