

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Ferrell Cothran, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF TIMOTHY J. BROWN,

ORIGINAL

APPELLANT.

APPELLATE CASE NO 2019-000821

ANDERS BRIEF OF APPELLANT

RECEIVED
DEC 11 2019
SC Court of Appeals

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial judge err in refusing to grant appellant's directed verdict motion because the State's expert testified appellant had, at most, only a 13.8% chance of reoffending within five years and therefore the State failed to satisfy the likely-to-reoffend element of the statute?

STATEMENT OF THE CASE

The Attorney General instituted commitment proceedings under the sexually violent predator act against appellant and on April 15, 2019, a trial was held in Charleston County before the Honorable R. Ferrell Cothran, Jr., and a jury. R. 1. James G. Bogle represented the Attorney General and James K. Falk represented appellant. R. 1. The jury found appellant met the SVP definition and Judge Cothran ordered him committed. R. 195-96. This appeal follows.

STANDARD OF REVIEW

“A case should be submitted to the jury when the evidence is circumstantial ‘if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.’” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” Id. “Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” Id. at 139, 708 S.E.2d at 776-777. “On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state.” Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court’s denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

ARGUMENT

In this sexually violent predator case, the trial judge erred in refusing to grant appellant's directed verdict motion because the State's expert testified appellant had, at most, only a 13.8% chance of reoffending within five years and therefore the State failed to satisfy the likely-to-reoffend element of the statute.

The expert in this sexually violent predator case, Dr. Marie Gehle, testified as the State's only witness. She admitted appellant did not have pedophilia. R. 79. She claimed appellant suffered from a personality disorder and a mental abnormality. R. 78-81. The alleged personality disorder was antisocial personality disorder ("ASPD"). R. 81. On cross-examination, she admitted that an ASPD diagnosis would not be "terribly uncommon" for the general prison population, not just sex offenders. R. 109-10. She was familiar with the United States Supreme Court's decision in Kansas v. Crane, 534 U.S. 407 (2002), in which the Court noted a study that found that "40% - 60% of the male prison population is diagnosable with antisocial personality disorder." Crane, 534 U.S. at 412, *citing* Moran, The Epidemiology of Antisocial Personality Disorder, 37 *Social Psychiatry & Psychiatric Epidemiology* 231, 234 (1999). Dr. Gehle guessed that the United States Supreme Court's figures "would probably be an over estimate." R. 109.

The mental abnormality Dr. Gehle claimed appellant suffered from was biastophilia. R. 78-80. She defined this paraphilia as "when you are sexually aroused by having coercive, forced sex with a nonconsenting person." R. 79. On cross-examination, Dr. Gehle admitted that "biastophilia" was not listed in the DSM-V. R. 100-04. She said it was included in the "other specified paraphilias" category, even though it was not listed. R. 102-03. She pointed to the phrase, "but not limited to" in the DSM-V as support for her diagnosis. R. 103.

Dr. Gehle used two actuarial instruments to assess appellant's risk to reoffend. R. 83-86. These actuarial tables tracked various characteristics of sex offenders and computed a risk of reoffense within five years. R. 83-86. On one of the instruments, the Static-99R, appellant's risk to reoffend sexually within five years was only 11%. R. 85. On the other instrument, the Static-2002R, appellant's risk was 13.8%. R. 85-86.

On cross-examination, Dr. Gehle admitted that appellant's chances of reoffending based on these tables would decrease because of his age. R. 111-12. Appellant was 57 at the time of trial and his score would decrease once he turned 60. R. 111-12. When asked to put a percentage chance on his risk, Dr. Gehle could not do so. R. 112.

Dr. Gehle also admitted that appellant had received significant treatment for other nonsexual mental illnesses while in prison. R. 97-101. Appellant formerly had substance abuse problems, PTSD, and schizoaffective disorder. R. 97-101. He was given anti-depressants and anti-psychotic medications while in prison. R. 97-101.

Dr. Gehle could not answer how his treatment for these serious conditions could affect appellant's sexual desires and dysfunction. R. 100. However, appellant's brother, a retired soldier who was injured in Desert Storm, testified that he saw a "100 percent change" in appellant after being treated for his mental illnesses. R. 123-24. Appellant testified that his medication made him feel much better and gave him confidence he could "be a productive person in society." R. 137.

Appellant moved for a direct verdict both at the close of the State's case and after the defense case, which was denied. R. 120, 153. The trial judge erred in denying appellant a directed verdict. The State bears the burden of proving a defendant meets each element of the definition of a sexually violent predator beyond a reasonable doubt. S.C. Code Ann. § 44-48-

100(A). “‘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.” S.C. Code Ann. § 44-48-30(9). The statute does not further define “likely.”

The State in this case failed to prove beyond a reasonable doubt that appellant was likely to reoffend sexually unless confined. In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015) (reversing denial of directed verdict on appeal). A directed verdict should be granted if the State’s evidence only raises a suspicion that a defendant will reoffend. See id. at 22, 774 S.E.2d at 465.

The beyond a reasonable doubt standard is more rigorous than the preponderance of the evidence standard. Judges in this state frequently define the preponderance standard by asking juries to imagine the scales of justice, even at the beginning of the case, tipping ever so slightly one way or another. This standard implies a numerical value of 51%. Therefore, the beyond a reasonable doubt standard necessarily must be a percentage greater than 51% if assigned a numerical value.

Here, the numerical value given appellant’s likelihood to reoffend was only 11-13%. An 11-13% value on this important element of the statute could not even satisfy the preponderance standard, much less the beyond a reasonable doubt. Proof beyond a reasonable doubt means jurors must be “firmly convinced” of the proposition and it must eliminate any “real possibility” of the opposite proposition. See State v. McHoney, 344 S.C. 85, 98-99, 544 S.E.2d 30, 36-37 (2001) citing Victor v. Nebraska, 511 U.S. 1 (1994). An 87% chance that appellant would not reoffend is far more than a real possibility. Given appellant’s age, his risk would steeply decline.

Furthermore, the court failed to realize that after the treatment of appellant’s mental illnesses, his likelihood of reoffending was less than the actuarial instruments’ percentages. Dr. Gehle could not offer any opinion about the effect of this treatment. Appellant’s brother and

appellant both testified about the change proper medical treatment made in appellant's personality and behavior. As a matter of law, appellant was entitled to a directed verdict because the State's burden of proof failed on this critical element. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's commitment should be reversed.

A handwritten signature in black ink, appearing to read 'D. Alexander', is written over a horizontal line. The signature is stylized with long, sweeping strokes.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2019.

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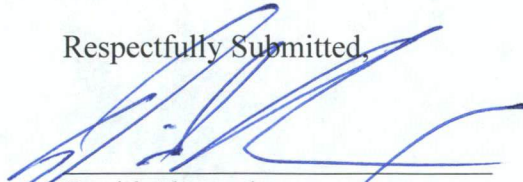
Counsel for Timothy J. Brown states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge R. Ferrell Cothran, which was held on April 15 & 16, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Timothy J. Brown.

This 9th day of December, 2019.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial Transcript dated April 15-16, 2019
- (2) Court's Exhibit Nos. 1 and 2

I certify that this designation contains no matter which is irrelevant to this appeal.

December 9, 2019


David Alexander
Appellate Defender

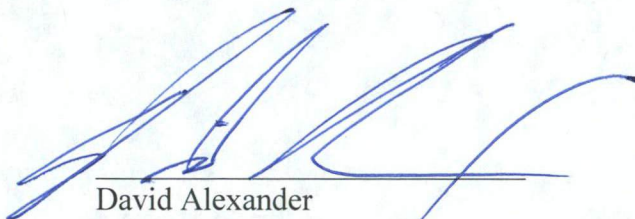
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

December 9, 2019.



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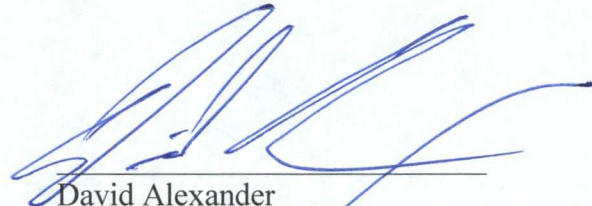
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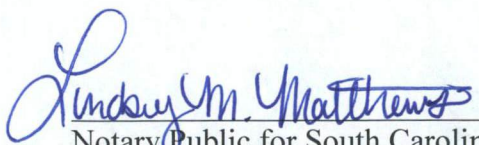
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Timothy J. Brown, at 4546 Broad River Road, Columbia, SC 29210, this 9th day of December, 2019.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of December, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.