

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2012-210426

IN THE MATTER OF THE CARE AND TREATMENT OF
CALVIN J. YAWN,

Appellant.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS

ARGUMENT3

 The circuit court properly denied Yawn's directed verdict motion because
 there was ample evidence from which the jury could, and did, find Yawn
 had a mental abnormality that made him likely to commit future acts of
 sexual violence if not confined for long term control, care and treatment.3

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

<u>Credit Union v. Higgins</u> , 394 S.C. 189, 714 S.E.2d 550, 552 (2011).....	8
<u>Hamilton v. Charleston County Sheriff's Dept.</u> , 399 S.C. 252, 731 S.E.2d 727, 728 (Ct. App. 2012).....	8
<u>Kansas v. Hendricks</u> , 521 U.S. 346, 366-367 (1997)	10
<u>RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P.</u> , 399 S.C. 322, 732 S.E.2d 166, 171 (2012).	8
<u>Welch v. Epstein</u> , 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000).	8

Statutes

S.C. Code §44-48-20 (Supp. 2012).....	10
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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Yawn's directed verdict and JNOV motions because there was ample evidence from which the jury could, and did, find Yawn had a mental abnormality that made him likely to commit future acts of sexual violence if not confined for long term control, care and treatment.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On February 14, 2003, Appellant Calvin J. Yawn (“Yawn”) pled guilty to two counts of lewd act on a child, arising from the molestation of a minor male between the ages of five and nine, and that victim’s five year old brother. He was sentenced to eight years, suspended to ninety days and five years’ probation. (Plaintiff’s Exhibits 1 and 2; Record on Appeal [R.], pp. 126-132).

On October 6, 2010, Yawn pled guilty to one count of lewd act on a child, arising from the sexual molestation of an eight year old male on or about March 19, 2009. He was sentenced to ten years, suspended to time served (479 days), and five years probation. (Plaintiff’s Exhibit 4; R., pp. 137-140).

On February 2, 2011, Yawn pled guilty to lewd act on a child, arising from the sexual molestation of an eight year old male between January 1, 2009 and April 30, 2009. He was sentenced to three years incarceration. (Plaintiff’s Exhibit 3; R., pp. 133-136).

In accordance with the Sexually Violent Predator Act (“SVP Act”), prior to Yawn’s release from incarceration, Respondent State of South Carolina (the “State”) commenced a civil commitment proceeding in the Greenville County Court of Common Pleas in April, 2011. On June 28, 2011, the circuit court found probable cause to believe Yawn met the criteria for commitment as a sexually violent predator, and appointed Marie Gehle, Ph.D., to conduct a mental health evaluation of Yawn. Dr. Gehle diagnosed Ywan with the mental abnormality of pedophilia, and found he was a high risk to re-offend sexually, which met the criteria for commitment under the SVP Act. (Trial Transcript [TT], pp. 53-57; R., pp. 53-57).

The case was called for a jury trial on March 19, 2012, before the Honorable E. Edward Welmaker, Circuit Court Judge. The State called Dr. Gehle, who was qualified as an expert in forensic psychology. (TT, pp. 28-30; R., pp. 28-30).

Dr. Gehle testified about her evaluation protocol and the things she considered in evaluating Yawn, including the facts of his criminal offenses, records from the S.C. Department of Corrections, and a forensic interview of Yawn. She stated that was the type of information reasonably and typically relied on by forensic experts. (TT, pp. 31-37; R., pp., 31-37).

According to the documents reviewed by Dr. Gehle, the victims in Yawn's 2003 lewd act convictions were brothers. In 1995, the older brother was five years old, and he told his father and grandmother that Yawn came into the room while he was playing a computer game, reached over the victim's shoulders, put his hands inside the victim's pants and fondled his penis. The father called Yawn to the home, and they confronted the victim, who began crying, ran out of the room, and ultimately recanted the allegation.

In 2000, the original victim's five year old brother reported Yawn had molested him. At that time, the original victim was nine years old, and he reported Yawn fondled his penis while they were swimming in the lake. The victim was able to get away from Yawn, who told him not to tell anyone because the victim's father would be upset and Yawn would hurt him.

Yawn pled guilty on February 14, 2003 to one count of lewd act on a child as to each victim, and was sentenced to eight years suspended to ninety days and five years probation. He was also ordered to complete sex offender counseling. (Plaintiff's Exhibits 1 and 2; R., pp. 126-132).

Dr. Gehle testified she was unable to obtain any records regarding the sex offender treatment Yawn participated in while on probation, but she did question him about what he learned from that treatment. He said he “learned not to be looking for a woman more than five years younger or five years older, try to keep yourself out of situations that congregate, don’t go to Wal-Mart until late at night.” (TT, pp. 41-42; R., pp. 41-42).

Dr. Gehle also testified she reviewed the records regarding Yawn’s subsequent sexual offenses. On or about March 19, 2009, Yawn fondled the genitals of an eight year old male, who was his step-daughter’s friend. The child was playing video games at Yawn’s house, and Yawn walked him home. During the walk, Yawn asked the child about a cup he was wearing as part of a baseball uniform. When they reached the porch of the child’s home, Yawn asked if he could touch the cup, and even though the child said no, Yawn put his hand inside the child’s pants and the cup, and touched the child’s penis. The child immediately reported the incident to his mother, and Yawn was arrested. On October 6, 2010, Yawn pled guilty to one count of lewd act on a child, and sentenced to ten years, suspended to time served (479 days) and five years probation. The sentencing judge ordered the probation to begin after a pending charge was resolved (see below). (TT, pp. 42-44, Plaintiff’s Exhibit 4; R., pp. 42-44).

In addition, between January 1, 2009 and April 30, 2009, Yawn fondled the genitals of another eight year old male, his wife’s nephew. The child reported that he took showers with Yawn on several occasions when he was visiting his aunt, and Yawn fondled his penis on at least two occasions. The child’s mother stated she knew Yawn was a registered sex offender, but Yawn told her he had to register because he had sex

with an underage girl, so she did not believe he posed a danger to her son. Yawn was arrested on June 17, 2009. He pled guilty to one count of lewd on a child on February 2, 2011, and was sentenced to three years, with credit for time served of 469 days. (TT, pp. 44-46; Plaintiff's Exhibit 3; R., pp. 133-136).

Based on all the information she reviewed and her interview of Yawn, Dr. Gehle diagnosed him with pedophilia, sexually attracted to males, non-exclusive type. She testified to a reasonable degree of psychological certainty that Yawn had serious difficulty controlling his behavior, as evidenced by his continuing to offend against minors after he was convicted in 2003, and after he attended sex offender treatment. She concluded to a reasonable degree of psychological certainty that Yawn's pedophilia made him likely to reoffend sexually if not confined in a secure facility for long term control, care and treatment. (TT, pp. 47-57; R., pp. 47-57).

On cross-examination, Yawn asked Dr. Gehle what type of treatment she would recommend for someone like him. She responded:

I don't necessarily make treatment recommendations. But in this case right now Mr. Yawn is denying that he committed any offenses. So I don't know that he'd benefit from treatment.

(TT, pp. 61-62; R., pp. 61-62). Upon further questioning, she clarified her statement by stating she did not know if he would benefit from treatment "[a]t this time." (TT, p. 62; R., pp. 62). On re-direct examination, she stated:

When somebody's in denial of their offenses, they can still choose to participate in treatment and maybe they will start to open up, you know, but when somebody's in denial, they're not necessarily going to benefit directly from treatment until, you know, they start to become honest.

(TT, pp. 82-83; R., pp.82-83).

After the State rested its case, Yawn moved for a directed verdict based on Dr. Gehle's testimony he would not benefit from treatment. The circuit court denied the motion, finding that when Dr. Gehle's testimony was considered in full, she stated he would not currently benefit from treatment because of his denial of any wrongdoing. (TT, pp. 85-86; R., pp. 85-86).

Yawn testified he pled guilty to the four charges because his attorneys told him he would get lighter sentences, and either he wanted to keep his job, he would get credit for time served, or he just wanted to "get it over with." On cross-examination, he admitted he swore to tell the truth each time he pled guilty, and he pled guilty to the facts underlying each of the four offenses. (TT, pp. 93-101; R., pp. 93-101).

The jury found Yawn was a sexual predator beyond a reasonable doubt. After denying Yawn's motion for judgment notwithstanding the verdict (JNOV), the circuit court committed him to the custody of the South Carolina Department of Mental Health for long term control, care and treatment. (TT, pp. 121-123; Order of Commitment; R., pp. 144). This appeal followed.

ARGUMENT

The circuit court properly denied Yawn's directed verdict and JNOV motions because there was ample evidence from which the jury could, and did, find Yawn had a mental abnormality that made him likely to commit future acts of sexual violence if not confined for long term control, care and treatment.

Yawn contends the circuit court erred in denying his directed verdict and JNOV motions because the State failed to prove he needed long term control, care and treatment. He asserts Dr. Gehle's testimony he would not benefit from treatment proved the State was trying to commit him for control rather than treatment, and sending him to the SVP treatment program would be a waste of money. This assertion ignores significant portions of the evidence.

In reviewing the denial of a directed verdict, the court should consider the question of whether any evidence existed in favor of the non-moving party. S.C. Fed. Credit Union v. Higgins, 394 S.C. 189, 714 S.E.2d 550, 552 (2011). The court should be concerned only with the existence or nonexistence of evidence. *Id.*; see also Hamilton v. Charleston County Sheriff's Dept., 399 S.C. 252, 731 S.E.2d 727, 728 (Ct. App. 2012) (same).

The trial court must deny a motion for a directed verdict or judgment notwithstanding the verdict ("JNOV") if the evidence yields more than one reasonable inference, or its inference is in doubt. RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166, 171 (2012). A JNOV motion should be granted **only** if no reasonable jury could have reached the challenged verdict, and the appellate court will reverse the trial court's ruling only if **no** evidence supports it. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). In deciding such motions, neither the trial

court nor the appellate court has the authority to decide credibility issues, or to resolve conflicts in the testimony or the evidence. *Id.* at 419.

Considering the evidence in this case in the light most favorable to the State, the issue of whether Yawn is a sexually violent predator was clearly a question for the jury. It was undisputed he has the mental abnormality of pedophilia, and his past conduct starkly indicated he has serious difficulty controlling his sexually deviant behavior.

After his guilty pleas in 2003, and subsequent participation in sex offender treatment, he sexually molested two more eight year old boys in 2009. Even after pleading guilty to those offenses, Yawn essentially denied or minimized his conduct during his interview with Dr. Gehle and his testimony at trial. His denials were the basis of Dr. Gehle's testimony that he would not benefit from treatment "at this time." Obstacles to treatment imposed by Yawn himself do not preclude his commitment as a sexually violent predator under the SVP Act.

In upholding the constitutionality of the Kansas SVP statute, which was the original model for South Carolina's law, the United States Supreme Court stated:

Accepting the Kansas court's apparent determination that treatment is not possible for this category of individuals does not obligate us to adopt its legal conclusions. We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, **incapacitation may be a legitimate end of the civil law.** Accordingly, the Kansas court's determination that the Act's "overriding concern" was the continued "segregation of sexually violent offenders" is consistent with our conclusion that the Act establishes civil proceedings, especially when that concern is coupled with **the State's ancillary goal of providing treatment to those offenders, if such is possible.** While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, **we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.** A State could hardly be seen as furthering a "punitive" purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Similarly, it

would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. **To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.**

Kansas v. Hendricks, 521 U.S. 346, 366-367 (1997) (internal citations omitted) (emphasis added). Taken to its logical conclusion, Yawn's argument leads to the exact result rejected in Hendricks – individuals who have a mental abnormality and are likely to reoffend if not confined for treatment must be released into the community if they would not benefit from treatment for any reason. Such a result flies in the face of an express legislative purpose underlying the SVP Act – protecting the public from risks presented by individuals who have a mental abnormality that makes them likely to re-offend if not confined for treatment. *See* S.C. Code §44-48-20 (Supp. 2012).

The SVP program does provide treatment for all individuals committed there under the SVP Act. The extent to which a committed individual benefits from the treatment offered is within the individual's control, but the failure to benefit from treatment does not preclude commitment.

There was ample evidence to support the jury verdict in this case. Accordingly, the circuit court properly denied Yawn's directed verdict and JNOV motions, and the jury verdict and Order of Commitment should be affirmed.

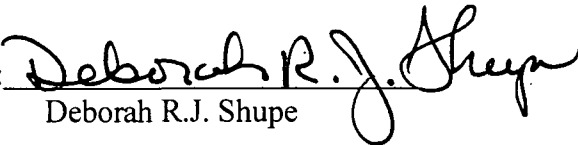
CONCLUSION

Based on the foregoing reasons, the State respectfully submits the circuit court's rulings, the jury verdict and the Order of Commitment should be affirmed.

Respectfully submitted,

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IN THE MATTER OF THE CARE AND TREATMENT OF
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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b),
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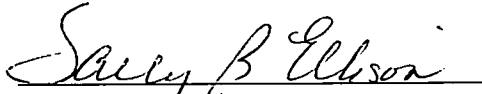
PROOF OF SERVICE

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

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

This 13th day of March 2013.


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