

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

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SOUTH CAROLINA COURT OF APPEALS

IN THE MATTER OF THE CARE AND
TREATMENT OF PATRICK GUESS,

APPELLANT

Appellate Case No. 2011-203688

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the court erred by refusing to direct a verdict where the state presented no evidence there was a significant likelihood appellant would engage in repeated acts of sexual violence where the state's own statistical evidence showed appellant had a less than one in four likelihood that he would re-offend within five years?

STATEMENT OF THE CASE

In 2002, appellant was convicted of criminal sexual conduct with a minor in the second degree. R. 4, ll. 11-18. The state subsequently moved to have appellant classified and retained in custody as a sexually violent predator.

His case was called to trial on November 14, 2011 before the Honorable Alison Renee Lee. David Belding represented appellant. Lloyd Flores, Jr. was the assistant attorney general. R. 1.

At the conclusion of the trial on November 15, 2011 the jury found appellant was a sexually violent predator. R. 112, ll. 7-13. This appeal follows.

ARGUMENT

The court erred by refusing to direct a verdict where the state presented no evidence there was a significant likelihood appellant would engage in repeated acts of sexual violence where the state's own statistical evidence showed appellant had a less than one in four likelihood that he would re-offend within five years.

Relevant Facts

Dr. Kimberly Harrison had a PhD in Clinical Psychology. R. 8, ll. 17-24. She testified that: "Psychology in general is the study of behavior, thoughts, emotions, mental disorders . . . and then Forensic Psychology is the application of those psychological principles to questions of law." R. 8, l. 22 – 9, l. 9. She was qualified as an expert in Forensic Psychology without objection. R. 9, ll. 17-22.

Harrison testified she reviewed appellant's criminal history, and she knew he had been convicted of criminal sexual conduct with a minor in the second degree in 2002. She said the report showed appellant assaulted a fourteen-year-old female acquaintance from his neighborhood. R. 13, ll. 9-23. Harrison stated she also reviewed appellant's school records and "interviewed him and conducted what's called the Actuarial Risk Assessment Instrument." R. 11, ll. 6-12.

Harrison was aware when appellant was fourteen years old in 1996 he sexually assaulted his four-year-old female cousin. R. 14, ll. 4-20. Appellant pled guilty to ABHAN for this offense, and he was sent to the Department of Juvenile Justice (DJJ). R. 14, ll. 4-20.

Harrison revealed that appellant said his sexual intercourse with the fourteen-old-girl was consensual. However, she testified that appellant admitted to fantasizing about other

“children.” “He admitted to having sexual fantasies of his victim for several months prior to actually committing the offense against her.” R. 16, ll. 1-18.

Harrison said appellant had risk factors including the fact that he was a male. He also had never been married or been in any long-term relationship, and he had victims unrelated to him. Harrison said appellant was considered “to be in the high-risk group” on the Static 99-R test because he “scored higher than about ninety percent of sex offenders in terms of his risk level.” R. 19, ll. 6-19.

Harrison said appellant had an anti-social personality disorder and she opined he had a propensity to commit sexually violent offenses and he was a menace to the health and safety of others. R. 21, l. 10 – 23, l. 22. Harrison said to a reasonable degree of psychological certainty that appellant’s paraphilia and anti-social personality disorder made him likely to engage in acts of sexual violence if he was not confined to a secure facility. R. 24, ll. 11-22.

On cross-examination Dr. Harrison said she received her degree from the University of North Texas, and she studied under a well known professor of psychology, Dr. Richard Rogers. R. 26, l. 5 – 28, l. 21. Defense counsel questioned Harrison about the meaning of “likely” to re-offend in the statute. Harrison acknowledged this was an ambiguous term “that we struggle with in doing these evaluations.” R. 29, l. 18 – 30, l. 4. Harrison said her risk assessments were “complex, multi-faceted decisions.” R. 30, ll. 2-10.

Harrison admitted she only talked to appellant for two and half hours. She acknowledged there was a controversy among psychologists about sexually violent predator evaluations. R. 35, l. 9 – 42, l. 6. She admitted that Webster’s dictionary defined likely as “probable, reasonably to be expected.” R. 42, ll. 11-18. She said the statute did not define

likely to re-offend as there being more than a fifty percent chance. At one point she defensively stated that she did not write the statute at issue here. Harrison testified the statute read "likely to engage in acts of sexual violence means the 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." R. 43, l. 1 – 44, l. 2. (emphasis added). Defense counsel asked Harrison if a twenty-five percent chance of something happening meant it was "likely." Harrison acknowledged, while dodging the question, that a fifty percent chance something was probable to happen was more of a chance something would occur than forty-nine percent. R. 44, ll. 3-21. Harrison admitted that she concluded appellant **had a 24.7 percent chance of re-offending within five years** based on other sex offenders "with his score." R. 44, l. 22 – 45, l. 18.

Harrison explained "if you had a group of 100 guys who all had the same score, about 25 of them went on reoffend in five years." R. 45, l. 19 – 46, l. 2. Harrison admitted this meant that three out of the four in that pool would not re-offend. R. 46, ll. 3-19. Harrison repeated that appellant said that his sex with the fourteen-year-old girl was consensual, and appellant told her he thought she was seventeen. R. 49, l. 4 – 50, l. 14. The following occurred on cross-examination of Harrison:

Mr. Belding: Okay. Did he receive any sex offender treatment while he was in the Department of Corrections?

Dr. Harrison: The records do not indicate that he did, no.

Mr. Belding: So, really this is just care and control. This is just a way of keeping him off the streets, isn't it?

Dr. Harrison: I don't - - I didn't write the law.

Mr. Belding: Okay.

Dr. Harrison: And they do offer treatment at DMH.

Mr. Belding: One day a week?

Dr. Harrison: That's my understanding of how it is now.

R. 56, l. 18 – 57, l. 2.

On re-direct testimony Harrison claimed it would not “be ethical” to base her opinion on “one objective test” [24.7 chance of reoffending] given to appellant. R. 61, ll. 9-13. Harrison defended her opinion of appellant saying it “goes to the diagnosis of the paraphilia, that he was aroused by having sex with a four-year-old.” R. 62, ll. 2-18.

Defense counsel moved for a directed verdict noting the state's one witness acknowledged there was a lot of ambiguity in the statute and the one objective factor was the Static-99 test. Appellant only had a 24.7 likelihood of re-offending in five years and just thirty percent over ten years “so, we're talking about a 1 out of 4 or 1 out of 3 chance. That's the likelihood that she testified to, Dr. Harrison, on the stand. That's not likely. By any normal definition of likely, that's unlikely.” R. 74, l. 8 – 77, l. 5.

Defense counsel argued that appellant was entitled to a directed verdict based on this statistical unlikelihood appellant would reoffend, and that giving this case to the jury just invited a verdict based on passion and prejudice. The assistant attorney general argued that the jury could find appellant was a sexually violent predator when the evidence was viewed in the light most favorable to the state. R. 78, ll. 16-20. The judge stated Dr. Harrison's opinions were not based “solely on objective standards.” “I think because the state has recognized that psychology is not an exact science, that there is not an objective way to

come to a final conclusion. . . .” The judge ruled here was evidence presented by the state and it was therefore a jury question. R. 78, l. 24 – 81, l. 25.

Discussion

The sexually violent predator act is designed to: (1) meet the special needs of sexually violent predators; (2) address the *significant likelihood that they will engage in repeated acts of sexual violence* if not treated for their mental conditions; and (3) *assess the risks* requiring their involuntary civil commitment in a secure facility for a long-term control, care, and treatment. In Re Care and Treatment of Brown v. State, 372 S.C. 611, 616-616, 643 S.E.2d 118, 121 (Ct. App. 2007); In Re Care and Treatment of Canupp, 380 S.C. 611, 618, 671 S.E.2d 614, 617 (Ct. App. 2008).

The issue in this case is the meaning of “significant likelihood.” Defense counsel Belding argued when moving for a directed verdict that a 24.7 chance of committing another offense was not likely or probable by any definition. Appellant Guess was entitled to a directed verdict because the objective evidence in this case showed there was not a “significant likelihood” he would engage in repeated acts of sexual violence if not treated. See In Re Care and Treatment of Brown v. State, 372 S.C. 611, 643 S.E.2d 118 (2007).

The purpose of the requirements in the sexually violent predator act is to ensure that involuntary commitment procedures under the act are *only used to control a limited subclass of dangerous persons* and not to broadly subject any dangerous person to what may be indefinite terms. In Re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893, 894 (2003). The state has the burden of proving beyond a reasonable doubt that the person is a sexually violent offender; See S.C. Code Ann. § 44-48-100 (2002), and the act defines “likely” to engage in acts of sexual violence, to mean the person’s propensity “to commit

acts of sexual violence *is of such degree* as to pose a menace to the health and safety of others.” S.C. Code § 44-48-30(9); In Re Care and Treatment of Harvey, 355 S.C. 53, 60 S.E.2d 893, 896 (2003). (emphasis added).

Here, the state failed to prove that appellant should be committed because he “suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility, rendering him likely to commit a dangerous act.” In Re Luckabaugh, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002).

Appellant submits that any person who commits a particular crime (burglary, rape, drug dealing, etc.) is more likely than a “normal person” to commit that same offense in the future. However, that is not, and cannot, what “significant likelihood to re-offend” means. Appellant understands that court looks at the totality of the evidence when ruling on a directed verdict motion. However, a 24.7 % likelihood to re-offend is not a significant likelihood, and the fact appellant at one time had sexual intercourse with a four year old cannot be deemed a significant likelihood that he would re-offend. In other words, the sexual offense itself cannot prove a likelihood to reoffend or else any person who ever had sex with a child would never be released. Further, appellant was only fourteen years old at the time of the offense, and it is now known that teenagers are still developing their minds, and can be expected to exercise better judgment as they grow older. See Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455 (2012). The Court in Miller noted that “children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 2463 (2012) *citing Roper v. Simmons*, 543 U.S. 551 (2005).

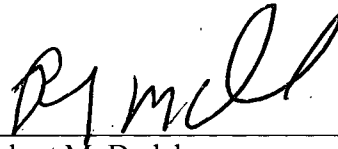
Children also are “are more vulnerable ... to negative influences and outside pressures, including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings . . . [and] a child's character is not as “well formed” as an adult's; his traits are “less fixed” [and] “[o]nly a relatively small proportion of adolescents' ” who engage in illegal activity “ ‘develop entrenched patterns of problem behavior.’” *quoting* Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003). Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 2464 (2012).

Dr. Harrison undoubtedly found appellant's sexual desires abnormal but her stand-alone opinion that appellant was sexual predator renders the language of the statute meaningless if a **24.7 chance** of re-offending is considered a “significant likelihood” within the meaning of the statute. Respectfully, if that is the meaning of the statute then its purpose is to detain persons who have served their sentences based on a small statistical chance they may reoffend. That cannot be the meaning of a constitutional statute, and defense counsel correctly argued appellant was entitled to a directed verdict in this case.

CONCLUSION

By reason of the foregoing argument, this Court should order a directed verdict in appellant's favor.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

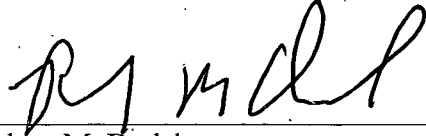
ATTORNEY FOR APPELLANT

This 21st day of June, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

June 21st, 2013



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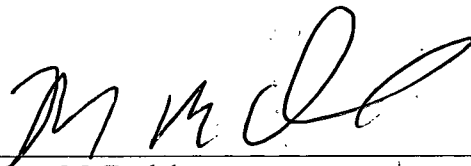
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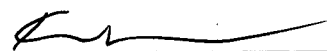
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of June, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of June, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013