STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable G. Thomas Cooper, Circuit Court Judge
Appellate Case No. 2011-198707

IN THE MATTER OF THE CARE AND TREATMENT OF WILLIAM BRYAN FETNER,

Appellant,

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On August 22, 1998, Appellant William Bryan Fetner ("Fetner") lured a seven year old female out of a Wal-Mart store with the intent to take her to a secluded location to perform oral sex on him. The child ran away before they got to Fetner's truck. (State's Exhibit 2, Trial Transcript [TT], pp. 67-68; R., pp. 215-217, 67-68).

On September 7, 1998, Fetner went to a Wal-Mart to look at sporting goods. After entering the store, however, he decided to look in the toy section for a potential minor victim between the ages of six and ten. He found a seven year old female there, and told her to come with him to the front of the store to meet her father. He held the child's hand and walked toward the patio area where his truck was parked, with the intent to drive her to a secluded location and make her perform oral sex, or some type of sexual act, on him. When the child saw her father standing at the cash register, Fetner let go of her and left the store. (State's Exhibit 4, TT, pp. 64-65; R., pp. 222-223, 64-65).

On November 13, 1998, Fetner lured a seven year old female away from the toy section in a Target store and into the men's restroom. He took the child inside a stall in the restroom, latched the door, pulled down her pants and started touching her on the buttocks. When a store employee came into the restroom and heard the child saying she was not supposed to be in the men's restroom, Fetner pulled up the child's pants and told her to be quiet. The child started to cry and Fetner took her out of the restroom. The child walked back toward the toy section and Fetner left the store. (State's Exhibits 1 and 3, TT, pp. 57-61; R., pp. 212-214, 218-220, 57-61).

On July 25, 2000, Fetner pled guilty to one count of lewd act on a child under sixteen,

and three counts of kidnapping, arising from the three incidents. He was sentenced to fifteen years incarceration on each count, to be served concurrently. (State's Exhibits 1 - 4; Record on Appeal (R.), pp. 212-223).

In accordance with the Sexually Violent Predator Act ("SVP Act"), prior to Fetner's release from incarceration, Respondent State of South Carolina (the "State") commenced a civil commitment proceeding in the Richland County Court of Common Pleas on February 11, 2011. On April 25, 2011, the circuit court found probable cause to believe Fetner met the criteria for commitment as a sexually violent predator, and ordered a mental health evaluation by a court appointment expert. Peggy Wadman, M.D., performed the evaluation, concluded Fetner has the mental abnormality of pedophilia, and he is likely to re-offend against children if not confined for long term control, care and treatment. (TT, pp. 49-56, 73-78; R., pp. 49-56, 73-78).

The case was called for a jury trial on August 22, 2011, before the Honorable G. Thomas Cooper, Circuit Court Judge. Dr. Wadman was qualified as an expert in forensic psychiatry, and testified that as part of her evaluation, she reviewed documents regarding Fetner's offense history and his records while incarcerated, and then interviewed Fetner. (TT, pp. 54-55; R., pp. 54-55).

During Dr. Wadman's interview with Fetner, he admitted committing the 1998 offenses, and provided significant details of the offenses and why he committed them. He stated he "is sexually interested in little girls, . . . six to ten," and beginning in his late teens or early twenties, Fetner "had sexual fantasies about little girls, and he had a certain type of little girl; that they were little girls between six and ten, white girls, slender girls, little girls

who would go along with it . . . they weren't real feisty." (TT, pp. 60, 74; R., pp. 60, 74).

Based on his long history of fantasies regarding children and his offending history, Dr. Wadman diagnosed Fetner with the mental abnormality of pedophilia, which is characterized by recurrent, intense sexually arousing fantasies, urges or behaviors involving children. She testified pedophilia is not curable, but can be controlled with treatment. (TT, pp. 74-76; R., pp. 74-76).

Dr. Wadman further opined to a reasonable degree of medical certainty Fetner's pedophilia affected his volitional capacity such that he was predisposed to commit future sexually violent offenses against children if not confined in a secure facility for intensive treatment. She also stated to a reasonable degree of medical certainty Fetner posed a menace to the health and safety of others if not confined for treatment. (TT, pp. 76-81; R., pp. 76-81).

During a jury charge conference, Fetner objected to a portion of the reasonable doubt charge that included the words "real possibility," which he argued lessened the State's burden to prove the case beyond a reasonable doubt, "because what the jury is being told is well, if you feel like there is a real possibility, then you have got to give him the benefit of the doubt." He further argued the language shifted the burden of proof. (TT, pp. 164-166; R., pp. 153-155).

The circuit court overruled the objection. In connection with the State's burden to prove its case beyond a reasonable doubt, the court subsequently charged the jury:

> In most civil cases tried in the Court of Common Pleas, which is this court, the burden of proving the claim is by the greater weight of the evidence or what we call the preponderance of the evidence.

However, in this type of case under this statute, the State's burden is greater than that. Here it must be, as you've heard, beyond a reasonable doubt.

As I already stated to you, the State has the burden of proof. That is the responsibility of proof. In this State, according to the Sexually Violent Predator Act, the State must prove its case to the standard of proof beyond a reasonable doubt.

If the State fails to meet this high burden, then you must find the Respondent is not a sexually violent predator.

What is a reasonable doubt in law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. Let me repeat that. A reasonable doubt is the kind of doubt that would case a reasonable person to hesitate before acting.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced. there are few things in this world that we know with absolutely [sic] certainty.

The law does not require that proof overcomes every possible doubt. What is required, if based on your consideration of the evidence, you are firmly convinced that the Respondent is a sexually violent predator, then you must return a verdict for the State.

If, on the other hand, you think there is a real possibility that he's not a sexually violent predator, you must give him the benefit of the doubt and find a verdict for Mr. Fetner.

(TT, pp. 207-208; R., pp. 196-197).

The jury found beyond a reasonable doubt that Fetner is a sexually violent predator. (TT, pp. 215-216; R., pp. 202-203). Pursuant to the SVP Act, the circuit court committed Fetner to the South Carolina Department of Mental Health for long term control, care and treatment. This appeal followed.

ARGUMENT

I. The circuit court properly exercised its discretion in allowing the court appointed mental health evaluator to briefly relate the procedural history leading to her appointment.

During her direct testimony, Dr. Wadman briefly testified, over Fetner's objection, about the process, including committee reviews and a probable cause finding by a judge, leading to her appointment by the circuit court to evaluate Fetner under the SVP Act. (TT, pp. 52-54; R., pp. 53-54). On appeal, Fetner contends the circuit court erred in allowing this testimony, asserting it allowed the jury to rely on the beliefs of others in reaching a verdict.

The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice. State v. Gillian, 373 S.C. 601, 646 S.E.2d 872, 878 (2007); State v. Stephens, 398 S.C. 314, 728 S.E.2d 68, 71 (Ct. App. 2012). Even if evidence is admitted erroneously, a reviewing court must look to the entire record to determine what effect, if any, the error had on the verdict. State v. Salley, 398 S.C. 160, 727 S.E.2d 740, 746 (2012).

As support for his contention that allowing Dr. Wadman's testimony was error in this case, Fetner cites State v. Thomas, 287 S.C. 411, 339 S.E.2d 129 (1986), and State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (Ct. App. 2003). Both of these cases involved criminal prosecutions rather than civil proceedings, and are otherwise distinguishable.

In Thomas, the solicitor told the jury during closing argument that the case had already been examined by a magistrate and a grand jury, a preliminary hearing had been held, and an appeal would enable a higher court to review any decision made by the jury. 339

S.E.2d at 129. Reversing the defendant's conviction, the Supreme Court stated: "[w]e have repeatedly condemned closing arguments that lessen the jury's sense of responsibility by reference to preliminary determinations of the facts. . . [and] found error where the jury was advised their decision was subject to appellate review." *Id.* (citations omitted) (emphasis added).

In Rudd, the solicitor told the jury, again during closing argument, that the defendant "'has had many protections before he gets into this court of law to face you jurors," and stated "in addition to numerous others who had examined Victim's allegations, a preliminary hearing was held before a magistrate, and the case had been presented to a grand jury." 586 S.E.2d at 156. Reversing the defendant's conviction, the Court of Appeals found such statements "could have improperly lessened a juror's sense of responsibility to independently determine the facts of this case by permitting him or her to rely on the opinions of the investigators, the magistrate, and the grand jury." *Id.* The Court noted "improper comments do not require reversal if they are not prejudicial to the defendant," and "[t]he appropriate determination is whether the solicitor's comment so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 157; *see also* State v. Webb, 389 S.C. 174, 697 S.E.2d 662 (Ct. App. 2010), *cert. denied*, November 3, 2011) (Solicitor's references to wild animals, and reliance on statements not in evidence, during closing did not so infect the trial with unfairness as to constitute a denial of due process.).

Unlike Thomas and Rudd, this case does **not** involve statements made during closing argument. Rather, the brief testimony at issue was at the very beginning of Dr. Wadman's testimony, and the State did not refer to any prior proceedings during its opening statement

or closing argument.[1] (TT, pp. 38-41, 52-54, 168-179; R., pp. 38-41, 52-54, 157-168). Dr. Wadman's testimony was nothing more than background information regarding her involvement in the case, and she immediately followed it by clearly stating she worked for the court, and was "charged with doing a fair and impartial evaluation of the Respondent and coming to some type of conclusion." (TT, pp. 53-54; R., pp. 53-54).

Further, even if the testimony was erroneously admitted, it did not prejudice Fetner by so infecting the trial with unfairness as to cast doubt upon the jury's basis for its verdict. As discussed above, the testimony was brief, it came at the very beginning of Dr. Wadman's testimony, and the State did not reference any prior proceedings in opening statement or closing argument. As discussed below, the jury was adequately charged regarding what the State had to prove, and the State's burden to prove its case beyond a reasonable doubt. Therefore, Fetner cannot show any prejudice from the testimony at issue.

Finally, there is overwhelming evidence supporting the jury verdict. Dr. Wadman's testimony regarding Fetner's mental abnormality and risk to re-offend was undisputed. His history of fantasies involving young girls, combined with his documented conduct, more than corroborated Dr. Wadman's conclusions. The evidence amply demonstrated Fetner is a sexually violent predator, who has serious difficulty controlling his sexually deviant behavior, he is a significant risk to re-offend against children if not confined for long term control, care and treatment, and the jury verdict should be affirmed.

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[1]Dr. Wadman's testimony regarding how she got involved in the case was akin to an investigator's testimony about the course of an investigation. *See* State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994) (Police officers statements about receiving information and complaints in the neighborhood before establishing surveillance were offered for the limited purpose of explaining why a government investigation was undertaken.).

II. The circuit court properly charged the jury in accordance with applicable law, and the charge as given did not lessen the reasonable doubt standard of proof, or shift the burden of proof to Fetner.

Fetner also contends the circuit court erred in denying his motion to remove language regarding "a real possibility" from the reasonable doubt charge. As the circuit court found, and trial counsel acknowledged, South Carolina's appellate courts have specifically approved the jury charge given in this case, including the "real possibility" language. (TT, pp. 164-166; R., pp. 153-155).

In reviewing jury charges for error, an appellate court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial. State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 583 (2010). "'A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.'" *Id.* (*quoting* State v. Adkins, 353 S.C. 312, 577 S.E.2d 460, 463 [Ct. App. 2003]). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (*citing* State v. Foust, 325 S.C. 12, 479 S.E.2d 50 [1996]).

A reasonable doubt charge stating the jurors must give the defendant the benefit of the doubt if they think "there is a real possibility [the defendant] is not guilty," does not lessen the government's burden of proof, or suggest the defendant bears the burden of proof. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30, 36-37 (2001); State v. Simmons, 384 S.C. 145, 682 S.E.2d 19, 36-37 (Ct. App. 2009). The language must be considered in the context of an earlier instruction requiring the jurors to be "'firmly convinced' of the defendant's guilt." McHoney, 544 S.E.2d at 36-37.

In this case, the circuit court charged the jury **eight times** that the State had the

burden to prove beyond a reasonable doubt Fetner is a sexual violent predator as defined by the SVP Act. (TT, pp. 203-204, 207-210; R., pp. 192-193, 196-199). The court also instructed the jury a reasonable doubt was "the kind of doubt that would cause a reasonable person to hesitate to act," and "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced." (TT, p. 208; R., p. 197). The court then stated:

> What is required, if based on your consideration of the evidence, you are firmly convinced that the Respondent is a sexually violent predator, then you must return a verdict for the State.
>
> If, on the other hand, you think there is a real possibility that he's not a sexually violent predator, you must give him the benefit of the doubt and find a verdict for Mr. Fetner.

(TT, p. 208; R., p. 197).

Thus, in addition to the eight times the court charged the jury the State had the burden to prove its case beyond a reasonable doubt, the court twice instructed the jurors that in order to find the State had proven its case beyond a reasonable doubt, they must be "firmly convinced" Fetner is a sexually violent predator as defined in the SVP Act. Fetner's contention the "real possibility" language somehow lessened the State's burden of proof or shifted the burden of proof to him is not only firmly contrary to existing law, it is simply meritless.

Fetner's reference to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), as support for his position in this case is unavailing. Belcher involved a judicially created jury charge allowing a permissible inference of malice from use of a deadly weapon. The charge at issue in this case does not even relate to an inference of any kind. Rather, it merely provides a context for the meaning of reasonable doubt.

Fetner's reliance on State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), and State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), is likewise unavailing. In Aleksey, while acknowledging reasonable doubt jury charges instructing the jury to "seek the truth" are disfavored, the Supreme Court found no error in a charge instructing the jury its objective was "to seek the truth" in connection with its determination of witness credibility, especially in light of the trial court's complete and proper reasonable doubt and circumstantial evidence charges. 538 S.E.2d at 252-252.

In Needs, the Supreme Court held the trial court's jury charge on circumstantial evidence was erroneous because it instructed jurors to seek a reasonable explanation other than the defendant's guilt, but found the error was harmless because the trial court instructed the jury twenty-seven times that the State had the burden to prove guilt beyond a reasonable doubt. 508 S.E.2d at 867. The Court then urged trial courts to avoid using any "seek" language when charging reasonable doubt or circumstantial evidence, and significantly, referenced the reasonable doubt charge approved in McHoney as one of the "appropriate ways to define reasonable doubt." 508 S.E.2d at 868, n. 12.[2]

The circuit court charged the correct law, and used language expressly approved for use in defining reasonable doubt. Therefore, the jury charge was proper, and the jury verdict should be affirmed.

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[2]The Court cited State v. Darby, 324 S.C. 114, 477 S.E.2d 710 (1996), as the source of the approved charge. The Darby charge was specifically approved in McHoney.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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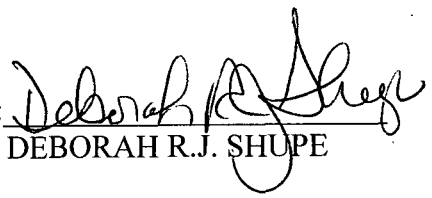
BY: 
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully Submitted,

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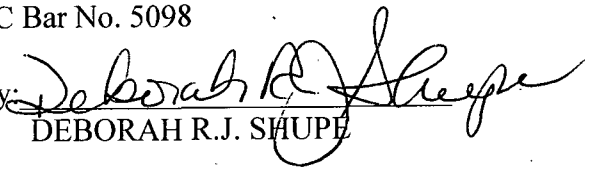
By: 
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PROOF OF SERVICE

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

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

This 26th[th] day of November, 2012.

Sally B. Ellison

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