

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2013-001203

RECEIVED

JAN 17 2014

SC Court of Appeals

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

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly exercised its discretion in determining the details of Appellant's sexual offenses were relevant to the court appointed expert's opinion regarding Appellant's mental status for purposes of commitment as a sexually violent predator.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In July 2008, Appellant Richard Dean Capps pled guilty to two counts of lewd act on a minor arising from his molestation of a nine year old boy and a ten year old girl. He was sentenced to nine years incarceration. (State's Exhibit 1; Record on Appeal [R.], pp. ____).

In accordance with the Sexually Violent Predator Act ("SVP Act"), prior to Appellant's release from incarceration, Respondent State of South Carolina (the "State") commenced a civil commitment proceeding in the Greenville County Court of Common Pleas on June 29, 2012. On September 18, 2012, the circuit court found probable cause to believe Appellant met the criteria for commitment as a sexually violent predator, and appointed Peggy C. Wadman, M.D., to conduct a mental health evaluation of Appellant. Dr. Wadman diagnosed Appellant with the mental abnormality of pedophilia, and found he met the criteria for commitment under the SVP Act. (Trial Transcript [TT], p. 46; R., p. ____).

The case was called for a jury trial on May 28, 2013, before the Honorable G. Edward Welmaker, Circuit Court Judge. Appellant moved to exclude the indictments and sentencing sheets from his lewd act convictions because there were scrivener errors in the documents, Appellant pled guilty under Alford,¹ and they would be more prejudicial than probative. The circuit court considered the prejudicial effect, and ruled the documents were admissible. (TT, pp. 22-31; R., pp. ____).

Dr. Wadman testified for the State and was qualified as an expert in forensic psychiatry. (TT, pp. 41-44; R., pp. ____). As part of the evaluation, she reviewed all

¹Alford v. North Carolina, 400 U.S. 25 (1970).

documentation regarding Appellant's criminal offenses and sex offender treatment, interviewed Appellant, and used tools designed to assess a sex offender's risk of re-offending. (TT, pp. 45-49; R., pp. ____). She testified she relied on information regarding Appellant's sexual offenses because "past behavior is the best predictor of future behavior," and knowing the details of the person's offenses helps establish a diagnosis. (TT, pp. 48-51; R., pp. ____).

Dr. Wadman testified Appellant's two lewd act convictions involved different victims - an eight to nine year old boy and a ten year old girl, and the crimes occurred while Appellant was out on bond from a previous arrest for a sex offense on a child. The minor boy reported Appellant fondled him in the bathtub, and Appellant put his mouth on the boy's "private." The minor female reported Appellant digitally penetrated her vagina on twelve or more occasions, and threatened to "whip her" if she told anyone. (TT, pp. 51-52; R., pp. ____).

Dr. Wadman also testified Appellant's previous offense, for which he was arrested and out on bond when he molested the two victims above, involved a seven or eight year old boy, who did not report the abuse until he was thirteen years old. The boy reported Appellant took baths with him and rubbed his genitals, and on one occasion fondled him while they watched a pornographic movie. (TT, pp. 53-54; R., pp. ____).

Dr. Wadman stated the prior offense was especially relevant because sometimes simply being arrested could be enough to stop sex offenders. Appellant's inability to stop offending against children after he was arrested for similar conduct indicated an inability to control the offending behavior. (TT, p. 54; R., p. ____).

Dr. Wadman further testified her review of the records revealed Appellant was accused of molesting his five year old granddaughter on at least three occasions in 2001. He was not arrested in connection with the molestation, but the Lexington County Family Court issued a restraining order barring Appellant from having any contact with the victim. Dr. Wadman stated the 2001 incidents were relevant to the evaluation because they showed the incidents with the current victims “weren’t just happenstance occurrences,” and revealed a “pattern” of conduct. (TT, p. 55; R., p. ____). She stated the information regarding Appellant’s granddaughter was part of the basis for her ultimate opinion in the case. (TT, p. 56; R., p. ____).

Dr Wadman testified she also interviewed Appellant for over two hours. During the interview, Appellant indicated he did not abuse alcohol or drugs, which was significant to Dr. Wadman because it meant Appellant was not disinhibited by alcohol or drugs when he committed his offenses. He also reported he had prostate cancer in 2004 and had a prostatectomy, which caused urinary incontinence and required him to wear adult diapers. Dr. Wadman testified this information was significant because he sexually abused two children after the prostatectomy and its physical consequences. (TT, pp. 56-59; R., pp. ____).

Appellant admitting having a “sexual curiosity towards children,” which started when he was a teenager. He initially minimized or denied committing the sexual offenses with which he was charged, and even when he did admit certain conduct, he tended to blame the victim. Dr. Wadman testified these were cognitive distortions common in pedophiles. (TT, pp. 59-61; R., pp. ____).

Dr. Wadman further testified she reviewed the records from Appellant's participation in a prison sex offender treatment, which indicated Appellant was angry when talking about his crimes, he did not take responsibility for his crimes, and felt he should not be in prison due to his disability. The records also indicated Appellant minimized the victim and circumstances of his crimes. Based on Appellant's statements during the interview and her review of the records, Dr. Wadman stated she considered Appellant's participation in the treatment program as "a treatment failure," which increased the risk Appellant would re-offend. (TT, pp. 61-62; R., pp. ____).

Considering everything she reviewed and the interview with Appellant, Dr. Wadman diagnosed Appellant with the mental abnormality of pedophilia. She concluded to a reasonable degree of medical certainty Appellant was a risk to re-offend against children, and posed a menace to the health of safety of others. She testified Appellant had serious difficulty controlling his behavior and propensities to offend against children, and was more likely to commit acts of sexual violence if not confined for treatment. (TT, pp. 66-70; R., pp. ____).

The jury found beyond a reasonable doubt Appellant was a sexually violent predator as defined by the SVP Act, and the circuit court committed Appellant to the custody of the S.C. Department of Mental Health for long term control, care and treatment. (TT, pp. 157-159; R., pp. ____). This appeal followed.

ARGUMENT

The circuit court properly exercised its discretion in determining the details of Appellant's sexual offenses were relevant to the court appointed expert's analysis and opinion regarding Appellant's mental status for purposes of commitment as a sexually violent predator.

Appellant contends the trial court erred in allowing Dr. Wadman to testify regarding the underlying facts of his criminal offenses because their prejudicial effect outweighed their probative value. He argues the testimony was unnecessary because Dr. Wadman could testify about any testing she performed and her interview with Appellant, and he was willing to stipulate he had been convicted of sexually violent crimes.

The decision to admit contested evidence rests within the sound discretion of the trial judge. In the Matter of the Care and Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). Appellate courts will not disturb the trial court's rulings regarding admissibility of evidence absent prejudicial abuse of discretion. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998); Ettel, 660 S.E.2d at 287.

“Generally, all relevant evidence is admissible,” and “evidence is relevant if it tends to establish or make more or less probable the matter in controversy.” Ettel, 660 S.E.2d at 287; *see also* State v. Brooks, 341 S.C. 57, 533 S.E.2d 325, 328 (2000) (same); State v. King, 349 S.C. 142, 561 S.E.2d 640, 645 (Ct. App. 2002) (same); Rule 401, SCRE.

Evidence is unfairly prejudicial if it creates an undue tendency to suggest a verdict on an improper basis. State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119, 123 (2000). Unfair prejudice does not mean damage to the defendant's case resulting from

the legitimate probative force of the contested evidence. State v. Ford, 334 S.C. 444, 513, S.E.2d 385, 389 (Ct. App. 1999). A determination regarding the prejudicial effect of evidence must be based on the entire record, with the result generally turning on the facts of each case. State v. Brooks, 533 S.E.2d at 328; Dickerson, 535 S.E.2d at 123.

Appellant concedes the indictments from his two lewd act convictions were admissible under In the Matter of the Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003). He argues this case is distinguishable from Corley because Dr. Wadman testified to facts outside the details in the indictments. This argument ignores another part of the Corley analysis directly relevant to this case.

The indictments and sentencing sheets constitute evidence the person was convicted of a designated sexually violent offense. S.C. Code §44-48-30(1)(a) (Supp. 2012). The prior conviction is only one prong of the State's burden, however, and State must also prove the person has a mental abnormality that makes him likely to re-offend sexually if not confined for treatment. S.C. Code §44-48-30(1)(b) (Supp. 2012).

In the instant case, the State sought to prove that appellant's likelihood to re-offend was based in part upon the fact that his previous offenses were similar to one another. The testimony of the State's expert illustrates why evidence regarding the details of the offense was directly relevant to the ultimate issue of this case. Dr. Swartz-Watts testified it was important if a person's past crimes were similar in nature, e.g., similar sex, race, and age of the victims. She testified that where there is similarity, it is significant because it evinces a pattern of behavior which in turn indicates the person would be at an increased risk to commit future offenses. In addition, Dr. Swartz-Watts stated that appellant's two victims were similar age, race and gender. Thus, it is clear the details of appellant's prior offenses found in the indictments were **relevant to the issue of whether appellant was likely to engage in acts of sexual violence again**. Rule 401, SCRE.

Corley, 577 S.E.2d at 454 (emphasis added); *see also* Ettel, 660 S.E.2d at 288 (expert's testimony regarding prior sexual offenses admissible because it

established a pattern of behavior significant to determination of risk to re-offend). As in Corley and Ettel, the expert in this case testified the underlying facts of Appellant's offenses were relevant, and significant, considerations in her evaluation of Appellant's mental status and likelihood to re-offend. (TT, pp. 50-66; R., pp. ____).

An indictment generally sets forth the alleged offense in very brief terms with few details of the actual conduct, but those underlying details are critical components in determining whether the person has a mental abnormality that makes him likely to re-offend. Just as the expert in Corley, Dr. Wadman considered the age and gender of the victims, the number of victims, the time period and longevity of the offending conduct, and the similarity of the conduct in the offenses, and testified all these facts were relevant to her ultimate conclusions.

Appellant's reliance on State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), attempts to conflate criminal law analysis and civil commitment proceedings. In criminal cases, evidence of prior crimes is inadmissible to show propensity to commit criminal acts. *Id.* at 319. The Supreme Court found the prior bad acts evidence in Johnson was "extensive," unrelated to any material fact or element of the offense being tried, and served only to focus the jury's attention on the defendant's propensity for criminal activity. *Id.* at 320.

As recognized in Corley, however, "a person's dangerous propensities are the focus of the SVP Act," and the details of the person's prior offenses are relevant to that issue. 577 S.E.2d at 454. As set forth above, Dr. Wadman testified the details of Appellant's offenses were directly relevant to determining if he had a mental abnormality

that made him likely to re-offend.² Since Dr. Wadman's expert opinion was based in part on those details, her testimony about the details she considered in the course of the evaluation, and why those details were significant, was admissible.

The circuit court expressly considered the prejudicial effect of the evidence at issue, and found the probative value outweighed the prejudicial effect. The court's ruling is supported by the record, as well as the analysis in Corley. There was no abuse of discretion in admitting the evidence, and the jury verdict should be affirmed.

² Unlike Johnson, the offense details presented in this case were hardly "extensive," and they went directly to a material fact in issue.

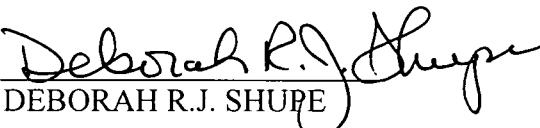
CONCLUSION

Based on the foregoing, Respondent respectfully submits Appellant's commitment as a sexually violent predator should be affirmed.

Respectfully submitted,

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January 17, 2014

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IN THE MATTER OF THE CARE AND TREATMENT OF
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Appellant.

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

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

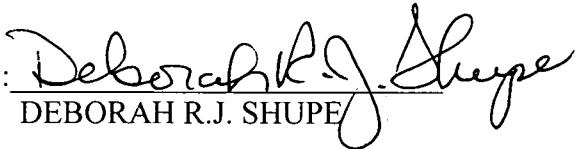
1. Trial Transcript, pp. 1, 22-32, 41-95, 157-159
2. State's Exhibit 1
3. Order of Commitment dated May 29, 2013

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

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
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify all parties required by Rule to be served have been served.

This 17th day of January, 2014.


SALLY B. ELLISON
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January 17, 2014

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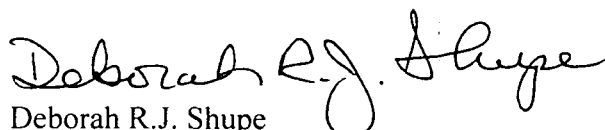
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Re: In the Matter of the Care and Treatment of Richard Dean Capps
Appellate Case No. 2013-001203

Dear Ms. DuRant:

Enclosed are two (2) 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)