STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable George M. McFaddin, Circuit Court Judge
Appellate Case No. 2021-000537

In the Matter of the Care and Treatment
of James Gregory Younger,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court did not abuse its discretion in allowing the State's expert to testify about uncharged and/or unconvicted sex offense allegations against Appellant because the expert testified it was best practice in psychosexual evaluations to consider the person's entire sexual behavior functioning, and she considered the allegations against Appellant as one data point for diagnostic and risk assessment purposes.

II. The State expert's testimony regarding the pattern of sexual behavior functioning established by the similarities of the allegations against him spanning a twenty plus year period was relevant and probative to the ultimate issue before the jury, and the prejudice to Appellant did not substantially outweigh the testimony's significant probative value in this SVPA proceeding.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In June 2014, Appellant James Gregory Younger was convicted at trial of criminal sexual conduct, third degree, arising from the sexual assault of a female acquaintance, and sentenced to ten years incarceration. Prior to Appellant's release from incarceration, Respondent State of South Carolina initiated a civil action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Appellant's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was scheduled for a jury trial on April 19, 2021, before the Honorable George M. McFaddin, Jr., Circuit Court Judge.

Prior to trial, Appellant moved to exclude all testimony regarding allegations reported to law enforcement by multiple women alleging Appellant sexually assaulted them. (Motion in Limine to Exclude Testimony Relating to Respondent's Pending Criminal Charges, dated February 22, 2021; Record on Appeal [R.], pp. _____). The State filed a Return to the Motion in Limine on March 17, 2021. (State's Return to Motion in Limine to Exclude Testimony Relating to Respondent's Pending Criminal Charges, filed March 17, 2021; R., pp. _____).

A. Pre-Trial Motion

At a hearing before Judge McFadden on March 30, 2021, Appellant argued there were pending sex offense charges against him in North Carolina arising from some of the women's allegations, and he could not receive a fair trial if testimony regarding those charges was presented to the jury because he would not be able to defend himself without waiving his 5th Amendment right not to make any statements. He further argued the testimony would be hearsay, but conceded the information was relevant and could be considered by the experts. (Motion Hearing Transcript [MHT], pp. 4-12; R., pp. ____).

The State argued Appellant discussed the facts of the pending North Carolina charges with the court appointed expert, which waived any 5th Amendment issue. The State further argued the SVPA allows use of the person's criminal offense history in determining if the person meets the criteria for civil commitment, Appellant's criminal offense history was directly relevant to the determination of whether he has a mental abnormality or personality disorder that makes him likely to re-offend sexually, and the State was not offering the uncharged or unconvicted allegations for the truth of the matter asserted. (MHT, pp. 13-16; R., pp. _____).

In addition to the parties' arguments, Judge McFadden heard testimony from Respondent's expert, Marie Gehle, Psy.D., and the State's expert, Emily Gottfried, Psy.D. Both experts testified about how they consider uncharged/unconvicted allegations for purposes of evaluations pursuant to the SVPA. (MHT, pp. 21-64; R., pp. ____).

By Order filed April 13, 2021, Judge McFadden denied Appellant's Motion in Limine, finding actions under the SVPA are civil in nature, and the 5th Amendment protections do not apply, but even assuming the 5th Amendment did apply, Appellant waived it when he discussed the facts of the allegations with the two evaluators. Judge McFadden further found: 1)while Dr. Gottfried's testimony regarding uncharged and unconvicted sex offense allegations against Appellant was prejudicial, it would not "unfairly" prejudice Appellant; 2) Dr. Gottfried's testimony about the allegations went to the basis of her ultimate opinions about Appellant's mental abnormalities/personality disorders and his risk to reoffend sexually; 3) both Dr. Gottfried and Dr. Gehle testified information regarding the person's criminal history is relied on by experts in the mental health field conducting psychosexual evaluations; and 4) how the experts treated the information regarding Appellant's history as it related to a pattern of behavior went to the weight

of the experts' testimony and conclusions, not admissibility. (Order Denying Motion in Limine, filed April 14, 2021, pp. 1-8; R., pp. ____).

Judge McFadden also expressly found Dr. Gottfried's testimony regarding allegations that did not result in charges, or had criminal charges pending in North Carolina, was not offered for the truth of the matter asserted, or to prove Appellant actually committed the offenses. Rather, the testimony would only go to her use of it in forming her ultimate opinions. (Order, pp. 8-9; R., pp. ____).

B. Trial

Prior to the jury being sworn, Appellant renewed his pre-trial motion regarding testimony about uncharged/unconvicted sex offense allegations. Judge McFadden affirmed his prior order regarding that issue. (Trial Transcript [TT], p. 34; R., p. _____).

1. Gottfried Qualification and Testimony

Before the jury, Dr. Gottfried was qualified as an expert in forensic and clinical psychology. She testified her evaluation protocol included reviewing all available information, administering computer based psychological testing, and a clinical interview. (TT, pp. 67-74; R., pp. ____).

Dr. Gottfried testified that as part of her comprehensive evaluation of Appellant, she reviewed: reports, documents, photographs and videos from various police investigations in North Carolina; documents related to Appellant's sexually violent offense in South Carolina and his subsequent incarceration on that conviction; records from the Sumter County Detention Center where Appellant was housed pending the SVPA trial; letters victims wrote to the prison prior to Appellant's release; hospital records from some reported victims; and prior evaluation reports

regarding Appellant. Dr. Gottfried testified this is the type of information typically and reasonably relied on by experts in her field.

In addition to the documents reviewed, Appellant was scheduled to come to MUSC on three days for testing and a clinical interview. On the first day Appellant completed a battery of tests. On the second scheduled day of testing, Appellant did not complete the tests, but Dr. Gottfried had a conversation with him. On the third day, Dr. Gottfried conducted the clinical interview. (TT, pp. 74-75; R., pp. _____).

a. Appellant's General Criminal History

Dr. Gottfried testified the best predictor of future behavior is past behavior, so actions that occurred in the past help predict things that may occur in the future. In evaluating Appellant, she considered his entire criminal history, including convictions, pending charges, and incidents reported to law enforcement with no charges ultimately filed, because Appellant's entire criminal history may be predictive of reoffending.

Dr. Gottfried also testified best practices manuals regarding how to do psychosexual evaluations indicate the evaluator should look at the person's history of sexual behaviors that were illegal, whether it was charged or not. She stated she may weigh the various reports differently, but it is important to consider the history of illegal sexual behavior because the person may not be forthcoming about it, and the reports may reveal patterns of behavior that might support symptoms of a mental illness. (TT, pp. 75-79; R., pp. _____).

According to the records Dr. Gottfried reviewed, Appellant's criminal history included a 1988 charge for assault on a female, which was dismissed in 1989. In 1990, he was convicted of assault on a female, which involved a female (T.B.) who dated Appellant and reported to police

he assaulted her multiple times, including one time he choked her, and he had rough sex with her. He was sentenced to two years probation. (TT, pp. 80-82, R., pp. _____).[1]

In 1990, Appellant was charged and convicted of a probation violation. Dr. Gottfried testified probation violations suggest an inability to follow rules, which is a risk factor for sexual offenses, and is factored into risk assessment tools used in evaluations. (TT, pp. 82-83; R., pp. ____).

Between 1991 and 1996, Appellant was charged with various non-sexual offenses, The charges and dispositions included: injury to personal property (dismissed); assault and battery (convicted and sentenced to ninety days in jail and three years probation); first degree arson (convicted of malicious damage and sentenced to one year in jail and five years probation); assault with a deadly weapon with intent to inflict serious injury (convicted and sentenced to six years in prison and five years probation); a traffic offense (convicted); and simple assault (dismissed). (TT, p. 83; R., p. ____).

In 2005, Appellant was charged with second degree rape, which was dismissed in 2007. Based on that reported offense, however, Appellant was indicted in North Carolina in 2019 for second degree forcible rape and second degree forcible rape of a physically helpless victim. (TT, pp. 83-85; R., pp. ____).

In 2008, Appellant was charged and convicted of assault on a female, and sentenced to one year probation. Also in 2008, Appellant was charged with driving while impaired, convicted and

[1]Appellant objected to the testimony on grounds of hearsay and relevance. The State argued the evidence was not being offered for the truth of the matter asserted, but merely as evidence of what Dr. Gottfried considered in reaching her opinions, and it was directly relevant to the basis for her opinions. Judge McFadden overruled the objection. (TT, pp. 80-82; R., pp. ____).

sentenced to a maximum of sixty days in jail, community service and one year of probation. (TT, p. 85; R., p. ____).

In 2009, Appellant was charged with possession of drug paraphernalia, convicted and sentenced to community punishment. He was also charged in 2009 with computer trespass, convicted and sentenced to twenty days in jail. (TT, p. 85; R., pp, ____).

In 2012, Appellant was charged in Sumter County with second degree assault and battery and third degree criminal sexual conduct. He was convicted in 2014 of third degree criminal sexual conduct, and sentenced to ten years incarceration. (TT, p. 86; R., p. ____).

In July 2019, in addition to the two charges arising from the 2005 allegations, Appellant was indicted in North Carolina for first degree kidnapping, second degree forcible rape, and second degree forcible rape of a physically helpless victim for allegations related to a 2007 victim. (TT, p. 86; R., p. ____).

b. Detention Center Records

Dr. Gottfried also reviewed records from the Sumter County Detention Center where Appellant was housed pending the SVPA trial. She testified it was important to consider infractions or rules violations to determine whether Appellant had been able to follow the rules on that institution, as well as whether there were patterns of behavior that might indicate a potential diagnosis. (TT, pp. 86-87; R., pp. ____).

The detention center records included almost daily incident reports or notes related to Appellant, and revealed Appellant sought some type of medical attention nearly every day. Appellant frequently had extra items in his cell he was not allowed to have, including mattresses, clothing, laundry bags, blankets, towels, and Bibles. In one incident, officers found a plastic rope tied in a knot, which they confiscated, but Appellant removed it from an officer's desk after it was

confiscated. The records also included multiple reports of Appellant disrespecting detention center officers, refusing to obey officers' orders or command, making threats against other inmates, and engaging in verbal altercations with other inmates. Appellant's cellmates requested to be moved from his cell because he tried to start conflicts. While these incidents were not sexual, Dr. Gottfried testified the records "really demonstrated a pattern of [Appellant] currently not following the rules," and suggested "[Appellant] may think that the rules don't apply to him and that he is entitled to special treatment that is not given to other inmates." (TT, pp. 88-89; R., pp. ____).

c. Appellant's Sexual Offenses

Dr. Gottfried then testified she reviewed records regarding the 2012 sexual offense in Sumter County for which Appellant was convicted in 2014. She stated such records are the type of records typically relied on by expert in her field, and it is necessary to look at the underlying details to see what actually happened. (TT, pp. 89-90; R., pp. ____).

According to police reports and other documents, the Sumter County victim (K.B.) dated Appellant for approximately five months between May 2012 and September 2012, and they had consensual sex during that time. During a consensual encounter in September 2012, K.B. noticed Appellant's phone was propped up and recording them having sex. When she confronted him, Appellant stated he would delete the video. (TT, p. 92; R., p. ____).

When the sex resumed, Appellant instructed K.B. to turn over on her stomach and he became more aggressive. He put his hand over her mouth and his other arm around her throat until she passed out. When K.B. regained consciousness, she was disoriented, had trouble walking and her rectal area was severely painful. Appellant told her his penis had slipped one time into her anus. K.B. was bleeding from her anus, had bruises and skin discoloration on her anus and buttocks, and sought medical treatment. Medical evidence presented at Appellant's criminal trial

indicated the amount of bruising was not constituent with a one-time slip, but showed massive trauma consistent with prolonged force. (TT, pp. 92-93; R., pp. ____).

Dr. Gottfried testified the presence of choking or strangling K.B. was similar to the allegation Appellant choked T.B. in his assault on a female conviction in 1990. She reiterated that diagnosing a person with a mental disorder, mental abnormality or personality disorder cannot be based on a single incident, so an evaluator looks for patterns of behavior that go toward the person's sexual arousal patterns. (TT, pp. 93-94; R., pp. _____).

Dr. Gottfried then testified about sexual assault charges pending against Appellant in North Carolina related to the 2005 victim (L.M.R.), who reported she was on a date with Appellant at his residence, and they were watching a movie and drinking wine. L.M.R. woke up the next morning wearing no clothes, and she did not remember what happened. A family member picked her up and took her to the hospital, where a medical exam revealed a vaginal tear extending into L.M.R.'s rectum, and her urine sample indicated the presence of Ambien. L.M.R. did not have a prescription for Ambien and stated she did not take it. When questioned by law enforcement, Appellant stated he and L.M.R. had consensual oral, anal and vaginal sex, and denied putting anything in her drink.

According to the records, the local prosecutor dismissed the second degree rape charge in 2007 after Appellant's attorney produced naked pictures of L.M.R. taken on the night of the incident. L.M.R. denied any knowledge of the pictures, but the prosecutor concluded the pictures indicated she had consented. Appellant was indicted in 2019 on charges arising from the incident. Appellant told Dr. Gottfried the sex was consensual, and he did not know anything about Ambien. (TT, pp. 94-97; R., pp. ____).

Appellant was charged in 2008 of assault on a female (S.M.M.) in North Carolina, arising from an incident at a concert in Greensboro, NC. The victim was walking to the restroom when

Appellant walked past her in the opposite direction and commented on her shoes. When the victim looked down at her shoes, Appellant reached across her body and cupped her breast. Security guards arrested Appellant, and he was convicted and sentenced to one year probation. (TT, pp. 97-99; R., pp. ____).

In 2019, Appellant was also indicted in North Carolina on charges arising from a 2007 incident at another concert in the Greensboro Coliseum. According to the records, the victim (K.L.W.) left the concert with an unidentified male, who drove her to his house. She subsequently woke up nude laying in a bed on her stomach with the male on top of her back and hitting her in the head. The male subsequently brought K.L.W. back to the Coliseum. She went to the hospital, where it was determined her labia was red, she had small tears in her vagina, and some tenderness and swelling to her head. The medical records also indicated K.L.W. was very nauseous and threw up in the CT scanner.

K.L.W. was not able to describe the male, his residence or his vehicle, and said she did not want to pursue the matter. She reported the male kept her panties and driver's license, but the license was later mailed back to her. Due to the lack of any information to identify the male, the case was not pursued in 2007.

During an unrelated investigation in 2010, however, the North Carolina State Bureau of Investigation (SBI) executed a search warrant on Appellant's computer, and found some images of K.L.W. in which she appeared to be unconscious, naked from the waist down and located in the cargo area of a vehicle. There were other pictures of K.L.W. naked and asleep in a location identified as Appellant's residence. As a result, Appellant was indicted in 2019 on charges related to the incident. (TT, pp. 99-104; R., pp. ____).

Appellant then objected to testimony regarding information received as a result of a hotline set up by North Carolina law enforcement. Judge McFadden sustained the objection regarding hotline calls. The State asked to proffer Dr. Gottfried's testimony regarding which incidents she considered were based on actual police reports and victim statements versus only calls to the hotline. (TT, pp. 104-110; R., pp. ____).

i. Dr. Gottfried's Proffer

Dr. Gottfried testified the incidents she considered were either reported to police or to the hotline. She went over every incident in detail, and only three of the allegations were based solely on calls to the hotline. All the other allegations she considered involved reports and statements given directly to law enforcement. (TT, pp. 111-119; R., pp. ____). After the proffer, Judge McFadden ruled that no information received solely from the hotline was admissible, but allegations with reports and statements directly reported to law enforcement were admissible. Appellant then objected to the evidence as unduly prejudicial. (TT, pp. 119-124; R., pp. ____).

ii. Sexual Offenses Testimony Before the Jury (TT, pp. 80-88, 91-102, 125-135; R., pp. ____)

Dr. Gottfried testified before the jury about allegations from multiple victims alleging Appellant sexually assaulted them between 1990 and 2013. The criminal history included:

Convictions and Pending Charges

Appellant's 1990 and 2008 convictions for assault on a female, and 2014 conviction for third degree criminal sexual conduct in Sumter County, and the 2019 charges arising from the incidents involving L.M.R. and K.L.W.

Uncharged Reports to Law Enforcement

J.B. reported she was engaged to Appellant in 1998, and during sex, he choked her, slapped her, pulled her hair, tied her up, held her down, and tried to photograph and video her during sex.

When Dr. Gottfried asked Appellant about the allegations, he stated he had "no clue why she would report that he had choked her and that they had a great relationship."

M.J. reported she dated Appellant for several years, and he choked her during sex until she almost passed out. Appellant denied that occurred.

T.G. reported she went on a date with Appellant in 2005 and had two glasses of wine, but could not remember anything from that night until the next day. She stated Appellant told her he slipped her Valium at a sushi restaurant and had sex with her. Appellant told Dr. Gottfried they had consensual sex and T.G. lied about the Valium.

C.P. reported she dated Appellant from January 2005 to April 2005. She stated Appellant drugged her wine several times, and had anal sex with her even though she told him she did not want to have anal sex. Appellant told Dr. Gottfried he did not recall anything about anal sex with C.P.

K.G.M. reported she was a college classmate of Appellant's in 2005, and he sexually assaulted her while she repeatedly pled with him to stop, and he covered her mouth, grabbed her throat, put her face in a pillow, which made it hard for her to breathe or call for help. Appellant told Dr. Gottfried the incident never happened, but he was aware of the allegation because campus security pulled him out of class after K.G.M. reported it.

T.S. reported she went out with Appellant and some friends in 2008, but the next day she could not remember anything and felt like she could not move her body. She state Appellant called her and apologized for sticking his hand down her pants, which she did not remember.

N.G.N. reported she dated Appellant for approximately two months in 2008. While they were dating, he choked her, then apologized the next day. She stated he also drugged her wine and took videos of her when she was incoherent, including one in which she was throwing up, but

she did not remember it happening. Appellant told Dr. Gottfried the allegations were not true, but he did take a couple of pictures of N.G.N. passed out on the floor naked.

S.F.G. reported she had wine with Appellant in 2009, but did not remember anything after drinking the wine, and she thought she had been drugged. She stated Appellant took pictures of her, then threatened to kill her if she told anyone and to put the pictures of her on the internet. S.F.G. ultimately got a court order of protection from a court against Appellant.[2] When Dr. Gottfried asked Appellant about the allegations, he denied all of them.

C.P. reported she dated Appellant in 2009. She stated he choked her at least five times, and told her he knew CPR so if something happened he could resuscitate her. She also stated Appellant anally and vaginally raped her. Appellant denied all the allegations.

T.M.C. reported she dated Appellant for approximately three months in 2009. She stated Appellant strangled her until she almost passed out, but told her he had gone to nursing school so he knew how much a person could handle. Appellant told Dr. Gottfried he did not remember any strangling.

L.M.T. reported she dated Appellant for several months in 2011. Appellant told her he gave her Ativan to get her to unlock her phone for him and have sex with him, and also told her he put something in her wine. Appellant told Dr. Gottfried he and L.M.T. had a consensual relationship and he never drugged or raped her.

R.S./R.S.D. reported she met Appellant in 2011 through a friend, and Appellant later showed up at her house, held her down and vaginally and anally raped her. She stated he forced her head into a pillow and she had a hard time breathing. She also stated she had bruising on the back of her neck, her thighs and wrists from when Appellant held her down. She stated she did

[2]Dr. Gottfried reviewed a transcript of the hearing regarding the order of protection.

not report the assault at the time because Appellant knew where she lived and she was worried for her safety and the safety of her daughter.

Appellant went to North Carolina while out on bond from the 2012 Sumter County charges. In 2013, G.F.S. reported she was a friend of Appellant's girlfriend. One night when she was sleeping at the girlfriend's house, G.F.S. woke up and Appellant was performing oral sex on her and penetrating her vagina with his fingers. Appellant told G.F.S. he was getting back at his girlfriend for cheating on him. Appellant told Dr, Gottfried the encounter was consensual.

In 2015, C.A.F. reported Appellant drugged and raped her. Appellant told Dr. Gottfried he did sleep in the same bed with C.A.F., but they did not have sex.

Based on the records she reviewed, Dr. Gottfried determined there was a "really striking pattern" of Appellant having consenting sexual relationships with women, but at some point in the relationship, he engaged in nonconsensual sex with the women by incapacitating them (either drugging, strangling or choking), and then performing sex acts on them to which they had not consented, particularly anal sex. She found there were indications Appellant engaged in this pattern even though he had sexual partners who did consent to having anal sex with him, and he frequently gave the victims false information about himself. (TT, pp. 134-135; R., pp. ____).

d. Risk Assessment

Dr. Gottfried also scored Appellant on the Static 99-R and Static 2002-R, which are actuarial risk assessment measures based on numerous studies of people who have been convicted of sex offenses and following them for a five or ten year period to see if they reoffend. Appellant's score on the Static 99-R was five, which placed him in the above average risk category for being charged with or convicted of another sexual offense. Appellant's score was higher than 88.7% of the people included in the underlying studies, with an approximate re-offense rate of 2.7 times the

rate of sex offenders scoring in the average range on the test. Dr. Gottfried stated it was important to note that only thirty percent of sex crime victims actually report the sexual assaults, and the risk assessment tools only include people who were caught re-offending. (TT, pp. 138-140; R., pp. ____).

Appellant's score on the Static 2002-R was five, which was also in the above average risk category. Appellant's score was approximately 1.9 times higher than the re-offense rate of sex offenders in the middle range of risk distribution. Dr. Gottfried testified the research suggests that using both risk assessment tools together improves the validity of both tests. (TT, pp. 141-142; R., pp. ____).

In addition to the Static risk assessments, Dr. Gottfried utilized the Sexual Violence Risk 20, which is used as a guide to structure professional judgment regarding possible risk factors. She testified the SVR 20 is "a good predictor of future sexual violence and studies suggest it's, at least, as accurate, if not more accurate" than the Static assessment tools.[3]

Based on the records, the psychological tests results, the risk assessment tools and her interview of Appellant, Dr. Gottfried concluded Appellant has numerous recognized dynamic risk factors, which are factors that can be changed in treatment. She testified the risk factors are based on very large studies of thousands of convicted sex offenders who re-offended and the factors that made them similar. Appellant's dynamic risk factors included: a stable pattern of sexual arousal

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[3]In addition to reviewing all available records, Dr. Gottfried administered multiple psychological assessments as part of Appellant's evaluation. One significant assessment was the Hare Psychopathy Checklist Revised, 2nd Ed., which looks for characteristics associated with psychopathy. Psychopathy traits include "the gift of gab," superficially charming, lying, reliance on others for money, irresponsibility, impulsivity, multiple arrests for different types of crimes. The assessment has a "cut score" for determining whether an individual is a psychopath, and Appellant's score was one point below the cut score, which Dr. Gottfried testified meant that while he would not necessarily be classified as a psychopath, Appellant has many characteristics associated with a psychopathic personality condition. (TT, pp. 136-137; R., pp. ____).

to non-consent; a history of substance abuse problems (self-reported); multiple traits of psychopathy or psychopathic personality; chronic sex offending; physical harm in the sexual offending; a serious failure to accept responsibility for his sexual acts, including those for which he was convicted; attitudes supporting sexual offending such as hostility toward women; psychological coercion or threats and intimidation in his sex offenses; a negative attitude toward supervision as evidenced by his probation violations; narcissistic traits that make him reject supervision; a lack of realistic future plans; and a negative attitude toward treatment and a belief that he does not need treatment. She testified Appellant does not believe he needs treatment because "he says he did not commit any of the alleged or convicted offenses against him." (TT, pp. 143-147; R., pp. ____).

e. Diagnoses and Opinions

Dr. Gottfried diagnosed Appellant with narcissistic personality disorder, testifying he met the full diagnostic criteria for that disorder. Appellant has a "grandiose sense of self-importance," believes he is "special and unique," has a "sense of entitlement," he exploits people, is arrogant, and lacks empathy. (TT, pp. 147-148; R., pp. ____).

Dr. Gottfried also diagnosed Appellant with Other Specified Personality Disorder with Antisocial Traits. She testified Appellant demonstrates a failure to conform to the rules of society, he is deceitful and impulsive, he exhibits irritability and aggressiveness, and is irresponsible. She further testified Appellant met every potential symptom for antisocial personality disorder, except there was no evidence of conduct disorder before the age of fifteen, which is required for an antisocial personality disorder diagnosis. Dr. Gottfried also stated Appellant is "strongly antisocial," which "really characterizes him," and he exhibits many features of psychopathy, which is also a personality condition. (TT, pp. 148-152; R., pp. ____).

In addition to the two personality disorder diagnoses, Dr. Gottfried diagnosed Appellant with Paraphilic Coercive Disorder, which is characterized by persistent urges, fantasies or behaviors involving coercive sexual acts toward nonconsenting people, and reflects an underlying deviant sexual arousal to forced sex and sexualizing power, control and dominance over nonconsenting people. She testified the diagnosis was based on the pattern of sexual assaults of multiple women over a twenty plus year period and the striking similarities between the reported assaults, including the assaults for which Appellant was convicted. (TT, pp. 153-156; R., pp. _____).

Dr. Gottfried testified it is important to consider the interaction of Appellant's personality disorders and his paraphilic disorder. Appellant's personality disorders alone are "risky," because they are related to conning and manipulating people, a lack of remorse or empathy, exploiting others, and feeling entitled to take whatever he wants. His paraphilic disorder involves sexual arousal to coercion, force, threats and power of another person. Dr. Gottfried testified Appellant sought to satisfy his sexual arousal to coercion, and due to his personality disorders, he felt entitled to get his sexual needs met with no consideration of the needs, desires or safety of his victims. (TT, pp 157-158; R., pp. _____).

Dr. Gottfried testified to a reasonable degree of psychological certainty that Appellant suffers from relevant personality disorders and a mental abnormality that affect his emotional or volitional capacity such that he is predisposed, and has the propensity, to commit future acts of sexual violence to such a degree as to pose a menace to the public health and safety. She further testified Appellant was a risk to reoffend sexually unless he is confined to a secure facility to long-term control, care and treatment. She stated out-patient treatment would not be sufficient to get Appellant the treatment he needs and protect the public. Finally, Dr. Gottfried testified to a

reasonable degree of psychological certainty that Appellant is a sexually violent predator as defined by the SVPA. (TT, pp. 159-162; R., pp. _____).

f. Cross-Examination

On cross-examination, Dr. Gottfried stated she believed Appellant had nonconsensual sex with women when they could not consent because Appellant had drugged them or otherwise rendered them incapacitated. She testified she did not necessarily assume all the victims were telling the truth, but she had to consider all illegal sexual behavior, charged or not, to determine whether Appellant has a mental abnormality or personality disorder that makes him likely to reoffend sexually. She further testified she did not necessarily rely on the victims' reports, but she did consider them, and convictions obviously carry more weight.

Dr. Gottfried testified it would be difficult to speculate about her conclusions if she did not have all the information regarding the uncharged assaults or the charges pending in North Carolina, but stated she thought there was still an identifiable pattern of conduct when considering the convictions and pending charges. She further testified it was not her job to determine guilt or innocence, and again stated she did not necessarily assume all of the alleged assaults actually happened, but it was striking how many women reported similar things over a twenty plus year period, and those similarities presented a data point she could not simply ignore for purposes of the evaluation. (TT, pp. 189-213; R., pp. ____).

2. Dr. Gehle's Trial Testimony

On direct examination, Dr. Gehle testified she reviewed the same records Dr. Gottfried reviewed, interviewed Appellant on two occasions, and scored the Static 99-R (4) and Static 2002-R (5). She stated Appellant denied all of the allegations related to sexual assaults that were not charged, and testified it was her practice not to consider allegations that were not verified by a

conviction or the person's admission. She disagreed with Dr. Gottfried's diagnoses and opinion, opining Appellant did not have a mental abnormality or personality disorder that would meet the definition of a sexually violent predator. (TT, pp. 234-272; R., pp. ____).

On cross-examination, Dr. Gehle again stated she gives little to no weight to any allegations when the person denies the allegations and there was no conviction. She acknowledged Appellant was charged with second degree rape in 2005, which included accusations of drugging the victim, and then assaulting her vaginally and anally. She also acknowledged Appellant told her his arrest so affected him mentally that it was difficult for him to focus and continue in school. (TT, pp. 280-286; R., pp. ____).

Dr. Gehle testified it was "fair" to say Appellant was more concerned about how this arrest impacted him rather than what the offense did to the victim. When pressed, Dr. Gehle conceded that even though Appellant said his 2005 arrest greatly affected him, he did not change his behavior, and committed another sexual assault a year after the 2005 charge was dismissed (the 2008 incident at the Greensboro Coliseum involving S.M.M.). (TT, pp. 286-288; R., pp. _____).

Even though Dr. Gehle did not give any weight to the numerous allegations against Appellant spanning twenty plus years, with very similar circumstances reported by women geographically separated, she acknowledged she stated in her evaluation report that the allegations were "concerning." She further acknowledged stating in the report that there was "compelling" evidence in some of the cases, and if all the alleged incidents occurred, Appellant had never changed his behavior in spite of being arrested and convicted in at least two of the incidents. (TT, pp. 289-298; R., pp. _____).

3. Verdict

The jury found beyond a reasonable doubt Appellant is a sexually violent predator as defined by the SVPA, and the circuit court committed him to DMH's custody for long term control, care and treatment. (TT, pp. 429-432, Order of Commitment filed April 22, 2021; R., pp. ____). This appeal followed.

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." State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009); *see also* MacKenzie v. C&B Logging, 436 S.C. 122, 871 S.E.2d 185, 188–89 (Ct. App. 2022) (appellate court's review of the circuit court's admission or exclusion of potentially relevant evidence is considered under a deferential standard, and the trial court's decision will not be reversed unless it appears the trial court clearly abused its discretion with prejudice to the objecting party).

"'The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion.'" State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020) (*quoting* State v. Chavis, 412 S.C. 101, 771 S.E.2d 336, 338 [2015]). "'A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion,'" which "'occurs when the conclusions of the [trial] court are either controlled by an error of law or are based on unsupported factual conclusions.'" *Id.* (alteration in original).

ARGUMENT

I. The circuit court did not abuse its discretion by allowing the State's expert to testify about uncharged and/or unconvicted sex offense allegations against Appellant because the expert testified it was best practice in psychosexual evaluations to consider the person's entire sexual behavior functioning, and she considered the allegations against Appellant as one data point for diagnostic and risk assessment purposes.

Appellant contends the circuit court erred in admitting Dr. Gottfried's testimony regarding the uncharged and/or unconvicted allegations Appellant sexually assaulted multiple women over a period of twenty plus years because the testimony was hearsay. Contrary to Appellant's contention, the challenged evidence was not offered for the truth of the matter asserted, but as Judge McFadden expressly ruled, it was offered **only** to provide the jury with part of the basis for Dr. Gottfried's opinions. *See* In re Detention of Coe, 286 P.3d 29, 43 (Wash. 2012) (evidence on unadjudicated offenses is admissible in a civil commitment case provided it is not being offered for the truth of the matter asserted).

Dr. Gottfried did testify she personally believed the incidents happened, particularly given the similarities of the reports, but even though she did not know if the allegations were true, they were something she had to consider as part of her evaluation. Dr. Gottfried also stated the underlying facts of Appellant's sexual convictions did present a pattern, but she truthfully testified it would be difficult for her to say what her conclusions would have been if she had not known about the other allegations. (TT, pp. 189-213; R., pp. ____).

The jury also heard Dr. Gehle's testimony about why she did not consider the uncharged/unconvicted allegations in reaching her opinions, including her view that police reports come "from the perspective of trying to prove that somebody committed conduct and so they're written in a way that makes it seem more true than maybe it would be," and her belief in the "right of innocent until proven guilty." (TT, p. 270; R., p. ____). In reaching its verdict, the jury was

free to discount Dr. Gottfried's testimony regarding the uncharged/unconvicted allegations precisely because she expressly said she did not know if the allegations she considered were true, and equally free to accept Dr. Gehle's opinion that the allegations should not be considered at all.[4]

Appellant's repeated reference to Dr. Gottfried's testimony as recounting "lurid" or "graphic" details of the victims' reports is misleading. Dr. Gottfried only testified to the limited details of each allegation that she found were similar (primarily incapacitation by drugging, strangling or choking followed by sexual assaults, including anal sex), and it was the striking similarities of reports by women from different geographic areas across a twenty plus year period that made the reports significant for purposes of Dr. Gottfried's opinions.[5]

Dr. Gottfried's testimony in the State's case-in-chief encompassed ninety-seven pages of the trial transcript. (TT, pp. 67-164; R. pp. ____). Only sixteen pages of her direct examination before the jury dealt with Appellant's criminal offense history, including his convictions, pending charges and uncharged allegations. (TT, pp. 80-86, 125-135; R., pp. ____). Thus, approximately 87% of Dr. Gottfried's testimony dealt with other matters, including the tests and risk assessment

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[4]Interestingly, in assessing the evidence before the jury, Appellant ignores Dr. Gehle's testimony regarding her reasons for not considering the uncharged/unconvicted allegations against Appellant, but then claims Dr. Gehle's testimony indicates "it does not appear at all settled that using even the fact of uncharged conduct is a best practice in the esoteric field of SVP evaluations." While the field of SVP evaluations may have been "esoteric" at one point, twenty states, the District of Columbia and the federal government now have sexual predator commitment laws, and multiple articles and books address the practice, so the field of SVP evaluations has greatly expanded beyond being "esoteric." Further, Dr. Gehle merely testified "it has been my practice not to consider allegations," while Dr. Gottfried testified "best practices manual, so the books written about how to do these kinds of evaluations indicate that you just want to look at their history of sexual behavior functioning that was illegal whether it was discovered or charged or not." (Emphasis added). (TT, pp.79, 270; R. pp. ____).

[5]Appellant's contention the allegations were based only on police reports and statements is inaccurate. Dr. Gottfried testified she also reviewed medical records associated with some of the victims, a protection order hearing transcript associated with one victim, and the *in camera* sworn testimony of two victims in Appellant's criminal trial in Sumter County. By implication, Dr. Gottfried also had K.B.'s sworn testimony in the criminal trial.

tools she utilized in formulating her opinions. Further, the State did not dwell on the details of the multiple reports in closing, but only pointed out the similarities between the allegations and Appellant's conduct in the offenses for which he was convicted. (TT, pp. 394-395; R., pp. ____).

Assuming for purposes of argument that the evidence at issue was hearsay, Appellant's reliance on State v. Jenkins, 436 S.C. 362, 872 S.E.2d 620 (2022) is misplaced. In Jenkins, the Supreme Court held that when evidence relied on by an expert serves dual purposes, the trial court must "'determine whether the evidence has sufficient probative force for serving the legitimate purpose that the evidence should be admitted, despite its inherent tendency to serve the improper purpose.'" *Id.* at 631(*quoting* State v. Perry, 430 S.C. 24, 842 S.E.2d 654, 657-58 [(2020]). The evidence at issue in this case did not serve dual purposes. Rather, as Judge McFadden found, its only purpose was to inform the jury of the basis for Dr. Gottfried's opinions, not to establish the allegations were true, or even believable. Again, the jury was free to discount the evidence and Dr. Gottfried's opinions entirely.

It is well established that propensity evidence is not admissible in criminal cases. Rule 404(b), of the South Carolina Rules of Evidence; State v. Dinkins, 435 S.C. 541, 868 S.E.2d 181, 187 (Ct. App. 2021) ("Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial.") It is also well established that SVPA cases are **not** criminal proceedings, however, and the person's **propensity** to commit future acts of sexual violence is the focus of SVPA proceedings. *See, e.g.,* In re Care & Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008) (A "'person's **dangerous propensities** are the focus of the SVP Act.'") (*quoting* In re Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451, 453 [2003]) (emphasis added).

The SVPA affords evaluators "reasonable access to the person for the purpose of the examination, as well as access to **all** relevant medical, psychological, criminal **offense**, and disciplinary records and reports." S.C. Code Ann. § 44–48–90 (2018) (emphasis added). Criminal "offenses" can include both convictions and offenses not resulting in convictions as long as they are relevant to the determination of whether a person is a sexually violent predator. *See* White v. State, 375 S.C. 1, 649 S.E.2d 172, 176 (Ct. App. 2007) (past convictions and prior offenses not resulting in convictions that bear on whether a person is a sexually violent predator are admissible in SVPA cases). "Because a 'person's dangerous propensities are the focus of the SVP Act," consideration of "'[p]ast criminal history is therefore directly relevant to establishing 44–48–30(1)(a),' which in turn bears directly on whether one suffers from a mental abnormality under section 44–48–30(1)(b)." Ettel, 660 S.E.2d at 287. Prior unconvicted sexual offenses may establish a "pattern of behavior of sexual assaults," which aids in the diagnosis of a mental abnormality and goes to the person's propensity to commit future sexual offenses. *Id.* at 288.

Appellant's contention that evidence of uncharged/unconvicted conduct is inadmissible at a SVPA trial, even if it is directly relevant and necessary to explain the expert's methodology, evaluation and opinion, is counter-intuitive to the language of the statute regarding access to the person's criminal offense history, as well as case law finding propensity to commit future acts of sexual violence is the focus of SVPA proceedings. Essentially, the experts would be statutorily entitled to access and consider the person's entire criminal offense history, including uncharged/unconvicted offenses, for purposes of diagnosis and risk assessment, but then could not testify at trial about the basis for their conclusions if it includes the uncharged/unconvicted offenses.

Recognizing the purposes of expert testimony in sexual predator cases, other jurisdictions have allowed evidence of uncharged/unconvicted conduct.[6] In sexual predator civil commitment cases, expert testimony regarding the details of underlying facts or data of uncharged sexual offenses is "'highly probative and helpful to the jury in explaining the basis of [the expert's] opinion that [a person] has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.'" In re Commitment of Renshaw, 598 S.W.3d 303, 314 (Tex. App. 2020) (*quoting* In re Commitment of Stuteville, 463 S.W.3d 543, 556 [Tex. App. 2015]). The need to present evidence of uncharged/unconvicted offenses to explain the basis of the expert's opinion is great because, without that evidence, the jury would not hear about the person's pattern of sexual conduct, and the jury would not be basing its verdict on the full picture of the person's sexual deviance. *Id.* at 315.

In State v. Floyd Y., 22 N.Y.3d 95, 2 N.E.3d 204 (2013), the court found that a significant number of jurisdictions take a flexible approach allowing the admission of "basis hearsay" in sexual predator commitment cases, but require the trial courts to make independent reliability assessments, which serve to protect the individual's substantial liberty interests.

> [B]asis hearsay does not come into evidence for its truth, but **rather to assist the factfinder with its essential article 10 task of evaluating the experts' opinions. In order to assess an expert's testimony, the factfinder must understand the expert's methodology and the practice in the expert's field.** In this case, for example, [the expert] testified that experts in her field "rely heavily upon witness statements, affidavits, [and] victim statements ... because in treatment there are issues of confronting a sexual offender with exactly what happened." Understanding her diagnosis and her treatment of Floyd Y. **requires understanding the information she considered when making her diagnostic and treatment decisions.** As our concurring colleagues concede, **out-of-court statements are routinely admitted at trial for purposes other than to demonstrate their truth. Factfinders in article 10 trials cannot comprehend or**

[6]Virginia is the only jurisdiction the State can find, and Appellant cites, that prohibits introduction of any evidence regarding unadjudicated offenses in sexual predator civil commitment cases. *See* Commonwealth v. Wynn, 671 S.E.2d 137 (2009).

> **evaluate the testimony of an expert without knowing how and on what basis the expert formed an opinion.**
>
> **To the extent that a factfinder's assessment might turn on its acceptance of basis evidence as true, article 10 provides the respondent with an opportunity to challenge the State's expert by presenting a competing view of the basis evidence through the testimony of the respondent's expert.**

Id., at 212-13 (internal citations omitted) (emphasis added); *see also* State v. John S., 23 N.Y.3d 326, 15 N.E.3d 287, 300–01 (2014) (hearsay at issue was derived from documentary sources, including complaints from five different victims attacked within a 32–day time period involving a strikingly similar pattern, which supported trial court's finding the information was sufficiently reliable).

Presenting a competing view of the basis evidence is exactly what Appellant did in this case via Dr. Gehle's testimony. Then, Appellant emphasized in closing argument the extent of Dr. Gehle's experience conducting SVPA evaluations and that she was appointed by the court to conduct Appellant's evaluation, while the State hired Dr. Gottfried which might factor into how she formulated her opinions. (TT, pp. 404-408; R., pp. ____).

In State v. John S., the court found:

> The State's experts based their mental abnormality diagnoses, in part, on patterns of behavior that they perceived had emerged from respondent's criminal history, such as his propensity to commit sex offenses in public places, to reoffend after having been previously sanctioned for a sex offense, and to use violence to control his victims. **It was reasonable for the trial court to conclude that basis testimony about the 1968 charges (which involved three violent rapes) was necessary for the jury to adequately evaluate whether these opinions were credible or convincing, and that excluding the testimony may have stymied the jury's fact-finding.**

15 N.E.3d at 300–01 (emphasis added).[7]

[7]The court held it was error to admit evidence regarding an uncharged rape based solely on a presentence report from the person's criminal case, but found the error was harmless. *Id.* at 547-548.

Appellant's reliance on In re Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), is misplaced. The evidence at issue in Bilton was an expert's testimony about the results of a scientific test administered by someone else, but the testifying expert did not have training or experience administering the specific test, and did not know who had actually performed the test or how it was performed. *Id.* at 165-166. The instant case does not involve a scientific test performed by an unknown individual. Dr. Gottfried was able to testify first-hand about each part of Appellant's evaluation, what documents she personally reviewed, what she considered and how she used all the information in reaching her opinions. Thus, the Bilton analysis simply does not apply.

Appellant's contention the fact the law enforcement reports did not result in charges "craves the inference that those statements were of dubious reliability" is speculative and ignores the reality of sex offenses. Initially, as both Dr. Gottfried and Dr. Gehle testified, the vast majority of sex offenses are not reported. (TT, pp. 140, 317-318; R., pp. ____). Further, there are a myriad of reasons charges are not filed in sex offenses that are reported, notably protecting the victims' mental well being from having to relive their sexual assaults. In this case, some of the victims reported why they did not initially report Appellant's assaults, including fear of the Appellant, and L.M.R.'s experience after she did report the assault in 2005 starkly demonstrates another reason sex offenses are not reported.

As discussed in depth above, the challenged evidence was not admitted to prove the allegations were true, but only to explain part of the basis for Dr. Gottfried's methodology, analysis and opinions regarding Appellant's mental status and risk to reoffend sexually. To the extent the challenged evidence constituted hearsay, it was basis hearsay necessary to explain to the jury what Dr. Gottfried considered and how she reached her opinions. Without that evidence, the jury would

not have the 'full picture" of Appellant's sexual deviance, and its fact finding responsibility would have been stymied.[8] Therefore, Judge McFadden did not abuse his discretion in admitting the evidence, and his ruling should be affirmed.

[8]Appellant himself acknowledged the significance and inherent reliability of the challenged evidence when he testified that the odds of multiple women from different geographic locations and over a period of twenty plus years reporting such similar allegations against him were "slim to none." (TT, pp. 386-387; R., p. ____).

II. The State expert's testimony regarding the pattern of sexual behavior functioning established by the similarities of the allegations against him spanning a twenty plus year period was relevant and probative to the ultimate issue before the jury, and the prejudice to Appellant did not substantially outweigh the testimony's significant probative value in this SVPA proceeding.

Appellant contends Judge McFadden erred in admitting the evidence of uncharged/unconvicted allegations against him because "Rule 403 does not allow the volume of unfairly prejudicial details from uncharged conduct that was admitted in [Appellant's] trial." Judge McFadden conducted the required Rule 403 balancing test, and specifically found '[w]hile [Appellant] claims he will be prejudiced by the admission of the North Carolina allegations, he fails to address the only relevant inquire – is it *unfair* prejudice," and based on applicable case law, Judge McFadden found the evidence "can reveal a pattern of dangerousness, and may be submitted to the jury in a case of this nature." (Order Denying Motion to Exclude Testimony, pp. 4, 7-8. [emphasis in original]; R., pp. ____).

In SVPA cases, the statute affords evaluators access to the person's criminal offense history and contemplates consideration of uncharged/unconvicted criminal offenses by the evaluators, and the possibility of unfair prejudice does not substantially outweigh the probative value of evidence regarding prior uncharged/unconvicted sexual offenses. *See, e.g.,* Ettel; Corley; Manigo.[9] In Ettel, the expert used information about prior unconvicted sexual offenses, as well as verbal information she received from law enforcement regarding a possible sexual component of a prior murder conviction, in finding "a pattern of behavior" supporting her paraphilia diagnosis and risk assessment. The court of appeals affirmed the trial court's admission of the evidence, finding the

[9]Appellant's attempts to distinguish these cases on factual differences, but the court's analysis and conclusion in each case regarding the ultimate issue of admissibility of uncharged/unconvicted criminal offenses remains the same.

possibility of unfair prejudice did not substantially outweigh the evidence's high probative value. 660 S.E.2d at 288.

As in Ettel, Dr. Gottfried used Appellant's criminal offense history of both adjudicated and unadjudicated sexual offenses to determine if there was a pattern of behavior for purposes of diagnosis and risk assessment. Particularly in the SVPA context, the significant probative value of that evidence was not substantially outweighed by the prejudice to Appellant, even if the possibility of prejudice was high.[10]

In a case almost on point with the instant case, the Texas Court of Appeals directly addressed the issue of "unfair prejudice" from evidence regarding uncharged/unconvicted allegations in sexual predator civil commitment cases. Stuteville, 463 S.W.3d at 555-556. In Stuteville, the expert testified Stuteville had approximately twenty-seven to forty-three victims (in addition to the four victims of his charged offenses), which Stuteville asserted "was based largely on unsubstantiated rumors, gossip, and multiple levels of hearsay." As Appellant argues in this case, Stuteville further asserted "'[t]he sheer volume of this evidence created a substantial danger' that the jury based its verdict on further punishing Stuteville for the uncharged sexual offenses." 463 S.W.3d at 555.

The court noted the expert testified about details associated with multiple charged and uncharged sexual offenses against children attributed to Stuteville "going back as far as 1987," and she "explained to the jury how and why the underlying offenses and details assisted her in evaluating Stuteville to determine whether he had a behavioral abnormality that made him likely to engage in predatory acts of sexual violence and that Stuteville posed a high risk of reoffending

[10]Appellant conceded at the pre-trial motion hearing that the uncharged/unconvicted allegations were relevant to the experts' evaluations. (MHT, pp. 8-9; R., pp. ____).

sexually."[11] According to the expert, "Stuteville's large number of victims and his long period of offending are illustrated by the details of the charged and uncharged offenses that she described to the jury." *Id.* at 555-556. The court found the evidence of charged and uncharged offenses was "highly probative and helpful to the jury in explaining the basis of [the expert's] opinion." *Id.*

Responding to Stuteville's assertion that admitting the "'voluminous, unneeded and emotionally charged details [was] . . . unfairly prejudicial because of their tendency to arouse the jury's hostility against Mr. Stuteville," the court stated "the Beaumont Court of Appeals has repeatedly upheld a trial court's decision to allow an expert to testify about the details of such offenses in SVP cases." The court then found the trial court did not abuse its discretion by allowing the challenged testimony, because "the trial court could have reasonably concluded that the facts and details related to Stuteville's offenses would be helpful to the jury in weighing [Stuteville's] testimony and [the expert's] testimony, and in explaining the basis for [the expert's] opinion." *Id.*

The exact same analysis applies in the instant case. Judge McFadden found the evidence regarding uncharged/unconvicted sex offense allegations against Appellant was "highly relevant" to the jury's consideration of whether Appellant had the propensity to commit future acts of sexual violence, and it "must not be suppressed merely because it would prejudice [Appellant]." (Order Denying Motion to Exclude Testimony, p. 5; R., p. ____). In short, Judge McFadden found the prejudice to Appellant did not substantially outweigh the highly probative value of the evidence.

Appellant asserts "[t]he singular unfairness here is that many of these women, as both experts said, had consensual sex with [Appellant]," but fails to demonstrate how that fact enhanced the prejudice to him. Indeed, the undisputed fact most of the women did have a relationship with

[11]Appellant's attempt to differentiate his case from cases involving pedophiles in which consent is not an issue is unavailing for purposes of the probative value/prejudice analysis.

Appellant at some point was an argument available to Appellant to undermine the allegations' validity. In addition, Appellant again summarily asserts the North Carolina authorities "declined to prosecute most of them," but as discussed above, there are many reasons, other than prosecutorial decisions regarding the strength of a case, that charges are not filed in sex offense cases.

Finally, Appellant's claim that the "manifest prejudice is the jury hearing an expert take as fact that he sexually assaulted nineteen women" ignores much of Dr. Gottfried's testimony regarding how and why she considered the allegations. In explaining her methodology and conclusions, Dr. Gottfried specifically testified about Appellant's version of what did or did not happen in each incident, that she did not investigate the allegations, she did not know if they were true, and it was not her job to determine guilt or innocence. In addition, as discussed above, the jury also heard Dr. Gehle's testimony about why she did not consider the allegations for purposes of her evaluation, which included testimony that she only considers facts verified by convictions or admissions, and it was free to accept Dr. Gehle's testimony in reaching a verdict. (TT, pp. 249-250, 270; R., pp. ____).

The challenged evidence was no doubt prejudicial to Appellant, but as Judge McFadden found, the ultimate issue is whether the evidence "unfairly" prejudiced Appellant, and the prejudice must substantially outweigh the evidence's probative value. Other than summarily claiming the obvious prejudice, Appellant fails to demonstrate how the evidence at issue meets the "substantially outweighs" threshold. Therefore, Judge McFadden did not abuse his discretion in admitting the challenged evidence, and his ruling should be affirmed.

CONCLUSION

Based on the foregoing reasons, the State respectfully submits the Court should affirm the circuit court's admission of the evidence regarding uncharged/unconvicted sex offense allegations against Appellant, and the jury's verdict that ultimate finding Appellant is a sexually violent predator beyond a reasonable doubt.

Respectfully submitted,

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December 7, 2022

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable George M. McFaddin, Circuit Court Judge
Appellate Case No. 2021-000537

In the Matter of the Care and Treatment
of James Gregory Younger,

Appellant.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address reflected in the AIS system, and by depositing a copy in the United States mail, postage prepaid, addressed to:

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The Initial Brief and Designation of Matter has also been filed with the Court of Appeals through the AIS system.

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

This 7th day of December, 2022.

Sally B. Ellison

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Subject: In the Matter of the Care and Treatment of James Gregory Younger Appellant Case No. 2021-000537 INITIAL BRIEF OF RESPONDENT
Attachments: Initial Brief of Respondent James Gregory Younger Appellate Case No. 2021-000537 (03171299xD2C78).PDF

Follow Up Flag: Worldox

Good Afternoon:

Attached for service upon you this date is the Initial Brief of Respondent and Designation of Matter in the above appeal. A copy will also be placed in the US Mail as set forth in the Proof of Service.

Please acknowledge receipt of this email.

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