STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Horry County
Hon. Edward B. Cottingham, Circuit Court Judge

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

PETITIONER.

Opinion No. 2011-UP-121 (S.C. Ct. App. filed March 24, 2011)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DEBORAH R.J. SHUPE
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTION PRESENTED

I. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion for a directed verdict. Further, it is questionable whether this issue was properly preserved for review on appeal.

II. The Court of Appeals correctly affirmed the trial court's decision allowing the social worker's testimony because she did not express an opinion, but merely relayed her own personal observations regarding Appellant. Further, it is questionable whether Petitioner's argument was preserved for review on appeal.

STATEMENT OF THE CASE

Petitioner was convicted on the qualifying charges of criminal sexual conduct with a minor in the first degree and sentenced to an indeterminate term with the Department of Juvenile Justice. Prior to his release, the Multidisciplinary Team found probable cause to believe Petitioner is a sexually violent predator. On April 21, 2008, the State filed a petition alleging Petitioner was a sexually violent predator under the SVP Act. The Honorable J. Michael Baxley found probable cause to believe Petitioner was a sexually violent predator and ordered an evaluation pursuant to Section 44-48-80 of the South Carolina Code (Supp. 2008).

After an evaluation by Dr. Dan Neller, Petitioner proceeded to trial before the Honorable Edward B. Cottingham and a jury. The jury found Petitioner was a sexually violent predator and Judge Cottingham issued an order committing Petitioner to the Department of Mental Health for his control, care, and treatment.

The South Carolina Court of Appeals affirmed Petitioner's commitment on March 24, 2011, and Petitioner filed a petition for rehearing. The petition for rehearing was denied May 31, 2011 and his Petition for Writ of Certiorari followed.

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion for a directed verdict. Further, it is questionable whether this issue was properly preserved for review on appeal.

Petitioner maintains the Court of Appeals erred in finding the trial court properly denied his motion for a directed verdict because the State failed to present evidence Petitioner's mental abnormality, sexual sadism, made him likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care and treatment. First, Petitioner failed to properly preserve the issue for review on appeal. Additionally, the State presented ample evidence justifying the trial court's decision to send the case to the jury. Finally, Petitioner seems to argue expert opinion is required in order to find evidence supporting Petitioner is a sexually violent predator; however, this issue was not raised to the trial court and the jury is free to consider or reject the sole expert's testimony.

Preservation

The motion for directed verdict made by Appellant at trial did not provide any specific grounds, but merely indicated he believed there was no evidence as far as the sexually violent predator act and the State failed to prove beyond a reasonable doubt. This is similar to the motion made in In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001), which the South Carolina Supreme Court found was insufficient to preserve the issue for review on appeal. Id. at 92-93, 551 S.E.2d at 238 (citing Connolly v. People's Life Ins. Co., 299 S.C. 348, 384 S.E.2d 738 (1989)). Because Appellant failed to provide any specific grounds for his motion for directed verdict, the issue is not preserved for review on appeal.

Additionally, Petitioner never raised to the trial court the specific arguments he raises in his brief that the State failed to "provide evidence on the element of the Sexually Violent Predator Act that appellant was likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment" and expert testimony is necessary to support sending an SVP case to the jury. Therefore, because the trial court never considered the issues, they are not properly preserved for review on appeal. Id.; see also, Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (finding issue cannot be raised for the first time on appeal and must have been made with specificity before the trial court).

Merits

The Court of Appeals correctly found the State presented ample evidence supporting the decision of the trial court to allow the case to proceed to the jury for a determination of whether Petitioner is a sexually violent predator. "On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." In re Matthews, 345 S.C. 638, 646-647, 550 S.E.2d 311, 315 (2001) (citing Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999)). In ruling on a motion for directed verdict, the appellate court, like the trial court, is concerned with the existence of evidence, not its weight. Id. (citing State v. Cooper, 334 S.C. 540, 551-552, 514 S.E.2d 584, 590 (1999)).

A sexually violent predator is 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." S.C. Code Ann. § 44-48-30(1) (Supp. 2007). It is

indisputable that Appellant meets the requirement of section 44-48-30(1)(a) as he was adjudicated delinquent for criminal sexual conduct with a minor, first degree. See S.C. Code Ann. §§ 44-48-30(2)(d) & 44-48-30(6)(b) (Supp. 2007). Appellant appears to concede that he has a mental abnormality, and the State provided evidence of his mental abnormality through Dr. Neller diagnosing Appellant with sexual sadism. (App.Br.6-7; 9; T.44-45; R.44-45). Therefore, Appellant's only contention is that the State failed to provide evidence he was "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."

Section 44-48-30 provides "'[l]ikely to engage in acts of sexual violence' means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9) (Supp. 2007). The State provided evidence demonstrating Appellant's propensity to commit future acts of sexual violence.

Dr. Neller testified as an expert for the court. He testified Appellant suffered from sexual sadism which "describes a person who, enjoys humiliating, a person who enjoys harming a person and becomes sexually aroused by the harm he's inflicting on a person." (T.44-46; R. 44-46). While Dr. Neller indicated he could not find Appellant was likely to engage in acts of sexual violence, he admitted he did not speak to several people with significant information available related to Appellant. (T.74-75; R. 74-45).

The facts presented at the hearing clearly disputed Dr. Neller's belief that Appellant would not commit acts of sexual violence and were clearly believed by the jury more than Dr. Neller's conclusion. Over a period of three years, Appellant engaged in anal rape,

forcible oral sex, and fondling of a step-nephew who was between the ages of six to nine at the time. (T.34; R. 34). Appellant's own written statement of the events indicate he "was always listening to the wrong voice. One would say 'do it,' while the other would say 'don't do it.'" (T.38, State's Exhibit 4; R. 38; 129-130). Further, he indicated "I raped him [his step-nephew] because he wasn't willing to do what I wanted him to do." (T. 38; State's Exhibit 4; R. 38; 129-130).

Appellant's other charge was for disturbing schools. While it is not a sexually based crime, the undertones of Appellant's offense are sufficient to give one pause. Specifically, Appellant threatened to bring a gun to school to shoot someone and to "shove [the gun] up a person's butt." (T.35; 60; R. 35; 60).

In addition to the two charges, Appellant had a history of violent and aggressive behavior. Appellant acknowledged harming the family cat when he was upset or angry. (T.59; R. 59). Further, he was committed for treatment after he attempted to poison his parents by pouring veterinary medicine into their tea. (T.60; R. 60). While committed, Appellant had thirty disciplinary infractions, including fashioning a weapon and aggressiveness toward other juveniles and staff members. (T.61; R. 61).

Some of the information presented by witnesses with first-hand knowledge of Appellant was contradictory to the information Dr. Neller received from Appellant and apparently relied upon in reaching his conclusion. First, Dr. Neller reported Appellant was taking several medications including Adderall, Wellbutrin, and Tenex. Gayle Shellenberg, Appellant's social worker with the South Carolina Department of Juvenile Justice, testified he was not taking those medications and had not been on them for almost a year and a half

prior to the time of his interview with Dr. Neller. (T.111; R. 111). Further, Dr. Neller indicated Appellant had not received any level drops, lockups, or major write-ups in the past year. Ms. Shellenberg, however, testified Appellant had eleven level drops for various reasons including disorderly conduct, refusing to obey instructions, disrespect, and threatening conduct. (T.111-112; R. 111-112).

Appellant was described by several witnesses as having "a grandiose sense of self-importance and expects to be recognized as superior." (T.53; R. 53). Further, Petitioner "prides himself on being smarter than staff and aligns himself with the program coordinators and refers to them on a first name basis." (T.56; R. 56). Appellant demonstrates "a sense of entitlement" and will "take advantage of other juveniles and staff if he feels that it will benefit him." (T.56-57; R. 56-57).

Appellant has shown no empathy for the violent sexual acts he committed against his step-nephew. Linda Price, a parole examiner for the South Carolina Juvenile Parole Board, testified about an incident involving Appellant when she discussed the terms of his possible release from DJJ. She stated he arrived calm and relaxed. When Appellant learned the Juvenile Parole Board ordered restitution for the victim, Appellant's behavior completely changed. She testified:

> [Appellant] got very loud and red-faced. He yelled, slammed the table with his fists and then got out of his chair and started pacing around in a circle while stating his opinion that he should not have to pay for anything.
> He talked rapidly and yelled as he questioned why he had to pay restitution. [Appellant] continued to use a loud tone and got louder as he blurted more words blaming the victim for his commitment.

> He also stated, "They should have to pay for me. Whose going to have to pay for me?"

(T.85; R. 85). This exchange demonstrates Appellant refuses to accept responsibility for what he did to his step-nephew and shows his sense of entitlement as well as his belief he is the victim in this case.

Most significant, Appellant continues to have very vivid, deviant, violent sexual fantasies. Appellant also had lapses in the sex offender treatment received when he experienced the fantasies involving force and sadistic behavior, because he chose not to use "his thought stopping but engages in masturbation even though he is aware that this is a lapse in treatment." (T.53; R. 53).

Significantly, even at the time of his evaluation, Petitioner "fantasized about finding a young girl, transporting her to a wooded area and beating, raping, and murdering her." (T.61; R. 61). "He also fantasized about kidnapping a adolescent female relative. He fantasized that in order for the family to get the child back, anyone who loved the little girl would have to perform oral sex on him." (T.61-62; R. 61-62). One of Appellant's most recent fantasies, of the type he was having weekly when interviewed by Dr. Neller, was described:

> He described a recent rape fantasy in which he waited for a dancer to leave a strip club and approached her from behind. In the fantasy he brandished a knife. She gasped, and he asked her if she wanted to engage in sexual activity. Out of fear, she went long with it. He forced her to the car where he penetrated her from behind.

(T.64; R. 64). In order to make his mental fantasies more concrete while committed to DJJ, Appellant downloaded pornographic cartoons from the internet. One cartoon depicted a sadistic, violent rape of a girl. (T.112-113; R. 112-113).

The details of Appellant's history as well as his recent behavior and fantasies demonstrate a clear propensity for him to commit acts of sexual violence such that he poses a menace to the health and safety of others. His recent weekly fantasies, vividly describing violent sexual attacks of women and girls are sufficient evidence to support the trial court's denial of Appellant's motion for directed verdict and sending the case to the jury. The testimony of Appellant's fantasies of bondage, power, and rape, coupled with the examples and descriptions of Appellant's past behavior and attitude toward others, paint a vivid picture of someone who is clearly a member of the mentally abnormal and extremely dangerous group of sexually violent predators for whom the SVP Act was created in order to provide for their involuntary civil commitment in a secure facility for long-term control, care, and treatment.

Further, the testimony of an expert is not necessary to establish the likelihood that Appellant would engage in future acts of sexual violence, and the jury was free to accept or reject any portion of the testimony presented by any of the witnesses at trial, including Dr. Neller. "As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness." Sauers v. Poulin Bros. Homes, Inc., 328 S.C. 601, 605, 493 S.E.2d 503, 504 (Ct. App. 1997) (citing State v. Milian-Hernandez, 287 S.C. 183, 186, 336 S.E.2d 476, 478 (1985) (The jury may properly disregard expert testimony.); State v. Campen, 321 S.C. 505, 510, 469 S.E.2d 619, 622 (Ct. App. 1996) (Although the only

expert testimony established that the defendant had the ability to conform his conduct to standards of right and wrong, the expert's testimony was not "dispositive, inasmuch as the jury could have elected to disregard [the expert's opinion]."); State v. Smith, 304 S.C. 129, 131, 403 S.E.2d 162, 163 (Ct. App. 1991) (The jury is free to believe one portion of a witness's testimony and disbelieve another.); accord, Smith v. Safeco Life Ins. Co., 303 S.C. 131, 399 S.E.2d 427 (Ct. App. 1990)).

Additionally, the State was not required to present expert testimony of its own in order to directly refute the testimony of Dr. Neller, the court appointed evaluator. See e.g., Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991); see also, Sauers v. Poulin Bros. Homes, Inc., 328 S.C. at 606, 493 S.E.2d at 504-05. The testimony by lay witnesses may be believed by the jury over the testimony of the expert witness, and the jury is free to accept or reject any portion of the testimony of the expert and other witnesses.

Accordingly, even assuming the issue is properly preserved for review on appeal, the trial court did not err in denying Appellant's motion for a directed verdict. Ample evidence supported the finding Appellant is a sexually violent predator. Expert testimony was not necessary in order for the jury to conclude Appellant has been convicted of a sexually violent offense and 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. Therefore, the Court of Appeals did not err in affirming the trial court's denial of Appellant's motion for directed verdict.

II. The Court of Appeals correctly affirmed the trial court's decision allowing the social worker's testimony because she did not express an opinion, but merely relayed her own personal observations regarding Appellant. Further, it is questionable whether Petitioner's argument was preserved for review on appeal.

Petitioner maintains the Court of Appeals erred in finding the trial court properly allowed Gayle Shellenberg, a social worker with the Department of Juvenile Justice, to testify regarding whether Appellant displayed symptoms consistent with Dr. Neller's diagnosis. Shellenberg did not render an opinion regarding Appellant's diagnosis, but merely articulated Appellant's behaviors she had personally witnessed. Also, this issue is not properly preserved for review on appeal.

Preservation

First, the issue is not properly preserved for review on appeal. Appellant objected in the middle of a question asked to Shellenberg: "Does he seem to display - - - ." The objection stated was merely "she's not an expert in this." The question sought her personal observations and in no way sought her comment on Dr. Neller's report or any type of opinion or diagnosis. Importantly, Appellant did not object when Shellenberg offered her descriptions of Appellant's behaviors as detailed by the diagnosis offered by Dr. Neller, nor when she was explaining the triggers for Appellant's behaviors. Therefore, the issue as raised by Appellant is not preserved for review on appeal because the objection was insufficient and Appellant failed to make a contemporaneous objection when Shellenberg's testimony subject to his current complaint was introduced. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for

the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Merits

On the merits, the trial court properly admitted Shellenberg's testimony because it was based on her personal observations and did not require specialized knowledge or expertise. "Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in understanding testimony, and do not require special knowledge." State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) (citing Rule 701, SCRE; State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996)). As stated in Williams:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter. The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury. The terms "fact" and "opinion" denote merely a difference of degree of concreteness of description. Some statements are not mere opinions but are impressions drawn from collected, observed facts. A natural inference based on stated facts is not opinion evidence. Where the distinction between fact and opinion is blurred, it is often best to leave the matter to the discretion of the trial judge.

State v. Williams, 321 S.C. 455, 463-464, 469 S.E.2d 49, 54 (1996) (internal citations omitted); see also, Small v. Pioneer Machinery, Inc., 329 S.C. 448, 468, 494 S.E.2d 835, 845 (Ct. App. 1997) (finding opinion of lay witness who operated a log skidder was admissible

because it was based on personal observations, "special knowledge and experience in the daily operation of the machine, as well as the environment in which it was used.").

Shellenberg testified she was familiar with Appellant and his behaviors and had witnessed his behavior. Further, she testified she heard Dr. Neller discuss his report, including his reliance on a memorandum written by Shellenberg detailing Appellant's behaviors. (T.106-107; R. 106-107). She testified she was familiar with kids displaying anti-social, narcissistic, and paranoid features and had worked with Appellant when he displayed those features. (T.107-108; R. 107-108). Shellenberg testified about Appellant's behavior and how she saw triggers causing his behaviors. She testified regarding his belief that he was more superior than others and how he did things because others were getting more attention or he felt like the victim. (T.108-109; R. 108-109).

Shellenberg's testimony was not expert opinion rendering a diagnosis, but was merely reciting behaviors she had witnessed or had personal knowledge of which were consistent with the diagnosis previously testified to by Dr. Neller. Her testimony was designed to aid the jury in understanding Appellant's behaviors and what is likely to cause him to reoffend, which is one of the main considerations of the SVP Act. See In re Care and Treatment of Corley, 353 S.C. 202, 207, 577 S.E.2d 451, 454 (2003) (finding "a person's dangerous propensities are the focus of the SVP Act."). Further, given her experience as Appellant's social worker while in DJJ, and her history of dealing with children with similar behaviors, her testimony was particularly relevant in aiding the jury to reach a conclusion regarding Appellant's propensity to reoffend. As a result, the Court of Appeals correctly affirmed the trial court's admission of Shellenberg's testimony.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Appeals should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DEBORAH R.J. SHUPE
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 1, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Horry County
Hon. Edward B. Cottingham, Circuit Court Judge

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

PETITIONER.

PROOF OF SERVICE

I,William M. Blitch, Jr., certify that I have served the within Return to Petition for Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served. This 1st day of August, 2011.

William M. Blitch, Jr.
Assistant Attorney General
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727