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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Anderson County
Honorable R. Scott Sprouse, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JAMES L. WILLIFORD,

RESPONDENT.

APPELLATE CASE NO. 2024-001782

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

COUNTER STATEMENT OF THE ISSUE.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The Court of Appeals properly held the penile plethysmography (PPG) test was not reliable as required by Rule 702, SCRE and the trial court’s error in admitting PPG test results contributed to the result of Mr. Williford’s trial.4

Relevant facts.....4

Discussion.....8

CONCLUSION.....14

TABLE OF AUTHORITIES

South Carolina Cases

Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000) 9

In re Gonzales, 409 S.C. 621, 763 S.E.2d 210 (2014)..... 9

Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (2020) 3, 9, 10, 11

Matter of Daily, Op. No. 6061 (S.C. Ct. App. June 12, 2024) (Howard Adv. Sh. No. 22 at 19). 10

Matter of Gregg, Op. No. 2022-UP-336 (S.C. Ct. App. filed August 10, 2022)..... 12

Matter of Williford, Op. No. 2024-UP-270 (S.C. Ct. App. Filed July 24, 2024) 8

State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011)..... 3

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)..... 9

State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990)..... 12

State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) 9

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006)..... 3

Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010)..... 8, 9

Other Jurisdictions

Billips v. Commonwealth, 652 S.E.2d 99 (Va. 2007) 11

Commonwealth v. Ortiz, 93 Mass.App.Ct. 381, 100 N.E.3d 790 (2018) 11

Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258 (9th Cir. 2000)..... 10

Gentry v. State, 443 S.E.2d 667 (Ga. Ct. App. 1994)..... 11

In re Commitment of Sandry, 367 Ill.App.3d 949, 306 Ill. Dec. 202, 857 N.E.2d 295 (2006)..... 11

United States v. Medina, 779 F.3d 55 (1st Cir. 2015) 11

United States v. Powers, 59 F.3d 1460 (4th Cir. 1995) 11

United States v. Rhodes, 552 F.3d 624 (7th Cir. 2009) 10

United States v. Weber, 451 F.3d 552 (9th Cir. 2006)..... 10

Rules

Rule 221(a), SCACR 2

Rule 403, SCRE 9

Rule 702, SCRE 1, 4

Statutes

S.C. Code Ann. §§ 44-48-10 to 44-48-180 (2018 & Supp. 2023)..... 2

Other Authorities

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders
(5th ed. 2013) 5

COUNTER STATEMENT OF THE ISSUE

Whether the Court of Appeals properly found the penile plethysmography (PPG) test was not reliable as required by Rule 702, SCRE and the trial court's error in admitting PPG results contributed to the result of Mr. Williford's trial?

STATEMENT OF THE CASE

The Attorney General initiated sexual violent predator commitment proceedings against respondent, James L. Williford, in Anderson County. On June 14, 2021, a bench trial was held before the Honorable R. Scott Sprouse. App. 4. Christopher Runyan and Suzanne Shaw represented the state. App. 5. Don Thompson represented Mr. Williford. App. 5. By written order Judge Sprouse found Mr. Williford was a sexually violent predator and ordered him committed. App. 286.

James L. Williford, through counsel, appealed the commitment under the Sexually Violent Predatory Act (the SVP Act).¹

On July 24, 2024, The Court of Appeals reversed Mr. Williford's commitment and remanded his case. App. 330-33. Pursuant to Rule 221(a), SCACR, the state filed a petition for rehearing on August 12, 2024. App. 334-48. On request from the Court of Appeals, respondent filed a return to the petition for rehearing on August 23, 2024. The Court of Appeals denied the state's petition for rehearing by order filed on September 20, 2024. App. 349.

On October 21, 2024, the state filed a petition for writ of certiorari with this Court. Respondent filed return to the state's petition for writ of certiorari on November 5, 2024. This Court granted the state's petition for certiorari on February 12, 2025, and requested additional briefing. On March 14, 2025, the state filed their brief.

Respondent's brief follows.

¹ S.C. Code Ann. §§ 44-48-10 to 44-48-180 (2018 & Supp. 2023).

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.” *Matter of Bilton*, 432 S.C. 157, 161-62, 851 S.E.2d 442, 444 (Ct. App. 2020), *reh’g denied* (Dec. 22, 2020) (quoting *State v. Commander*, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417 (2011)) (internal quotation marks omitted). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.* at 162, 851 S.E.2d at 444 (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted).

ARGUMENT

The Court of Appeals properly held the PPG test was not reliable as required by Rule 702, SCRE and the trial court's error in admitting PPG results contributed to the result of Mr. Williford's trial.

Relevant facts

Before trial, defense counsel made a motion to suppress testimony related to the penile plethysmography (PPG) test and results arguing the test did not meet the “requirements of admissibility for scientific evidence.” App. 251; App. 24-31. Defense counsel asserted testimony about the PPG test and the results of the test were inadmissible because the test: (1); lacked standardization (2); had not been adequately published or peer reviewed (3); had no quality control procedures; (4) did not calculate a margin of error. App. 25-27. Defense counsel also argued the prejudicial effect of the PPG test evidence far outweighed any probative value that it had. App. 31, ll. 1-5

The state proffered testimony regarding the PPG test through its expert Dr. Emily Gottfried from The Medical University of South Carolina (MUSC).² App. 33, l. 1-34, l.2. Dr. Gottfried became involved in this case when the Attorney General's office asked her for a *second* opinion in the pre-commitment evaluation of Williford. App. 98, ll. 1-10. Gottfried explained that the PPG test is a physiological test given to an individual to test their arousal. She explained that the examinee sits in a private room and places a gauge, a thin flexible stretchy band, on his penis. Then the examinee is presented with a series, a trial, of audio or visual stimuli of sexual situations. The test measures the changes of circumference of the examinee's penis in response to the stimuli. App. 41, ll. 3-17.

² Gottfried's proffered testimony about the PPG test was incorporated by reference because this was a bench trial, and the court already heard her testimony. App. 96, ll. 1-14.

Gottfried insisted throughout her testimony the PPG test was just one data point to consider, but she also contended, “sexual arousals due to nonconsensual or abusive stimuli is a strong predictor of future sexual recidivism.” App. 38, ll. 10-13.

Gottfried testified her lab uses two stimulus sets. The Marshall test set, developed by Bill Marshall, is audio descriptions of sexual stimuli and neutral stimuli. The other, developed by Bill Burke, called Real Child Voices (RCV), consists of visual slides and audio which includes children’s voices and women’s voices. App. 57-58.

Gottfried admitted there were problems with standardization of the PPG test because it was used for different purposes and acknowledged it was difficult to know what every lab that conducts the test does. App. 45, ll. 8-10; 76, ll. 1-5. Gottfried also recognized some literature indicated offenders do not show expected arousal patterns on the PPG test. App. 53, ll. 19-22. She explained she was working with a group of individuals to address some of the standardization problems. App. 46, 3-7; 53, ll. 13-18. Gottfried conceded there are ways to manipulate the test to show false positives and false negatives. App. 76-77.

Gottfried testified she published articles specific to the PPG test and presented at conferences about the test. App. 35-36. She contended the PPG test had been peer reviewed and that there had been “at least a hundred publications” about the PPG test specific to abusive or illegal sexual behaviors. App. 39, ll. 12-23. The state’s attorney asked Gottfried to read two sections from the Diagnostic Statistical Manual of Mental Disorders³ where the PPG test is mentioned. App. 49-50.

Limestone Technology is a Canadian Company that makes the hardware used in the PPG test and some of the software used in the test. App. 72, ll. 2-3. Gottfried testified she and the

³ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).

technicians at her lab are trained in the PPG. Gottfried said she was certified in the PPG test as a “licensed technologies certified clinical analyst” and her clinic and lab were certified by Limestone Technologies as both a clinical and research laboratory. App. 37-38; 42, ll. 15-20. She also testified that each examinee is given a new gauge which is calibrated on a five-step program before the test starts. App. 42, ll. 21-23. The countermeasures Gottfried described using were as follows: (1) a soundcheck, (2) monitoring the temperature and humidity of the room, and (3) standardized instructions. App. 43, ll. 2-10.

Gottfried testified that there are twenty-seven trials in the Marshall set and twenty-four in the RCV set and both sets were given to Williford. She said that they do not conduct multiple PPG tests on an individual. App. 78, ll. 6-10. Gottfried explained the lab at MUSC uses a “very conservative cut score,” which is a “clinical decision made about what is significant and what isn’t significant.” App. 44, ll. 12-17. When asked if there had ever been a margin of error calculated on the PPG test Gottfried responded that specificity and sensitivity account for the margin of error. App. 78. Gottfried explained that sensitivity is a “true positive,” someone who is aroused by certain stimuli and the PPG test shows that they are aroused by that same stimulus. Specificity is a “true negative,” where a person is not aroused by a specific stimulus and the PPG test shows that they are not aroused by those stimuli. App. 55, l. 17-56, l. 1.

Gottfried insisted the PPG test should not be used as the sole criterion for any decisions and said it would be unethical to test someone who had never been charged or convicted of a sexual offense. She stated the PPG test does not tell you anything other than what the examinee is aroused by on that day in the lab. App. 47-48.

The court denied the motion to suppress finding that the PPG testimony would assist the court as the trier of fact in understanding the evidence, which involved scientific issues outside

the realm of the ordinary knowledge of a lay person. App. 92, l. 22-93, l. 4. The court found that the PPG test had been subject to peer review and “numerous publications.” App. 93, ll. 11-19. The court found that, although the testimony indicated there were different standards in some countries, there was a standard application of the test in the United States, based on Gottfried’s testimony. App. 93, l. 20-94, l. 4. The court found the standard for quality control procedures was met. App. 94, ll. 5-13. Lastly, the court found the standard for “consistency and method with recognized scientific laws and procedures,” was met where Gottfried used the standard instructions provided by the manufacturer of the test and testified that there were methods to prevent manipulation of the test. App. 94, l. 14-92.

During cross-examination Gottfried was asked if it were possible to conduct a pre-commitment evaluation without a PPG. She responded the test was “part of [her] standard battery” of tests and there has only been one case referred by the Attorney General’s office where her lab did not conduct the test because “there was just a ton of data in that case so really supported the diagnosis.” App. 64, ll. 12-22. Gottfried was asked if she could do the evaluation without the PPG and she responded, “no.” App. 65, ll. 5-10. She went further and testified that if the PPG were to be found inadmissible, she would still administer the test and use it as a data point. App. 65, ll. 7-23. Gottfried testified that the test was “especially” useful in Mr. Williford’s case because she thought he was not being forthcoming in other assessments. App. 66, 2-7. In fact, on multiple tests given during the Mr. Williford’s results were unproblematic. However, Gottfried explained those tests were “self-reports” and did not measure sexual arousal. App. 66-70.

Williford was given both the Marshall stimulus set and the RCV stimulus set. App. 62, ll. 5-10; 125, ll. 16-18. Gottfried said that recently the lab began tailoring the RCV set to the

“offending pattern” of the examinee, but Williford’s examination was *not* tailored. App. 59, ll. 1-10. Mr. Williford was not convicted of offenses against children, except for an offense that occurred when he was a juvenile. Regardless, he was given the complete sets that included scenarios with children. App. 73, l. 24—75, l. 8.

Gottfried testified that Williford showed “clinically significant arousal” to trials involving coercion or sexual violence of an adult woman; coercion of a female child; violence against a female child or infant; consensual sexual behavior with an adult woman, and persuasion of a male child. App. 125, l. 25-126, l. 6. Gottfried testified that the data from the PPG test factored into her ultimate opinion regarding Williford. App. 124, l. 24-125, l. 1.

Discussion

On July 24, 2024, the Court of Appeals issued an opinion reversing the decision of the lower court in the above captioned case. *Matter of Williford*, Op. No. 2024-UP-270 (S.C. Ct. App. Filed July 24, 2024). The court correctly held “the PPG is not reliable as required by Rule 702, SCRE” and the lower court’s error in admitting PPG results contributed to the result of the bench trial. *Matter of Williford*, Op. No. 2024-UP-270 (S.C. Ct. App. Filed July 24, 2024).

“The admission of expert testimony is governed by Rule 702, SCRE, which provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

“Expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony.

First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.” *Id.* (internal citations omitted).

To determine reliability, the trial judge should apply the factors outlined by this Court in *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), 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. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). “Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect.” *Id.*

The state argues the court failed to apply the correct standard of review and instead reviewed the issue *de novo*. The court cited *In re Gonzalez*, which stated “[a]n abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). To warrant reversal, an appealing party must demonstrate not only error, but also prejudice. *Id.*

The Court of Appeals properly found the trial court abused its discretion in admitting Dr. Gottfried’s testimony about the PPG test and results from the test given to Williford because the PPG test evidence lacked scientific reliability and validity. *See generally Matter of Bilton*, 432

S.C. 157, 162, 851 S.E.2d 442, 444 (2020) (Stating “[t]he test is controversial and has been criticized for a lack of standardization and for being subject to manipulation.”). In support of the court’s finding the lower court abused its discretion the court cited its recent opinion, *Matter of Daily*, in that case the court held the PPG test was not a reliable method of determining whether the offender was a sexually violent predator, and the admission was not harmless. Op. No. 6061 (S.C. Ct. App. June 12, 2024) (Howard Adv. Sh. No. 22 at 19) *cert granted* February 12, 2025.

In *Matter of Bilton*, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), the Court of Appeals addressed the admissibility of PPG test results through an expert who did not administer or observe the PPG testing or review the test’s raw data. In that case, the court held “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.” *Id.* at 167, 851 S.E.2d at 446. It concluded the trial court abused its discretion by admitting the PPG evidence and, finding the error was not harmless, remanded for a new commitment trial. *Id.* at 167, 851 S.E.2d at 447.

In its holding, the Court of Appeals specified the PPG “test is controversial and has been criticized for a lack of standardization and for being subject to manipulation.” *Id.* at 162, 851 S.E.2d at 444 (citing *United States v. Rhodes*, 552 F.3d 624, 626-27 (7th Cir. 2009) and *United States v. Weber*, 451 F.3d 552, 565 (9th Cir. 2006)). The court noted, “with limited exceptions . . . courts have ‘uniformly’ declared that PPG test results are ‘inadmissible as evidence because there are no accepted standards for this test in the scientific community.’” *Id.* at 162-63, 851 S.E.2d at 444 (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000)). The court further emphasized, “some authorities take the position that the PPG has value in treating sex offenders but that concerns about reliability and a lack of uniform standards

preclude its admission as evidence at trial.” *Id.* at 164, 851 S.E.2d at 445 (citing *Commonwealth v. Ortiz*, 93 Mass.App.Ct. 381, 100 N.E.3d 790, 796-97 (2018) (collecting cases)). Other “jurisdictions have held that an expert may rely on a PPG as a basis for the expert’s opinion but have expressly declined to consider whether the test results should be disclosed to the jury given the special weight the jury is likely to afford things that have the appearance of scientific evidence.” *Id.* at 164-65, 851 S.E.2d at 445 (citing *In re Commitment of Sandry*, 367 Ill.App.3d 949, 306 Ill. Dec. 202, 857 N.E.2d 295, 317 (2006)).

In *Billips v. Commonwealth*, 652 S.E.2d 99, 101-02 (Va. 2007), the Virginia Supreme Court held an expert’s report that relied on PPG testing was inadmissible, even at sentencing. The *Billips* court approached PPG testing critically and found the test inadmissible:

Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers not schooled in the particular field under consideration. Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be “scientific,” and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism. That tendency has given rise to frequent complaints of “junk science” in the courts. To guard against that risk, we continue to require a “threshold finding of fact with respect to reliability of the scientific method offered. . . .”

Id. at 101-02. “Esoteric” and “junk science” are both accurate descriptions of PPG testing. *See also United States v. Medina*, 779 F.3d 55, 65 (1st Cir. 2015) (discussing reliability problems with PPG testing); *Gentry v. State*, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) (“Given the rejection of [PPG] evidence by other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia.”); *United States v. Powers*, 59 F.3d 1460, 1470-71 (4th Cir. 1995) (holding the PPG did not meet the scientific

standards for admissibility and emphasizing the “extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test.”).

In *Matter of Gregg*, the Court of Appeals, in an unpublished opinion, held the circuit court abused its discretion in finding the PPG testimony was admissible. There was no evidence the Limestone certification standards had been subjected to peer review and/or found reliable. There was also no evidence MUSC's PPG procedures had been subjected to peer review and/or found reliable. Finally, there was no evidence the Real Child Voices stimulus set had been subjected to peer review and/or found reliable. *Matter of Gregg*, Op. No. 2022-UP-336 (S.C. Ct. App. filed August 10, 2022), *cert granted* May 23, 2023, *cert. dismissed as improvidently granted* June 5, 2024.

Here, the court stated the factors the trial court should consider when determining the reliability: (1) publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) quality control procedures used to ensure reliability; and (4) consistency of the method with recognized scientific laws and procedures. *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990).

The trial court erred finding Gottfried’s testimony about the PPG test was admissible pursuant to the above factors. While the PPG test has long been written about, at least one publication that Dr. Gottfried mentioned specifically was not relevant to its use in this case.⁴ App. 40-41 Additionally, much of Gottfried’s testimony regarding this factor was that *she* had written about the test and had given presentations about the test at different conferences. However, her testimony lacked any detail regarding what her presentations and publications

⁴ Gottfried mentioned a peer reviewed paper published in Nature on June 8, 2021. She stated that the paper “noted that the PPG may be useful as a non-invasive potential technique to evaluate penile erection in men’s health.” App. 40, ll. 1-11.

specifically discussed about the PPG test.

The trial court erred finding there was standard application based on Gottfried's testimony. While Gottfried testified that PPG testing was being used in over fifty labs across the country, she explicitly admitted standardization was a problem that had not been resolved. Her testimony regarding Williford's test reflected those problems with standardization. Gottfried admitted Williford was given the entire real child voices (RCV) set although his offending pattern did not include children. Gottfried testified she started tailoring the tests for each examinee, which demonstrated that, even her lab, lacked sufficient standardization regarding how the test was administered.

The trial court erred finding that the standard for quality control procedures was met. Gottfried's testimony about quality control procedures was scant and mostly revolved around the procedures used at the MUSC lab. Gottfried was unable to testify regarding how the test is administered in other labs around the country.

Lastly, the court properly found the error was not harmless where Dr. Gottfried relied heavily on the PPG test and her testimony emphasized its importance in her conclusions. In its opinion the court noted Gottfried's admission that she could not conduct an evaluation without the PPG test. Gottfried disregarded evidence that Williford remitted and focused heavily on the results from the PPG test. Accordingly, this Court should affirm the Court of Appeals decision below.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals decision reversing Mr. Williford's commitment and grant him a new trial.



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ATTORNEY FOR RESPONDENT

This 1st day of May, 2025.