

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2011-203688

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

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Guess' directed verdict motion because the court appointed expert testified to a reasonable degree of psychological certainty Guess has both a mental abnormality and a personality disorder that cause him serious difficulty controlling his conduct, and he is a high risk to engage in 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 January 31, 2002, a Richland County jury convicted Appellant Patrick Guess (“Guess”) of criminal sexual conduct with a minor, and the circuit court sentenced him to twelve years incarceration. The conviction arose from Guess’ April 2000 sexual assault of a fourteen year old female neighbor he lured into an abandoned house in the neighborhood. (State’s Exhibit 1; Record on Appeal [R.], pp. 116-118).

In accordance with the Sexually Violent Predator Act (“SVP Act”), prior to Guess’ release from incarceration, Respondent State of South Carolina (the “State”) commenced a civil commitment proceeding in the Richland County Court of Common Pleas in April 2011. The circuit court found probable cause to believe Guess met the criteria for commitment as a sexually violent predator, and appointed Kimberly S. Harrison, Ph.D., to conduct a mental health evaluation of Guess. Dr. Harrison diagnosed Guess with paraphilia, not otherwise specified, and anti-social personality disorder, and found he was a high risk to re-offend sexually. Based on her findings and conclusions, Dr. Harrison recommended Guess for commitment under the SVP Act. (Trial Transcript [TT], pp. 46-50; R., pp. 20-24).

The case was called for a jury trial on November 14, 2011, before the Honorable Alison Renee Lee, Circuit Court Judge. Dr. Harrison was qualified as an expert in forensic psychology, and testified her evaluation protocol included reviewing Guess’ criminal history, Department of Juvenile Justice (“DJJ”) records, and school records, interviewing Guess, and conducting an actuarial risk assessment. (TT, pp. 34-37; R., pp. 8-11).

Dr. Harrison stated Guess' criminal history was important for purposes of diagnosis and risk assessment. In addition to his 2002 criminal sexual conduct with a minor conviction, Guess was charged in 1996 with first degree criminal sexual conduct with a minor in connection with the sexual molestation of his four year old female cousin, including penetration of her vagina with his penis, and was sentenced to an indeterminate term at DJJ after he pled guilty to assault and battery of a high and aggravated nature.¹ (TT, pp. 38-40; R., pp. 12-14). While confined at DJJ, Guess was found guilty of sexual misconduct against a male DJJ resident, and was placed in a special management unit for thirty days. (TT, pp. 40-41; R., pp. 14-15).

Guess also participated in sex offender treatment at DJJ, which included group and individual sessions, and educational classes regarding appropriate sexual behaviors. During that treatment, Guess admitted molesting his four year old cousin, as well as other victims. He admitted he had sexual fantasies about his cousin for several months prior to the actual molestation, including fantasies about her fighting back, which he found especially arousing. (TT, pp. 41-43; R., pp. 15-17).

In the interview with Dr. Harrison, however, Guess completely denied committing the offense against his cousin, even though he pled guilty and admitted it in treatment at DJJ. He did admit committing the April 2000 offense against the fourteen year old victim, but claimed it was consensual and he thought the victim was seventeen years old.² (TT, pp. 42-43; R., pp. 16-17).

¹ Guess was on probation from this conviction when he committed the April 2000 offense against the fourteen year old victim. (TT, p. 59; R., p. 33).

² Guess' recitation of Dr. Harrison's testimony on this issue is incredibly misleading because he conflates it to appear her testimony regarding his fantasies related to his fourteen year old victim, rather than his four year old victim. (Brief of Appellant,

Dr. Harrison testified Guess had multiple risk factors for sexual reoffending, including having a male victim, never being married or in a long term romantic relationship, and having victims who were not related to him. She stated those are recognized factors that increase the likelihood of future sexual offenses. (TT, pp. 43-44; R., pp.17-18).

Dr. Harrison also testified she used an actuarial risk assessment tool as “one piece of information” for purposes of assessing Guess’ risk to commit future acts of sexual violence. She stated the Static-99R considers ten known risk factors that relate to the likelihood of recidivism in sex offenders, which are scored based on the offender’s history compared with other sex offenders. Guess’ Static-99R score was “higher than about 90 percent of sex offenders in terms of his risk level,” and was considered to be “in the high-risk group.” (TT, pp. 44-45; R., pp. 18-19).

Based on all the information she reviewed, including Guess’ offense records and disciplinary records while incarcerated, as well as her forensic interview with him, Dr. Harrison diagnosed Guess with two disorders; paraphilia, not otherwise specified, and anti-social personality disorder. She testified the paraphilia diagnosis was based on his offense history and disclosures in treatment at DJJ, which indicated a sexual arousal to non-consenting victims. The anti-social personality disorder was based on his history of chronically breaking the law and rules, and doing things that put others at risk. Dr. Harrison stated both disorders, particularly in combination, lead to a propensity to commit acts of sexual violence. (TT, pp. 46-49; R., pp.20-23).

pp. 5-6). By emphasizing the word “children,” Guess uses this conflation to imply Dr. Harrison mischaracterized his fantasies, as well as to downplay the significance of those fantasies.

Dr. Harrison opined to a reasonable degree of psychological certainty that Guess had the propensity to be dangerous and commit future acts of sexual violence, and his propensity was of such a degree as to pose a menace to the health and safety of others. She further opined Guess' disorders caused him serious difficulty controlling his behavior, and he was likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care and treatment. (TT, pp. 49-50; R., pp. 23-24).

On cross-examination, Dr. Harrison testified certain terms in the SVP Act are ambiguous, such as the word "likely," but "likely to engage in acts of sexual violence" is defined in the statute as "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." (TT, pp. 55-56; R., pp. 29-30). She further testified that a risk assessment under the SVP Act is "a complex, multifaceted decision." (TT, p. 56; R., p. 30).

As to the Static-99R scores, Dr. Harrison stated that approximately twenty-five percent of the sex offenders in the same high risk category of Static-99R scores as Guess were actually arrested on new sexual offense charges within five years, and approximately thirty-three percent were arrested on new charges within ten years. She stated the Static-99R score was not the only information she used, and she also considered factors not included in the Static-99R. She again testified the circumstances of Guess' sexual offenses indicated he had difficulty controlling his behavior. (TT, pp. 68-75; R., pp. 42-49).

On re-direct examination, Dr. Harrison further clarified her use of the Static-99R, stating she did not just rely on that score because "[y]ou can't reduce a person down to ten historical items." She testified she based her conclusions "on all of the records that

[she] had on his past behavior, on [her] interview with him, as well as other what we call dynamic risk factors,” including his “impulsivity, poor problem-solving skills, those types of things that the Static 99 doesn’t consider at all.” (TT, pp. 85-87; R., pp. 59-61). She further testified that the Static-99R percentage rates of reoffending are only based on reported subsequent arrests, and sex offenses are frequently not reported. (TT, pp. 91-92; R., pp.65-66).

After the State rested its case, Guess moved for a directed verdict, arguing the only objective evidence in the record indicated there was a 24.7 % likelihood he would reoffend, which made it statistically unlikely to reoffend, and therefore, the State failed to meet the statutory requirement for civil commitment. (TT, pp.104-107; R., pp 74-77). The circuit court denied the motion, finding Dr. Harrison’s opinion was not based solely on one objective standard; rather, she considered a multitude of factors, and her conclusion was based on a myriad of things she found in records and through the interview with Guess. The court further found the SVP Act adequately defined “likely to engage in acts of sexual violence” in terms that would be given their common, ordinary everyday meaning. The court concluded there was sufficient evidence to submit the case to the jury. (TT. pp. 108-111; R., 78-81)

The jury found Guess is a sexual violent predator beyond a reasonable doubt. The circuit court denied his post-trial motions, and committed him to the custody of the South Carolina Department of Mental Health for long term control, care and treatment. (Form 4 Order, Verdict Form and Order of Commitment filed November 15, 2011; R., pp. 119-121). This appeal followed.

ARGUMENT

The circuit court properly denied Guess' directed verdict motion because the court appointed expert testified to a reasonable degree of psychological certainty he has both a mental abnormality and a personality disorder that cause him serious difficulty controlling his conduct, and he is a high risk to engage in future acts of sexual violence if not confined for long term control, care and treatment.

Guess asserts the circuit court erred in denying his directed verdict motion because Dr. Harrison's testimony revealed there was only a 24.7% chance he would reoffend, which he contends did not meet the statutory requirement of a "significant likelihood" of reoffending. The error in the defendant's position approaches Brobdingnagian proportions.

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). 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. Welch v. Epstein, 342 S.E. 279, 536 S.E.2d 408, 419 (Ct. App. 2000).

As a threshold matter, “significant likelihood” is not the statutory requirement for determining a person’s sexually violent predator status. Section 44-48-30 defines a “sexually violent predator” as a person who: 1) has been convicted of a sexually violent offense; and 2) “suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. S.C. Code §44-48-30(1)(a) & (b) (Supp. 2012). The SVP Act then defines “likely to engage in acts of sexual violence” as “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.” S.C. Code §44-48-30(9) (Supp. 2012). Therefore, the degree of “likelihood” required under the SVP Act, and what the evidence must show, is specifically defined, and the word “significant” is not included in that requirement.³

Even if evidence of a “significant likelihood” to reoffend is required, however, the evidence presented in this case was more than sufficient to meet that requirement. As the circuit noted in denying the directed verdict motion, Dr. Harrison expressly testified the Static-99R was only one factor she considered in reaching her conclusions regarding Guess’ risk to reoffend sexually.⁴ (TT, pp. 85-87, 108-111; R., pp. 59-61, 78-81).

In addition to the Static-99R score, Dr. Harrison considered factors not encompassed by the ten question Static-99R, including Guess’ entire criminal history, her interview with him, his general inability to control his conduct as evidenced by his

³ The only time the SVP Act uses the word “significant” is in the “Legislative findings,” which states the General Assembly found “the likelihood a sexually violent predator will engage in repeated acts of sexual violence if not treated for their mental conditions is significant.” S.C. Code §44-48-20 (Supp. 2012).

⁴ Dr. Harrison stated it would be unethical for her to base her opinion on one objective test, and she would be subject to professional discipline if she did so. (TT, p. 87; R., p. 61).

behavior in prison, his impulsivity, and his poor problem solving skills. She also considered the underlying circumstances of his first sex related offense involving his four year old cousin, including the type of harm caused to the victim, the way Guess responded when the crime was reported, the presence of other people in the home when the crimes was committed, and the fact the victim was a relative who could easily identify him. She stated these factors supported the paraphilia diagnosis, as well as indicated an inability to control behavior.

Dr. Harrison further testified the fact Guess committed his second sexual offense with the fourteen year old victim while he was on probation, and under increased scrutiny, from the first conviction, also indicated an inability to control his behavior.⁵ Other recognized risk factors she considered were the fact Guess had a male victim (while in DJJ), he has never been married or in a long term relationship, and he had victims who were not related to him. She testified all of these factors increased Guess' risk to reoffend sexually if not confined for treatment, and she specifically opined to a reasonable degree of psychological certainty that Guess' mental abnormality and personality disorder, especially in combination, made him a risk to reoffend sexually, and his risk was of such a degree as to make him a menace to the health and safety of others. (TT, pp.46-50, 72, 74-77, 83, 85-89; R., pp. 20-24,46, 48-51, 57, 59-63).

While focusing on the 24.7% figure, Guess conveniently ignores another significant statistic related to his Static-99R score.⁶ Dr. Harrison testified his score was

⁵ It should be noted that this offense also occurred **after** Guess participated in sex offender treatment at DJJ.

⁶ Dr. Harrison testified the 24.7% reoffending figure was based on "detected reoffenses," and sexually violent offenses are "frequently not reported." (TT, pp. 91-92; R., pp. 65-66).

“**higher** than about **90 percent** of the sex offenders in terms of his risk level,” and he was considered to be in the “high-risk group,” when compared to other sex offenders rated on the Static-99R. (TT, pp. 44-45; R., pp. 18-19) (emphasis added). In other words, Guess’ risk to reoffend was in the **top ten percent** of all sex offenders included in the database. Even as the sole “objective” factor of the evaluation, that is a “significant” risk to reoffend.

Guess also attempts to divert attention from his entire record by alluding to the fact he was fourteen years old at the time of his first sex offense against his four year old cousin, essentially chalking the sexual violation of a four year old up to a mere “lack of maturity and an underdeveloped sense of responsibility,” and a vulnerability to negative influences and outside pressures over which he had limited control. (Brief of Appellant, pp. 10-11). The blatant fallacy of this assertion is amply demonstrated by the fact Guess continued to offend sexually **after** he was committed to DJJ for that offense, including an offense while in DJJ, **after** he participated in sex offender treatment at DJJ, **after** he was released from DJJ and **while** he was on probation, and **after** he turned eighteen. Guess also ignores his numerous disciplinary problems while incarcerated for his second sex offense conviction also belie his youthful immaturity argument. In short, despite numerous factors what would ordinarily serve to help him mature and develop a sense of responsibility, it is clear Guess simply continued to ignore the rights of others, and do whatever he wanted to do.

The record contains ample evidence from which the jury could, and ultimately did, determine Guess is a sexually violent predator. Therefore, the circuit court properly submitted the case to the jury for determination.

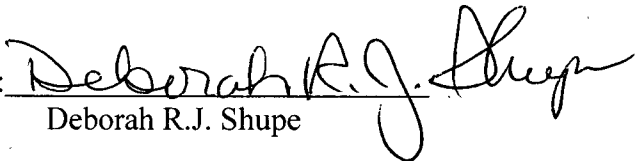
CONCLUSION

Based on the foregoing, the State respectfully submits the circuit court properly denied the directed verdict motion, and Guess' commitment should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY: 
Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

June 24, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Richland County
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IN THE MATTER OF THE CARE AND TREATMENT OF
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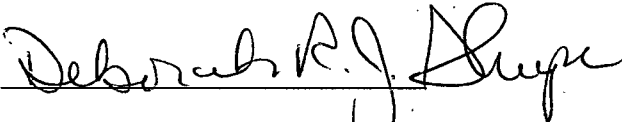
CERTIFICATE OF COUNSEL

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

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY: 

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

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Appeal from Richland County
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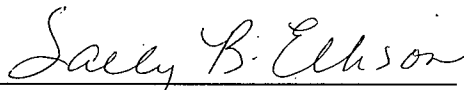
PROOF OF SERVICE

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

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 24th day of June, 2013.



Sally B. Ellison
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4156



ALAN WILSON
ATTORNEY GENERAL

June 24, 2013

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

RE: In the Matter of the Care and Treatment of Patrick Guess
Appellate Case No.2011-203688

Dear Mr. Dudek:

Enclosed herewith and served upon you are two (2) copies of the Final Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe
Enclosures

cc: Honorable Jenny A. Kitchings (original and 15 copies)
Victim Services

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