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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Jennifer B. McCoy, Circuit Court Judge
Appellate Case No. 2022-001219

IN THE MATTER OF THE CARE AND TREATMENT OF ANTONIO D. PATTERSON,

APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Judge McCoy did not abuse her discretion in allowing Dr. Gehle to testify about Appellant's expunged convictions for the limited purpose of explaining that expunged convictions must be factored into the risk assessment tools used in sexual predator evaluations, and Appellant was not prejudiced because this was a bench trial and Judge McCoy is presumed to have only considered appropriate evidence in deciding the case on the merits.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In 2010, a jury convicted Appellant Antonio D. Patterson of one count of criminal sexual conduct, first degree, arising from a 2006 sexual assault, and he was sentenced to twelve years incarceration. Appellant then pled guilty to one count of criminal sexual conduct, third degree, arising from another sexual assault, and he was sentenced to ten years incarceration, concurrent with his twelve-year sentence. Prior to Appellant's release from incarceration, Respondent State of South Carolina commenced proceedings pursuant to the Sexually Violent Predator Act (SVPA) seeking Appellant's commitment to the South Carolina Department of Mental Health (DMH) for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on July 25, 2022. After the State withdrew its request for a jury trial, the case was tried before the Honorable Jennifer B. McCoy, Circuit Court Judge.

Prior to trial, Appellant moved to exclude any testimony by the State's expert regarding dismissed charges and uncharged allegations. The State indicated it did not intend to discuss charges that had been expunged, but other charges that did not result in convictions would be discussed to the extent they were relevant to the expert's diagnosis. Judge McCoy deferred ruling until the evidence was offered during trial. (July 25 Hearing Transcript [7/25 HT], pp. 37-57; Record on Appeal [R.], pp. 37-57).

The State presented Marie Gehle, Psy.D, of DMH, who was qualified as an expert in forensic psychology and forensic sex offender evaluations. She testified she was appointed by the court to conduct an evaluation to determine if Appellant met the criteria for civil commitment pursuant to the SVPA. Her methodology included reviewing all available information and documentation, conducting a standard interview, scoring two actuarial risk assessments, reviewing dynamic risk factors, and preparing a report of her findings and opinions. (July 26 Trial Transcript [7/26 TT], pp. 8-13; R., pp. 67-72).

Dr. Gehle testified she interviewed Appellant for approximately three hours, during which Appellant was "very irritable, domineering," and "tried to control the interview." He claimed he was falsely accused and that his brother committed the offense for which Appellant was convicted. She further testified Appellant was "not very honest and straightforward, and "wanted to portray himself in a positive light." Based on her observations, Dr. Gehle started "to think about personality disorders, those very difficult interactions, that deceitfulness . . . [h]e thought that he could just say things that were untrue or false and that it wouldn't be questioned," which can be indicative of a personality disorder. (7/26 TT, pp. 14-15; R., pp. 73-74).

Dr. Gehle summarized the information she reviewed, which included Appellant's criminal history report, public index records, police reports, medical records regarding a sexual assault examination of a victim, investigative records, warrants, indictments, and "records about the expunged charges." She explained all the information was important because "it's a long-standing principle in psychology that past behavior predicts future behavior." She stated a person's personal history is important to the consideration of possible mental abnormalities and personality disorders, to see how the person lived their life, and what kind of problems they did or did not have. (7/26 TT, pp. 16-18; R., pp. 75-77).

Dr. Gehle testified Appellant's personal history and background included evidence of conduct disorder, which is a diagnostic requirement of antisocial personality disorder. Appellant told Dr. Gehle he had "a lot of behavioral problems as a kid," including bullying other children, taking lunch money, giving the teachers a hard time, cutting class, and teasing other people. He also stated he was physically cruel to people, destroyed property, lied and conned people, and got in trouble a lot at school and home. In spite of reporting these problems, Appellant "conveyed information" in a way that indicated "he had a pretty positive view of himself," said that "everyone

8loved him," and he was "so easy to get along with, and so likeable." (7/26 TT, pp. 18-19; R., pp. 77-78).

Dr. Gehle further testified "it's really important to review a full criminal history to get a timeline," as well as "victim details, age, gender, race, relationship of the victims, relationship between the offender and the victim, circumstances around the offenses, the method of operation of the offenses, interaction between the offender and the victim, so what the victim does, how he reacts to that." She stated this information "helps for the actuarials and it's important for the dynamic risk," and understanding what drives the offending is "important in the consideration of a mental abnormality or personality disorder." (7/26 TT, pp. 19-20; R., pp. 78-79).

Dr. Gehle explained that in considering the person's criminal history, she gives the most weight to convictions. When considering possible diagnoses, she gives weight to the person's admissions, and things she observes during the interview, especially if something happens repeatedly. She considers charges (unconvicted) for purposes of the risk assessment as dictated by the assessment tools developers, but she does not typically consider them in the context of rendering a diagnosis. (7/26 TT, pp. 20-21; R., pp. 79-80).

Appellant's criminal history included several non-sexual convictions and charges Dr. Gehle considered for evaluation purposes. Appellant was convicted of giving false information, which Dr. Gehle found significant because Appellant claimed his brothers actually committed criminal acts or served time under Appellant's name. She testified, over Appellant's objection, that Appellant also had a number of expunged charges. In overruling Appellant's objection, Judge McCoy stated: "I'll give it the proper weight that it deserves under the statute." (7/26 TT, pp. 21-22; R., pp. 80-81).

After Judge McCoy ruled, the State did not ask any questions about the expunged charges, instead asking Dr. Gehle how the providing false information conviction tied into what she observed during the interview. Dr. Gehle testified Appellant provided false information to her and he was "pretty deceitful, misleading in the interview." When Dr. Gehle stated "there were some expunged changes that were significant," the State interrupted her and asked her about Appellant's sex crimes. (7/26 TT, p. 22; R., p. 81).

Dr. Gehle testified Appellant was convicted in 2010 of criminal sexual conduct in the first degree based on a 2006 sexual assault. After he was convicted, Appellant pled guilty to criminal sexual conduct in the third degree based on a sexual assault that occurred while he was out on bond from the 2006 charge. (State's Exhibit 1, State's Exhibit 2; R., pp.232, 233). She summarized the facts of each offense and explained why the facts were important in formulating her opinions regarding diagnosis and risk. (7/26 TT, pp. 22-31; R., pp. 81-90).

Dr. Gehle diagnosed Appellant with antisocial personality disorder and explained how he met the criteria for the diagnosis. She testified Appellant met the first criteria for the diagnosis (failure to conform to social norms) because he had repeated arrests over time, a pattern of deceitfulness in the information he provided to the courts and to her, and a history of impulsivity and aggressiveness including "charges for criminal domestic violence." Appellant objected on the ground "that is an expunged event." The State informed Judge McCoy there was a court order allowing Dr. Gehle to look at those records, she used them in the risk assessment, and she was "not discussing them." Judge McCoy overruled the objection, stating she would "allow it for the purposes it is being introduced." (7/26 TT, pp. 38-42; R., pp. 97-101).

After testifying about how Appellant met the other criteria for an antisocial personal disorder, Dr. Gehle explained the difference between someone with antisocial personality disorder

and someone who just has a criminal history is that the personality disorder goes to "the way they are thinking, perceiving, the way they are explaining," and how the person is currently interacting which "speaks to how he interprets, perceives." She testified antisocial personality disorder is a chronic condition, and explained how someone with antisocial personality disorder might interact in society, including being ruthless in business, difficulty getting along with people and in relationships, committing crimes, and being deceptive. (7/26 TT, pp. 42-43; R., pp. 101-102).

Dr. Gehle used the Static-99R and the Static-2002R actuarial risk assessments in Appellant's evaluation, which is a standard practice of experts in the field. She stated it was difficult to score Appellant on the Static-99R because she did not have sufficient details about the victim characteristics in one of the expunged charges, but the coding rules for the Static-99R specifically require inclusion of expunged charges for scoring purposes. Based on the available information, Appellant's score was a three, which was in the average risk to reoffend category, but Dr. Gehle testified the score could be as high as seven if she had additional information about the expunged charges. (7/26 TT, pp, 47-50; R., pp. 106-109).

Appellant's score on the Static-2002R was five, which is in the above average risk to reoffend category. Dr. Gehle testified that unlike the Static-99R, the Static-2002R does not give any weight to unconvicted charges. Offenders with Appellant's score on the Static-2002R are twice as likely as the routine sex offender to be charged with another sex offense within five years. Dr. Gehle testified the risk assessments only include offenders who have been convicted of a sex offense and are then caught committing another sex offense, and because the research indicates the majority of sex offenses are unreported, there is a potential the assessments underestimate the risk of reoffending. (7/26 TT, pp. 50-53; R., pp. 109-112).

Dr. Gehle identified six known dynamic risk factors for reoffending applicable to Appellant: lack of emotionally intimate relationships with adults, lifestyle impulsiveness, poor problem solving, resistance to rules and supervision, grievance and hostility, and negative social influences. In explaining how Appellant met the lack of emotional relationships with adults risk factor, Dr. Gehle testified about Appellant's marriage and his statement to her that he did not spend any time with his wife and children, he drank excessively, and "he had some domestic violence charges." Appellant objected on the ground that the charges were expunged. Judge McCoy overruled the objection "for the purposes of being used for today's hearing." Dr. Gehle then immediately moved onto the other risk factors she found and how they applied to Appellant. (7/26 TT, pp. 53-57; R., pp. 112-116).

Dr. Gehle testified Appellant did not think he was at risk to reoffend, which indicated a lack of insight into how he got in his situation in the first place. Appellant told Dr. Gehle he planned to live with family members if released, which was "pretty similar to what his situation was when he was out in the community," and he would have no supervision upon release. (7/26 TT, pp. 57-62; R., pp. 116-121).

Dr. Gehle opined to a reasonable degree of psychological certainty that Appellant has a propensity to commit future sex offenses to such a degree that he is likely to reoffend. She further opined Appellant's risk to sexually reoffend poses a menace to the health and safety of others if he is not committed to a facility for long term control, care and treatment. (7/26 TT, pp. 62-63; R., pp. 121-122).

Appellant presented testimony from a former employer and then testified on his own behalf. Appellant essentially denied telling Dr. Gehle many of the things she testified he told her during the interview that formed the basis for her opinions, and testified about classes he took and

programs he participated in while incarcerated. On cross-examination, Appellant admitted he never had any sex offender treatment while incarcerated. (7/26 TT, pp. 101-128; R., pp. 160-187).

During closing argument, the State reiterated Dr. Gehle's testimony regarding the information she considered relating to each element the State is required to prove beyond a reasonable doubt. Regarding the Static-99R risk assessment, the State argued:

> She talked to you about the limitations of the Static-99R. It does allow for charges, and so she did include the expunged charges. She couldn't – in fairness to her, she couldn't really figure out the disposition. So his score could have been as high as a seven, but she couldn't make that conclusion because she didn't have the necessary information. So I think in fairness to her, she did the right thing. She testified this is what I know, this is what I confirm. Based on those confirmations, he scored a three, which is in the average risk category for that Static-99R, which is above the average, which is a two.

(7/26 TT, pp. 137-138; R., pp. 196-197).[1]

Judge McCoy took the matter under advisement. (7/26 TT, pp. 165-166; R., pp. 224-225). By Order filed July 28, 2022, Judge McCoy found beyond a reasonable doubt that Appellant is a sexually violent predator and placed him in DMH's custody for long term control, care and treatment. (Order of Commitment filed July 28, 2022, 2021; R., pp. 227). This appeal followed.

[1]That was the State's only reference to the existence of expunged charges during closing argument.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87, 93 (2002); *see also* State v. Phillips, 430 S.C. 319, 844 S.E.2d 651, 662 (2020) (trial court's decision to admit or exclude evidence is reviewed by appellate court under a deferential standard for an abuse of discretion); Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) (same). Appellate courts review Rule 403 rulings pursuant to an abuse of discretion standard and give great deference to the trial court. Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197, 199 (2007). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should only be reversed in exceptional circumstances. Johnson v. Horry County. Solid Waste Auth., 389 S.C. 528, 698 S.E.2d 835, 838 (Ct. App. 2010).

ARGUMENT

Judge McCoy did not abuse her discretion in this bench trial by allowing Dr. Gehle to testify about Appellant's expunged convictions for the limited purpose of explaining that expunged convictions must be factored into the risk assessment tools used in sexual predator evaluations.

During the bench trial in this case, Judge McCoy allowed Dr. Gehle to give very limited testimony explaining how and why she considered Appellant's expunged charges. Appellant begins his argument, however, by attacking the antisocial personality disorder diagnosis generally as a basis for civil commitment under the SVPA, cavalierly asserting "the Attorney General's case against [Appellant] was not strong and had trouble differentiating [Appellant] from someone with a medical condition versus a common criminal," and he then attacks the evidence as insufficient to support that diagnosis at all. (Brief of Appellant, pp. 4-6).[2] Those arguments have nothing to do with the evidentiary issue Appellant raises on appeal and are nothing more than a distraction from Appellant's inability to show Judge McCoy abused her discretion in this case.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is **substantially** outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE (emphasis added).

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[2]By way of footnote, Appellant references a 2023 amendment to the SVPA that modified the definition of "likely to commit acts of sexual violence" as, **in part**, "more probably than not will engage in acts of sexual violence." He contends this modification "resembles the preponderance of the evidence standard in civil cases and is usually described to juries at 51%. (Brief of Appellant, p. 6 n. 1). Not only is the 2023 amendment irrelevant in this case, Appellant's effort to reduce the issue in SVPA cases to a simple mathematical formula ignores the rest of the statutory definition as well as the complex interplay between mental abnormalities and/or personality disorders and future dangerousness.

Assessment of prejudice in the context of a bench trial presents "a near insurmountable burden for a defendant to prove prejudice" because a trial judge "is presumed" to separate admissible and inadmissible evidence during the mental process of adjudication even though the judge has heard both. State v. Inman, 395 S.C. 539, 720 S.E.2d 31, 45 (2011). "A trial judge's role in a bench trial is to admit all evidence and evaluate it in a non-jury setting." Brown v. Allstate Ins. Co., 344 S.C. 21, 542 S.E.2d 723, 726 (2001).

Appellant's discussions of the State's pre-trial "agreement" about the expunged charges is misleading. The State indicated it did intend to ask Dr. Gehle about unconvicted or uncharged offenses, but it did not intend to "discuss" the expunged charges. In fact, the State did not ask Dr. Gehle any questions about those charges, but Dr. Gehle referenced them on her own during her testimony explaining what she considered during the evaluations and why certain information was important.

When testifying about Appellant's non-sexual criminal history, Dr. Gehle stated Appellant "had a number of charges that were expunged - -" and Appellant objected. Significantly, in overruling the objection Judge McCoy stated: "I'll give it the proper weight that it deserves under the statute." (emphasis added). To preclude further reference to the expunged charges at that time, the State moved on and asked specifically about a non-sexual conviction for giving false information. Dr. Gehle testified it was significant because she found Appellant to be deceitful and misleading during her interview with him, and "there were some expunged charges that were significant," but the State immediately stated "[l]et's move on to [Appellant's] sex crimes." (7/26 TT, pp. 21-22: R., pp. 80-81). Thus, the State did not initiate or encourage Dr. Gehle to "discuss" the expunged charges.

Dr. Gehle testified she diagnosed Appellant with antisocial personality disorder, and explained what it is and the diagnostic criteria. The State asked Dr. Gehle to explain how Appellant meets the diagnostic criteria for antisocial personality disorder. The first criteria is a failure to conform to social norms, and Dr. Gehle testified Appellant had repeated arrests, a pattern of deceitfulness, and history of impulsivity and aggressiveness, and "had charges for criminal domestic violence."

Appellant objected on the ground the charges were expunged. The State responded that a court order allowed Dr. Gehle to look at the expunged records, and she was "not discussing them." Judge McCoy overruled the objection and allowed the testimony "for the purposes it is being introduced." (7/26 TT, pp. 38-41; R., pp .97-100). The State did not elicit or induce Dr. Gehle's reference to the expunged records, appropriately noted Dr. Gehle was not "discussing" the records and did not ask any questions about them after the objection.

Similarly, the next mention of the expunged charges occurred when Dr. Gehle testified about scoring the Static-99R and Static-2002R, and stated, without objection, that Appellant was difficult to score on the Static-99R because the scoring rules require that expunged charges be included in the score calculation.[3] She stated Appellant's score was three, which was in the average risk to reoffend category, but it could be as high as seven if she had additional information about the expunged charges.[4] Again, the State did not initiate or encourage Dr. Gehle's reference to the expunged charges, and there was no "discussion" of them.

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[3]Appellant ignores the lack of an objection to this testimony.

[4] The Static-2002R does not give any weight to unconvicted or expunged charges. Even without the expunged charges, Appellant score on the Static-2002R was five, which is in the above average risk to reoffend category.

Subsequently, Dr. Gehle testified she identified six dynamic risk factors impacting Appellant's risk to reoffend sexually, one of which is a lack of emotionally intimate relationships with adults. In the course of testifying about the specific things she considered regarding that risk factor, Dr. Gehle stated "[h]e drank excessively, and then he had some domestic violence charges." Appellant objected on the ground those charges were expunged. Citing Dr. Gehle's previous testimony about standards requiring consideration of expunged charges, Judge McCoy overruled the objection "for the purposes of being used for today's hearing." Again, the State did not elicit reference to, or "discussion" of, Appellant's expunged charges.

In short, contrary to Appellant's assertions, the State abided by its pre-trial "agreement" not to "discuss" Appellant's expunged charges. Those charges were referenced by Dr. Gehle without any prompting from the State, and only briefly mentioned in connection with information Dr. Gehle considered in forming her ultimate opinions regarding diagnosis and risk assessment. In fact there was absolutely no "discussion" regarding the facts of the expunged charges.

Appellant's assertion the State "capitalized" on the expunged charges during its closing argument is likewise belied by the record. The State only mentioned the expunged charges once during its entire argument, and only in connection with Dr. Gehle's difficulty in scoring the Static-99R, which requires consideration of expunged charges.[5] Significantly, there was no objection to the testimony the State referenced.

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[5]Appellant contends the State referenced the expunged charges because it was "[f]aced with an actuarial score that equated to only a 13.8% chance to reoffend." This contention continues Appellant's attempt to reduce the ultimate issue in the case to a simple mathematical equation rather than a comprehensive consideration of all available information. Such an approach undermines the purpose of the SVPA, which is to protect the public from dangerous individuals who have mental abnormalities or personality disorders that predispose them to commit future acts of sexual violence if not confined for treatment. The mathematical equation Appellant espouses compares "routine" sex offenders who have been caught reoffending, and it does not account for the presence of a predisposing mental abnormality or personality disorder.

It is clear Judge McCoy was well aware of her role as judge and fact-finder in this case. She allowed the challenged testimony "for purposes of the hearing," and even if testimony regarding the existence of Appellant's expunged charges was inadmissible, which the State disputes, it "is presumed" Judge McCoy separated admissible and inadmissible evidence during the mental process of adjudicating the issues before her. Therefore, Judge McCoy's rulings and Appellant's civil commitment as a sexually violent predator should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits Judge McCoy's judgment and Appellant's civil commitment pursuant to the SVPA should be affirmed.

Respectfully submitted,

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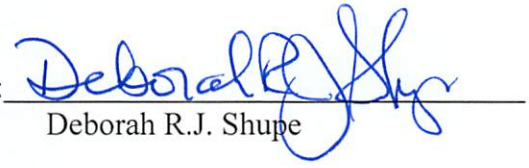
BY: 
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APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR and the April 15, 2014, Order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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