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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable Kristi F. Curtis, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF ELIJAH DESHAWN WHACK,

APPELLANT.

APPELLATE CASE NO. 2022-000550

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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial judge err in refusing to charge the jury on the full definition of circumstantial evidence from State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), accepting the Attorney General's argument that the charge does not apply in civil cases?

STATEMENT OF THE CASE

The Attorney General petitioned for Elijah Whack's commitment as a sexually violent predator and on April 4, 2022, appellant was tried before the Honorable Kristi F. Curtis and a Clarendon County jury. Tr. 1. Christopher S. Runyan represented the Attorney General. Tr. 1. James Falk represented appellant. Tr. 1. The jury found appellant was an SVP and Judge Curtis ordered him committed. Tr. 523, l. 14 – 25.

STANDARD OF REVIEW

An error must be harmless beyond a reasonable doubt. State v. King, 424 S.C. 188, 201, 818 S.E.2d 204, 210-11. Only an error that did not contribute to the verdict can be harmless beyond a reasonable doubt. Id.

ARGUMENT

In this sexually violent predator case, the trial judge erred in refusing to charge the jury on the full definition of circumstantial evidence from *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), and accepting the Attorney General's argument that the charge does not apply in civil cases.

The Attorney General argued that the Supreme Court's definition in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) of circumstantial evidence was "basically criminal law." Tr. 435, l. 3 – 9. Despite the existence of a unitary set of evidence rules for both civil and criminal cases, the Attorney General opposed appellant's jury hearing the Logan charge, saying, "This is a civil procedure. I think it has no place in this." Tr. 435, l. 3 – 9. When the judge indicated she might give the Logan charge, the Attorney General then claimed that, even though the burden of proof in an SVP trial is the same as a criminal trial, giving the Logan charge would increase his burden of proof. Tr. 437, l. 2 – 9. The judge ultimately agreed with the Attorney General and refused to give the Logan charge. Tr. 439, l. 9 – 18.

Appellant specifically requested the definition of circumstantial evidence explaining that to the extent the State relies on circumstantial evidence, the circumstances must be consistent with each other and when taken together, point conclusively to a finding that appellant was a sexually violent predator. Tr. 434, l. 3 – 437, l. 1. Defense counsel cited Logan and the trial judge stated her recollection of Logan's holding. Tr. 434, l. 3 – 17. After the Attorney General's objections that Logan is confined to the criminal realm and that it increased his burden of proof, the trial judge stated, "I just don't think it fits within the context of the sexually violent predator proceeding in that all of the circumstances don't necessarily have to be consistent with each other for them to return a verdict. It's not like a murder case where you're looking at the facts

and do, you know, did the person commit this particular offense, so I just don't think it [falls] within the statutory scheme." Tr. 438, l. 9 – 18. Judge Curtis did not give the charge. Tr. 504, l. 25 – 505, l. 15. Appellant renewed his objection after the court's charge. Tr. 513, l. 17 – 22.

The same rules of evidence apply in civil and criminal proceedings. See Rule 1101(b), SCRE. "These rules apply generally to civil actions and proceedings, to criminal cases and proceedings, and to contempt proceedings except those in which the court may act summarily." Id. Rule 1101 contains some exceptions where the rules of evidence do not apply, but SVP cases are not listed. See Rule 1101(d)(3). Appellate courts have cited the rules of evidence in SVP cases without controversy. See In re Manigo, 389 S.C. 96, 106, 697 S.E.2d 629, 633-34 (Ct. App. 2010) (citing Rules 801(c) and 703, SCRE).

The same burden of proof in criminal cases applies in SVP cases. See S.C. Code Ann. § 44-48-100(A) ("The court or jury must determine whether, beyond a reasonable doubt, the person is a sexually violent predator."). Logan contains no language specifically limiting its applicability to criminal cases. The Court stated "that trial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when so requested by a defendant." Logan at 99, 747 S.E.2d at 452. The trial judge erred in refusing appellant's request to give the Logan charge modified for an SVP case.

The necessity of the charge is important when the defendant's mental state is the primary issue. See State v. Herndon, 430 S.C. 367, 845 S.E.2d 499 (2020). In Herndon, just like here, the trial judge refused to give the Logan charge after it was requested and specifically cited by the defense. Id. at 368, 845 S.E.2d at 501. The defendant in Herndon admitted shooting her abusive boyfriend, but asserted self-defense. Id. at 370-71, 845 S.E.2d at 501. The State's claims that the shooting was not in self-defense were based on circumstantial evidence, some of

which conflicted. Id. at 373, 845 S.E.2d at 502-03. The Court held, "The competing inferences involved in this circumstantial evidence case illustrate well the need for the Logan charge." Id. See also State v. Sanchez, 435 S.C. 468, 867 S.E.2d 595 (Ct. App. 2021) (reversing for failure to give the Logan charge where the issue was circumstantial evidence of the defendant's knowledge that illegal drugs were in her car).

Of the four elements of self-defense, at a minimum, two solely involve the mental state of the defendant. See State v. Curry, 406 S.C. 364, n.4, 752 S.E.2d 263, n.4 (2013). The assessment of the defendant's fault in bringing on the difficulty requires a jury to assess a defendant's mental state. The same is true for the jury's assessment of whether the defendant actually believed she was in imminent danger of losing her life or sustaining serious bodily injury. The other two elements also bear on a defendant's mental state to a lesser degree as they contain objective measurements of a defendant's perceptions.

Like in Herndon or Sanchez, an SVP trial is wholly about assessment of the defendant's mental state. A forensic psychologist uses tests, documents, and interviews to construct a diagnosis of a mental abnormality or personality disorder. The expert psychologist must link the mental defect to the defendant's likelihood to reoffend sexually. All of these parts of the psychologist expert witness's work and opinion require chains of inferences that a jury must evaluate. These chains of inferences are circumstantial evidence.

In appellant's case, the opinion of the expert, Dr. Christopher Gillen ("Gillen") contained one of the weakest diagnoses of an SVP defendant—antisocial personality disorder ("ASPD").[1] Tr. 211, l. 8 – 16. Dr. Gillen rejected a diagnosis of exhibitionistic disorder. Tr. 208, l. 6 – 18. He rejected pedophilic disorder. Tr. 208, l. 18 – 209, l. 5. He rejected biastophilia, which is arousal to sex with a nonconsenting partner. Tr. 209, l. 9 – 16. Dr. Gillen settled for ASPD. Tr. 211, l. 8 – 16.

Dr. Gillen explained ASPD: "So, generally speaking, antisocial personality disorder is when someone has a chronic disregard for the rights and wellbeings of other people, and that can present itself in a lot of different ways." Tr. 211, l. 24 – 212, l. 15. He said the disorder manifests "through repeated rule violating and criminal acts." Tr. 211, l. 24 – 212, l. 15. He listed irritability, impulsive behavior, "or leading an irresponsible lifestyle." Tr. 211, l. 24 – 212, l. 15. People with ASPD are also deceitful, callous, and lack remorse. Tr. 211, l. 24 – 212, l. 15. Dr. Gillen's initial general description had nothing to do with sex and seemed to describe common recidivist criminals. In its decision barely upholding the constitutionality of SVP statutes in a 5-4 vote, the United States Supreme Court noted a study in Kansas v. Crane, 534 U.S. 407 (2002) that "40% - 60% of the male prison population is diagnosable with antisocial personality disorder." Id. *citing* Moran, The Epidemiology of Antisocial Personality Disorder, 37 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999).

[1] While South Carolina allows a diagnosis of ASPD to pass the directed verdict threshold in an SVP case, its use has been rejected by other states that hold that the diagnosis is too broad and does not relate to sexual reoffending as opposed to generic criminality. Compare Matter of Snow, 425 S.C. 544, 823 S.E.2d 467 (2019) (holding that diagnosis of "other specified personality disorder" was sufficient) with State v. Donald DD., 24 N.Y.3d 174 (2014) (holding that a diagnosis of antisocial personality disorder simply has so little probative value regarding inability to control the commission of sexual crimes that it was legally insufficient to form the basis for commitment).

Applying ASPD to appellant, Dr. Gillen said appellant lied, stole, and was truant as a juvenile. Tr. 212, l. 16 – 213, l. 22. In adulthood, Dr. Gillen said appellant was impulsive and irresponsible. Tr. 212, l. 16 – 213, l. 22. He violated rules. Tr. 212, l. 16 – 213, l. 22. The "most important trait" for Dr. Gillen was that appellant was callous and lacked remorse for his behavior. Tr. 212, l. 16 – 213, l. 22.

Dr. Gillen elaborated on his assessment with "dynamic risk factors." Tr. 227, l. 13 – 229, l. 17. He concluded appellant had a preoccupation with sex. Tr. 227, l. 13 – 229, l. 17. This means someone has a sex drive that is difficult to control. Tr. 227, l. 13 – 229, l. 17. In addition to appellant's qualifying sexual offenses, Dr. Gillen noted that appellant had episodes of infidelity, sometimes had sex "up to five times a day," and had approximately twenty-five sexual partners, some of whom were strangers "one night stand sort of relationships as well can speak to that risk factor." Tr. 227, l. 13 – 229, l. 17. Many Americans probably would be shocked to learn that their sexual peccadilloes and high sex drives can be classified as risk factors for sexually violent crimes.

Dr. Gillen also listed several other dynamic risk factors, all of which seemed to describe common criminal behavior instead of the sexual violence with which the SVP Act is supposedly concerned. Tr. 231, l. 3 – 239, l. 4. Appellant had "negative social influences" in his associates. Tr. 231, l. 3 – 239, l. 4. He had "grievance hostility." Tr. 231, l. 3 – 239, l. 4. He had "resistance to rules and supervision" and "lifestyle impulsiveness." Tr. 231, l. 3 – 239, l. 4. Appellant had poor coping skills and poor problem solving. Tr. 231, l. 3 – 239, l. 4. These "dynamic risk factors" could describe a drug dealer, a burglar, or an embezzler as well as they could describe a child molester.

On cross-examination, Dr. Gillen struggled to link appellant's ASPD to his risk to **sexually** reoffend versus committing a non-sexual crime. Tr. 264, l. 19 – 277, l. 22. He agreed he needed to "make that direct connection" between ASPD and sexual reoffending. Tr. 265, l. 21 – 25. Dr. Gillen agreed that the dynamic risk factors he listed "could be" prevalent among the male prison population, but said that the expression of those traits does not lead most people to "recurrent sexually problematic behavior." Tr. 266, l. 11 – 19. He agreed that these traits led to chronic criminal behavior. Tr. 266, l. 20 – 267, l. 1. When asked how he would "separate [appellant] from sort of the routine criminal offender," Dr. Gillen replied:

> So, the way I conceptualize antisocial personality disorder for these SVP cases is simply meeting the criteria for antisocial personality disorder does not in and of itself mean someone is gonna be risky to do this behavior again. I'm gonna try to be looking at, as I mentioned earlier, the specific relationship of those traits with sexual offending and how are those specific traits as it relates to sexual offending still happening today. In [appellant's] case, unlike other people who might have antisocial personality disorder, I believe there is a direct relationship between those traits and the offending and is risked [sic] to do it again.

Tr. 267, l. 2 – 20.

While Dr. Gillen's opinion was "a direct relationship" between appellant's ASPD and sexual offending existed, his preface to this opinion admitted that simply having ASPD does not automatically imply future sexually violent behavior. The chain of inferences to connect ASPD and the likelihood to reoffend sexually is much longer than, for example, pedophilia. Pedophilia disposes a person to commit a very specific reprehensible sexually violent act. ASPD makes common criminal recidivism more likely.

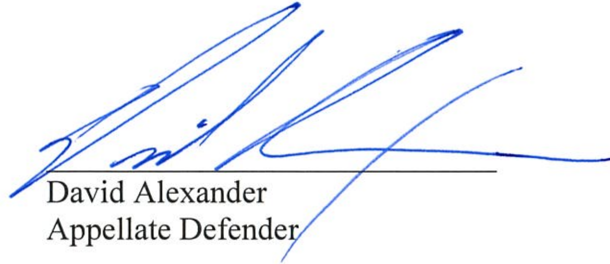
The jury needed to assess the likelihood that ASPD made it likely that appellant would sexually reoffend. See S.C. Code Ann. § 44-48-30(1)(b) ("suffers from a mental abnormality or personality disorder **that makes** the person **likely to engage in acts of sexual violence**....")

(emphasis added). The jury needed to distinguish appellant from common criminals and find he was one of the "mentally abnormal and extremely dangerous group of sexually violent predators." See S.C. Code Ann. § 44-48-20. Their assessment required the Logan definition of circumstantial evidence to decide whether a history of lying, substance abuse, fighting as a kid, and truancy together with his sexual offenses and the very general diagnosis of ASPD meant appellant was a recidivist or a sexually violent predator.

The evidence in this case was close. Appellant's family members testified that he had a place to live, a business opportunity, and financial and emotional support if he was released. Tr. 329, l. 5 – 15. Tr. 333, l. 15 – 21. Tr. 368, l. 11 – 369, l. 4. His brother-in-law, a pastor, planned to mentor appellant. Tr. 354, l. 13 – 355, l. 22. Appellant testified in his defense, said he had changed, and talked about his plans if he was released. Tr. 388, l. 19 – 413, l. 3. The jury asked a question about visitation rules and what requirements appellant would need to meet if he were released. Tr. 516, l. 4 – 7. The Logan charge would have made a difference in how the jury evaluated the weak circumstantial evidence of the linkage between ASPD and appellant's risk to reoffend. This Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and remand for a new trial.



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This 2nd day of February, 2023.