

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

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SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF PATRICK GUESS,

APPELLANT.

Appellate Case No. 2011-203688

Unpublished Opinion No. 2014-UP-056

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner seeks rehearing because this Court respectfully misapprehended the fact appellant was entitled to a directed verdict because the state's only witness testified that Guess had only *a twenty-five percent chance* of reoffending within five years. R. 44. A fair reading of the Sexually Violent Predator Act mandates that a person who objectively has only a twenty-five percent chance of reoffending should not remain confined indefinitely in the custody of the state.

S.C. Code §44-48-30 provides the following pertinent definitions:

(1) "Sexually violent predator" means a person who:

(a) has been convicted of a sexually violent offense; and

(b) suffers from a mental abnormality or personality disorder **that makes the person likely to engage in acts of sexual violence** if not confined in a secure facility for long-term control, care, and treatment.

The act defines “likely to engage in acts of sexual violence” to mean the person’s propensity “to commit acts of sexual violence *is of such degree* as to pose a menace to the health and safety of others.” S.C. Code Ann. § 44-48-30(9) (2002). The act also requires a determination that “an individual can only be committed if he suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility....” In re Luckabaugh, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002). The purpose of the requirements in the sexually violent predator act is to ensure that involuntary commitment procedures under the act are *only used to control a limited sub-class of dangerous persons* and not to broadly subject any dangerous person to what may be indefinite terms. In Re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893, 894 (2003).

A case should be submitted to the jury when the evidence is circumstantial “if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which has guilt may be fairly and logically deduced.” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict....” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774 776 (2011) (quoting State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984)).

During the trial, defense counsel moved for directed verdict on grounds that the statistical evidence was the only objective evidence of recidivism risk and that Dr. Harrison’s testimony that Guess had a one in three or **one in four chance of re-offending was not “likely.”** R. 74-75. The judge nonetheless denied the directed verdict motion. R. 78-81.

The issue on appeal is whether the state presented any evidence that there was a **significant likelihood** Guess would reoffend. The state’s only witness was Dr. Kimberly

Harrison. Dr. Harrison opined that Mr. Guess was considered “to be in the high-risk group of the Static 99-R test because he “scored higher than about ninety percent of sex offenders in terms of his risk level” and Mr. Guess had several risk factors including that he is male, has never married or been in a long-term relationship, and had victims unrelated to him. R. 19. However, on cross examination, Dr. Harrison admitted that Guess had a relatively low statistical risk of reoffending. R. 44-46. Specifically, Dr. Harrison testified **that her Static 99-R risk assessment indicated that Mr. Guess had only a 24.7 percent chance of reoffending within five years.** R. 44.

Dr. Harrison’s statistical evidence is the only objective evidence on the record. Dr. Harrison acknowledged that her conclusion was based on other sex offenders with the same score as Guess. R. 44. She explained “if you had a group of 100 guys who all had the same score, about 25 of them went on to reoffend in five years.” R. 45. She admitted this meant that *three out of four people in the pool would not reoffend* within five years. R. 46. She admitted that **two-thirds** of sex offenders with Guess’ score do not reoffend within ten years. R. 46.

The central issue of this case is the meaning of a “significant likelihood.” Appellant Guess was entitled to directed verdict if the evidence in the case because as a matter of law a 25% chance of reoffending is not **likely**: See In re Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118 (2007).

Again, the only evidence directly bearing on Guess’s recidivism risk was the Static-99 test. The test showed Guess is a low risk to reoffend. Therefore, the state presented no evidence showing a “significant likelihood” that Guess would reoffend. Appellant’s submission remains that the mere opinion of an expert that appellant was a sexually violent predator that flies in the face of the only objective statistical evidence is insufficient to survive a directed verdict motion.

Again, a twenty-five percent recidivism likelihood cannot be what “significant likelihood to re-offend” means. “Significant likelihood” is normally understood to indicate an occurrence is probable or more likely than not. Twenty-five percent is not probable. Also, this interpretation would disregard the statutory language requiring propensity “of such degree” to threaten public safety.

This Court should grant rehearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

February 20, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

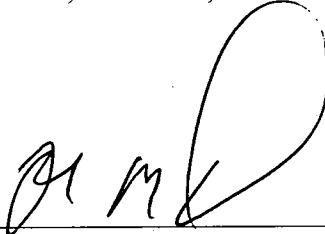
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CERTIFICATE OF SERVICE

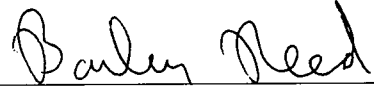
The undersigned attorney hereby certifies that a true copy of Petition for Rehearing in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of February, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of February, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.