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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

R. Lawton McIntosh, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF CALVIN MILLER,

APPELLANT

APPELLATE CASE NO. 2014- 001735

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to conduct the requisite analysis under Rule 401, SCRE, and Rule 403, SCRE, and admitting testimony regarding Appellant's prior charges and convictions for non-sexual conduct?

STATEMENT OF THE CASE

On March 15, 2013, the State filed a petition to involuntarily commit Appellant Calvin Joe Miller pursuant to the South Carolina Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10, *et seq.* The immediate predicate conviction was a guilty plea for lewd act upon a child entered on August 3, 2010. R. * (State's Petition at page 2). Appellant was sentenced to eight years imprisonment, with credit for time served of 470 days. R. * (State's Petition at page 2; Pet'rs Ex. C to State's Petition).

On July 14-15, 2014, the SVP action was tried before the Honorable R. Lawton McIntosh and a jury. Miller was represented by R. Mills Ariail, Jr., and the State was represented by Assistant Attorney Generals James G. Bogel and Nicole Wetherton. Tr. 1. The jury concluded that appellant was a sexually violent predator. Tr. 269, l. 8 – 270, l. 7. On July 15, 2014, Judge McIntosh signed an Order of Commitment placing Miller in the custody of the Department of Mental Health. R.* (Order of Commitment).

This appeal follows.

STATEMENT OF FACTS

There was no dispute in this case that Miller was previously convicted of a sexually violent offense (lewd act) or that he suffered from a mental abnormality – pedophilia. The element of the “sexually violent predator” definition that was in dispute was whether Miller’s pedophilia made him “likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.” See S.C. Code Ann. § 44-48-30(1); S.C. Code Ann. § 44-48-100(A). The only witnesses at the trial were two experts.

Dr. Kimberly Harrison, formerly a chief psychologist at the Department of Mental Health, was the original court-appointed evaluator assigned to Miller’s case. She had conducted twenty-four pre-commitment evaluations, out of which she recommended commitment seven times, and been qualified an expert thirty-six times with respect to SVP cases alone. Tr. 188, l. 7 – 194, l. 8. Dr. Harrison conducted her evaluation of Miller in August 2013, which included an interview, psychological testing, and a review of pertinent records. Tr. 194, l. 11 – 196, l. 23. She testified on behalf of the defense that she did not find that Miller to be a part of the small group of “extremely dangerous” sex offenders to whom the SVP Act was intended to apply. Tr. 208, ll. 6-18. The State had a second evaluation conducted by Dr. Susan Knight, who testified that Miller needed to be committed. Dr. Harrison explained that what Dr. Knight characterized as “additional factors” increasing Miller’s risk to reoffend were already considered in the tests conducted, improperly magnifying those factors. Tr. 206, ll. 11-17. She also disagreed with Dr. Knight’s diagnosis of Miller with a personality disorder. Tr. 199, l. 14 – 202, l. 6.

Miller was charged for offenses committed against his twin nieces and was sentenced to eight years imprisonment as a result of his entry of guilty plea entered on

August 8, 2010 to one count of lewd act upon a child with respect to conduct against one of those nieces that occurred in 2003. Tr. 66, l. 16 – 70, l. 3. Miller was previously convicted in North Carolina in 1996 of one count of incident liberties with a child, arising from a 1994 incident. Tr. 70, l. 4 – 72, l. 4. The trial court overruled trial counsel's objection to the admission of these following non-sexual offenses charges and convictions: 1992 charges for breaking and entering and larceny, both of which were dismissed; 1995 and 2009 convictions for criminal domestic violence; 2005 conviction for possession of marijuana; and 999, 2003, and 2005 convictions for failure to register as a sex offender. Tr. 72, l. 15 – 77, l. 17.

The State's expert, Dr. Knight, was a consultant from the Medical University of South Carolina. She had been qualified as an expert on only three prior occasions in regards to sexually violent predator cases, all of which were as a State's witness. Tr. 54, l. 24 – 56, l. 20; Tr. 58, l. 22 – 60, l. 8. Dr. Knight interviewed and conducted testing on Miller for a total of four hours and reviewed his court and prior treatment records. Tr. 62, l. 19 – 64, l. 23. She did not contact with any of Miller's family members or former employers, other than his mother, who did not respond. Tr. 80, ll. 11-21; Tr. 177, ll. 6-19.

She conducted a Static-99 assessment, which placed Miller in the moderate low risk category for reoffending. Offenders with that score have a sexual recidivism risk of twelve percent (12%) over the next five years and eighteen (18%) percent over the next ten years. Tr. 85, l. 15 – 87, l. 18. On average, twenty-five percent of sex offenders score higher than Miller and seventy-five percent score the same or below. Tr. 87, l. 25 – 88, l. 7; Tr. 171, l. 8 – 173, l. 16; Tr. 222, l. 8 – 223, l. 16. The risk factors for which Miller was positive on the Static-99 included that he had an unrelated victim, a prior

sexual conviction, four or more other convictions, and a past violent conviction. Tr. 88, ll. 8-13.

Dr. Harrison agreed that Miller achieved a score of three on the Static-99, rendering him a low moderate degree of risk for sexual reoffending. She then looked at other risk factors that might elevate his risk and found that a significant number of them did not apply to Miller. Tr. 202, l. 17 – 206, l. 10. Unlike Dr. Knight, who placed additional significance of Miller's non-sexual criminal history, Dr. Harrison noted that those were already a factor in the Static-99's risk score. Tr. 206, ll. 11-17.

In addition to the Static-99, Dr. Knight conducted other testing to determine if there were other risk-factors that were not accounted for in that assessment, many of which were inconclusive or otherwise inconsequential. Tr. 89, ll. 1-8. Dr. Harrison did not use some of the other tests utilized by Dr. Knight because of problems with their validity and reliability. Tr. 206, l. 22 – 207, l. 14; Tr. 217, l. 17 – 218, l. 18. Using the SASSI-3 evaluation, Dr. Knight determined that Miller does not have a substance abuse disorder. Tr. 89, ll. 9-18. The Hare Assessment conducted revealed that Miller did not score high enough to meet the threshold criteria for a diagnosis as a psychopath either. Tr. 98, ll. 3-11. Dr. Knight also conducted a Conner's assessment, which measured attention, concentration, and impulsivity. Miller scored in the middle such that "there wasn't much to take away" from the test. Tr. 92, ll. 4-13.

Miller also underwent a penile plethysmograph (PPG), which measures sexual arousal based on a variety of stimuli. According to Dr. Knight, because Miller did not respond to anything, his test was invalid and she could not draw any conclusions. She insinuated that Miller's lack of reaction may have been an effort to deceive the PPG

based on his admission to her that exaggerated his symptoms during psychological testing that he underwent at Patrick Harris Psychiatric Hospital in 2009. However, she admitted that the invalid test may have also been due to anxiety, medication, erectile dysfunction, or other reasons and that she could not say with any certainty that Miller was trying to deceive the PPG. Tr. 93, l. 13 – 97, l. 2; Tr. 162, l. 7-18; Tr. 167, l. 13 – 168, l. 7. Dr. Harrison noted that the Department of Mental Health no longer used the PPG in conducting SVP evaluations. Tr. 207, ll. 15-16; Tr. 218, l. 19 – 219, l. 13.

An Able Assessment was also administered, which includes a questionnaire about sexual behavior history and a test of the person's reaction time to looking at different images. Not surprisingly, based on his prior convictions, Miller's assessment "endorsed some sexual abuse" and revealed that he was most interested in adolescents and adults. Tr. 91, l. 14 – 92, l. 16. However, he scored low on the test's measure for cognitive distortions, which assessed his justifications for sexual misconduct. Tr. 166, ll. 15 – 167, l. 12. Dr. Knight noted comments made by Miller indicating that he perceived a difference in the offensiveness of anal intercourse versus vaginal intercourse. Tr. 78, l. 14 – 79, l. 10. Dr. Harrison found that such attempts to minimize or justify behavior is typical in people with pedophilia. Tr. 215, l. 1 – 216, l. 8.

Dr. Knight conducted a personal assessment inventory (PAI), which measures personality traits. The test revealed that Miller "was trying to portray himself in a good light and probably a better light than actually is reflected by other clinical data." Despite that, she testified that the PAI "suggested" a diagnosis of personality disorder with antisocial traits. Tr. 89, l. 25 – 90, l. 25; Tr. 161, l. 13 – 162, l. 3. Dr. Harrison testified that there were no indicators that Miller was being dishonest during her evaluation and

that she expects people to try to portray themselves in a positive light because they are trying to avoid being committed. She asked questions about details in the record to counteract any such attempts. Tr. 197, ll. 12-22.

Dr. Knight testified that as a result of her testing and interview, she determined that Miller had additional risk factors not accounted for in the Static-99, which included a history of sexually deviant arousal to prepubescent children based on his admission that he was sexually attracted to his nieces and anti-social traits based on his history of failing to conform his conduct to the requirements of the law. She claimed that those two additional factors placed Miller at a higher risk for sexual re-offense. Tr. 98, ll. 5-20.

Dr. Knight ultimately diagnosed Miller with pedophilia, non-exclusive type, sexually attracted to females. Tr. 125, l. 16 – 127, l. 24. This was the same diagnosis rendered by Dr. Harrison. Tr. 127, l. 25 – 128, l. 9. However, unlike Dr. Harrison, Dr. Knight also diagnosed Miller with a personality disorder with antisocial traits. Dr. Knight considered his prior diagnosis with the same disorder by Patrick Harris Psychiatric Hospital and the PAI testing that suggested the diagnosis. Tr. 132, ll. 13-20. She based her diagnosis on her assessment of Miller's "failure to conform [his] behavior to the law," "pattern of irresponsibility," and "pattern of physical aggressiveness." His failure to conform to his conduct to the law was based on his criminal history, which was notably considered by her as a factor in the Static-99, an additional factor increasing his risk to sexually reoffend despite only two of his convictions being of a sexual nature, and then again in his diagnosis as antisocial. She based her finding of his pattern of irresponsibility on Miller's having held over fifty jobs, defaulted on a bank loan, and failed to register as a sex offender on three occasions. Lastly, the pattern of physical

aggressiveness was based upon his two prior criminal domestic violence charges, an altercation with a peer while hospitalized, and his having slammed a door during his sex offender treatment at the Department of Corrections. Tr. 128, l. 10 – 130, l. 7; Tr. 132, l. 7-12; Tr. 168, l. 19 – 169, l. 14; Tr. 183, l. 5 – 184, l. 5. Miller's failures to register as a sex offender and criminal domestic violence charges resulted in three prior convictions, revealing further duplication in Dr. Knight's consideration of his criminal history. Dr. Harrison revealed that Miller's slamming the door during a treatment session at the Department of Corrections was due to his being upset over being referred for SVP commitment. Tr. 216, l. 20 – 217, l. 10.

Dr. Knight testified that the diagnosis of a personal disorder can elevate one's risk to re-offend. Tr. 134, ll. 7-19; Tr. 170, l. 10 – 171, l. 7. However, she agreed that a high percentage of individuals in the Department of Corrections have some antisocial traits. Tr. 169, l. 15-22. Dr. Knight's opined that her combined diagnoses revealed that Miller has serious difficulty in controlling his behavior. Tr. 135, ll. 2-20. She also said that Miller has "the propensity to commit future sexually violent offenses" based primarily on "his offense history and difficulty controlling his sexual behavior." Tr. 135, l. 21 – 136, l. 7. Dr. Knight found that because Miller is likely to engage in acts of sexual violence, he requires long term control, care, and treatment and met the definition to be found a sexually violent predator. Tr. 136, ll 8-25.

In explaining why her opinion differed from Dr. Harrison's, Dr. Knight said that she considered factors beyond the Static-99 and that she put emphasis on other things, such as Miller's release plan. Tr, 137, l. 1 – 138, l. 5. According to Dr. Knight, that included plans to reside with another sex offender who had been released from the SVP

program and to work at a zoo. Tr. 138, l. 14 – 140, l. 18. She also noted the fact that Miller did not have any probation and would not be required to attend any sex offender treatment if released. Tr. 138, ll. 6-13; Tr. 184, l. 18 – 185, l. 8. She said that if Miller were released after his trial, prepubescent children would be at risk. Tr. 141, ll. 4-6.

However, Dr. Knight admitted on cross-examination that Miller attended voluntary sex offender treatment at the Department of Corrections. Tr. 173, l. 24 – 174, l. 19. She also admitted that he had not any disciplinary infractions since his incarceration in 2010. Tr. 174, l. 20 – 175, l. 3. Dr. Harrison found the lack of infractions to suggest that Miller had not been displaying antisocial behaviors to such a degree that he was breaking the rules in prison. She noted that others whom she has evaluated had pages upon pages of infractions, indicating their problems with getting into trouble and breaking the rules even in a controlled environment. Tr. 205, l. 19 – 206, l. 10.

Dr. Knight also admitted that Miller indicated an intention to try to find a family member to reside with and only mentioned residing with the former inmate as an initial step when he was first released from jail. Tr. 175, l. 4 – 176, 2. Dr. Harrison explained that it is not uncommon for sex offenders to live together because they know each other and there are restrictions on where they can reside. Tr. 219, l. 18 – 220, l. 19. Further, Miller's discussion of his past work at a zoo was in response to Dr. Knight's question about his ideal job. She did not actually ask Miller what his work plans were for when he was released. Tr. 176, l. 3 – 177, l. 5. Miller mentioned previously working at a zoo to Dr. Harrison, but he indicated future interest in employment in either a restaurant or assembly work. Tr. 200, l. 20 – 201, l. 15; Tr. 220, l. 20 – 221, l. 15; Tr. 224, ll. 7-16.

Miller maintained denial of the act that led to his 1996 conviction, indicating that the child was injured on her bicycle. Tr. 184, ll. 6-17; Tr. 198, l. 15-20. Dr. Harrison noted that the pediatrician report from the incident found that the injury to the child could have been either a penetration or straddle injury. Tr. 213, l. 25 – 214, l. 25. However, Miller admitted his conduct toward his nieces and expressed a desire to apologize to them once they are old enough. Tr. 178, l. 6 – 179, l. 8; Tr. 198, l. 21 – 199, l. 9.

Dr. Harrison considered other diagnoses but found that there was not sufficient data to render any other diagnosis beyond pedophilia with any degree of certainty. Specifically, she did not find that Miller demonstrated a “pervasive lifelong pattern of antisociality” to diagnosis him with a personality disorder. Tr. 199, l. 14 – 202, l. 6. She testified that Miller did not meet the criteria for commitment under the SVP Act. Tr. 208, ll. 15-18. Based on his diagnosis and risk level, she could not say that he is “likely to engage in acts of sexual violence.” Tr. 208, ll. 1-5. She further stated that “the [SVP] statute specifies that this Act is intended for an extremely dangerous group of sex offenders, and I don’t believe -- based on all the other evaluations that I have done under this Act, I don’t believe that Mr. Miller falls into that **small, but extremely dangerous group.**” Tr. 208, ll. 6-14 (emphasis added).

ARGUMENT

The trial court erred in failing to conduct the requisite analysis under Rule 401, SCRE, and Rule 403, SCRE, and admitting testimony regarding Appellant's prior charges and convictions for non-sexual conduct.

Trial counsel objected to the admission of testimony regarding Miller's prior charges and convictions for nonsexual offenses, which included: 1992 charges for breaking and entering and larceny, both of which were dismissed; 1995 and 2009 convictions for criminal domestic violence; a 2005 conviction for possession of marijuana; and 1999, 2003, and 2005 convictions for failing to register as a sex offender. The trial judge overruled the objection, but noted it for the record. Tr. 72, l. 5 – 75, l. 17. These prior convictions, for non-sexual offenses and non-violent offenses, were not relevant to the jury's determination of whether Miller was "likely to engage in acts of **sexual violence** if not confined." S.C. Code Ann. § 44-48-30(1). Further, even if they were relevant, there was substantial danger that the jury would find in favor of commitment based upon Miller's general criminal propensity rather than based upon the requisite finding that Miller was a sexually violent predator beyond a reasonable doubt. In this marginal case, where the doctor from the Department of Mental Health advocated against commitment, the prejudice from the admission of Miller's prior, non-sexual charges and convictions was amplified.

Admittedly the SVP Act allows the experts evaluating the person under the Act to have "reasonable access to the person for the purpose of the examination, as well as access to all *relevant* medical, psychological, *criminal offense*, and disciplinary records and reports." S.C. Code Ann. § 44-48-90(C) (emphasis added). However, these offenses can include both convictions and offenses not resulting in convictions **if they are**

relevant to the determination of whether a person is a sexually violent predator. See White v. State, 375 S.C. 1, 9, 649 S.E.2d 172, 176 (Ct. App. 2007).

“Relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE; see also State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) (“Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.”). “Evidence which is not relevant is not admissible.” Rule 402, SCRE. “Evidence should be excluded if it is . . . irrelevant or unnecessary to substantiate the facts.” State v. Stokes, 339 S.C. 154, 159, 528 S.E.2d 430, 432 (Ct. App. 2000) (quoting State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999)). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” Rule 403, SCRE.

In In re the Care and Treatment of Corley, our Supreme Court noted that the SVP Act requires the State to prove beyond a reasonable doubt that a person is a sexually violent predator. 353 S.C. 202, 206, 577 S.E.2d 451, 453 (2003) (citing S.C. Code Ann. § 44-48-100). A sexually violent predator is defined as 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. Id. (citing S.C. Code Ann. § 44-48-30(1)(a) & (b)). The Court found that “past criminal history” is relevant to establishing section 44-48-30(1)(a) of the SVP Act. Id. The Court further

found that “a person’s dangerous propensities” are the focus of the SVP Act’s requirement that the State prove that the person is “likely to engage in acts of sexual violence if not confined.” Id. at 206-07, 577 S.E.2d at 453-54. The Court noted the SVP Act defines “[l]ikely to engage in acts of sexual violence” to mean “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.**” Id. (citing S.C. Code Ann. § 44-48-30(9)) (emphasis added).

In Corley, the defendant was convicted in March 1993 of assault and battery of a high and aggravated nature (ABHAN) and sentenced to ten years. Then, in August 1993, he pled guilty to criminal sexual conduct (CSC) in the second degree and was sentenced to 14 years, concurrent. Id. at 204, 577 S.E.2d at 452. Corley argued that the underlying details of the offenses should not have been admitted due to his willingness to stipulate to the convictions. Id. However, the State used the details surrounding the conviction “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.” Id. at 207, 577 S.E.2d at 454. The State’s expert testified that the similarity between the two offenses, including the age, race, and gender of the victims, “evinces a pattern of behavior which in turn indicates the person would be at an increased risk to commit future offenses.” Id. Notably then, it appears that the ABHAN offense was sexual in nature, distinguishing Corley from the present case. Here, Miller did not dispute the admission of his prior sexual offenses, which included the 1996 and 2010 convictions for indecent liberties with a child and lewd action with a child. Rather, he challenged admission of his **non-sexual** charges and convictions.

In White v. State, this Court considered whether the trial court properly excluded White's past unadjudicated sexual offenses at the SVP probable cause hearing. 375 S.C. 1, 7, 649 S.E.2d 172, 175 (Ct. App. 2007). This Court determined that the circuit court erred, and that it could have considered "any prior relevant offenses, which may be contained in the State's petition," which included both convictions and offenses not resulting in convictions. Id. at 8-9, 649 S.E.2d at 175-76. Instructive to this Court's analysis was the Kansas Supreme Court's decision in Matter of Hay, 953 P.2d 666, 677 (Kan. 1998), in which the court stated: "In assessing whether an individual is a sexually violent predator, *prior sexual history* is highly probative of his or her propensity for future violence." Id. at 9, 649 S.E.2d at 176 (emphasis added). Though finding that White's criminal sexual offenses not resulting in convictions were directly relevant to the circuit court's probable cause determination, this Court noted that its holding was "not stating past convictions and prior offenses not resulting in convictions that have no bearing on whether a person is a sexually violent predator should be admissible." Id. at 10 n.3, 649 S.E.2d at 176-77 n.3. Thus, White is not dispositive on the issue in the present case either, which involves charges and conviction for **non-sexual** offenses, and by implication suggests they are irrelevant.

The State pointed to In re the Care and Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), in support of its position that Miller's prior charges and convictions for nonsexual offenses were admissible. In Ettel, the trial court admitted testimony regarding three prior sexual offenses that Ettel admitted to during his SVP evaluation, but which did not result in convictions. 377 S.C. at 560-61, 660 S.E.2d at 286-87. He also

admitted testimony regarding Ettel's prior murder conviction, which was alleged to involve an attempted sexual assault:

In 1962, Ettel was convicted in Michigan of murdering his girlfriend's mother with a pair of sewing scissors. Dr. Crawford testified the arresting officers told her the mother's shirt was pulled above the mother's head, and Ettel allegedly told the officers he tried to sexually assault the mother before he killed the mother. No incident report was available for Dr. Crawford to substantiate the officers' testimony.

Id. at 560 n.2, 660 S.E.2d at 287 n.2.

This Court found that the trial court properly admitted the testimony regarding both the prior sexual offenses and the prior murder conviction, all of which "were relevant because Dr. Crawford relied on them in evaluating Ettel's need for and likelihood of success in treatment as well as his ability to control his behavior in the future." Id. at 563, 660 S.E.2d at 288. This Court further found that the possibility of unfair prejudice did not substantially outweigh the probative value of the testimony. Id.

Here again, the nature of the prior charges and convictions in Ettel are distinguishable. In Ettel, the details of both the charges and convictions revealed that they were all at least potentially sexual in nature. Here, there was no testimony regarding any sexual motivation behind Miller's breaking and entering and larceny charges, both of which were dismissed. Further, there was no testimony that the other convictions for marijuana, criminal domestic violence, or failure to register as a sex offender were sexual in nature. The expert in Ettel did testify that regardless of whether the murder was a sexual crime, "it goes to [Ettel's] propensity to commit further violent crimes." Id. at 563, 660 S.E.2d at 288. However, both White and the SVP Act itself make clear the concern at an SVP trial is with the likelihood to commit **sexual** violence, not just violence generally. See 375 S.C. at 9, 649 S.E.2d at 176 (finding that there was no dispute that

White's prior convictions satisfied the first prong of S.C. Code Ann. § 44-48-30(1) such that "the determinate factor is whether he suffers from a mental abnormality such that he is likely to commit acts of **sexual** violence in the future" (emphasis added); S.C. Code Ann. § 44-48-30(9)) (defining "[l]ikely to engage in acts of **sexual** violence" as "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." (emphasis added)).

In the present case, Dr. Knight testified that a person's nonsexual charges and convictions are necessary to her evaluation because they give her "an idea of any other criminal behavior they may have been involved in, the nature of that behavior. It can also go to diagnosis, things like that." Tr. 76, ll. 2-9. Regarding Miller specifically, she agreed that these offenses were not the sole basis of her opinion, but found them "significant." Tr. 76, l. 10 – 77, l. 17. She considered Miller's criminal history in her determination that he had a pattern of antisocial traits, which was based on her findings of Miller's "failure to conform [his] behavior to the law," "pattern of irresponsibility," and "pattern of physical aggressiveness." Tr. 129, l. 10 – 130, l. 7; Tr. 132, l. 7-12. Ultimately, Dr. Knight diagnosed Miller with personality disorder with antisocial traits. Tr. 128, ll. 10- 18.

The defense expert, Dr. Harrison, testified that Miller's nonsexual criminal offenses were taken into account in the Static-99 and were thus a factor in the calculation of the risk score under that assessment. Tr. 206, ll. 11-17. Dr. Knight likewise indicated that the Static-99 risk score factored in Miller's prior sexual conviction, four or more other convictions, and past violent conviction. Tr. 88, ll. 8-13.

The precedent of this State does not go so far as to permit admission of person's entire criminal record, including charges and convictions of both a sexual and non-sexual nature, in an SVP trial. Rather, the trial court should have made a twofold inquiry. First, were the charges and convictions relevant to the determination of whether Miller was a sexually violent predator? Second, was the probative value of the offenses outweighed by the danger of undue prejudice? See Ettel, 377 S.C. at 563, 660 S.E.2d at 288; Rule 401, SCRE; Rule 403, SCRE.

The experts' testimony that Miller's criminal history was relevant to their assessment and diagnosis and the Static-99 risk assessment was not dispositive of whether testimony regarding those charges and convictions should have been allowed in the trial. The trial judge ought not delegate relevancy decisions to witnesses. Also, even if the judge found that there was some relevance, the trial court should have engaged in a probative value versus prejudice affect analysis. Here, the essential element missing, in contrast to the applicable case law, is the sexual nature of the other charges and convictions admitted, significantly decreasing their probative value. To the extent that they were factors in the calculation of the Static-99 risk score, it was unnecessary to reveal the nature of the offenses to the jury. Dr. Knight also testified regarding the impact that Miller's criminal history had on her highly suspect diagnosis of Miller's personality disorder with antisocial traits. She opined that antisocial personality traits can elevate one's risk to re-offend and that "antisocial personality disorder or antisocial traits, [] would also predispose one to be more likely to commit acts, criminal acts, than somebody without that disorder." Tr. 134, ll. 7-19; Tr. 135, ll. 17-20. However, given that the prior

convictions were already part of the Static-99 sexual recidivism risk score, Dr. Knight's duplicitous use of Miller's prior convictions to further inflate his risk level was improper.

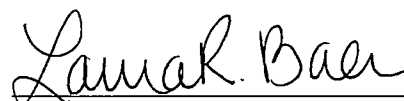
Allowing testimony regarding the myriad of other charges and convictions also created a substantial risk that the jury would render its decision based on the fact that it viewed Miller as a general danger to society or sought to punish him further for his three failures to register as a sex offender. This was improper when the jury's focus should have instead been on whether Miller was likely to engage in **acts of sexual violence** if he was not confined.

Therefore, the trial court erred when it failed to engage in the requisite analysis pursuant to Rule 401, SCRE and Rule 403, SCRE, and admitted testimony regarding Miller's charges and convictions that were nonsexual in nature. Miller is accordingly entitled to a new trial.

CONCLUSION

For the foregoing reasons, Appellant Calvin Joe Miller respectfully requests that this Court reverse his commitment and remand his case for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

R. Lawton McIntosh, Circuit Court Judge

RECEIVED

JUL 27 2015

SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF CALVIN MILLER,

APPELLANT

APPELLATE CASE NO. 2014- 001735

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. Calvin Joe Miller, SCDMH-Sexual Violent Predator, 7901 Farrow Road, Building #3, Columbia, SC 29203, this 27th day of July, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of July, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: May 15, 2025