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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
The Honorable Frank R. Addy, Circuit Court Judge
Appellate Case No. 2016-000035

IN THE MATTER OF THE CARE AND TREATMENT OF LEONARD JENKINS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly allowed the State's expert to identify which specific segment of the public would be most at risk in light of Appellant's diagnosed mental abnormality and personality disorder,

II. Trial counsel's purported ineffective assistance of counsel is not preserved for appellate review.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In 2012, Appellant Leonard Jenkins pled guilty to one count of lewd act on a child, arising from the molestation of a nine year old female. Appellant also had previous convictions for assault and battery of a high and aggravated nature, and second degree assault and battery, which involved sexual assaults on a twelve year old female and a fourteen year old female respectively. Prior to Appellant's release from prison, the State commenced a civil proceeding pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking his commitment for long term control, care and treatment as a sexually violent predator. (Petition Pursuant to the Sexually Violent Predator Act [SVPA Petition], with Exhibits, filed October 2, 2014; Record on Appeal [R.], pp. 152-267).

After the circuit court found probable cause to believe Appellant is a sexually violent predator and ordered an evaluation, the court appointed evaluator concluded Appellant had both a sexual disorder and a personality disorder, and determined he met the statutory criteria for commitment as a sexually violent predator. The case was called for a jury trial on January 4, 2016, before the Honorable Frank R. Addy, Jr. Circuit Court Judge.

The court appointed evaluator, Amy C. Swan, Psy.D., was qualified as an expert in forensic psychology. She testified her evaluation of Appellant included reviewing documents related to his offenses, such as victim statements, incident reports, arrest warrants, and court documents, his prison records, and a three hour interview with Appellant. (Trial Transcript [TT], pp. 37-45; R., pp. 37-45).

Dr. Swan looked at the facts of each underlying crime to determine if there was a pattern of behavior on which to base a diagnosis. Based on her review of the documentation and the interview with Appellant, Dr. Swan determined he had pedophilic disorder, sexually attracted to

females, non-exclusive type, which is a sexual attraction to prepubescent children, typically less than thirteen years old. She found Appellant sexually molested three minor females ranging in age from nine to fourteen years old. She also found it significant that Appellant reoffended twice after pleading guilty in 2001 to molesting a minor female. (TT, pp. 45-57; R., pp. 45-57).

Dr. Swan also diagnosed Appellant with other specified personality disorder with antisocial features. She explained she could not diagnose him with antisocial personality disorder because she did not have sufficient evidence he exhibited a conduct disorder before the age of fifteen, which is required for an antisocial personality disorder diagnosis, but Appellant's history of repeated arrests (sexual misconduct and nonsexual misconduct), probation violations and prison disciplinary actions indicated an inability to control and conform his conduct to societal norms. Dr. Swan stated Appellant's pedophilia and personality disorder were "a double whammy," which significantly increased the risk he would reoffend sexually. (TT, pp. 57-63; R., pp. 57-63).

In addition to static (unchangeable) risk factors such as having a sexual disorder, Dr. Swan identified multiple dynamic risks factors Appellant exhibited he could change through treatment. Those factors included lifestyle impulsivity, poor problem solving, resistance to rules and supervision, and externalized coping. As to his static risk factors, Dr. Swan used an actuarial based risk assessment tool, on which Appellant scored in the moderate-high risk to reoffend range. She stated the actuarials underestimate risk because they are based on individuals who are either arrested or convicted within five or ten years, and less than ten percent of sex crimes result in arrest and/or conviction. (TT, pp. 63-71; R., pp. 63-71).

Dr. Swan indicated Appellant had received no sex offender treatment while incarcerated even though he had the opportunity to participate in treatment. During her interview with

Appellant, he stated he did not need treatment, and he "was at zero risk to commit a sexual crime because he had never committed one in the first place." (TT, p. 72; R., p. 72).

Dr. Swan opined to a reasonable degree of psychological certainty Appellant had both a mental abnormality and personality disorder that caused him serious difficulty controlling his sexual behavior, and made him more likely to engage in future acts of sexual violence if not confined in a secure facility for long term control, care and treatment. She stated outpatient treatment would not work for Appellant because he had already proven he would not stop sexually offending even after being sanctioned, he did not believe he needed treatment, and he was not likely to invest much effort unless he was in a secure facility for treatment. (TT, pp. 72-77; R., pp. 72-77).

The State asked Dr. Swan who would be at risk if Appellant was released. Appellant objected on the ground it was irrelevant. The State argued the question went to Dr. Swan's overall opinion of Appellant's dangerousness as a sexual offender. The circuit court overruled the objection, finding it was relevant to Dr. Swan's specific diagnosis. Dr. Swan then testified girls between the ages of nine and fourteen would be at risk based on Appellant's past pattern of behavior. (TT, p. 76; R., pp. 76).

At the close of the State's case, the court denied Appellant's motion for a directed verdict, finding there was evidence from which the jury could conclude beyond a reasonable doubt Appellant is a sexually violent predator. (TT, 99-100; R., pp. 99-100). Appellant then presented testimony from his brother, his wife and a jail chaplain. (TT, pp. 102-114; R., pp. 102-114).

The jury found beyond a reasonable doubt Appellant is a sexually violent predator, and the circuit court committed him to the South Carolina Department of Mental Health for long

term control, care and treatment. (TT, p. 147, Order of Commitment filed January 5, 2016; R., pp. 147; 268). This appeal followed.

ARGUMENT

I. The circuit court properly allowed the State's expert to identify which specific part of the public would be at risk in light of Appellant's diagnosed mental abnormality and personality disorder.

Appellant contends the circuit court erred in allowing Dr. Swan to testify girls between the ages of nine and fourteen would be at risk if Appellant was released because this testimony was irrelevant pursuant to Rule 402, SCRE. He argues the State is only required to prove an individual is likely to engage in acts of sexual violence, not the identity of the potential victims.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Brewer, 411 S.C. 401, 768 S.E.2d 656, 658 (2015). The trial judge has broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146, 148 (1991).

In cases under the SVPA, the State must not only prove the existence of a mental abnormality or personality disorder, it must prove a causal link between the individual's mental abnormality/personality disorder and his risk to reoffend sexually. "Inherent within the mental abnormality prong of the Act is a lack of control determination, i.e. the individual can only be committed if he suffers from a mental illness which he cannot sufficiently control **without** the structure and care provided by a mental health facility, rendering him likely to commit a dangerous act." In re Treatment & Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 349 (2002) (emphasis in original).

Contrary to Appellant's contention, the testimony at issue was directly relevant to the required connection between Appellant's mental abnormality and personality disorder and his risk to reoffend sexually. Rather than merely showing a risk to reoffend in general, the testimony indicated the specific portion of the public – girls between the ages of nine and

fourteen – who would be most at risk given Appellant's pedophilia diagnosis.[1] This was consistent with Dr. Swan's testimony regarding Appellant's diagnosis and his pattern of behavior.

The circuit court did not abuse its discretion in allowing the testimony at issue. Therefore, the ruling should be affirmed.

[1]Appellant's real argument is one of prejudice versus probative under Rule 403, SCRE, which was not raised in the circuit court, and therefore, is not preserved for appellate review. His comparison of the testimony at issue in this case to cases regarding the length of a defendant's possible sentence and the "golden rule" is nothing more than an attempt to avoid the preservation issue.

II. Trial counsel's purported ineffective assistance of counsel is not preserved for appellate review.

Appellant asserts his trial counsel was ineffective for failing to seek exclusion of Dr. Swan's testimony regarding the other specified personality disorder with antisocial features diagnosis on the grounds "it is factually and legally insufficient for commitment under the SVP Act." (Brief of Appellant, p. 5). The issue is not preserved for appellate review, and therefore, is not properly before the Court.

The South Carolina Supreme Court recently held ineffective assistance of counsel claims in SVPA proceedings are not reviewable in a direct appeal from the person's commitment absent an objection at trial, but should be asserted in a petition for common law habeas corpus relief. *See* In the Matter of the Care & Treatment of Jeffrey Allen Chapman, No. 2014-001181, 2017 WL 606506, at *6 (S.C. Sup. Ct., Feb. 15, 2017).

> Because there is no existing statutory procedure providing for [an evidentiary hearing similar to a post-conviction relief hearing], we find Chapman's claims regarding ineffective assistance of counsel akin to other habeas claims, in that the existing relief for the claims is either inadequate (due to the lack of a fully developed record) or unavailable (due to the absence of a specified procedure in which to assert the claims). Thus, we agree with the State that persons committed under the Act may pursue their unlawful custody claims, including ineffective assistance of counsel claims, in habeas proceedings.

Id. at *5.

As in Chapman, Appellant's ineffective assistance of counsel claim was not raised in the

circuit court, and is not preserved for appellate review.[2] Appellant may seek relief in the circuit court pursuant to an appropriately filed habeas corpus petition. Therefore, the jury verdict finding Appellant is a sexually violent predator should be affirmed.

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[2]In any event, Appellant's argument fails on the merits. The vast majority of jurisdictions have found an antisocial personality disorder diagnosis in sufficient in sexual predator cases. *See* State v. Donald DD, 24 N.Y.3d

CONCLUSION

Based on the foregoing reasons, the State respectfully submits the judgment of the lower court should be affirmed.

Respectfully submitted,

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174, 199 (2014) (dissenting opinion). Further, the diagnosis of other specified personality disorder is expressly recognized in the Diagnostic and Statistical Manual of Mental Disorders, 5th Ed. (DSM-5), p. 684.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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