(5)

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County

Honorable Frank R. Addy, Circuit Court Judge

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

APPELLANT

APPELLATE CASE NO. 2016-000035

FINAL BRIEF OF APPELLANT

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2.

Whether trial counsel provided ineffective assistance in failing to exclude the State's expert's diagnosis of "other specified personality disorder with antisocial features" because such a diagnosis is factually and legally insufficient for commitment under the SVP statute and the State used this diagnosis to argue that appellant was more likely to reoffend because of, as the State argued, the "double whammy" of antisocial disorder and pedophilia?

STATEMENT OF THE CASE

On October 2, 2014, the State filed a petition in York County seeking Leonard Jenkins' commitment as a sexually violent predator. R. 152 – 267. On January 4, 2016, Jenkins was tried before the Honorable Frank R. Addy, Jr. and a jury. R. 1. James G. Bogle, Jr. represented the State. R. 1. Anna Rawl Good represented Jenkins. R. 1. The jury deliberated for nearly an hour and found that Jenkins was a sexually violent predator. R. 146, l. 7 – 147, l. 23. On January 5, 2016, Judge Addy signed an order committing Jenkins to the SVP program. R. 268.

ARGUMENT

1.

The trial court erred in permitting, over objection, the State to elicit from its expert witness that young girls would be at risk if appellant were released where such a question was irrelevant and intended only to inflame the passions of the jury.

The State's sole witness in this SVP trial was a psychologist, Dr. Amy Swan ("Swan"). Swan received her doctorate in clinical psychology from "Nova Southeastern University in Fort Lauderdale, Florida." R. 38, ll. 10 – 12. Swan makes $4,000.00 if she does an evaluation for the Department of Mental Health and $4,500.00 if she does an evaluation for the Attorney General. R. 80, ll. 19 – 22. Swan is from Florida. R. 38, ll. 2 – 4. Despite residing in Florida, Swan was appointed by the court as its evaluator in this case. R. 42, ll. 14 – 16. Swan opined that appellant was a sexually violent predator. R. 75, l. 22 – 76, l. 3.

Swan claimed that appellant has pedophilia and "other specified personality disorder with antisocial features." R. 73, ll. 20 – 22. She based this conclusion, in part, on her three-hour interview with appellant. R. 43, ll. 18 – 20. She also based her conclusion, in part, on appellant's criminal history, including arrests which were never the subject of a conviction or of which appellant was acquitted. R. 59, ll. 2 – 7. One of these arrests was for speeding, which bolstered Swan's opinion that appellant demonstrated "consistent irresponsibility." R. 62, ll. 15 – 20.

Swan testified about appellant's criminal history in connection with her pedophilia diagnosis. R. 54, l. 21 – 57, l. 11. She told the jury, "Over a period of approximately 10 years Mr. Jenkins sexually assaulted three girls. One was nine, one was 12, and one was 14." R. 56, ll. 13 – 16. Swan said, "If you're interested in children when you're 17, you're still going to be

interested in children when you're 70." R. 64, ll. 4 – 6. Near the end of her direct-examination, Swan gave her conclusions that appellant had the requisite mental abnormality and personality disorder and that he had serious difficulty in controlling his behavior. R. 74, ll. 12 – 22. She stated that appellant needed to be confined. R. 75, ll. 9 – 21. The Attorney General walked Swan back over the elements of the statute with yes-or-no questions. R. 75, l. 22 – 76, l. 14.

After Swan again ticked off each element, the Attorney General asked, "Who would be at risk if he was released?" R. 76, l. 15. Appellant immediately objected. R. 76, ll. 16 – 18. Trial counsel argued, "I don't believe that's relevant as to who would be at risk. It's whether he's likely to re-offend or not." R. 76, ll. 16 – 18. Judge Addy overruled her objection, reasoning that Swan had "testified as to a specific diagnosis." R. 76, ll. 21 – 22. Swan then answered, "It would be girls between the ages of nine and 14, that's his previous pattern." R. 76, ll. 23 – 24.

The trial judge erred in overruling appellant's objection because this evidence was irrelevant. Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. The definition of a "sexually violent predator" is a person who "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1)(b). The phrase "likely to engage in acts of sexual violence" is further defined 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." S.C. Code Ann. § 44-48-30(9). While the State must prove that a defendant is likely to engage in acts of sexual violence, it is not required to prove who a defendant's potential victims might be. Much as the question of length of a sentence is irrelevant in a criminal trial, the question of who might be a victim is irrelevant. See State v. Mizell, 349 S.C. 326, 331, 563 S.E.2d 315, 318 (2002) ("The jury is, generally, not entitled to learn the

possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence."). Therefore, this question was not relevant to any of the elements of the statute.

Swan's answer to the question—young girls—was highly inflammatory. This question and its answer can be analogized to "golden rule" violations because it seeks to destroy the impartiality of the jurors. See Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009). In State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965), the solicitor's argument that the defendant might "come in your wife's bedroom or your mother or daughters" was held improper. Here, the Attorney General argued in closing that appellant had "a 27 percent chance of a sex offense against a little girl, and that's a whole different way of looking at it." Tr. 129, ll. 16 – 20. The trial judge erred in allowing this irrelevant evidence which prejudiced appellant. This Court should reverse.

2.

Trial counsel provided ineffective assistance in failing to move to exclude the State's expert's diagnosis of "other specified personality disorder with antisocial features" because such a diagnosis is factually and legally insufficient for commitment under the SVP statute and the State used this diagnosis to argue that appellant was more likely to reoffend because of, as the State argued, the "double whammy" of antisocial disorder and pedophilia.

Swan could not diagnose appellant with antisocial personality disorder because he did not fit the criteria. R. 57, l. 12 – 58, l. 4. No evidence existed that appellant had "bad behavior prior to the age of 15," so Swan was restricted from making a diagnosis of antisocial personality disorder. R. 57, l. 12 – 58, l. 4. Instead, she diagnosed appellant with "**other** specified personality disorder with antisocial features." R. 57, l. 12 – 58, l. 4 (emphasis added).

Swan said the first feature of this "other" diagnosis is "failure to conform to social norms with respect to lawful behavior." R. 58, ll. 16 – 25. She listed the remaining features of her "other" diagnosis: deceitfulness, irritability and aggressiveness, reckless disregard for the safety of self and others, consistent irresponsibility, and lack of remorse. R. 61, l. 20 – 62, l. 24.

Swan emphasized the importance of the diagnosis of "other" personality disorder. R. 63, ll. 2 – 14. She stated that "having a personality disorder with antisocial features also increases your risk for committing another sexual crime, because there are two pathways to sexual re-offense." R. 63, ll. 7 – 14. Swan stated if you had pedophilia and the "other" disorder, "**it's a double whammy**, because then you have both pathways to sexual re-offense and your risk is higher." R. 63, ll. 7 – 14 (emphasis added). The Attorney General emphasized this portion of Swan's testimony in his closing argument: "Both the mental abnormality, pedophile, the

personality disorder, the antisocial features, combined in what Dr. Swan called **the double whammy**." R. 125, ll. 22 – 25.

Trial counsel's failure to object to any of this testimony or to the admissibility of opinions regarding "other" personality disorder with antisocial characteristics constitutes ineffective assistance and a violation of appellant's due process rights. Appellant expects the State to urge this Court not to consider a claim based on ineffective assistance of counsel in this direct appeal. Appellant asserts that in an SVP case, such procedural bars are not proper pursuant to the Due Process Clause because, if barred, appellant has no other means to raise the claim. Currently the South Carolina Supreme Court is considering a case that asks it to recognize an SVP defendant's right to raise ineffective assistance of counsel claims on direct appeal. See In the Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellate Case No. 2014-001181 (argued on May 17, 2016). The right to the effective assistance of counsel in SVP cases flows from the Due Process Clauses of both the United States and South Carolina Constitutions. U.S. Const. amend. V, XIV; S.C. Const. Art. I, § 3. Addington v. Texas, 441 U.S. 418, 425 (1979). Vitek v. Jones, 445 U.S. 480, 492 (1980). But see In the Matter of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 58 (2004). Appellant urges this Court to adopt the reasoning of the Kansas Supreme Court in In re Ontiberos, 287 P.3d 855, 865 (Kan. 2012) and consider this claim that would be traditionally considered unpreserved.

The SVP Act and due process require a link between the personality disorder and the likelihood of reoffending. Kansas v. Hendricks, 521 U.S. 346, 371-72 (1997). In Justice Kennedy's concurrence in Hendricks, he stated that if "it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." Id. at 372. Swan described antisocial personality

disorder as "a criminal lifestyle." R. 57, ll. 18 – 21. Being committed indefinitely for having a "criminal lifestyle" is exactly the imprecision and expansion of civil detention against which Justice Kennedy warned. And, of course, Swan could not even diagnose appellant with antisocial personality disorder, but instead lumped him in the category of "other."

The majority in Hendricks wrote extensively about whether the Kansas statute's definition of mental abnormality satisfied substantive due process. Id. at 356-60. Approving the Kansas statute, the Court wrote that it required "evidence of past sexually violent behavior and a present mental condition **that creates** a likelihood of such conduct in the future if the person is not incapacitated." Id. at 357 (emphasis added). Focusing on the lack of control, the Court stated that the "lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." Id. at 360. From the Court's opinion, it is clear that due process requires a link between the mental abnormality and the inability to control future sexual behavior.

The Supreme Court refined its holding in Kansas v. Crane, 534 U.S. 407 (2002). The Court rejected the defendant's argument that due process requires the state to prove complete lack of control. Id. at 411. But the Court also rejected the state's argument that it did not have to prove any lack of control. Id. at 412. The Court wrote that the lack of control finding distinguishes dangerous sexual offenders from other persons who are dangerous and this "distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment. Id. In its citation for this sentence, the Court noted a study that found that "40% - 60% of the male prison population is diagnosable with antisocial personality disorder." Id. *citing* Moran, The

Epidemiology of Antisocial Personality Disorder, 37 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999). The Court further held that there "must be proof of serious difficulty in controlling behavior." Id. at 413. Elaborating, the Court stated that the proof of lack of control

> 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.**

Id. (emphasis added).

Our Supreme Court interpreted Crane in In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002). The Court wrote in Luckabaugh, "[W]e believe Crane holds the substantive due process clause requires a court to determine an individual suffers from a mental illness **which makes it** seriously difficult, though not impossible, for that person to control his dangerous propensities." Luckabaugh at 143, 568 S.E.2d at 348 (emphasis added). "Inherent within the mental abnormality prong of the Act is a lack of control determination . . . ." Id. at 144, 568 S.E.2d at 349. Like the United States Supreme Court, our Supreme Court requires a link between the mental abnormality or personality disorder and the defendant's inability to control his sexual impulses. "The purpose of the SVPA is to involuntarily commit only a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be an indefinite term of confinement." In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013) (internal quotations omitted). Again, Swan's description of a "criminal lifestyle" is not in keeping with our Supreme Court's interpretation of the SVP Act.

Antisocial personality disorder has been held legally insufficient by the New York Court of Appeals. State v. Donald DD, 24 N.Y.3d 174 (2014). In Donald DD.'s case, he had sex with a

fourteen-year-old acquaintance when he was eighteen and then forced himself on her twelve-year-old cousin in 2002. Id. at 181. In 2004, after his release from prison, Donald DD. raped his wife's friend in a cemetery. Id. After his release, he violated probation and was then released again on parole when he molested his children and had forcible sex with his wife. Id. at 182. His parole was revoked and the state brought an SVP proceeding against him. Id. at 182-83. Two psychologists testified that Donald DD. had antisocial personality disorder. Id. Both psychologists testified that Donald DD.'s antisocial personality disorder gave him serious difficulty in controlling his sex-offending conduct. Id. at 183-84.

Citing Crane and other authorities for the point that the vast majority of all incarcerated offenders could be diagnosed with antisocial personality disorder, the court held:

> **A diagnosis of [antisocial personality disorder] alone**—that is, when the [antisocial personality disorder] diagnosis is not accompanied by a diagnosis of any other condition, disease or disorder alleged to constitute a mental abnormality—**simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case.**

Id. at 190 (emphasis added). The court's analysis reveals that a diagnosis of antisocial personality disorder simply has so little probative value regarding inability to control the commission of sexual crimes that it was legally insufficient to form the basis for commitment. Id. at 190-92.

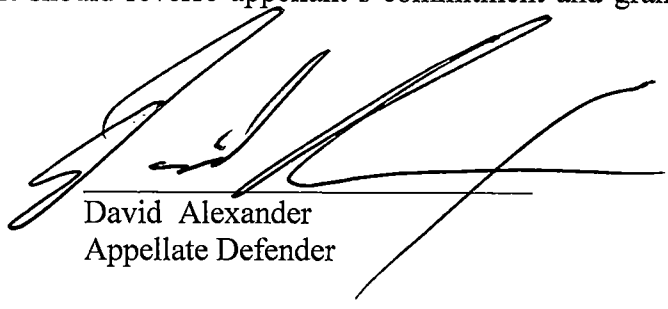
The reasoning of Donald DD applies with even more force in appellant's case because Swan could not diagnose him with antisocial personality disorder, but resorted to "other." Donald DD had a companion case in which the defendant was diagnosed with paraphilia not otherwise specified. Id. at 186. The Court described this diagnosis as "controversial" and a "catch all." Id.

If antisocial personality disorder is by itself insufficient, then a diagnosis of "other" which was made only because Swan could not diagnose appellant with antisocial personality disorder,

cannot suffice to commit appellant indefinitely. Trial counsel was ineffective in failing to have this testimony excluded. It allowed the State to use its "double whammy" theory to convince the jury that appellant could not control his behavior and was likely to reoffend. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and grant him a new trial.



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This 4th day of May, 2017.

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."

May 4, 2017

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