

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge.

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

APPELLANT

APPELLATE CASE NO. 2011-198707

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing the state's witness to describe the steps of the screening procedure to determine probable cause because it usurped the jury's function and was prejudicial to Appellant?

2. Did the trial court err in denying Appellant's motion to remove from the reasonable doubt jury charge the language "if you think there is a **real possibility** that he is not a sexually violent predator" because this "real possibility" language shifted the burden of proof and lessened the reasonable doubt standard that the state had to prove?

STATEMENT OF THE CASE

On July 25, 2000, Fetner appeared before the Honorable James Barber and entered guilty pleas to committing a lewd act on a minor and three counts of kidnapping. He was sentenced to the negotiated sentence of fifteen years on each charge with all to run concurrently. Prior to his scheduled release in 2011, the Multi-Disciplinary Team and the Prosecutor's Review Committee determined there was probable cause that Fetner was a sexually violent predator. Probable cause was found, and he was ordered to undergo a psychiatric evaluation by Dr. Peggy Wadman. Dr. Wadman determined that Fetner had a mental abnormality of pedophilia and that he met the criteria pursuant to S.C. Code Section 44-48-30 to be a sexually violent predator.

On August 2-23, 2011, Fetner proceeded to trial before the Honorable G. Thomas Cooper and a jury. Fetner was represented by Jack Swerling, and the state was represented by Lloyd V. Flores, Jr. The jury found that Fetner was a sexually violent predator. Judge Cooper issued an order committing Fetner to the Department of Mental Health for long-term control, care and treatment. R. 202, ll. 12 – 25; R. 208, ll. 1 -19. Fetner's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in allowing the state's witness to describe the steps of the screening procedure to determine probable cause because it usurped the jury's function and was prejudicial to Appellant.

William Fetner was convicted of committing a lewd act on a minor and three counts of kidnapping that stemmed from three different incidents that occurred between August 22, 1998, through November 13, 1998. All the incidents involved young girls approximately age seven. R. 57, ll. 2 – R. 68, ll. 16.

On August 22, 1998, Fetner was in a Wal-Mart store in West Columbia and went to the children's aisle where he saw a young girl reading a book. He told her he knew her aunt and offered to take her to her aunt. He told the forensic psychiatrist who evaluated him, Dr. Peggy Wadman, that his plan was to take her to his truck and go to a secluded location and have her perform oral sex on him. Then he was going to drop her off at a store or police station. However, the girl became suspicious and ran back into the store. R. 67, ll. 12 – 25; R. 68, ll. 1 – 18.

On September 9, 1998, Fetner was in a Wal-Mart on Garner's Ferry Road, and decided to go to the toy aisle to look for a potential victim. He saw two girls and asked the oldest one, who looked to be about seven or eight, to come with him because her father was at the front of the store and was leaving. He walked her to the patio area and was planning to take her in his truck to a secluded place and have her perform oral sex on him. However, the little girl saw her father and Fetner let her go. He told Dr. Wadman he felt very remorseful and told himself he would never do it again. R. 64, ll. 4 – 25; R. 65, ll. 1 – 24. The third incident occurred on November 13, 1998 when Fetner went to the toy aisle in a Target store

on Decker Boulevard. He lured a seven year old girl into the men's restroom by befriending her and offering her ice cream. He took her to a back stall in the rest room, pulled down her pants, and was touching her on her buttocks. A store employee came in and heard the little girl. Fetner let her go, and he left the store. R. 57, ll. 16 – 25; R. 58, ll. 1 – 25; R. 59, ll. 1 – 25; R. 60, ll. 1 – 25; R. 61, ll. 1 – 9.

Dr. Wadman testified that on the risk assessment instrument, the Static 99R which was one of the most validated risk surveys, Fetner had four of the top five risk factors for reoffending. She said he ranked at the top about the 80% level. R. 70, ll. 2 – 25; R. 71, ll. 1 – 9. She noted one reason supporting this ranking was because he did not participate in sex offender treatment while he was incarcerated. R. 71, ll. 12 – 16.

Fetner's attorney, on cross examination, elicited from Dr. Wadman that Fetner could not participate in sex offender treatment because he was in protective custody. Defense counsel produced a letter from then Assistant Solicitor Knox McMahon to the Department of Corrections dated January 4, 2001, recommending that Fetner be placed in protective custody because he had testified for the state against a defendant charged with the murder of an eight year old child. He was in protective custody the full thirteen years he was incarcerated. R. 104, ll. 5 – 25; R. 105, ll. 1 – 25; R. 106, ll. 1 – 25; R. 107, ll. 1 – 5; R. 144, ll. 3 – 35; R. 145, ll. 1 – 24; R. 146, ll. 1 – 6.

Dr. Wadman testified that Fetner met the criteria to be a sexually violent predator pursuant to S.C. Code Section 44-48-30. She diagnosed him as having pedophilia where he was attracted to little girls between the ages of six and ten. She said he was likely to reoffend and needed long term care, control, and treatment. R. 74, ll. 1 – 25; R. 78, ll. 1 – 20.

During the direct testimony of the state's witness, Dr. Wadman, the forensic psychiatrist who was court ordered to evaluate Fetner, the state asked how she became involved in this case. Dr. Wadman then began to explain the steps involved in screening a person for the sexually violent predator program beginning with their conviction for a sexually violent offense. Defense counsel objected to the procedure as to how "we got here." The judge overruled the objection. R. 52, ll. 1 – 25. Dr. Wadman then continues by saying:

Anyway, it goes through a process. There's several levels of screening. There's what's called a multidisciplinary committee that people are on, a judge-----

R. 52, ll. 24-25; R. 53, ll. 1 – 2.

Fetner's counsel again objected:

Your Honor, just again, I object to any of these committees or any kind of these findings. I think it usurps the jury's function and prejudices---

R. 53, ll. 3 – 6.

The judge responded that he understood but the witness had to give some background to show how this case arose. He told the witness to go ahead. R. 53, ll. 7 – 11.

Dr. Wadman then continued to explain that there were several steps where a group decided if Fetner met the qualifications. Then she said there is a probable cause hearing before a judge. If the judge found probable cause, then an examiner was appointed to evaluate the person to determine if he met the criteria as a sexually violent predator. R. 53, ll. 12 – 21.

In State v. Thomas, 287 S.C. 411, 339 S.E.2d 129 (1986), the Supreme Court held that the solicitor's remarks during closing argument that the case had already been examined by a magistrate and a grand jury, that a preliminary hearing had been held, and that an appeal would enable a higher court to review any decision made by a jury were reversible error. The Court wrote that this lessened the jury's sense of responsibility by reference to preliminary determinations of facts. The Court also held that these statements were improper because they injected an arbitrary factor into jury deliberations, and that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts.

In State v. Rudd, 355 S.C. 543, 586 S.E. 2d 153 (Ct. App. 2003), the Court of Appeals held that the solicitor's reference to the "many protections" the defendant had received before going to trial, constituted unfairly prejudicial and improper reference to the preliminary determination of facts. In that case involving a lewd act upon a child, the solicitor referenced the repeated questioning of the victim by police and social workers, the preliminary hearing before the magistrate, and grand jury indictment. The Court of Appeals held that this lessened the jury's sense of responsibility to independently determine the facts by allowing it to rely on the opinion of others.

The Court of Appeals also held in State v. Rudd, id., that improper comments did not require reversal if they were not prejudicial to the defendant.

Fetner was prejudiced by the jury knowing that a judge and several committees thought Fetner was a sexually violent predator. This allowed the jury to rely on the beliefs of others. This was an arbitrary factor injected into jury considerations.

ARGUMENT

The trial court erred in denying Appellant's motion to remove from the reasonable doubt jury charge the language "if you think there is a **real possibility** that he is not a sexually violent predator" because this "real possibility" language shifted the burden of proof and lessened the reasonable doubt standard that the state had to prove.

William Fetner was convicted of committing a lewd act on a minor and three counts of kidnapping that stemmed from three different incidents that occurred between August 22, 1998, through November 13, 1998. All the incidents involved young girls approximately age seven. R. 57, ll. 2 – R. 68, ll. 16.

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The state argued in his closing that the lack of treatment was a “critical portion of why he needs to be in this particular treatment program.” R. 164, ll. 11 – 19.

Dr. Wadman testified that Fetner met the criteria to be a sexually violent predator pursuant to S.C. Code Section 44-48-30. She diagnosed him as having pedophilia where he was attracted to little girls between the ages of six and ten. She said he was likely to reoffend and needed long term care, control, and treatment. R. 74, ll. 1 – 25; R. 78, ll. 1 – 20.

When the judge discussed jury charges with both attorneys, defense counsel objected to the state’s reasonable doubt charge. R. 153, ll. 23 – 25; R. 154, ll. 1 – 8. Counsel argued:

I object to the language, “if on the other hand, you think there is a real possibility that he is not a sexually violent predator,” having--- searching for a real possibility lessens the standard that the state has 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.

R. 154, ll. 9 – 18.

Counsel continued to argue that the standard was if the jury was convinced beyond a reasonable doubt. He said that the ‘real possibility’ language was burden shifting. R. 154, ll. 19 – 25. The state argued that it was adequate and met the provisions of the law. R. 155, ll. 1 – 12.

The judge gave the reasonable doubt charge to the jury which included the “real possibility” language. R. 197, ll. 1 – 25. He told the jury

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.

R. 197, ll. 16 – 19.

South Carolina Code Section 44-48-100(A) provides:

The court or jury must determine whether, beyond a reasonable doubt, the person is a sexually violent predator.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

In viewing the jury charge as a whole, the language "real possibility" lessened the reasonable doubt standard for the state to prove. This was prejudicial to Fetner.

In State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009), the Court of Appeals affirmed the trial court and held that the language contained in the reasonable doubt charge which told the jury that if they thought there was a "real possibility" that Simmons was not guilty, was not in error. The Court cited the Supreme Court cases of State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001); State v. Darby, 324 S.C. 114, 477 S.E.2d 710 (1996); and State v. Needs, 333 S.C. 134, 508 S.E.2d 857, 868 (1998) where the Supreme Court approved of the "real possibility" language in the reasonable doubt charge.

The Court of Appeals relied on the Supreme Court's approval in State v. McHoney, *supra*, of the following jury instruction:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt...If based upon your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of that doubt and find him not guilty.

The Supreme Court and the Court of Appeals wrongly decided these cases when they approved the "real possibility" language in the reasonable doubt charge.

Appellant respectfully requests this Court to consider the case of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Supreme Court overruled years of precedent by holding that a jury charge instructing that malice may be inferred from the use of a deadly weapon was no longer good law in South Carolina where evidence was presented that would reduce, mitigate, excuse or justify the homicide. The Supreme Court wrote that they did not reach their decision lightly, but wrote that a jury charge was no place for purposeful ambiguity; and the jury charge was confusing and prejudicial.

Jury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they run the risk of unconstitutionally shifting the burden of proof to a defendant. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). This Court has repeatedly indicated that trial courts should avoid instructing jurors to "seek some other rational or logical explanation other than the guilt of the accused" when charging jurors on either reasonable doubt or circumstantial evidence; such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof to a defendant. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (S.C., 1998).

The charge here was akin to the charges in Aleksey, and Needs in that the jury was not simply instructed to return a not guilty verdict if the State failed to prove guilt beyond a reasonable doubt, but instead they were in effect instructed that if they were not convinced that there was a real possibility of innocence, they were free to convict. The only party available to shoulder the burden of convincing the jury that the possibility of innocence was real was the defendant.

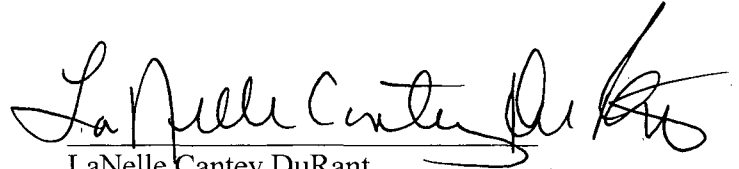
The judge's charge that the jury should give the defendant the benefit of the doubt only if convinced that there was a real possibility that he was innocent was inconsistent with the presumption of innocence under which the defendant is entitled to the benefit of the doubt. Therefore, as counsel for appellant argued prior to the charge, this was a burden shifting charge, not permissible under the state or federal constitution.

The jury charge in Fetner's case where the judge used the "real possibility" language is confusing in light of the reasonable doubt charge, and was prejudicial to Fetner because it shifted the burden of proof to him.

CONCLUSION

Based on the above, the order of the trial court committing Fetner to the SVP program should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name.

LaNelle Cantey DuRant
Appellate Defender

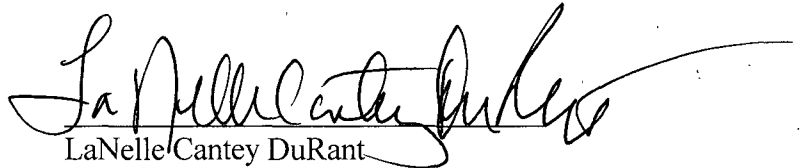
ATTORNEY FOR APPELLANT

This 6th day of December, 2012.

CERTIFICATE OF COUNSEL

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

December 6, 2012



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STATE OF SOUTH CAROLINA

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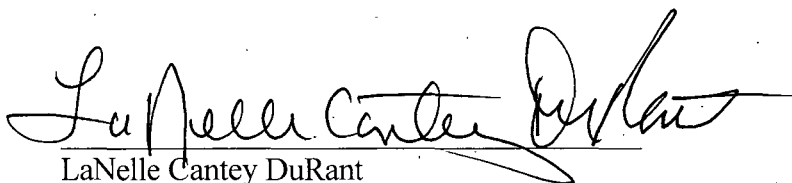
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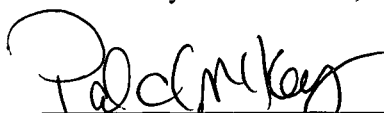
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of December, 2012.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of December, 2012.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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