

SUPREME COURT OF SOUTH CAROLINA

The Care & Treatment of Way v. State

410 S.C. 377 · Decided November 20, 2013

SUMMARY

The South Carolina Supreme Court held that the State should not have cross-examined Way about his evaluation by a non-testifying psychiatric expert and should not have invoked the missing witness rule regarding that expert. The court nevertheless found the errors harmless and affirmed the Court of Appeals' decision as modified. The State's cross-petition for certiorari was dismissed as improvidently granted.

CASE DETAILS

COURT	Supreme Court of South Carolina
WRITING FOR THE COURT	Justice Beatty; Chief Justice Toal; Justice Kittredge; Justice Hearn; Justice Pleicones
JURISDICTION	South Carolina
DECIDED	November 20, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Way appealed an order committing him under South Carolina's Sexually Violent Predator Act. The South Carolina Court of Appeals affirmed. The Supreme Court of South Carolina granted cross-petitions for writs of certiorari concerning the State's questioning of Way about a non-testifying psychiatric expert and the State's closing-argument use of the missing-witness rule.
STANDARD OF REVIEW	In a jury-tried action at law, appellate jurisdiction extends to correction of errors of law. The scope of cross-examination and the range and propriety of closing argument are reviewed for abuse of discretion. Reversal requires both error and resulting prejudice.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Vincent Neal Way v. State

TOPICS

[evidence](#)[expert testimony](#)[harmless error](#)[appellate procedure](#)[standard of review](#)

PRACTICE AREAS

evidence

mental health law

civil commitment

appellate procedure

QUESTIONS PRESENTED

1. Whether the State could cross-examine Way about his retention of and evaluation by a non-testifying psychiatric expert.
2. Whether the State could invoke the missing-witness rule and argue that the absence of the non-testifying psychiatric expert supported an adverse inference.
3. Whether the errors concerning the cross-examination and closing argument required reversal.

HOLDINGS

1. The State should not have been permitted to question Way about his retention of Dr. Martin, because the probative value of that evidence was substantially outweighed by the danger of unfair prejudice under Rule 403 of the South Carolina Rules of Evidence.
2. The missing-witness rule should be limited to fact witnesses and should not be invoked against medical, psychological, psychiatric, or similar medical expert opinion witnesses.
3. The errors in allowing the questioning and closing argument were harmless because they could not reasonably have affected the outcome of the trial.

KEY QUOTATIONS

“As we explained in Gonzalez, we believe invocation of the missing witness rule should be limited to fact witnesses, and it should not be invoked as to medical, psychological, psychiatric, or similar medical expert opinion witnesses.” (384)

“Consequently, we agree with the Court of Appeals that any error could not have reasonably affected the outcome here.” (385)

FACTUAL BACKGROUND

Way had prior convictions for sexually abusive conduct involving minors, including a 1993 lewd act involving his thirteen-year-old niece and a 1997 lewd act involving a thirteen-year-old girl. Before his release from prison, a multidisciplinary team determined probable cause existed to believe he was a sexually violent predator, and the State initiated civil commitment proceedings. At the commitment trial, the State's psychiatric expert testified that Way had a qualifying sexual disorder and was likely to reoffend; Way had also been evaluated by Dr. Tom Martin, an expert who did not testify. The State questioned Way about the evaluation and argued that the jury could infer Dr. Martin's testimony would have been adverse.

PROCEDURAL HISTORY

A jury found Way met the statutory definition of a sexually violent predator, and the circuit court ordered his involuntary civil commitment for long-term control, care, and treatment. The Court of Appeals affirmed, holding that the questioning was proper but that use of an adverse inference from the expert's absence was improper,

while finding the error harmless. The Supreme Court affirmed the Court of Appeals as modified as to Way and dismissed the State's certiorari petition as improvidently granted.

DISPOSITION

affirmed

CASES CITED

- Carson v. CSX Transp., Inc., 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012)
- Duncan v. Ford Motor Co., 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009)
- O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct. App. 2006)
- Clark v. Cantrell, 339 S.C. 369, 389-390, 529 S.E.2d 528, 539 (2000)
- State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010)
- In re the Care & Treatment of Gonzalez, 409 S.C. 621, 763 S.E.2d 210 (2014)
- Judy v. Judy, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009)
- State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)
- Dansbury v. State, 193 Md. App. 718, 1 A.3d 507, 522 (2010)
- In re the Care & Treatment of Way, Op. No. 2011-UP-268, 2011 WL 11734641 (S.C. Ct. App. filed Aug. 24, 2011)