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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2012-210127

IN THE MATTER OF THE CARE AND TREATMENT OF
JIMMY MAC McBRIDE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

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Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
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STATEMENT OF ISSUE ON APPEAL

The circuit court properly allowed the court appointed expert to testify about all of McBride's prior sexual offenses, including two offenses no billed by the grand jury, because the expert testified he relied on all the prior offenses in the evaluation, and explained why the offenses were significant.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On May 25, 2005, Appellant Jimmy Mac McBride ("McBride") pled guilty to one count of second degree criminal sexual conduct with a minor, and was sentenced to eight years incarceration. The case arose from McBride's sexual molestation of his eleven year old daughter. (Trial Transcript [TT], pp. 65-66, 73-76, State's Exhibit 1; Record on Appeal [R.], pp. 26-27, 34-37, 99).

On January 24, 2006, McBride pled guilty in Jackson County, FL, to one count of lewd or lascivious battery, arising from his molestation of a fourteen year old female. He was sentenced to five years incarceration, to be served concurrent with his sentence in South Carolina. (TT, pp. 66, 76-80, State's Exhibit 2; R., pp. 27; 37-41; 102).

In accordance with the Sexually Violent Predator Act ("SVP Act"), prior to McBride's release from incarceration, Respondent State of South Carolina (the "State") commenced a civil commitment proceeding in the Marion County Court of Common Pleas in February, 2011. On June 2, 2011, the circuit court found probable cause to believe McBride met the criteria for commitment as a sexually violent predator, and appointed Jeffrey Musick, Ph.D., to conduct a mental health evaluation of McBride. Dr. Musick diagnosed McBride with 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. 82-90; R., pp. 43-51).

The case was called for a jury trial on March 19, 2012, before the Honorable D. Craig Brown, Circuit Court Judge. Prior to trial, McBride moved to exclude any testimony regarding charges against him that did not result in convictions. The State argued evidence regarding sexual offenses that did not result in convictions was

admissible to the extent an expert relied on the information as a basis for his opinion. The circuit court denied McBride's motion, finding the law is clear that evidence of prior conduct, charged and uncharged, is material evidence in a case under the SVP Act. (TT, pp. 37-43; R., pp. 6-12).

The State called Dr. Musick, who was qualified as an expert in forensic psychology. (TT, pp. 60-62; R., pp. 21-23). As part of the evaluation process, Dr. Musick reviewed all available documentation regarding McBride, including his criminal history, contacted people who had interacted with McBride, and interviewed McBride in person. He testified his record review included some sexual charges against McBride that did not result in convictions, because such offenses indicate the presence of a risk factor for future sexual offending. (TT, pp. 63-66; R., pp. 24-27).

According to the records reviewed by Dr. Musick, McBride was arrested in 1988 on a charge of second degree criminal sexual conduct arising from him allegedly having sexual intercourse with a fourteen year old girl.¹ Dr. Musick testified the grand jury did not find a sufficient basis to indict McBride, so the charge did not go any further, but he considered the allegations relevant to McBride's risk to reoffend. When Dr. Musick asked McBride about the charge, he denied having sex with the alleged victim. (TT, pp. 68-69; R., pp. 29-30).

Dr. Musick also considered and testified about a February 2003 charge against McBride of first degree criminal sexual conduct, involving a twenty-four year old female acquaintance who alleged McBride drove her to a remote location, threatened her life and then raped her. The court records indicated the charge was dropped because the victim

¹ McBride's counsel properly objected contemporaneously with the testimony regarding unconvicted sexual offense allegations.

did not want to testify before the grand jury. McBride told Dr. Musick he had consensual sex with the victim, who accused him of sexual assault because he reneged on giving her cocaine in exchange for the sex. (TT, pp. 69-70; R., pp. 30-31).

McBride was also charged with first degree criminal sexual conduct in connection with an incident in July 2003 involving McBride's twenty-six year old ex-girlfriend. The victim alleged McBride raped and beat her for hours. Medical records indicated the victim had an abrasion inside her lower lip, and the severity of any beating she suffered was mild. The charge was ultimately dismissed due to the victim's lack of cooperation. McBride told Dr. Musick he had consensual sex with the victim, who claimed he sexually assaulted her because he lied to her about being married. (TT, pp. 71-72; R., pp. 32-33).

As to McBride's 2005 conviction for second degree criminal sexual conduct with a minor in connection with the sexual molestation of his eleven year old daughter, Dr. Musick testified the victim reported McBride felt her vaginal area, then put his penis inside her and ejaculated. After the assault, McBride gave the victim five dollars, and made a threatening sign to her with his hand across his throat. (TT, p. 73; R., p. 34).

During the investigation, McBride originally denied sexually assaulting the victim, and alleged the victim's mother got the victim to make the allegation against him, but then he pled guilty to the charge. He told Dr. Musick he initially denied the charge because he was too intoxicated to remember the incident, and he still did not remember it, but his daughter would not lie about him. (TT, pp. 73-74; R., pp 34-35).

Dr. Musick testified the incident provided support for a diagnosis of anti-social personality disorder, as well as evidence of serious difficulty controlling sexual behavior. He found five aspects of the incident significant: 1) McBride offended against a victim

who could easily identify him; 2) he knew the victim had previously reported being sexually abused by someone else, so he knew she might report the offense; 3) McBride's wife and two sons were inside the residence at the time of the offense, which increased the risk of being detected; 4) the offense occurred just six days after McBride was arrested for the incident involving his ex-girlfriend, and he was out on bond and under some degree of home detention for that offense; and 5) McBride committed the offense even though he had an appropriate sex partner (his wife) available to him at the time. (TT, pp. 74-76; R., pp. 35-37).

Dr. Musick testified that records from McBride's 2006 Florida conviction for lewd and lascivious battery indicated the fourteen year old female victim reported McBride asked her to go with him to a store across the street to buy sodas, but they got into a truck instead, and parked behind a motel where McBride forced her to have sex with him. McBride told authorities he allowed the victim to perform oral sex on him in exchange for two bags of drugs, and he thought the victim was nineteen. Other witnesses reported McBride knew the victim was fourteen. (TT, p. 77; R., p. 38).

McBride told Dr. Musick he did not know the victim was underage, and he would not have engaged in sexual activity with her if he had known she was fourteen. He also said he met the victim at a "prostitution house," and paid the madam \$50 for the victim to perform oral sex on him. (TT, pp. 77-78; R., pp. 38-39).

Dr. Musick found the Florida incident further supported a diagnosis of anti-social personality disorder, and provided additional evidence regarding McBride's risk to reoffend sexually. He noted various things regarding the incident indicated an increased risk to reoffend: 1) the victim was a stranger to McBride who he only met the day of the

incident; 2) McBride was not related to the victim; 3) it was another sex offense with evidence of hostility and physical aggression toward the victim; 4) McBride committed the offense while he was under investigation for the sexual offense against his daughter, which evidenced serious difficulty controlling his sexual behavior; and 5) McBride committed the offense even though he had an appropriate sexual partner (his wife) available at the time. (TT, pp. 78-80; R., pp. 39-41).

Dr. Musick also reviewed records regarding a 2004 first degree criminal sexual conduct charge against McBride in connection with the assault of a twenty-four year old female acquaintance. The victim alleged McBride took her to a remote location and asked if he could touch her, and when she refused, he choked her, slapped her and told her to pull her pants down. When she did not comply, the victim said McBride hit her, pulled her clothes down, forced her legs apart and raped her. The charge was dismissed when the grand jury did not find a sufficient basis for an indictment. McBride told Dr. Musick he never met the victim and did not sexually assault her. (TT, pp. 80-81; R, pp. 41-42).

Dr. Musick testified he also considered McBride's non-sexual criminal history, which included nine convictions. He stated the non-sexual convictions supported a diagnosis of anti-social personality disorder because they were evidence of unlawful behavior. In addition, five of the convictions were for assault and battery, indicating physical aggression, which is one of the criteria for an anti-social personality disorder diagnosis. (TT, pp. 81-82; R., pp. 42-43).

McBride's non-sexual criminal convictions also constituted evidence regarding his risk to reoffend sexually. Dr. Musick testified there were two aspects of McBride's

non-sexual offense history that were significant to assessment of the risk to reoffend: 1) he had four or more prior sentencing dates, including his sexual and non-sexual convictions; and 2) some of his non-sexual convictions involved violence. (TT, p. 83; R., p.44).

Dr. Musick testified McBride had no sex offender treatment while incarcerated. McBride told Dr. Musick he does not have any sexual problems and does not need sex offender treatment, but would participate in treatment if required to do so. (TT, p. 83; R., p. 44).

Dr. Musick further testified he scored McBride on a commonly used and accepted risk assessment instrument known as the Static-99R, which assigned point values to risk factors. McBride's score was higher than approximately 81% of the sample of sex offenders used in the study. (TT, pp. 83-87; R., pp. 44-48).

Based on the records he reviewed and the interviews he conducted, Dr. Musick diagnosed McBride with anti-social personality disorder, and testified to a reasonable degree of psychological certainty that his personality disorder affected McBride's emotional or volitional capacity such that he is predisposed to commit future sexual offenses. He further testified McBride's propensity to commit future acts of sexual violence posed a menace to the health and safety of others, he had serious difficulty controlling his behavior, and he met the requirement for civil commitment as a sexually violent predator. (TT, pp. 87-92; R., pp. 48-53).

The jury found McBride was a sexual predator beyond a reasonable doubt. Based on the jury verdict, the circuit court committed him to the custody of the South Carolina

Department of Mental Health for long term control, care and treatment. (Order of Commitment; R., pp. 110). This appeal followed.

ARGUMENT

The circuit court properly allowed the court appointed expert to testify about all of McBride's prior sexual offenses, including two offenses not billed by the grand jury, because the expert testified he relied on all the prior offenses in the evaluation, and explained why the offenses were significant.

McBride contends the circuit court erred in allowing Dr. Musick to testify regarding the two criminal charges against him that were rejected by the grand jury, because the evidence was more prejudicial than probative. This contention is without merit in light of the express language of the SVP Act, as well as applicable case law.

The admission of evidence is a matter within the trial court's discretion, and the trial court's ruling will not be reversed absent an abuse of discretion. In the Matter of the Care and Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008). Evidence is relevant if it tends to establish, or make more or less probable, the matter in controversy, and all relevant evidence is generally admissible. *Id.* (citing Rules 401 and 402, SCRE). Rule 403, SCRE, provides relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. *Id.*

In a proceeding under the SVP Act, all appointed or retained experts evaluating the person are allowed "reasonable access to the person for the purposes of the examination, as well as access to all relevant medical, psychological, **criminal offense**, and disciplinary records and reports." S.C. Code §44-48-90 (Supp. 2012) (emphasis added); *see also* Ettel, 660 S.E.2d at 287. The criminal "offenses can include **both** convictions **and offenses not resulting in convictions** as long as they are relevant to the determination of whether a person is a sexual violent predator." Ettel at 287 (emphasis added); *see also* In the Matter of the Care and Treatment of Chandler, 382 S.C. 250, 676

S.E.2d 676, 681 (2009) (“Under the [SVP] Act, a person’s ‘criminal offense record’ includes convictions for criminal sexual offenses **as well as evidence of criminal sexual offenses not resulting in convictions.**”) (citing Ettel) (emphasis added).

McBride attempts to distinguish Ettel on the ground “there was no evidence the charges went before the grand jury and were no-billed.” (Brief of Appellant at 8). This contention ignores the fact Ettel was actually **acquitted** on one of the charges at issue in that case. The Court of Appeals held evidence regarding the acquitted charge was relevant and admissible because the evaluator testified she considered it in evaluating Ettel’s mental status, as well as the issue of whether he was likely to reoffend sexually if not confined for treatment. 660 S.E.2d at 288. Further, the information went to the evaluator’s conclusions regarding Ettel’s ability to control his behavior, and it was not the only sources for the evaluator’s conclusions. *Id.*

This case is on point with Ettel. Dr. Musick testified he considered and relied on **all** McBride’s offenses, convicted and unconvicted, in reaching his conclusions. He specifically stated the unconvicted offenses were significant indicators of an increased risk to reoffend sexually. (TT, pp. 69-73; R., pp. 30-34).

Evidence impacting the issue of McBride’s risk to reoffend sexually was particularly relevant because Dr. Musick diagnosed McBride with anti-social personality disorder, rather than a specific sexual disorder. Thus, McBride’s pattern of prior sexual offenses, convicted and unconvicted, indicated his personality disorder frequently

manifested itself in sexual offenses, and he was likely to reoffend sexually if not confined for treatment.²

Dr. Musick considered and relied on all of McBride's criminal offenses, sexual and nonsexual, convicted and unconvicted, in reaching his diagnosis of anti-social personality disorder, and his opinion McBride is likely to reoffend sexually if not confined for long term control, care and treatment. Since the two unconvicted sexual offenses were part of the basis for Dr. Musick's expert opinions, the circuit court did not abuse its discretion in allowing Dr. Musick to testify about them. Accordingly, the jury verdict and Order of Commitment should be affirmed.

² Even without the two no-billed offenses, McBride still has a significant historical pattern of sexual offenses – two convictions and two unconvicted offenses.

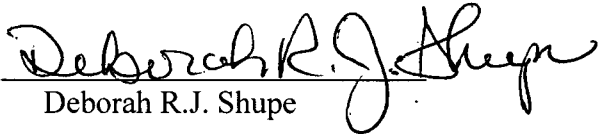
CONCLUSION

Based on the foregoing, the State respectfully submits the circuit court's rulings, the jury verdict and the Order of Commitment should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY: 
Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

June 12, 2013

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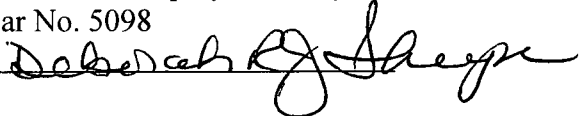
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY: 

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

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

LaNelle Cantey DuRant
Assistant Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.

This 12 day of June, 2013.



Sally B. Ellison
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4156

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