IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 091119

STEVEN LAWRENCE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLEE

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Comes now the Appellee, the Commonwealth of Virginia (hereinafter the "Commonwealth"), the Petitioner below, and files this Brief of Appellee in response to the Brief of Appellant filed by the Appellant/Respondent below, Steven Lawrence (hereinafter "Lawrence"). The Commonwealth respectfully requests that this honorable Court dismiss Lawrence's Appeal and affirm the judgment of the Fairfax County Circuit Court (hereinafter the "Trial Court").

STATEMENT OF THE CASE

The Commonwealth initiated this case under the Civil Commitment of Sexually Violent Predators Act, Code of Virginia §37.2-900 et seq. (1950), as amended (hereinafter, the "SVPA"). A jury determined that Lawrence is a sexually violent predator (hereinafter, "SVP") on December 2, 2008 and the Honorable Randy I. Bellows decided to civilly commit Lawrence on January 27, 2009, pursuant to Virginia Code Section 37.2-908. The issues raised by Lawrence arise from the jury trial on December 2, 2008.

STATEMENT OF THE FACTS

At the jury trial on December 2, 2008, the Commonwealth presented evidence from two (2) expert witnesses and introduced six (6) exhibits. The evidence at trial showed that Lawrence had the following charges

and/or convictions: 1975 rape charge, 1980 rape conviction, 1986 possession of sawed off shotgun charge, 1987 consorting with a prostitute charge, 1988 pandering charge, and 1989 rape, sodomy and robbery convictions. Appx. 119-128, 283-290 Both of the Commonwealth's expert witnesses opined that Lawrence had a sexually deviant interest in non-consensual sex and both experts concluded that Lawrence was a high to very high risk to re-offend sexually. Appx. 138-139, 159, 222, 230

Lawrence objected to, and this appeal centers on, Dr. Gravers' reliance on and testimony from police reports regarding four (4) criminal charges that did not result in a conviction: the 1975 rape charge, the 1986 possession of sawed off shotgun charge, the consorting with a prostitute charge, and the 1988 pandering charge. Appx. 78-115 Lawrence argued that Dr. Gravers could not rely on the police reports or testify from them because they involved unadjudicated conduct and they were hearsay. *Id.* The Trial Court and counsel for the parties debated the matter extensively. *Id.* The Trial Court ruled that the police reports were not hearsay because they were not offered for the truth and allowed Dr. Gravers' to testify to the information contained in the reports. Appx. 112, 116 In addition, the Trial Court gave the jury a cautionary instruction that "testimony regarding allegations of behavior contained in police reports for which the respondent

has not been convicted was not offered to prove that the behavior actually occurred, but only the basis for the expert's opinion." Appx. 113, 117

STANDARD OF REVIEW

Because this appeal involves a review of the Trial Court's evidentiary ruling regarding Dr. Gravers' testimony, the Court must determine if the Trial Court abused its discretion. *Commonwealth v. Allen*, 269 Va. 262, 274, 609 S.E.2d 4 (2005). However, for the issue of whether the police reports were hearsay, the standard of review stated in the *Wynn* case is applicable. *Commonwealth v. Wynn*, 277 Va. 92, 671 S.E.2d 137 (2009) (A "trial court has no discretion to admit clearly inadmissible evidence because "admissibility of evidence depends not upon the discretion of the court but upon sound legal principles."" Citing, *Norfolk & Western Ry. Co. v. Puryear*, 250 Va. 559, 563, 463 S.E.2d 442, 444 (1995))

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. *Wynn* distinguished

Lawrence is relying exclusively on the Court's decision in *Commonwealth v. Wynn*, 277 Va. 92, 671 S.E.2d 137 (2009) to support his argument; however, the *Wynn* case is factually different from this case. The *Wynn* Court did not state that unadjudicated allegations or charges are

automatically inadmissible; the *Wynn* Court seemed to rely on the trial court's decision that the information was hearsay and conclude that an expert cannot testify to hearsay. *Wynn*, 277 Va. at 98-99. The Trial Court in this matter carefully weighed and analyzed the evidence that was challenged and the purpose of the introduction of the evidence. Appx. 78-115 The Trial Court's decision in this case was based on sound legal principles and careful analysis and it should be upheld.

Another important factual distinction between this case and *Wynn* is that the Trial Court in this case issued a cautionary instruction to the jury. Appx. 113, 117 The Trial Court instructed the jury that the information gleaned from police reports in offenses for which there was no conviction was only offered as support for the expert's opinion and does not mean the allegations in the report are true. *Id*. The jurors were told not to give the information more weight than the purpose for which it was offered.

II. Harmless Error

The *Wynn* case was decided after this SVP trial. Even if, under *Wynn*, the challenged testimony was hearsay, its admission into evidence through Dr. Gravers was a harmless error considering the mountain of information that was admitted from other sources and was unchallenged. *Adams v. Commonwealth*, 275 Va. 260, 277-278, 657 S.E.2d 87 (2008).

Based on their extensive experience and training, Dr. Ilona Gravers and Dr. Ronald Boggio were both accepted as psychological experts in the diagnosis, treatment and risk assessment of sex offenders. Appx. 69, 219 Both experts diagnosed Lawrence with paraphilia not otherwise specified, a sexually deviant interest in non-consensual sex, and both experts found that Lawrence had antisocial traits. Appx. 138-141, 222-223 Both experts concluded that Lawrence was a high to very high risk to commit future sexual offenses. Appx. 159, 230

Even without the information from the police reports, the jury learned that Lawrence had a history or pattern of sexually aggressive behavior. Appx. 137, 222. He made and endorsed statements demonstrating his rape behavior and thought processes, his aggression towards and manipulation of women, and his abuse of relationships. Appx. 118, 201-203, 213, 265

Lawrence was convicted of rape in 1980. Appx. 124-126, 221-222 For this offense, Lawrence gave an adult woman, who was a stranger to him, a ride in his vehicle. Appx. 124-125 He drove her to a particular location, threatened her, overpowered her, and raped her. *Id.* When someone or something frightened him, Lawrence threw the victim from the car into a ditch. Appx. 125 In his interview with Dr. Gravers, Lawrence

admitted that he planned to force the victim to have sex with him. Appx. 126

Lawrence was also convicted of rape, sodomy and robbery in 1990. Appx. 126-127, 221-222 In this offense, Lawrence grabbed an adult woman, who was a stranger to him, in a restaurant parking lot. Appx. 135 Lawrence and his co-defendant dragged the victim to the wooded area behind some retail stores. *Id.* Lawrence's co-defendant threatened to kill and beat the victim and, when she tried to scream, the co-defendant forced sexual intercourse with the victim. Appx. 135-136. While the co-defendant raped the victim, Lawrence stole the victim's jewelry. Appx. 136. After the co-defendant finished raping the victim, Lawrence raped her and told her to do whatever the co-defendant told her to do. *Id.* In his interview with Dr. Gravers, Lawrence admitted that he forced the victim to have sex. Appx. 137

Both experts agreed that Lawrence was a high to very high risk to re-offend sexually. Appx. 159-230 Both experts agreed that Lawrence exhibits the two (2) most significant risk factors for sex offenders, sexual deviance and antisocial behavior. Appx. 142-143, 229 Dr. Gravers opined that Lawrence also had nine (9) dynamic risk factors elevating his risk to re-offend sexually: intimacy deficits, a high degree of psychopathy, sexual

deviance, problems with self-regulation, substance abuse problems, problems with sexual self-regulation, problems regulating his anger, cognitive distortions supportive of sexual offending, and a prior probation violation. Appx. 150-158. With all of this information in evidence, the information Lawrence has objected to could only have had a minimal impact, if any, on the jury's decision.

In addition, much of the information from the police reports Lawrence objected to was established through other means at the trial and, therefore, it was harmless error to admit it through Dr. Gravers. *Teleguz v. Commonwealth*, 273 Va. 458, 481, 643 S.E.2d 708 (2007).

With respect to the 1986 consorting with prostitutes charge, Lawrence admitted to Dr. Gravers that he paid prostitutes and admitted to Dr. Boggio that he had been involved in providing prostitution with the assistance of a former girlfriend. Appx. 120, 222 The only remaining detail was that Lawrence burned the prostitute with cigarettes for not producing enough money. Appx. 78, 119 With respect to the possession of a sawed off shotgun charge, Lawrence told Dr. Gravers that he had an argument with his girlfriend, the police came and he had a shotgun. Appx. 121 The only remaining detail in this case was that he threatened her with the shotgun when she refused to have sex with him. Appx. 119 With respect

to the 1975 rape charge, Lawrence admitted to some of the facts from the police report. Appx. 123 In addition, Dr. Boggio testified, without objection, that he considered Lawrence's charges and convictions to be "sexual in nature", including the charges and convictions for rape in 1980, rape and sodomy in 1989, rape in 1975, an offense in 1986, consorting with a prostitute in 1987, and pandering in 1988. Appx. 221-222

There was an abundance of information supporting the opinions of Drs. Gravers and Boggio, even without the police reports, and much of the information was admitted without objection through other means; therefore, Dr. Gravers' testimony was harmless error, if any at all.

III. Dr. Gravers' opinion testimony

Lawrence seeks to exclude Dr. Gravers' entire testimony and all of her opinions given at trial solely because she considered the information from police reports on four (4) charges with no conviction as a part of the basis for her opinions in this case. However, the *Garrett* case does not support Lawrence's argument to exclude Dr. Gravers' testimony. *Garrett v. Commonwealth*, 276 Va. 590, 667 S.E.2d 739 (2008)

The underlying challenged criminal behavior in this case is significantly different from the challenged criminal behavior in the *Garrett* case. In the *Garrett* case, there were three (3) petitions for carnal

knowledge against the respondent that had been dismissed and there was no additional information as to why they were dismissed. *Garrett*, 276 Va. at 607. When the expert saw that the respondent had been placed in an aftercare program, she erroneously thought he was punished for the carnal knowledge allegations and essentially treated them as convictions. *Id.* at 594, 607. Unlike the *Garrett* case, there was no evidence in this case that Dr. Gravers made a factual error, that she was speculating beyond the information she had, or that the information she considered was unreliable.

Experts can consider or base their opinions on allegations or charges in forming their opinions in sexually violent predator cases. *Commonwealth v. Wynn*, 277 Va. 92, 99-100, 671 S.E.2d 137 (2009). In addition, Virginia Code Section 8.01-401.1 clearly states that experts can rely upon facts and circumstances even if they may be otherwise inadmissible in evidence.

The manner in which the experts in this case and the *Garrett* case relied on the challenged criminal behavior is also significantly different. The *Garrett* expert testified that the three (3) petitions were a significant factor in her opinion that the respondent was a sexually violent predator, and the Court determined that without the petitions she could not have reached her diagnosis. *Garrett v. Commonwealth*, 276 Va. 590, 607, 667 S.E.2d 739 (2008). The expert made a factual assumption that was not

true and that factual error served as the decisive factor in her opinion that Garrett had a "mental abnormality." *Garrett*, 276 Va. at 606-608. It was determined that her opinion was speculative and unreliable and was not based on an adequate factual foundation. *Id.*

In this case, Dr. Gravers considered the police reports from four (4) charges that did not result in a conviction as a part of her opinion, but she never stated that it was a decisive factor or even significant part of her conclusions. In fact, she repeatedly stated on cross-examination that without the police reports, her opinions regarding diagnosis and risk assessment would remain the same. Appx. 164-166, 170 The information from the police reports had limited use in this case. The information from the police reports related to Dr. Gravers personality disorder diagnosis, but they were not a substantial part of her opinion. Appx. 168-170 The police report regarding the 1975 rape charge only related to the scoring of the actuarial instruments. Appx. 166 The reports on the charges for prostitution, pandering, and possession of a sawed off shotgun only related to one of the nine (9) dynamic risk factors identified by Dr. Gravers, intimacy deficits, and they were not even the sole basis for her conclusion that Lawrence had intimacy deficits. Appx. 165, 167, 207

Dr. Gravers had an abundance of additional information on which she relied to reach her conclusions. Dr. Gravers explained that based on the two (2) convictions for rape, Lawrence was a "power rapist." Appx. 138 Dr. Gravers determined that Lawrence was a high risk to re-offend on the actuarial instruments and found many dynamic risk factors elevating Lawrence's risk to re-offend sexually. Appx. 149-159 Even without the police reports from the four (4) charges that did not result in a conviction, Dr. Gravers had a strong factual foundation for her opinions.

The remedy sought by Lawrence is not appropriate. Even the *Garrett* Court did not exclude the expert's testimony in its entirety; the expert was prohibited from relying on the underlying criminal information and the case was remanded to the circuit court to see if the expert's ultimate opinions in the case would be affected with the limits on what she could consider. *Garrett v. Commonwealth*, 276 Va. 590, 608, 667 S.E.2d 739 (2008). Dr. Gravers' testimony and her opinions should not be stricken and, it is clear that if the Court were to remand the case, Dr. Gravers would have reached the same well-supported conclusions.

CONCLUSION

For the reasons stated herein, the Commonwealth requests that the Court dismiss Lawrence's Appeal and affirm the judgment of the Trial Court.

RESPECTFULLY SUBMITTED,
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CERTIFICATE

I hereby certify that in compliance with Rules of Supreme Court of Virginia 5:26(d), I have:

1. Filed 12 true and accurate copies of the Brief of Appellee with the Supreme Court of Virginia;
2. Mailed three (3) true and accurate copies of the Brief of Appellee via first class mail, postage prepaid, to counsel for the Appellant; and
3. Filed an electronic copy by electronic mail to scvbriefs@courts.state.va.us.

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November 3, 2009