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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County
The Honorable Paul Burch, Circuit Court Judge
Appellate Case Tracking No. 2017-00232-

RECEIVED
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SC Court of Appeals

IN THE MATTER OF THE CARE AND TREATMENT OF
TIMOTHY WAYNE SCHAEFER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly allowed the State's expert to give limited testimony about Appellant's criminal lifestyle, including his multiple arrests for nonsexual offenses, because it was directly relevant to her diagnosis of other specified personality disorder with antisocial features, and to her assessment of Appellant's propensity to commit future acts of sexual violence if not confined for treatment.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On February 24, 2014, Appellant Timothy Wayne Schaefer pled guilty to one count of criminal solicitation of a minor, two counts of sexual exploitation of a minor, third degree, and one count of contributing to the delinquency of a minor, arising from his soliciting a thirteen year old female for sex and his possession of child pornography, and was sentenced to concurrence terms of incarceration up to eight years. Prior to Appellant's release from prison, Respondent State of South Carolina commenced an action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Appellant's civil commitment to the South Carolina Department of Mental Health (DMH) for long term control, care and treatment. The matter was called for a jury trial on October 30, 2017, before the Honorable Paul M. Burch, Circuit Court Judge.

Prior to trial, Appellant moved to exclude testimony from the State's expert witness regarding nonsexual charges reflected on Appellant's criminal history, arguing the testimony was more prejudicial than probative. The State argued Appellant's nonsexual offenses were directly relevant to the expert's diagnosis of other specified personality disorder with antisocial features, and necessary to the expert's explanation of the basis for that diagnosis.¹ After hearing argument, the circuit court denied the motion based on existing case law, but noted the expert could be cross-examined about how the expert considered the charges. (October 30 Trial Transcript [TT1], pp. 27-32; Record on Appeal [R.], pp. 10-17).²

¹The trial transcript is replete with errors that may cause some confusion. By way of example, the transcript incorrectly indicates the diagnosis at issue during the pretrial discussion was "other specified pedophilic disorder," rather than "other specified personality disorder." This error is repeated throughout the transcript. As discussed below, the expert diagnosed Appellant with pedophilic disorder, other specified paraphilic disorder, and other specified personality disorder.

² The trial took place over two days with two different court reporters, so there are two transcripts. For ease of reference, the October 30 trial transcript will be referenced herein as TT1, and the October 31 trial transcript will be referenced herein as TT2.

The State presented testimony from Amy Swan, Psy.D., who was qualified as expert in forensic psychologist. She testified she was appointed by the court to conduct a pre-commitment evaluation of Appellant pursuant to the SVPA. As part of her evaluation protocol, Dr. Swan reviewed court records, police records and prison records, and interviewed Appellant for three hours and five minutes. She testified the information she gleaned from reviewing the available records and interviewing Appellant was the type of information typically and reasonably relied on by experts in her field, and she considered all the information in reaching an opinion regarding Appellant's mental status. (TT1, pp. 87-97; R., pp.72-82).

Dr. Swan testified a person's past sexual offense behavior is the best predictor of future sexual behavior, and if the person is arrested or convicted of a sexual offense, but then offends again, the risk to do it in the future increases. In addition, she stated a person's nonsexual offending history is important because a criminal lifestyle is one pathway to committing a future sex offense. (TT1, pp. 97-98; R., pp. 82-83).

In reviewing Appellant's criminal history, Dr. Swan noted he was arrested in April 1995, for contributing to the delinquency of a minor (a fourteen year old female). The charge was ultimately dropped, but Dr. Swan testified the arrest should have been a "wake-up call" for Appellant to let him know not to have future contact with minors because he could be charged with a crime. Appellant told her the charge arose from his dating a fourteen year old girl when he was nineteen, and her parents found out and pressed charges against him. (TT1, pp. 98-99, 102-103; R., pp. 83-84, 87-88).

The arrest apparently did not deter Appellant because he was arrested for possession of child pornography between July 2004 and January 2005, which he knew was illegal. He pled guilty in July 2010 and was sentenced to five years incarceration, suspended to ninety days in jail

and two years probation. The arrest and conviction still did not deter Appellant from future illegal conduct involving minors, however, because his probation officer discovered child pornography on Appellant's computer a mere eleven days after Appellant completed his ninety day jail sentence. Appellant's probation was revoked, and he was sent to prison for four years and nine months. (TT1, pp. 98-100, 104-106, State's Exhibit 1; R., pp. 83-85, 89-91, 374-381, 374-375).

Appellant was released from prison on March 1, 2012, and the very next day he started contacting a thirteen year old female, ultimately leading to his arrest on twenty-two sex offenses, including sexual exploitation of a minor, criminal solicitation of a minor, contributing to the delinquency of a minor, stalking, and committing or attempting to commit a lewd act on a child for sexually assaulting the thirteen year old female. Dr. Swan testified this indicated Appellant "is so preoccupied with young girls that he could not refrain from having contact with one for even one day," and Appellant told her "he became so addicted to child pornography that he was not able to stop himself from looking at it." On February 24 2014, Appellant pled guilty to one count of sexual exploitation of a minor third degree, and two counts of criminal solicitation of a minor, and the remaining nineteen charges were dropped as part of the plea agreement. (TT1, pp. 106-120, State's Exhibits 2, 3 and 4; R., pp. 91-105, 376-381).

Dr. Swan testified each of Appellant's re-offenses after being sanctioned for an offense involving a minor increased his risk to reoffend sexually against a minor. She further testified that in addition to his sexual offenses, Appellant had a significant nonsexual criminal history, including arrests for driving under the influence, fraudulent checks, criminal domestic violence, possession of marijuana, driving too fast for conditions, shoplifting, malicious injury to property, probation violation, malicious injury to courthouse or jail, possessing contraband in county or

municipal prisons, malicious injury to animals, personal property, which revealed a pattern of repeatedly being arrested and breaking the law, and also increased his risk to reoffend sexually. (TT1, pp. 120-123; R., pp. 105-108). Dr. Swan stated Appellant's criminal lifestyle indicated antisocial personality disorder as defined by the Diagnostic and Statistical Manual, Fifth Edition (DSM-V), which considers "repeatedly performing acts that are grounds for arrest."

After considering all the documentary evidence, Appellant's statements during the interview, the results of a penile plethysmograph (PPG) and an actuarial risk assessment tool (Static-99R), Dr. Swan diagnosed Appellant with pedophilia, other specified paraphilic disorder (hebephilia and biastophilia), and other specified personality disorder with antisocial features. She testified Appellant's paraphilic disorders and personality disorder cause him serious difficulty controlling his deviant behavior, and increases his risk to commit acts of sexual violence in the future. In addition to static risk factors incorporated in the Static-99R, Dr. Swan considered multiple dynamic risk factors associated with Appellant, including sexual preoccupation, sexualized violence or rape, multiple paraphilias, offensive attitude toward his victims, emotional congruence with children, lack of emotionally intimate relationships with adults, lifestyle impulsiveness, poor problem solving skills, and dysfunctional coping. (TT1, pp. 124-152; R., pp. 109-137).

Dr. Swan opined to a reasonable degree of psychological certainty that Appellant's paraphilic disorders and personality disorder make him likely to engage in acts of sexual violence if not confined to a secure facility for long term control, care and treatment. She testified Appellant has serious difficulty controlling his deviant behavior, he has the propensity to be dangerous, he poses a menace to the health and safety of others, and he meets the criteria for civil commitment under the SVPA (TT1, pp. 152-154; R., pp. 137-139).

Appellant testified about the courses he took while incarcerated, and stated he had learned that his crimes affected his victims. He testified he would avoid situations that might cause him to reoffend by keeping his "mind on the Lord and all." He denied telling Dr. Swan he was addicted to child pornography, claiming he simply said he was "addicted to the internet." If released, he planned to work with a tree company and do wood crafts. (October 31 Trial Transcript [TT2], pp. 19-37; R., pp. 177-195).

The jury found Appellant is a sexually violent predator, and the circuit court committed him to the South Carolina Department of Mental Health for long term control, care and treatment. (TT2, pp.77-82, Order of Commitment filed October 31, 2017; R., pp. 235-240, 373). This appeal followed.

STANDARD OF REVIEW

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 495 (2013). Appellate courts will not disturb the trial court's ruling absent a manifest abuse of discretion accompanied by probable prejudice, which occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *Id.*

ARGUMENT

The circuit court properly allowed the State's expert to give limited testimony about Appellant's criminal lifestyle, including his multiple arrests for nonsexual offenses, because it was directly relevant to her diagnosis of other specified personality disorder with antisocial features, and to her assessment of Appellant's propensity to commit future acts of sexual violence if not confined for treatment.

Appellant contends the circuit court erred in admitting Dr. Swan's testimony regarding Appellant's prior and pending charges for non-sexual offenses without conducting an analysis required by Rule 401, SCRE, and Rule 403, SCRE, to determine whether the prejudice to Appellant substantially outweighed the evidence's probative value. To the contrary, the record reveals the entire argument before the circuit court regarding admissibility involved Rules 401 and 403, and after hearing argument and reviewing relevant case law on the precise issue, the circuit court properly determined the evidence was relevant and admissible.

The SVPA expressly gives experts "reasonable access to the person for the purpose of the examination, as well as access to all relevant medical, psychological, **criminal offense**, and disciplinary records and reports." S.C. Code Ann. § 44-48-90 (2018) (emphasis added). "Criminal offense" includes both convictions and offenses not resulting in convictions "as long as they are relevant to the determination of whether a person is a sexually violent predator." In re Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008); *see also* White v. State, 375 S.C. 1, 649 S.E.2d 172, 176 (Ct. App. 2007) (legislature did not limit "criminal offense" in the SVPA to only convictions; therefore, the court must assume the legislature intended to include both convictions and prior offenses not resulting in convictions that bear on whether a person is a sexually violent predator as admissible evidence in a SVPA case).

A person's dangerous **propensities** are the focus of the SVPA, and **past criminal history bears directly on the presence of a mental abnormality and/or personality disorder, as well as the person's risk to reoffend.** In re Chandler, 382 S.C. 250, 676 S.E.2d 676, 680 (2009) (citing Ettel, 660 S.E.2d at 287); *see also* In re Corley, 353 S.C. 202, 577 S.E.2d 451, 453-54 (2003) (same). Similar to the conviction versus offense issue decided in White, the legislature did not limit the expert's consideration of "criminal offenses" to sexual offenses, but intended to include any criminal offenses, sexual or non-sexual, relevant to the person's mental status and risk to reoffend. *See* In re the Detention of Altman, 723 N.W.2d 181, 184-185 (Iowa 2012) (the statutory definitions of "mental abnormality" or "sexually violent predator" do not require the person's risk be primarily sexual in nature; and the fact he might be "even more likely to commit other types of offenses does not detract from his risk as a sexual predator"); *see also* In re Commitment of Hooker, 360 Ill. Dec. 334, 968 N.E.2d 1087, 1100-1103 (2012) (person's criminal history, sexual and non-sexual, is relevant and admissible in a sexual predator case as the bases for an expert's diagnosis and opinion) (citing In re Commitment of Doherty, 343 Ill.App.3d 615, 934 N.E.2d 590 [2010]).

In Ettel, the Court of Appeals found Ettel's prior sexual offenses and murder conviction were relevant because the expert relied on them in evaluating his need for, and likelihood of success in, treatment and his ability to control his behavior in the future. The expert testified Ettel's murder conviction was relevant to his propensity to commit further violent crimes, even if there was no sexual component, and she used it to develop a diagnosis and render an opinion regarding his ability to control his behavior. *Id.* *See also* State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 [2002] [admission of motion filed by defendant did not violate his due process rights

because it was relevant in evaluating defendant's need for and probability of success in treatment]).

In this case, in addition to his multiple sexual offenses, Appellant's criminal history included arrests for driving under the influence (or suspension), criminal domestic violence, possession of marijuana, forgery, driving too fast for conditions, shoplifting, malicious injury to property, violation of probation, malicious willful injury to courthouse or jail, possessing contraband in county or municipal prisons, and malicious injury to animals, personal property. (TT1, pp.122-123; R., pp. 107-108). These charges spanned over seventeen years, from 1997 to 2014. (TT1, p. 27; R., p. 12).

Dr. Swan testified Appellant's non-sexual offense history was relevant because it showed a criminal lifestyle, which directly related to her diagnosis of other specified personality disorder with antisocial features, as well as her analysis of his risk to reoffend sexually.³ As for the evidence's possible prejudice, Appellant's non-sexual offenses were not the only basis for Dr. Swan's diagnoses and opinion. In assessing Appellant's mental status and risk to reoffend sexually, Dr. Swan also considered and relied on the specifics of Appellant's sexual offenses, his work history, and his statements during her clinical interview with him. Based on all the information she relied on, including Appellant's non-sexual offenses, she concluded he had two mental abnormalities (pedophilic disorder and other specified paraphilic disorder), and a personality disorder (other specified personality disorder with antisocial features), and he was a high risk to reoffend sexually if not confined for long term control, care and treatment. (TT1, pp. 138-154; R., pp. 123-139). See Ettel, 660 S.E.2d 285 at 288 (expert also relied on prior sexual

³Dr. Swan testified she had no evidence regarding Appellant's behavior prior to the age of fifteen, which is required for an antisocial personality disorder, so she diagnosed other specified personality disorder with antisocial features, which is a valid diagnosis under the DSM-V. (TT1, pp. 141-142; R., pp.126-127).

conviction, statements made during clinical interviews, and Ettl's record while in a sex offender treatment program in reaching her ultimate diagnosis and opinion); *see also* Gaster, 564 S.E.2d at 94 (disputed evidence was relevant and its probative value outweighed any prejudicial effect such that circuit court properly admitted the evidence within its discretion). Appellant's pedophilic and other specified paraphilic disorders were undisputed, and the probative value of his extensive criminal history, sexual and non-sexual, cannot be seriously disputed, particularly on the issue of his risk to reoffend sexually against children.

Appellant contends the evidence at issue was more prejudicial than probative because it created a substantial risk the jury would render its decision on an improper basis, *i.e.*, a general criminal propensity rather than a risk to reoffend sexually. To the contrary, it is far more likely the jury rendered its decision based on Appellant's sexual offense history, combined with the thoroughness and validity of Dr. Swan's evaluation and opinions regarding Appellant's mental status and risk to reoffend.

Dr. Swan's testimony presented the evidence regarding Appellant's non-sexual offenses very concisely, with the primary focus on how and why they were significant to her diagnoses and opinion regarding Appellant's risk to reoffend sexually, which limited the potential prejudice to Appellant as much as possible. (TT1, pp. 122-124; R., pp. 107-109). The offenses were part of the basis for her diagnosis of other specified personality disorder with antisocial features, and they showed Appellant's inability to control his conduct, which went directly to her risk assessment. She specifically testified the combination of Appellant's paraphilic and personality disorders significantly increased his risk to reoffend sexually. (TT1, pp. 142-143, 152-154; R., pp. 127-128).

If the limited evidence regarding Appellant's non-sexual offenses was not admitted, Dr. Swan could testify about her diagnoses of paraphilic and personality disorders, as well as her conclusion Appellant was a high risk to reoffend, but she could not testify about evidence going directly to the heart of the basis for her opinions, thus giving only a partial explanation to the jury. Such a result deprives the jury of vital information regarding the validity of an expert's opinions about the person's mental status and risk to reoffend, which is contrary to the legislative intent of the SVPA.

The circuit court allowed the evidence at issue in this case after carefully considering the analysis in prior case law, particularly as it related to the admissibility of non-sexual offenses. Given the direct relevance of Appellant's non-sexual criminal offenses to Dr. Swan's conclusions, and specifically the highly probative nature of the evidence to Appellant's personality disorder diagnosis and his overall risk to reoffend sexually, the circuit court did not abuse its discretion in allowing Dr. Swan's limited testimony regarding those offenses. Therefore, the court's ruling and the jury's verdict should be affirmed.

CONCLUSION

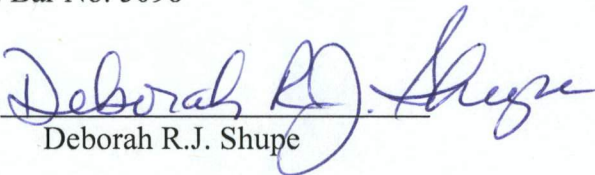
Based on the foregoing reasons, the State respectfully submits Appellant's civil commitment under the SVPA should be affirmed.

Respectfully submitted,

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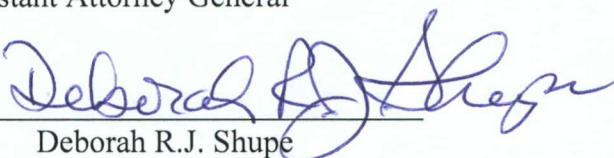
CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 14, 2014, order from the South Carolina Supreme Court entitled, "Revised Order concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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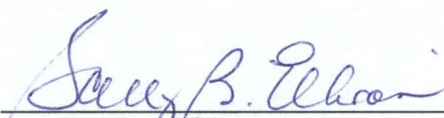
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the within Final Brief of Respondent of Matter on Appellant by depositing two 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 12th day of April, 2019.



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