

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Tanya A. Gee, Circuit Court Judge
Appellate Case No. 2016-001706

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JUN 19 2018

SC Court of Appeals

In the Matter of the Care and Treatment of Charles T. Sullivan,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly questioned the individual potential jurors who replied affirmatively when asked whether they believed pedophiles could not be rehabilitated, in order to determine if they could fairly and impartially follow the court's instructions on the law and base their verdict on the evidence presented at trial, excused those jurors who indicated they could not be fair and impartial, and properly exercised its discretion in qualifying the potential jurors who indicated they could be fair and impartial, two of whom were ultimately seated on the jury.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In 1998, Appellant Charles T. Sullivan pled guilty to multiple charges involving the sexual molestation of multiple minors between 1978 and 1997, and was sentenced to thirty-five years incarceration. Prior to Appellant's release from prison, the State commenced a civil proceeding pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking his commitment for long term control, care and treatment as a sexually violent predator. The case was called for a jury trial on July 25, 2016, before the Honorable Tanya A. Gee, Circuit Court Judge.¹

The court appointed evaluator, Marie E. Gehle, Psy.D., was qualified as an expert in forensic psychology. She testified her evaluation of Appellant included reviewing documents related to his offenses, such as victim statements, incident reports, arrest warrants, court documents, his prison records, and a six hour interview with Appellant. (Trial Transcript [TT], pp. 120-128; R., pp. 120-128).

Dr. Gehle testified Appellant's sex offenses spanned decades, and occurred while Appellant was either a volunteer or an employee in positions giving him access to children. The criminal charges resulted from a lengthy criminal investigation initiated after two minor boys reported Appellant molested them while he was their coach. In addition, after earlier allegations, Appellant moved to England, where he secured a position mentoring young boys. After Appellant was arrested when a boy alleged Appellant molested him, Appellant fled the country

¹The jury *voir dire* and selection are discussed in detail in the "Argument" below.

and returned to South Carolina.² (TT, pp. 128-205, State's/Plaintiff's Exhibits 2, 3, 4, 5, 6 & 7; R., pp. _____).

Based on Appellant's history of sexual preoccupation with children, his acting on his sexual deviance by molesting multiple prepubescent and pubescent children, the results of an actuarial risk assessment tool, Appellant's insufficient sex offender treatment, and her interview with Appellant, Dr. Gehle diagnosed Appellant with pedophilic disorder (non-exclusive type, attracted to male children), other specified paraphilic disorder (non-consent), and narcissistic personality disorder. She testified to a reasonable degree of psychological certainty Appellant's paraphilic and personality disorders cause him significant difficulty in controlling his sexually deviant behavior, predispose him to offend against children, and make him likely to commit acts of sexual violence against children if not confined for treatment. (TT, pp. 205-224; R., pp. 205-224).

Appellant cross-examined Dr. Gehle extensively regarding her evaluation methodology and the protocol she used. He challenged her scoring on the actuarial risk assessment tool, and her consideration, or lack thereof, of certain documentation from the S.C. Department of Corrections regarding Appellant's behavior and the counseling/treatment he received while incarcerated. She testified Appellant's statements during her interview with him indicated any sex offender treatment he may have received was not sufficient to address his sexually deviant urges and conduct regarding children. (TT, pp. 224-259; R., pp. 224-259).

The State then presented testimony from Sylvia Roberts, who was qualified as an expert

²Appellant's truncated version of the testimony is included in the "Argument" portion of his brief, and includes many misstatements and mischaracterizations of Dr. Gehle's testimony, as well as the testimony of Appellant's witnesses, including his own testimony. Rather than attempt to address and correct the multiple inaccuracies in Appellant's brief, which would add significantly to the length of this brief, the State urges the Court to consider the actual transcript for purposes of testimony and context.

in sex offender treatment. She testified she directs the Sex Offender Treatment Program for the Department of Corrections at the Broad River Correctional Facility, and is the only person authorized to do sex offender treatment with the Department of Corrections. She first became aware of Appellant when she was asked about a sex offender treatment program at the correctional facility in Allendale. Upon reviewing the materials used in that program, she learned Appellant had plagiarized the program materials she developed for the program at Broad River, and he was listed as the program facilitator. (TT, pp. 261-268; R., pp. 261-268).

The Department of Corrections ended the Allendale program based on Ms. Roberts' investigation. As a result of the unauthorized program Appellant instituted and facilitated, however, other inmates who had been involved in the Allendale program refused the opportunity to participate in the authorized program at Broad River because "they were already taking sex offense treatment" at Allendale.

Appellant ultimately entered and completed the Broad River program, but "he still did not grasp the concept of cognitive behavior therapy," and he continued "to use defense mechanisms of denial of what had been done or he minimized his role in his crimes." Prior to his completion of the program, Ms. Roberts discussed his need for additional treatment with Appellant, and he told her he did not need any further treatment, and he was "done with us people." (TT, pp. 268-272, 287; R., pp. 268-272, 287).

Appellant testified at length on direct examination, often engaging in extensive narratives. (TT, pp. 383-466; R., pp. 383-466). The State's cross-examination was short and direct regarding Appellant's offenses, and highlighted the fact he had not reoffended since 1998 because he was in prison without access to minor boys. (TT, pp. 469-478; R., pp. 469-478).

The jury found beyond a reasonable doubt 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. (TT, pp. 523-528, Order of Commitment filed July 28, 2016; R., pp. 523-528, 591). This appeal followed.

ARGUMENT

The circuit court properly questioned the individual potential jurors who replied affirmatively when asked whether they believed pedophiles could not be rehabilitated, in order to determine their ability to fairly and impartially follow the court's instructions on the law and base their verdict on the evidence presented at trial, excused jurors who indicated they could not be fair and impartial, and properly exercised its discretion in qualifying the potential jurors who indicated they could be fair and impartial, two of whom were ultimately seated on the jury.

Appellant contends the circuit court erred in failing to dismiss for cause all members of the jury pool who responded affirmatively when asked during *voir dire* if they believed pedophiles could not be rehabilitated. Assuming the *voir dire* question was appropriate, the circuit court properly questioned those jurors individually, and acted within its discretion in finding some of the potential jurors could be fair and impartial in deciding the case based on the court's instructions and the evidence presented at trial.

A. Standard of Review

The trial judge is in the best position to determine the credibility of the jurors, and the appellate court should grant the trial judge broad deference on this issue. Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622, 624 (1986); State v. Johnson, 248 S.C. 153, 149 S.E.2d 348 (1966) (a juror's impartiality is addressed to the discretion of the trial judge); State v. Loftis, 232 S.C. 35, 100 S.E.2d 671 (1957) (the appellate court will not interfere with the discretion of a trial judge in matters involving the jury because the trial judge has the opportunity to consider the credibility of the jurors). Disqualification of a juror is a matter within the sound discretion of the trial court. The Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc., 418 S.C. 142, 791 S.E.2d 152, 161 (Ct. App. 2016), *reh'g denied* (Oct. 21, 2016), *cert. denied* (Nov. 15, 2017). The scope of *voir dire* and the manner in which it is conducted generally are also left to the sound discretion of the trial judge. *Id.* (citing State v.

Smart, 278 S.C. 515, 299 S.E.2d 686 [1982], *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 [1991]); State v. Wise, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004) (same).

The court should disqualify a juror if it appears the juror is not indifferent in the case. Abofreka, 341 S.E.2d at 624. Whether a juror is indifferent in a cause is a question of fact which is not reviewable in the appellate courts unless it appears there is no evidence to support the trial court's conclusion. State v. Fuller, 229 S.C. 439, 93 S.E.2d 463, 467 (1956), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); State v. Spann, 279 S.C. 399, 308 S.E.2d 518, 520 (1983) ("A juror's competence is within the trial judge's sole discretion and is not reviewable on appeal unless wholly unsupported by the evidence.").³

B. Juror Qualification

"[I]n all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury." S.C. Code Ann. § 14-7-1050 (Supp. 2015). "To safeguard this right, prospective jurors must be excused for cause **when** ... the [circuit] court determines that the juror **cannot** be fair and impartial." Burke v. AnMed Health, 393 S.C. 48, 710 S.E.2d 84, 86 (Ct. App. 2011)(emphasis added); *see also* State v. Kelly, 331 S.C. 132, 502 S.E.2d 99, 104 (1998)(same).

In State v. Sellers, 257 S.C. 35, 43, 183 S.E.2d 889 (1971), jurors were asked if they believed a law enforcement officer was more likely to tell the truth because of his position.

³Appellant acknowledges this standard of review, but then attempts to dismiss it by asserting the circuit court's questions of the individual jurors were "boiler plate" and nothing more than a "stark little exercise" that was "inadequate for ferreting out bias," and the jurors' responses were "rote general statements." (Brief of Appellant, pp. 14-15). Appellant's assertions ignore the circuit court's ability to observe the individual jurors' demeanor and assess their credibility as they responded to the court's questions, an advantage the appellate court does not have, but must consider, in reviewing the circuit court's determinations.

Jurors who responded affirmatively also stated they did not believe black people were more likely to falsify under oath because of their race, and indicated they could fairly and impartially try the case. In affirming the jury verdict, the Supreme Court found no abuse of discretion in qualifying the jurors, finding the trial judge properly construed the jurors' answers to mean that while they generally considered the fact a witness was an officer was likely to favorably affect his credibility, they could appropriately weigh the officer's testimony in the light of the particular facts and circumstances, and give the parties a fair and impartial trial. *Id.* at 892-893.

In State v. Powers, 331 S.C. 37, 501 S.E.2d 116, 121–22 (1998), the defendant contended “he should have been permitted to ask prospective jurors their **opinion** of various mitigating circumstances” in a death penalty case. *Id.* at 121 (emphasis in original). In rejecting that contention, the Supreme Court held a defendant is not entitled to ask potential jurors about their opinion of specific mitigating factors, but may challenge for cause any potential juror “who indicates he or she will **automatically** vote for death in every case.” *Id.* at 121-122 (citing State v. David Clayton Hill, 331 S.C. 94, 501 S.E.2d 122 [1998]) (emphasis in original). See also Morgan v. Illinois, 504 U.S. 719, 729 (1992) (the Sixth and Fourteenth Amendments provide a defendant with the constitutional right to a fair and impartial jury of his peers, not the right to handpick a jury); State v. Stanko, 376 S.C. 571, 658 S.E.2d 94, 96–97 (2008) (defendant was not entitled to ask potential jurors about their specific views of the insanity defense, and allowing parties to ask case specific questions during *voir dire* veers close to allowing the parties to stake out a jury); State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254, 255 n. 2 (1993) (*voir dire* is intended to determine whether a juror is so biased or prejudiced he could not apply the law as charged, and is not to be used as a means of pre-educating or indoctrinating a jury or impaneling a jury with particular predispositions).

Just like the defendants in the cases discussed above, Appellant requested the *voir dire* question regarding whether a pedophile could ever be “rehabilitated” in an obvious effort to “stake out” a jury, as demonstrated by his attempt to get all the potential jurors who responded affirmatively excused for cause without further inquiry. (TT, pp. 52-53; R., pp. 52-53). This intent is further demonstrated by his admission on appeal that “[h]e attempted to make his jury as fair as possible by **weeding out** those jurors who believed pedophiles cannot be rehabilitated.” (Brief of Appellant, p. 13) (emphasis added). Therefore, Appellant concedes he tried through *voir dire* to obtain a result that criminal defendants, even those facing the death penalty, are not afforded by constitutional or statutory law.⁴

In spite of Appellant’s rhetoric regarding the plight of pedophiles in society, and reference to a belief that SVP trials are “like shooting fish in a barrel” for the State,⁵ a lay person’s belief regarding whether pedophiles can be “rehabilitated” does not automatically disqualify the person from being fair and impartial when listening to experts and other witnesses regarding whether a particular person is a pedophile, whether pedophiles in general can be “rehabilitated,” whether the particular person needs treatment, and, most important, whether the treatment should be in a secure facility because the person cannot control his pedophilic behavior. As a threshold matter, the term “rehabilitated” is a term of art that is both extraordinarily broad and ambiguous, and may well mean different things to different people.

⁴Nothing in the Constitution or §14–7–1050 gives such a right to parties in a civil action.

⁵In fact, contrary to the stated belief, the State has lost SVP jury trials, even when the respondent did not put up any testimony in opposition to the State’s expert witness testimony the respondent has a mental abnormality that makes him likely to reoffend if not confined for long term control, care and treatment.

Thus, further inquiry into each individual juror's ability to consider the evidence presented in light of the law as charged is required before a juror is disqualified from sitting on the jury.⁶

The circuit court properly conducted such an inquiry in this case, and excused potential jurors who could not set aside any preconceived notions about pedophiles regardless of the evidence presented and the law charged.⁷ Fourteen potential jurors initially responded affirmatively to the question of whether they believed a pedophile could not be rehabilitated. (TT, pp. 41-43; R., pp. 41-43). After individual questioning, the court excused five of those potential jurors because they expressly indicated they could not be fair and impartial. The remaining nine potential jurors indicated they could set any personal beliefs aside and decide the case on the evidence presented and the law as charged by the court. (TT, pp. 53-66; R., pp. 53-66).

Thereafter, in order to have a sufficient jury pool, the court summoned additional potential jurors. Six of those potential jurors answered the "rehabilitation" question

⁶Appellant asserts "that the subject matter of a sexually violent predator case is one where, **as a matter of law**, we know juries struggle being fair." (Brief of Appellant, p. 12) (emphasis added). It must be noted Appellant cannot cite any case law establishing "as a matter of law" that juries in SVP cases struggle to be fair and impartial any more than juries in other types of cases. If the particular subject matter determines a juror's ability to be fair, it is hard to imagine a juror who can be fair in any cases involving disturbing images and evidence, such as a multiple murder case, or any violent crime case. Contrary to Appellant's assertion, our justice system assumes juror impartiality and fairness in the absence of evidence to the contrary.

⁷Appellant contends the court's questions and the jurors' responses were simply about the jurors' "ability to be fair," which minimizes the fundamental goal of the jury system. The ultimate issue is whether a potential juror can set any preconceived beliefs aside, and decide the case before them based on the evidence presented during trial and the law as charged by the court, and the court's questions in this case were aimed at determining if the jurors could focus on the evidence and the law in rendering a verdict, even if they had some preconceived beliefs regarding pedophiles. Appellant's rhetoric aside, SVP cases are no different from other cases where potential jurors may have some preconceived beliefs, such as the belief police officers generally tell the truth, they have to set aside in rendering a verdict.

affirmatively, and the court excused three of those jurors after individual questioning. (TT, pp. 81-86; R., pp. 81-86).

Of the remaining twelve potential jurors (nine from the initial pool and three from the second pool), six were included in the final jury selection pool, and Appellant chose to exercise his four strikes against four of the six potential jurors. (Random Strike Sheet dated 5/27/15; R., pp. 587). While Appellant complains he had to use all his strikes on these jurors, he does not indicate which other jurors he was unable to strike because of the circuit court's rulings. In reality, just like every party to any criminal or civil jury trial, Appellant had to make hard choices in exercising his preemptory strikes.

Significantly, during the court's individual questioning, both of the jurors ultimately seated on the jury indicated, without hesitation or equivocation, they could be fair and impartial, and decide the case on the evidence presented and the law as charged by the court. (TT, pp. 56-61; R., pp. 56-61). In short, of the twelve jurors seated, ten never expressed any belief regarding the "rehabilitation" of pedophiles, and the remaining two indicated they could set aside any preconceived beliefs on the issue and decide the case based on the evidence and the law. All twelve jurors' adherence to that process is amply indicated by the fact the jury asked for a written copy of the jury charge during deliberations, deliberated for over an hour before rendering a verdict, and polling after the verdict revealed the verdict was unanimous. (TT, pp. 522-526; R., pp. 522-526).

Finally, there is overwhelming evidence in the record to support the jury's verdict in this case. Dr. Gehle testified in detail about the process she used in conducting the evaluation, her findings regarding Appellant's offenses and mental status, and the basis for her diagnoses and ultimate opinion regarding whether Appellant met the criteria for commitment as a sexually

violent predator. Ms. Roberts testified about Appellant's manipulative conduct in connection with the unauthorized program he initiated at Allendale, and his attitude regarding his need for treatment. The State's evidence was then amply corroborated by Appellant's own extensive and rambling testimony, starkly demonstrating his manipulative, narcissistic tendencies, and his continuing minimization of his sexually deviant conduct while purportedly taking responsibility for his crimes against multiple children.

When the *voir dire* process in this case is viewed in its entirety, the circuit court made proper inquires to ascertain whether each potential juror, including those jurors who answered the "rehabilitation" question affirmatively, would be able to render a verdict based solely on the evidence presented during trial and the law as charged by the court. The court properly exercised its discretion in determining the potential jurors' ability to do so, and its rulings should be affirmed.

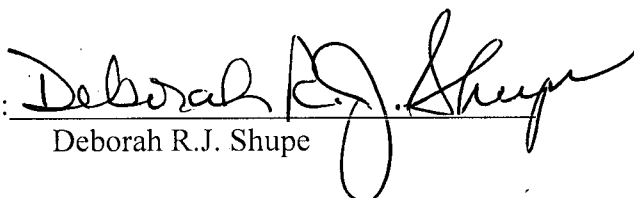
CONCLUSION

Based on the foregoing, the State respectfully submits Appellant's commitment as a sexually violent predator should be affirmed.

Respectfully submitted,

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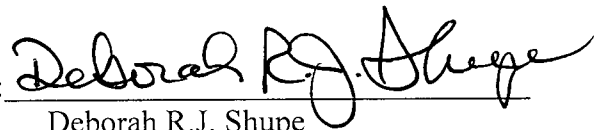
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the April 15, 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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