

S.W.3d 405 (Ark. 2000)). The court ruled that, even if the exclusion of the proffered records was erroneous, any resulting error was harmless. The court noted an evidentiary error is harmless if the error is slight and the evidence of guilt is overwhelming (citing *Johnston v. State*, 431 S.W.3d 895 (Ark. 2014)). It noted that the error in refusing to allow these records to be admitted, if any, was slight because Ms. Jackson's credibility was challenged by other evidence, such as inconsistencies in her prior statements and her criminal history. The court also stated there was overwhelming evidence of Mr. Collins' guilt through Mr. Bailey's testimony and other corroborating physical evidence.

Justice Josephine Hart offered the only dissenting opinion. She disagreed with the majority on each point of the ruling and opined that the circuit court abused its discretion. She argued that the conviction should be reversed and remanded for a new trial.

Discussion

There are numerous methods by which to impeach a witness, such as bringing forward the witness' prior inconsistent statements, prior criminal history, bias against a party, or interest in a specific outcome. One's mental health history (including substance use disorders) may be admissible if it is directly relevant to the witness' ability to perceive and recall events and testify accurately. A witness' substance use is likely to be admissible because substances often affect those abilities. In this case, evidence of the witness' mental illness and the impact on her testimonial capacity was not examined because of Arkansas' Rule 503. Although the defense tried to equate a history of mental illness with an inability to provide accurate testimony, a mental health history does not inherently make a witness' testimony unreliable or untruthful. In this case, Ms. Jackson's testimony aligned with that of the other witnesses. Thus, her mental health did not necessarily affect her ability to provide reliable, accurate testimony.

This case raises an important question for trial witnesses who have mental health histories: will their health information remain private when they are called to testify in court? The possibility that witnesses' private health information may not remain private can be one of myriad reasons witnesses may be reluctant to testify in court. The

ruling in this case upheld a witness' right to privacy and maintained that witnesses have the privilege to deny disclosure of their private health records.

Relevant but Prejudicial Evidence in Expert Testimony Cross-Examination

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Prejudicial Error to Introduce an Arrest Warrant From an Unrelated Case to Impeach an Expert Witness

DOI:10.29158/JAAPL.200018LI-20

In *In re Campbell*, 830 S.E.2d 14 (S.C. 2019), a sex offender who had been civilly committed under the South Carolina Sexually Violent Predator (SVP) Act appealed his commitment to the South Carolina Supreme Court. The South Carolina Supreme Court reversed and remanded because prejudicial evidence was used to cross-examine an expert witness.

Facts of the Case

Kenneth Campbell was serving sentences for criminal sexual conduct with a minor in the first degree and committing a lewd act on a child under the age of 16. Prior to the completion of these sentences, the state filed a petition pursuant to the SVP Act seeking Mr. Campbell's civil commitment for long-term control, care, and treatment. South Carolina law defines an SVP 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" (S.C. Code Ann. § 44-48-30(1) (2018)).

The trial court made a determination of probable cause and appointed an expert, Dr. Marie Gehle, to perform an evaluation of Mr. Campbell. Dr. Gehle diagnosed pedophilic disorder in Mr. Campbell, but opined that he was not at a high risk to reoffend and therefore did not meet the commitment criteria as an SVP. The state then obtained an independent evaluation from Dr. Ana Gomez, who agreed with Dr. Gehle about Mr. Campbell's diagnosis but opined that Mr. Campbell was at a high risk of reoffending if not civilly committed.

The state asked Dr. Gehle if she had ever wrongly opined that an SVP candidate was not going to reoffend. Dr. Gehle stated that she did not know. The state then asked about a previous, unrelated, sex offender precommitment evaluation that Dr. Gehle performed for Michael Thomas. The state had Dr. Gehle read parts of the evaluation in which she opined that Mr. Thomas was unlikely to reoffend. The state then had Dr. Gehle read an arrest warrant that stated Mr. Thomas was subsequently charged with criminal sexual conduct and his DNA was a match for that of the alleged rapist.

The state said in closing arguments that the alleged rape committed by Mr. Thomas was within two years of his evaluation by Dr. Gehle, and that had he been committed as an SVP, it could have prevented the rape. The state emphasized that Dr. Gehle had been wrong in the case of Mr. Thomas. The jury found beyond a reasonable doubt that Mr. Campbell met the statutory definition of an SVP, and he was committed.

Mr. Campbell appealed his SVP commitment to the South Carolina Supreme Court. In his appeal, he argued that the use of an arrest warrant (from an unrelated case involving another individual) to impeach Dr. Gehle was prejudicial.

Ruling and Reasoning

The South Carolina Supreme Court reversed and remanded for a new commitment proceeding because the state inappropriately impeached the credibility of Dr. Gehle by introducing evidence of a recent arrest warrant for an unrelated sex offender whom the expert had opined was unlikely to reoffend. The admission of testimony about a "mere arrest warrant" (i.e., not a conviction) of an unrelated individual in a collateral matter was found to be unduly prejudicial.

In general, the scope of cross-examination is largely within the trial court's discretion. Furthermore, the appellate review will not overturn the trial court's ruling pertaining to the scope of cross-examination of a witness to test credibility absent manifest abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or when grounded in factual conclusions without evidentiary support (relying on *Clark v. Cantrell*, 529 S.E.2d 528 (S.C. 2000)).

To obtain a reversal based on errors in admitting evidence, there must be a reasonable probability that the jury's verdict would have been different if this evidence were not admitted (citing *State v. Commander*, 721 S.E.2d 413 (S.C. 2011)). Therefore, the scope of cross-examination is within the discretion of the trial judge, whose decision will only be reversed on appeal by a showing of prejudice.

The South Carolina Supreme Court found that the arrest warrant under the broad scope was deemed to be relevant. "Anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony" (*State v. Jones*, 343 S.C. 562, 570 (S.C. 2001)). In this case, the arrest warrant was a collateral matter only raised during re-cross-examination. Although it could not have been presented during the state's case-in-chief to prove Mr. Campbell was an SVP, the court found the arrest warrant to be relevant, holding any evidence that shows the accuracy, truthfulness, or sincerity of a witness may be admissible to help the finder of fact determine the witness' credibility.

Despite its relevance, the court pointed out that a "mere arrest warrant" in no way proves that someone committed an offense and could only have minimal impact on the credibility of the expert witness. Therefore, the court deemed the unrelated warrant had low probative value as to whether Mr. Campbell was an SVP.

The court also found that the admission of the warrant was more prejudicial than probative in this case. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one" (*State v. Wilson*, 345 S.C. 1, 7 (S.C. 2001)). The determination of prejudice should be determined by the totality of the court record. The state mischaracterized the results of the evaluation of Mr. Thomas because Dr. Gehle did

not guarantee either man would never reoffend; rather, Dr. Gehle concluded that the rate of reoffending was 15.8 percent in the next five years and 24.3 percent in the next ten years, which was average for sex offenders. The state argued in both re-cross-examination and closing arguments that Dr. Gehle had been wrong and that, as a result, another woman had presumably been raped, and therefore Mr. Campbell was bound to hurt another child. Finally, the court found that the last statement during closing argument, “You heard the testimony. What do you think is going to happen?” (*Campbell*, p 18) was unfairly prejudicial and clouded jurors’ ability to weigh the evidence clearly.

Discussion

This case underscores the importance of a response to the question as to whether the expert has ever been wrong. The court points out that if the expert had denied being wrong, the state would have been bound by the expert’s answer and the arrest warrant or other evidence would not have been admissible. The court relied on *State v. DuBose*, 341 S. E.2d 785 (S.C.1986), which held that, where a witness denies an act involving a matter collateral to a party’s case-in-chief, the inquiring party is not permitted to introduce evidence in contradiction or impeachment. In this case, if the expert witness had denied ever being wrong rather than say that she did not know, the state could not have introduced evidence to impeach her.

Additionally, this case illustrates the importance of experts acknowledging the difference between risk estimation and risk prediction in violence risk assessments. Although Dr. Gehle had not recommended civil commitment in the prior case, she had not characterized the offender as having no risk of reoffending. In risk assessment, there is never a guarantee that a low-risk offender will not reoffend or that a high-risk offender will reoffend. An expert can offer only risk estimates, not predictions.

Fetal Alcohol Spectrum Disorder and the Death Penalty

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Fifth Circuit Denied Rehearing on Whether Fetal Alcohol Spectrum Disorder is Equivalent to Intellectual Disability under Atkins

DOI:10.29158/JAAPL.200019-20

In *In re Soliz*, 938 F.3d 200 (5th Cir. 2019), Mark Soliz motioned the federal court of appeals to consider a successive *habeas* application and stay of execution. Mr. Soliz argued that his diagnosis of Fetal Alcohol Spectrum Disorder (FASD) should exempt him from the death penalty and that his case was eligible to be reconsidered according to *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court of Appeals for the Fifth Circuit denied his motion, stating that Mr. Soliz did “not present a new claim of a retroactive constitutional right recognized by the Supreme Court that was previously unavailable to him” (*Soliz*, p 203).

Facts of the Case

Mr. Soliz was sentenced to death in Texas in 2012 for intentional murder in the course of committing or attempting to commit burglary or robbery. The Texas Court of Criminal Appeals (CCA) affirmed the conviction and sentence in 2014. In his initial state application for writ of *habeas corpus*, Mr. Soliz argued that “that the reasoning of *Atkins* should be extended to create a categorical exemption from death sentences” (*Soliz*, p 201) for individuals with FASD.

In a complex series of appeals in both state and federal courts, Mr. Soliz pressed various claims, including that FASD should be regarded as an equivalent condition to intellectual disability (ID) under *Atkins*. In all instances, his claims were denied, except for granting a certificate of appealability on the *Atkins* claim (*Soliz v. Davis*, No. 3:14-CV-4556-KM, 2017 U.S. Dist. Lexis 144283 (N.D. Tex. Sept. 6, 2017)).