

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Edward B. Cottingham, Circuit Court Judge

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JUN 30 2011

S.C. Supreme Court

Opinion No. 2011-UP-121 (S.C. Ct. App. filed 3/24/2011)

08-CP-26-3108

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IN THE MATTER OF THE CARE AND  
TREATMENT OF THOMAS SIMMONS,

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PETITIONER

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 5/31/2011.App. 15.

## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the trial court properly overruled Simmons' motion for a directed verdict when the state did not provide evidence on the element of the Sexually Violent Predator Act that petitioner was likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment.
2. Whether the Court of Appeals erred in affirming the trial court allowing the social worker to testify about her personal observations of Simmons when she was giving her opinion on whether appellant displayed symptoms of the diagnosis given him by the expert when the social worker was not qualified as an expert and was giving an opinion on the report of the expert.

## STATEMENT OF THE CASE

On December 13, 2004, the Family Court of Horry County issued an order committing Thomas Simmons to the Department of Juvenile Justice for an indeterminate time not to exceed his twenty-first birthday for the charges of criminal sexual conduct with a minor first degree (2004-JU26-999) and violation of probation for disturbing schools (2002-JU26-1645). See order dated December 13, 2004. On February 21, 2008, the Multidisciplinary Team reviewed Simmons' file and found probable cause that he was a sexually violent predator. On April 21, 2008, the state filed a petition alleging that Simmons was a sexually violent predator according to S.C. Code Ann. Section 44-48-30(1) (Supp. 1998).

A probable cause hearing was held before the Honorable J. Michael Baxley on May 21, 2008 where Judge Baxley found there was probable cause that Simmons was a sexually violent predator under the statute. On December 1 – 2, 2008, Simmons proceeded to trial before the Honorable Edward B. Cottingham and a jury. Simmons was represented by Paul Archer, and the state was represented by James G. Bogle, Assistant Attorney General. The jury found that Simmons was a sexually violent predator under the South Carolina Sexually Violent Predator Act (SVP Act). Judge Cottingham issued an order on December 2, 2008 committing Simmons to the Department of Mental Health for long term control, care and treatment. Simmons' attorney filed a notice of appeal. The South Carolina Court of Appeals affirmed the trial court on March 24, 2011. In the Matter of the Care and Treatment of Thomas Simmons, Op. No. 2011-UP-121 (filed March 24, 2011). App.1. Simmons filed a petition for rehearing which the Court of Appeals denied on May 31, 2011. App. 5 – 15. This petition for a writ of certiorari to the Court of Appeals follows.

## ARGUMENT

1.

The Court of Appeals erred in holding that the trial court did not err in denying Simmons' motion for a directed verdict when the state did not provide evidence on the element of the Sexually Violent Predator Act that petitioner was likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment.

Thomas Simmons was convicted in Family Court when he was thirteen of criminal sexual conduct with a minor first degree (CSC) and violation of probation for disturbing schools. The CSC incident occurred over a period of three years when Thomas was between the ages of ten and thirteen. Thomas forced his step-nephew to engage in oral and anal sex and fondling over this time period. The step-nephew was between the ages of six and nine at the time. ROA. 32, ll. 18 – 25; ROA. 33, ll. 1 – 25. ROA. 34, ll. 1 – 25.

Thomas's conviction for disturbing schools was the result of his threatening to take a gun to school to "shove up someone's butt". ROA. 35, ll. 1 – 25.

Dr. Daniel Neller testified as the state's only expert witness. He was the Chief Psychologist for the South Carolina Sexually Violent Predator Program. ROA. 26, ll. 1 – 11. He was admitted by the trial court as an expert in Forensic Psychology. ROA. 26, ll. 12 – 25; ROA. 27, ll. 1 – 25; ROA. 28, ll. 1 – 25; ROA. 29, ll. 1- 17.

Judge Michael Baxley ordered, after the probable cause hearing, that Thomas undergo a psychiatric evaluation to determine if he met the criteria under the SVP Act to be a sexually violent predator. He approved Dr. Daniel Neller to do the evaluation. See Order for Evaluation dated May 21, 2008. Dr. Neller testified that he evaluated Thomas and a file of information about him. He met with Thomas for about seven hours and reviewed files from the Department of Mental Health

(DMH), Department of Juvenile Justice (DJJ), parole reports, petitions, orders, and statement written by Thomas. ROA. 30, ll. 9 – 25; ROA. 31, ll. 1 – 25; ROA. 32, ll. 1 – 25.

Dr. Neller said that Thomas had not been convicted of any other sexual offenses. ROA. 36, ll. 1 – 11. He said that Thomas wrote an empathy letter to the victim as part of his sex offender treatment program in DJJ. Thomas did complete the sex offender treatment administered by DJJ during his incarceration. Dr. Neller testified that Thomas was conflicted because he would hear voices telling him to do it and then would hear voices telling him not to do it. However, Dr. Neller said that Thomas did not have a psychotic disorder. ROA. 36, ll. 13 – 25; ROA. 37, ll. 1 – 25; ROA. 38, ll. 1 – 25; ROA. 39, ll. 1 – 25.

Dr. Neller testified that he diagnosed Thomas as having sexual sadism which he defined as a person who becomes aroused by the harm he is inflicting on another person and enjoys humiliating the person. He said it is a chronic condition but could be treated. ROA. 44, ll. 15 – 25; ROA. 45, ll. 1 – 25.

Although Dr. Neller saw sexual sadism as a mental abnormality, he did not think it meant that Thomas would re-offend again. ROA. 46, ll. 1 – 12. He said that juvenile sex offenders re-offend at a rate of around five to ten percent. While adult sex offenders re-offend at a rate around fifteen percent. ROA. 46, ll. 9 – 25; ROA. 47, ll. 1 – 4; ROA. 50, ll. 17 – 25.

Dr. Neller acknowledged that Thomas still had some difficulty controlling his behavior and that he had continued to offend while he was at DJJ. ROA. 48, ll. 12 – 23. He said that even though Thomas was still having some sexual rape fantasies, Dr. Neller said his final decision was that Thomas did NOT meet the criteria to be a sexually violent predator. ROA. 63, ll. 5 – 24; ROA. 64, ll. 1 – 24; ROA. 66, ll. 1 – 15.

Dr. Neller stated that the purpose of the SVP law was to identify an extremely dangerous group of sexual offenders. He did not believe that any expert would support committing Thomas to the program. ROA. 69, ll. 1 – 6. He responded on cross that the average people in the SVP Program were middle-aged men. Thomas would be housed with them maybe for the rest of his life. ROA. 69, ll. 7 – 19; ROA. 68, ll. 6 – 21.

Dr. Neller stated on cross examination again that he did not think that Thomas met the criteria of the SVP statute to be a sexually violent predator. ROA.69, ll. 20 – 25; ROA. 70, ll. 1 – 4. He said that although in his opinion that Thomas had sexual sadism, he did not think that Thomas was likely to engage in future sexual offenses. He said his expert opinion was that Thomas should not be placed in the SVP Program. ROA. 71, ll. 1 – 25; ROA. 72, ll. 1 – 22.

Linda Price, who worked for the South Carolina Board of Juvenile Parole, testified that the Board made a decision in February 2008 to release Thomas. However, release papers were not issued because he had to go through the screening process for the SVP Act. ROA. 77, ll. 17 – 25; ROA. 78, ll. 1 – 25; ROA. 79, ll. 1 – 25.

She met with the juveniles who were being released to discuss their release papers. Thomas was brought for her to discuss his release since he was scheduled to be released. ROA. 80, ll. 1 – 25; ROA. 81, ll. 1 – 6; ROA. 82, ll. 1 – 25; ROA. 83, ll. 1 – 25. When she told Thomas he would have to pay restitution to the victim, she testified that Thomas became extremely upset and slammed the table with his fists saying he should not have to pay for anything. At her insistence, he finally sat down but refused to talk anymore. ROA. 84, ll. 1 – 25; ROA. 85, ll. 1 – 19; ROA. 86, ll. 1 – 10.

Ms Price reported all of this to Gayle Shellenberg, Thomas's supervisor at DJJ, and to Ms. Shellenberg's supervisor. She also prepared a report for them. She also spoke to the

Multidisciplinary Team the following week and informed them. ROA. 86, ll. 11 – 25; ROA. 87, ll. 1 – 25.

On cross examination, Ms. Price admitted that she was not qualified as an expert to say whether Thomas met the criteria to be a sexually violent predator. ROA. 96, ll. 1 – 13.

Ms. Gayle Shellenberg was employed by DJJ as a social worker and said she was licensed as a social worker. ROA. 101, ll. 15 – 25; ROA. 102, ll. 1 – 23. She worked with Thomas at DJJ. She admitted that she was a certified sex offender treatment specialist, but she was not qualified to diagnose as Dr. Neller was. ROA. 117, ll. 4 – 25. She admitted that she could not give an opinion on whether Thomas met the criteria of the SVP Act to be a sexually violent predator. ROA. 118, ll. 1 – 24.

At the close of the state's case, appellant's counsel made a motion for a directed verdict on the basis that the state did not prove beyond a reasonable doubt the requirements of the Sexually Violent Predator Act. The state argued that "it was not so much about what the court-appointed expert, Dr. Neller, said as what he didn't say and what he didn't do." ROA. 120, ll. 11 – 25; ROA. 121, ll. 1 – 25. The judge denied the motion although he said the evidence was "rather weak". ROA. 122, ll. 2 – 25; ROA. 123, ll. 1 – 10.

A trial court has a duty to submit a case to the jury where the evidence is circumstantial if there is substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008).

In Thomas's case, the state did not meet the elements of the SVP Act. The SVP Act found at S.C. Code Section 44-48-30 provides that a person is a sexually violent predator if (1) he has been

convicted of a sexually violent offense; and (2) suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment.

The only expert, Dr. Neller, testified that Thomas had a mental disorder but that he did not think he would re-offend. Dr. Neller's expert opinion was that Thomas should NOT be committed to the SVP Program. Therefore, there was not SUFFICIENT evidence to submit the case to the jury. The other two witnesses did not testify as experts.

The state argued that Dr. Neller did not have the latest information about Thomas's problems. However, Dr. Neller knew when he wrote his report that Thomas still was having sexual rape fantasies and, he testified that he knew that Thomas still had some trouble with control. Therefore, the new information from Ms. Price and Ms. Shellenberg concerning Thomas's behavior would have made no difference in Dr. Neller's report.

The Court of Appeals affirmed the trial court. App. 1. The Court held that Simmons met both elements of the Sexually Violent Predator Act because he had been convicted of a sexually violent offense and he had a mental abnormality of sexual sadism. App. 2 – 3.

The Court of Appeals misapprehended the issue because the second element of the SVP Act, S. C. Code Section 44-48-30, requires that the person "suffers from a mental abnormality 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.**" [Emphasis added]. The expert testified that Simmons did not meet the definition because he was not likely to engage in future sexual offenses.

## ARGUMENT

2.

The Court of Appeals erred in affirming the trial court in allowing the social worker to testify about her personal observations of Simmons when she was giving give her opinion on whether appellant displayed symptoms of the diagnosis given him by the expert when the social worker was not qualified as an expert and was giving an opinion on the report of the expert.

Ms. Gayle Shellenberg testified that she worked at DJJ as a social worker for eight years, and she worked with Thomas. She said she had a Masters' Degree in social work and was licensed by the state of South Carolina as a social worker. ROA. 101, ll. 13 – 25; ROA. 102, ll. 1 – 25; ROA. 103, ll. 1 – 9.

When asked if she had examined the expert's, Dr. Daniel Neller's, report on Thomas, she responded that she had. The state's attorney handed her a copy. ROA. 106, ll. 10 – 13. The state said that Dr. Neller's report indicated that "Thomas's responses were consistent with anti-social, narcissistic, and paranoid features." ROA. 107, ll. 12 – 25. The state's attorney asked her if Thomas appeared to display these symptoms. Thomas's attorney objected on the grounds that she was not the expert on that. The judge overruled the objection and said that she was not an expert but was allowed to give her opinion. ROA. 108, ll. 1 – 11.

Ms. Shellenberg went on to testify that she had seen Thomas display symptoms of those three features. She said his triggers were entitlement and power and control. She testified that sexual offenders have a cycle where certain things trigger them to go into their offense cycle. She also stated that Thomas had a sense of grandiosity. ROA. 108, ll. 12 – 25.

The state's attorney then asked:

So, when Dr. Neller refers to Thomas having a grandiose sense of self-importance and expects to be recognized as a superior, is that what you're talking about...  
She responded; "Yes, I am".

ROA. 108, ll. 23-25; ROA. 109, ll. 1 – 3.

Ms. Shellenberg admitted to the state and to Thomas's attorney on cross examination that she was not an expert in this case. She said that Dr. Neller was the only expert testifying. ROA. 107, ll. 18 – 19; ROA. 118, ll. 1 – 25.

Rule 701, SCRE, provides that opinion testimony by a lay witness must be limited to opinions or inferences which (a) are rationally based on the perception of the witness; (b) are helpful to a clear understanding of the witness' testimony; (c) do not require special knowledge, skill, experience or training.

In State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), the South Carolina Supreme Court held that the police officer who was qualified as an expert in crime scene processing and fingerprint identification exceeded scope of his expertise in testifying in murder prosecution to his conclusion, drawn from crime scene measurements and observations, that victim had been riding a bicycle at time he was shot; in effect, officer was allowed to give an unqualified opinion on the ultimate issue of whether defendant had been acting in self-defense when he shot and killed victim.

In State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973), the Supreme Court ruled that the opinion of a lay witness must be based upon the personal observations of the witness and not merely upon the statements of another witness.

Gayle Shellenberg was allowed to give her opinion on what the symptoms of the diagnosis given by the expert, Dr. Neller, were. The opinion of what these symptoms were required special

knowledge and should have been provided by the expert who wrote the report. Ms. Shellenberg's opinion exceeded the scope of her area of specialty.

Ms. Shellenberg's testimony on her observations of Thomas's behavior should have been limited to the facts. She was not qualified to relate these behaviors to the diagnosis given by the expert. The proper procedure would have been for the expert to describe the symptoms of the diagnosis and then have Ms. Shellenberg describe Thomas's behavior. The conclusion should have been left to the jury.

Ms. Shellenberg was allowed to comment on the expert's report when she was not a qualified expert. She was licensed in a different area than the expert psychologist, Dr. Neller.

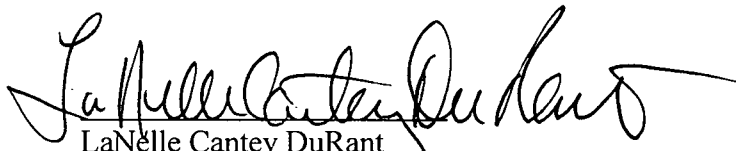
The trial court should have not allowed Ms. Shellenberg to relate Thomas's behaviors to the diagnosis of the report.

The Court of Appeals affirmed the trial court. App. 1. The Court held that the social worker's opinion met the requirements of lay witness opinion pursuant to Rule 701, SCRE. App. 3. The Court of Appeals misapprehended the issue because Rule 701(c), SCRE, provides that the lay witness can offer testimony in the form of an opinion if the opinions do not require special knowledge, skill, experience or training. The social worker's opinion required special knowledge and training because she was describing Simmons' behavior in terms of the symptoms of the diagnosis provided by the expert, Dr. Neller. She did not have the expertise to offer that information. The Court of Appeals misapprehended the issue as the social worker's testimony did not conform to Rule 701 ( c ) , SCRE.

CONCLUSION

By reason of the foregoing arguments, a petition for writ of certiorari to the Court of Appeals should be issued.

Respectfully submitted,

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 30th day of June, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Edward B. Cottingham, Circuit Court Judge

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Opinion No. 2011-UP-121 (S.C. Ct. App. filed 3/24/2011)  
08-CP-26-3108

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IN THE MATTER OF THE CARE AND  
TREATMENT OF THOMAS SIMMONS,

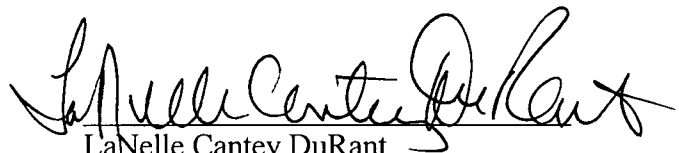
APPELLANT

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CERTIFICATE OF SERVICE

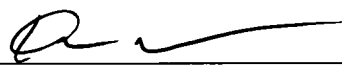
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 30th day of June, 2011.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day  
of June, 2011.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 2, 2013