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Nov 10 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF SHAWN TORLIF DAILY,

APPELLANT

APPELLATE CASE NO. 2022-000371

INITIAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator (SVP) case, did the trial judge abuse his discretion by admitting evidence through the state's expert witness concerning Appellant's results from the penile plethysmograph (PPG) test he underwent as part of his precommitment evaluation since the evidence was unreliable in violation of Rule 702, SCRE, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE?

STATEMENT OF THE CASE

On September 10, 2019, the Attorney General filed a petition seeking to involuntarily commit Appellant pursuant to the Sexually Violent Predator Act (SVPA). R. * (Petition). The trial commenced on March 14, 2022 before the Honorable R. Keith Kelly, and a jury. Tr. 1-2. Assistant Attorneys General Christopher Runyan and Suzanne Shaw represented the state. Tr. 2. Don Thompson represented Appellant. Tr. 2.

On March 16, 2022, the jury found Appellant was a sexually violent predator pursuant to the SVPA. Tr. 410, ll. 11-23. Judge Kelly ordered Appellant be committed to the Department of Mental Health for long term control, care, and treatment. R. * (Order of Commitment).

This appeal follows.

STATEMENT OF FACTS

Appellant pled guilty in 2010 to three counts of lewd act upon a child and assault and battery of a high and aggravated nature (ABHAN). Tr. 187, l. 21 – 188, l. 22. He was sentenced to fifteen years suspended upon the service of ten years' imprisonment and five years' probation for each count of lewd act and ten years imprisonment for ABHAN. Tr. 192, l. 19 – 193, l. 1; Tr. 198, ll. 15-20; Tr. 203, ll. 10-16; Tr. 207, ll. 2-8. All sentences were ordered to be served concurrently. The alleged offenses each involved a different female minor child, the daughters of Appellant's various girlfriends and friends, and occurred between 1993 and 2008. Tr. 188, ll. 4-9; Tr. 192, l. 1 – 210, l. 6.

Before Appellant's anticipated release from the Department of Corrections in February 2020, the state filed a petition pursuant to the Sexually Violent Predator Act (SVPA) seeking to involuntarily commit Appellant for long term control, care, and treatment. R. * (Petition). Dr. Christopher Gillen, a psychologist with the Department of Mental Health, was court appointed to evaluate Appellant. Tr. 303, ll. 14-16; Tr. 306, ll. 16-18. Dr. Gillen opined that Appellant did not meet the criteria to be committed as a sexually violent predator. Tr. 323, l. 23 – 324, l. 3. While he found Appellant had been convicted of sexually violent offenses and suffered from a mental abnormality, specifically pedophilic disorder, Dr. Gillen opined Appellant was not likely to engage in acts of sexual violence, as defined under the SVPA, if not confined. Tr. 310, l. 2 – 311, l. 10; Tr. 323, l. 3 – 324, l. 3; Tr. 342, l. 19 – 344, l. 5. He determined Appellant's risk of reoffending was the same as the average sex offender. Tr. 323, l. 23 – 324, l. 3.

The state sought a second opinion from the Sexual Behaviors Clinic and Lab of the Medical University of South Carolina (MUSC). Dr. Emily Gottfried, the director of the lab, evaluated Appellant and opined Appellant met the criteria to be committed as a sexually violent

predator. Tr. 174, ll. 2-6; Tr. 265, ll. 1-11. Like Dr. Gillen, Dr. Gottfried found Appellant had been convicted of sexually violent offenses and suffered from a mental abnormality, also pedophilic disorder. Tr. 187, l. 21 – 188, l. 3; Tr. 239, l. 24 – 240, l. 7. However, it was her opinion that because of Appellant’s disorder, “he is at a high risk to reoffend.” Tr. 260, ll. 7-25; Tr. 264, l. 16 – 267, l. 11.

As a part of her precommitment evaluation, Dr. Gottfried performed a penile plethysmograph (PPG) on Appellant.¹ Tr. 226, ll. 2-8. Appellant moved pretrial to suppress any evidence that he underwent a PPG examination and the results and conclusions derived therefrom. R. * (Motion to Suppress Testimony Related to PPG Testing and Results). In a written motion, he argued the evidence does not meet the requirements of admissibility of scientific evidence pursuant to Rule 702, SCRE, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). R. * (Motion to Suppress Testimony Related to PPG Testing and Results). Specifically, Appellant asserted the evidence was unreliable. R. * (Motion to Suppress Testimony Related to PPG Testing and Results). Quoting this Court’s opinion in Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), Appellant stated that “courts have ‘uniformly’ declared that PPG test results are ‘inadmissible as evidence because there are no accepted standards for this test in the scientific community.’” R. * (Motion to Suppress Testimony Related to PPG Testing and Results) (internal citation omitted).

¹ On March 9, 2020, Dr. Gottfried attempted to administer a PPG examination on Appellant as part of her evaluation. However, Appellant refused to consent to the test. On May 1, 2020, the state filed a motion to compel Appellant’s cooperation with the evaluation. The parties submitted briefs in September 2020 in lieu of a hearing. By order filed April 26, 2021, the Honorable J. Derham Cole ordered Appellant to cooperate with Dr. Gottfried’s evaluation, including the PPG test. R. * (State’s Memorandum in Opposition to Motion to Suppress Testimony Related to PPG Testing and Results). Appellant ultimately took the PPG in May 2021. Tr. 50, l. 19 – 51, l. 1.

Appellant argued there is a lack of standardization of stimulus sets used by various testing sites and in the interpretation of results. R. * (Motion to Suppress Testimony Related to PPG Testing and Results) (internal citation omitted). He further asserted that the Real Child Voices stimulus set lacks adequate publication and peer review. R. * (Motion to Suppress Testimony Related to PPG Testing and Results). Lastly, Appellant contended that “there are no quality control procedures in place to ensure reliability” and that studies have shown “the accuracy of the PPG can be influenced by many factors which can lead to false positives and false negatives.” R. * (Motion to Suppress Testimony Related to PPG Testing and Results).

Before the judge pretrial, Appellant’s counsel argued all testimony related to the PPG should be suppressed because it does not meet the threshold for admissibility pursuant to Rule 702, SCRE, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Counsel particularly emphasized factors three and four of the Jones standard arguing there are no quality control procedures to ensure the reliability of the PPG or “consistency of the method [with] recognized scientific laws and . . . procedures.” Tr. 11, ll. 10-17. He explained that the stimulus set used during the PPG Appellant underwent, called Real Child Voices, was developed by Dr. William Burke of Summerville. Counsel argued that this stimulus set, like other sets used for decades, is unreliable. Tr. 12, ll. 3-14.

Counsel asserted that it was his understanding that “the PPG is a good tool used in sex offender treatment” but should not be used to evaluate whether an individual will engage in sexually deviant behavior in the future. Tr. 12, l. 15 – 13, l. 5.

Lastly, Appellant’s counsel also argued the evidence should be excluded pursuant to Rule 403, SCRE, because any probative value of the evidence “is far outweighed by” unfair prejudice.

Tr. 14, ll. 13-20. He asserted that the jury would give the PPG evidence “more weight” than other evidence even though it is not “scientifically reliable.” Tr. 14, ll. 21-25.

In response to Appellant’s motion, the state proffered the testimony of Dr. Gottfried. She was qualified as an expert in forensic psychology and the penile plethysmography (PPG) without objection. Tr. 20, ll. 1-25. She has performed twenty-three precommitment evaluations for the sexually violent predator program and fifteen annual reviews. She also has a contract with the United States Federal Probation and conducts evaluations of individuals convicted of sexual offenses pursuant to this contract. Tr. 24, l. 4 – 25, l. 5. Dr. Gottfried explained that a PPG is “standardly” administered to all men referred to the Sexual Behaviors Clinic and Lab (SBCL) for a sexual behavior evaluation. Tr. 54, l. 19 – 55, l. 4; Tr. 55, ll. 22-25.

Dr. Gottfried is certified by Limestone Technologies, “the company that makes the PPG,” as a “clinical analyst for the PPG.” Tr. 26, ll. 1-5. To become certified, she completed a two to three day training program where she administered and interpreted PPGs. She had to submit her results for the PPGs she administered as part of the training to make sure she accurately scored them. Tr. 26, ll. 6-17.

Dr. Gottfried maintained that the PPG “is a physiological measure of male sexual arousal.” Tr. 28, ll. 6-7. She explained that the examinee sits in a private room by himself. Tr. 28, ll. 7-8. They have a “strain gauge” they put on their penis. Tr. 28, ll. 8-10. The examinee is then “presented with a variety of both sexual and neutral stimuli.” Tr. 28, ll. 10-12. The examiner is “looking to see if they have a greater or equal level of arousal to the deviant stimuli as they do to the [stimuli involving] consenting adults.” Tr. 28, ll. 4-19. The deviant stimuli involves nonconsensual or abusive scenarios. Tr. 28, ll. 15-16. In order to measure arousal, the

examiner looks for changes in the circumference of the penis and whether the examinee has an erection or the penis is engorged. Tr. 28, ll. 20-23.

Dr. Gottfried claimed the PPG has been widely used since 1950 and has been subject to peer review, not just in the sexual offending literature, but also in general sexual literature, such as literature involving erectile dysfunction and “general sexual wellbeing and health.” Tr. 29, ll. 3-14. She further maintained that the Sexual Behaviors Clinic and Lab employs several quality control measures. First, “everybody [at the lab] who is involved in PPG testing is certified (by Limestone, the manufacturer). So the person who administers it, the person who interprets it, everybody has been clinically certified to do that part of the evaluation.” Tr. 29, ll. 15-23; Tr. 54, ll. 13-18. Additionally, the “strain gauge” is calibrated three times before each test. Tr. 29, l. 24 – 30, l. 3. The SBCL also uses “countermeasures to help make sure it’s a valid administration.” Tr. 30, ll. 4-5. Essentially, the lab employs measures to prevent the examinee from cheating. The technician measures the examinee’s respirations and his movement. They also require the examinee to press a number on a keypad whenever the stimuli becomes sexual or violent to ensure the individual is paying attention. Lastly, the technician will ask the examinee to briefly describe the scenario he just heard to ensure he is paying attention. Tr. 30, ll. 5-22.

Dr. Gottfried conceded that there is a lack of standardization in the stimulus sets used by PPG examiners. Most of the countries that use the PPG can show some aspect of child pornography. However, in the United States, there is no medical exception to the federal child pornography laws so the stimulus sets cannot contain child pornography. Tr. 32, ll. 4-22. In addition to the stimulus sets, Dr. Gottfried admitted there is a lack of standardization in the scoring. In Canada, for example, examiners “use a much less conservative cut score” to measure arousal. Tr. 32, l. 23 – 33, l. 1. In the United States, examiners use a “cut score of 5 millimeters

of change” to the circumference of the penis, while in Canada, examiners use a cut score of one to 1.5 millimeters of change. Tr. 33, ll. 2-5.

Dr. Gottfried contended that the PPG is “generally accepted in the mental health and medical field” but again conceded standardization is a problem. Tr. 40, ll. 11-19. She testified that she is a member of an “international standardization group” which strives to standardize the PPG. However, there is a lot of resistance worldwide because various examiners do not want to change their methods. Tr. 41, ll. 1-10. Dr. Gottfried explained that another recognized problem is that the PPG does not “always have expected results.” Tr. 41, ll. 11-12. For example, an individual who sexually offended against children may not “always show arousal while undergoing a PPG to children.” Tr. 41, ll. 12-15.

Dr. Gottfried personally uses two stimulus sets when administering the PPG: the Marshall and the Real Child Voices. Tr. 60, ll. 1-9. Examiners usually use different stimulus sets and those are the two that Dr. Gottfried chooses to use. Tr. 60, ll. 8-11. However, she “tailors” the stimulus sets for each individual examinee. For example, if an examinee’s sexual offenses are against children, she may “skip” the stimuli depicting rape of an adult woman. Tr. 66, l. 23 – 68, l. 2. Dr. Gottfried maintained that tailoring the stimulus set does not mean the PPG lacks standardization. Tr. 68, ll. 3-16.

Real Child Voices, one of the stimulus sets used by Dr. Gottfried, is a relatively new stimulus set developed by Dr. William Burke of Summerville. Dr. Gottfried admitted that she and Dr. Gregg Dwyer, the former director of the SBCL, both collaborate with Dr. Burke. Dr. Burke also has a volunteer faculty appointment at MUSC. Tr. 61, ll. 9-16. The Real Child Voices stimulus set comes with all PPGs sold by Limestone Technologies and Dr. Burke profits

off these sales. Tr. 61, l. 17 – 62, l. 6. Another available stimulus set in the United States is called the Monarch. Tr. 62, ll. 12-18.

Dr. Gottfried explained that there are “three widely available [PPG] systems.” Tr. 61, ll. 17-19. One of these systems is the Limestone. Dr. Gottfried testified that she prefers the Limestone system because of “the calibration and standardization stuff.” She contended it is the “most reliable” system available. Tr. 61, ll. 17-23. This testimony demonstrates that there is a lack of standardization in the “systems” used by various examiners in addition to the stimulus sets.

When questioned about test/retest reliability, Dr. Gottfried explained that the examinee is presented with multiple stimuli presentations which enables the examiner to look for consistency within a single PPG test. Tr. 64, ll. 9-23. However, she admitted that she could not retest an individual a week later and obtain consistent results. Tr. 64, l. 24 – 65, l. 8.

After Dr. Gottfried’s *in camera* testimony, the trial judge took the matter under advisement. Tr. 76, ll. 19-25. The following morning he ruled Dr. Gottfried’s testimony concerning the PPG Appellant underwent and the results and conclusions derived therefrom was admissible. The judge explained that he reviewed Rule 702, Council, and Jones. Tr. 143, ll. 14-19. In support of his ruling, he emphasized that Dr. Gottfried testified the PPG has been subjected to peer review and has been the subject of numerous publications. Tr. 143, l. 19 – 144, l. 3. She also testified that “this method [stimulus set] is in use in over 50 laboratories throughout the United States . . . And while there is some international cooperation, there are different standards for some countries and the United States.” Tr. 144, ll. 4-13. The judge concluded that based on this testimony, “there is a standard application in the United States.” Tr. 144, ll. 14-16. As to quality control procedures, the judge found this standard was met. He

highlighted Dr. Gottfried's testimony that examiners in the United States use a "conservative threshold" to "err on the side of a false negative rather than a false positive." Tr. 144, ll. 16-23. Lastly, the judge concluded there was consistency of the method since the Real Child Voices stimulus set comes standard with the PPG system when purchased from the manufacturer and Dr. Gottfried and other technicians use standard instructions when administering the exam. Tr. 145, ll. 3-16. The judge concluded that Appellant's arguments or concerns "go to the weight of the testimony, not its admissibility." Tr. 145, l. 23 – 146, l. 2.

In her testimony before the jury, Dr. Gottfried explained that the PPG "is a physiological test, *objective* test of male sexual arousal." Tr. 226, ll. 9-11 (emphasis added). She maintained that the test is useful "in evaluations like these" because people have an "understandable motivation or reason for not being completely forthcoming about what is arousing to them, especially if it's something that can cause them shame, or could get them civilly committed." Tr. 224, ll. 3-18. When later asked why she uses the PPG, Dr. Gottfried asserted, "[I]t's really, really important to *objectively* know what this person is aroused by, because we can, for the most part, reasonably expect that somebody is not going to come in and say, 'I'm aroused by children.' Or they may say, 'I was, but I'm not now.' And so *the PPG is going to give you data about today on the day of the assessment what they were aroused by* in the laboratory." Tr. 236, ll. 8-25 (emphasis added). She further maintained that the PPG "has the greatest validity and reliability, so the statistics for it are the best for people who are aroused by children." Tr. 237, ll. 1-6.

Dr. Gottfried contended that Appellant's "results were right in line with his offenses. So he had clinically significant sexual arousal to trials featuring sexual activity with a female infant, a preschool aged female child, and a grammar school or elementary school aged child. And

those were really consistent with his offense behaviors.” Tr. 237, l. 21 – 238, l. 4. She further maintained Appellant “didn’t show clinically significant arousal to consenting adults.” Tr. 238, ll. 5-6. Dr. Gottfried told the jury that when she “did the mathematical equations” Appellant’s arousal to prepubescent female children was “more than two and a half standard deviations greater [than his arousal to consenting adults]. So what that means without explaining standard deviations and these scores, is that he [Appellant] showed a clear preference for children - - for the child scenarios over the adult scenarios.” Tr. 238, ll. 6-13.

STANDARD OF REVIEW

“The admission or exclusion of evidence is a matter within the trial court’s sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice.” Matter of Bilton, 432 S.C. 157, 161-62, 851 S.E.2d 442, 444 (Ct. App. 2020), reh’g denied (Dec. 22, 2020) (quoting State v. Commander, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417 (2011)) (internal quotation marks omitted). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id. at 162, 851 S.E.2d at 444 (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted).

ARGUMENT

In this sexually violent predator (SVP) case, the trial judge abused his discretion by admitting evidence through the state's expert witness concerning Appellant's results from the penile plethysmograph (PPG) test he underwent as part of his precommitment evaluation since the evidence was unreliable in violation of Rule 702, SCRE, *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE.

The trial judge abused his discretion by permitting Dr. Emily Gottfried, who was qualified as an expert in “forensic psychology and sexual offending behavior,” to testify about the PPG test Appellant underwent and the results and conclusions derived therefrom since the evidence was unreliable in violation of Rule 702, SCRE, *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010). Moreover, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice and should have been excluded pursuant to Rule 403, SCRE.

“The admission of expert testimony is governed by Rule 702, SCRE, which provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

“[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court *must* make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony.

First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, *the trial court must evaluate the substance of the testimony and determine whether it is reliable.* Id. (emphasis added) (internal citation marks omitted).

To determine reliability, the trial judge should apply the factors outlined by our Supreme Court in State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). “Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Id. (citing Rule 403, SCRE).

Dr. Gottfried vaguely maintained that the PPG has been subjected to peer review both in the “sexual offending literature” and the “general sexual literature.” Tr. 23, l. 16 – 24, l. 1; Tr. 29, ll. 2-14. While she also stated the Real Child Voices stimulus set, which was utilized during the PPG Appellant underwent, has been peer reviewed, she did so in a conclusory manner. Tr. 49, ll. 12-14.

Dr. Gottfried openly admitted there is a lack of standardization in the stimulus sets used by PPG examiners. Most of the countries that use the PPG can show some aspect of child pornography. However, in the United States, there is no medical exception to the federal child pornography laws so the stimulus sets cannot contain child pornography. Tr. 32, ll. 4-22. In

addition to the stimulus sets, Dr. Gottfried admitted there is a lack of standardization in the scoring. In Canada, for example, examiners “use a much less conservative cut score” to measure arousal. Tr. 32, l. 23 – 33, l. 1. In the United States, examiners use a “cut score of 5 millimeters of change” to the circumference of the penis, while in Canada, examiners use a cut score of one to 1.5 millimeters of change. Tr. 33, ll. 2-5.

Dr. Gottfried contended that the PPG is “generally accepted in the mental health and medical field” but again conceded standardization is a problem. Tr. 40, ll. 11-19. She testified that she is a member of an “international standardization group” which strives to standardize the PPG. However, there is a lot of resistance worldwide because various examiners do not want to change their methods. Tr. 41, ll. 1-10. Dr. Gottfried explained that another recognized problem is that the PPG does not “always have expected results.” Tr. 41, ll. 11-12. For example, an individual who sexually offended against children may not “always show arousal while undergoing a PPG to children.” Tr. 41, ll. 12-15.

Respectfully, the trial judge appeared to ignore this evidence concerning the lack of standardization and based his ruling in large part on Dr. Gottfried’s testimony that over fifty laboratories throughout the United States use the Real Child Voices stimulus set. See Tr. 144, ll. 4-16. Additionally, while the trial judge credited Dr. Gottfried’s testimony about the quality control procedures, these procedures were designed to prevent individuals from cheating. The quality control measures did not relate to one of the central concerns with PPGs—whether the subjects are aroused by what the stimulus set claims is the focus of the arousal.

In Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), this Court addressed a narrow issue regarding the admissibility of PPG test results through an expert who did not administer or observe the PPG testing nor review the test’s raw data. This Court held that “due

process does not allow a testifying expert to be a pipeline for someone else’s scientific work to be admitted into evidence without a baseline demonstration of reliability.” Id. at 167, 851 S.E.2d at 446. It concluded the trial judge abused his discretion by admitting the PPG evidence and, finding the error was not harmless, remanded for a new commitment trial. Id. at 167, 851 S.E.2d at 447. In so holding, this Court emphasized that the PPG “test is controversial and has been criticized for a lack of standardization and for being subject to manipulation.” Id. at 162, 851 S.E.2d at 444 (citing United States v. Rhodes, 552 F.3d 624, 626-627 (7th Cir. 2009) and United States v. Weber, 451 F.3d 552, 565 (9th Cir. 2006)). It noted that “with limited exceptions . . . courts have ‘uniformly’ declared that PPG test results are ‘inadmissible as evidence because there are no accepted standards for this test in the scientific community.’” Id. at 162-163, 851 S.E.2d at 444 (quoting Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000)). This Court further emphasized that “some authorities take the position that the PPG has value in treating sex offenders but that concerns about reliability and a lack of uniform standards preclude its admission as evidence at trial.” Id. at 164, 851 S.E.2d at 445 (citing Commonwealth v. Ortiz, 93 Mass.App.Ct. 381, 100 N.E.3d 790, 796-797 (2018) (collecting cases)). Other “jurisdictions have held that an expert may rely on a PPG as a basis for the expert’s opinion but have expressly declined to consider whether the test results should be disclosed to the jury given the special weight the jury is likely to afford things that have the appearance of scientific evidence.” Id. at 164-165, 851 S.E.2d at 445 (citing In re Commitment of Sandry, 367 Ill.App.3d 949, 306 Ill.Dec. 202, 857 N.E.2d 295, 317 (2006)).

In Billups v. Commonwealth, 652 S.E.2d 99, 101-02 (Va. 2007), the Virginia Supreme Court held an expert’s report that relied on PPG testing was inadmissible, even at a sentencing

hearing. The court in Billups approached PPG testing with a critical eye and ultimately concluded it was inadmissible:

Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers not schooled in the articular field under consideration. Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be “scientific,” and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism. That tendency has given rise to frequent complaints of “junk science” in the courts. To guard against that risk, we continue to require a “threshold finding of fact with respect to reliability of the scientific method offered. . . .”

Id. at 101-02. “Esoteric” and “junk science” are both accurate descriptions of PPG testing. See also United States v. Medina, 779 F.3d 55, 65 (1st Cir. 2015) (discussing reliability problems with PPG testing); Gentry v. State, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) (“Given the rejection of [PPG] evidence by other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia.”); United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995) (holding the PPG did not meet the scientific standards for admissibility and emphasizing the “extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test.”).

The PPG Appellant underwent, which included the Real Child Voices stimulus set, lacked reliability and the trial judge erred in admitting it. Because it was unreliable, Dr. Gottfried’s corresponding testimony had no probative value. Assuming the evidence had probative value, it was outweighed by the danger of unfair prejudice to Appellant and should have been excluded pursuant to Rule 403. Because the PPG test and its results had the appearance of scientific evidence, it is likely the jury afforded the evidence “special weight.” See Bilton, 432 S.C. at 164-165, 851 S.E.2d at 445. The error was highly prejudicial because of the risk noted by the Virginia Supreme Court in Billups that laymen, especially jurors, would

gravitate toward uncritical acceptance of the PPG when confronted with such a foreign and unusual trial like an SVP case. Dr. Gottfried urged the jury in this direction, telling them that the PPG was an “*objective* test of male sexual arousal.” Tr. 226, ll. 9-11 (emphasis added). She further claimed it is “really, really important to *objectively* know what this person is aroused by, because we can . . . reasonably expect that somebody is not going to come in and say, ‘I’m aroused by children.’ Or they may say, ‘I was, but I’m not now.’ And so *the PPG is going to give you data . . . what they were aroused by* in the laboratory.” Tr. 236, ll. 8-25 (emphasis added). The PPG was one of the main bases for her diagnosis of pedophilic disorder. The admission of this highly prejudicial evidence warrants reversal.

CONCLUSION

Based on the foregoing argument, this Court should reverse Appellant's commitment and remand this matter for a new trial.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of November, 2022.

RECEIVED

Nov 10 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF SHAWN TORLIF DAILY,

APPELLANT

APPELLATE CASE NO. 2022-000371

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary email address listed in the Attorney Information System (AIS), this 10th day of November, 2022.

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

From: [Leverett, Scott](#)
To: [SC - SHUPE DEBORAH](#)
Cc: sellison@scag.gov; [Caudy, Lara](#)
Subject: 2022-000371 - In the Matter of Shawn Torlif Daily - Initial Brief of Appellant
Date: Thursday, November 10, 2022 3:31:00 PM
Attachments: [2022-000371 - In the Matter of Shawn Torlif Daily - Initial Brief of Appellant.pdf](#)

Dear Ms. Shupe,

Attached please find a copy of the Initial Brief of Appellant in the above referenced case that is being filed today, November 10, 2022, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Lara Caudy
Appellate Defense