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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Walton J. McLeod, IV, Circuit Court Judge
Appellate Case No. 2024-001746

In the Matter of the Care and Treatment of
Phillip B. Nix,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Judge McLeod did not abuse his discretion in allowing the State's expert to testify about the underlying details of Appellant's sexual offenses that she relied on in reaching her diagnosis and risk assessment because the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In March 2013, Appellant Phillip Byron Nix was convicted of criminal sexual conduct with a minor, second degree, and sexual exploitation of a minor, third degree, in Lexington County. He was released from the Department of Corrections (SCDC) on community supervision, which was revoked in March 2022. Prior to Appellant's release from SCDC, Respondent State of South Carolina initiated a civil action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Appellant's civil commitment for long term control, care, and treatment as a sexually violent predator. The matter was called for a jury trial on August 12, 2024, before the Honorable Walton J. McLeod, IV, Circuit Court Judge.

The State presented Emily Gottfried, Ph.D., of the Medical University of South Carolina (MUSC), who is the Director of MUSC's Sexual Behavior Clinic and Lab (SBCL). In addition to her administrative duties at the SBCL, Dr. Gottfried conducts research on paraphilic disorders and accurate assessments of sexual offense risk prediction and assessment in general. She has multiple peer-reviewed scholarly publications and presentations at scientific conferences and gives lectures on sexual behavior topics. Dr. Gottfried was qualified without objection as an expert in clinical and forensic psychology and forensic sex offender evaluations. (Record on Appeal [R.], pp. 53-59).

Dr. Gottfried testified MUSC was retained by the State to conduct an evaluation of Appellant. As part of her evaluation protocol, Dr. Gottfried reviewed documents related to Appellant's criminal history, including police reports and court documents, SCDC and detention center records, and forensic reports. Appellant was then transported to the SBCL three times to undergo testing and a clinical interview. (R., pp. 59-65).

Dr. Gottfried testified that the best predictor of future behavior is the person's past behavior, and she examines the offense characteristics of any charges and convictions to determine

the likelihood of similar behavior occurring again, the victim pool, and to identify any patterns of behavior. She looks at the person's entire personal history and functioning. She asks about the person's development period, their childhood, school history, any personal abuse victimization, substance use, mental illness, and mental health treatment. She also explores the person's social history and support system. (R., pp. 65-69).

As to Appellant, Dr. Gottfried testified he did not have a support system that would hold him accountable because he told her that no one in his support system believed he had committed any of the sex offenses he was convicted for. Appellant also told Dr. Gottfried he had used alcohol, marijuana, cocaine, methamphetamine, heroin, and other opioids, but those substances did not cause him any problems. Appellant reported that he had five significant romantic relationships, and stated he did not have any unusual or deviant sexual interests or fantasies. Dr. Gottfried testified that on testing and in the interview, Appellant really minimized his sexual thoughts, fantasies, behaviors and masturbation habits, so she questioned the validity of his self-report. (R., pp 69-72).

Dr. Gottfried testified it was important for experts in her field to examine the person's juvenile and adult criminal history because some of the risk assessment measures rely specifically on different kinds of charges and convictions and the number of charges and convictions. She stated that the information goes to the person's ability to control his behavior, as well as patterns of behavior. (R., pp. 72-74).

Appellant told Dr. Gottfried he was first arrested for shoplifting when he was twelve or thirteen years old. After that, Appellant was arrested multiple times on various charges between 1994 to 2022. Dr. Gottfried testified Appellant's criminal history showed a pattern of him

disregarding the rules and not being able to control his behavior, even in a controlled environment like prison and on conditional release. (R., pp. 68-76).

Dr. Gottfried testified it was important to look at a person's sexual crimes to determine if there were any patterns of behavior and the reason the person was offending. Further, it also reveals possible victim characteristics if there were any future sexual offenses. It was also notable if the person got arrested and then reoffended. (R., p. 76).

As to Appellant, Dr. Gottfried testified he had been charged with five sexual offenses, including criminal sexual with a minor, first degree; criminal sexual conduct with a minor, second degree; sexual exploitation of a minor, second degree; sexual exploitation of a minor, third degree; and unlawful conduct toward a child. She testified it was necessary to examine the underlying details of the offenses to look for patterns and anything in the details to suggest an underlying mental abnormality or personality disorder, as well as to assist with assessing the risk to reoffend. (R., pp. 77-78).

According to the official records, Appellant pled guilty to criminal sexual conduct , second degree, on March 11, 2013. (R., pp. 342). The documents indicated Appellant's twelve-year-old daughter and 9-year-old stepdaughter reported Appellant had sexually offended against them. His daughter stated Appellant had been raping her for several months, and Appellant had told her she made it easy made it easy for him to become aroused because she was so beautiful. Both victims went through forensic interviews. Dr. Gottfried testified that during the daughter's interview, she reported the abuse started when she was eleven years old, it happened almost every day, and she would be bleeding and sore. The victim further reported some of the statements Appellant made to her such as "you should not be able to make me hard." (R., pp. 78-82).

At that point, Appellant objected "to this language." After a bench conference, the State asked Dr. Gottfried why Appellant's behavior regarding that conviction was significant to her opinion. She testified the behavior demonstrated Appellant cannot control his behavior because he offended shortly after he moved into the home, he offended in situations that had a really high likelihood of him getting caught, he offended against people who could readily identify him, he offended within the home when other people were present, and he offended against the victim nearly every day despite her reportedly being bleeding and sore and being distressed by it. When she asked Appellant about it, he told her he did not commit the offenses. (R., pp. 82-84).

Appellant was also convicted on March 11, 2013, of sexual exploitation of a minor, third degree. (R., pp. 345-347). According to the records, when Appellant was arrested on the criminal sexual conduct charge, the victim's mother reported to law enforcement that she found a cell phone with pictures of young girls on it. There were four pictures of young children, and the victim's mother identified that some of them were her children. Dr. Gottfried testified there was a picture of an eight- or nine-year-old girl exposing her breasts. Appellant objected "to all of the details," and Judge McLeod instructed the State "to lead the discussion in a little more general pace, not every single detail." (R., p. 84).

The State then asked Dr. Gottfried why this conviction was important to her in forming her opinion. Dr. Gottfried testified that Appellant possessed pictures of young girls on a cell phone and he was included in some of the pictures, and that "[t]ypically you're going to take pictures of - - save pictures of things that you're aroused by, things that you like," and it went along with Appellant's criminal sexual conduct offenses. When she asked Appellant about the pictures, he denied taking the pictures, and told her the phone did not have service and the children used it as a toy and took pictures of themselves. (R., p. 85).

Dr. Gottfried testified she reviewed Appellant's institutional records to determine his ability to control his behavior in a really secure controlled setting. SCDC's records included multiple disciplinary convictions for misconduct, and he also had an issue in the Lexington County Detention Center. She stated these disciplinaries showed Appellant could not control his behavior or follow rules even in controlled environments. (R., pp. 85-88).

Dr. Gottfried also testified Appellant had numerous probation violations, which she found significant because it also indicated his inability to follow the rules. On March 11, 2022, his community supervision was revoked and he was ordered to serve one year of his original sentence. (R., p. 348). Records indicated one basis for the revocation was the discovery of multiple screenshots of an adult and a two-year-old child on Appellant's phone.

Appellant objected and after discussion outside the presence of the jury, Judge McLeod asked Dr. Gottfried if Appellant had identified the two people in the pictures, and she stated that he did. Judge McLeod ruled that the evidence was highly probative and admissible as part of what Dr. Gottfried relied on in reaching her opinions, but that it should be streamlined to limit specific details. He stated that the fact the pictures were there and who was in them was enough. (R., pp. 89-98).

When the jury returned, Dr. Gottfried testified that Appellant's community supervision was revoked for failure to pay GPS fees, failure to pay a drug test fee, failing a drug test, failure to go to sex offender treatment, possession of pornographic websites on his phone, and possession of sexually stimulating and sexually explicit material on his phone. She stated these violations were further indications of Appellant's inability to follow the rules. The materials she reviewed from Appellant's phone were in line with his sex offense convictions and suggested Appellant had these sexual interests and continued to act on them even after conviction and punishment. When she

asked Appellant about the materials, he acknowledged there were some deleted screen shots on his phone of his daughter (victim) and her two-year-old daughter in the shower that he accidentally took on a FaceTime call. (R., pp. 99-101).

Dr. Gottfried then explained the tests and assessments she utilizes in her multi-method evaluations. On one computer based self-report test, Appellant exhibited cognitive impression management by attempting to present himself in a more positive light than is actually the case. In addition, there were validity concerns such that the responses might not have been an accurate representation of Appellant's current and historical level of functioning. Dr. Gottfried noted Appellant was defensive in his responses to some of the test questions, but he did report a history of significant substance use problems. On the sexual behavior portion of the test, Appellant's answers indicated he was pretty defensive about his history of sexual behavior, fantasies, masturbation thoughts, and offenses. (R., pp. 104-107).

Dr. Gottfried also utilized a clinician scored test – the Hare Psychopathy Checklist – Revised – which looks at traits of psychopathy that are linked to recidivism with certain characteristics specifically related to sexual offending. Appellant's results indicated a lack of remorse and guilt, a shallow affect, a history of promiscuous sexual behavior, irresponsibility, failure to accept responsibility for his own actions, juvenile delinquency, and criminal versatility. (R., pp. 107-108).

Based on all the information she gathered, Dr. Gottfried opined that Appellant has some deviant or paraphilic sexual interests, but there was insufficient data to raise it to the level of a paraphilic disorder. She stated there was some indication of sexual arousal to prepubescent and pubescent children, but she did not have anything to suggest it had lasted a sufficient period of time to meet the criteria for a paraphilic disorder. (R., pp. 108-111).

Dr. Gottfried also considered personality disorders and diagnosed Appellant with antisocial personality disorder. Appellant met the criteria for that diagnosis based on his multiple juvenile and adult arrests for criminal activity, his impulsivity related to substance use, relationships and sexual criminal history, his history of irresponsibility as evidenced by a failure to make child support payments and repeatedly violating his probation or conditional release, his lack of remorse for his offenses, and his failure to accept responsibility for his actions by putting the blame on other people. Dr. Gottfried testified that antisocial personality disorder is a chronic, persistent disorder that is a pervasive inflexible way of dealing with the world. (R., pp. 111-115).

Dr. Gottfried also considered substance abuse disorders and determined Appellant has a cocaine abuse disorder, but stated a substance abuse disorder does not cause a person to sexually offend. She testified it can be a risk for reoffending because it can affect the person's ability to control himself. She further testified that while Appellant's disorder was not active due to his incarceration, she did have concerns about his ability to maintain abstinence from cocaine or other substances if released. (R., pp. 115-116).

Dr. Gottfried testified about how she assesses risk to reoffend, and explained the assessment measures she uses consider research based stable and dynamic risk factors for reoffending. She stated she uses the Static-99R and Static-2002R actuarial measures, which relate to static risk factors that cannot change. The Static-99R scores range from negative 3 to twelve, and Appellant's score was two, which is in the average risk to reoffend category. The Static-2002R scores range from negative 2 to thirteen, and Appellant's score was five, which is in the above average risk to reoffend category. Dr. Gottfried testified the Static measures only include people in the study who have a detected sexual reoffense which can potentially underreport the

risk because the research suggests that only approximately 30% of all sexual offenses are reported. (R., pp. 116-122).

Dr. Gottfried also utilized the Stable-2007 measure that considers relevant dynamic risk factors that can be targeted in treatment. The Stable has a possible score of twenty-six and Appellant's score was fourteen, which Dr. Gottfried testified was "fairly high" and in the approximate 90th percentile of the normative group in the study. Dr. Gottfried further testified she determined Appellant had a number of dynamic risk factors for reoffending, including deviant sexual interest preference, problems with supervision or treatment, lack of concern for other people, a high sex drive, sexual preoccupation, impulsivity, problems with emotionally intimate relationships with adults, no stable support network, and poor problem-solving skills. Dr. Gottfried testified that when Appellant's scores of the Static-99R, the Static-2002R and the Stable 2007 are combined, Appellant was in the well above average risk to reoffend category, which is the highest risk category. (R., pp. 122-126).

When Dr. Gottfried asked Appellant about his risk to reoffend, he reported that "he's at no risk to reoffend, that he didn't commit the offenses to begin with, that he has no problem with his sexual behavior, that he didn't need treatment for it because he doesn't have any problem." He told her his plan to not reoffend "was to just be around adults" because he was worried someone might falsely accuse him and stated that "nobody has helped him with his sexual behavior problems because he doesn't have any; that he, again, didn't need treatment." Based on his statements to her, Dr. Gottfried concluded that Appellant "really lacked insight into his risk level, his antisocial personality disorder diagnosis, his sexual arousal to things that are not consensual or age appropriate." (R., pp. 126-127).

Dr. Gottfried opined that Appellant is at risk to reoffend because his antisocial personality disorder caused his sexual offense behaviors. She stated that when Appellant's offense behaviors and personality disorder are considered with the absence of protective factors, his lack of sexual behavior treatment and his belief that he does not need treatment, places him at high risk to reoffend sexually. (R., pp. 127).

Dr. Gottfried also testified that the plans Appellant had for release were living with a friend and then move to Orlando when he gets off community supervision, and he did not need any treatment because there is nothing wrong with him. She stated Appellant did not have any remaining supervision or probation if he was released, she did not believe his plans were realistic in light of his level of risk, she thought he needed more support, and she did not know if his support system would keep him accountable. Given Appellant's lack of insight into his level of risk and his need for treatment, Dr. Gottfried testified she did not think his future plans would keep him safe from reoffending. (R., pp. 128-129).

Dr. Gottfried testified to a reasonable degree of psychological certainty that Appellant's antisocial personality disorder affects his volitional control to the extent that it predisposes him to commit sexually violent offenses. She stated Appellant has serious difficulty controlling his propensity to commit sexually violent offenses to such a degree that he more probably than not would reoffend if not confined for long term control, care and treatment. (R., pp. 129-130).

Christopher Catoe of the South Carolina Department of Probation, Pardon, and Parole was qualified as an expert in Cellebrite phone analysis and examination. He explained the process of extracting and analyzing data from cell phones, and testified he was asked to do a forensic analysis of a phone confiscated from Appellant. In addition to pornographic websites, the analysis revealed that on January 24, 2022, eight screenshots taken during a fifty second period in a video chat

showed a young female and a child in the shower. The algorithm used by Cellebrite indicated all eight screenshots were 95% positive for nudity. Mr. Catoe testified the images were not sexual in nature. (R., pp. 152-166, 349-374).

Appellant called the Department of Mental Health evaluator who did Appellant's initial SVPA evaluation. The evaluator was qualified as an expert in forensic psychology without objection. The evaluator testified about his normal evaluation process, which includes reviewing available records, conducting a clinical interview of the person, and using actuarial risk assessment tools to determine the person's risk to reoffend sexually. (R., pp. 173-183).

As to Appellant, the evaluator initially issued a report opining that Appellant met the criteria for commitment under the SVPA, but five months later he issued another report finding Appellant did not meet the criteria for commitment. The evaluator testified the change in his conclusions was based on a change in the SVPA definition of "likely to reoffend," which he interpreted to require a greater than fifty percent lifetime risk to reoffend. (R., pp. 183-188).

The evaluator also diagnosed Appellant with antisocial personality disorder. He testified that Appellant had four of the seven documented criteria for that diagnosis, including rule violation or criminal behaviors throughout his life, impulsivity, recklessness, and lack of remorse or not accepting responsibility for his behavior. He further testified that Appellant's sexual offending "was better captured by his antisocial personality disorder" rather than a paraphilic disorder. (R., pp. 207-212).

The evaluator testified that after the statutory language changed, he utilized scientific research articles "to incorporate additional data information beyond what those actuarial risk assessment tools provided." One article involved a numerical formula to assess undetected offending. The evaluator used another statistical procedure to calculate a lifetime risk to reoffend

number. Based on those actuarial extrapolations, the evaluator determined Appellant's lifetime risk to reoffend was thirty-four percent, and because that was less than fifty percent, the evaluator concluded Appellant did not meet the SVPA criteria for commitment. (R., pp. 207-218).

On cross-examination, the evaluator testified that Appellant had a sexually deviant preference and engaged in sexually problematic behavior with minor females, that Appellant had a longstanding pattern of difficulty controlling his sexual behavior, and his antisocial personality disorder is a mental condition that affects his emotional and volitional capacity to engage in acts of sexual violence and predisposes him to engage in that behavior. He further testified that his risk assessment involved combining the numerical scores from several actuarial risk assessment tools to determine an "absolute recidivism estimate," and that after combining the scores Appellant's risk to reoffend was in the above average risk category. (R., pp. 239-249).

The jury found beyond a reasonable doubt that Appellant is a sexually violent predator as defined by the SVPA, and Judge McLeod committed him to the Department of Mental Health (DMH) for long term control, care, and treatment. (R., pp, 337-338, 2).

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

Judge McLeod did not abuse his discretion in allowing the State's expert to testify about the underlying details of Appellant's sexual offenses that she relied on in reaching her diagnosis and risk assessment because the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice.

Appellant contends Judge McLeod erred in allowing Dr. Gottfried's testimony regarding the contents of official documents related to Appellant's sexually violent convictions, and refers to Dr. Gottfried's testimony regarding the underlying facts of his convictions as "extensive," "superfluous" and "not necessary" to the issue before the jury. This contention is not supported by the record or relevant case law.

a. Admissibility

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).

Further, "[b]ecause a 'person's dangerous propensities are the focus of the SVP Act," consideration of "'[p]ast criminal history is therefore directly relevant to establishing 44–48–30(1)(a),' which in turn bears directly on whether one suffers from a mental abnormality under section 44–48–30(1)(b)." *In re the Care & Treatment of Ettel*, 377 S.C. 558, 660 S.E.2d 285, 287-288 (Ct. App. 2008) (a "'person's dangerous propensities are the focus of the SVP Act.'"); *In re the Care and Treatment of Corley,* 353 S.C. 202, 577 S.E.2d 451, 453 [2003]) (same). Prior sexual offenses may establish a "pattern of behavior of sexual assaults," which aids in the diagnosis of a

mental abnormality and goes to the person's propensity to commit future sexual offenses. *Ettel,* S.E.2d at 288.

In sexual predator civil commitment cases, expert testimony regarding the details of underlying facts or data of charged or uncharged sexual offenses is "'highly probative and helpful to the jury in explaining the basis of [the expert's] opinion that [a person] has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.'" *In re Commitment of Renshaw*, 598 S.W.3d 303, 314 (Tex. App. 2020) (*quoting In re Commitment of Stuteville*, 463 S.W.3d 543, 556 [Tex. App. 2015]). The need to present evidence regarding the underlying facts of the sexual offenses, charged or uncharged, to explain the basis of the expert's opinion is great because, without that evidence, the jury would not hear about the person's pattern of sexual conduct, and the jury would not be basing its verdict on the full picture of the person's sexual deviance. *Id*. at 315.

In *State v. Floyd Y.*, 22 N.Y.3d 95, 2 N.E.3d 204 (2013), the court found that a significant number of jurisdictions take a flexible approach allowing the admission of "basis hearsay" in sexual predator commitment cases.

> [B]asis hearsay does not come into evidence for its truth, but **rather to assist the factfinder with its essential article 10 task of evaluating the experts' opinions**. **In order to assess an expert's testimony, the factfinder must understand the expert's methodology and the practice in the expert's field.** In this case, for example, [the expert] testified that experts in her field "rely heavily upon witness statements, affidavits, [and] victim statements ... because in treatment there are issues of confronting a sexual offender with exactly what happened." Understanding her diagnosis and her treatment of Floyd Y. **requires understanding the information she considered when making her diagnostic and treatment decisions.** As our concurring colleagues concede, out-of-court statements are routinely admitted at trial for purposes other than to demonstrate their truth. **Factfinders in article 10 trials cannot comprehend or evaluate the testimony of an expert without knowing how and on what basis the expert formed an opinion.**

> **To the extent that a factfinder's assessment might turn on its acceptance of basis evidence as true, article 10 provides the respondent with an opportunity to challenge the State's expert by presenting a competing view of the basis evidence through the testimony of the respondent's expert.**

Id., at 212-13 (internal citations omitted) (emphasis added); *see also State v. John S.*, 23 N.Y.3d 326, 15 N.E.3d 287, 300–01 (2014) (hearsay at issue was derived from documentary sources, including complaints from five different victims attacked within a 32–day time period involving a strikingly similar pattern, which supported trial court's finding the information was sufficiently reliable).

Similarly, in South Carolina expert testimony setting out the basis for the expert's opinion, including information from police reports, witness statements and other official documents, is admissible to assist the factfinder evaluate the efficacy of the expert's methodology and opinions. In *Ettel*, the expert considered the underlying details of Ettel's sexually violent offense, which included binding, gagging and choking the victim, raping the victim, and forcing the victim to perform oral sex on him. *Ettel*, 660 S.E.2d at 286-287. She also testified about the underlying facts of unconvicted sexual offenses Ettel told her about during the interview, as well as verbal information she received from police officers regarding underlying facts and possible sexual component of Ettel's prior murder conviction. *Id*.

In finding the trial court did not abuse its discretion in admitting the testimony regarding the underlying facts of Ettel's sex offenses, this court found the testimony was relevant because the expert "relied on them in evaluating Ettel's need for and likelihood of success in treatment as well as his ability to control his behavior in the future." *Id*. at 288. The court further found that the prior sexual offenses established a pattern of sexual behavior that was significant because the expert testified that future behavior could only be predicted based on past behavior. Finally, the

court found that the prejudicial effect of the evidence did not substantially outweigh its probative value because the expert used the information to develop her opinion regarding Ettel's ability to control his behavior and to diagnose his paraphilia. *Id*.; *see also*, *In the Matter of the Care and Treatment of Manigo*, 389 S.C. 96, 697 S.E. 2d 629, 634 (2010) (expert's testimony about information she received from Manigo's treatment provider was admissible because she used it to form the basis for her opinion that Manigo was an SVP); *Corley*, 577 S.E.2d at 453-453 (details of sex offenses set forth in indictments were admissible to show the basis of the expert's opinion that Corley was likely to engage in future acts of sexual violence).

In this case, Dr. Gottfried's testimony regarding the underlying details of Appellant's sex offenses was neither extensive, unduly graphic or unnecessary. As a threshold matter, Dr. Gottfried testified the official documents she reviewed (i.e., police reports, medical reports, probation documents) were the type of records used by and relied on practitioners in her field to perform the type of assessment she performed in this case. She then explained exactly why the information from those documents was important to forming an opinion regarding Appellant. She stated an evaluator is looking for patterns of behavior, offense, and victim characteristics to try and determine the reason for the offenses and characteristics for possible future victims. (R., pp. 62-78).

Dr. Gottfried testified about the accounts of Appellant's sexual offenses as reflected in the indictments and official records. In 2013, Appellant was convicted of criminal sexual conduct with a minor, second degree, related to his molestation of his twelve-year-old daughter. (R., pp. 341). The documents indicating the victim stated Appellant had been having full intercourse with her for several months, and when she reported it to a relative, the victim said Appellant told her "she made it easy for him to get aroused because she was so beautiful". During a forensic interview,

the victim stated it started after Appellant was released from prison, it would happen almost every day and she would be bleeding and sore. (R., pp. 76-82).

Appellant objected "to this language," and after a bench conference, the State asked Dr. Gottfried what about Appellant's offending behavior was significant to her opinion. She testified his behavior demonstrated Appellant could not control his behavior because he offended shortly after going to live with the victim and her mother; he offended is situations that had a "really high likelihood of him getting caught which also suggested he could not control his behavior; he offended against someone who could readily identify him; he abused the victim when other people were reportedly present; and he reportedly offended against the victim nearly every day in spite of her reportedly bleeding, sore, and distressed. Dr. Gottfried further testified that when she asked Appellant about the offense, he denied ever having sexual contact with any of his children. (R., pp. 82-84).

Appellant was also convicted in 2013 of sexual exploitation of a minor, third degree. (R., pp. 342-344). Dr. Gottfried testified the records indicated that after Appellant was arrested on the criminal sexual conduct charge, the victim's mother told law enforcement that she found a cell phone with pictures of young girls on it, and she identified her children in some of the photos. When Dr. Gottfried testified that one of the pictures was of an eight- or nine-year-old girl exposing her breasts, Appellant objected, and Judge McLeod instructed the State not to get into every detail. (R., p. 84).

Thereafter, Dr. Gottfried testified that the fact that Appellant possessed pictures of young girls on his cell phone and he was included in some of the pictures was important to her in rendering her opinion because "[t]ypically you're going to take pictures of - - save pictures of things that you're aroused by, things that you like," and his possession of the pictures was consistent with the

criminal sexual conduct offense. When she asked Appellant about the pictures, he told her it was his cell phone, but it did not have service and the children used it as a toy, and he denied taking the pictures. (R., p. 85).

Dr. Gottfried then testified about Appellant's numerous disciplinaries while he was incarcerated, which showed a continuous pattern of Appellant's inability to control his behavior even in a very structured and controlled environment. In addition, Appellant had not received any sex offender treatment during his incarceration, and after he was released on probation, he only attended one session of a mandated sex offender treatment program. (R., pp. 85-88).

When Appellant was released on his 2013 convictions, he was placed on intense community supervision that had a number of strict rules Appellant was required to follow. Dr. Gottfried testified that Appellant violated the terms of his supervision less than two months after his release. (R., p. 348). According to the probation records, one of the grounds cited for revocation of Appellant's community supervision was his possession of multiple shots of an adult woman and a two-year-old child on his phone. Appellant objected and after discussion outside the presence of the jury, Dr. Gottfried testified that Appellant's supervision was revoked for multiple reasons, including failure to pay GPS fees, failure to pay a drug test fee, failure of a drug test, failure to complete sex offender treatment, possessing pornographic websites on his phone and possessing sexually stimulating and sexually explicit material on his phone. (R., pp. 89-100).

Dr. Gottfried testified that the materials reviewed from the data on Appellant's phone were consistent with his sexual offenses, suggested he continued to have the same sexual interests, and he continued to act on them even after being convicted and serving a prison sentence. When Dr. Gottfried discussed the probation violations with Appellant, he admitted there were some deleted screenshots discovered on his phone of his daughter and her two-year-old daughter in the shower

and claimed he accidentally took the screenshots during a FaceTime call because it was a new phone. (R., p. 101).

That was Dr. Gottfried's entire testimony regarding the underlying facts of Appellant's sexual offenses. Her testimony was not extensive or unduly graphic. She **only** conveyed the information that was significant and necessary to formulating her opinions, and she explained how and why it factored into them. Judge McLeod properly exercised his discretion in overruling the Appellant's Rule 403 objection and finding the testimony was admissible and the information was highly probative considering the State's high burden of proof. Judge McLeod was well aware of the nature of the testimony in SVPA cases and diligently exercised his discretion to oversee the testimony and lessen the prejudice to Appellant as much as possible. (R., p. 95-98). Therefore, Judge McLeod's rulings and the jury's verdict finding beyond a reasonable doubt that Appellant is a sexually violent predator as defined by the SVPA should be affirmed.

b. If it was error to admit the challenged testimony, it was harmless error.

Even assuming error, the purported error in admitting the limited testimony regarding the underlying details of Appellant's sexual offenses was harmless because it is a small part of the evidence submitted to the jury when the evidence is viewed in context and in relation to the entirety of the record as required by well-established South Carolina case law.[1] Error is harmless where it could not reasonably have affected the result of the trial. *In re Harvey*, 355 S.C. 53, 584 S.E.2d 893, 897 (2003). "A harmless error analysis is contextual and specific to the circumstances of the case," and "the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Heller*, 399 S.C. 157, 731 S.E.2d 312, 320 (Ct. App. 2012)

[1]The State does not concede error in the admission of the testimony to the underlying details of the offenses, rather, as set forth above, contends there was no error.

(emphasis added). "It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." *State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611, 613 (1983).

In SVPA cases, it is the jury's mission to determine if a person is a sexually violent predator, which requires that a person: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment. S.C. Code Ann. Section 44-48-30 (1)(a)(b). "Likely to engage in acts of sexual violence" means that a person is predisposed to engage in acts of sexual violence and more probably than not will engage in acts of sexual violence to such a degree as to pose a menace to the health and safety of others. S.C. Code Ann. Section 44-48-30 (9).

The jury heard testimony from Dr. Gottfried, and from the DMH evaluator. Both witnesses were qualified by the court as experts in forensic psychology. (R., p. 60, 178). Both experts testified they each performed a psychosexual evaluation of Respondent to determine if he met the criteria to be considered a sexually violent predator. (R., p. 60, 178-179).Both experts testified they reviewed records as a part of their evaluation process. (R., p. 65, 179).

Both Dr. Gottfried and the DMH evaluator testified Appellant had been convicted of two sexually violent offenses and the State entered into evidence certified copies of Respondent's qualifying convictions for criminal sexual conduct with a minor, second degree, and sexual exploitation of a minor, third degree (R., p. 77-80, 192, 341-344).

Both Dr. Gottfried and the DMH evaluator testified that based on their evaluation of Appellant, he met the diagnostic criteria and suffered from antisocial personality disorder (ASPD).

Both experts testified that Respondent's ASPD predisposed him to engage in acts of sexual violence. (R., p. 112, 145, 192, 300).

Both experts testified they scored actuarial assessments to assess Respondent's risk to sexually reoffend. Dr. Gottfried testified she scored the Static 99-R, Static 2002-R and the Stable 2007 actuarial assessments as a part of her evaluation. (R., p. 119, 122). Based on the scores, she testified Respondent was in the well above average risk category to reoffend sexually. (R., p. 125). The DMH evaluator testified he scored the Static 99-R, and the VRS-SO actuarial assessments as a part of his evaluation. (R., p. 184). Based on the scores, he testified Respondent was in the above average risk category to reoffend sexually. (R., p. 243).

Dr. Gottfried testified it was her opinion that Respondent would more probably that not engage in acts of sexual violence to such a degree as to pose a menace to the health and safety of others. (R., p. 127). The DMH evaluator testified that he originally found that Appellant met the criteria for commitment, but subsequently amended his report to change his opinion. (R., p. 184). Further, the DMH evaluator testified he changed his opinion based solely on his interpretation of changes to the SVPA. (R., p. 186-187). On cross examination, the DMH evaluator admitted he did not reinterview Appellant, that there was no new evidence or records to consider, and everything in his amended report was based on the data he had during the initial evaluation. (R., p. 233).

When viewed in light of the issues before the jury and the entire record, any purported error arising from the admission of testimony regarding underlying details of Appellant's sexual offenses was harmless. The evidence presented amply supports Judge McLeod's findings regarding the testimony regarding the underlying details of Appellant's sexual offenses. His ruling and the jury's verdict that Appellant is a sexually violent predator as defined by the SVPA should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that Appellant's commitment should be affirmed.

Respectfully submitted,

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September 30, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Walton J. McLeod, IV, Circuit Court Judge
Appellate Case No. 2024-001746

In the Matter of the Care and Treatment of
Phillip B. Nix,

Appellant.

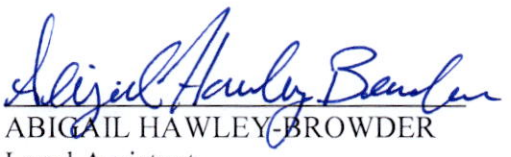
PROOF OF SERVICE

I, Abigail Hawley-Browder, certify I served the Final Brief of Respondent on Appellant by email to the Appellant's counsel at the address reflected in the AIS system. The Final Brief of Respondent has also been filed with the Court of Appeals through the e-filing system.

Kindle K. Johnson
223 E. Main St., Suite 500
Rock Hill, SC 29730

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

This 30 day of September, 2025.



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Abigail Hawley-Browder

From: Abigail Hawley-Browder
Sent: Tuesday, September 30, 2025 2:51 PM
To: 'kjohnson@kjohnsonlawfirm.com'
Cc: Chris Runyan
Subject: In the Matter of the Care and Treatment of Phillip Byron Nix (2024-001746)
Attachments: Nix FBOR.pdf

Good afternoon,

Please see attached Final Brief of Respondent In the Matter of the Care and Treatment of Phillip Byron Nix (2024-001746) to be filed with the Court of Appeals today.

Thank you,

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