

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-211486

IN THE MATTER OF THE CARE AND TREATMENT OF
DUSTY CYR,

Appellant,

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly allowed the State's expert witness to testify about details of Cyr's sexually violent offenses, because the offense details were significant to the expert's evaluation and conclusions on the issue of whether Cyr had a mental abnormality and/or personality disorder that made him likely to commit future acts of sexual violence.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On April 5, 2005, Appellant Dusty Cyr ("Cyr") pled guilty to three counts of lewd act on a child under sixteen. The charges arose from Cyr's sexual molestation of a five year old female, a ten year old female, and a seven year old female. In addition, Cyr subsequently pled guilty in Connecticut to three counts of risk of injury to a child in connection with the sexual molestation of his three male nephews, ages three, four and five. (State's Exhibits 1, 2, and 3; Record on Appeal [R.], pp. _____).

In accordance with the Sexually Violent Predator Act ("SVP Act"), prior to Cyr's release from incarceration, Respondent State of South Carolina (the "State") commenced a civil commitment proceeding in the Dorchester County Court of Common Pleas on June 6, 2011. On October 13, 2011, the circuit court found probable cause to believe Cyr met the criteria for commitment as a sexually violent predator, and appointed Peggy C. Wadman, M.D., to conduct a mental health evaluation of Cyr. Dr. Wadman diagnosed Cyr with the mental abnormality of pedophilia, as well as anti-social personality disorder, and found he was a high risk to re-offend sexually, which met the criteria for commitment under the SVP Act. (TT, pp. 106-114; R., pp. _____).

The case was called for a jury trial on April 9, 2012, before the Honorable William P. Keesley, Circuit Court Judge. After the jury was selected, the circuit court granted Cyr's motion for a bench trial. (TT, pp. 44-51; R., pp. _____).

Dr. Wadman testified for the State and was qualified as an expert in forensic psychiatry. (TT, pp. 55-57; R., pp. _____). As part of the evaluation, Dr. Wadman reviewed all the available documentation regarding Cyr's criminal offenses, interviewed

Cyr, and administered psychological tests designed to assess a sex offender's risk of re-offending. (TT, pp. 57-61; R., pp. ____). She testified she relied on information regarding the details of Cyr's sexual offenses because it was "very important to understand exactly what happened with the victims, the nature of the offenses, and what actions Cyr took against [the victims]." (TT, p. 62; R., p. ____).

Cyr objected to Dr. Wadman testifying about the details of his criminal convictions on the ground the details were prejudicial. The State contended the evidence was necessary to show the expert's analysis, particularly what she considered significant in reaching her conclusions regarding Cyr's mental status. The circuit court overruled Cyr's objection, finding Dr. Wadman testified experts in her field rely on such information in doing evaluations. (TT, pp. 63-64; R., pp. ____).

Dr. Wadman testified the ten year old female victim reported Cyr put his hand down the back of her pants five or six times when he was baby-sitting her, and on more than one occasion he laid her down and "humped" her. During her interview with Cyr, he said he was "high," the victim "would sit on my lap and rub around," and [she] was rocking back and forth on me, and I'm only human." (TT, pp. 68-69, State's Exhibit 1; R., pp. ____).

The five year old female victim reported she was in a shed with Cyr and another adult, and Cyr asked the other adult to leave. Cyr then made the victim lay down, and he thrust his pelvis and genital area against her genital area. Even though he pled guilty to the charge, Cyr told Dr. Wadman the incident did not happen. (TT, pp. 65-66, State's Exhibit 2; R., pp. ____).

The seven year old female victim reported Cyr, who was the victim's aunt's boyfriend at the time, touched her genital area with his hand "more than once," and the incidents occurred in her mother's bedroom. Again, even though he pled guilty to the charge, Cyr told Dr. Wadman he never touched the victim to get aroused, and denied fondling the victim's vaginal area. (TT, p. 69, State's Exhibit 3; R., pp. ____).

Dr. Wadman testified Cyr's accounts of the incidents during the interview were significant because he either denied or minimized his conduct, or blamed it on the victim. She stated this was a cognitive distortion used by pedophiles that needs to be addressed in treatment. (TT, p. 70; R., p. ____).

As to the Connecticut offenses, Dr. Wadman testified Cyr was originally charged with first degree and second degree sexual assault for conduct against his prepubescent nephews (three, four and five years old) between approximately 1996 to 1998. He pled guilty to three counts of risk of injury to a child, and was sentenced to fifteen years, suspended upon service of six years and fifteen years' probation, which was ordered to run concurrent with his 2005 South Carolina sentences. He admitted during the interview with Dr. Wadman that he molested the older two victims, but minimized his conduct with the youngest victim as "just consist[ing] of rubbing our things together," and "not an everyday thing." Dr. Wadman stated these offenses were significant because the victims were male, which increased Cyr's risk to re-offend "at least two-fold." (TT, pp. 71-73, 87-88, 105; R., pp. ____). She further testified Cyr failed to exhibit any appreciation for the harm he caused any of his victims. (TT, pp. 105-106; R., pp. ____).

Dr. Wadman testified Cyr had a significant history of non-sexual, anti-social and

conduct disorder behavior, including fighting, gang activity, shoplifting, truancy, vandalism, animal cruelty, and burglaries. She stated his non-compliant behavior continued while he was incarcerated, resulting in at least twenty major disciplinary infractions, including two for public exhibitionism and maturbation. Cyr told Dr. Wadman he made "some of the baddest knives in SCDC," and records indicated he had five possession of weapons infractions while incarcerated. (TT, pp. 88-92; R., pp. ____).

Dr. Wadman also used an actuarial risk assessment instrument called the Static-99R, which is a ten item scale. Cyr had a score of six on that instrument, which put him in the high risk category for re-offending. Dr. Wadman testified his risk of re-offending was in the top two percent of male sex offenders who have been convicted of sex crimes. She stated the Static-99R was information she considered in addition to Cyr's conduct in prison, and his lack of any sex offender treatment. (TT, pp. 93-94; R., pp. ____).

Based on all the information available to her, Dr. Wadman diagnosed Cyr with the mental abnormalities of pedophilia, non-exclusive type, and poly-substance dependence in a controlled environment, as well as a provisional diagnosis of bipolar disorder. She also testified he has anti-social personality disorder, which "puts him at increased risk to reoffend sexually." (TT, pp. 106-108; R., pp. ____).

Dr. Wadman opined to a reasonable degree of medical certainty that Cyr's mental abnormalities and personality disorder pre-disposed him to commit future sexually violent offenses. She further stated to a reasonable degree of medical certainty that Cyr's

propensity to commit future sexually violent offenses posed a menace to the health and safety of others, he had serious difficulty controlling his behavior, and he was likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care and treatment. (TT, pp. 109-111, 114; R., pp. ____). She also specifically opined Cyr was not a candidate for out-patient sex offender treatment due to his lack of control over his substance abuse problems, his impulsivity, and his history of not conforming to rules while incarcerated. (TT, p. 112; R., p. ____).

The circuit court found beyond a reasonable doubt that Cyr is a sexually violent predator. (TT, pp. 147-148; R., pp. ____). The circuit court then committed Cyr to the South Carolina Department of Mental Health for long term control, care and treatment. (Order of Commitment filed April 10, 2012; R., pp. ____). This appeal followed.

ARGUMENT

The circuit court properly allowed the State's expert witness to testify about details of Cyr's sexually violent offenses, because the offense details were significant to the expert's evaluation and conclusions on the issue of whether Cyr had a mental abnormality and/or personality disorder that made him likely to commit future acts of sexual violence.

Cyr contends the circuit court erred in allowing Dr. Wadman to testify regarding the details of his sexually violent convictions. This contention is meritless.

The admissibility of evidence, including an expert's testimony, is within the sound discretion of the trial judge, and the appellate court is limited to determining whether the trial court abused its discretion. State v. White, 382 S.C. 265, 676 S.E.2d 684, 686 (2009) (trial court's decision to admit or exclude testimony will not be reversed absent a prejudicial abuse of discretion); State v. Price, 368 S.C. 494, 629 S.E.2d 363, 365 (2006) (same); In the Matter of the Care and Treatment of Manigo, 389 S.C. 96, 697 S.E.2d 629, 634 (Ct. App. 2011), *cert. granted* September 9, 2011 (same); State v. Rice, 375 S.C. 302, 652 S.E.2d 409, 415 (Ct. App. 2007) (same). An abuse of discretion occurs when the ruling is based on an error of law, or a factual conclusion without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506, 509 (2005); Manigo, 697 S.E.2d at 634; Rice, 652 S.E.2d at 415.

An expert witness may state an opinion based on facts not within her personal knowledge, and may base her opinion on information made available before the trial if it is of the type reasonably relied on in the particular field to make opinions. Manigo, 697 S.E.2d at 634 (*citing* Hundley ex rel. Hundley v. Rite Aid of S.C., Inc., 339 S.E. 285, 529 S.E.2d 45 [Ct. App. 2000]). The expert may also testify regarding hearsay for the purpose

of showing what information she relied on in reaching an opinion. *Id.* See also Rule 703, SCRE (facts or data in the particular case on which an expert bases an opinion or inference need not be admissible evidence if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences).

In a sexual predator case, past criminal history is directly relevant to establishing the presence of a required sexually violent conviction, whether the person suffers from a relevant mental abnormality, and the person's propensity to commit acts of sexual violence. In the Matter of the Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451, 453-454 (2003); In the Matter of the Care and Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008). An expert may rely on the details of prior offenses in reaching an opinion on the person's mental status and propensity for future sexual violence. See Corley, 577 S.E.2d at 454 (expert testified details of past offense may show pattern of behavior indicating an increased risk to commit future offenses);¹ Ettel, 660 S.E.2d at 288 (details of prior unconvicted sexual offenses and murder conviction were admissible because the expert relied on them in reaching diagnosis of paraphilia, and evaluating person's need for and likelihood of success in treatment and ability to control his behavior).

In this case, Dr. Wadman testified the details of Cyr's offenses were a significant part of her evaluation, and she relied on them in developing her opinions regarding his

¹Cyr's contention the Supreme Court found in Corley that details beyond the face of the indictments were unnecessary is incorrect. The Court made no finding regarding the necessity of further details, which apparently were not offered at trial, but simply noted the details as presented in the indictments were not unduly prejudicial. 577 S.E.2d at 454.

mental abnormality, personality disorder and risk to re-offend sexually. In addition to reviewing the records, Dr. Wadman discussed each offense, including the details, with Cyr during the forensic interview, and testified his statements regarding the offenses provided further support for her opinions.

Finally, Cyr alludes to the evidence as prejudicial, but fails to show how the details as presented were unduly prejudicial. To the extent the purported prejudicial nature of the testimony at issue is before the Court, any assessment of prejudice to Cyr must be viewed from the posture of a bench trial as opposed to a jury trial. "It is well-established that it is a near insurmountable burden for a defendant to prove prejudice in the context of a bench trial as a judge is presumed to disregard prejudicial or inadmissible evidence." State v. Inman, 395 S.C. 539, 720 S.E.2d 31, 45 (2011).

This case was a bench trial at Cyr's request, and his claims of prejudice must be assessed accordingly. The circuit court is presumed to have disregarded any unduly prejudicial evidence, and therefore, even if the testimony regarding the details of Cyr's offenses was prejudicial, it does not warrant reversal of Cyr's commitment as a sexually violent predator.

CONCLUSION

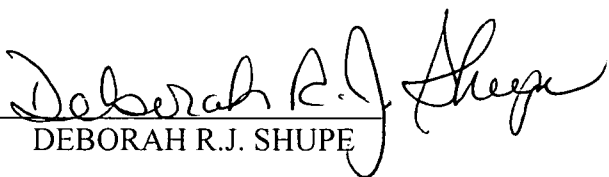
Based on the foregoing, the State respectfully submits the circuit court's finding Cyr is a sexually violent predator as defined by the SVP Act, and the Order of Commitment based on that finding, should be affirmed.

Respectfully submitted,

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July 17, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-211486

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IN THE MATTER OF THE CARE AND TREATMENT OF
DUSTY CYR,

Appellant,

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent proposes the following to be included in the Record on Appeal:

1. April 9, 2012 Trial Transcript, pp. 1, 44-51, 55-72, 87-138, 147-148
2. State's Exhibits 1, 2, and 3
3. Order of Commitment filed April 10, 2012

To facilitate preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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By:


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July 17, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable William P. Keesley, Circuit Court Judge
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IN THE MATTER OF THE CARE AND TREATMENT OF
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Appellant,

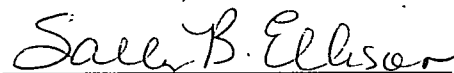
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant
Assistant Appellate Defender
SC Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.

This 17th day of July, 2013.



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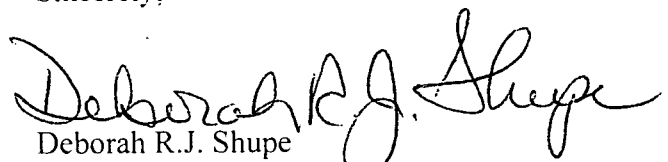
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Re: In the Matter of the Care and Treatment of Dusty Cyr
Appellate Case No. 2012-211486

Dear Ms. DuRant:

Enclosed herewith and served upon you are two copies of the Initial Brief of Respondent and Designation of Matter, with proof of service, in the above-referenced case.

Sincerely,


Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 1 copy enclosed)
Victim Services (with enclosure)

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