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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable Thomas A. Russo, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF MICHAEL A. FULTON,

APPELLANT

APPELLATE CASE NO. 2017-000012

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether appellant was entitled to a directed verdict because the State failed to prove he had a mental abnormality or personality disorder legally sufficient for his commitment under the SVP Act and due process?

STATEMENT OF THE CASE

The State sought appellant Michael A. Fulton's commitment into the Sexually Violent Predator program and on December 5, 2016, a trial was held before the Honorable Thomas A. Russo and a jury. R. 1. James G. Bogle, Jr. represented the State. R. 1. James K. Falk represented appellant. R. 1. The jury found appellant was a sexually violent predator and Judge Russo ordered his commitment. R. 255, ll. 20 – 21. This appeal follows.

ARGUMENT

Appellant was entitled to a directed verdict because the State failed to prove he had a mental abnormality or personality disorder legally sufficient for his commitment under the SVP Act and due process.

The State claimed appellant had a personality disorder that has been ruled legally insufficient for commitment and a mental abnormality that was rejected by the DSM-V. The State's sole witness was Dr. Marie E. Gehle. R. 92, ll. 4 – 21. She was not board-certified. R. 96, ll. 21 – 22. She had no access to scholarly journals at the Department of Mental Health. R. 176, ll. 2 – 9. She had to rely on "friends or colleagues" to stay current on changes in her field. R. 176, ll. 2 – 9.

Dr. Gehle claimed appellant had both a mental abnormality and a personality disorder. R. 132, l. 16 – 134, l. 17. Appellant's alleged mental abnormality was "other specified paraphilic disorder, biastophilia." R. 132, l. 16 – 134, l. 17. She explained that "biastophilia" is defined as "being aroused by having sex that is coercive with a nonconsenting person." R. 132, l. 16 – 134, l. 17. Appellant's alleged personality disorder was "antisocial personality disorder" ("ASPD"). R. 132, l. 16 – 134, l. 17.

On cross-examination, Dr. Gehle admitted biastophilia had been specifically omitted from the DSM-V. R. 153, ll. 5 – 9. Other paraphilic disorders listed in the DSM-V included voyeuristic disorder, exhibitionistic disorder, frotteuristic disorder, telephone scatalogia, and klismaphilia (arousal towards enemas), but biastophilia was not listed. R. 148, l. 3 – 152, l. 7.

Dr. Gehle admitted that a possible reason the medical community rejected biastophilia was because "a consensus or a strong majority of the forensic psychiatric community . . . do not believe that that is a mental illness or a personality disorder." R. 153, ll. 8 – 17. She further

explained that the debate in the medical community was also that doctors "were afraid of that disorder being used to describe every rapist without any specific criteria." R. 152, ll. 8 – 17. She agreed that just because someone committed a rape did not mean that the person suffered from biastophilia and that "[i]n certain cases, it's just criminal conduct." R. 152, l. 18 – 153, l. 9. She also agreed that a journal article in *Psychiatric Times* by Dr. Allen Francis stated that "coercive paraphilia is not the average rejected diagnosis. **It has been and is continuing to be badly misused to facilitate what amounts to an unconstitutional abuse of psychiatry.**" R. 154, l. 17 – 155, l. 20 (emphasis added).

Dr. Gehle claimed she did not know whether appellant could become aroused from consensual sex, but admitted that "in theory" it was possible because appellant said that he did and he had children. R. 143, ll. 15 – 23. Dr. Gehle never interviewed any of appellant's sexual partners. R. 143, l. 15 – 144, l. 4. Dr. Gehle had no evidence that appellant had rape fantasies. R. 158, ll. 8 – 12. She had no evidence that appellant viewed rape pornography. R. 158, ll. 11 – 12. Ultimately, Dr. Gehle admitted, "I don't have evidence that [rape is] the primary focus of his sexual arousal." R. 158, ll. 13 – 17.

As for ASPD, Dr. Gehle admitted that research showed that the vast majority of the male prison population could be diagnosed with ASPD. R. 168, ll. 5 - 19. She agreed that ASPD had been rejected in New York as a basis for SVP commitment. R. 180, ll. 3 – 14. After attempting to distinguish appellant's ASPD diagnosis from other repeat offenders with qualities like "deceitfulness" and "irresponsibility" she then admitted that she had described 70% of the prison population. R. 180, l. 15 – 181, l. 24.

The State rested after Dr. Gehle's testimony. R. 192, ll. 14 – 15. Appellant moved for a directed verdict. R. 193, l. 9 – 194, l. 25. Appellant argued that biastophilia was insufficient for

commitment because Dr. Gehle admitted there was doubt in the medical community about whether it exists. R. 193, l. 9 – 194, l. 25. Appellant also argued that antisocial personality disorder was insufficient for commitment because it described too broad a class of prisoners. R. 193, l. 9 – 194, l. 25. Judge Russo ruled that the issue was "a question for the jury" and denied appellant's motion. R. 195, l. 15 – 196, l. 2.

The trial judge erred in not granting a directed verdict because neither biastophilia nor ASPD were legally sufficient to commit appellant on the facts of this case. Both South Carolina's SVP statute and due process require a causal link between a defendant's alleged mental abnormality/personality disorder and the likelihood of committing a future act of sexual violence. S.C. Code Ann. § 44-48-30(1). Kansas v. Crane, 534 U.S. 407, 410 (2002) (noting that the Kansas statute was upheld because it linked the finding of dangerousness to a mental abnormality which made it difficult for the defendant to control his behavior, citing Kansas v. Hendricks, 521 U.S. 346 (1997)).

South Carolina's SVP statute states that the defendant must suffer from a mental abnormality or personality disorder "that makes the person likely to engage in acts of sexual violence." S.C. Code Ann. § 44-48-30(1). The statute requires a causal connection between the alleged mental defect and the potential to commit future sexual crimes. The State failed to prove any such connection between appellant's alleged biastophilia and sexual crimes. Dr. Gehle had no evidence that appellant could only be aroused by rape, viewed rape pornography, or had rape fantasies. She admitted, "I don't have evidence that [rape is] the primary focus of his sexual arousal." R. 158, ll. 13 – 17.

The State's complete failure to link biastophilia with appellant's crimes was compounded by Dr. Gehle's admission that the scientific community specifically rejected biastophilia as a

diagnosis in the DSM-V. R. 153, ll. 8 – 17. She admitted the concern of the scientific community that including biastophilia would lead to government overreach in trying to commit every rapist into SVP programs. She could offer no good reason why an arcane disorder such as klismaphilia would be included in the DSM-V but a disorder so dangerous and requiring civil commitment was not included. The evidence presented in this case was insufficient to commit appellant on the basis of a disorder not accepted by the medical community.

Nor can appellant's commitment rest on Dr. Gehle's ASPD diagnosis. She admitted that her description of ASPD would cover 70% of the male prison population. R. 180, l. 15 – 181, l. 24. In Hendricks, Justice Kennedy wrote 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." Hendricks at 372. Our Supreme Court holds, "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) (emphasis added).

ASPD has been held legally insufficient by the New York Court of Appeals and this Court should adopt the New York high court's reasoning. 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.

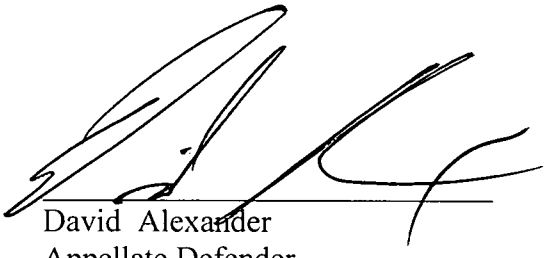
Citing Crane and other authorities for the point that the vast majority of all incarcerated offenders could be diagnosed with antisocial personality disorder, the Donald DD court held:

> 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. 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. Appellant urges this Court to adopt the New York Court of Appeals' reasoning in Donald DD. With no evidence linking a specious alleged mental defect to appellant's risk to sexually reoffend and the invalidity of ASPD, the trial court's denial of appellant's directed verdict motion should be reversed and appellant should be released from confinement.

CONCLUSION

For the foregoing reasons, appellant's commitment should be reversed and his release should be ordered.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of September, 2017.

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Appeal from Florence County

Honorable Thomas A. Russo, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF MICHAEL FULTON,

APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Fulton states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Thomas A. Russo, which was held on December 5 - 9, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Michael Fulton.

Respectfully Submitted,

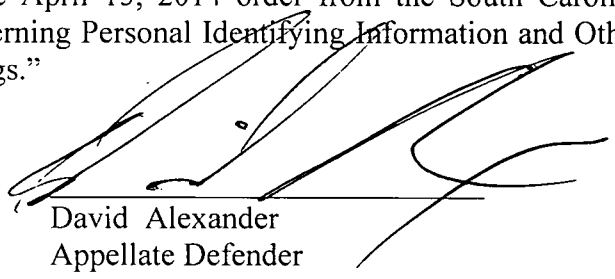
David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 12th day of September, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

September 12, 2017.



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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial transcript dated December 5, 7, & 8, 2016;
(2) State's Exhibit 1;
(3) Court's Exhibits 1 – 4.

I certify that this designation contains no matter which is irrelevant to this appeal.

September 12, 2017

David Alexander
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Michael Fulton, at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 12th day of September, 2017.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of September, 2017.

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