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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
The Honorable Daniel McLeod Coble, Circuit Court Judge
Supreme Court Appellate Case No. 2025-000548

IN THE INTEREST OF THE CARE AND TREATMENT
OF JEREMIAH JAMES POUGH,

APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Judge Coble did not abuse his discretion in admitting evidence regarding a penile plethysmograph test performed by the State's expert and used in formulating her opinion because the undisputed 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

Appellant Jeremiah James Pough pled guilty in November 2021 to two counts of criminal sexual conduct with a minor, second degree, one count of criminal sexual conduct with a minor, third degree, and one count of contributing to the delinquency of a minor. He was sentenced to ten years incarceration, suspended to four years with five years probation on each count, to be served concurrently. Prior to Appellant's release from incarceration, the State commenced an action pursuant to the South Carolina Sexually Violent Predator Act, S.C. Code Ann. §§44-48-10, et. seq. (2018), seeking Appellant's civil commitment for long term control, care and treatment as a sexual predator.

The matter was called for a jury trial on November 13, 2023, before the Honorable Daniel Coble, Circuit Court Judge. Prior to trial, Appellant moved to exclude evidence regarding a penile plethysmograph (PPG) the State's expert, Emily Gottfried, PhD, performed as part of her psychosexual evaluation of Appellant. Judge Coble conducted a pre-trial hearing to determine whether the PPG test is a reliable test under the factors set forth in relevant case law regarding the admissibility of scientific evidence.

Pre-Trial Testimony and Ruling

Dr. Gottfried testified about her experience as an assistant and associate professor of psychiatry and behavioral sciences at the Medical University of South Carolina (MUSC), and her position as director of the MUSC Sexual Behaviors Clinic and Lab (SBCL). In her current capacity, Dr. Gottfried conducts research regarding paraphilic sexual interests or disorders, the accurate assessment of sexual behavior risk, and the physiological arousal measuring for men and women. She is a member of multiple professional national and international organizations, including the Association for the Treatment and Prevention of Sexual Abuse (ATSA), the American Psychological Association, the Society for Personality Assessments, the American

Academy of Forensic Sciences, and the International Standardization Group for Penile Plethysmography. She has published multiple peer-reviewed articles and book chapters and given numerous peer-reviewed presentations, with additional invited presentations. One of her published articles, two or three of her published book chapters, and approximately ten of her peer-reviewed presentations dealt specifically with the PPG. She has also given webinars on the PPG for a forensic psychiatry lecture series in Canada and through the University of New Mexico. (Record on Appeal, pp. 93-98).

Dr. Gottfried testified the PPG is a standard part of every adult male sexual behavior evaluation at the SBCL, and it is an important component of her comprehensive, multi-method assessment. In addition to sexually violent predator evaluations, she has performed PPGs during evaluations of federal probationers, criminal defendants (on behalf of defense attorneys), and men involved in child custody disputes. During her career, Dr. Gottfried ordered approximately ninety-two PPGs and personally interpreted approximately seventy-five PPG test results.

Based on her extensive training, knowledge and experience, Dr. Gottfried was qualified as an expert in forensic clinical psychology and sex offender evaluations. She was also qualified as an expert in PPG technology. Judge Coble stated that he would still need to determine the reliability of the science underlying the PPG. (R., pp. 93-94, 101-102).

Dr. Gottfried testified about the history of the PPG, which was developed in the 1950s and has been used in a variety of contexts since that time. The system the SBCL uses is manufactured by Limestone Technologies and has been approved by the Food and Drug Administration. She testified the PPG is commonly used in the field of sexual dysfunction, such as treatment for sexual dysfunction disorders, and it is recognized as a medical device by insurance companies such as Blue Cross Blue Shield. Blue Cross has concluded that the PPG is “a non-invasive test for

measuring the variation in the volume of the penis and in the amount of the blood present or passing through it.” The FDA has concluded that the PPG is used “to measure penile tumescence in response to visual and auditory stimuli,” and the “data can later be combined with other standardized psychological testing procedures to assist clinicians with their assessment and treatment of sexual offenders.” (R., pp. 102-104, 636-640, 641-645).

Dr. Gottfried provided Judge Coble with a list of peer-reviewed published articles on the PPG, which provided the basis for her conclusion that the PPG is reliable and valid, and testified it adds incremental value to her psychosexual evaluations. She testified that one of the articles (McPhail) considered the results of a 2019 meta-analysis of data from multiple PPG studies focusing on sexual interest in children, and it concluded the PPG reliably differentiated between men who had a sexual interest in children and had offended against children from all other groups. Dr. Gottfried further testified about a 2019 best practices clinical handbook for evaluating sexually violent predators, which included a chapter specific to use of the PPG and concluded that the PPG has a role in both assessment and treatment decisions regarding men being considered for civil commitment as sexual predators. (R., pp. 105-109, 646-648, 657-663).

Dr. Gottfried uses the PPG as one data point for diagnostic purposes. She testified that the research shows there is a strong link between the presence of paraphilic arousal - which is sexual interest in something other than consenting human adults - and recidivism, so it is important to consider that in the lab and to determine what stimuli aroused the person on the day of the evaluation and if that arousal is consistent with their offense pattern. (R., p. 107).

Dr. Gottfried differentiated between the PPG and a polygraph, stating the only similarity is that they are both physiological measures. The polygraph attempts to ascertain if the person is being deceptive through changes in heart rate, breathing or skin responses, but nothing in the brain

is unique to deception, and there are many issues with the way a polygraph is administered and interpreted. The PPG is different because it is specifically looking at blood flow to the penis while the subject is presented with a variety of sexual scenarios, and arousal/erection is unique to sexual arousal. The PPG only reveals what the person is aroused to on the day of the test, and that provides a data point in the context of a larger evaluation to determine which data points converge and corroborate each other and which ones do not. The PPG does not reveal whether the person is lying, did something or will do something to a specific or non-specific victim. (R., pp. 109-111).

Dr. Gottfried testified the SBCL has both research and clinical certifications to administer the PPG, and being research certified means the lab's data can be combined with the data from other research certified labs because all the labs are using the same standardized procedures. Everything the lab does in performing a PPG is standardized, including temperature and humidity controls, and every PPG is performed and interpreted in the exact same way. The lab also uses countermeasures to detect if the person is attempting to affect the test results by squirming, flexing or holding their breath, and all the person's movement is captured through the physiological data. In addition, to ensure the person is paying attention, the person is instructed to hit a button on a keypad next to the chair when the scenario he is listening to becomes sexual or violent, and the technician will occasionally ask the person to describe the last trial he heard. There are also neutral non-sexual trials that are compared to the sexual trials. The SBCL has a manual that sets out all the procedures for performing a PPG, including a detailed checklist that must be followed. (R., pp. 111-118, 649-656). Dr. Gottfried also submitted a list of peer-reviewed articles specifically examining the Limestone system used in the SBCL, and a list of peer-reviewed articles examining the SBCL procedures in comparison to other labs. (R., pp. 113, 119-121, 664-665).

Dr. Gottfried testified the SBCL uses the Marshall and Real Child Voices (RCV) stimulus sets, which are used in other labs and sexual predator treatment programs, and both have been subjected to peer-review. She then explained the peer-review process for both scientific journals and scientific conferences and testified she has published peer-reviewed articles and serves as a peer-reviewer for approximately thirty-five scholarly journals. The peer-reviewed articles and conference presentations show that the Marshall and RCV sets are substantially equivalent. They are able to discriminate between people who have offended and are aroused by those offense behaviors from people who do not have the same stimuli in their victim pool, but some show that the RCV is slightly better than the Marshall. Dr. Gottfried testified that the Limestone system, Marshall and RCV stimulus sets have been found to be reliable and are generally accepted in the field of psychology in sexual predator evaluations. (R., pp. 122-125).

Dr. Gottfried testified there have been standardization issues with the PPG related to different cut scores and the stimulus sets used, but explained the standardization issue is primarily related to international standards because different countries have different laws. For example, Canada uses stimulus sets that include child pornography which labs in the United States are prohibited from using. (R., pp. 125-126).

Another issue raised in some literature is that some people do not show an “expected” arousal pattern, i.e., a man who offended against small children does not show arousal to small children in the lab. Dr. Gottfried explained that there are many reasons why people offend, and the majority of people who sexually offend against small children are not offending because of sexual arousal or a pedophilic disorder, so the lack of arousal in the lab for those individuals makes sense. (R., p. 127).

The cut score issue relates to what is considered a significant arousal and may differ depending on the purpose of the PPG. Dr. Gottfried explained that no test is perfect, every test has a cut score to determine what is significant, and the test will either miss people or put people in the wrong group. The SBCL uses a conservative cut score of five millimeters of change to determine a significant arousal for purposes of a sexual predator evaluation. Dr. Gottfried testified that using a conservative cut score may lead to false negatives, but the PPG is only one data point used in the SBCL evaluation. If, however, the PPG is used for treatment, a much lower cut score may be used because it provides a treatment target. (R., pp. 126-130).

Dr. Gottfried testified that the Diagnostic and Statistical Manual of Mental Illness, 5th Ed. Revised (DSM-5-TR) is used by psychologists, psychiatrists and anyone with a license to diagnose mental illnesses and is considered authoritative in the United States. The DSM-5-TR states the PPG is “the most thoroughly researched and longest used of [physiological] measures.” (R., pp. 132-133, 667).

Dr. Gottfried submitted a portion of the practice guidelines published by the Association for the Treatment of Sexual Abusers (ATSA) for the assessment, treatment and management of male adult sexual abusers. The guidelines state that research-supported assessment methods such as PPG may be useful for “obtaining objective behavioral data that may not be readily established through other assessment means.” Practitioners are instructed to take steps to assure that all examiners are appropriately trained in the use of the PPG, use accepted methods, adhere to applicable professional/discipline-specific standards or guidelines, and recognize that the PPG findings “are to be used in conjunction with other sources of assessment information, not as the single source of data for any assessment.” The PPG should be appropriately limited to “assessing the [person’s] relative sexual arousal and preferences regarding age and gender,” “evaluating the

[person's] arousal responses to various levels of sexually intrusive or aggressive/coercive behaviors," "exploring the potential role of offense-related sexual arousal in the [person's] sexually abusive or at-risk behavior and developing accompany treatment goals," and "monitoring the effectiveness of interventions" to modify, manage and express both healthy and offense-related sexual arousal. (R., pp. 670-671).

In Appendix B, the guidelines state that the PPG "provides objective information about male sexual arousal and is therefore useful for identifying atypical sexual interests, increasing client disclosure, and measuring changes in sexual arousal patterns over the course of treatment." PPG results "are not used as the sole criterion for determining atypical sexual interests, estimating risk for engaging in sexually abusive behavior, recommending that clients be released to the community, or deciding that clients have completed treatment." Results are to be "interpreted in conjunction with other relevant information (such as, the individual's offending behavior, use of fantasy, and pattern of masturbation) to determine risk and treatment needs" and "are not to be used to draw conclusions about whether an individual has or has not committed a specific sexual crime."

Laboratories are to "have a standard protocol for fitting gauges, presenting stimuli, recording data, and scoring." Examiners are to "use the appropriate stimulus set to assess sexual interests that are the subject of clinical concern," such as using "a stimulus set with depictions of children and adults to test clients who have child victims and who are suspected of having a sexual interest in children," and should have a minimum of two examples of each category. Using neutral stimuli, such as landscape pictures without any people, "may increase the validity of the assessment" "because lower responses to sexual stimuli than neutral stimuli may indicate faking attempts." The sensitivity of PPG testing (true positive) is lower than its specificity (true negative),

so the presence of atypical/deviant sexual arousal on a PPG is more informative than its absence. (R., pp. 673-676).

Dr. Gottfried testified about a 2009 book specific to conducting sexually violent predator evaluations that noted the PPG is “the psychophysiological assessment method with the longest research history,” but cited a 2006 article by the developer of the Marshall stimulus set that noted some problems with the PPG as limiting the use of the PPG in sexual predator evaluations. In 2014, however, the Marshall set developer published a subsequent article that reconsidered his 2006 criticisms of the PPG, and concluded that even with some standardization concerns, the PPG “remains the best approach to establish a sex offender’s sexual interest,” and if used with caution, use of the PPG “can fully contribute to risk assessment and to defining targets for treatment.” He further noted that integration of PPG test data across testing sites revealed “that the results of individuals who offend against children appear reasonably consistent in showing that some, but far from all, of these offenders displayed deviant arousal that requires treatment intervention,” and “the value of PPG assessments with these offenders appears to be clear.” (R., pp. 136-139).

Dr. Gottfried testified that based on her knowledge, experience and expertise in the field and with the PPG specifically, it was her opinion the PPG was reliable and valid, and she would not use it if she did not believe it would add something to her evaluations. She stated the PPG is generally accepted in the mental health community as it relates to the assessment and treatment of sex offenders, as well as the medical community for assessment of arousal. (R., pp. 139-140).

Judge Coble took the matter under advisement overnight, and rendered his ruling the next morning. He found the subject matter regarding the PPG was highly technical and dealt with psychiatry, psychology and human physiology, and how a scientist interpreted the data. Based on

that finding, Judge Coble ruled that expert testimony was necessary and would be helpful to the jury.

He further found Dr. Gottfried was qualified as an expert in several areas based on her skills, requisite knowledge, training and experience. Specifically, as to the PPG, Judge Coble found Dr. Gottfried had significant training, was published, and had done presentations for over a decade.

Judge Coble stated he was required to determine if the underlying science was reliable as a function of his role as gatekeeper. He found that the PPG is scientific in nature, so he had to view it in light of the factors to be considered in determining the admissibility of scientific evidence. Judge Coble noted that the PPG machine has been around since the 1950s, it has been used for purposes other than sex offender evaluations, and has been shown to be accurate in what it is doing and its physical form. Based on the testimony regarding how the machine works and what it measures, Judge Coble found the PPG machine is reliable and measures what it is supposed to measure.

Judge Coble then discussed the peer-reviewed articles submitted by Dr. Gottfried, and determined many of the articles went through the PPG and sexual behavior assessments based on different types of situations such as adult victims, child victims and violence. He determined that the literature indicated the general science underlying the PPG is sound in that it records the physiological changes in response to in the various stimulus situations. He found the PPG machine is based on science, and the science of studying the psychological connection between a potential offenders thoughts and physiological changes has been tested and studied for many years and it is reliable.

Referencing Dr. Gottfried's testimony regarding the Limestone PPG machine and the Marshall and RCV stimulus sets, Judge Coble found the PPG test results was one data point Dr. Gottfried used in her evaluation. He noted she did not rely on just that data point but used her expert training, experience and other knowledge of the medical field to reach her conclusion regarding the risk to reoffend sexually.

As to the issue of standardization, Judge Coble found that the underlying science of the application method described by Dr. Gottfried was standardized even if other labs used different stimulus sets. The testimony and articles indicated the underlying science was the same regardless of what stimulus sets were used.

Judge Coble also determined the SBCL had extensive quality control procedures as demonstrated by the checklist the lab uses in every PPG test. He found that the method utilized was consistent with recognized scientific laws and procedures, and Dr. Gottfried explained her use of a particular cut score for purposes of a precommitment evaluation versus treatment. He also referenced Dr. Gottfried's testimony that the cut score she uses is based on a desire to reduce the possibility of false positive test results.

Judge Coble referenced the DSM-5-TR indicating that the PPG is the most thoroughly researched and longest used physiological test for sexual arousal with sensitivity and specificity varying across sites which use different stimuli. He then cited Dr. Gottfried's explanation of why it may vary and how she uses it in different ways, which he found was based on scientific methods.

Based on his finding that the underlying science of the PPG was reliable, Judge Coble concluded the PPG evidence was reliable for purposes of Rule 702, SCRE, but the credibility could be attacked on cross-examination. He further found the PPG evidence was "extremely probative" because it went to an underlying element the State had to prove under the SVPA.

Judge Coble concluded the PPG was reliable and the evidence regarding Appellant's PPG test results was admissible. He then asked the State to prepare a proposed written order for Appellant's counsel to review "at some point." He specifically indicated that the order did not have to include just his oral ruling, and it could include the hearing testimony. (R., p. 203-210).

Trial Testimony

Dr. Gottfried

Dr. Gottfried was qualified as an expert in forensic psychology and forensic sex offender evaluations. She testified that when she conducts evaluations in sexual predator cases, she reviews all the records she received to make sure nothing is missing. The records may include mental health records, records from prisons and detention centers, police reports, criminal history reports, victim forensic interviews, records from social services and other agencies, and any prior psychological evaluations of the person. The person is then scheduled for three appointments, during which they are administered a battery of psychological tests, Dr. Gottfried conducts a comprehensive clinical interview regarding the person's entire history and symptoms the person could be experiencing. Dr. Gottfried then scores risk assessment measures and puts all the information together to write her report. (R., pp. 235-244).

Dr. Gottfried testified the State requested that the SBCL perform a precommitment evaluation of Appellant. Pursuant to a contract between MUSC and the State, there is a flat fee for the evaluation which does not depend on the results of the evaluation. Dr. Gottfried testified she has conducted evaluations for other parties, including people the State was seeking to commit as sexually violent predators. (R., pp. 244-245).

For Appellant's evaluation, Dr. Gottfried reviewed records from the Kershaw County Sheriff's Office, the Kershaw County Court of General Sessions, the Kershaw County Detention

Center, the South Carolina Department of Corrections, the Care House of the PeeDee, the South Carolina Network of Children's Advocacy Center, the Metropolitan Children's Advocacy Center, the Richland County Sheriff's Department, the Richland County Magistrate's Court, the South Carolina Department of Social Services, and the South Carolina Department of Mental Health. She stated this is the type of documentation and information typically and reasonably relied on by experts in the field of sexual offender evaluations, and she relied on those records, her interview of Appellant and the risk assessments she performed in rendering her opinion. (R., pp. 247-248).

Dr. Gottfried testified that the best predictor of future behavior is a person's past behavior, and looking at the person's past behavior can provide information regarding their risk to reoffend, including the level of violence and victim characteristics that could be expected if the person did reoffend. In evaluating Appellant, Dr. Gottfried did not just consider his current and past sexual functioning, but also considered things relevant to a full range of potential mental abnormalities and personality disorders. (R., pp. 248-249).

Dr. Gottfried then testified about Appellant's criminal history, which included some minor offenses such as breach of trust with fraudulent intent, possession of marijuana, assault and battery third degree, open container of alcohol, and trespassing. In addition, Appellant had been convicted of three sexually violent offenses. Dr. Gottfried testified it was necessary to examine the underlying facts of each offense for diagnostic and risk prediction purposes. (R., pp. 252-254).

On November 10, 2021, Appellant pled guilty to criminal sexual conduct with a minor victim eleven to fourteen years old, second degree, and was sentenced to ten years' incarceration, suspended to four years' incarceration and five years' probation, with credit for 811 days time served. (R., p. 624). Dr. Gottfried testified the facts of this offense that were important to her in rendering an opinion were that Appellant raped a fourteen year old female stranger after he gave

her alcohol. He reportedly knew the victim's sister, and asked the victim's and sister's mother if he could take them skating. Rather than take them skating, Appellant took them to his house to drink alcohol and smoke marijuana. Although the victim became very intoxicated she recalled Appellant trying to kiss her and she told him to stop and tried to push him away. Appellant then pulled the victim's pants down and vaginally raped her.

Dr. Gottfried testified the fact that Appellant continued the sexual assault after the victim was distressed and tried to get him to stop was important to her evaluation. When she interviewed Appellant, he told her that he and the victim had consensual sex, and he was not in his right mind due to alcohol and marijuana. He stated it was not rape because "there was no weapon" and "he didn't hit her with anything or beat her." (R., pp. 255-257).

Also on November 10, 2021, Appellant pled guilty to criminal sexual conduct with a minor, third degree, and was sentenced to ten years' incarceration, suspended to four years' incarceration and five years' probation, with credit for 811 days time served, to be served concurrent with the sentences imposed on other charges that day. (R., pp. 628-631). According to the records, Appellant offered the victim, who was a stranger to him, a ride home from a bar, but he took her to his house instead. The victim reported she was going in and out of consciousness, but when she woke up at one point, Appellant was sexually assaulting her. She woke up the next morning on Appellant's front porch, her shorts were pulled down to her feet and she was covered up with a tablecloth. She did not report it immediately, when she did report it several months later, a medical examination revealed a "healed hymenal transection," and the person conducting the examination noted a high suspicion of sexual abuse. (R., p. 259).

Dr. Gottfried testified the important facts of this offense were that Appellant raped an unconscious female who could not consent, and he was out on bond after being arrested for the

previous offense. Appellant told Dr. Gottfried he met the victim at a club and she spent the night at his house, but he was 90% sure they did not have sex. He stated he pled guilty because they were offering him a good deal and he wanted to get on with his life. Dr. Gottfried noted Appellant told a previous evaluator that he and the victim engaged in consensual sexual acts and her reporting to the police was in retaliation for him rejecting her several months later. (R., pp. 259-261).

On November 10, 2021, Appellant was also convicted on another charge of criminal sexual conduct with a minor under sixteen years of age, second degree, and received the same sentence he received on the two previous convictions, to be served concurrently. (R., pp. 632-635). The victim was the fifteen year old niece of Appellant's girlfriend. During a forensic interview, the victim stated that when her aunt worked nights, Appellant digitally penetrated her vagina causing pain. He also touched her legs and breasts on several occasions, which made her uncomfortable. (R., pp. 262-263).

Dr. Gottfried testified there was a clear indication the acts were not consensual because the victim reported that she repeatedly pushed Appellant's hand away and she freaked out when it happened. It was also significant that Appellant was out on bond from the two previous offenses when he committed this offense. Appellant told Dr. Gottfried that the alleged acts did not happen, and the allegations were the result of coaching by his girlfriend's mother because they were trying to evict the mother from the home. (R., pp. 263-265).

Dr. Gottfried reviewed the evaluation report issued by the court appointed evaluator from the Department of Mental Health (DMH), who concluded Appellant did not meet the criteria for civil commitment under the SVPA. She testified there were inconsistencies between what Appellant told the DMH evaluator and her. As an example, Appellant did not tell the DMH evaluator about engaging in consensual and asphyxiation sexual activities he described to Dr.

Gottfried. He also told the DMH evaluator that he did not masturbate at all, but he told Dr. Gottfried that he masturbates about monthly. Dr. Gottfried testified the biggest difference she noted was that the DMH evaluator did not diagnose any mental illness and Dr. Gottfried did. (R., pp. 265-269).

Dr. Gottfried testified about the battery of testing she does in every evaluation, which includes self-report via computer questionnaires, physiological testing, and clinical rated assessments. She uses this battery of testing to look for any symptoms the person might be experiencing, any personality characteristics, any substance abuse, sexual arousal and sexual behavior, and to look at their level of risk. These tests are used and reasonably relied on by experts in the field, and she uses the information obtained through these tests to form her opinions. Dr. Gottfried stated that given the high stakes nature of sexually violent predator evaluations, she uses multiple tests to give her multiple data points and allow her to conduct a multi-method assessment, which assesses the same thing in multiple different ways. (R., pp. 268-269).

Dr. Gottfried then testified about things she found significant about the psychological aspects of Appellant's test results, which included being suspicious and distrustful, having a chip on his shoulder, being cynical and believing others only act in their own interest, generally not liking people or not wanting to be around them, having some hostility, and holding some grudges for perceived wrongs done to him. There was indication that Appellant is impatient, he has some issues with his temper, he is reckless and impulsive, he bores easily, he craves stimulation, and he might do something impulsive to create excitement in his environment. (R., pp. 270-271).

Appellant described himself in the tests as having really strong opinions, being able to lead other people, being assertive and direct, and being really optimistic and unwilling to be limited by his own limitations. Dr. Gottfried testified that others who produced similar test results were often

self-confident and really focused on successes and achievements. While others might view Appellant as not sympathetic, Appellant views himself as being really independent, practical and caring little about what others think of him, but others may see him as really self-important, overbearing and domineering. (R., p. 271).

Appellant reported problems with drugs and alcohol and having resulting consequences. On a test that assessed Appellant's sexual behavior, he denied having sexual thoughts and engaging in sexual behaviors, but the test results indicated that he was preoccupied with sex and was callous in the form of either not having empathy for other people or a lack of guilt. There was also an indication of lifestyle impulsiveness and resistance to rules and supervision, and he scored high on a scale looking at attitudes of toughness and being really masculine. (R., pp. 271-272).

Dr. Gottfried testified that measuring sexual arousal in this type of evaluation is important because sexual arousal to illegal sexual behavior is a risk factor for future sex offenses. She stated that because people undergoing these evaluations are understandably motivated not to be totally forthcoming about what sexually arouses them, evaluators need a way to objectively measure sexual arousal in the lab, and the SBCL uses the PPG, which she described as a physiological measure of male sexual arousal. She then briefly described the PPG test and how it is administered. She testified the PPG is used pretty widely in general sexual functioning, such as patients experiencing impotence, erectile dysfunction or some other sexual dysfunction. She stated she is trained and certified to administer and interpret PPG test results. (R., pp. 272-273).

Dr. Gottfried further testified the PPG has been criticized for a lack of standardization, which she explained centered around use of the PPG internationally. She stated the PPG is widely used in Canada, the United Kingdom and Russia where they can use child pornography in their stimulus sets, but labs in the United States do not have a medical exception to use child

pornography, and there are on-going efforts to standardize PPG administration between countries, but it was difficult to get labs to stop using stimuli they have used for many years. (R., pp. 274-275).

She further testified there have been issues concerning the cut scores used to determine significant results. MUSC uses a conservative cut score for sexual predator evaluations because they are high stakes evaluations and the PPG is only one data point among the many data points she considers, so she would rather risk a false negative than a false positive result. (R., p. 275).

Dr. Gottfried testified she uses the PPG because they need an objective way to measure what sexually arouses the person being evaluated. Few people will readily admit to deviant sexual arousal, and it is a risk factor for reoffending if they have such arousal and have acted on it. (R., p. 278).

Appellant showed significant arousal to numerous trials in the PPG test, including nine out of ten trials involving rape or sexual violence. Dr. Gottfried testified this arousal pattern was consistent with his sexual offenses. He also showed arousal to consenting adult scenarios, which was compared to his arousal to rape or sexual violence scenarios. When Dr. Gottfried discussed his PPG results with Appellant, he did not deny the arousal, but first said he had not been aware of it, then admitted he had been aroused and stated he was shocked by the results and called his mother to talk to her about the results. (R., pp. 279-281).

Dr. Gottfried also used a clinician scored test that considered characteristics of psychopathy. While Appellant did not meet the threshold score to be classified as a psychopath, Dr. Gottfried testified he does have some characteristics associated with psychopathy, including being grandiose, having an inflated sense of self, superficial charm, low remorse and guilt,

emotionally shallow, a lack of empathy, callousness, and a failure to accept responsibility for, or the consequences of, his actions. (R., pp. 281-282).

Dr. Gottfried diagnosed Appellant with other specified paraphilic disorder, specifically paraphilic coercive disorder. She testified the disorder is characterized by really intense fantasies, behaviors and/or urges involving coercive sexual acts towards a non-consenting person, and reflects underlying deviant arousal to forced sex, and is conceived as the sexualizing of power control and dominance over a non-consenting person. In diagnosing this paraphilic disorder, the clinician considers whether the person has similar offenses, is the person offending even though he is in a relationship with a willing and consenting partner, did the offenses occur under circumstances where there was a high likelihood of being caught, and were most of the person's offenses sexual in nature. (R., pp. 284-287).

Dr. Gottfried also considered the existence of a personality disorder because the presence of personality pathology can increase the risk of future sexual offenses. She testified Appellant exhibited many traits that are characteristic of narcissistic personality disorder, but he did not meet the full criteria for that personality disorder, so she diagnosed him with other specified personality disorder with narcissistic features. She testified:

Based on my records and my evaluations, he has a really grandiose sense of importance or an over inflated sense of self-importance. He described himself as being too smart, overqualified to work a job in the prison. He kind of spoke at length about how other people aren't as mentally strong as he is. He acknowledged that other people would call him cocky or arrogant. He spoke at length about how good he is at fighting about the large sums of money that he made while he was in prison. I don't know for sure that he has fantasies of success and accomplishments, but he described his plan to design video games and then never have to work again.

He demonstrated the belief that he's special and he can only be understood by other special, unique people. He reported that others (*sic*) opinions of him really didn't matter to him. He said the only person's opinion who matters to him is his mom's because his mom has gotten a lot farther in life than he has. His sexual offenses

seem to be really like exploitive of the victims. So what I mean by that is like his sexual offenses were means to achieve his own outcomes.

He appears really entitled. He doesn't seem to have a lot of empathy. So for example, he said that other people told him that he's not concerned about them or how they feel. He's pretty cynical, selfish. And based on all the data that I had, it seems like this has been a pervasive pattern kind of since adolescence.

Based on all the information she had, Dr. Gottfried concluded that Appellant may not meet all five of the symptoms for a full narcissistic personality disorder, but he has traits of the disorder. (R., pp. 288-291).¹

Dr. Gottfried used several risk assessment tools that identify static risk factors for reoffending that cannot be changed, such as number of convictions, and dynamic risk factors that can be addressed with treatment, such as sexual deviance. She scored two actuarial risk assessments that consider static risk factors – the Static-99R and the Static-2002R. Appellant's score on the Static-99R, was eight on a scale of minus three to twelve, which was in the well above average risk to reoffend category with an expected recidivism rate of over fifty percent. Appellant scored in the 99th percentile of other people scored on that assessment, and his score of eight is almost seven and a half times the rate of someone with an average score (two). (R., pp. 293-298).

Appellant's score on the Static-2002R was six on a scale of minus two to thirteen, which was in the above average category to reoffend sexually, and in the 88th percentile of all people scored on the Static-2002R, with an expected recidivism rate of approximately thirty-four percent. Appellant's score of six was over two and a half times higher than the average risk on the Static-2002R. (R., p. 298).

¹Dr. Gottfried also diagnosed Appellant with alcohol abuse disorder and cannabis use disorder. (TT, pp. 266-268; R., pp. 291-293).

Dr. Gottfried used the Sexual Violence Risk 20, Version 2 (SVR-20), which provides professional judgment guidelines to consider dynamic risk factors that have been identified in the research studies as being risk factors. The clinician goes through each listed factor and considers whether or not they are present or absent and how relevant they are to the person being evaluated. The SVR-20 is a structured way to look at the dynamic risk factors so the clinician does not miss any factors. (R., p. 299-300).

Dr. Gottfried testified the SVR-20 splits the risk factors into psychosocial adjustments, sexual offending and future plan risk factors. As to the psychosocial adjustment factors, Dr. Gottfried testified Appellant exhibited problems with sexual deviation, sexual arousal, coercion, substance use problems and non-sexual offending, and partial or possible problems with traits of psychopathy and a history of relationship problems. As to the sexual offending factors, Appellant exhibited a problem with chronic sexual offending with frequent offenses over a relatively short period of time, extreme minimization and denial of his sex offenses, and attitudes that condone or support sex offending. As to the future plans factor, Appellant had a lack of realistic future plans, and possible or partial problems with having a negative attitude toward intervention because he did not believe he needs treatment so he will not reoffend. Based on all the information Dr. Gottfried gathered from the risk assessments, she determined Appellant “has a high number of static and dynamic risk factors and he represents based on the risk factors alone, a high risk to re-offend.” (R., pp. 300-301).

Dr. Gottfried testified Appellant’s plan if released was to live with his mother, and he told Dr. Gottfried he was not concerned about money because he made a lot of money while incarcerated and he wanted to go to school and create video games. Dr. Gottfried stated Appellant’s plans were not realistic given his level of risk because he had not received any

treatment for his paraphilic disorder or his personality disorder. She testified Appellant does not have good insight into the factors that made him offend, or a realistic strategy to prevent reoffending. He told Dr. Gottfried during the interview that his risk to reoffend was essentially non-existent, which she stated was unrealistic because no one's risk is non-existent. Appellant could not identify moods or situations that would increase his risk to reoffend, and when pushed to say how he was going to prevent reoffending, he told Dr. Gottfried that he just needed to not be drinking alcohol when he is around other people, and then said he would not drink alcohol at all or only drink alcohol when he is alone. Dr. Gottfried testified this was unrealistic because Appellant was found to be under the influence of alcohol while he was incarcerated, which indicated he could not even limit his alcohol use when in a controlled setting. (R., pp. 301-602).

Dr. Gottfried testified that alcohol did not make someone commit a sexual offense, but if Appellant said that alcohol was what caused him to offend and he is still drinking alcohol, it was an issue. In addition, during her evaluation and the previous evaluation, Appellant minimized his sexual thoughts, fantasies and behaviors, and said he was just going to suppress it, which is not realistic. Dr. Gottfried stated that without treatment for both disorders Appellant "represents a high risk and that's unrealistic with his plans." (R., pp. 302-303).

Dr. Gottfried opined to a reasonable degree of psychological certainty that Appellant's paraphilic coercive disorder and other specified personality disorder affects his volitional control to the extent that he is predisposed to commit acts of sexual violence because he acted on his arousal to rape and his personality characteristic relate to feeling entitled to engage in the sexual acts. When considered with his multiple dynamic risk factors and his lack of treatment, she stated the interplay of those factors affects his ability to stop himself and makes him more likely than not to reoffend sexually. She further opined that without treatment, Appellant was a menace to the

health and safety of others if not confined in a secure facility for long term control, care and treatment. (R., pp. 303-305).

DMH Evaluator

The DMH evaluator testified that she reviewed all the records related to Appellant's criminal offenses, had him complete a personality test, interviewed him and completed the Static-99R and Static-2002R risk assessments. She stated the scores she had for the risk assessments were the same scores Dr. Gottfried had, and the only real difference between her opinion and Dr. Gottfried's opinion was that she did not diagnose Appellant with either a mental abnormality or personality disorder. She also testified she did not use the PPG because based on her review of the literature, the PPG was not standardized or reliable because different labs do it differently. (R., pp. 402, 416-393).

On cross-examination, the DMH evaluator acknowledged that some past DMH evaluators have used the PPG, and that some research literature described the PPG as an objective measure of male sexual arousal. She also acknowledged that Appellant's sex offense history spanned more than six months, that he reoffended twice while out on bond from sex offense arrests and facing significant consequences, that he offended while he had an available adult partner, and that there was evidence he continued assaulting at least two of his victims in spite of them telling him to stop and being in distress during the sexual assault. She further acknowledged that at the time she did her evaluation, she was unaware that Appellant was disciplined in prison for being under the influence of alcohol (which occurred prior to her evaluation), and that he got into a fight at the detention center while awaiting trial. (R., pp. 450-503).

The jury found beyond a reasonable doubt that Appellant is a sexually violent predator as defined by the SVPA. This appeal followed.

After the appeal was filed, the case was remanded to the circuit court to afford Judge Coble the opportunity to issue the written order he intended to issue memorializing his verbal ruling regarding admissibility of the PPG. The filed Order noted the trial court's gatekeeping function to make a preliminary assessment of evidence admissibility in the face of a challenge to a particular type of evidence, and set out the legal standards for the admissibility of evidence, particularly scientific evidence. (R., pp. 617-619).

The Order then set forth Judge Coble's findings of fact, which were consistent with his oral findings. He discussed the history of the PPG and noted it has been used in a variety of contexts since it was developed in the 1950s, including uses in medical fields other than psychology, and the system used in the SBCL is approved by the Food and Drug Administration to measure "penile tumescence in response to visual and auditory stimuli," which "can later be combined with standard psychological testing procedures to assist clinicians with their assessment and treatment of sexual offenders." Based on the testimony and evidence, Judge Coble found that the PPG system reliably measures blood flow to the penis. (R., pp. 619-620).

Judge Coble then examined the combination of physical and physiological aspects of the PPG in connection with "the thought and connections from the brain to the blood flow and how that is measured." He reviewed the Court's exhibits entered during the hearing, which included peer-reviewed articles Dr. Gottfried testified she relied on as the basis for why she conducts a PPG and why she believes it is reliable and valid. He noted the articles go through PPG and sexual behavior assessment based on different types of situations, and discuss how the PPG works and its connection with a sex evaluation, pre-commitment or treatment. He found that "the general science seems to be sound that you can study the PPG and its relation with sexual evaluation and the physiological changes that the machine records." Based on the testimony and evidence

presented, Judge Coble found that “the physical machine works based on science and it is reliable,” and “the science of studying the psychological connection between thoughts of a potential offender or a patient and the machine is based on peer-reviewed articles that the PPG is reliable, it has been tested, and it has been studied for many years through many different peer-reviewed articles.” (R., p. 620).

As to the prior application of the PPG, Judge Coble noted there is an issue of standardization, specifically between countries, and different stimulus sets are used. He found that between 50-100 labs have purchased the Limestone PPG system, and multiple sexually violent predator treatment programs around the country have purchased that system as well. Judge Coble discussed his questions to Dr. Gottfried regarding the scientific method she uses to choose stimulus sets. He noted Dr. Gottfried’s testimony that in assessing an offender’s arousal, she looks at sexual arousal to consenting adults and stimulus sets that match the offender’s victim or offense characteristics from the offender’s sexual conviction, and when interpreting the data, she compares the person within themselves, i.e., comparing the offender’s level of arousal to consenting adults against their level of arousal to abusive, non-consensual trials. He also noted that in response to his inquiry regarding how the trials are developed to show arousal, Dr. Gottfried testified that except for neutral trials, all the PPG trials describe sexual situations, and the only variation is the level of coercion or violence, the gender and the age, and they all involve sexual assault or consenting sexual experiences. Judge Coble found that the underlying science of the different stimulus sets used in different places and as scientifically conducted by Dr. Gottfried for each person is standardized. (R., pp. 620-621).

Judge Coble discussed Dr. Gottfried’s extensive testimony regarding the quality control procedures used in the MUSC lab, and the MUSC PPG administration instructions manual is used

to ensure the PPG is done properly. He noted that Dr. Gottfried testified every PPG performed in the lab is administered in the same way, including calibrating the strain gauge at least three times before the system even allows the PPG to begin. He further noted Dr. Gottfried's testimony regarding the lab's countermeasures to ensure the person is not manipulating the test. Judge Coble found that the checklist created by MUSC shows there are quality control procedures used in administration of the PPG. (R., p. 621).

As to the consistency of the method with recognized laws and procedures, Judge Coble noted Dr. Gottfried's testimony that any test has a cut score to determine what is a significant result, and her explanation that the MUSC uses a conservative cut score to indicate a clinical significant arousal because the PPG is just one data point she uses in her evaluations, and she would rather miss someone on the PPG (false negative) than say the person has arousal when the person did not actually have that arousal. He further noted her testimony that different labs may use different cut scores because a lower cut score may be significant for a person in treatment because it showed a change on a specific treatment target.

Judge Coble noted that in response to his questions regarding what data points she uses other than the PPG, Dr. Gottfried testified she administers a battery of psychological tests looking at psychopathology, symptoms of mental illness, and personality functions. He further noted Dr. Gottfried gives a lengthy sexual behavior questionnaire and performs a clinical interview, during which she asks the person about their entire history and their sexual history. She also looks at the victim's description of the offense and all the official reported information, and asks the person for their version of what happened during the offense and what they were aroused by, as well as what the person was aroused by in the lab on the day of testing. Judge Coble found it was

“important to the assessment that the PPG results are only one data point among many Dr. Gottfried uses in making her assessment.” (R., pp. 621-622).

Regarding the probative value of the PPG evidence versus its prejudicial effect, Judge Coble found that the statute required the State to prove Appellant had a mental abnormality or personality disorder that made him a risk to reoffend sexually if not confined for treatment, and noted the State’s argument that the PPG evidence would assist the jury in understanding Dr. Gottfried’s sexual deviancy diagnosis and the importance of the fact that Appellant’s PPG test results were identical to his criminal sexual offending history. Judge Coble further noted Dr. Gottfried’s testimony that the chapter from a clinical handbook entered as Court’s Exhibit 5, indicated that ““deviant sexual arousal has been found by multiple researchers to be a significant predictor of sexual offense recidivism.”” Judge Coble found that the PPG evidence was “extremely probative because it goes to the underlying elements the State must prove, and the probative value is not substantially outweighed by the prejudicial effect.” (R., p. 622).

Based on his findings of fact, Dr. Gottfried’s expert testimony, the Court’s Exhibits submitted by the State, and the extensive arguments of counsel, Judge Coble concluded that as required by case law, the State provided the court with a factual and scientific basis of the PPG. He further concluded that the underlying science of the PPG is reliable for purposes of Rule 702, SCRE, and the State had carried its burden of demonstrating the high probative value of the PPG evidence as it related to the underlying elements that the State must prove to civilly commit someone under the SVPA, and therefore, the PPG evidence was admissible. (R., pp. 622)

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). *See also*, State v. Wallace, 440 S.C. 537, 892 S.E.2d 301, 307 (2023) (appellate courts will not reverse a trial court's ruling on evidentiary issues unless the trial court did not act within the discretion granted to trial courts).

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); State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 207 (Ct. App. 2008) (“If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate court.”).

ARGUMENT

Appellant asserts Judge Coble erred in admitting the PPG evidence because the PPG is “neither standardized nor reliable.” Noticeably absent from Appellant’s brief is **any** in-depth discussion or analysis regarding the extensive and undisputed expert pretrial testimony Judge Coble heard from Dr. Gottfried regarding PPG testing reliability, including current and on-going research, peer-reviewed articles and presentations, and her training on the operation of the PPG test system and interpretation of PPG test results.² More notable is the lack of **any** reference or discussion, other than a short footnote, to Judge Coble’s thorough and detailed order acknowledging his role as gatekeeper of admissible evidence and setting out his findings as to each relevant factor he was required to consider before admitting scientific evidence.

The absence of substantive argument regarding the pretrial testimony on which Judge Coble relied, and the written memorialization of his PPG verbal ruling, is telling, and the reason is simple. Appellant cannot legitimately argue that Judge Coble’s ruling is not supported by the evidence, which is the focus of appellate review.

A. Pretrial Hearing

As set forth in detail above, Dr. Gottfried testified at the pretrial hearing about her first-hand training and experience, multiple research studies and publications regarding the reliability of the PPG test, the DSM-5 reference to the PPG test, and her active participation in on-going

²By way of footnote, Appellant infers some nefarious purpose behind the State’s “pattern” of using Dr. Gottfried as an expert in SVPA cases. (Brief of Appellant, p. 3, n. 4). The true reason the State uses Dr. Gottfried can be found by simply looking at her credentials, the thoroughness of her evaluations and her integrity in presenting her opinions. In addition, the State has used other experts in SVPA cases, including Dr. Geoff McKee and Dr. Donna Maddox, and has communicated with another psychologist about serving as an expert for the State. The pool of potential experts in South Carolina for SVPA cases is small, so choices are limited, and the State wants a qualified expert in these cases.

national and international studies and scientific presentations regarding PPG testing and the stimulus sets used in the PPG test. Based on her testimony, Judge Coble qualified Dr. Gottfried as an expert in the field of PPG technology. Dr. Gottfried then testified in depth regarding the SBCL protocols and quality control procedures used in every PPG test the lab conducts. (R. pp. 94-179). In addition to Dr. Gottfried's testimony, the State submitted multiple exhibits at the pretrial hearing that supported her testimony regarding the general acceptance of the PPG for sex offender evaluations and treatment, and the extensive SBCL quality control procedures for all PPG tests performed there. (R., pp. 636-681).

It is clear from the record that Judge Coble paid very close attention to the testimony and evidence presented during the pretrial hearing, and he specifically questioned Dr. Gottfried about "a standard procedure scientifically for choosing stimuli," the scientific method used to determine what aroused the person, what other data points Dr. Gottfried considered in her evaluations, and how the PPG factored into treatment. (R., pp. 175-179). Judge Coble's active involvement in the pretrial hearing and the discussion in his written order make it clear he recognized, and took very seriously, his role as gatekeeper and the factors he had to consider in ruling on the admissibility of PPG evidence.

Rather than address the substance of Dr. Gottfried's pre-trial testimony regarding PPG reliability and how she uses it in the sex offender evaluations she conducts, Appellant cherry-picks Dr. Gottfried's testimony and takes her statements out of context. For instance, he asserts Dr. Gottfried's testimony included "acknowledgments about the lack of standardization over the stimuli set used (Real Child Voices, the Marshall set, and actual pornographic material) and the cut scores to indicate medically significant signs of arousal." (App. Br., p. 10). Read in context, however, Dr. Gottfried's discussion of the lack of standardization went to the international

problems with other countries and the difficulty getting those countries to change what they have been doing for a long time. As to the cut scores, Dr. Gottfried explained what cut score MUSC uses and why, and testified about on-going efforts to reach an agreement on what cut scores to use for various types of evaluations and treatment. (R., pp 125-127). The fact that experts use different cut scores to determine significant results on any test does not render the underlying science behind the test itself unreliable, and it is something that can be addressed on cross-examination.

Appellant also asserts Dr. Gottfried “acknowledged problems regarding lack of expected arousal response.” Read in context, she stated that was a “criticism” of the PPG, and she did not say it was a “problem.” She then explained as an example that someone who molested children may not show arousal in the lab because they offended against the children for some reason other than sexual arousal, and stated “that makes sense to me.” (R., p. 12). In short, Dr. Gottfried does not believe the “expected arousal” criticism is legitimate, and she explained her reasoning.

Appellant next asserts that Dr. Gottfried “acknowledged there are no studies on the efficacy of the PPG for pre-commitment evaluations on those have (sic) have coercive paraphilic disorder,” which he claims, “is related to the fact that most of the research related to PPG testing involves arousal to minor children and pedophilia.” Again, Appellant’s assertion, for which he cites one page in the transcript, lacks crucial context.

In response to a question about publications specifically concerning use of the PPG in sexual predator precommitment cases, Dr. Gottfried testified

[T]here are some studies looking at SVP, pre-commitment, but the literature on the SVP pre-commitment, that’s not typically the sample that they’re using in these research studies. So there are studies on here looking at people who are aroused by rape that have nothing to do with children, but without looking through it, I’m pretty confident that there’s not going to be one that’s dealing specifically with pre-commitment SVP evaluations.

(R., pp. 141-142). When asked if the RCV dealt “in large part” with children, Dr. Gottfried testified that the RCV set “includes rape of adult women, children, teenagers,” and it “has sets concerning things other than children.” She further testified that the PPG has been used for risk assessment and tested in a variety of settings, and then referred to the SVP Clinical Handbook chapter that specifically discussed the value and use of the PPG in SVP precommitment evaluations. (R., pp. 142-144, 657-663). The fact that there may not be any published articles about a study specifically involving the use of the PPG in SVP pre-commitment evaluations is a red herring. It goes without saying that the pool of subjects for such a study would be limited, and the PPG’s reliability does not depend on whether it has been researched in a particular **type** of case.

As to the issue of whether most of the research regarding the PPG dealt with pedophiles, Dr. Gottfried testified that articles by certain authors (Rice and Harris) “were about men who offended against adult women,” and the PPG is “definitely used in men who have offended against children, but not exclusively.” She further testified that “there are a number of publications looking at men who offended against adults and never had a detected victim that was a child.” (R., p. 147).

Appellant then asserts that Dr. Gottfried “acknowledged the problems with admission of PPG test results in court.” When asked if the PPG was recognized as a valid way to determine sexual predator status across the United States, Dr. Gottfried testified “it varies across jurisdictions,” and “the appeals court cases have been mixed.” She also stated that the PPG is regularly used for dangerous offender proceedings in Canada and the United Kingdom has no issues getting it admitted in court. (R., pp. 144).

Appellant further asserts Dr. Gottfried “noted that most SVP evaluators responding to surveys did not use the PPG.” The context of her testimony on this issue is critical. When questioned about an article about a survey about the respondents’ use of the PPG in sexual predator evaluations and concluding most of the respondents did not use it, Dr. Gottfried stated she was familiar with the article, it was from 2007, and “was a survey of forty-one people who said they conducted SVP evaluations.” In short, the article was based on one outdated survey of a limited number of people who claimed they conducted sexual predator evaluations.³ Appellant did not offer a more up-to-date publication at trial, and has not cited one for this Court.

In his final cherry-picked reference to Dr. Gottfried’s pretrial testimony, Appellant asserts Dr. Gottfried “acknowledged there were no control group studies outside of pedophilia on the efficacy of the PPG,” but she made no such acknowledgement. Rather, she described the way control groups are formulated, and specifically described the research studies she has conducted comparing different groups of people, including people who have raped adults versus molested children, and a study comparing the RCV and Marshall sets to another type of test for sexual arousal. She also testified that the person being tested is clinically his own control group because his arousal to various deviant trials is compared to his arousal to consenting adults and neutral stimulus. (R., pp. 166-171).

After glossing over the extensive pretrial evidence and ruling, Appellant engages in a completely irrelevant discussion of historic case law regarding the admissibility of forensic interviewer evidence to bolster the testimony of a minor, which has nothing to do with the issue in this case, and is nothing more than a distraction and misdirection. The reason for this irrelevant

³The DMH evaluator testified about this “survey” as one reason she does not use the PPG. The most remarkable aspect of the DMH evaluator’s testimony regarding the PPG was her lack of knowledge about it.

discussion, however, is clearly revealed by the very next paragraph of Appellant’s Brief, which claims the State has attempted to introduce PPG evidence “[d]espite numerous cases warning about the reliability of penile plethysmograph (PPG) testing, prosecutors have continued to bolster the opinion of their retained experts with use of and reliance upon PPG testing.”⁴

As a threshold matter, there have not been “numerous” cases in South Carolina discussing the admissibility of PPG evidence. As established by the cases cited in Appellant’s own brief, multiple South Carolina cases since 2002 have indicated PPG evidence was used in the cases in a variety of ways. The first case to question admissibility of PPG evidence was In re Care and Treatment of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020), which turned on the issue of whether an expert, with no PPG training or experience, could testify about a PPG performed by someone other than the expert herself. This court held in that circumstance the testimony was conduit hearsay and inadmissible. The court was clear that it was not ruling on the general admissibility of PPG evidence, however, stating “[w]e 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.” *Id.* at 446. Thus, the court left open the possibility that a proper foundation could support general admissibility of PPG evidence.

In light of the Bilton reference to evidence establishing “a baseline demonstration” of PPG reliability, the State offered substantial foundational evidence to establish the reliability and admissibility of PPG evidence in subsequent cases, including this case. As evidenced by the cases cited in Footnote 6 below, multiple circuit court judges found that the evidence the State presented

⁴Appellant refers to SVP proceedings as “prosecutions” and the State’s attorneys as “prosecutors,” or a “solicitor.” It is well established that SVPA proceedings are civil, not criminal. Thus, the proceedings are not “prosecutions,” and the attorneys handling SVPA cases are not “prosecutors” or “solicitors.”

did establish PPG testing is reliable and admissible. The first published opinion from a South Carolina appellate court holding that PPG evidence is unreliable and inadmissible was Daily, which was filed in June 2024, after the trials in this case and the cases cited in Footnote 7 below. The Supreme Court has now granted writs of certiorari in Daily, Williford and Hyman to review the court of appeals' opinions reversing the SVPA commitments in those cases on the grounds that admission of PPG evidence was in error and the error was not harmless. Thus, the issue of reliability and admissibility of PPG evidence in South Carolina is far from settled.

Appellant then asserts that the PPG evidence was highly prejudicial because Dr. Gottfried testified about specific details of Appellant's test results, and told the jury about Appellant's reaction when she told him about the results. He also asserts the State "drove the 'value' of the 'objective' PPG test home to the jury during closing argument." (Brief of Appellant, pp. 14-15). In light of Judge Coble's ruling that the PPG evidence was admissible, it was entirely appropriate for Dr. Gottfried to testify about Appellant's PPG test results and how they factored into her multifaceted and thorough evaluation, and for the State to discuss her testimony in closing arguments.

Further, the PPG evidence was a small fraction of Dr. Gottfried's trial testimony. Her entire testimony was 143 pages of the transcript. (R., pp. 236-379). Her direct and redirect testimony regarding the PPG test was 11.5 pages or 8% of her testimony for the State. (R., pp. 273-281, 366-367). Most of that testimony was Dr. Gottfried explaining what the PPG is and how it works. Her PPG testimony during cross-examination was 2 pages, making her total PPG trial testimony 13.5 pages or 9% of her total trial testimony. (R., pp. 318-320). The vast majority of Dr. Gottfried's trial testimony went to Appellant's criminal offenses, his disciplinarys while incarcerated, the multiple tests (other than the PPG) she administers in her evaluations, Appellant's results on those tests, his statements to her during the interview (other than the PPG discussion),

explanation of paraphilic coercive disorder and other specified personality disorder with narcissistic traits and how they apply to Appellant, everything she considered in reaching her conclusions, and her opinion that Appellant meets the criteria for commitment under the SVPA.

As to the State's closing argument, both the initial argument and the reply argument are a total of 25 pages, and the total PPG argument is 5 pages or 20% of the total argument. The other 80% of the State's closing argument went to the thoroughness of Dr. Gottfried's evaluation when compared with the DMH evaluator, all the data Dr. Gottfried obtained and used in forming her opinion, including the facts of his criminal offenses that supported Dr. Gottfried's opinion. Appellant's counsel discussed the PPG test extensively in his closing argument of 28 pages, which required the State to address it again in reply. (R., pp. 537-565).

Importantly, in the reply argument, the State told the jury:

And his results of the PPG taken altogether, all those different data points, you want to throw the PPG out? Go ahead, But you got to consider all his other data points that Dr. Gehle did not consider. Because all those things I listed to you that Dr. Gottfried testified to you, those are factors that Dr. Gehle told you she didn't even get to in a book that she uses. She didn't get to them. Dr. Gottfried followed through, and I believe established, he has paraphilic coercive disorder.

The State also reminded the jury that the PPG was only one data point, and Dr. Gottfried made her determinations based on her clinical training and her experience. (R., pp. 569-570).

In his "factual" statement, Appellant claims the State "sold" the PPG "to the jury as an objective test of male arousal."⁵ In fact both experts testified, that it is exactly how multiple studies describe the PPG. (R., pp. 272-273, 469). Interestingly, the first sentence in the only published article Appellant cites in his brief reads: "Phallometry (also known as penile plethysmography or penile tumescence testing) **is an objective method of assessing male sexual arousal.**" Bickle,

⁵That part of Appellant's brief is entitled "Standard of Review," but it is clearly Appellant's version of the "facts."

A., et al., International overview of phallometric testing for sexual offending behaviour and sexual risk, BJPSYCH International, Vol. 8, No. 4, p. 11 (November 2021) (emphasis added).⁶ The article further states:

When employed in clinical forensic psychiatry, phallometry should form part of a much broader sexology assessment. Phallometry response profiles should only be interpreted by experts (often forensic psychiatrists and psychologists with specific training), and the results should be used only as a supplementary resource to guide clinical impressions.

Id. Thus, Dr. Gottfried performs and uses the PPG exactly as the article suggests.

Courts have recognized the general acceptance and admissibility of the PPG test in sexually violent predator cases.⁷ 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.⁸ *Id.* at 719. The court further found the issue of the PPG test's reliability goes

⁶Appellant cites this article for a discussion about the validity of PPG testing for assessing sexual sadism as compared to pedophilia. This case does not involve sexual sadism, and the State did not allege sexual sadism was an issue or present the PPG evidence as a factor to show Appellant is a sexual sadist. This is yet another misdirection and distraction from the issue in this case.

⁷In addition to Judge Coble in the instant case, multiple South Carolina circuit court judges have determined the PPG is reliable and admissible. See In re Care and Treatment of Gregg, Op. No. 2022-UP- 336 (S.C. Ct. App. filed August 10, 2022) (reversing Judge D. Jefferson's admission of PPG evidence), *cert. granted* May 23, 2023, *cert. dismissed as improvidently granted* June 5, 2024; In re Care and Treatment of Daily, 443 S.C. 557, 905 S.E.2d 310 (Ct. App. 2024) (reversing Judge Kelly's admission of PPG evidence), *cert granted* February 12, 2025; In re Care and Treatment of Williford, Op. No. 2024-UP-270 (S.C. Ct. App. filed July 24, 2024) (reversing Judge Sprouse's admission of PPG evidence), *cert granted* February 12, 2025); In re Care and Treatment of Hyman, Op. No. 2024-UP-271 (S. C. Ct. App. filed July 24, 2024) (reversing Judge Henderson's admission of PPG evidence), *cert granted* February 12, 2025; In re Care and Treatment of Sharp, C.A. No. 2022-CP-21-01382 (Price, J.) (appeal pending).

⁸Significantly, 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, and the Washington courts have found it to be reliable.

to the weight of the evidence rather than its admissibility.⁹ *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 also 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, and discussed numerous academic articles that 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

⁹The court of appeals dismissed Halgren as distinguishable in In re Care and Treatment of Bilton, 432 S.C. 157, 851 S.E.2d 442, 446 (Ct. App. 2020), on the ground that the Washington court found the PPG test was not novel and subject to the test for scientific evidence. This ignored the expressly stated reason for the Washington court’s finding, which 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.

method is a matter affecting the weight 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).

In Bilton, the court of appeals 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 that went directly to the issue of reliability. 851 S.E.2d at 446. As with its dismissal of Halgren, the court of appeals’ 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 extensive discussion of evidence indicating the PPG test is reliable and generally accepted is directly relevant here.¹⁰

There is ample evidence the PPG test is widely researched and generally accepted. *See Golde, J.A., et. al., Psychophysiological Assessment of Erectile Response and Its Suppression as a Function of Stimulus Media and Previous Experience with Plethysmography*, *Journal of Sex*

¹⁰The Bilton court also cited 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 implied that MUSC required Bilton to masturbate prior to the PPG test, which was inaccurate. 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. To the contrary, Dr. Gottfried expressly testified MUSC’s protocols do not include any masturbation requirement, and further any such self-stimulation would spoil the test. (R., pp. 116-117).

Research, 37(1), 53–59 (2000); Letourneau, E.J., A Comparison of Objective Measures of Sexual Arousal and Interest: Visual Reaction Time and Penile Plethysmography, Sex Abuse 14(3), 207-23 (July 2002); Kalmus, Beech, Forensic Assessment of Sexual Interest: A Review, Aggression and Violent Behavior. Vol. 10 Issue 2, pp. 193–217 (2005); Stinson, J.D., Becker, J.V, Assessing Sexual Deviance: A Comparison of Physiological, Historical, and Self-Report Measures. J. Psychiatric Practice, 14(6):379-88 (Nov. 2008); Howes, R.J., Measurement of Risk of Sexual Violence Through Phallometric Testing, Leg Med (Tokyo) 11 Suppl 1:S368-369 (April 2009); Marshall W. L., Phallometric Assessments of Sexual Interests: An Update, Current Psychiatry Rep. 16(1):428 (Jan. 2014); Burke, W. & Murphy L., International Collaboration: The Development of the Real Child Voices Stimulus Set, Keynote Address – International Academy of Sex Research Annual Meeting (July 2017); Plaud, J.J., The Use of Penile Plethysmography in SVP Assessment and Treatment Decision Making, Sexually Violent Predators: A Clinical Science Handbook 243-254 (O'Donohue & Bromberg (eds.) (2019); Gottfried, E., Use of Penile Plethysmography in Evaluations with Individuals Who Commit Sex Offenses, South Carolina Chapter of the Association for the Treatment of Sexual Abusers Annual Conference Presentation (March 2019); McPhail, I.V., *et al.*, Validity in Phallometric Testing for Sexual Interests in Children: A Meta-Analytic Review, Assessment 26(3) 535-552 (2019); Murphy, L., Bradford, J. M., & Fedoroff, J. P., Laboratory Measurement of Penile Response in the Assessment of Sexual Interest, Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues, 159 (2021); Gottfried, E., *et al.*, Examining Relationships Between PPG Stimuli and a Visual Reaction Test of Sexual Interest, 40th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers Presentation (September 2021).

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 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 some controversy regarding PPG testing remains, as the Sandry court noted, the existence of contrary authority is not dispositive.¹¹

As evidenced by the Court’s Exhibits submitted to Judge Coble, the FDA has approved several PPG systems, including the Limestone system used in this case, and Blue Cross Blue Shield recognizes the PPG test as a medical procedure. (R., pp. 636-645). In addition, the Medicaid/Medicare regulations provide coverage for PPG tests.¹² 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.

¹¹Indeed, 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).

¹²*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>).

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 suggests 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 699 (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.¹³

In psychosexual behavior evaluations, the PPG test provides data useful in 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 Tong, Dean, 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

¹³Published 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 MUSC intentionally uses a cut score that is double the cut score recommended in the research literature to minimize the possibility of false positive results.

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); Peters, James M., 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).¹⁴

Judge Coble acted within the discretion granted to trial courts and his findings regarding the reliability of the PPG test and the admissibility of evidence regarding Appellant’s PPG test results are amply supported by the record. *See Wallace*, 892 S.E.2d at 312 (trial court’s ruling will not be reversed unless the court failed to act within the discretion granted to trial courts). Indeed, Appellant fails to show that even one of Judge Coble’s findings was not supported, instead relying on conclusory statements that the PPG is unreliable. Dr. Gottfried considered the PPG test results as a single data point in a multi-faceted psychosexual evaluation, and without focusing on the PPG test, she testified about **all** the tests and information she considered in reaching her opinions regarding Appellant’s paraphilic coercive disorder diagnosis and his risk to reoffend sexually if not confined for long term control, care and treatment.

¹⁴ The ATSA Best Practice Guidelines were recently updated, and they state “[t]he presence of age-inappropriate and non-consensual arousal has consistently been found to be a significant risk factor for sexual recidivism,” and the PPG “may be useful to evaluate a client’s sexual arousal response, particularly if a client’s sexual offending history or offense dynamics are indicative of a high level of risk and there is concern about the reliability of client self-report.” ATSA Best Practice Guidelines for Men (6th ed), pp. 36-37.

Judge Coble took his role as gatekeeper very seriously, considered all the evidence presented during the pretrial hearing and the argument of counsel, made meticulous findings regarding reliability of the science underlying the PPG test with reference to the evidence on which his findings were based, and then reduced his verbal ruling to a written order. As evidenced by Appellant's failure to even address or discuss Judge Coble's findings and conclusions, Appellant essentially seeks a *de novo* review rather than the appropriate abuse of discretion standard of appellate review. Under the abuse of discretion standard, Judge Coble's findings of fact and ruling that the PPG is reliable and admissible is well supported by the undisputed evidence and should be affirmed.

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).

In addition to making an essentially conclusory argument that the PPG evidence was unreliable and inadmissible, Appellant appears to address a potential harmless error analysis by quoting portions of Dr. Gottfried's PPG testimony and the State's closing argument references to the PPG. As argued above, the PPG evidence was properly admitted. Therefore, because there was no error, the references to it in testimony and closing argument were appropriate and a harmless error analysis is not necessary.

A “person's dangerous propensities are the focus of the SVP Act.” In re Care & Treatment 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]). To the extent Appellant is making a veiled Rule 403 probative versus prejudice argument, which requires him to show that the prejudicial effect “substantially” outweighed the evidence’s probative value, his argument fails. The State was required to prove beyond a reasonable doubt that Appellant presently has a mental abnormality and/or personality disorder that makes him likely to engage in acts of sexual violence (propensity) if not confined for long term control, care and treatment. See In re Care and Treatment of 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).

Dr. Gottfried considered the PPG test results as one data point in a multi-faceted evaluation that included extensive testing, review of Appellant’s records and the DMH evaluation, and a clinical interview of Appellant during which she reviewed his personal history with him, as well as his sexual offenses and all the test results. In light of the elements the State must prove under the SVPA, the probative value of the PPG test results as part of Dr. Gottfried’s evaluation cannot be seriously challenged. The PPG results were a part of her diagnostic and risk analysis, and the jury was entitled to hear about everything she did and considered in reaching her conclusions regarding Appellant’s diagnoses and risk to reoffend.

The PPG test results were no doubt prejudicial to Appellant, but they were consistent with his history of raping and sexually molesting young females, and Dr. Gottfried testified the PPG test was only one data point in her evaluation. Thus, as Judge Coble found, the prejudice to Appellant did not substantially outweigh the evidence’s probative value. See Lyles, 665 S.E.2d at

207 (determination of prejudicial effect against probative value must be based on the entire record and turns on the facts of each case).

Finally, Appellant engages in rank speculation regarding “the impact the use of the PPG [has] on the outcomes of SVP cases.” He hypothesizes that since the DMH evaluator testified she finds a person qualifies for commitment under the SVPA in approximately 33% of the evaluations she performs, and Dr. Gottfried testified she finds 51.7% of the individuals the State refers to MUSC for a second opinion do qualify for commitment, it necessarily means the State “would obtain a qualified diagnosis in 67 of 100 hypothetical cases” “in no small part based on the impact of PPG testing.” The absurdity of this hypothesis is readily apparent for several reasons.

First, it **assumes** the State has a 100% referral rate when the DMH evaluators do not recommend commitment, which is highly inaccurate.¹⁵ Second, since Dr. Gottfried does not disagree with the DMH evaluator(s) in 48.3% of the cases she evaluates, the PPG is clearly not the paramount factor, or stated another way, the “be all, end all,” of her evaluation process. Thus, Appellant’s hypothesis is faulty in the extreme.

When viewed in light of the issues before the jury and the entire record, the evidence presented amply supports Judge Coble’s findings regarding the PPG test’s reliability, and that the prejudice to Appellant arising from the PPG test evidence did not substantially outweigh the evidence’s probative value. Thus, Judge Coble’s rulings and the jury’s verdict that Appellant is a sexually violent predator as defined by the SVPA should be affirmed.

¹⁵In fact, since 2018, DMH evaluators did not recommend commitment in 125 precommitment cases, and the State only referred 47, or 38%, of those cases to MUSC.

CONCLUSION

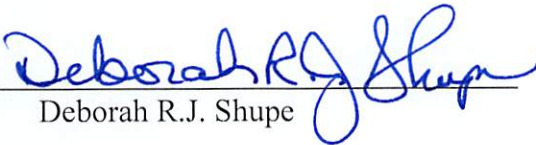
Based on the foregoing, the State respectfully submits Judge Coble's ruling and Appellant's civil commitment pursuant to the SVPA should be affirmed.

Respectfully submitted,

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