

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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DEC 14 2015

SC Court of Appeals

Appeal From Greenville County
The Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2014-001735

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

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly allowed the State's expert to testify about Appellant's non-sexual criminal charges and convictions, because the expert considered those charges and convictions in reaching her opinion regarding Appellant's diagnoses and risk to reoffend sexually if not confined for long term control, care and treatment.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant Calvin Miller pled guilty on August 3, 2010, to one count of committing a lewd act on a child under the age of sixteen, arising from the molestation of his twin nieces when they were under the age of ten, and was sentenced to eight years incarceration, with no probationary term. Prior to his release from prison, Respondent State of South Carolina commenced an action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Appellant's civil commitment to the South Carolina Department of Mental Health (DMH) for long term control, care and treatment. The matter was called for a jury trial on July 14, 2014, before the Honorable R. Lawton McIntosh, Circuit Court Judge.

The State presented testimony from Susan Knight, Ph.D., who was qualified as an expert in psychology and forensic psychology. Dr. Knight testified she worked for the Medical University of South Carolina (MUSC) Sexual Behaviors Clinic, and MUSC assigned her to conduct Appellant's forensic evaluation after the State retained MUSC on the case. (Trial Transcript [TT], pp. 51-60; Record on Appeal [R.], pp. ____).

In evaluating Appellant, Dr. Knight used the standard protocol for MUSC evaluations, including review of all available records, a clinical interview of Appellant, which lasted approximately four hours, collateral interviews, and a battery of psychological and physiological tests. She testified this is the type of information experts rely on in the field of forensic psychology. (TT, pp. 61-66; R., pp. ____).

According to records associated with Appellant's 2010 lewd act conviction, Dr. Knight testified he was originally charged with two counts of criminal sexual conduct with a minor under the age of eleven, and one count of lewd act on a minor under the age

of sixteen. The offenses were reported in 2009 when the victims (Appellant's twin nieces) were ten years old, but the actual abuse occurred years earlier. One victim stated Appellant fondled her genitals and breasts when she was five or six years old, and again when she was eight years old. The other victim reported Appellant anally raped her when she was five or six years old, and again when she was eight years old. (TT, pp. 66-69; R., pp. ____).

In addition to his 2010 conviction, Appellant had a previous conviction in North Carolina for a sexual offense involving the digital penetration of a three year old female he was babysitting. The victim immediately reported the incident to her mother, and her five year old brother reported witnessing Appellant "punching [victim] in her private area." (TT, pp. 70-72; R., pp. ____).

Appellant objected to Dr. Knight testifying about his nonsexual offenses, which included breaking and entering, larceny, two criminal domestic violence convictions, possession of marijuana, and three failure to register as a sex offender convictions. The circuit court overruled the objection based on applicable case law. Dr. Knight then testified it is necessary to consider the nonsexual offense history of the person being evaluated because it goes to diagnosis and a pattern of behavior, but she did not base any diagnosis or opinion solely on Appellant's criminal history. (TT, pp. 72-77; TT, pp. ____).

During the four hour interview with Dr. Knight, Appellant denied any sexual conduct with his nieces when they were five or six years old, but admitted fondling one and sodomizing the other when they were eight years old. He stated the fondling lasted

a minute, and he put her hand on his penis, but it ended when the victim said it was weird because he was her uncle, so he got embarrassed and quit. (TT, p. 78; R., p. ____).

As to the other victim, Appellant stated he was laying in the bed with her, and asked her if he could put his penis in her "butt," and she said okay. He said the sexual activity lasted a couple of minutes on that occasion. A week later he asked the victim if she wanted to do it again, and she agreed, but his conscience started bothering him when she got undressed and laid on the bed, so nothing happened. (TT, pp. 78-79; R., pp. ____).

Appellant told Dr. Knight he believes anal intercourse "does not count as somebody's first time of having sex." Dr. Knight testified Appellant's distinction between the severity of anal intercourse and vaginal intercourse showed a lack of insight into the gravity of the sex act with his eight year niece, and was "quite concerning." (TT, pp. 79-80; R., pp. ____).

Appellant also told Dr. Knight he had sexual thoughts and fantasies about his nieces, and started masturbating to those fantasies, which "took over his mind." He stated he was attracted to the physical characteristics of his prepubescent nieces, particularly the smoothness of their vaginal areas, which was significant to her diagnosis of pedophilia. (TT, pp. 80-82; R., pp. ____).

As to the North Carolina offense, even though he pled guilty to the charge, Appellant denied any sexual contact with the victim, stating she got injured in a bike accident. When he pled guilty, Appellant had the option of incarceration or probation, and he chose incarceration because "he didn't have a place to live, so he was afraid he

would violate his probation.” Dr. Knight found his version of the incident significant because it “could have been a denial of the offense.” (TT, pp. 82-84; R., pp. _____).

Dr. Knight testified about the battery of tests administered pursuant to the evaluation protocol, which includes measures of attention and impulsivity, substance abuse, personality, psychopathy, sex offender risk, and sexual interests. She stated the protocol is designed to give the most clear picture of the person they can get from a psychological, physiological and sexual arousal standpoint, and the results form the basis for an ultimate opinion. (TT, pp. 84-85; R., pp. _____).

The Static-99R is an actuarial risk assessment tool comprised of ten risk factors correlating with the person’s risk to commit another sexual offense. At the time of Dr. Knight’s evaluation, Appellant’s score on the Static-99R was four, which put him in the moderate high risk category. Between the evaluation date and trial, Appellant turned forty years old, lowering his score to three, which is the moderate low risk category. Dr. Knight testified the lower score did not change her ultimate opinion in the case because the Static-99R is just one tool, and it does not account for all risk factors applicable to the individual being evaluated. (TT, pp. 85-89; R., pp. _____).

Other tests indicated Appellant did not have any attention, substance abuse or psychopathy problems. A test measuring personality traits indicated Appellant tried to present himself in a better light than other clinical data, and suggested a diagnosis of personality disorder with antisocial traits. Another tool indicated a history of sex abuse, and sexual interests in adolescent and adult females. (TT, pp. 89-93, 97; R., pp. _____).

MUSC administered a penile plethysmograph (PPG) as part of Appellant’s evaluation. Dr. Knight explained the PPG is designed to measure a man’s sexual arousal

by their physiological response to visual and audio stimuli, and Appellant's PPG was invalid because he did not respond to any stimuli. She testified the lack of response could be the result of several things, including Appellant trying to manipulate the test by moving around, holding his breath and contracting his muscles, all of which was indicated during his PPG.

Dr. Knight further testified records she reviewed from Appellant's voluntary two month stay in a psychiatric hospital around the time he was arrested indicated he was uncooperative, aggressive and grossly exaggerated his symptoms on psychological tests. In addition, Appellant told her he lied to get into the hospital because he "wanted to beat his charges and play insane," and she found Appellant's history of trying to fool tests significant in connection with the PPG results.¹ (TT, pp. 93-97; R., pp. _____).

Dr. Knight testified Appellant's Static-99R results revealed several risk factors to reoffend, including a prior sex offense, an unrelated victim, multiple sentencing dates, and a violent conviction. She further testified he had additional risk factors not included in the Static-99R, including a history of sexually deviant arousal to prepubescent children, antisocial traits, cognitive distortions regarding his conduct and victims, which makes him a higher risk to reoffend sexually than reflected on the Static-99R. (TT, p. 98, 122-123; R., pp. _____).

¹Testimony proffered by the State but excluded from evidence also indicated Appellant was disruptive, narcissistic and manipulative during his participation in a Department of Corrections sex offender treatment program, and even though he "passed" the program by answering enough questions on a test correctly, he did not internalize the concepts and could not apply them to himself. (TT, pp. 110-114; R., pp. _____).

Dr. Knight also expressed concern about Appellant's plans if he was released from confinement, which included living with another convicted sex offender, who had been committed as a sexually violent predator. The sex offender he planned to live with was also a pedophile, who violated his probation by being around prepubescent children, and after his release from DMH's sexually violent treatment program, he was caught mailing his pubic hair and bodily fluids to residents in the program. She testified this plan indicated Appellant had no insight into his risk to reoffend, particularly because his plan to avoid reoffending was to "always keep an adult around." (TT, pp. 138-141; R., pp. ____).

Based on his admitted sexual attraction to prepubescent females and history of acting on those urges, Dr. Knight diagnosed Appellant with the mental abnormality of pedophilia, attracted to females, non-exclusive type. Based on his lengthy criminal history, his pattern of irresponsibility evidenced by his job history and failure to comply with the sex offender registry requirements, and his pattern of physical aggressiveness, Dr. Knight also diagnosed Appellant with a personality disorder with antisocial traits. (TT, pp. 125-134; R., pp. ____).²

Dr. Knight testified to a reasonable degree of psychological certainty Appellant's pedophilia and personality disorder cause him serious difficulty controlling his behavior, and he has the propensity to commit future acts of sexual violence. She stated he requires long term control, care and treatment due to his disorders. (TT, pp. 135-138; R., _____)

² Appellant was also diagnosed with personality disorder with antisocial traits during his 2009 psychiatric hospitalization. (TT, p. 132; R., p. ____).

pp. _____).

Kimberly Harrison, Ph.D., who was originally appointed by the court to evaluate Appellant, testified as an expert on Appellant's behalf. She diagnosed him with pedophilia, attracted to females, non-exclusive type, but concluded he did not meet the criteria for commitment under the SVPA because he was a low risk to reoffend. She did not conduct any psychological tests during the evaluation, but did score the Static-99R. (TT, pp. 188-208; R., pp. _____).

On cross-examination, Dr. Harrison testified she saw the records from Appellant's psychiatric hospitalization, including the personality disorder with antisocial traits diagnosis, but she did not contact anyone at the hospital to follow-up after she concluded there was not enough "data" to render a similar diagnosis. She also confirmed the only assessment tool she used to reach her ultimate conclusion was the Static-99R, even though other tests and tools were available. Finally, she testified Appellant said similar things regarding anal intercourse versus vaginal intercourse during her interview with him, blamed the North Carolina incident on a bike injury, and told her about his plan to live with the convicted sex offender, but she did not find any of that information particularly concerning. (TT, pp. 209-224; R., pp. _____).

The jury found Appellant is a sexually violent predator beyond a reasonable doubt, and the circuit court ordered him into DMH's custody for long term control, care and treatment. (TT, pp. 269-272, Order of Commitment filed July 15, 2014; R, pp. _____). This appeal followed.

ARGUMENT

The circuit court properly allowed the State's expert to testify about Appellant's non-sexual criminal charges and convictions, because the expert considered those charges and convictions in reaching her opinion regarding Appellant's diagnoses and risk to reoffend sexually if not confined for long term control, care and treatment.

Appellant contends the circuit court failed to conduct a Rule 403, SCRE, analysis regarding evidence of Appellant's non-sexual criminal charges and convictions, and erred in allowing the State's expert to testify about those offenses. When the record is considered in context rather than the truncated version offered by Appellant, the evidence was directly relevant, its significant probative value outweighed the prejudicial effect, and the circuit court properly exercised its discretion in allowing it.

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 495 (2013). Appellate courts will not disturb the trial court's ruling absent a manifest abuse of discretion accompanied by probable prejudice, which occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *Id.*

The SVPA expressly gives experts "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 (Supp. 2014) (emphasis added). "Criminal offense" includes both convictions and offenses not resulting in convictions "as long as they are relevant to the determination of whether a person is a sexually violent predator." In re the Care & Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008); *see also* White v. State, 375 S.C. 1, 649 S.E.2d 172, 176 (Ct. App. 2007) (Legislature did not limit "criminal offense" in the

SVPA to only convictions; therefore, the court must assume the legislature intended to include both convictions and prior offenses not resulting in convictions that bear on whether a person is a sexually violent predator as admissible evidence in a SVP case.)

A person's dangerous propensities are the focus of the SVPA, and past criminal history bears directly on the presence of a mental abnormality and/or personality disorder, as well as the person's risk to reoffend. In re the Care and Treatment of Chandler, 382 S.C. 250, 676 S.E.2d 676, 680 (2009) (citing Ettel); In re the Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451, 453-54 (2003). Similar to the conviction versus offense issue decided in White, the legislature did not limit the expert's consideration of "criminal offenses" to sexual offenses, but intended to include any criminal offenses, sexual or non-sexual, relevant to the person's mental status and risk to reoffend. See In re the Detention of Altman, 723 N.W.2d 181, 184-185 (Iowa 2012) (the statutory definitions of "mental abnormality" or "sexually violent predator" do not require the person's risk be primarily sexual in nature; and the fact he might be "even more likely to commit other types of offenses does not detract from his risk as a sexual predator");³ see also In re Commitment of Hooker, 360 Ill. Dec. 334, 968 N.E.2d 1087, 1100-1103 (2012) (person's criminal history, sexual and nonsexual, is relevant and

³ South Carolina's definitions of "mental abnormality" and "sexually violent predator" are similar. Compare Iowa Code §229A.2(5) (mental abnormality is one predisposing person to commit sexually violent offenses) and Iowa Code §229A.2(11) (sexually violent predator is person likely to engage in predatory acts constituting sexually violent offenses) with S.C. Code §44-48-30(2)(3) (Supp. 2014) (mental abnormality is a mental condition predisposing the person to commit sexually violent offenses) and S.C. Code §44-48-30(1)(b) (Supp. 2014) (sexual predator is person who suffers from mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence).

admissible in a sexual predator case as the bases for an expert's diagnosis and opinion) (*citing In re Commitment of Doherty*, 343 Ill.App.3d 615, 934 N.E.2d 590 [2010]).

In Ettel, the Court of Appeals found Ettel's prior sexual offenses and murder conviction were relevant because the expert relied on them in evaluating his need for, and likelihood of success in, treatment, and his ability to control his behavior in the future. 660 S.E.2d at 288 (*citing State v. Gaster*, 349 S.C. 545, 564 S.E.2d 87 [2002] [admission of motion filed by defendant did not violate his due process rights because it was relevant in evaluating defendant's need for and probability of success in treatment]). The expert testified Ettel's murder conviction was relevant to his propensity to commit further violent crimes, even if there was no sexual component, and she used it to develop a diagnosis and render an opinion regarding his ability to control his behavior. *Id.*

In this case, in addition to his sexual offenses, Appellant's criminal history included breaking and entering, criminal domestic violence, and sex offender registry violations. It spanned decades, from his teenage years to his arrest in 2009, and across two states. Dr. Knight testified Appellant's non-sexual offense history was relevant because it showed patterns of irresponsibility, physical aggressiveness, and failing to conform his conduct to the law, which went directly to his personality disorder with antisocial traits diagnosis. Combined with his undisputed pedophilia, the personality disorder increased his risk to commit a future act of sexual violence against a child. (TT, pp. 76-77, 98, 128-130; R., pp. _____).

As for the evidence's possible prejudice, Appellant's non-sexual offenses were not the only basis for Dr. Knight's diagnoses and opinion. She also considered and relied on the specifics of Appellant's sexual offenses, his work history, her clinical

interview with Appellant, and information regarding his participation in the sex offender treatment program (to the extent it was allowed at trial) in concluding he has a high risk to reoffend sexually. See Ettel, 660 S.E.2d 285 at 288 (expert also relied on prior sexual conviction, statements made during clinical interviews, and Ettel's record while in a sex offender treatment program in reaching her ultimate diagnosis and opinion); see also Gaster, 564 S.E.2d at 94 (disputed evidence was relevant and its probative value outweighed any prejudicial effect such that circuit court properly admitted the evidence within its discretion). Appellant's pedophilia diagnosis was undisputed, and the probative value of his criminal history, sexual and non-sexual, cannot be seriously disputed, particularly on the issue of his risk to reoffend sexually against children.

The evidence was also highly probative on the issue of Dr. Knight's personality disorder with antisocial traits diagnosis, which Appellant understandably attempts to dismiss as "highly suspect." Dr. Knight testified extensively regarding the basis for this diagnosis, which significantly, the psychiatric professionals who evaluated Appellant during his two months in a psychiatric hospital in 2009 also gave him. Dr. Harrison's failure to give any credence to the prior diagnosis, or even reach out to the hospital before deciding to ignore it, was "highly suspect."⁴

⁴ Appellant's contentions regarding Dr. Knight's use of the Static-99R amply demonstrate why a professional should not rely solely on the Static-99R in rendering an opinion on a person's risk to reoffend because of differing views on what it does or does not include. While Appellant correctly states the Static-99R score accounts for prior convictions, it does **not** consider the length of the person's offense history, or the significance in a sexual predator case of prior non-sexual offenses such as repeatedly violating the sex offender registry laws. Dr. Knight found both of those factors significant in this case.

Ultimately, what weight to give both the opinions of Dr. Knight and Dr. Harrison was a decision for the jury. See In re Det. of Anderson, 826 N.W.2d 516 (Iowa Ct. App. 2012) (weight to be given to the evidence in a sexual predator case was for the fact finder to determine). Appellant essentially concedes his non-sexual offense history was relevant to Dr. Knight's diagnosis and conclusions, but contends it "created a substantial risk that the jury would render its decision based on the fact that it viewed [Appellant] as a general danger to society or sought (sic) to punish him further for his three failures to register as a sex offender." (Brief of Appellant, p. 20). To the contrary, it is far more likely the jury rendered its decision based on the thoroughness and validity of Dr. Knight's evaluation and opinion compared to Dr. Harrison's perfunctory evaluation.⁵

Taken to its logical conclusion, Appellant's argument regarding the admission of non-sexual criminal offenses in a sexual predator case will put every evaluator in the position of either ignoring non-sexual offenses regardless of their relevance to diagnosis and risk to reoffend, or rendering an opinion they cannot support at trial because they cannot testify about those offenses. In this case, if the evidence regarding Appellant's non-sexual offenses was not admitted, Dr. Knight could testify about her diagnoses and conclusion, but she would have to omit a significant component of her evaluation, thus giving only a partial explanation to the jury. Such a result deprives the jury of vital

⁵The State did not mention or elaborate on Appellant's non-sexual offenses during its opening statement or closing argument. Further, neither the State nor Dr. Knight dwelt on the nature of those offenses during Dr. Knight's testimony, but presented the evidence very concisely with the primary focus being why they were significant to Dr. Knight's diagnosis and opinion. (TT, pp. 44-48, 76-77, 129-130, 246-254; R., pp. _____).

information regarding the person's mental status and risk to reoffend, which is contrary to the legislative intent of the SVPA.

Given the relevance of Appellant's non-sexual criminal offenses to Dr. Knight's conclusions, and the highly probative nature of the evidence, the circuit court did not abuse its discretion in allowing Dr. Knight's testimony regarding those offenses. Therefore, its ruling should be affirmed.

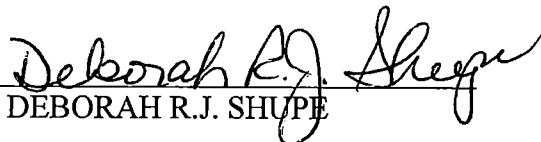
CONCLUSION

Based on the foregoing, Respondent submits the jury verdict finding Appellant is a sexually violent predator beyond a reasonable doubt should be affirmed.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
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Appeal From Greenville County
The Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2014-001735

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IN THE MATTER OF THE CARE AND TREATMENT OF
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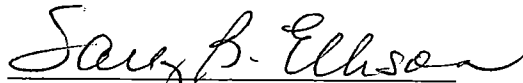
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter by depositing a copy in the United States mail, postage prepaid, addressed to:

Laura R. Baer
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I further certify all parties required by Rule to be served have been served.

This 14th day of December, 2015.



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SC Court of Appeals

Re: In the Matter of the Care and Treatment of Calvin Miller
Appellate Case No. 2014-001735

Dear Ms. Baer:

Enclosed is a copy 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 2 copies enclosed)
Victim Services (with enclosures)