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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable William Seals, Circuit Court Judge
Appellate Case No. 2023-000285

In the Matter of the Care and Treatment
of Joseph Curtis, Jr.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Judge Seals did not abuse his discretion in allowing the State's expert to testify about Appellant's uncharged conduct because the information was a necessary part of the expert's psychosexual evaluation, and the information was one of multiple data points that served as a basis for the expert's diagnostic and risk assessment opinions.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In July 2014, Appellant, Joseph Curtis, Jr., pled guilty to criminal sexual conduct, third degree, kidnapping and incest, arising from the forcible rape of his 20-year-old niece, and was sentenced to twelve 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 jury trial on February 7, 2023, before the Honorable William Seals, Circuit Court Judge.

Prior to trial, Appellant moved to exclude any testimony regarding Appellant's unconvicted and/or uncharged conduct that the State's expert considered in her evaluation and opinions.[1] Judge Seals ruled that if the unconvicted and/or uncharged conduct factored into the expert's report, it was permissible for her to use it in her testimony. (Trial Transcript [TT] pp. 161-166; R., pp. 34-39).[2]

Emily Gottfried, Psy.D., of the Medical University of South Carolina (MUSC), who was qualified as an expert in forensic and clinical psychology, and sex offender evaluation and risk assessment, testified regarding the Appellant's evaluation, and her diagnoses and opinion. She testified MUSC was retained to conduct an independent evaluation on Appellant. Dr. Gottfried's standard evaluation protocol includes reviewing all available information, administering computer based psychological testing, and a clinical interview. As part of Appellant's comprehensive

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[1]Appellant's version of the trial arguments and testimony set out as "Factual and Procedural Background" is argumentative rather than an accurate recitation of **relevant** arguments and testimony. The State craves reference to the actual transcript as cited below for the arguments and testimony.

[2]There was also pre-trial testimony and argument about the admission of evidence regarding a penile plethysmograph conducted by the State's expert, which Judge Seals excluded as unduly prejudicial. (TT, pp. 70-148; SUPP. R., pp. 1-79).

evaluation, Dr. Gottfried reviewed police reports, witness statements, prison records, Horry County and Sumter County court documents, and she listened to recorded law enforcement interviews of Appellant, the victim, and the victim's mother during the investigation of Appellant's 2012 offenses against his niece. Appellant was transported to MUSC for three days for testing (first and second days) and the clinical interview (third day). (TT, pp. 166-184; R., pp. 39-57).

Dr. Gottfried testified she considered Appellant's entire criminal history, including convictions, charges, incidents reported to law enforcement with no charges ultimately filed, and institutional infractions which she discussed with Appellant during the clinical interview, as part of formulating her diagnostic and risk assessment opinions. She stated review of these types of records together with the clinical interview, and the battery of tests and assessments she uses in psychosexual evaluations is standard practice and reasonably relied on in the field of forensic psychology. (TT, pp. 187-212, 233-234; R., pp. 60-85, 106-107).

a. Appellant's Sexual Offenses

Dr. Gottfried testified about Appellant's sex offense history as reflected in official documents, which included charges in 2000 for criminal sexual conduct with a minor, in the second degree, and lewd act on a minor involving a fourteen year old female. The alleged conduct involved Appellant digitally penetrating the girl's vagina on numerous occasions between June and July 1998. The records indicated the charges were ultimately dismissed due to lack of cooperation from the victim. (TT, p. 191; R., p. 64).

In 2006, Appellant was charged with two counts of indecent exposure and two counts of contributing to the delinquency of a minor, based on allegations Appellant exposed himself and masturbated in front of his girlfriend's nine year old and sixteen year old daughters. The older daughter reported this happened fifteen to twenty times between November 2005 and February

2006. Appellant pled guilty to two counts of contributing to the delinquency of a minor, and was sentenced to two years' incarceration, suspended to seventy-three days, and three years' probation. (TT, p. 194; R., p. 67).

In 2012, Appellant was charged with criminal sexual misconduct, kidnapping, and incest, arising from the forcible rape of his twenty year old niece. The victim reported Appellant had exposed himself and masturbated in front of her in the past, but he had never physically assaulted her until the rape. While detained on those charges, Appellant was also charged with exposure of private parts in a lewd and lascivious manner for conduct at the jail. Appellant pled guilty to criminal sexual conduct in the third degree, kidnapping and incest, and was sentenced to ten years' incarceration. The charge related to Appellant's conduct in the jail was dismissed in 2014.

b. Appellant's Non-Sexual Convictions, Charges, Institutional Infractions, and Uncharged Conduct

According to the records Dr. Gottfried reviewed, Appellant's criminal history included three 1989 drug related charges in New Jersey, and Appellant told Dr. Gottfried he was convicted and sentenced to six months' probation. In 1990, Appellant was charged in South Carolina with assault and battery with intent to kill, and possession of a firearm or knife during the commission of or attempt to commit a violent crime arising from a shooting incident at Appellant's workplace. He pled guilty in 1991 to assault and battery with intent to kill, and was sentenced to fifteen years in prison. While incarcerated on that conviction, Appellant was convicted of two major infractions for sexual misconduct in the Department of Corrections, including masturbating in front of female officers. Appellant was released from incarceration in June 1998. (TT, pp. 189-190; R., pp. 62-63).[3]

[3]Appellant renewed his objection to the testimony on grounds of hearsay and relevance that was discussed before the trial, which Judge Seals overruled. (TT, p. 187; R., p. 60).

In August 1998, Appellant was charged with an alcohol violation (disposition unknown). He was charged with possession of marijuana in 2000, convicted at a bench trial, and ordered to pay a fine. (TT, p. 190; R., p. 63). Dr. Gottfried testified Appellant was investigated in 2004 for assault and battery that appeared to be related to an altercation with a coworker, but Appellant was not charged. In 2005, Appellant was investigated for domestic violence allegations after "his girlfriend called the police," but Appellant was not formally charged. In 2006, Appellant's girlfriend at the time (the mother of the two 2006 minor victims) reported to police that Appellant was harassing her, but Appellant was not charged. (TT, pp. 193-194; R., pp. 66-67).

In the official records Dr. Gottfried reviewed, there was a 2002 police report listing Appellant as a "suspect" in an Orangeburg investigation into allegations of criminal sexual conduct with a minor because Appellant was in a relationship with the mother of the two minor victims. Both minor victims "had ripped hymens." Dr. Gottfried immediately stated there was no indication Appellant was ever charged in that investigation. (TT, pp. 192-93; R., pp. 65-66).

Dr. Gottfried further testified to Appellant's general rule breaking behavior while he was in custody, which included infractions for failure to lockdown, gambling, trading food, verbal altercations with other inmates, and having an extra uniform. (TT, p. 202; R., p. 75).

c. Risk Assessment

Dr. Gottfried 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 followed for a five or ten-year period to see if they reoffend. Appellant's score on the Static 99-R was six, which placed him in the well-above average risk category for being charged with or convicted of another sexual offense. Appellant's score was higher than 94.2% of the people included in the underlying studies, with an approximate reoffense rate of 3.77 times the

rate of sex offenders scoring in the average range on the assessment. Dr. Gottfried stated it was important to note that only 30% of sex crime victims actually report the sexual assaults, and the risk assessment tools only include people who were caught re-offending. Additionally, she explained that the Static-99R expressly requires the evaluator to count unconvicted conduct, and it is a widely used and reliable test in her field. (TT, pp. 221-25; R., pp. 94-98).

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. 221-25; R., pp. 94-98).

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 assesses dynamic risk factors (factors that can be addressed possibly changed with treatment), while the Static tests only consider static risk factors (factors that cannot be changed, such as age). (TT, p. 226; R., p. 99).

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. 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: problems with sexual deviation regarding his arousal to exposing himself, or exhibitionism; antisocial personality disorder traits; relationship problems; nonsexual offending; chronic sexual offending; diverse sexual offending; escalation; extreme minimization/denial of

sexual offending; negative attitude towards intervention or treatment; and possible/partial problems with lacking realistic future plans. (TT, pp. 226-228; R., pp. 99-101).

d. Diagnoses and Opinions

Dr. Gottfried diagnosed Appellant with other specified personality disorder with antisocial and narcissistic traits. Dr. Gottfried testified that Appellant's antisocial traits included deceitfulness, impulsivity, aggressiveness, and reckless disregard for safety. The traits that lead to the diagnosis of narcissistic traits included a sense of entitlement, lack of empathy, exploitation of others, and arrogance. (TT, pp. 205-210; R., pp. 78-83).

In addition to the personality disorder, Dr. Gottfried testified she diagnosed Appellant with exhibitionism disorder. Dr. Gottfried explained that exhibitionism disorder is a paraphilic disorder in which a person has an intense or preferential sexual arousal to exposing their genitals to an unsuspecting person. She diagnosed this disorder based on Appellant's record of masturbating to his victims in the community as well as while incarcerated. (TT, pp. 211-12; R., pp. 84-85).

Dr. Gottfried testified she believed Appellant has serious difficulties controlling his conduct, his personality disorder makes his needs the most important, and he did not care about the safety, the well-being, or the desires of his victims. She further testified Appellant's disregard for others is a direct manifestation of his personality disorder. (TT, pp. 231-33; R., pp. 104-106).

Dr. Gottfried testified to a reasonable degree of psychological certainty that Appellant suffers from relevant personality disorders and a mental abnormality that affects 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 health and safety of the public. She further testified Appellant was at risk to reoffend sexually unless he is confined to a secure facility for 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. 233-34, 345-46; R., pp. 106-107, 218-219).

e. Cross-Examination

On cross-examination, Dr. Gottfried testified she reviewed the entire file as it was given to her by the State, and explained how she reads the file and considers all documents she has and summarizes them in her report. She characterized each incident of reported criminal conduct as a data point in her evaluation of Appellant's mental status as a sexually violent predator. Dr. Gottfried explained that she considered domestic violence, but it had little to no bearing on her opinion, and she discussed it during direct examination to flesh out the timeline because she listed it in her report. (TT, pp. 233-34; R., pp. 106-107).

Dr. Gottfried testified the arrests that did not lead to convictions were considered as part of the process for scoring Appellant's risk with the Static-99R, as required by the assessment's coding rules. (TT, pp. 287-88; R., pp. 160-161). Dr. Gottfried acknowledged that she did not have any firsthand information regarding the unconvicted/uncharged conduct, and relied solely on the audiotapes, the police reports, the indictment and the warrants that she received, and she took the reports as written. (TT, pp. 249-50; R., pp. 122-123).

f. Dr. Gehle's Trial Testimony

Dr. Gehle testified that reviewing Appellant's entire criminal history was "absolutely essential" in forming her final opinion. (TT, pp. 374-75; R., pp. 247-248). To form her opinion, she reviewed the criminal history, interviewed Appellant, and scored the Static 99-R (6) and Static 2002-R (4). She disagreed with Dr. Gottfried's diagnoses and opinion, and opined Appellant did not have a mental abnormality or personality disorder that would meet the definition of a sexually

violent predator. Additionally, she testified she gave Appellant "the benefit of the doubt" during his interview, stating she believed he was innocent of any charge or allegation for which he was not convicted of. (TT, pp. 394-402; R., pp. 267-275).

On cross-examination, Dr. Gehle testified she gives little to no weight to any allegations the person denies unless a conviction occurred. (TT, pp. 446-47; R., pp. 319-320). Dr. Gehle acknowledged that Appellant displayed self-protective behaviors when answering interview questions. (TT, p. 442; R., p. 315). Although she did not give any weight to the allegations, Dr. Gehle acknowledged that the Appellant's conduct increased in severity over the years. (TT, p. 458; R., p. 331).

g. 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. 504-505; Order of Commitment filed February 9, 2023; R., pp. 377-378; 393). 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).

ARGUMENT

Judge Seals did not abuse his discretion in allowing the State's expert to testify about uncharged allegations of conduct involving Appellant because the information was a necessary part of the expert's psychosexual evaluation, and the information was one of multiple data points that served as a basis for the expert's diagnostic and risk assessment opinions.

Appellant contends the circuit court erred in admitting Dr. Gottfried's testimony regarding the uncharged allegations against him that spanned over a period of twenty plus years because the testimony was "conduit" hearsay. Contrary to Appellant's contention, the challenged evidence was not offered for the truth of the matter asserted but, as Judge Seals found, it was offered as part of the analysis and basis for Dr. Gottfried's opinions, it was directly relevant to the issues, and the prejudice to Appellant did not substantially outweigh the evidence's probative value. (TT, pp. 164-66; R., pp. 37-39).

A. Admissibility

While propensity evidence is not admissible in criminal cases, it is well established that SVPA cases are not criminal proceedings 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). Thus, information regarding charged and uncharged offenses are relevant and essential to an evaluator's formation of an opinion regarding the person's propensity to commit future acts of sexual violence, and is highly probative of the SVPA's focus. Matter of Hay, 263 Kan. 822, 953 P.2d 666, 678. In recognition of the importance of such information to assessing the person's dangerous propensities, 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 offenses, and disciplinary records and reports," which can include both convictions and offenses not resulting in convictions if they are relevant to the determination of whether a person is a sexually violent predator. S.C. Code Ann. § 44–48–90(C) (2018) (emphasis added); 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 asserts the information regarding his uncharged offenses, specifically the 2002 investigation regarding Appellant being a suspect in a sex offense against his girlfriend's two daughters, the 2004 simple assault investigation for simple assault and battery based on an altercation with a coworker, the 2005 domestic violence allegation, and the 2006 allegation of harassment reported by the mother of Appellant's 2006 victims, was "offered for the truth of the matter asserted" simply because the jury had to believe the information was true in order to accept Dr. Gottfried's opinions. As a threshold matter, taken to its logical conclusion Appellant's assertion would prohibit testimony regarding any information an expert relies on that is found in official records, including the NCIC report (rap sheet) that Dr. Gehle testified "is absolutely essential and necessary to forming [her] opinion." Indeed, Dr. Gehle testified she even "stopped submitting reports" during a period of time she did not have access to NCIC reports "because [she]

needed that information before [she] could absolutely give an opinion." (TT, pp. 374-375, 430; R., pp. 247-248, 303).

Appellant's argument would also prohibit expert testimony regarding information obtained from medical and mental health records, school records, correctional facility records, official police records, victim statements, victim medical examination reports, victim forensic interview reports, publicly available information (public indexes) regarding criminal offenses that are not included in an NCIC report for some reason, and any collateral interviews the expert conducted (such as probation officials and the person's family members). Both Dr. Gottfried and Dr. Gehle testified they review and rely on many of these information sources in reaching their ultimate opinions regarding diagnosis and future risk to reoffend. (TT, pp. 178-181, 186-191, 372-378, 387-388, 395-396, 410-411; R., pp. 51-54, 59-64, 245-251, 260-261, 268-269, 283-284). They simply consider and use the information differently.

Dr. Gottfried testified she accepted the reports of uncharged allegations as written and acknowledged she did not know if the allegations were true, but they were something she had to consider as part of her evaluation and they carried less weight in her analysis. Dr. Gottfried stated the underlying facts of Appellant's sex offense charges, institutional infractions, and sex offense convictions presented a pattern supporting her exhibitionism diagnosis. As to her diagnosis of other specified personality disorder with antisocial and narcissistic traits, Dr. Gottfried testified she would still diagnose Appellant with the disorder even without the uncharged allegations, but she did have to consider them because they were allegations of criminal conduct. (TT, pp. 250, 252, 338-340; R., pp. 123-125, 211-213). The jury was free to disregard Dr. Gottfried's opinions precisely <u>because</u> she candidly testified she did <u>not</u> know if the uncharged allegations were true.

The jury also heard Dr. Gehle's testimony that she did not consider the uncharged conduct in reaching her opinions. (TT, pp. 446-47; R., pp. 319-320). In reaching its verdict, the jury was free to accept Dr. Gehle's opinion that uncharged allegations should not be considered at all.

Assuming for purposes of argument only 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 Seals found, the evidence was admissible to inform the jury of the basis for Dr. Gottfried's opinions, not to establish the allegations were true, or even believable. (TT, pp. 164-66; R., pp. 37-39). Again, the jury was free to discount the evidence and Dr. Gottfried's opinions entirely.

Significantly, Appellant's contention that evidence of uncharged 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 evaluators' access to the person's criminal offense history, as well as case law finding that propensity to commit future acts of sexual violence is the focus of SVPA proceedings. Essentially, experts would be statutorily entitled to access and consider the person's entire criminal offense history, including uncharged conduct revealed in official records, 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 offenses.

Recognizing the purposes of expert testimony in sexual predator civil commitment cases, other jurisdictions have allowed experts to testify regarding the person's uncharged conduct. 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]). Evidence of uncharged offenses is necessary to explain the basis of the expert's opinion 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. *See also* 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).

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**

> **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).

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).[4]

Appellant presented a competing view of the basis evidence via the testimony of Dr. Gehle. During closing argument, Appellant emphasized the extent of Dr. Gehle's experience conducting SVPA evaluations and that she was appointed by the court to conduct the evaluation. Additionally, Appellant implied that since the State hired Dr. Gottfried, her diagnoses and opinion would be biased in the State's favor. (TT, pp. 476-478; R., pp. 349-351).

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[4]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 correctly asserts the court of appeals cited Floyd Y in In re Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), but then ignores significant aspects of the Floyd Y analysis as discussed above. Further, to the extent Bilton addressed conduit hearsay, it is clearly distinguishable from the instant case. The evidence at issue in Bilton was an expert's testimony about the results of a scientific test (penile plethysmography) administered by someone else, the testifying expert did not have training or experience in administering the specific test, and she did not know who actually performed the test or how it was performed. *Id.* at 165-166. This case does not involve a scientific test performed by an unknown individual. Dr. Gottfried performed the analysis and testified 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 that the fact that law enforcement reports did not result in charges "craves the inference that those statements were of dubious reliability" is highly speculative and ignores the reality of sex offenses. Initially, Dr. Gottfried's testimony that the vast majority of sex offenses are not reported was undisputed. (TT, p. 220; R., p. 93). Further, there are a myriad of reasons sex offense charges are either not filed or filed charges are dismissed, notably protecting the victims' mental well-being from having to relive their sexual assaults.

Dr. Gottfried testified that Appellant was charged for criminal sexual conduct of a minor in 2000, but the charge was *nolle prossed* specifically because the victim would not cooperate with the prosecution. This further demonstrates the difficulty victims have in reporting sex offenses, and prosecutors have in proceeding on the charges that are reported. (TT, p. 191; R., p. 64).

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 was hearsay, it was "basis" hearsay that was 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. Therefore, Judge Seals did not abuse his discretion in admitting the evidence, and his ruling should be affirmed.

B. Rule 403

Appellant contends Judge Seals erred in admitting the evidence of uncharged allegations against him because "Rule 703 does not stretch so far to allow this violation of the rules prohibiting hearsay." Judge Seals allowed Dr. Gottfried's testimony regarding uncharged conduct reflected in Appellant's official records as part of her analysis because "[i]t factors into her report and she gave them weight." (TT, p. 166; R., p. 39).

Rule 403, SCRE, provides that 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" (emphasis added). "A trial court has particularly wide discretion in ruling on Rule 403 objections," and its decision regarding the comparative probative value and prejudicial effect of evidence should only be reversed in exceptional circumstances. State v. Lee, 399 S.C. 521, 732 S.E.2d 225, 228 (Ct. App. 2012); State v. Adams, 354 S.C. 361, 580 S.E.2d 785, 794 (Ct. App. 2003) ("A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.").

In SVPA cases, the statute affords evaluators access to the person's criminal offense history, which clearly includes uncharged/unconvicted criminal offenses, and the possibility of

unfair prejudice from allowing the expert to reference this evidence as part of the basis for the expert's opinion does not substantially outweigh the evidence's probative value. *See, e.g.,* Ettel; Corley; In re Care & Treatment of Manigo, 389 S.C. 96, 697 S.E.2d 285 (Ct. App. 2010).[5] In Ettel, the expert used information about prior unconvicted sexual offenses, as well as verbal information she received from out-of-state law enforcement regarding a possible sexual component of a murder conviction, in finding "a pattern of behavior" supporting her paraphilia diagnosis and risk assessment.[6] The court of appeals affirmed the trial court's admission of the evidence, finding the 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 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.

In a case much more dramatic than 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. 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,

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[5]Appellant 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.

[6]Appellant asserts Ettel is distinguishable because Ettel himself told the evaluator about his uncharged sexual conduct. This assertion ignores the Ettel expert testifying about verbal information she received from law enforcement on which she relied in reaching her opinion.

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 553-56.

The court noted the expert testified about details associated with multiple charged and uncharged sexual offenses against children "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 sexually." 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.* The court affirmed admission of the evidence. *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, except Dr. Gottfried testified to four instances of uncharged conduct, only two of them being sexual in nature, and her testimony about these incidents was externally limited. Judge Seals found the evidence regarding uncharged allegations against Appellant was relevant to the jury's consideration of whether Appellant had the

propensity to commit future acts of sexual violence, and the prejudice to Appellant did not substantially outweigh the highly probative value of the evidence.

Appellant asserts that evidence of the uncharged conduct was not reliable. As discussed above, however, Dr. Gottfried did not testify the allegations were true. Rather, she candidly testified she did not have firsthand knowledge of the allegations, she had not talked to any of the victims, and she did not know if the allegations were true. (TT, p. 250; R. p. 123). Dr. Gottfried told the jury she considers *all* the available information in reaching a diagnoses and opinion regarding risk, but gives different weight to information regarding unconvicted/uncharged allegations. She did not testify she believed the police reports to be accurate or reliable, just that *she* used them to write *her* report and considered them for *her* diagnosis and risk assessment.

Further, as discussed above, the jury also heard Dr. Gehle's testimony that she did not consider the unconvicted/uncharged allegations for purposes of her evaluation, but as a general rule, she only considered facts verified by convictions or Appellant's admissions during her interview. Of note, Dr. Gehle chose not to even consider the 2006 indecent exposure charges even though Appellant admitted some exposure of his genitals occurred, but gave an excuse for it – his robe was open and he did not know the victim was there.[7] (TT, pp. 391-92, 420-25; R. pp. 264-265, 293-298). The jury was free to accept and agree with Dr. Gehle's testimony in reaching a verdict. (TT, pp. 421-23; R. pp. 294-296).

[7] As indicated by her testimony of the 2006 indecent exposure charges, Dr. Gehle credits the person's version of events even if it is contradicted by victim's statements and police investigative reports. In this case, Dr. Gehle essentially assumed that Appellant's version must be accurate because the indecent exposure charges were dismissed as part of Appellant's agreement to plead guilty to the contributing to the delinquency of a minor charges. This view shows a fundamental misunderstanding of the realities involving prosecuting sex crimes against minor children.

Appellant's reference to Dr. Gottfried's testimony as recounting "salacious" details regarding the uncharged allegations is inaccurate and misleading. Dr. Gottfried only testified to limited details of each allegation she found relevant as data points to consider in her diagnosis and risk assessment. She gave a brief one to two sentence account of the uncharged conduct according to the reports she received and then moved to the next subject immediately. (TT, pp. 187-196, 198-204; R. pp. 60-69, 71-77). She later testified that the uncharged conduct was given less weight in her ultimate opinions. (TT, pp. 338-39; R. pp. 211-212).

Dr. Gottfried's testimony in the State's case-in-chief encompassed one-hundred-eighty pages of the trial transcript. (TT, pp. 167-347; R. pp. 40-220). Only fifteen pages of her direct examination before the jury dealt with Appellant's entire criminal offense history, which included his convictions, unconvicted charges, uncharged conduct and institutional infractions. The uncharged conduct accounted for an even smaller fraction of those fifteen pages. Thus, approximately 92% of Dr. Gottfried's testimony dealt with matters other than Appellant's criminal history, including the tests and risk assessment tools she utilized in formulating her opinions. (TT, pp. 187-196, 198-204; R., pp. 60-69, 71-77).

Assuming the challenged evidence was prejudicial to Appellant, the evidence did not unfairly prejudice Appellant, and the prejudice did not substantially outweigh the evidence's probative value. Other than summarily claiming the obvious prejudice, Appellant fails to assert or demonstrate how the evidence at issue meets the "substantially outweighs" threshold. Therefore, Judge Seals did not abuse his discretion in admitting the challenged evidence, and his ruling should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the Court should affirm Judge Seals' admission of the evidence regarding Appellant's reported but uncharged criminal conduct, and the jury's verdict that finding Appellant is a sexually violent predator beyond a reasonable doubt.

Respectfully submitted,

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August 1, 2024

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable William Seals Circuit Court Judge
Appellate Case No. 2023-000285

In the Matter of the Care and Treatment
of Joseph Curtis, Jr.,

Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify I served the within Final Brief of Respondent on Appellant by email to the address reflected in the AIS system to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

The Final Brief of Respondent has also been filed with the Court of Appeals through the email filing.

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

This 1st day of August, 2024.

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