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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JAMES RONNIE NICHOLS, JR.,

APPELLANT.

APPELLATE CASE NO 2020-001538

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying appellant's directed verdict motion because the leading actuarial instrument used in sexually violent predator cases only predicted a 2.8% recidivism rate?

STATEMENT OF THE CASE

The State sought appellant's commitment as a sexually violent predator and on November 9, 2020, appellant was tried in Lexington County before the Honorable Walton J. McLeod and a jury. R. 1. James Bogle represented the State and Aimee Zmroczek represented appellant. R. 1. The jury found appellant was a sexually violent predator and Judge McLeod ordered him committed. R. 188, l. 2 – 192, l. 23. 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

The trial court erred in denying appellant's directed verdict motion because the leading actuarial instrument used in sexually violent predator cases only predicted a 2.8% recidivism rate.

The State's only witness was an expert from Florida, Dr. Amy Swan. R. 127, l. 16 – 129, l. 21. She was paid $4,000.00 for her testimony. R. 178, l. 20 – 25. She no longer treated sex offenders and only performed evaluations in Florida, Missouri, and South Carolina. R. 178, l. 12 – 19. She admitted she had "made an excellent living doing this work." R. 178, l. 8 – 11. She denied that she had recommended commitment in every SVP case she worked on in South Carolina. R. 179, l. 10 – 12. She guessed she had not recommended commitment in eight cases, but could not remember the names of the defendants in any of those cases. R. 179, l. 13 – 17.

Appellant's predicate convictions were for molesting his three children. R. 137, l. 7 – 141, l. 1. In his interview with Dr. Swan, he admitted abusing his children, but did not admit every single accusation. R. 143, l. 15 – 145, l. 3. Dr. Swan criticized him for denying "half of the acts that the children reported." R. 208, l. 12 – 14. She agreed that some indictments against appellant were dismissed, but refused to concede that some of the abuse appellant denied could have been alleged in those indictments. R. 208, l. 15 – 209, l. 3. Appellant called the solicitor who prosecuted these cases and she testified that she dismissed some of the indictments because she felt she could not ethically present them as a guilty plea and could not prove them. R. 241, l. 4 – 11.

On direct-examination, Dr. Swan denigrated appellant for replying to a question about whether he needed sex offender treatment by stating he had only abused his own children. R. 155, l. 11 – 19. She stated. ". . . as if that was somehow less than offending against someone

who was a stranger." R. 155, l. 11 – 19. But on cross-examination, Dr. Swan admitted that the recidivism risk for defendants who abuse their own children "is typically lower than, for example, snatching a child off the street who's a stranger." R. 169, l. 5 – 15.

Dr. Swan diagnosed appellant with pedophilia and hebephilia. R. 157, l. 2 – 17. She explained that "hebephilia" is an attraction to "children who have just entered puberty." R. 157, l. 2 – 17. On cross-examination, she admitted that "pedo-hebephilic disorder was rejected" by the DSM-5. R. 182, l. 1 – 3.

Dr. Swan assessed appellant on the Static-99, an actuarial instrument used to predict the recidivism rate of sex offenders. R. 165, l. 15 – 169, l. 4. The range of scores on the Static-99 is -3 to 12. R. 165, l. 15 – 169, l. 4. Appellant scored a zero. R. 165, l. 15 – 169, l. 4. This placed him "in the low risk range." R. 165, l. 15 – 169, l. 4. Dr. Swan told the jury that the Static-99 underestimated appellant's recidivism risk. R. 165, l. 15 – 169, l. 4.

Seventy-six percent (76%) of sex offenders scored higher than appellant on the Static-99. R. 185, l. 20 – 25. Appellant's score of zero equated to a 2.8% chance of reoffending within five years. R. 186, l. 7 – 14. Dr. Swan said that percentage came with the qualification that the developers of the Static-99 instruct that the absolute recidivism rate should not be used "because they are unstable" and the risk relative to other sex offenders should be used. R. 186, l. 11 – 23.

Appellant attended sex offender therapy with an expert called by the State in a pre-trial hearing, but Dr. Swan dismissed this treatment as insufficient. R. 195, l. 4 – 196, 19. She opined that appellant's two session where the doctor reported appellant did will meant "absolutely nothing." R. 196, l. 7 – 19. The last time Dr. Swan treated a sex offender was fifteen years before her testimony. R. 196, l. 20 – 24. Appellant testified that he looked into continuing treatment with his doctor if he were to be released. R. 224, l. 1 – 3.

Appellant testified that he was a different person than the man who abused his children because he "accepted the Lord Jesus Christ into my life." R. 224, l. 21 – 225, l. 4. Appellant's son, one of his victims, testified for appellant and attested to the truth of appellant's relationship with God. R. 234, l. 2 – 7. Dr. Swan admitted on cross that "having a religious conversion lowers your risk." R. 169, l. 16 – 23.

Appellant's son testified that his children—his victims—would "like to see him out." R. 234, l. 11 – 18. They wanted him to have a chance at outpatient treatment. R. 234, l. 11 – 18. Appellant had a plan for his release. R. 225, l. 20 – 226, l. 25. He planned to live with his father and work as a landscaper. R. 225, l. 20 – 226, l. 25. He explained he was subject to lifetime GPS monitoring and reporting to the sheriff's office every three months. R. 225, l. 20 – 226, l. 25.

Appellant moved for a directed verdict at the close of the State's case and again after presenting his defense. R. 110, l. 11 – 112, l. 3. R. 248, l. 7 – 15. As part of her motion, defense counsel cited the low recidivism risk given by the Static-99. R. 110, l. 11 – 112, l. 3. Judge McLeod denied appellant's motions. R. 110, l. 11 – 112, l. 3. R. 248, l. 7 – 15.

The trial court erred in denying appellant's directed verdict motion. 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 2.8%. A 2.8% 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). A 97.2% chance that appellant would not reoffend is far more than a real possibility. 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.

s/David Alexander
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Ronnie Nichols 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 Walton J. McLeod, IV, which was held on November 10 and 12, 2020, 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 James Ronnie Nichols.

Respectfully Submitted,

s/David Alexander
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) Transcript dated November 9, 2020
(2) Transcript dated November 10 & 12, 2020

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

s/David Alexander
David Alexander
Appellate Defender

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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."

s/David Alexander
David Alexander
Appellate Defender

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ATTORNEY FOR APPELLANT

This 11th day of August, 2021.