

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dillon County

Honorable Paul M. Burch, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JOSHUA FLOWERS,

APPELLANT

APPELLATE CASE NO. 2017-002408

ANDERS BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

In this SVP case, whether the trial judge erred in refusing to ask appellant's requested voir dire: (1) whether any member of the panel believed that someone who suffers from pedophilia will never be cured; and (2) whether any member of the panel believed that it is impossible to rehabilitate persons convicted of committing sexual crimes against children; thereby depriving appellant of his right to a fair and impartial jury as guaranteed by state law?

STATEMENT OF THE CASE

The Attorney General filed a petition seeking the commitment of appellant Joshua Flowers under the Sexually Violent Predator Act and on November 6, 2017, appellant was tried in Dillon County before the Honorable Paul M. Burch and a jury. R. 1. James G. Bogle, Jr. represented the Attorney General and James K. Falk represented appellant. R. 1. After deliberating only eighteen (18) minutes, the jury found appellant was a sexually violent predator. R. 179, l. 19 – 180, l. 11. This appeal follows.

STANDARD OF REVIEW

In general, the scope of voir dire and the manner in which it is conducted are within the trial judge's sound discretion. State v. Wise, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004). An appellate court must examine a juror's responses in light of the entire voir dire, with the primary consideration being that the juror is unbiased, impartial, and capable of following instructions on the law. State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 161 (1990). "A voir dire examination must be reviewed in its entirety to determine whether the trial court erred in its qualification or disqualification of prospective jurors." State v. Drayton, 293 S.C. 417, 422, 361 S.E.2d 329, 323 (1987).

ARGUMENT

In this SVP case, the trial judge erred in refusing to ask appellant's requested voir dire:

(1) whether any member of the panel believed that someone who suffers from pedophilia will never be cured; and (2) whether any member of the panel believed that it is impossible to rehabilitate persons convicted of committing sexual crimes against children; thereby depriving appellant of his right to a fair and impartial jury as guaranteed by state law.

In this SVP case, the Attorney General's expert witness diagnosed appellant as suffering from "pedophilic disorder, sexually attracted to males, nonexclusive type." R. 82, ll. 17 – 19. She also testified about appellant's prior convictions involving children. R. 62, ll. 6 – 24. R. 71, ll. 6 – 14. In 2010, appellant pled guilty to a sexual charge involving a minor under the age of eleven. R. 62, ll. 6 – 24. In North Carolina, in 2009, appellant was convicted of taking indecent liberties with a child. R. 71, ll. 6 – 14.

Appellant was twenty-seven years old at the time of trial. R. 132, ll. 2 – 5. He is gay and married to a man. R. 134, ll. 20 – 22. R. 42, ll. 22 – 24. Appellant testified that at the time he committed his crimes, he did not know what he was thinking and when asked about his relationship with his husband, said that "prior to the incident I was still kind of trying to find myself, and you know, now I'm, I'm comfortable enough to say that, you know, that's what I am." R. 136, l. 11 – 137, l. 12. He expressed remorse for his actions, acknowledging that the children were "terrified" and were having emotional problems as a result. R. 136, ll. 15 – 21. In prison, appellant took vocational classes, got treatment in Alcoholics and Narcotics Anonymous, and took sexual predator classes. R. 137, ll. 13 – 21. If released, appellant planned to get a degree in culinary arts and move to Texas to be with his husband. R. 134, ll. 1 – 13. R. 141, l. 22 – 142, l. 1.

Knowing these facts and jurors' potential prejudices, appellant asked the court to voir dire the jury about their feelings on homosexuality and on whether pedophiles can be rehabilitated. R. 9, ll. 6 – 18. R. 13, l. 8 – 14, l. 21. The court asked two questions about homosexuality, but refused to ask about the rehabilitation of pedophiles. R. 9, ll. 6 – 18. R. 13, l. 8 – 14, l. 21.

On homosexuality, the court asked potential jurors to stand if: (1) they believed homosexuality was “a sin or is unnatural,” and (2) they thought South Carolina should pass a law making same-sex marriage illegal. R. 9, ll. 6 – 18. The trial judge noted that “80 percent of the panel stood on those two questions.” R. 14, ll. 15 – 21. Judge Burch conducted additional, individualized voir dire on jurors that stood and many of them said they could not be impartial. R. 14, l. 24 – 22, l. 15. One of the potential jurors excused by Judge Burch stated his belief that homosexuality was a “sickness,” “disgusting,” and “doing the devil’s work.” R. 21, l. 14 – 22, l. 15.

Appellant placed his objection on the record concerning the questions regarding pedophilia that the court refused to ask. R. 13, l. 8 – 14, l. 21. First, appellant wanted to know whether any potential juror believed that “someone who suffers from pedophilia will never be cured.” R. 13, l. 8 – 14, l. 21. Second, appellant wanted to know whether any potential juror believed “that it’s impossible to rehabilitate persons that were convicted of committing sexual crimes against children.” R. 13, l. 8 – 14, l. 21. The Attorney General opposed appellant’s request, calling it “overbroad” and suffering from a “lack of specificity.” R. 13, l. 8 – 14, l. 21. Judge Burch stated his refusal to ask these questions was based on the State’s objection and that the questions were covered by other, more general questions about sexual abuse and sexual

crimes. R. 13, l. 8 – 14, l. 21. The jury that was selected from this restricted voir dire ultimately deliberated only eighteen (18) minutes. R. 179, ll. 19 – 21.

Refusing to ask appellant's voir dire violated his right to an impartial jury. The state constitution guarantees the right to an impartial jury. S.C. Const. Art. I, § 14 ("The right of trial by jury shall be preserved inviolate."). South Carolina also statutorily guarantees litigants in civil cases an impartial jury. S.C. Code Ann. § 14-7-1050 ("[I]n all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury."). The SVP Act requires a jury trial when requested by a party. S.C. Code Ann. § 44-48-90(B).

Defendants are entitled to voir dire to insure the essential demands of fairness. Ham v. South Carolina, 409 U.S. 524, 526 (1973). In Ham, the United States Supreme Court reversed because the trial judge refused to ask questions concerning possible racial prejudice. Id. Defendants are entitled to know whether jurors can comply with their oath and comply with a trial judge's instructions. State v. Bennett, 328 S.C. 251, 257-58, 493 S.E.2d 845, 848 (1997) compare State v. Hill, 361 S.C. 297, 308-310, 604 S.E.2d 696, 702 (2004).

We know, as a matter of law, that juries struggle with being fair when it comes to the subject matter of SVP cases. See State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (2005) (holding admissibility of propensity evidence in sexual abuse case required reversal). Our evidence law does not trust jurors with propensity evidence. See Rule 404, SCRE. Rule 404 excludes character evidence offered to prove action "in conformity" with a person's character. Id. In Nelson, the Court recognized the great danger of propensity evidence in cases involving sexual abuse of children. Nelson at 6-15, 501 S.E.2d at 718-23. Nelson was accused of molesting children and the State admitted his membership card in the Punky Brewster fan club and photos

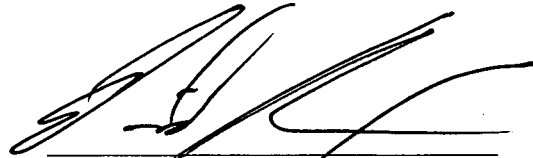
of young girls. Id. The Court held this evidence “clearly inadmissible” as propensity evidence used to show the defendant was a pedophile. Id. The Court reversed Nelson’s criminal conviction. Id. The Court’s omission of a harmless error analysis further demonstrates the prejudicial impact of evidence a defendant is a pedophile on a jury. Id.

Unlike Nelson, which was a criminal case, this civil SVP trial was solely about appellant’s propensity to commit sexually violent acts in the future. S.C. Code Ann. § 44-48-30(9) (defining “Likely to engage in acts of sexual violence” as meaning a “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”). A jury in a criminal case is incompetent to hear propensity evidence, but a jury in a sexually violent predator case **must** hear propensity evidence.

Without the answers to appellant’s voir dire regarding pedophilia, appellant cannot be sure he received a fair trial from an unbiased jury who could follow the instructions of the court. Eighty percent of the panel admitted bias against homosexuals. Undoubtedly, the bias against pedophiles and preconceived notions about the ability to reform and recidivism rates was higher. See Dara L. Schottenfeld, Comment, Witches and Communists and Internet Sex Offenders, Oh My: Why it is Time to Call Off the Hunt, 20 St. Thomas L. Rev. 359, 382 & n.170 (Winter 2008) (“Our culture views sexual offenses involving children as being the worst imaginable crime—worse, even, than murder.”). The failure to ask these questions rendered appellant’s trial “fundamentally unfair.” Mu’Min v. Virginia, 500 U.S. 415, 425-26 (1991). This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and remand this case for a new trial.

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of August, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua Flowers 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 Paul M. Burch, which was held on November 6 -7, 2017, 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 Joshua Flowers.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 28th day of August, 2018.

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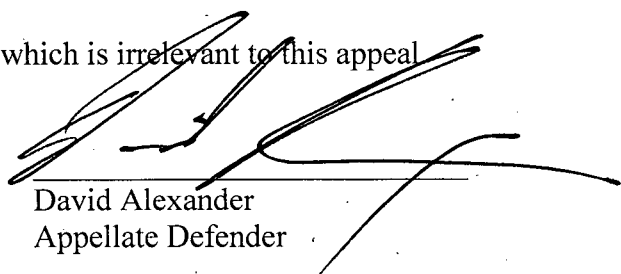
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

(1) Trial Transcript

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

August 28, 2018



David Alexander
Appellate Defender

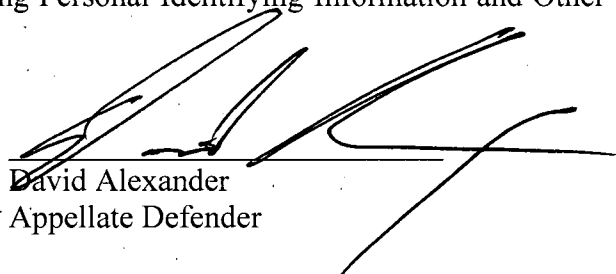
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ATTORNEY FOR APPELLANT

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."

August 28, 2018.



David Alexander
Appellate Defender

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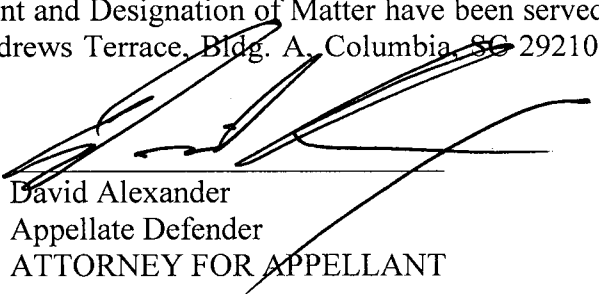
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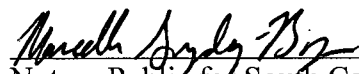
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CERTIFICATE OF SERVICE

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 Joshua Flowers, at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 28th day of August, 2018.


David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of August, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028