

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
The Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2021-000733

RECEIVED

Aug 12 2024

SC Court of Appeals

IN THE MATTER OF THE CARE AND TREATMENT
OF JAMES LEWIS WILLIFORD,

APPELLANT

RESPONDENT'S PETITION FOR REHEARING

On July 24, 2024, this court reversed Appellant's civil commitment pursuant to the South Carolina Sexually Violent Predator Act (SVPA), finding error in the admission of evidence regarding the results of a penile plethysmograph (PPG) conducted in the course of Appellant's evaluation, and the error was not harmless. Matter of Williford, Op. No. 2024-UP-270 (S.C. Ct. App. filed June 24, 2024). Pursuant to Rule 221(a), SCACR, Respondent respectfully requests that the court rehear the matter, and consider the significant points overlooked and/or misapprehended by the court as discussed below.

Rehearing is appropriate and necessary in this case because the court failed to apply the appropriate standard of review, overlooked evidence in the record, and misapprehended the law related to admissibility of expert opinions. In particular, the court's apparent *de novo* determination regarding reliability and admissibility of the PPG evidence failed to recognize, analyze, or give due deference to the findings and legal conclusions of the Honorable R. Scott Sprouse regarding

the reliability of PPG testing, which he made after a full pre-trial evidentiary hearing consistent with State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), and State v. Council, 335 S.C. 1,515 S.E.2d 508 (1999) (hereinafter Jones/Council). In reversing Judge Sprouse’s ruling that the PPG was reliable, the court ignored significant, undisputed evidence regarding the PPG’s reliability and its admissibility as a factor considered by the State’s expert in formulating her opinion that Appellant meets the criteria for commitment as a sexually violent predator under South Carolina law.¹

In addition, even assuming error, which the State disputes, the court’s harmless error analysis was fundamentally flawed. The court again focused on very limited testimony regarding the PPG evidence without considering that evidence in context and in relation to the entirety of the evidence as required by well-established South Carolina case law.

ARGUMENT

A. The court failed to apply the required and appropriate 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 the trial court’s rulings were based on an error of law or were unsupported by evidence in the record. State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020); State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009); *see also* State v. Davis-Kocsis, Op. No. 28213, 2024 WL 3169855 at *3, n. 2 (S.C. Sup. Ct. filed June 26, 2024) (appellate court’s standard of review regarding evidentiary rulings is “simply to determine whether the trial court acted within its

¹The court decided this case without oral argument, during which all the evidence regarding the PPG’s general reliability and acceptance could have been discussed, and the State would have been afforded an opportunity to address the court’s concerns.

discretion,” and “[i]f so, we affirm”). The exercise of discretion means “the trial court—when ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it.” State v. Wallace, 440 S.C. 537, 892 S.E.2d 310, 312–13 (2023) (citing Morris v. BB&T Corp., 438 S.C. 582, 885 S.E.2d 394, 397 [2023]).

The trial court’s recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process; and when a trial court’s thought process of applying sound principles of law to the court’s view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court’s exercise of discretion, even when the judges on the appellate court might have made the decision differently.

Morris at 397. Trial courts are tasked only with determining whether the basis for the expert’s opinion is sufficiently reliable such that it may be offered into evidence, and vigorous cross examination, presentation of contrary evidence and careful instructions on the burden of proof are the traditional appropriate means of attacking admissible evidence. In re Matter of Ridley, 433 S.C. 316, 858 S.E.2d 165, 168-169 (Ct. App. 2021).

At the time of this bench trial, there was no authority in South Carolina holding the PPG is unreliable as a matter of law. Matter of Daily, filed three years after this case was tried, was the first case in South Carolina holding that PPG evidence was unreliable. Indeed, in the only previously published case regarding PPG evidence, Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), this court expressly declined to rule on the issue of PPG reliability. *Id.* at 446 (“We wish to emphasize that we are not called on to review whether some hypothetical procedure would qualify as a baseline demonstration that Bilton's PPG test results were reliable. We simply hold, as noted above, that due process does not allow a testifying expert to be a pipeline

for someone else's scientific work to be admitted into evidence without a baseline demonstration of reliability.”) (emphasis added).² Thus, there was no basis for finding Judge Sprouse committed an error of law, and his factual findings and conclusions should have been analyzed for evidentiary support.³

The court reversed Judge Sprouse’s conclusions with no analysis of the evidence before him, much less his detailed findings on each Jones/Council factor with references to the specific evidence on which he relied.⁴ Rather, the court summarily concluded the PPG test did not meet the requirements for admissibility of scientific evidence, citing a lack of standardization, adequate publication and peer review, quality control procedures and calculation of margin of error. These cited reasons indicate the court failed to even consider much of Dr. Gottfried’s testimony.

There was no dispute that Dr. Gottfried is an expert in forensic and clinical psychology and on the PPG. Significantly, her pre-trial testimony regarding the PPG was undisputed.

Dr. Gottfried is a clinical member of the Association for the Treatment of Sexual Abusers (ATSA), which is a national organization dealing with the type of work performed at the SBCL, and she sits on the executive committee of the South Carolina ATSA Chapter. She serves on the executive committee of the American Psychological Association (APA) Division 41, which is the American Psychology and Law Society, as well as the executive committee of the APA Division 12, which deals with clinical psychology assessment. She is a member of the American Academy

² The Bilton court’s holding that the State’s expert testimony regarding the PPG was a pipeline for scientific work performed by someone else recognized that the PPG is **scientific** work.

³To the extent the court relied on Daily in finding an error of law, Daily was decided well after the trial in this case, the State submits Daily was incorrectly decided, and a petition for rehearing is pending in that case.

⁴Indeed, it is difficult to find anything in the court’s summary opinion indicating the court even read, much less considered, Judge Sprouse’s analysis, findings and conclusions.

of Forensic Sciences, and other similar organizations, and is a member of the International Standardization Committee for the PPG. (R., pp. 31-32).

Multiple studies regarding the PPG have been peer reviewed, and approximately 100 publications specific to abusive or illegal sexual behaviors have discussed use of the PPG. The PPG is also discussed in the general sexual behavior literature, looking at things such as erectile dysfunction, sexual health and wellness. Dr. Gottfried testified a peer reviewed paper published on June 8, 2021, in the general sexual behavior literature section of Nature, which “is a really, really high impact factor journal,” found the PPG “may be useful as a non-invasive potential technique to evaluate penile erection in men’s health,” and it “can actually be applied to clinical penile hardness and erectile function assessments.” (R., pp. 36-37).

Dr. Gottfried further testified the Sexual Behaviors Clinic and Lab has multiple quality controls for the PPG testing. Everyone in the SBCL is trained and certified by Limestone (the test machine and software manufacturer) to conduct their parts of the test, including administration of the test and interpretation of the data. They use a new gauge for each test, and the gauge is calibrated on a five-step program before a test can even begin. They also use countermeasures to make sure the test administration is reliable, and each test is conducted in the same way for every examinee. They do a sound check, and constantly monitor the temperature and humidity in the test room. There are standardized instructions in a ten-page document with a numbered checklist that the person administering the test goes over with each examinee. (R., pp. 39-40).

As further quality control, the equipment is also set-up to detect when the examinee is trying to manipulate the results of the test. The examinee may move around or squirm in the seat, try to have an erection to something he is not aroused to by flexing, or hold his breath. One countermeasure is that the pad the examinee sits on during the test picks up movements, and

another is a respiration strap which indicates any irregularities in breathing. There is also a keypad on the examinee's chair, and the examinee is instructed to press it if a scenario becomes either violent or sexual, which demonstrates whether the examinee is actually paying attention during the test. The test technician may ask the examinee to briefly describe a scenario, which is also designed to measure the examinee's attention to the test. (R., pp. 40-41).

The SBCL uses a very conservative cut score (change in penile circumference) to determine whether results are significant for purposes of SVPA psychosexual evaluations, and Dr. Gottfried testified using a high cut score may lead to false negative results, but in high stakes SVPA evaluations they do not want to say an examinee is aroused by something when he is not.⁵ She also reiterated the PPG is only one data point considered in SBCL evaluations. (R., pp. 41-42).

Dr. Gottfried testified the 2014 ATSA practice guidelines for assessment, treatment and management of male sex offenders recognize the PPG as a useful tool in both assessment and treatment of adult men because it provides a means to obtain objective behavioral data that may not be readily established through other assessment means. The guidelines also stress the PPG should not be used as the sole criterion for any decisions regarding an examinee, and Dr. Gottfried testified it would be unethical to use the PPG as the sole data point or to determine a person's criminal guilt. (R., pp. 43-45).

⁵Dr. Gottfried testified the cut scores are an area the Committee on Standardization is considering, and different scores may be used depending on the purpose of the PPG (i.e., assessment, treatment, penile health issues, etc.). While evaluators may use different cut scores, the underlying data remains the same. The primary standardization issue is not related to cut scores, but arises from the fact that other countries are allowed to use child pornography in a PPG test, but the United States cannot, and does not, use child pornography. Through the Standardization committee's work, other countries now use some of the stimuli currently used throughout the United States, but they continue to use child pornography as well. (R., pp. 42-43).

Dr. Gottfried stated the Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed. (DSM-5), also recognizes the PPG can be used to compare the person's normal sexual interests to paraphilic interests. The DSM-5 further states the PPG is "[t]he most thoroughly researched and longest used" psychophysiological measure of sexual interests, "although the sensitivity and specificity of diagnosis may vary from one site to another." (R., pp. 45-47).

Dr. Gottfried testified that a 2019 book, Sexually Violent Predators Clinical Science Handbook, has a chapter (Chapter 15) entitled "The Use of Penile Plethysmography in SVP Assessment and Treatment Decision Making." The author states the use of the PPG is important in both evaluating and treating sex offenders being considered for civil commitment under sexual predator laws because research has found the identification of deviant sexual arousal is a significant predictor of sexual recidivism. Dr. Gottfried further testified the PPG is generally accepted in the mental health community as evidenced by the literature from ATSA, the DSM-V, Federal Drug Administration approval of the Limestone system, which the SBCL uses, and recognition of the PPG as a valid medical test by the Federal Drug Administration, Medicare/Medicaid and Blue Cross/Blue Shield. (R., pp. 48-50).

Dr. Gottfried acknowledged there are criticisms of the PPG regarding standardization, offenders who do not show expected arousal patterns, and consistency with self-reported arousal patterns. She testified that a 2019 meta-analysis of the PPG included data from fifty-three studies and almost 9,500 men, and addressed many of the standardization issues, including the type of stimuli used, interpretations using standardized scores, and whether predictive effect sizes were strong or stronger than most risk factors for sexual recidivism. (R., pp. 50-52).

Dr. Gottfried then explained that "sensitivity is true positive," such as "someone is aroused by children and the PPG shows that they are aroused by children." "Specificity is a true negative,

where the person is not aroused by children and the PPG shows that they are not aroused.” Dr. Gottfried again explained the SCBL uses the conservative cut score, which may result in more false negatives, rather than risking false positives in a high stakes SVPA evaluation. (R., pp. 52-54).

Dr. Gottfried testified the SBCL uses two stimuli sets, the Marshall set, which is older and audio recordings only, and the Real Child Voices (RCV) set, which is slides plus audio. The RCV set is standard on all Limestone Technology PPG systems, and Dr. Gottfried testified that at least fifty labs across the country use it, including sexual predator programs in Minnesota, California, New York, Illinois and Missouri. Dr. Gottfried further testified the 2019 meta-analysis found the slide plus audio was the preferred and most valid way to administer a PPG, and the RCV set has been studied and been the subject of peer reviewed presentations at multiple scientific conferences. (R., pp. 54-58).

The SBCL saw Appellant twice in February 2020, and completed the evaluation in April 2020 after COVID related delays, and Appellant consented to the evaluation, including the PPG. Appellant’s results on psychological tests indicated defensiveness or deception. He denied committing any sexual offenses, including the ones he pled guilty to, and denied any sexual arousal. He also provided inconsistent information between the SBCL and DMH evaluations, as well as between the days of the SBCL evaluation. (R., pp. 59-61).

On cross-examination, Dr. Gottfried testified there were multiple studies looking at the specificity and sensitivity of the PPG, which dealt with false negatives and false positives, and established the margin of error for the PPG. She stated any test can theoretically be manipulated, and the SBCL uses a conservative cut score to minimize the possibility of false positive results. (R., pp. 73-77).

As noted above, the court did not discuss or analyze any of Judge Sprouse's findings and conclusions, but in a conclusory fashion, overlooked the extensive evidence before Judge Sprouse regarding the reliability of the PPG, particularly in relation to the Jones/Council factors. Apparently relying on Daily, which was not the law when this case was tried, the court implicitly concluded that Judge Sprouse erred as a matter of law in finding the PPG is reliable

It is clear from the record that Judge Sprouse recognized his responsibility to exercise his discretion regarding admissibility of PPG evidence, and he meaningfully engaged in exactly the deliberative process described in Wallace and Morris.⁶ Rather than fully analyze the evidence and Judge Sprouse's findings, the court overlooked the evidence and findings regarding standardization, the extensive peer review of, and publications about, the PPG, the quality control measures established by the PPG manufacturer of the PPG machine used in the MUSC's SBCL, as well as at least fifty labs across the United States, and the direct testimony regarding the margin of error calculations in the published research.

Instead of applying the appropriate abuse of discretion standard of review, this court engaged in a *de novo* review and based on the Daily opinion and this court's recent, consistent negative view of the PPG test in general, substituted its judgment for Judge Sprouse's without finding abuse of discretion as to any of Judge Sprouse's findings or conclusions. An appellate court's negative view of a particular scientific test or evidence is not a basis for overruling a trial court's comprehensive and well-reasoned analysis and ruling regarding the evidence's admissibility. See Morris; Wallace; State v. Phillips, 430 S.C. 319, 844 S.E.2d 651, 662 (2020)

⁶The extensive evidence before Judge Sprouse and his detailed ruling regarding admissibility of PPG evidence are set forth in detail at pages 5-10 of the Brief of Respondent with citations to the record, and are incorporated herein by reference.

(appellate courts analyze the admissibility of scientific evidence for the first time when the trial court fails to meaningfully exercise its discretion).

B. The court's harmless error analysis overlooked other overwhelming evidence that supported Judge Sprouse's bench trial verdict and mischaracterized Dr. Gottfried's testimony.

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893, 897 (2003); SCRE Rule 103(a). “A harmless error analysis is contextual and specific to the circumstances of the case,” and “the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Heller, 399 S.C. 157, 731 S.E.2d 312, 320 (Ct. App. 2012) (emphasis added). “It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence.” State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611, 613 (1983).

“It is well-established that it is a near insurmountable burden for a defendant to prove prejudice in the context of a bench trial as a judge is presumed to disregard prejudicial or inadmissible evidence.” State v. Inman, 395 S.C. 539, 720 S.E.2d 31, 45 (2011) (*citing* People v. Jackson, 949 N.E.2d 215, 229 [2011][the danger of prejudice is lessened in a bench trial]). While the PPG evidence in this case was prejudicial to Appellant, that prejudice did not invalidate Judge Sprouse's ultimate verdict.

As with its PPG analysis, this court set forth the correct harmless error standard, then failed to apply it to this bench trial. Rather than considering the PPG testimony in context and reviewing the case before Judge Sprouse as a whole, the court simply concluded the PPG evidence may have

contributed to Judge Sprouse's verdict, and therefore, error in admitting the PPG evidence was not harmless.⁷

In finding admission of the PPG evidence was not harmless, this court overlooked other, and indeed overwhelming, evidence in the record that more than supported Judge Sprouse's verdict, even without any of the PPG evidence. Dr. Gottfried testified about Appellant's evaluation process, including the full battery of psychological tests administered, and what she considered in reaching her conclusions. She reviewed Appellant's criminal history, including his qualifying convictions under the SVPA, and stated his scores on actuarial risk assessment tools were in the well above average risk to reoffend category. In addition, Appellant exhibited several dynamic risk factors for reoffending not considered in the actuarial risk assessments. (R., pp. 92-134).

Dr. Gottfried's testimony regarding Appellant's PPG test results was limited, and she stated the results were consistent with the pattern of Appellant's reported sex offenses. (R., pp. 122-123). Her entire trial testimony, including cross-examination and re-direct, is seventy-six pages (93-169), and the PPG test result testimony is one and one-half pages, or 2% of it. Contrary to this court's finding, this demonstrates Dr. Gottfried did not "emphasize" the importance of Appellant's PPG test results, and as she stated, the PPG was only one data point she considered in the course of her comprehensive evaluation of Appellant.

Dr. Gottfried diagnosed Appellant with antisocial personality disorder, narcissistic personality disorder and paraphilic coercive disorder. She testified that the paraphilia diagnosis was premised on the pattern of coercion and force in Appellant's sex offenses, and when that was

⁷The State does not concede error in the admission of the PPG evidence, but as set forth above, contends there was no error. This harmless error analysis is only in response to the court's harmless error conclusion.

considered with the PPG results and Appellant's personality characteristics, his paraphilia significantly increases his risk for future sexual violence. (R., pp. 134-144).

Appellant's expert ascribed Appellant's criminal behavior to his early lifestyle and upbringing rather than a personality disorder or mental abnormality. She concurred with Dr. Gottfried's testimony that Appellant scored in the well above average risk to reoffend category on the actuarial risk assessment tools, as well as Appellant's defensiveness, his minimization of his level of responsibility, and his dynamic risk factors, but opined he did not have any personality disorders or mental abnormalities that would qualify him for commitment under the SVPA. (R., pp.170-227).

Judge Sprouse heard from two experts. One expert performed a thorough and multi-faceted psychosexual evaluation. The other expert performed a less thorough evaluation, accepted Appellant's self-serving statements to her about how he had changed as true, then blamed Appellant's significant history of sexual offending on his childhood rather than a mental abnormality or personality disorder. She agreed Appellant was a high risk to reoffend sexually according to the well-established actuarial risk assessment tools, one of which she scored one point higher than Dr. Gottfried's score. On cross-examination, she also agreed, albeit reluctantly, that there was "some evidence initially that could suggest" Appellant had an interest in non-consensual sexual activity. (R., pp. 170-227). Thus, the only true disagreement between the experts was whether Appellant has a mental abnormality or personality disorder at all.

The State briefly referenced the PPG test during closing argument (R., p. 231), and focused instead on the thoroughness of Dr. Gottfried's evaluation, the pattern of coercion and force established by Appellant's sexual offenses, Appellant's statements to Dr. Gottfried, the issues the two experts agreed on, and the basis for Dr. Tross' opinion Appellant did not have either a mental

abnormality or personality disorder. (R., pp. 229-233). More significantly, Appellant's counsel argued in closing that "the big thing, Judge, in this case is whether or not there is a mental abnormality or personality disorder to begin with." (R., p. 234).

Judge Sprouse was free to accept or reject either expert's opinion on the issue of whether Appellant has a mental abnormality or personality disorder that is causally linked to his sexual offending and his propensity to reoffend sexually is to such a degree as to constitute a danger to the public. Even without the PPG evidence, the differences in thoroughness and methodology between the evaluations were stark, and Judge Sprouse could determine the experts' respective credibility and weigh their opinions accordingly. Further, the PPG results evidence was arguably cumulative to the undisputed evidence regarding the facts of Appellant's sex offense history, which was the basis for Dr. Gottfried's paraphilia diagnosis.

The court's reference to a quote from Dr. Gottfried's pre-trial testimony stating she could not do an evaluation if she could not use the PPG blurs the substance of her entire statement. The court correctly states the reason Dr. Gottfried gave for not doing an evaluation without the PPG was that it was part of the standard protocol for the SBCL, she would not take it out of that protocol, and she would still administer it and use it as a data point if she could not testify about the results in court. (R., p. 62). Contrary to the court's implication that Dr. Gottfried's statements indicated the PPG was a primary basis for her opinions in this case, however, the substance of her statements was that she would not do an evaluation without the PPG, rather than that she could not do an evaluation without it. Further, the court does not indicate how those limited statements during the pre-trial hearing obviated, or even outweighed, all the other evidence presented to Judge Sprouse during the trial regarding the basis for Dr. Gottfried's opinions.

The evidence about Appellant's PPG test results was a minimal part of Dr. Gottfried's testimony. Rather than consider that minimal testimony in context with the other evidence presented as the basis for Dr. Gottfried's opinions, and give credence to Judge Sprouse's ability to sort through all the evidence presented, this court summarily concluded the error in admitting the PPG evidence was not harmless beyond a reasonable doubt. Accordingly, the court should rehear this matter and find that any error from admission of the PPG evidence was harmless beyond a reasonable doubt.

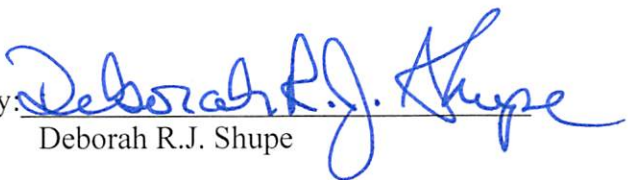
CONCLUSION

Based on the foregoing and the matter set forth in the Brief of Respondent, the State respectfully requests that the court reconsider and rehear this case, reverse its opinion, and affirm Appellant's commitment under the SVPA.

Respectfully submitted,

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August 12, 2024

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County
The Honorable R. Scott Sprouse, Circuit Court Judge
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IN THE MATTER OF THE CARE AND TREATMENT
OF JAMES LEWIS WILLIFORD,

APPELLANT

PROOF OF SERVICE

I, Abigail Hawley-Browder, certify I served the Respondent's Petition for Rehearing on Appellant by email to the Appellant's counsel at the address reflected in the AIS system. The Respondent's Petition for Rehearing has also been filed with the Court of Appeals via ctapp@sccourt.org.

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

This 12th day of August, 2024.


ABIGAIL HAWLEY-BROWDER
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Abigail Hawley-Browder

From: Abigail Hawley-Browder
Sent: Monday, August 12, 2024 4:04 PM
To: sshipe@sccid.sc.gov
Cc: Deborah Shupe; smcinnis@sccid.sc.gov
Subject: In the Matter of the Care and Treatment of James Lewis Williford (2021-0007333)
Attachments: WILLIFORD James - Petition for Rehearing (03662092xD2C78).PDF

Good afternoon Ms. Shipe,

Attached please find a Petition for Rehearing for In the Matter of the Care and Treatment of James Lewis Williford (2021-0007333). This petition will be filed today with the Court of Appeals via e-mail filing. If you will please confirm receipt of e-mail.

Thank you!

Abigail Hawley-Browder, Legal Assistant
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