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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF RICHARD DEAN CAPPS,

APPELLANT

APPELLATE CASE NO. 2013-001203

INITIAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing the forensic expert, Dr. Peggy Wadman, to testify about the details of the sexually violent offenses that Appellant Capps previously pled guilty to during his trial for commitment to the Sexually Violent Predator Program?

STATEMENT OF THE CASE

In July 2008, Richard Capps pled guilty to two counts of committing a lewd act on a minor child which involved two different children. He was sentenced to nine years on each charge with both to run concurrently. See State's Exhibit 1. Prior to his release from incarceration, Capps was referred to the Multidisciplinary Team to determine if there were probable cause that he met the requirements to be a sexually violent predator pursuant to the Sexually Violent Predator Act, S.C. Code Section 44-48-30. Probable cause was found at each of the steps in the evaluation for the sexually violent predator program. The court appointed examiner, Dr. Peggy Wadman, determined that Capps had the mental abnormality of pedophilia. Tr. 66, ll. 13 – 25.

On May 28-29, 2013, Capps proceeded to trial before the Honorable G. Edward Welmaker and a jury to determine if he met the criteria to be a sexually violent predator. Capps was represented by Elizabeth P. Wiygul, and the state was represented by Nicole Wetherton. The jury found that Capps was a sexually violent predator. Judge Welmaker issued an order committing Capps to the Sexually Violent Predator Program. Capps' attorney filed an appeal. This appeal follows.

STATEMENT OF FACTS

Richard Capps had two convictions of committing a lewd act on a child. Pretrial, the state told the judge that they wanted to admit the two indictments and the explanations of the charges. The state cited the case of In the Matter of The Care and Treatment of John Phillip Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), for the proposition that the details of Capps' prior offenses as found in the indictments were admissible. Tr. 22, ll. 12 – Tr. 24, ll. 4.

Defense counsel argued to the court that she would be willing to stipulate to the prior convictions, but she was opposed to any of the materials being admitted. Defense counsel argued that Capps entered an Alford plea, and the state should not retry the facts of his convictions. Counsel objected on the basis that it was more prejudicial than probative. Counsel also argued that there had been many scrivener's errors in the paperwork throughout. She explained that one of the indictment numbers referenced on one of the warrants was the incorrect indictment number. Then there was the tracking sheet from the court indicating that the charges were dismissed. Tr. 24, ll. 5 – Tr. 26, ll. 24.

The judge ruled that he read the Corley case and he weighed the prejudicial effect. The judge ruled that the documents and details were allowed. Tr. 29 ll. 1 – Tr. 31, ll. 19.

Dr. Peggy Wadman, forensic psychiatrist with the Department of Mental Health, testified that she was appointed by the court to evaluate Capps to determine if he had a mental abnormality. Tr. 41, ll. 1 – 23; Tr. 45, ll. 1 – 17. She diagnosed Capps as having pedophilia which was an attraction to prepubescent children over a period of six months. Tr. 66, ll. 13 – 25.

Dr. Wadman described to the jury the two convictions as contained in the indictments. Defense counsel objected based on her earlier arguments when the indictments and accompanying documents were admitted into evidence. Tr. 53, ll. 4 -14.

Dr. Wadman then described the details of the two convictions. One of the cases involved a boy about eight or nine, and the other conviction involved his ten year old sister. Capps was babysitting these two children and their younger sister. The boy told police that Capps would take baths with him and fondle him .Capps also put his mouth on the boy's "private part." Capps digitally penetrated the vagina of the ten year old sister several times and touched the younger sister in the same way. Capps was not charged with touching the youngest daughter. Capps was out on bond when he committed these offenses for a previous sex offense against a seven or eight year old boy who did not report until he was thirteen. Tr. 51, ll. 20 – Tr.54, ll. 20.

Dr. Wadman then described an offense for which Capps was not charged. He was accused of sexually fondling his five year old granddaughter in 2001. DSS became involved and a permanent restraining order was issued barring Capps from having any contact with the granddaughter. Tr. 54, ll. 21 – Tr. 55, ll. 25.

Dr. Wadman administered the Static-99R which was a risk assessment tool to determine the likelihood of the person reoffending. Capps scored in the low to moderate range of the risk of reoffending. Tr. 64, ll. 1 – Tr. 65, ll. 25.

Dr. Wadman testified that Capps met the legal criteria to be a sexually violent predator and was likely to commit future acts of sexual violence unless he was committed to a facility for long-term control, care, and treatment. Tr. 69, 1 – 22.

ARGUMENT

The trial court erred in allowing the forensic expert, Dr. Peggy Wadman, to testify about the details of the sexually violent offenses that Appellant Capps previously pled guilty to during his trial for commitment to the Sexually Violent Predator Program.

The sexually violent predator act at S.C. Code Section 44-48-30 provides that a sexually violent predator had to have been convicted of a sexually violent offense as provided in the statute and has a mental abnormality or personality disorder that would make him likely to commit sexually violent acts in the future unless he was committed to a facility for long-term care, control and treatment.

In the case of In the Matter of the Care and Treatment of John Phillip Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), the Supreme court held that indictments outlining details underlying the defendant's convictions for assault and battery of a high and aggravated nature (ABHAN) and criminal sexual conduct (CSC) were admissible. The Court wrote that the probative value of the details underlying the ABHAN and CSC convictions, as presented in the indictments, outweighed the danger of prejudice.

Defense counsel in Capps' case argued to the court that the indictments and the details were not necessary because she was willing to stipulate to the convictions. It is clear from the ruling in Corley, *id.* that the Supreme Court ruled that the details as contained in the indictments were more probative than prejudicial and were admissible. Tr. 53, ll. 1 – 14.

Capps' case is distinguished because Dr. Wadman testified to details outside the indictments. The trial court erred in allowing the prejudicial details which were outside the indictments to be admitted when defense counsel was willing to stipulate to the convictions. All that was necessary to meet the statute was that he had been convicted of a sexually

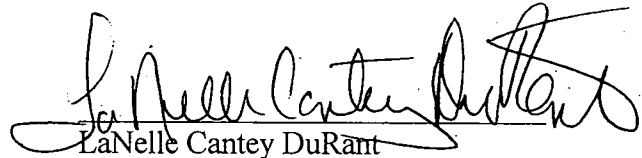
violent offense. The doctor could describe the testing she had done and the other documents she reviewed, and her interview with Capps without describing the details of the convictions.

In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), the Supreme Court ruled that under the totality of the circumstances, the admission of extensive evidence in detail of the appellant's prior criminal conduct was an abuse of discretion, prejudiced the jury, and constituted reversible error. The Court wrote that a clear distinction must be made between the amount of proof necessary to establish a material fact or element of the crime charged, and the point at which such prior-acts evidence became prejudicial. In Johnson's case, the Court held that the prejudicial impact of the excessively detailed evidence presented concerning appellant's prior crimes outweighed its probative value.

CONCLUSION

Based on the above, the trial judge's order of commitment should be reversed and Capps released; or in the alternative remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of November, 2013.

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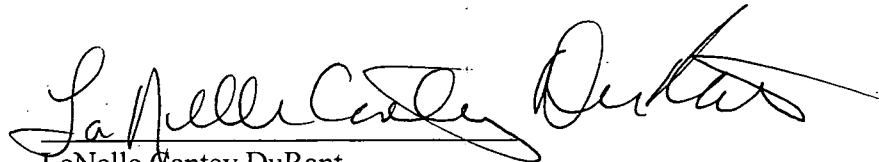
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) State's Exhibit One: Indictments and Sentencing Sheets (4 pages)
- (2) Respondent's Exhibit One: Tracking Sheets (2pages)
- (3) Court's Exhibit One: Note from Jail
- (4) Trial transcript May 28-29, 2013 Pages 1-3, 22-31, 34 - 95, 97 - 125, 129 - 160.

I certify that this designation contains no matter which is irrelevant to this appeal.

November 25th, 2013



LaNelle Cantey DuRant
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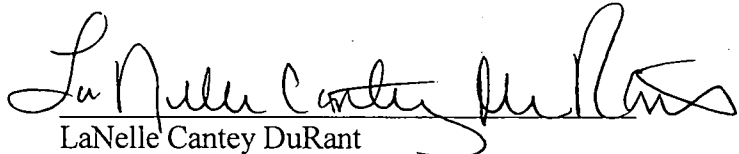
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Richard dean Capps, at the Sexual Violent Predator Program, 7901 Farrow Road, Columbia, SC 29203, this 25th day of November, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of November, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.



SCCID

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Robert M. Dudek, Chief Appellate Defender
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SC Court of Appeals

Deborah R.J. Shupe, Esquire
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Re: The State v. Richard Dean Capps

Dear Ms. Shupe:

Enclosed are two copies of the Initial Brief of Appellant and Designation of Matter in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

LaNelle Cantey DuRant
Appellate Defender

LCD/mpm

Enclosure