VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 24th *day of* October, 2014.

Lamont Antonio Turner, Appellant,

against Record No. 131414
Circuit Court No. CL12-136

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Powhatan County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that any error in the judgment of the circuit court was harmless.

A jury in the Circuit Court of Powhatan County found that Lamont Antonio Turner is a sexually violent predator. See Code §§ 37.2-900 and -908(C). Concluding that Turner does not qualify for conditional release and that no suitable less restrictive alternative to involuntary secure inpatient treatment exists, the circuit court committed Turner to the custody of the Department of Behavioral Health and Developmental Services for appropriate inpatient treatment in a secure facility. See Code § 37.2-908(D).

On appeal, Turner asserts that the circuit court erred in admitting hearsay testimony concerning his criminal history and convictions, juvenile treatment records, and mental health

diagnoses.[1] Relying on a presentence report and transfer hearing report, both prepared in 1993, a probation officer testified, inter alia, about Turner's juvenile treatment history and stated that the records showed that Turner had never successfully completed any sex offender treatment. A licensed clinical psychologist testified that Turner's records contained a prior diagnosis of conduct disorder.

The Commonwealth agrees that the probation officer's testimony was hearsay but argues that it was, however, admissible as a business record pursuant to Virginia Rule of Evidence 2:803(6).[2] The Commonwealth further agrees that the psychologist's testimony was hearsay but contends that any error in admitting his testimony was harmless. Assuming the admission of this challenged testimony from the probation officer and the psychologist was inadmissible hearsay, any error was nevertheless harmless.

---

[1] Turner waived his argument that the circuit court erred in admitting testimony about his prior criminal history and convictions. After the Commonwealth's witnesses testified regarding these matters, Turner offered the same evidence in his own defense. See Pettus v. Gottfried, 269 Va. 69, 79, 606 S.E.2d 819, 825 (2005) ("[W]hen a party unsuccessfully objects to evidence that he considers improper but introduces on his own behalf evidence of the same character, he waives his objection to the other party's use of that evidence."). With respect to his institutional infractions, Turner did not assign error to the circuit court's ruling allowing the documentary record of those infractions to be admitted into evidence. See Rule 5:17(c). Turner also admitted that he had received more than 200 infractions while incarcerated. Thus, the Court does not address whether the circuit court erred in admitting testimony about Turner's criminal history and the record of his institutional infractions.

[2] Alternatively, the Commonwealth argues on appeal that the probation officer's testimony was admissible as a public record under Virginia Rule of Evidence 2:803(8).

"Harmless error requires a showing that the parties 'had a fair trial on the merits and substantial justice has been reached.'" Lawrence v. Commonwealth, 279 Va. 490, 497, 689 S.E.2d 748, 752 (2010)(quoting Code § 8.01-678). A "nonconstitutional error is harmless if the reviewing court can be sure that the error did not influence the jury and only had a slight effect." Id. "'But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected'" and the verdict "'cannot stand.'" Clay v. Commonwealth, 262 Va. 253, 260, 546 S.E.2d 728, 731-32 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 764-65 (1946)).

As relevant to the issues in this appeal, the Commonwealth had to prove by clear and convincing evidence, see Code § 37.2-908(C), that Turner, "because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts." Code § 37.2-900. Turner's own testimony, along with the psychologist's testimony regarding his interview with Turner and the record of Turner's institutional infractions, established Turner's history of violent, sexual conduct. Further, the psychologist diagnosed Turner with "exhibitionism" and "antisocial personality disorder." The psychologist explained that there are seven criteria or symptoms for making an antisocial personality disorder diagnosis, only three of which must manifest in the patient as a juvenile and continue into adulthood. The psychologist opined that Turner manifested at least five, but "more likely six," of the seven

criteria, both as a juvenile and as an adult. Without objection, the psychologist then discussed each diagnostic criterion and how Turner met it.

Based on these findings, the psychologist concluded that Turner has a high risk for continuing to commit sexually violent acts, that his antisocial personality disorder makes it difficult for Turner to control his behavior, and that Turner meets the criteria for a sexually violent predator. Given this unchallenged testimony, the Court concludes that any error in admitting the hearsay testimony "did not influence the jury" and was therefore harmless. Lawrence, 279 Va. at 497, 689 S.E.2d at 752.

For these reasons, the Court affirms the circuit court's judgment. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

JUSTICE GOODWYN, dissenting.

I respectfully dissent because I disagree with the majority's conclusion that the error was harmless.

A portion of the hearsay evidence elicited from the probation officer and the psychologist, regarding treatment received by Turner and purported facts concerning offenses and acts perpetrated by Turner, was not corroborated by Turner's testimony or statements. Further, the psychologist was improperly allowed to testify on direct examination as to the diagnosis of another expert not present at trial.

As stated by the majority, "nonconstitutional error is harmless if the reviewing court can be sure that the error did not influence the jury and only had a slight effect." Lawrence v. Commonwealth, 279 Va. 490, 497, 689 S.E.2d 748, 752 (2010) (citing Clay v. Commonwealth, 262 Va. 253, 260, 546 S.E.2d 728, 731-32 (2001)). "'But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected'" and the verdict "'cannot stand.'" Clay, 262 Va. at 260, 546 S.E.2d at 731-32 (quoting Kotteakos v. United States, 328 U.S. 750, 764-65 (1946)). I do not believe it is possible to be sure that the error in this case did not influence the jury. Therefore, I disagree with the majority's conclusion that the error was harmless.

A Copy,

Teste:

Clerk