

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 JOE MILLER,

APPELLANT

APPELLATE CASE NO. 2014- 001735

FINAL 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. 197 – 198. Appellant was sentenced to eight years imprisonment, with credit for time served of 470 days. R. 197 – 198; R. 207 (Pet'r's 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. R. 1. The jury concluded that appellant was a sexually violent predator. R. 188, l. 8 – 189, 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. 196.

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. R. 142, l. 7 – 148, l. 8. Dr. Harrison conducted her evaluation of Miller in August 2013, which included an interview, psychological testing, and a review of pertinent records. R. 148, l. 11 – 150, l. 23. She testified on behalf of the defense that she did not find Miller to be a part of the small group of “extremely dangerous” sex offenders to whom the SVP Act was intended to apply. R. 162, 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. R. 160, ll. 11-17. She also disagreed with Dr. Knight’s diagnosis of Miller with a personality disorder. R. 153, l. 14 – 156, 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 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. R. 25, l. 16 – 29, 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. R. 29, l. 4 – 31, l. 4. The trial court overruled trial counsel's objection to the admission of the 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 1999, 2003, and 2005 convictions for failure to register as a sex offender. R. 31, l. 15 – 36, 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. R. 13, l. 24 – 15, l. 20; R. 17, l. 22 – 19, l. 8. Dr. Knight interviewed and conducted testing on Miller for a total of four hours and reviewed his court and prior treatment records. R. 21, l. 19 – 23, l. 23. She did not contact any of Miller's family members or former employers, other than his mother, who did not respond. R. 39, ll. 11-21; R. 132, 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. R. 44, l. 15 – 46, l. 18. On average, twenty-five percent of sex offenders score higher than Miller and seventy-five percent score the same or below. R. 46, l. 25 – 47, l. 7; R. 126, l. 8 – 128, l. 16; R. 176, l. 8 – 177, 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. R. 47, 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. R. 156, l. 17 – 160, 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. R. 160, 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. R. 48, 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. R. 160, l. 22 – 161, l. 14; R. 171, l. 17 – 172, l. 18. Using the SASSI-3 evaluation, Dr. Knight determined that Miller does not have a substance abuse disorder. R. 48, 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. R. 57, 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. R. 51, 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. R. 52, l. 13 – 56, l. 2; R. 117, l. 7-18; R. 122, l. 13 – 123, l. 7. Dr. Harrison noted that the Department of Mental Health no longer used the PPG in conducting SVP evaluations. R. 161, ll. 15-16; R. 172, l. 19 – 173, 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. R. 50, l. 14 – 51, l. 16. However, he scored low on the test's measure for cognitive distortions, which assessed his justifications for sexual misconduct. R. 121, ll. 15 – 122, l. 12. Dr. Knight noted comments made by Miller indicating that he perceived a difference in the offensiveness of anal intercourse versus vaginal intercourse. R. 38, l. 14 – 39, l. 10. Dr. Harrison found that such attempts to minimize or justify behavior is typical in people with pedophilia. R. 169, l. 1 – 170, 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. R. 48, l. 25 – 49, l. 25; R. 116, l. 13 – 117, 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. R. 151, 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. R. 57, ll. 5-20.

Dr. Knight ultimately diagnosed Miller with pedophilia, non-exclusive type, sexually attracted to females. R. 84, l. 16 – 86, l. 24. This was the same diagnosis rendered by Dr. Harrison. R. 86, l. 25 – 87, 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. R. 91, 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. R. 87, l. 10 – 89, l. 7; R. 91, l. 7-12; R. 123, l. 19 – 124, l. 14; R. 138, l. 5 – 139, 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. R. 170, l. 20 – 171, l. 10.

Dr. Knight testified that the diagnosis of a personal disorder can elevate one's risk to re-offend. R. 93, ll. 7-19; R. 125, l. 10 – 126, l. 7. However, she agreed that a high percentage of individuals in the Department of Corrections have some antisocial traits. R. 124, l. 15-22. Dr. Knight's opined that her combined diagnoses revealed that Miller has serious difficulty in controlling his behavior. R. 94, 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." R. 94, l. 21 – 95, 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. R. 95, 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. R. 96, l. 1 – 97, 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. R. 97, l. 14 – 99, 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. R. 97, ll. 6-13; R. 139, l. 18 – 140, l. 8. She said that if Miller were released after his trial, prepubescent children would be at risk. R. 100, ll. 4-6.

However, Dr. Knight admitted on cross-examination that Miller attended voluntary sex offender treatment at the Department of Corrections. R. 128, l. 24 – 129, l. 19. She also admitted that he had not any disciplinary infractions since his incarceration in 2010. R. 129, l. 20 – 130, 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. R. 159, l. 19 – 160, 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. R. 130, l. 4 – 131, l. 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. R. 173, l. 18 – 174, 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. R. 131, l. 3 – 132, 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. R. 154, l. 20 – 155, l. 15; R. 174, l. 20 – 175, l. 15; R. 178, ll. 7-16.

Miller maintained denial of the act that led to his 1996 conviction, indicating that the child was injured on her bicycle. R. 139, ll. 6-17; R. 152, 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. R. 167, l. 25 – 168, l. 25. However, Miller admitted his conduct toward his nieces and expressed a desire to apologize to them once they are old enough. R. 133, l. 6 – 134, l. 8; R. 152, l. 21 – 153, 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. R. 153, l. 14 – 156, l. 6. She testified that Miller did not meet the criteria for commitment under the SVP Act. R. 162, 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.” R. 162, 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.**” R. 162, 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. R. 31, l. 5 – 34, 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." R. 35, ll. 2-9. Regarding Miller specifically, she agreed that these offenses were not the sole basis of her opinion, but found them "significant." R. 35, l. 10 – 36, 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." R. 88, l. 10 – 89, l. 7; R. 91, l. 7-12. Ultimately, Dr. Knight diagnosed Miller with personality disorder with antisocial traits. R. 87, 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. R. 160, 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. R. 47, 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." R. 93, ll. 7-19; R. 94, 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,


Laura R. Baer
Appellate Defender

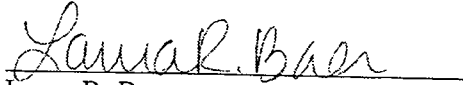
ATTORNEY FOR APPELLANT

This 2nd day of March, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

March 2nd, 2016

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
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APPELLATE CASE NO. 2014- 001735

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant 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, this 2nd day of March, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of March, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.



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March 2, 2016

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Re: In re Calvin Joe Miller

Dear Ms. Shupe:

Enclosed are two copies of the Final Brief of Appellant and Final Reply Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Laura R. Baer
Appellate Defender

LRB/ssd

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

RECEIVED

FEB 26 2016

IN THE MATTER OF THE CARE AND TREATMENT OF SC Court of Appeals
CALVIN MILLER,

Appellant.

FINAL 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. 10-19).

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. 20-25).

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. 25-28).

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. 29-31).

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. 31-36).

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. 37).

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. 37-38).

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. 38-39).

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. 39-41).

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. 41-43).

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. 43-44).

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. 44-48).

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. 48-52).

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. 52-56).

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. 57, 81-82).

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. 69-73).

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. 97-100).

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. 84-93).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. 91).

pp. 94-97).

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. 142-162).

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. 163-178).

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. 188-191, 196). 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

³South 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. 35-36, 57, 87-89).

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 Ettl*, 660 S.E.2d 285 at 288 (expert also relied on prior sexual conviction, statements made during clinical interviews, and Ettl'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. 5-9, 35-36, 88-89, 179-187).

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.

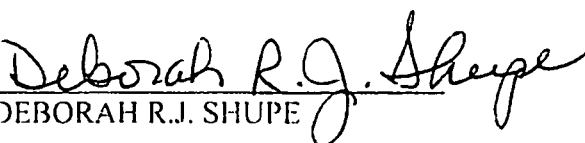
CONCLUSION

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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February 26, 2016

STATE OF SOUTH CAROLINA
IN THE 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.

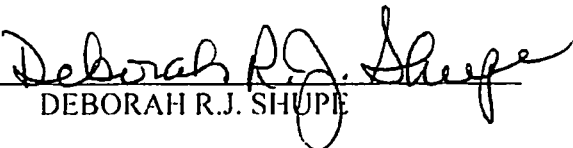
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, Order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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February 26, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appcal 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.


PROOF OF SERVICE

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

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

This 26th day of February 2016.



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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 JOE MILLER,

APPELLANT

APPELLATE CASE NO. 2014-001735

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

In the Brief of Appellant, appealing his civil commitment under the Sexually Violent Predator (SVP) Act, Appellant Calvin Miller raised the following issue:

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?

During Miller's civil commitment hearing, the State's expert was permitted to testify on direct regarding Miller's prior 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 court failed to conduct any balancing test regarding the probative value versus unfair prejudice before determining that the prior, non-sexual charges and offenses were admissible. R. 31, I. 5 – 36, I. 17. As more fully discussed in Appellant's Brief, the admittance of the prior, non-sexual charges and convictions was improper because of the substantial risk that the jury based its finding on what it viewed as Miller's general danger to society rather than the narrow question of whether he was "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)(b). This danger was exacerbated by the conflicting expert testimony regarding Miller's risk to reoffend.

Respondent argues that admission of the non-sexual charges and convictions was proper because the State's expert, Dr. Susan Knight, considered the convictions in reaching her diagnoses and assessing Miller's risk to reoffend. "Even if admissible under Rule 703[, SCRE] or Rule 705, [SCRE,] however, the determination of whether an expert may

testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE.” State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999). Under Rule 403, SCRE, the testimony “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Id. at 628m 521 S.E.2d at 512.

Respondent quotes In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), for the proposition that “a person’s dangerous propensities are the focus of the SVP Act.” Respondent’s Brief, p. 11. The full paragraph from which that quotation was excised reads:

Moreover, appellant’s offer to stipulate to the requirement in section 44-48-30(1)(a), with the details of the offenses suppressed, would have hampered the State’s ability to establish the requirement in section 44-48-30(1)(b). The 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.” § 44-48-30(9) (emphasis added). Therefore, a person’s dangerous propensities are the focus of the SVP Act.

Corley, 353 S.C. at 206-07, 577 S.E.2d at 453-54. Thus, when read in context it is clear that the Court meant that the focus of the SVP Act is a person’s dangerous propensities “to commit acts of sexual violence.” Later the same year as its opinion in Corley, our Supreme Court reiterated in In re Harvey, 355 S.C. 53, 61 n.7, 584 S.E.2d 893, 897 n.7 (2003), that “the purpose of the requirements in the SVP Act is to ensure that these involuntary commitment procedures are “**only** used to control a ‘limited subclass of dangerous persons’ and **not to broadly subject any dangerous person to what may be indefinite terms.**” (emphasis in original). See also Kansas v. Crane, 534 U.S. 407, 412-

13, 122 S.Ct. 867, 870 (2002) (“[T]here must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, **must be sufficient to distinguish the dangerous sexual offender** whose serious mental illness, abnormality, or disorder subjects him to civil commitment **from the dangerous but typical recidivist convicted in an ordinary criminal case.**” (emphasis added)).

Respondent points to two out-of-state cases – In re Altman, 723 N.W.2d 181 (Iowa 2012), and In re Hooker, 968 N.E.2d 1087 (Ill. 2012) – in support of its argument that admission of Miller’s prior, nonsexual offenses was proper. Obviously neither case is mandatory authority and a full review reveals that they are inapposite.

Unlike the present case, the defendant in In re Altman, 723 N.W.2d 181, 183 (Iowa 2012), did not seek to exclude his lengthy history of over forty arrests and multiple convictions, all but two of which related to non-sexual offenses. Instead, Altman welcomed their introduction in support of his argument that the State did not present sufficient evidence that his mental condition “predisposed him to commit sexually violent offenses to a degree that would constitute a menace to the health and safety of others.” 723 N.W.2d at 183. The Altman court concluded that the “the State need only establish that more likely than not the respondent will commit additional sexually violent offenses.” Id. at 188. The court accordingly rejected Altman’s contention that the State was required to “prove his *greatest* risk to the public is the likelihood of future sexual offenses.” Id. at 187-88 (emphasis in original). It was in that context that the Court wrote: “The fact that it is likely he will also commit other crimes does not detract from his risk as a sexual predator.” Id. at 188. Here, Miller is not arguing for judgment not

withstanding the verdict in light of the testimony, but rather he is arguing that the testimony should never have been admitted.

In In re Hooker, 968 N.E.2d 1087 (Ill. 2012), the Illinois Supreme Court considered whether the trial court erred in allowing the State's expert witnesses at the SVP hearing to testify to certain facts underlying their opinions, which included Hooker's prior arrests and allegations that did not result in arrest. 968 N.E.2d at 1098. Significantly, the trial court gave the following limiting instruction to the jury:

Ladies and gentlemen, I am going to allow the witness to testify as to what he considered, and the information that he considered is going to be allowed by me for a limited purpose, and it's permitted for you to weigh and evaluate the opinion that is going to be given by this witness. The material itself that's referred to is not evidence in this case, and that material can't be considered by you as evidence. You may consider the material for the purpose of deciding what weight, if any, to give the opinions that are going to be made by this witness.

Id. at 1091. The Hooker court noted a decreased risk of prejudice in light of the court's limiting instruction that the testimony was not substantive evidence. Id. at 1101. However, the Hooker court took the opportunity to clarify that such a limiting instruction was not necessary in an SVP hearing because the Illinois SVP Act expressly authorized the State to "introduce evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were imposed." See ILL. COMP. STAT. 207/35(b) (West 2002). Notably, no such provision is contained in South Carolina's SVP Act and no such limiting instruction was given in Miller's case. See S.C. CODE ANN. § 44-48-10, et seq.

With respect to the prejudice to Miller from the testimony, Respondent noted that other factors beyond the non-sexual charges and convictions were considered by Dr.

Knight in reaching her diagnosis and opinion. Respondent's Brief, pp. 12-13. In In re Ettel, 377 S.C. 558, 563, 660 S.E.2d 285, 288 (2008), this Court found that Ettel's prior sexual offenses not resulting in convictions and prior murder conviction were relevant to Dr. Pamela Crawford's opinion and diagnosis. The Ettel Court aptly noted that Dr. Crawford testified that her opinion remained the same even without that information and also relied on several other factors. 377 S.C. at 563, 660 S.E.2d at 288. Conversely, no such testimony was presented in Miller's case. While Dr. Knight admitted that she did not rely "solely upon his criminal past" in reaching her "ultimate decision," she testified that she found them to be "significant." R. 35, l. 2 – 36, l. 17.

Further, Ettel's prior conviction "stemmed out of a sexual assault in which he bound and gagged the victim, choked and beat her, and then forced the victim to perform oral sex on him after raping her." 377 S.C. at 560, 660 S.E.2d at 286. He threatened to "cut her [the victim] into pieces" if she did not remain silent during the ordeal. Id. Ettel also admitted to three other sexual offenses that did not result in convictions, which were committed against a customer in an appliance store where he worked in Michigan, a hitchhiker whom he kidnapped in Montana, and co-worker at an animal hospital where he worked in Montana. Id. Additionally, Dr. Crawford testified to a possible sexual motivation related to Ettel's 1962 murder conviction. Id. at 560-61 n.2, 660 S.E.2d at 287 n.2. Thus, there was not the same danger in Ettel that the jury based its decision on the offender's general criminal propensity rather than his danger "to engage in acts of sexual violence." S.C. CODE ANN. § 44-48-30(1)(b).

Lastly, Respondent argues that a favorable ruling for Appellant "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.” Respondent’s Brief, p. 14. Respondent claims that such would “deprive[] the jury of vital information regarding the person’s mental status and risk to reoffend, which is contrary to the legislative intent of the SVPA.” Respondent’s Brief, pp. 14-15. On the contrary, it is the improper admission of such evidence that detracts from the purpose of the SVP Act, which is to “control a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be indefinite terms.” Harvey, 355 S.C. at 61 n.7, 584 S.E.2d at 897 n.7.

It cannot be disputed that facts or data relied upon by experts are not automatically admissible, but must instead be subject to a balancing test under Rule 403, SCRE. See State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999); see also United States v. Gillis, 773 F.2d 549 (4th Cir. 1985). Since the analysis of whether probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues “turns on the facts of each case,” a favorable decision for Miller does not mean that evidence of prior, non-sexual crimes could not be admissible under different circumstances. See State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008) (“The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.”). That said, there is a serious danger in an SVP hearing that the State will seek to bolster feeble evidence of a person’s risk to reoffend sexually by introducing evidence of the person’s prior, non-sexual conduct, as it did in

the present case.¹ See In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015) (“A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an **extraordinary remedy**. Although this Court has repeatedly held the Act constitutional, we decline to construe it in a manner which would lessen the State’s burden of proof. The General Assembly has carefully written our SVP Act to lay out exactly what is required to establish that someone is a sexually violent predator; **the State must prove, beyond a reasonable doubt that the individual is presently a sexually violent predator.**” (additional emphasis added)).

¹ The experts agreed that the risk to reoffend sexually based on the Static-99 test was 12% of the next 5 years and 18% over the next ten years. R. 45, l. 6 – 47, l. 13; R. 156, l. 17 – 162, l. 18; R. 176, l. 8 – 177, l. 16. Obviously troubled by the low statistic, Assistant Attorney General Bogel posed a question to the defense expert, Dr. Kimberly Harrison, regarding whether she would get on her plane to fly back home if she found out it had a twelve percent chance of crashing. R. 177, ll. 9-16. The implication was that *any* risk to reoffend is too high. However, the SVP Act requires a finding that the person is “*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.

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Appellant Calvin 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 2nd day of March, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply Brief 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."

March 2nd, 2016



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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 JOE MILLER,

APPELLANT

APPELLATE CASE NO. 2014-001735

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant 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, this 2nd day of March, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 2nd day of March, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.