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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2021-000734

IN THE MATTER OF THE CARE AND TREATMENT
OF ANDY EUGENE HYMAN,

APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Judge Henderson did not abuse his discretion in admitting evidence regarding a penile plethysmograph test performed by the State's expert, which she used in formulating her opinion, because the evidence established penile plethysmography is recognized and accepted in the field of sex offender evaluation and treatment as a reliable, objective measure of deviant sexual interests.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In 2016, Appellant Andy Eugene Hyman pled guilty in Florence County to one count of criminal sexual conduct with a minor in the third degree, and was sentenced to ten years incarceration. 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 June 7, 2021, before the Honorable Roger E. Henderson, Circuit Court Judge.

Prior to trial, Appellant moved to exclude any testimony by the State's expert regarding a penile plethysmograph (PPG) performed during a comprehensive psychosexual evaluation of Appellant's mental status and risk to reoffend sexually. Before swearing the jury, the circuit court conducted a full evidentiary hearing pursuant to State v. Council,[1] during which Marie Gehle, Psy.D, of DMH, testified for Appellant, and Emily Gottfried, Ph.D., of the Medical University of South Carolina (MUSC), testified for the State.

A. Pre-Trial Hearing

Dr. Gehle

Dr. Gehle testified she is a clinical forensic psychologist with DMH, she conducts pre-commitment evaluations under the SVPA, and she has never utilized the PPG test because she believes it is not standardized which makes it unreliable. She stated everyone conducting PPG tests uses different stimulant sets, and there is no research on the stimulus sets utilized in MUSC's PPG tests, particularly the Real Child Voices (RCV) stimulus set . She also testified about a "best practices" book regarding evaluation of sexually violent predators, which recommended not using

[1] 335 S.C. 1, 515 S.E.2d 508 (1999).

the PPG test as part of such evaluations. (Trial Transcript [TT], pp. 101-115; Record on Appeal [R.], pp. 8-22).

On cross-examination, Dr. Gehle acknowledged the "best practices" book she referenced was published in 2009, and stated she was unaware of any updates since the original publication. She stated she remembered looking at articles from 2019 and 2020, and the 2019 article was about a collaboration of professionals regarding PPG standardization issues. She testified she was not trained to administer a PPG test, she had no expertise in using the PPG test, she had never published any articles about the reliability of the PPG, and she had never seen a PPG test performed. In addition, she was unaware of a 2019 meta-data study out of Washington State which found the PPG test had a 92% reliability factor in reproducing results indicating a pedophilic disorder. (TT, pp. 115-122; R., pp. 22-29).

Dr. Gottfried

Dr. Gottfried is an Assistant Professor of Psychiatry and Behavioral Sciences at MUSC, and the Director of MUSC's Sexual Behaviors Clinic and Lab (SBCL). In her capacity as Director, she oversees all SBCL administrative duties, performs most of the evaluations, as well as overseeing and providing treatment. She is a clinical member of the Association for Treatment of Sexual Abusers (ATSA), and sits on the Executive Committee of the American Psychology and Law Society, and the Executive Board for the Clinical Psychology Section of the American Psychological Association. She has twenty-six peer reviewed published articles, including an article comparing the PPG test's use in Canada, the United Kingdom and the United States, has written book chapters about best practices in sexual behavior evaluations that included information about the PPG test, and has given research presentations regarding the PPG test at national and international conferences. (TT, pp. 124-127; R., pp. 31-34).

Dr. Gottfried orders PPG tests for all adult men being evaluated at the SBCL. She is trained and certified to administer and interpret the PPG test by Limestone Technologies, which developed and manufactures the PPG test machine and software used in the SBCL. The SBCL is certified by Limestone as a clinical and research laboratory, which is the highest level of certification. (TT, pp. 129-130; R., pp. 36-37).

Research literature indicates that sexual arousal to non-consensual abusive scenarios is a strong predictor of sexual recidivism, and the PPG test provides a physiological measure of male sexual arousal. The PPG test has been peer reviewed in both the sex offender and general sexual behavior literature.

The SBCL has a standard protocol used in every PPG test performed there. The test room is climate controlled, including the humidity and temperature, and the gauge used in the test must be calibrated using a five step process before the test can start. The testing equipment and software includes countermeasures in the event the person does something that might interfere with the test results, *i.e.*, moving around, changes in breathing pattern, etc. The SBCL also uses a very conservative cut score for significant arousal to minimize the possibility of false/positive results. (TT, pp. 132-137; R., pp. 39-44).

The ATSA practice guidelines support responsible use of the PPG test as a data point in sexual behavior evaluations and treatment. Dr. Gottfried stated, "responsible use" means you are following the protocol, interpreting the results in a standardized manner, and not using the PPG test results as the "sole data point to look at risk, release recommendations, diagnosis." (TT, pp. 138-139; R., pp. 45-46).

Dr. Gottfried testified the recommendation not to use the PPG in the 2009 book Dr. Gehle referenced was premised on a 2006 article from Bill Marshall, who subsequently published another

article in 2014 "that was much more supportive of the PPG." She stated research since 2009, including the 2019 meta-analysis of data from thirty to fifty studies with PPG test results of over 10,000 men, addressed many issues identified in earlier PPG test research. In addition, the Diagnostic and Statistical Manual, 5th Ed., (DSM-5) recognizes use of the PPG test. (TT, pp. 139-140; R., pp. 46-47).

Dr. Gottfried testified men who sexually offend against children may do so for multiple reasons that are not due to sexual arousal to prepubescent children, and the PPG test is most reliable in differentiating between men who have sexual arousal to children and those who do not. The 2019 meta-analysis study considered multiple groups of men, including men who had sexually offended against children, men who had not sexually offended against children, men who had never been arrested before, and men who had recidivated by committing a new sexual offense. The results indicated that when compared to other groups, the men who had offended against children showed "really robust differences [and] much greater arousal to the child scenarios than the other groups." (TT, pp. 140-143; R., pp. 47-50).

The SBCL uses the RCV stimulus set, which comes with every PPG test system from Limestone and is used in between fifty and one hundred labs, as well as the Minnesota, California, New York, Illinois and Missouri sexually violent predator programs. The SBCL also uses the Marshall stimulus set, which has been used and researched for many years. Dr. Gottfried testified the SBCL uses both sets because "[w]e want to do a multi-method assessment where we're measuring the same thing in multiple different ways." (TT, pp. 144-145; R., pp. 51-52).

Dr. Gottfried testified research regarding the PPG test has been increasing, and a 2019 "best practices" book regarding sexually violent predator evaluations includes a chapter discussing the utility of using the PPG test in sexually violent predator evaluations. She emphasized she uses

the PPG test results as one data point, and does not base any diagnosis or opinion solely on it. (TT, pp. 147-148; R., pp. 54-55).

On cross-examination, Dr. Gottfried testified she was working on a couple of studies regarding the RCV stimulus set, but none of the studies had been published in peer reviewed journals yet. She also testified she was participating with international partners in studies comparing the RCV, Marshall and other stimulus sets, and abstracts of those studies had been peer reviewed by scientific committees and accepted for presentation at national and international research conferences, including the American Academy of Forensic Sciences, the International Association for Sex Research, the American Psychology and Law Society, and ATSA. (TT, pp. 149-151; R., pp. 56-58).

Dr. Gottfried again testified that everyone in the SBCL is certified by Limestone to administer the PPG test, which included having Limestone conduct on-site inspections of the PPG lab and procedures. She stated she did not know if other certifications were available, or what companies other than Limestone do. (TT, p. 152; R., p. 59).

In order to minimize the possibility of false/positive PPG test results, the SBCL uses a cut score of 5mm change in tumescence to establish a clinically significant arousal. The SBCL's cut score is double the research literature's recommended cut score of 2.5mm. They also look for consistency between the person's offense history and self-report, as well as response consistency across multiple stimulus sets. (TT, pp. 155-157; R., pp. 62-64).

Pre-Trial Ruling

At the conclusion of testimony, Appellant acknowledged there are studies regarding the PPG test, but his "concern" was the RCV stimulus set used in the Limestone system, which was not part of a "peer-reviewed study showing its validity," and the Limestone certification was "not

necessarily the same as being certified by some kind of independent agency." The State responded that Dr. Gottfried testified there was considerable literature finding the RCV and Marshall stimulus sets are reliable, and the PPG test results was only one data point she considered in her evaluation. The State further argued the PPG test evidence was relevant to show Appellant's current arousal pattern. Judge Henderson found that given the circumstances of the case, the probative value of the PPG test evidence outweighed the prejudice, and the evidence was admissible. (TT, pp. 157-162; R., pp. 64-69.

-69).

B. Trial

Dr. Gottfried's Trial Testimony

Before the jury, Dr. Gottfried was qualified as an expert in clinical psychology and forensic psychology, and specifically sex offender evaluations, and she testified MUSC was retained to perform a pre-commitment evaluation of Appellant pursuant to the SVPA. As part of her evaluation protocol, she reviewed criminal history records, incident/police reports relating to the person's offenses, prison records, medical records and mental health records. Appellant was transported to MUSC on several occasions for psychological and physiological testing, and a clinical interview, which included reviewing the tests' results with him. (TT, pp. 187-200; R., pp. 94-107).

Dr. Gottfried testified Appellant pled guilty in 1997 to one count of criminal sexual conduct second degree and one count of lewd act on a minor. (State's Exhibit 1 [1997 Indictment and Sentencing Sheet]; R., pp. 389-391). The charges involved three female victims, two were six years old and one was eight years old. During the interview, Appellant told Dr. Gottfried he fondled two of the girls, got them to grab his penis, and he may have rubbed his penis in their

genital area and played with their butt. The third victim was Appellant's neighbor, and he said he talked her into taking her clothes off because he wanted to see her. Appellant said he talked the victims into engaging in the behaviors with him, and told them not to tell anybody because he would get in trouble.

In 2016, Appellant pled guilty to one count of criminal sexual conduct with a minor third degree - commit/attempt lewd act on minor under sixteen years of age. (State's Exhibit 2 [2016 Sentencing Sheet]; R., pp. 392). The charges involved three female victims, who were five, seven and eight years old. Appellant told Dr. Gottfried he did not offend against the five and seven year old victims, but he did offend against his eight year old niece by fondling her, feeling her chest, her genitals and her butt, and rubbing his penis on her, and he did this four or five times. Appellant then admitted he performed oral sex on his niece and got her to put her mouth on his penis. In addition to the 1997 and 2016 convicted offenses, Appellant told Dr. Gottfried he exposed himself to a female cousin when he was fifteen or sixteen years old, and sexually touched both of his sisters when he was eighteen or nineteen years old, and they were approximately eleven and fifteen years old. (TT, pp. 200-211; R., pp. 107-118).

Dr. Gottfried testified an offender's offending history is relevant to assessing future risk because prior behavior is the best predictor of future behavior, and the offending history may show patterns of behavior. Dr. Gottfried testified Appellant's criminal history and admissions to her demonstrated Appellant had a pattern of inappropriate sexual behaviors with prepubescent female children beginning when he was fifteen to sixteen years old, which included multiple offenses against prepubescent children under ten years old, fantasizing about prepubescent children and looking at sexualized images of children. Based on all the information she gathered during the

evaluation, Dr. Gottfried diagnosed Appellant with pedophilic disorder, which is an intense and persistent sexual arousal to prepubescent children. (TT, pp. 212-216; R., pp. 119-123).

Dr. Gottfried then testified about the standard battery of tests the SBCL uses in evaluating all adult men, which were administered to Appellant as part of the psychosexual evaluation. The tests included the Minnesota Multiphasic Personality Inventory Version 3 (MMPI), the Personality Assessment Inventory (PAI), and the Multidimensional Inventory of Development Sex and Aggression. (MIDSA). Some of the results from these tests indicated Appellant tried to present himself in an overly positive light, he did not want to admit some minor faults that most people will admit, he was reluctant to admit having undesirable negative reactions, and he had some feelings of sexual inadequacy with adults. (TT, pp. 216-221; R., pp. 123-128).

Dr. Gottfried also used the Sexual Violence Risk-20, which is a tool to help scientifically structure professional judgment when looking for known risk factors relevant to the person being evaluated. She noted Appellant had a history of problems with sexual deviance, consistent sexual arousal to prepubescent children, sexual preoccupation during his offending, a reported history of being the victim of child abuse, offending against his victims multiple times across many years, some psychological coercion in sexual offending, and a possible negative attitude about supervision. (TT, pp. 221-223; R., pp. 128-130).

As part of her assessment of Appellant's risk to reoffend sexually, Dr. Gottfried used two actuarial risk assessment tools, the Static-99R and the Static-2002R. Appellant's score on the Static-99R was two, and his score on the Static-2002R was four, which were in the average category for reoffending when compared to other offenders. She testified these risk assessments only include offenders who have offended and then committed new detected offenses, and only

approximately thirty percent of sex offenses are reported, so the Static scores may potentially underestimate the actual risk of recidivism. (TT, pp. 223-226; R., pp. 130-133).

Dr. Gottfried testified about the PPG test in general, explaining what it measures and how it is administered, and describing the stimulus sets used during the test. Judge Henderson sustained Appellant's objection to testimony about the PPG test reliability, finding the State could redirect or recall Dr. Gottfried if Appellant opened the door to the reliability issue on cross-examination or during Dr. Gehle's direct testimony. (TT, pp. 227-230; R., pp. 134-137).

Thereafter, Dr. Gottfried testified Appellant showed clinically significant arousal on both stimulus sets to scenarios featuring sexual violence against a prepubescent female child, coercion against a prepubescent female child, sexual violence against a pubescent or adolescent child, persuasion against a prepubescent female child, and sexual activity with a male infant. He also showed significant arousal to scenarios featuring consensual sexual activity with an adult woman. Appellant's maximum arousal on the first stimulus set was to a scenario featuring sexual violence against a prepubescent female child, and his maximum arousal on the second stimulus set was to a scenario featuring coercion against a female prepubescent child. Dr. Gottfried stated the PPG test arousal pattern was consistent with Appellant's history of sexually offending against prepubescent female children. (TT, pp. 230-232; R., pp. 137-139).

Dr. Gottfried testified there are dynamic risk factors that are not considered by the Static risk assessment tools, but can be addressed in treatment. She found Appellant's dynamic risk factors include sexual arousal to children, sexual preoccupation, chronic sex offending, grooming behaviors, negative attitudes toward supervision, and poor insight into his need for management and treatment of his sexual arousal to children. She further testified Appellant told her he had not really told anyone who might be a support for him in the community about his offending behavior,

and he had no plans to attend sex offender treatment in the community. In Dr. Gottfried's opinion, Appellant's stated plan to prevent himself from reoffending by just not thinking about it was not a realistic plan, especially for someone with pedophilic disorder. (TT, pp. 232-236; R., pp. 139-143).

Dr. Gottfried testified to a reasonable degree of psychological certainty that Appellant has pedophilic disorder, he fantasizes about prepubescent children, and he acted on his pedophilic disorder despite intervention and prior treatment, which makes him likely to reoffend sexually against children. She opined Appellant has serious difficulty controlling his pedophilic impulses, and his risk to reoffend poses a danger to public safety. (TT, pp. 236-238; R., pp. 143-145).

Dr. Gehle's Trial Testimony

Dr. Gehle explained her evaluation protocol and testified she reviewed all the available documentation regarding Appellant. She also diagnosed Appellant with pedophilic disorder, sexually attracted to females, non-exclusive type, stating Appellant's criminal history provided sufficient information to make that diagnosis. Dr. Gehle stated she heard Dr. Gottfried's testimony regarding the PPG test results, and she was not surprised by any of the results. (TT, pp. 273-294; R., pp. 180-201).

Dr. Gehle also scored the Static-99R and Static-2002R, and placed Appellant in the average risk to reoffend category. The only dynamic risk factor she assigned to Appellant was a sexual preference for prepubescent children. She did not find he had a sexual preoccupation because "he did not seem to be dominated by his sexuality," and "it wasn't on his mind all the time." Dr. Gehle opined Appellant was not likely to reoffend sexually, and his risk was "the same as the average sex offender." (TT, pp. 288-299; R., pp. 195-206).

On cross-examination, Dr. Gehle acknowledged Appellant did not disclose to her that he exposed himself to his twelve year old female cousin when he was fifteen years old, or that he

touched his two minor sisters inappropriately when he was approximately eighteen years old. She further acknowledged that during her interview with Appellant, she specifically asked him if he had any sexual contact with family members and he told her no, which was false. (TT, pp. 307-309; R., pp. 214-216).

Dr. Gehle stated Appellant told her he did not need any sex offender treatment, even though he had sex offender treatment when he was incarcerated on the 1997 conviction and in the community after he was released, and subsequently reoffended. He also denied he was at any risk to reoffend. (TT, pp. 311-313; R., pp. 218-220).

Verdict

The jury found beyond a reasonable doubt that Appellant is a sexually violent predator, and Judge Henderson placed him in DMH's custody for long term control, care and treatment. (TT, pp. 384-385 Order of Commitment filed June 9, 2021; R., pp. 291-292, 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). "'The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion.'" State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020) (*quoting* State v. Chavis, 412 S.C. 101, 771 S.E.2d 336, 338 [2015]). "'A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion,'" which "'occurs when the conclusions of the [trial] court are either controlled by an error of law or are based on unsupported factual conclusions.'" *Id.* (alteration in original).

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 Henderson did not abuse his discretion in admitting evidence regarding a penile plethysmograph performed by the State's expert which she used in formulating her opinion, because the evidence established penile plethysmography is recognized and accepted in the field of sex offender evaluation and treatment as a reliable, objective measure of deviant sexual interests.

Appellant contends Judge Henderson erred in admitting Dr. Gottfried's testimony regarding the PPG test conducted as part of her comprehensive psychosexual evaluation of Appellant's mental status and risk to reoffend, asserting there was no evidence the PPG test is reliable, and its admission was more prejudicial than probative. As support, Appellant primarily relies on dicta from In re Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), while ignoring virtually undisputed evidence before Judge Henderson regarding the research and acceptance of the PPG test. He also presents an extremely truncated and misleading summation of Dr. Gottfried's testimony.

In considering the admissibility of scientific evidence, the court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Jones, 343 S.C. 562, 541 S.E.2d 813, 819 (2001). This type of evidence is also subject to attack for relevancy and prejudice, and once the evidence is admitted, the jury may give it such weight as it deems appropriate. State v. Council, 335 S.C. 1, 515 S.E.2d 508, 517-518 (1999).

A. PPG Testing Reliability

In this case, Judge Henderson heard extensive testimony regarding competing expert views of PPG testing reliability. Dr. Gehle testified she read articles about PPG test standardization

issues, and cited a "best practices" book published in 2009, which recommended against using PPG tests in pre-commitment sexually violent predator evaluations. She stated the PPG test is used in treatment, but differentiated treatment use from sexual predator evaluations because of the possible outcomes. She testified there was no "research on the stimulus sets used at MUSC, specifically the RCV, showing it is a reliable assessment of pedophilic arousal." (TT, pp. 103-115; R., pp. 10-22).

On cross-examination, Dr. Gehle admitted the 2009 "best practices" book she cited had not been updated since 2009, and stated she was unaware of any developments in standardizing the RCV and Marshall stimulus sets. She further admitted she had no actual training or experience in administering PPG tests or interpreting PPG test results, she had never seen a PPG test performed, and she was "not aware" there was a protocol and standard procedure for administering the test. Dr. Gehle also admitted she was unaware of the 2019 meta-analysis of multiple studies involving thousands of PPG tests, even stating she did not "actually know what [State's counsel was] talking about." She testified she heard the PPG test stimulus sets "once," but it had been "too long" ago for her to state what a particular scenario described. (TT, pp. 115-122; R., pp.22-29). In short, Dr. Gehle's knowledge regarding the PPG test was extremely limited.[2]

By comparison, Dr. Gottfried testified extensively regarding the use and reliability of PPG testing, including her first-hand training and experience, multiple research studies and publications

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[2]Appellant's reliance on Dr. Gehle's testimony and Bilton as support for excluding the PPG test evidence in this case is interesting. In Bilton, this Court held the State's expert was not qualified to testify about the PPG test because she possessed only a basic familiarity with the PPG test and how it is performed, had never seen one performed, and was not familiar with the stimulus sets and machine. 851 S.E.2d at 445. If the Bilton court found the expert's qualification and experience with the PPG test was insufficient to establish basic reliability, Dr. Gehle's utter lack of qualification and experience with the PPG test patently renders her testimony insufficient to establish the PPG test is not reliable, especially when compared with Dr. Gottfried's extensive knowledge and first-hand experience with conducting and interpreting PPG tests.

regarding the reliability of the PPG test, the DSM-5 reference to the PPG test, and Dr. Gottfried's active participation in on-going national and international studies and scientific presentations regarding PPG testing in general and the RCV stimulus set in particular. She testified in depth regarding the SBCL protocols and quality control procedures used in every PPG test the lab conducts.[3] She stated the PPG test research has been increasing, and a 2019 "best practices" book specifically about sexually violent predator evaluations includes a chapter discussing the utility of PPG testing in such evaluations.

Notwithstanding the Bilton dicta claiming near uniformity of other jurisdictions excluding the PPG test, courts, including South Carolina circuit courts, have recognized the general acceptance and admissibility of the PPG test in sexually violent predator cases.[4] In In re Detention of Halgren, 156 Wash. 2d, 132 P.3d 714 (2006), the Washington Supreme Court found PPG test results were admissible as part of the diagnostic process, and the PPG test testimony would assist the jury in understanding the expert's sexual deviancy diagnosis.[5] *Id.* at 719. The court further found the issue of the PPG test's reliability goes to the weight of the evidence rather than its

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[3]In his Statement of Facts, Appellant discounts the training and protocols established by Limestone and utilized at MUSC because Limestone "is merely a company that developed the hardware and software used by some psychologists to conduct PPG tests," and no "independent agency" certifies the labs or analysts. (Brief of Appellant, p. 11). It is simply inaccurate to claim no independent agency has evaluated Limestone's system. As discussed below, federal government agencies and private insurance companies have evaluated the Limestone system and approved it as a valid medical test. Once the system was approved, who better than the company that developed it to train people how to use it?

[4]In addition to the instant case, PPG test evidence was admitted in In re Ronald MJ Gregg, 2018-CP-10-03472 (Jefferson, J.)(*rev'd* August 10, 2022; Petition for Writ of Certiorari filed December 7, 2022); In re Shawn Torlif Daily, 2019-CP-42-03230 (Kelly, J.) (appeal pending); In re James Lewis Williford, 2019-CP-04-01380 (Sprouse, J.) (appeal pending).

[5]Significantly, Washington's sexual predator statute expressly gives the courts the discretion to order the person to comply with a PPG test if requested by the evaluator. RCW §71.09.050(1). Thus, the Washington legislature recognized the PPG test is a valuable tool that should be available to evaluators if they believe it is necessary.

admissibility.[6] *Id.*; *see also* In re Detention of Herrick, 198 Wash. App. 439, 393 P.3d 879, 885 (2017) (PPG testing may provide critical information to an evaluator in determining if alleged sexual predator has a mental abnormality, and PPG testing is an effective and generally accepted method for evaluating sex offenders).

The Illinois appellate court found PPG test evidence was admissible in In re Commitment of Sandry, 367 Ill.App.3d 949, 858 N.E.2d 295 (2006). As to the admissibility of a particular test or methodology, the court stated: "once it is determined that a methodology is generally accepted, it follows that it has achieved a sufficient degree of reliability and validity to cross the threshold of admissibility." *Id.* at 309. The court then engaged in an exhaustive analysis of case law [use of PPG mentioned in at least 21 states, including South Carolina], statutes [eleven state statutes] and regulations. *Id.* at 310-313.

The court also discussed numerous academic articles, which it determined provided ample support "to conclude that PPG testing is accepted by a substantial number of experts in this field such that it may be used to support a qualitative assessment of the future dangerousness of an individual." *Id.* at 309-316 (emphasis added). Acknowledging some experts have criticized and rejected PPG testing, the court noted the existence of contrary authority is not dispositive because many people could disagree on the acceptance of any given methodology, but those who accept it may still constitute a significant subset of experts in any given field. *Id.* at 316; *see also* State v. Graham, 275 Kan. 176, 183, 61 P.3d 662, 667 (2003) (some disagreement in the scientific and medical community as to the reliability of a particular test method is a matter affecting the weight

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[6]The Bilton court dismissed Halgren as distinguishable because the Washington court found the PPG test was not novel and subject to the test for scientific evidence. This ignored the reason for the Washington court's finding was that the PPG test had been analyzed in a previous case and found to be an effective method for assessing and treating sex offenders. 132 P.3d at 719.

of such evidence and not its admissibility; such evidence is admissible if a qualified expert witness testifies the particular test method is reliable and accurate, and it is generally accepted as such by other experts in the field).

The Bilton court distinguished Sandry on the premise that "Illinois courts do not examine reliability before scientific evidence is admitted," and did not even address all the case law and research articles discussed in Sandry. 432 S.E.2d at 446. The court's conclusion that Illinois courts do not examine reliability ignored a very significant part of the Sandry opinion, which analyzed Illinois case law expressly stating "'[t]he determination of the reliability of an expert's methodology is naturally subsumed by the inquiry into its general acceptance in the scientific community.'" 857 N.E.2d at 308 (*quoting* Donaldson v. Central Illinois Public Service Co., 767 N.E.2d 314 [2002])(emphasis added). Thus, in examining whether the PPG test is generally accepted in the scientific community, the Sandry court necessarily considered "reliability," and its discussion of evidence indicating the PPG test is reliable and generally accepted is directly relevant here.[7]

There is ample evidence the PPG test is generally accepted. The PPG test "is a widely recognized means of measuring male sexual arousal to given stimuli," and "has become a standard objective measure of arousal and is considered by some researchers and clinicians to be essential in the assessment and treatment of male sex offenders and men with paraphilic interests." Murphy, L., *et. al.*, Standardization of Penile Plethysmography in Assessment of Problematic Sexual

[7]The Bilton court cited to a concurring opinion in United States v. Weber, 451 F.3d 552 (9th Cir. 2006) for the proposition that the PPG test is "Orwellian when, **as here**, the State compels the subject to arouse himself sexually and then forces him to view deviant stimulants." 851 S.E.2d at 444 (emphasis added). This statement is misleading. There was no evidence in Bilton, and there is no evidence in this case, that MUSC requires the person to "arouse himself sexually" before beginning the test. Dr. Gottfried testified about the protocols MUSC follows in every PPG test, which do not include any masturbation requirement.

Interests, J. Sex. Med. 12(9): 1853-1861 (2015); *see also* Murphy, L., *et. al.*, Assessment of Problematic Sexual Interests with the Penile Plethysmograph: an Overview of Assessment Laboratories, Current Psychiatry Reports 17(5):567 (2015) (PPG test "is an objective assessment of sexual arousal based on the change in penis circumference and volume due to increased vasocongestion in the penis"); Howes R. J. & Howes, S. E., Sexual Arousal as a Function of Stimulus Mode: Implications for Phallometric Assessment, J. Forensic Res. 8(6):398 (2017) (PPG test is "[p]erhaps the best means of objectively measuring deviant sexual interest"). While controversy regarding PPG testing remains, as the Sandry court noted, the existence of contrary authority is not dispositive.[8]

In addition to numerous studies and articles indicating the PPG test is reliable and generally accepted, the PPG test has undergone Federal Drug Administration (FDA) review, and the FDA has approved several PPG systems, including the Limestone system used in this case.[9] In addition, the Medicaid/Medicare regulations provide coverage for PPG tests.[10] Major insurance companies, such as Blue Cross Blue Shield, also recognize the PPG test as a medical procedure, and either provide limited coverage or exclude it from coverage.[11] The federal government's and insurance companies' recognition of the PPG test as a valid medical procedure amply demonstrates its general acceptance in the health care community.

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[8]Indeed, DNA evidence has been widely accepted for years, but its admission is still challenged. *See* State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020) (evidence regarding "touch DNA" was inadmissible).

[9]*See* https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf (501(k) Summary – Limestone Technologies, Inc.)

[10]*See* Federal Register Volume 72, Number 61, Addendum III and Addendum V (Friday, March 30, 2007) (https://www.gpo.gov/fdsys/pkg/FR-2007-03-30/html/07-1414.htm).

[11]The PPG test is not just utilized in psychosexual evaluations and/or treatment, but used in general medical health care as well. *See* Blue Cross Blue Shield of Texas, Treatment of Male Sexual Dysfunction, Special Comment on Contract Exclusions (January 7, 2003) (https://www.bcbstx.com/provider/pdf/medicalpolicies/surgery/717-010.pdf).

As Dr. Gottfried testified, further evidence of the PPG test's general acceptance in the mental health community is the reference to it in the DSM-5, which provides:

> Psychophysiological measures of sexual interest may sometimes be useful when an individual's history suggest the possible presence of pedophilic disorder but the individual denies strong or preferential attraction to children. **The most thoroughly researched and longest used of such measures is penile plethysmography**, although sensitivity and specificity of diagnosis may vary from one site to another.

DSM-5-R 698 (emphasis added). While previous DSM versions did not recognize the PPG test at all, by the time the DSM-5 was published in 2013, there was sufficient research indicating the PPG test's validity as a tool to measure an individual's sexual interest.[12]

In psychosexual behavior evaluations, the PPG test provides data useful is determining an individual's level of risk to commit acts of sexual aggression by measuring the extent to which the individual is dominated by sexual arousal to deviant stimuli, and predictions of risk to re-offend "are rendered much more accurate by the inclusion of data from this technique." Howes, R. J., Measurement of Risk of Sexual Violence Through Phallometric Testing, Legal Medicine 11:368-369 (2009). "Although not universally embraced, there nonetheless remains widespread acceptance and recognition of the value of phallometric assessment," and it "is certainly an assessment procedure which has come a long way since it was first devised." Howes & Howes, *supra* (emphasis added). *See also* Dean Tong, The Penile Plethysmograph, Abel Assessment for Sexual Interest, and MSI-II: Are They Speaking the Same Language?, 35 Am. J. of Fam. Therapy, 187, 190 (2007) ("The PPG, when administered properly, represents a direct and objective

[12]Published in February 2022, the DSM-5-TR contains the same language on page 795, but adds that sites "frequently use different stimuli, procedures and scoring." As discussed above, however, the Limestone system used by MUSC has standardized protocols and procedures utilized in between fifty and one hundred labs across the country and internationally, and to minimize the possibility of false positive results, MUSC intentionally uses a cut score double the minimum cut score recommended in the research literature.

measurement of a man's level of sexual arousal to normal versus sexualized stimuli. Since there is a strong relationship between an individual's pattern of sexual arousal and the probability that he may or will act upon that arousal, an important first step in gauging one's propensity to sexual deviancy is to obtain an accurate assessment of that person's sexual arousal patterns, which is precisely what the PPG does.")(emphasis added); James M. Peters, Assessment and Treatment of Sex Offenders: What Attorneys Need to Know, Advocate, 23 (Dec. 1999) (PPG test "is invaluable in the evaluation, treatment and management of known sexual offenders.")(emphasis added).

The evidence before Judge Henderson established PPG testing is generally accepted in the mental health field, and is widely used in sexual behavior evaluations as an objective measure of sexual arousal for diagnosis and risk assessment purposes. Judge Henderson's ruling that the PPG test evidence was admissible was not controlled by an error of law, and it is amply supported by evidence in the record.

B. Probative/Prejudice

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).

Appellant makes the conclusory argument that even if the PPG test evidence had probative value, it was outweighed by the danger of unfair prejudice to him. The PPG test results were no doubt prejudicial to Appellant, but they were consistent with his history of sexually offending

against children, and Dr. Gottfried testified the PPG test was only one data point in her evaluation. Indeed, **Dr. Gehle** testified she was not "surprised" by Appellant's PPG test results.

The fact Appellant was convicted in 1997 of sexually offending against prepubescent children, received sex offender treatment while incarcerated for that conviction and in the community after his release, and then reoffended against prepubescent children in 2015, clearly indicated a sustained deviant interest in prepubescent children. During his evaluations with both Dr. Gehle and Dr. Gottfried, however, Appellant claimed he was no longer sexually aroused by prepubescent children, even stating there was **no** risk he would reoffend. Dr. Gehle accepted his claim at face value, but Dr. Gottfried did not.

Results from psychological tests Dr. Gottfried administered as part of Appellant's psychosexual evaluation indicated Appellant may try to present himself in a better light, and not be forthcoming about his sexual interests. Significantly, only **after** Dr. Gottfried confronted him about his test results, Appellant admitted to sexually molesting three prepubescent family members (a cousin and his two sisters), which had never been reported.[13]

The SVPA created a civil process for assessing potential sexually violent offenders. It is not punitive in nature, but is intended "to: (1) meet the special needs of sexually violent predators; (2) address the significant likelihood that they will engage in repeated acts of sexual violence if not treated for their mental conditions; and (3) assess the risks requiring their involuntary civil commitment in a secure facility for long-term control, care, and treatment." Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118, 121 (Ct. App.2007). (*citing* S.C. Code Ann. §44–48–20). A "'person's dangerous propensities are the focus of the SVP Act.'" In re Care & Treatment

[13]When Dr. Gehle directly asked Appellant if he had ever offended against family members, he lied and told her no. If Dr. Gehle had done any testing in her evaluation, she may have more aggressively questioned Appellant rather than blindly accepting his response as fact.

of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008) (*quoting* In re Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451, 453 [2003]).

In SVPA actions, the State is required to prove beyond a reasonable doubt the person presently suffers from a mental abnormality or personality disorder that makes him likely to engage in future acts of sexual violence if not confined for treatment. *See* In re Taft, 413 S.C. 16, 774 S.E.2d 462, 466 (2015) (the State must prove beyond a reasonable doubt that the person is presently a sexually violent predator). In light of the State's significant burden of proof, any reliable test or assessment tool used by an expert in assessing the person's mental status and risk to reoffend, including the PPG test, should be submitted for the jury's consideration in accessing the expert's methodology and ultimate opinions. An expert is always subject to cross-examination about any test or assessment on which the expert relied in forming relevant opinions.[14]

In this case, both experts diagnosed Appellant with pedophilic disorder (deviant sexual interest in prepubescent children). In light of that undisputed diagnosis, the jury had to determine if Appellant presently had the propensity to offend sexually against children in the future in not confined for treatment.

As noted above, Appellant told both experts he was no longer sexually aroused by children, and was not a risk to offend against children in the future. At trial, Appellant told the jury he was a changed man who just wanted to go to church. (TT, p. 335; R., p. 242).

In the face of Appellant's claims, however, the PPG test results indicated Appellant's well established history of sexual arousal to prepubescent children continued, which was highly

[14]Due to Appellant's objection to testimony regarding PPG testing reliability, the jury only heard very limited testimony regarding the PPG test, which consisted of a general description of how the test is administered, and the names of the stimulus sets to which Appellant showed significant arousal. (TT, pp. 227-233; R., pp. 134-140).

relevant to the jury's determination of whether Appellant was presently likely to offend sexually against children in the future if not confined for treatment for his pedophilic disorder. Dr. Gottfried testified about all the data she considered in her evaluation, which included Appellant's history of offending against prepubescent children, information from the psychological tests she administered, the PPG test results, and information gathered during Appellant's interview. The PPG test was only one data point in Dr. Gottfried's comprehensive psychosexual evaluation of Appellant, and her diagnosis and risk assessment opinions were based on all the data gathered in the course of Appellant's evaluation, not solely on the PPG test results. When viewed in light of the issues before the jury and the entire record, the prejudice to Appellant arising from the PPG test evidence did not substantially outweigh the evidence's probative value.[15]

Based on the evidence presented, Judge Henderson found the PPG test evidence was admissible, and the prejudice to Appellant did not substantially outweigh the evidence's probative value. His findings are amply supported by the evidence in the record and should be affirmed.

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[15]The State's reference to the strength of the PPG test evidence during closing argument did not ask the jury to ignore all other evidence in the case, or raise the level of prejudice such that it substantially outweighed the PPG test evidence's probative value. Significantly, in responding to Appellant's closing argument, the State did not even mention the PPG test result, but focused on all the information Dr. Gottfried obtained and considered, including Appellant's sexual offending history, the multiple array of tests administered by MUSC, and Appellant's own statements during his interview with Dr. Gottfried, all of which supported a verdict that Appellant is a sexually violent predator beyond a reasonable doubt. (TT, pp. 354-357, 367-371; R., pp. 261-264, 274-278).

CONCLUSION

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

Respectfully submitted,

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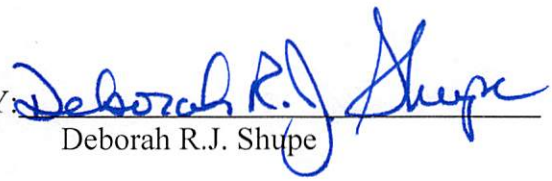
BY: 
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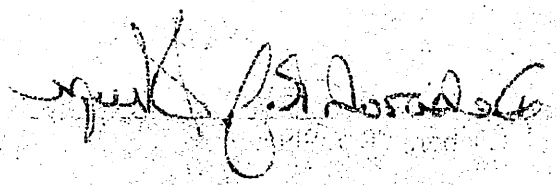

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2021-000734

IN THE MATTER OF THE CARE AND TREATMENT
OF ANDY EUGENE HYMAN,

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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