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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County
The Honorable Kristi F. Curtis, Circuit Court Judge
Appellate Case No. 2022-000550

In the Matter of the Care and Treatment
of Elijah Deshawn Whack,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Judge Curtis did not abuse her discretion in determining the full State v. Logan circumstantial evidence charge did not apply in a civil trial under the SVPA, but even if failure to give a portion of the Logan charge was error, it was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In October 2014, Appellant Elijah Deshawn Whack pled guilty to criminal sexual conduct with a minor in the third degree, which is a statutorily delineated sexually violent offense, and was sentenced to fifteen years incarceration. In June 2020, Respondent State of South Carolina initiated proceedings pursuant to the South Carolina Sexually Violent Predator Act (SVPA), S.C. Code Ann. §§44-48-10, *et seq.* (2018), seeking Appellant's civil commitment for long term control, care and treatment. The matter was called for a jury trial in April 2022 before the Honorable Kristi F. Curtis, Circuit Court Judge.

The State presented testimony from Christopher Gillen, Psy.D., who was court-appointed to evaluate Appellant under the SVPA. He was qualified as an expert in forensic psychology, and testified he is employed with the South Carolina Department of Mental Health (DMH), where he had completed nine SVPA pre-commitment evaluations, and forty-six SVPA annual review evaluations. (Trial Testimony [TT], pp. 150-158; Record on Appeal [R.]., pp. 102-110).

Dr. Gillen's evaluation protocol includes reviewing all available records and requesting additional documentation if necessary. He also interviews the person and conducts collateral interviews as necessary. gathering information about their background and general history, which he compares against the records. When he has as much information as he can get from the records and interview(s), Dr. Gillen scores two risk assessment measures. Dr. Gillen testified the information he receives and relies on is the type of information reasonably relied on by professionals in his field. (TT, pp.159-165; R., pp. 111-117).

Dr. Gillen testified one of the strongest predictors of a person's risk to engage in future sexual acts is their past general and sexual behavior. The person's history is important in sexual predator evaluations because it helps evaluate the presence of a mental abnormality or personality disorder and is directly related to risk assessment. (TT, pp. 166-167; R., pp. 118-119). Appellant's history and report to Dr. Gillen included multiple behavioral issues, such as stealing, fighting and lying to get out of trouble, prior to the age of fifteen, which are behaviors relevant to consideration of an antisocial personality disorder diagnosis. (TT, pp. 167-168; R., pp.119-120).

Dr. Gillen also considered Appellant's relationship history, including Appellant's relationship with one of his sex offense victim's mother. The relationship was reported as chaotic, with infidelity and an instance of domestic violence. Dr. Gillen testified that how Appellant perceives relationships was significant to the evaluation. (TT, pp. 168-169; R., pp. 120-121).

Dr. Gillen conducted collateral interviews with Appellant's sister and a woman Appellant identified as a "romantic partner" who he intended to ask to marry him. The sister confirmed Appellant's self-report regarding his adolescent behavior history. The other interviewee told Dr. Gillen she had a previous romantic relationship with Appellant, but she now viewed him more as a friend, and they had never discussed marriage. (TT, pp. 169-172; R., pp. 121-124.

Dr. Gillen also reviewed and considered Appellant's nonsexual and sexual criminal history. He testified this information is important to identifying patterns of behavior over time, and to scoring the risk assessment measures to consider the person's risk of committing a sexual offense in the future. In Appellant's criminal history, Dr.

Gillen found a pattern of violent, nonsexual offenses as well as sexually violent offenses. (TT, pp. 172-174; R., pp. 124-126).

Appellant's sexually violent convictions included 1999 guilty pleas to three counts of criminal sexual conduct with a minor, second degree, and one count of committing a lewd act, and a 2014 guilty plea to one count of criminal sexual conduct with a minor, third degree. (State's Exhibits 1-5; R., pp.480-495). Dr. Gillen testified he reviewed law enforcement and court records regarding the offenses, which is the type of information relied on experts in the field of psychology, and it is necessary to examine the underlying details of the offenses because they help determine if there are consistent behavior patterns over time and speak to the person's risk to do it again. (TT, pp. 174-176; R., pp. 126-128).

Dr. Gillen testified all the 1999 criminal sexual conduct offenses involved a fifteen-year-old female and occurred during the summer of 1998. The offenses occurred in different locations, including a vehicle, the victim's grandmother's home, and a motel. Appellant was also convicted of conspiracy to commit criminal sexual conduct based on his paying and working with a co-conspirator to facilitate his offending against the victim, which included driving Appellant to the locations and paying the co-conspirator to have sex with the victim. (TT, pp. 177-186; R., pp. 129-138).

During Appellant's interview with Dr. Gillen, Appellant admitted the sexual contact, but described it as consensual, denied any elements of force, and stated the charges and convictions resulted from a conspiracy against him. Dr. Gillen testified Appellant's statements showed some underlying personality traits consistent with an antisocial personality disorder, his offending history, cognitive processes, and

impulsivity. They also exhibited a lack of remorse and insight deficits, which indicated Appellant did not understand or recognize the problem with his conduct or why he sexually offended, and these characteristics are directly relevant to Appellant's risk to reoffend sexually. (TT, pp. 186-187; R., pp. 138-139).

Appellant's 1999 lewd act conviction involved a fourteen-year-old female. According to the records, Appellant was found with the victim on a dirt road, both were naked, and it was alleged Appellant had engaged in a lewd act with the victim. Appellant told Dr. Gillen nothing sexual occurred, consensual or otherwise. Dr. Gillen testified Appellant's denial again indicated insight deficits and difficulty understanding behavior patterns, which are relevant to managing someone's risk to reoffend in the future. (TT, pp. 188-190; R., pp.140-142).

After Appellant served his period of incarceration for the 1999 guilty pleas, he had community supervision for two years, which ended May 30, 2010. (TT, pp. 190-191; R., pp. 142-143). According to available records, shortly after completing his community supervision, Appellant sexually offended against an eight-year-old female in 2010 by forcing her to perform oral sex on him. He then offended against the same victim several times between January and June 2013 by fondling her with his hand and penis. He pled guilty to one count of criminal sexual conduct with a minor, third degree, on October 16, 2014, and was sentenced to fifteen years incarceration. (TT, pp. 192-193; R., pp. 144-145).

Appellant told Dr. Gillen he did not engage in any sexual behavior with this victim and stated the case against him was a conspiracy by his girlfriend's family to get custody of the victim. Dr. Gillen testified that Appellant's statements were significant

because, as with his earlier convictions, Appellant framed the case against him as a conspiracy. (TT, pp. 193-194; R., pp.145-146).

Dr. Gillen also reviewed Appellant's records from the South Carolina Department of Corrections, which included possession of a weapon, refusing/failing to follow orders, and possession of tattoo paraphernalia, and two substantiated sexual misconduct infractions involving exposing his penis. Dr. Gillen testified the sexual misconduct infractions were important because they indicated difficulty controlling sexual behavior even in a very secure setting, which is directly relevant to diagnosing a possible personality disorder or mental abnormality that predisposes a person to reoffend in the future. Dr. Gillen further testified the infractions also went directly to personality traits directly influencing Appellant's sex offending history, such as impulsivity and callousness or lack of remorse. When asked about the sexual misconduct infractions, Appellant denied knowing about the first infraction and stated he was falsely accused of the second infraction. (TT, pp. 195-198; R., pp. 147-150).

In addition to reviewing the records regarding Appellant's sexually violent convictions and sexual misconduct infractions while in the Department of Corrections, Dr. Gillen searched the public index and discovered Appellant was charged with indecent exposure in 2020 while detained in the Clarendon County jail based on an incident that occurred within twenty-four hours of Appellant's arrival at the jail from the Department of Corrections. Dr. Gillen testified the incident was significant because it further indicated Appellant was unable to control his sexual arousal and behavior and he continued to engage in the same type of problematic behaviors for which he had been previously sanctioned. When Dr. Gillen asked Appellant about the incident, Appellant

denied engaging in the behavior and blamed the Attorney General's Office for putting him "under a microscope" and looking for extra charges to put on him. (TT, pp. 200-202; R., pp. 152-154).

Dr. Gillen testified the records indicated Appellant had not participated in any sex offender treatment. When he talked with Appellant about sex offender treatment, Appellant denied having a problem related to sex offending, and he did not recognize that it would be a problem for him in the future. (TT, pp. 203-204; R., pp. 155-156).

Dr. Gillen considered various paraphilic disorder diagnoses, but concluded Appellant did not have a paraphilic disorder. He also considered personality disorder diagnoses and concluded Appellant has antisocial personality disorder, which involves a chronic disregard for the rights and well-being of other people that can present in different ways, such as repeated rule violations and criminal acts, irritability, aggressive actions, impulsive behavior, recklessness, irresponsible lifestyle, deceitfulness, lying, and callousness or lack of remorse. (TT, pp. 207-212; R., pp. 159-164).

Dr. Gillen based Appellant's antisocial personality diagnosis on evidence Appellant had conduct disorder before the age of fifteen, which included theft, fighting, lying and truancy. As an adult, Appellant exhibited irresponsibility, recklessness, rule violating behavior as evidenced by his sexual and nonsexual offense histories, employment and relationship histories, and a consistent callousness or lack of remorse for his behavior. Dr. Gillen testified Appellant demonstrated these traits by his repeated sexual and nonsexual offenses, and during Dr. Gillen's interview when talking about each different sexual offense and his perceptions of his offenses. (TT, pp. 212-214; R., pp. 164-166).

As part of his risk assessment analysis, Dr. Gillen scored two actuarial risk assessment tools – the Static-99R and the Static-2002R. These tools are based on studies involving sex offenders and provide a statistical comparison of offenders with certain known static risk factors. Appellant's score on the Static-99R placed him in the well above average risk category, and his score on the Static-2002R placed him in the above average risk category, even with score reductions for his age. (TT, pp. 214-225; R., pp. 166-177).

In addition to the static risk assessment scores, Dr. Gillen considered various dynamic risk factors research have identified as related to sexual reoffending. He testified there are fifteen separate dynamic risk factors related to increased risk to reoffend. Dr. Gillen identified multiple dynamic risk factors applicable to Appellant, including sexual preoccupation, lack of emotionally intimate relationships with adults, negative social influences, grievance, hostility, resistance to rules and supervision, lifestyle impulsiveness, callousness or lack of concern for others, poor problem solving, and dysfunctional coping. He discussed each factor at length and explained how Appellant exhibited each one. He then explained how the static scores and dynamic risk factors combined to provide "the picture of someone who's likely, again, to do this." (TT, pp. 225-240; R., pp.177-192).

During the interview, Dr. Gillen and Appellant discussed Appellant's plans if he was released, which included going to live with his mother. Dr. Gillen testified he did not consider those plans realistic given Appellant's level of risk. He explained that Appellant described the environment "as a similar environment as the time when he was out in the community last when he sexually offended," and Appellant had not "done

enough management on his own to manage the risk factors that he has going on to make that environment supportive and pro-social for him." He further testified that Appellant's sister would not be able to hold Appellant accountable because she "had a very similar mindset and thinking about the sexual offenses that [Appellant] had, denying sexual offense occurred, that, you know, he was railroaded by the system," and "she doesn't even want to believe, you know, that these things happened." (TT, pp. 240-243; R., pp. 192-195).

Dr. Gillen opined to a reasonable degree of psychological certainty that Appellant's antisocial personality disorder causes him serious difficulty controlling his behavior and was directly related to Appellant's history of sexually violent offenses. He further opined that Appellant's personality disorder makes him likely to commit future acts of sexual violence if not confined for long term control, care, and treatment. (TT, pp. 244-248; R., pp. 196-200).

Sergeant Evony Mills of the Clarendon County Detention Center testified she was on duty at the detention center on September 1, 2020, when she observed Appellant exposing his penis through the cell door flap as she walked past his cell. She immediately told Appellant she would write him up and she filed an incident report about the incident. (TT, pp. 320-325; R., pp. 272-277).

Appellant's sister testified she had consistent contact with Appellant while he was in prison and in the detention center, and they talked on the phone frequently. She stated she believed he cared about other people, he recognized a need to reach out and get counseling, and he had changed while he was incarcerated. (TT, pp. 326-334, 339-340; R., pp. 291-292; 272-286).

On cross-examination, Appellant's sister stated she did not believe Appellant had committed the sexual offenses for which he was convicted, she did not believe Appellant has a problem with sexual offending, and she did not know what might trigger him to offend sexually because she did not believe he did anything wrong. She acknowledged she was around Appellant during the time he was accused of sexually offending, but stated she would support him and hold him accountable if he was released. When ask how she would be present everywhere Appellant goes if released, she stated "just to say that I could be present to stop something that I don't believe happened, I don't know how else to answer that." (TT, pp. 334-339; R., pp. 286-291).

The mother of Appellant's children testified she had been in contact with Appellant while he was in prison and in the detention center. The contact included phone calls, letters and visits. She stated she was not concerned about Appellant being around her and their children, and he was a great father. She testified she had "heard" about Appellant's sexual offenses, but she had no idea what might trigger his sexual offending. (TT, pp. 341-349; R., pp. 293-301).

Appellant's brother-in-law testified that he pastors a church and if Appellant was released, he believed he could help Appellant by mentoring him and giving Appellant guidance to lead him in the right direction. He stated he had been in contact with Appellant during his time in prison and at the detention center, and he had seen growth in Appellant such that Appellant was not the same person he was when he was convicted. (TT, pp. 349-366; R., pp. 301-318).

Appellant's brother testified he planned to open a car repair business with Appellant if he was released. He stated he had seen changes in Appellant over the time

he was incarcerated. On cross-examination, Appellant's brother stated he "knew for certain" Appellant did not commit the offenses he was convicted of in 2014, but Appellant's attorney told him to plead guilty because he was facing a sentence of twenty-five years to life if he was convicted. (TT, pp. 367-377; R., pp. 319-329).

Appellant testified he used to be young and wild and wanted to do his "own thing," he hung out with individuals he should not have and got caught up in that lifestyle of drugs, partying, hanging out and fighting. He talked about things he did while incarcerated for his 1998 convictions, what he did after his release from prison, and what he did during his incarceration for his 2015 conviction. He testified about his relationships with his family members and his children, and his future plans if released, which included speaking with a counselor. On cross-examination, Appellant denied committing any of the sexual offenses to which he pled guilty. (TT, pp. 387-429; R., pp. 339-381).

During the charge conference, after the State requested that the language "crimes may be proven by circumstantial evidence" be removed for Judge Curtis' proposed charges on the ground the case is not a criminal case, the following colloquy occurrrd:

> Appellant's Counsel: I think we ought to try and craft the circumstantial evidence charge that's closer to what we need. It's more in a criminal case. And what I'll be talking about is some type of language that's similar to the second paragraph you know, with the Logan charge.
>
> The Court: Something along the lines of the extent the State seeks to prove - - I don't have it in here but just my recollection of the Logan language. Something along the lines of to the extent that the State wishes to prove a fact by circumstantial evidence or it's usually prove a crime by circumstantial evidence and all the circumstances must be consistent with each other.
>
> Appellant's Counsel: Myself, if you can say proof and point conclusively to guilt because that's the only kind what this form is going to read.

The State: We have nothing to do with guilt in a civil trial.

Appellant's Counsel: All right, so commitment, we want to change that. But I think we're, we know that - - yes, that charge, try to craft a charge similar to that second part of Logan.

The State: And I guess I would just make objection to it because it's, you know, that's basically criminal law. This is a civil procedure. I think it has no place in this. I think they can use circumstantial evidence as you've charged it here. I don't think there's any greater distinction.

Appellant's Counsel: Well, of course, my argument is this is not just a civil case, it's got implications of - - that he would be confined.

The State: The case law says it is civil in nature. It is a civil case according to the statute so there is no punishment in these cases.

Appellant's Counsel: It does result in the deprivation of a liberty and cannot dispute that.

The State: No, no dispute in that, no, absolutely not.

The Court: Okay. So I'm deleting the sentence that says "Crimes may be proven by circumstantial evidence," keeping in "the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weight all of the evidence in the case. However, to the extent the petitioner relies on circumstantial evidence, all the circumstances must be consistent with each other, and when taken together, point conclusively to the" - - -

Appellant's Counsel: To a commitment or to - - well, to a finding that he's a sexually violent predator I guess would be the way to say it.

The State: I don't think it should be said so. I'm objecting to it so.

The Court: Okay. I just included the sentence, "However, to the extent petitioner relies on circumstantial evidence, all the circumstances must be consistent with each other and when taken together point conclusively to a finding that the respondent is a sexually violent predator." You know, it doesn't - - it just doesn't fit neatly within this because, of course, they're not trying to determine what happened to find the person guilty or not guilty. Just, I mean, generally - - not generally, because always in a trial where the jury is having to determine what occurred.

> The State: Your Honor, my argument would be that this language is also - - it's increasing our burden that not only do we have to prove beyond a reasonable doubt, now you're saying that it must be conclusively point to , which to me says even more than firmly convinced. I just don't think - - I think that sentence is, you know, prejudicial to the State.
>
> Appellant's Counsel: The burden - - the State burden in a criminal case which is in this case is still beyond a reasonable doubt and that language is consistent. Whether the State's burden in a criminal case, I don't think - -
>
> The Court: But, I mean, what are - - what are all the circumstances that have to be consistent with each other?
>
> Appellant's Counsel: It would have to be - - I mean, nobody - - it would have to be his testimony and the testimony of my witnesses that are testifying to, you know, that he's not the same person Dr. Gillen is testifying about.
>
> The State: To [Appellant's] argument that, Your Honor, the burden - - beyond a reasonable doubt in a criminal case is the standard in a criminal case. This is a civil case and the normal civil case preponderance of the evidence and we had an increased burden due to the liberty interest so I think - - I don't think that's apples to apples because we are at a higher standard that what we normally would be at. I think this adds an increased burden to that so that will be my argument.
>
> The Court: Yeah, I just don't think that - - I understand your positions. 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 fills (sic) within the statutory scheme.

(TT, pp. 433-438; R., pp. 385-390). The circumstantial evidence charge given to the jury did not include language requiring that all the circumstances be consistent with each other in order for the jury to find Appellant is a sexually violent predator. (TT, pp. 504-505; R., pp. 456-457).

The jury found Respondent is a sexually violent predator beyond a reasonable doubt. Based on the jury's verdict, Judge Curtis committed Appellant to DMH custody

for long term control, care, and treatment. (TT, pp. 523-524, Order of Commitment filed April 6, 2022; R., pp. 475-476, 491). This appeal followed.

STANDARD OF REVIEW

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion, which occurs when the trial court's ruling is based on an error of law or is not supported by the evidence. Cole v. Raut, 378 S.C. 398, 663 S.E.2d 30, 33 (2008) (*citing* Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528, 539 [2000]). Erroneous jury instructions are subject to harmless error analysis. State v. Burdette, 427 S.C. 490, 832 S.E.2d 575, 578 (2019). In making a harmless error analysis, the appellate court's inquiry is whether the erroneous charge contributed to the verdict rendered rather than what the verdict would have been had the jury been given the correct charge, and the jury instructions must be considered as a whole. State v. Brown, 438 S.C. 146, 881 S.E.2d 771, 773 (Ct. App. 2022); State v. Kerr, 330 S.C. 132, 498 S.E.2d 212, 218 (Ct. App. 1998)

ARGUMENT

Judge Curtis did not abuse her discretion in determining the full State v. Logan circumstantial evidence charge did not apply in a civil trial under the SVPA, but even if failure to give a portion of the Logan charge was error, it was harmless beyond a reasonable doubt.

Appellant contends Judge Curtis erred by failing to give the portion of the circumstantial evidence charge set forth in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), that states to the extent the State relies on circumstantial evidence, the circumstances must be consistent with each other and point conclusively to the ultimate issue before the jury. He asserts the fact that SVPA cases are civil rather than criminal is irrelevant because "[t]he same rules of evidence apply in civil and criminal proceedings," "[t]he same burden of proof in criminal cases applies in SVP cases," and "Logan contains no language specifically limiting its applicability to criminal cases."[1] While these individual assertions are accurate, they do not obviate the fundamental differences between sexually violent predator civil proceedings and criminal proceedings, or lead to the inevitable conclusion Appellant espouses.

A. Preservation

As a threshold matter, the issue as stated in Appellant's brief is arguably different from the issue as argued before Judge Curtis. To the extent the issue Appellant now raises on appeal is different from what was raised before Judge Curtis, it is not preserved for appellate review. *See* State v. Benton, 338 S.C. 151, 526 S.E.2d 228, 231 (2000) (jury instruction issue not preserved because appellant argued one ground in support of a

[1]Appellant's reference to the Rules of Evidence is perplexing because he does not indicate which evidentiary rule(s) applies to a Logan charge. Indeed, the Logan opinion does not reference the Rules of Evidence at all as relevant to whether the charge is required.

circumstantial evidence charge at trial and another ground on appeal); *see also* State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995) (a party cannot argue one ground below and then argue another ground on appeal).

During the charge conference, Judge Curtis asked Appellant "what are all the circumstances that have to be consistent with each other." Appellant responded: "it would have to be his testimony and the testimony of my witnesses that are testifying . . . that he's not the same person Dr. Gillen is testifying about." (TT, p. 437; R., p. 389) (emphasis added). Rather than simply requesting the Logan circumstantial evidence charge, Appellant's argument made it clear he was asking Judge Curtis to greatly expand the scope of the jury instruction in Logan, which requires consistency only in the circumstances the State relies on through circumstantial evidence without regard to evidence presented by the defendant. After hearing Appellant's position, Judge Curtis found the requested portion of the Logan charge did not fit "within the context of the sexually violent predator proceeding in that all of the circumstances have to be consistent with each other for them to return a verdict," and further explained "[i]t's not like a murder case where you're looking at the facts and . . . did the person commit this particular offense, so I just don't think it fills (sic) within the statutory scheme." (TT, pp. 437-438; R., pp. 389-390).

B. Applicability of Logan

Even if the issue presented on appeal is preserved, Appellant ignores the fundamental difference between a sexually violent predator civil case and a criminal case. As Judge Curtis aptly noted in explaining her ruling, in a criminal case the State must prove the defendant committed a particular crime beyond a reasonable doubt. Pursuant to

Logan and its progeny, to the extent the State relies on circumstantial evidence to establish a necessary element of that particular crime, the circumstances must be consistent with each other and point conclusively to guilt beyond a reasonable doubt.

In sexual predator cases, however, the requisite crime is already established by direct evidence of the person's statutory qualifying conviction. The focus then turns to the presence of a diagnosed mental abnormality or personality disorder that makes the person likely to reoffend sexually in the future (propensity). Evidence of a mental abnormality or personality disorder diagnosis and a causal connection between the diagnosis and the person's propensity to reoffend are necessarily provided by a mental health expert's opinions.

"Expert opinion testimony is a form of direct evidence" because it is based on "'the assertion of a human being as to the existence of a thing in issue.'" Beck v. Fleener, 376 N.W.2d 594, 597-598 (Iowa 1985) (*quoting* IA Wigmore, Evidence §24 at 944 [Tillers rev. 1983]); *see also* Campbell v. Wagner, 303 Ill. App. 3d 609, 708 N.E.2d 539, 542 (1999) (expert opinion testimony is not itself circumstantial evidence warranting the giving of a circumstantial evidence instruction); *cf.* Chalfant v. Carolinas Dermatology Grp., P.A., 439 S.C. 372, 887 S.E.2d 1, 9 (Ct. App., 2023) (where both expert testimony and circumstantial evidence are presented, inquiry is only whether there was sufficient evidence to support a causal connection inference). In this case, the only evidence the State relied on was the expert opinion of Dr. Gillen.

Under Appellant's theory as presented to Judge Curtis, any inconsistencies, including information presented during the person's case-in-chief that is inconsistent with the State's evidence, would virtually require the jury to return a verdict for the person.

While there may be inconsistencies among the documents, statements, and other information an expert considered in reaching his opinions, which can be explored through cross-examination and argument of counsel, the expert's opinions are direct evidence, and inconsistencies in things the expert considered in reaching those opinions do not mandate a verdict for the person.

Appellant's reliance on State v. Heardon, 430 S.C. 367, 845 S.E.2d 499 (2020), and State v. Sanchez, 435 S.C. 468, 867 S.E.2d 595 (Ct. App. 2021), is misplaced. He asserts these cases support inclusion of the Logan language at issue because the defendants' mental state was the primary issue. Again, Appellant compares apples to oranges.

The mental state at issue in Heardon arose from the defendant's self-defense claim, which required the jury to assess whether she was at fault in bringing on the difficulty and believed she was in imminent danger at the time she shot and killed the victim. In reversing the voluntary manslaughter conviction, the supreme court noted the State's own witness (pathologist) testified the fatal wound could have been caused **either** by the defendant shooting the victim as he walked up the stairs to the house **or** as he charged toward the defendant as the defendant claimed. 845 S.E.2d at 502-503. In short, the "competing inferences" in circumstantial evidence presented by the State necessitated the Logan charge.

In Sanchez, the jury was required to assess whether the defendant knew the drugs she was charged with trafficking were in a hidden compartment of the car she was driving, which was an element of the offense the State had to prove beyond a reasonable doubt. In reversing the trafficking conviction, the court of appeals noted the State's

evidence regarding the defendant's knowledge of the drugs was largely circumstantial, the State's witness admitted there was no investigation of the car's previous owner or tests on the car's hidden compartment, and there was no direct evidence of the defendant's knowledge of the hidden compartment or drugs. Based on those findings, the court found it was error not to give the Logan circumstantial evidence charge. 867 S.E.2d at 599-598.

Both Heardon and Sanchez involved mental status issues directly related to the particular crime the State had to prove beyond a reasonable doubt. In both cases, there were inconsistencies in the State's evidence that warranted the Logan circumstantial evidence charge. In the instant case, however, the criminal conviction was already established, the mental status at issue was necessarily established by direct evidence from a qualified expert, and there were no inconsistencies in the State's evidence on that issue.

Harmless Error

Notwithstanding the mandatory language in Logan, erroneous jury instructions remain subject to a harmless error analysis and the appellate court's authority to consider the jury charge as a whole and in light of the evidence and issues presented at trial, and to warrant reversal, the failure to give a requested charge must be both erroneous and prejudicial. Herndon, 845 S.E.2d at 501–02 (citations omitted). The appellate court's inquiry is whether the failure to give a requested charge contributed to the verdict rendered and the jury instructions must be considered as a whole. Brown, 881 S.E.2d at 773.

Assuming the Logan charge was applicable in this SVPA case, Judge Curtis' failure to give the second part of the Logan charge was harmless. Given the substantial

direct evidence before the jury regarding Appellant's criminal history, antisocial personality disorder, lack of remorse, and high risk to reoffend sexually with no realistic plans to avoid reoffending, the failure to give the full Logan charge did not impact the jury's verdict. Therefore, any error in failing to give the charge was harmless.

CONCLUSION

Based on the foregoing reasons, the State respectfully submits the Court should affirm the circuit court ruling and Appellant's civil commitment as a sexually violent predator pursuant to the SVPA.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

August 28, 2023

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County
The Honorable Kristi F. Curtis, Circuit Court Judge
Appellate Case No. 2022-000550

In the Matter of the Care and Treatment
of Elijah Deshawn Whack,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief oof Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

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August 28, 2023