

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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May 03 2021

SC Court of Appeals

Appeal From Richland County
The Honorable Doyet A. Earley, III, Circuit Court Judge
Op. No. 5810 (S.C. Ct. App. filed March 17, 2021)
Appellate Case No. 2011-199986

IN THE MATTER OF THE CARE AND TREATMENT OF
RICHARD D. RIDLEY,

Appellant,

RETURN TO PETITION FOR REHEARING

On March 17, 2012, this Court properly affirmed Appellant Richard D. Ridley's continued civil commitment pursuant to the S.C. Sexually Violent Predator Act (SVPA). Appellant filed a Petition for Rehearing on March 29, 2021, asserting this Court overlooked or misapprehended a material factual or legal matter, specifically Appellant's "central argument that the DSM-5 is a peer-reviewed manual for psychiatric diagnosis and that the exclusion of biastophilia from the DSM-5 is a conclusive determination that biastophilia is not recognized as a valid psychiatric diagnosis." This Court requested the State file a return to the Petition for Rehearing. Appellant's assertion is premised on a very narrow reading of the evidence before the circuit court during trial, and completely ignores the pre-trial expert testimony regarding the mental health community's acceptance of biastophilia as a valid specifier for the DSM-5 diagnosis of Other Specified Paraphilic Disorder (formerly Paraphilia Not Otherwise Specified), on which the circuit court based its ruling that the biastophilia testimony was admissible.

During pre-commitment proceedings, the court appointed evaluator diagnosed Appellant with Other Specified Paraphilic Disorder (OSPD)-(Bastophilia) and Antisocial Personality Disorder (ASPD) with Narcissistic Traits. Appellant voluntarily committed to the South Carolina Department of Mental Health (DMH) Sexually Violent Predator Treatment Program on August 25, 2014. In accordance with the SVPA, DMH reviewed Appellant's mental status in 2015, 2016 and 2017, and determined his mental status had not so changed he was safe to be at large. Appellant moved for release against DMH's recommendation, and the matter was called for a jury trial on February 26, 2018, before the Honorable Doyet A. Early, III, Circuit Court Judge.

Prior to trial, Appellant moved to exclude any evidence regarding the OSPD (Bastophilia/Non-Consent) diagnosis on the ground it was not scientifically reliable.¹ The circuit court held a Jones/Council² hearing to determine if the diagnosis was reliable and accepted by the mental health community. (Record on Appeal [R.]. pp. 28-54).

As this Court noted, the parties stipulated to the State expert's (Dr. Gordon Brown) qualifications during the pre-trial hearing. Dr. Brown then testified about the process he used to perform the 2017 review of Appellant's mental status, which included clinical interviews of Appellant and thorough review of Appellant's records, including his criminal records, prior evaluation, and treatment records, and stated the records he reviewed were the type typically and reasonably relied on by other experts in his field. He further testified that after conducting the evaluation, he diagnosed Appellant with OSPD – Bastophilia, and ASPD with Narcissistic Traits. In rendering these diagnoses, Dr. Brown used the Diagnostic and Statistical Manual of Mental

¹Appellant did not challenge the diagnosis of Antisocial Personality Disorder with Narcissistic Traits in the circuit court, and did not challenge it on appeal.

²State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001); State v. Council, 335 S.C. 15, 515 S.E.2d 508 (1999).

Disorders, Fifth Ed. (DSM-5), which is an official, peer reviewed publication of the American Psychiatric Association. 2021 WL 1009318, *2

This Court then thoroughly analyzed relevant portions of the DSM-5 relating to an OSPD diagnosis, which expressly states the list of eight paraphilic disorders set forth in the DSM-5 is not exhaustive, and given the numerous distinct paraphilic disorders identified and named, the diagnosis of OSPD is “indispensable and will be required in many cases.” *Id.* at *3 (*quoting* DSM-5 at p. 685). The DSM-5 also expressly indicates the list of disorders in the DSM-5 that might give rise to an OSPD diagnosis includes, but is “not limited to,” those listed. *Id.*

Dr. Brown testified Biastophilia is indicated when a person is “sexually aroused by the aspect of having nonconsensual sex with someone,” and it is a recognized modifier for personality disorders and mental abnormalities in the mental health field. He acknowledged there is debate in the mental health community regarding the diagnosis’ validity, but he believed it was a valid and reliable diagnosis. Based on Dr. Brown’s testimony, the circuit court found that disagreement within the field did not render the diagnosis scientifically unreliable for purposes of the SVPA. *Id.*

Applying the appropriate deferential standard of review for a trial court’s ruling regarding the admission of expert testimony, this Court held the circuit court did not abuse its discretion in this case. The Court found Dr. Brown’s method of evaluating Appellant included standard practices in the industry, and the circuit court properly found the question of whether OSPD – Biastophilia is a valid diagnosis under the SVPA was a determination within the jury’s province. *Id.* at *4.

Addressing a similar diagnosis in a sexually violent predator case under Wisconsin’s sexually violent predator statute, the Seventh Circuit Court of Appeals found civil commitment

upon a finding of a “mental disorder” did not violate due process even if the predicate diagnosis was not found within the four corners of the DSM-4, and stated:

[T]he factfinder has the ultimate responsibility to assess how probative a particular diagnosis is on the *legal* question of the existence of a “mental disorder”; the status of the diagnosis among mental health professionals is only a step on the way to that ultimate legal determination. The methodology and the outcome of any mental health evaluation offered as evidence is a proper subject for cross-examination, and we would expect that, in the ordinary case, such efforts would expose the strengths and weaknesses of the professional medical opinions offered.

McGee v. Bartow, 593 F.3d 556, 576 (7th Cir. 2010) (emphasis in original). The court also found the DSM-4 expressly provided a “not otherwise specified” (now “Otherwise Specified” in the DSM-5) diagnosis would be appropriate “where a ‘symptom pattern’ is not consistent with a specific DSM classification, but ‘clinically causes significant distress or impairment.’” *Id.* at 577 (quoting the DSM-4).³ See also In re Det. of Melcher, 2 N.E.3d 1181, 1195 (Ill. App. 2013) (paraphilia not otherwise specified – nonconsent diagnosis has been the predicate for numerous probable cause or sexually violent person findings in Illinois and other jurisdictions, and even though there are conflicting professional views regarding its validity, its general acceptance in the field is supported by the “judicial landscape”).

Appellant presented several articles and two New York cases for the proposition that OSPD-Biastophilia is not accepted as a valid diagnosis by the mental health community. (R., pp. 373-485). A close reading of the articles and cases reveals the article authors and courts had underlying problems with sexually violent predator laws and proceedings in general, and went to great lengths to discredit a diagnosis they believed (with no supporting evidence) would be

³As this Court noted in this case, the DSM-5 contains significantly similar language regarding appropriate use of the “otherwise specified” diagnosis category. 2021 WL 1009318 at *3.

misused in such proceedings. Indeed, Dr. Brown testified the diagnosis is rarely used in SVPA cases, and only with appropriate caution.

Other scholarly articles and publications validate the diagnosis. An advisor to the DSM-5 sub-working group of the Sexual and Gender Identity Disorders Work-Group reviewed various research studies, and concluded “[t]here is significant empirical support for the existence of a distinctive coercive paraphilia . . . [which] involves preferential sexual arousal to forcing sex upon a woman in a way that she obviously experiences as coercive.” The author then proposed possible diagnostic criteria for Coercive Paraphilia, including at least a six month period of “recurrent, intense sexually arousing fantasies or sexual urges focused on sexual coercion, as indicated by self-report, laboratory testing, or behavior,” which causes the person distress or impairment, or to seek sexual stimulation from forcing sex on non-consenting persons. Thornton, David, Evidence Regarding the Need for a Diagnostic Category for a Coercive Paraphilia, *Arch Sex Behav* 39:411-418 (2010).

Another advisor to the same sub-working group, who was a lawyer handling sexually violent predator cases in Washington, opined that adding a Paraphilic Coercive Disorder diagnosis in the DSM-5 would represent “an improvement over current options,” particularly in the sexually violent predator context, because it would “most accurately identify the small group of men who have previously committed, and are likely in the future to commit, this type of predatory behavior.” “In the absence of a PCD diagnosis, the ‘distinct paraphilia’ is now being documented as Paraphilia Not Otherwise Specified (rape) or Paraphilia Not Otherwise Specified (non-consent), or some similar terminology.” Stern, Paul, Paraphilic Coercive Disorder in the DSM: The Right Diagnosis for the Right Reasons, *Arch Sex Behav* 39:1443-1447 (2010).

J. Paul Federoff, MD, FRCPC, Director of the Sexual Behaviors Clinic at the Royal and Head of the Division of Forensic Psychiatry in the Department of Psychiatry at the University of Ottawa, is a recognized leading expert in the field of forensic psychiatry, particularly related to sex offenders. He recently authored a book on paraphilias, Chapter 10 of which is entitled “Other Specified Paraphilic Disorders,” and includes a list of over one hundred “Paraphilias Described in the Literature.” Federoff, J. Paul, The Paraphilias, Changing Suits in the Evolution of Sexual Interest Paradigms, 217-278 (Oxford Press 2020). Biatophilia is included in that list, and is defined as “[s]exual arousal from sexually assaulting another person (without consent).” *Id.* at p. 222. *See also* Zinik, Gary and Padilla, Jesus, Rape and Paraphilic Coercive Disorder, *Sexual Offending* 45-66 (A. Phenix, H.M. Hoberman (eds.), Springer Science + Business Media New York 2016) (“there is sufficient theoretical, clinical, and scientific basis for the mental health and criminal field to recognize [paraphilic coercive disorder] as a legitimate diagnostic entity”).

In response to the claim a diagnosis of Other Specified Personality Disorder was insufficient to support civil commitment, the South Carolina Supreme Court held the SVPA “does not define personality disorder, nor limit the State by restricting which personality disorders it may use to satisfy the second element, and “[t]he obvious intent in not defining the term was to leave to medical professionals the task of determining what is—and what is not—a personality disorder.” The Court then found Other Specified Personality Disorder “is a diagnosable personality disorder recognized in the DSM-5.”⁴ Matter of Snow, 425 S.C. 544, 823 S.E.2d 467, 469 (2019). The same analysis applies to OSPD-Biatophilia.

⁴ Other Specified Personality Disorder is listed in the DSM-5 section regarding personality disorders, and is essentially the personality disorder equivalent of Other Specified Paraphilic Disorder. DSM-5 at pp. 684, 705.

Mental health community acceptance of the OSPD-Biastophilia diagnosis is amply demonstrated in this case by the fact the court appointed evaluator diagnosed the same paraphilic disorder in Appellant's 2014 pre-commitment evaluation, which was affirmed by subsequent annual review evaluations in 2015, 2016 and 2017. Further, the diagnosis was presented as a predicate mental abnormality in another reported South Carolina SVPA case, and other courts have recognized it as generally accepted in the mental health community. *See In re Chapman*, 419 S.C. 172, 796 S.E.2d 843, 845 (2017) (court appointed evaluator testified Chapman suffered from biastophilia, anti-social personality disorder, and substance abuse disorder); *In re Commitment of Adams*, ___ N.W.3d ___, 2021WL 2021 WL 1187346 at *9 (Ill. App. 2021) (case law supports the conclusion that OSPD (nonconsent), formerly labeled PNOS, is generally accepted in the psychological and psychiatric communities).

The mere existence of disagreement, even vehement disagreement, among professionals in the mental health community regarding the OSPD-Biastophilia diagnosis' validity does not mandate excluding expert testimony about it. Rather, as the circuit court and this Court found, the diagnosis' validity for SVPA civil commitment purposes was subject to cross-examination and opposing expert testimony (if offered), and ultimately, was a matter for the jury's determination. This Court properly considered the record before the circuit court, analyzed relevant authority, particularly the DSM-5, and affirmed the circuit court's ruling that the OSPD-Biastophilia diagnosis was sufficiently reliable to allow expert testimony regarding Appellant's diagnosis.

CONCLUSION

Based on the foregoing, and the arguments set forth in the Final Brief of Respondent, the State respectfully submits the Petition for Rehearing should be denied in its entirety.

Respectfully submitted,

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May 3, 2021

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IN THE MATTER OF THE CARE AND TREATMENT OF
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PROOF OF SERVICE

I, Salley B. Ellison, certify I served the Return to Petition for Rehearing on Appellant by email and by depositing a copy in the United States mail, postage prepaid, addressed to:

Arthur K. Aiken
Aiken & Hightower, PA
PO Box 90707
Columbia, SC 29290

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

This 3rd day of May, 2021.



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Sally Ellison

From: Sally Ellison
Sent: Monday, May 3, 2021 11:36 AM
To: art@aikenandhightower.com
Cc: Deborah Shupe; Sally Ellison; Victim Services
Subject: In the Matter of the Care and Treatment of Richard D. Ridley Appellate Case No. 2011-199986
Attachments: Ridley Richard Letter Serviing Petition for Rehearing (02528385xD2C78).pdf; RIDLEY Richard In the Matter of. Appellant's Petition for Rehearing Case No. 2018-000527 (02528351xD2C78).pdf

Good Morning:

Attached for service this date is the Return to the Petition for Rehearing in the above appeal. This Petition will be filed today with the Court of Appeals through AIS One Drive. A hard copy of the Return will also be served on you as indicated in the Proof of Service.

Please acknowledge receipt of this email.

Thank you.

Sally Ellison
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