ASTATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County
The Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2024-002086

In the Matter of the Care and Treatment of
Alonza V. Gibson, Jr.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Judge Gibbons did not abuse his discretion by allowing the State's expert witness to testify about unconvicted sexual offenses because the information was part of the basis for the expert's opinions regarding Appellant's paraphilic and personality disorder diagnoses and his risk assessment as required by the SVPA, the testimony was not unduly graphic, and the prejudicial effect did not substantially outweigh the evidence's probative value.

II. Judge Gibbons did not abuse his discretion by denying Appellant's request for a curative jury instruction based on a portion of the State's closing argument.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In September 2013, Appellant Alonza V. Gibson, Jr., was convicted in Clarendon County of criminal sexual conduct with a minor, third degree, assault and battery, second degree, and threatening the life of a public official, and sentenced to ten years incarceration, suspended to thirty months and three years probation. His probation was revoked in March 2015 and he was ordered to serve five years of the original ten year sentence. After Appellant was released from the Department of Corrections (SCDC), he committed various offenses until 2019 when he pled guilty in Sumter County to assault and battery, first degree, and was sentenced to three years incarceration. In 2022, Appellant pled guilty in Lexington County to assault and battery, second degree, and was sentenced to eighteen months with credit for 265 days time served. Prior to Appellant's release from SCDC on the 2022 conviction, 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 December 3, 2024, before the Honorable Brian M. Gibbons, 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. 74-82).

Dr. Gottfried testified that the State retained MUSC to conduct an evaluation of Appellant pursuant to the SVPA. 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. 82-84).

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 again, and to identify the person's victim pool any patterns of behavior. She looks at the person's entire personal history and functioning. She asks about the person's development period, his 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. As to Appellant, Dr. Gottfried testified that he was "more difficult" to interview because he was really evasive and defensive, and he was "pretty angry with the evaluation process." She stated Appellant was frustrated and "frequently provided answers that had a lot of words, but not a lot of substance." (R., p. 85).

In addition to interviewing Appellant, Dr. Gottfried reviewed "a lot of records" on Appellant, which included documents from police departments in Manning, Columbia, West Columbia and Sumter, court documents from general sessions courts in Clarendon County, Manning, Sumter, West Columbia and Lexington. She also had records from the South Carolina Department of Probation, Parole and Pardon Services (PPP), SCDC, and the Clarendon County Detention Center. She had Appellant's criminal history reports and the evaluation conducted by the South Carolina Department of Mental Health (DMH) evaluator. She testified this was the type of information typically and reasonably relied on by experts in her field when conducting the type

of evaluation at issue in this case, and she considered and relied on it in formulating her opinions. (R., pp. 85-86).

Dr. Gottfried then testified about what she learned regarding Appellant's personal history, educational history, employment history, financial history, social network and support system, mental health history, substance use history, relationship history and sexual history. She noted that there were discrepancies between the information Appellant provided to her about these topics and what he told the DMH evaluator. (R., pp. 87-93).

Regarding Appellant's criminal history, Dr. Gottfried testified it was important to look at his ability to follow the rules in general, and for any patterns of behavior. She stated that a history of violence can be predictive of future violence and sexual violence, and it is important to look at the details of violent offenses because they can give an idea of whether another offense might occur, the severity of it, the level of violence and the amount of damage done. She further testified that professionals in her field look at criminal charges that did not result in convictions because the details may show a pattern of behavior. In addition, the charges are used to score certain risk assessment measures, and they help formulate a diagnosis and risk assessment. (R., pp. 93-94).

Dr. Gottfried testified Appellant "has a pretty extensive history" of arrests. He was arrested at least twenty-nine times over a twenty-two year period for offenses including assault and battery, petty larceny, probation violations, failure to register as a sex offender, trespassing, burglary, contributing to the delinquency of a minor and threatening the life of a public official. She stated the level of violence in the assault and battery charges against Appellant was important. (R., pp. 94-96).

In 2013, Appellant was convicted of assault and battery, second degree and threatening the life of a public official. Dr. Gottfried testified the offenses occurred in the Clarendon County

Detention Center where Appellant struck a victim in the head and the victim required stitches, and he threatened to kill a correctional officer. Appellant told Dr. Gottfried that "the cuffs were too tight and he was upset about it." (R., pp. 96-97, 307-310).

In 2019, Appellant was convicted of assault and battery, first degree, in Sumter County. According to the records, Appellant had an altercation with a seventy-three year old woman, who had visible injuries to her face, swelling on her forehead and profuse bleeding out of her nose. Dr. Gottfried testified the level of violence in the offense was "striking." Dr. Gottfried further testified that Appellant had "several convictions and multiple charges for assault and battery against both men and women." (R., pp. 97-98, 311-313).

As to his sexual offenses, in 2009, Appellant was charged with assault and battery of a high and aggravated nature, criminal sexual conduct, first degree, and kidnapping, but all the charges were ultimately dismissed in 2011. Dr. Gottfried testified the records indicated the victim was a thirty-seven year old women, and Appellant went to her house and told her someone was looking for her. They were walking down the street when Appellant struck the victim on her face with a wrench, causing her to lose consciousness. Appellant pulled the victim into a yard, raped her vaginally, anally and orally, threatened to kill her if she told anyone, and then fled the scene. The charges were dismissed due to "a lack of victim cooperation." Dr. Gottfried again testified it was important to examine the underlying details of convictions and charges to gather additional data points for a possible diagnosis because the details may reveal patterns of behavior and possible sexual arousal (R., pp. 99-104).

In 2012, Appellant was charged with criminal sexual conduct, first degree, kidnapping, strong arm/common law robbery and assault and battery, first degree. In 2013, he pled guilty to criminal sexual conduct, third degree, and the remaining charges were dismissed. (R., pp. 318-

320). According to the official records, police responded to the hospital emergency room because a seventeen year old female reported she had been raped. The victim told officers that she was sitting under a tree at 1:30 a.m. when a male stranger, subsequently identified as Appellant, approached her, started talking to her, and agreed to buy her a pack of cigarettes. At some point they walked to an abandoned house where Appellant pulled up her shirt and a fight ensued. The victim further reported that Appellant hit her in the eye and when she tried to fight back, he choked her until she lost consciousness for some time. He vaginally raped the victim and covered her mouth because she was screaming. (R., pp. 104-106).

Dr. Gottfried testified that the level of violence in the offense was important in light of Appellant's other offenses and his pattern of behavior. She also found it significant that the victim was a stranger to Appellant. When she asked Appellant about the offense, he told her that the victim lied and the State could not prove the offense, but he could not explain why he pled guilty. Dr. Gottfried testified that she noted Appellant told the DMH evaluator that he had been dating the victim, but all the reports indicated they were strangers. (R., pp. 105-107).

In 2022, Appellant was convicted of assault and battery, second degree. (R., pp. 314-313). The records indicated officers were dispatched to the Lexington Medical Center, and a forty-one year old female reported her boyfriend, identified as Appellant, had come up behind her, presented a knife and pushed her into a parking lot. The victim further reported that Appellant again presented the knife in the parking lot, hit her with a closed fist, threw her to the ground and raped her. The records indicated the victim had lacerations to her head and her face was swollen. Dr. Gottfried testified that Appellant was originally charged with criminal sexual conduct, first degree. (R., pp. 107-108).

Dr. Gottfried also reviewed records regarding Appellant from SCDC and the Clarendon County Detention Center, and testified these are the type of records experts in the field rely on. She stated Appellant had disciplinary reports or infractions approximately seventeen times at SCDC. Seven of his disciplinaries were for striking an inmate with or without a weapon, three were for fighting without a weapon, one was for damaging or destroying property. He was also disciplined for threatening to inflict harm on an inmate and striking an employee with or without a weapon. Dr. Gottfried testified that a number of the disciplinaries were violent offenses. While in the Clarendon County Detention Center, Appellant had seven incident reports filed over a one year period, primarily related to threatening staff, having verbal altercations with staff, or fighting other inmates.

Dr. Gottfried testified Appellant did not have any sex offender treatment while he was in SCDC. She stated this factored into her analysis because he was ordered to attend sexual behavior counseling while he was on probation. Appellant failed to complete the counseling as ordered, which demonstrated he did not think he needed it or he disregarded that part of his requirements. Then when he had another opportunity to get treatment while in SCDC after his probation was revoked, he still declined to get it. (R., pp. 110-111).

Dr. Gottfried also considered Appellant's probation records which indicated Appellant's probation was revoked in 2004 and in 2006 (a 2000 Youthful Offender Act sentence) and in 2015 (criminal sexual conduct, third degree, in 2013). (R.., p. 321). The 2015 revocation was based on Appellant's failure to report to his probation officer; his failure to update his address; his failure to refrain from using illegal drugs; his failure to pay fines and restitution; his failure to attend sex offender counseling; and his absconding to Nebraska. Appellant told Dr. Gottfried that the Youthful Offender probation violations were because "he was young," he did not have the money

to pay the fines and restitution, and he did not report because he did not have the money. He also said he went to two of the sexual behavior treatment groups but did not go back, and he went to Nebraska even though he knew he was not allowed to do it. (R., pp. 112-114).

Dr. Gottfried testified about the multiple tests and assessments she used in formulating her opinions regarding diagnosis and risk, and the results of those tests and assessments. She diagnosed Appellant with sexual sadism disorder (a paraphilic disorder) and other specified personality disorder with antisocial and psychopathic traits. She opined that he is a high risk to reoffend sexually based on his diagnoses and the results of risk assessment tools she utilized. Finally, she opined that Appellant meets the criteria for civil commitment under the SVPA, and testified that all her opinions were to a reasonable degree of psychological certainty. (R., pp. 114-149).

The DMH evaluator testified about her protocol for evaluations, which included reviewing the records and interviewing the person. In this case, she also had Appellant complete a personality test. She used the same risk assessment tools that Dr. Gottfried used, and she identified many of the same dynamic risk factors that Dr. Gottfried identified. She also diagnosed Appellant with other specified personality disorder with antisocial traits, but did not diagnose a paraphilic disorder. She testified that Appellant denied having any deviant sexual interests and she did not find a pattern of deviant sexual interests because Appellant was not convicted of the other sexual offenses Dr. Gottfried considered. She concluded that Appellant did not meet the criteria for commitment under the SVPA. (R., pp. 173-224).

At the conclusion of closing arguments, Appellant objected to part of the State's rebuttal argument about the criminal records, and requested either a curative instruction or an additional jury charge related to the records, arguing that the State indicated the records were reliable. The

State disputed the claim, stating that in response to statements in Appellant's closing argument, he talked about what both doctors testified they reviewed and relied on, and he did not say the records were reliable. The State further argued that in Appellant's closing argument, Appellant stated there was "no evidence" regarding the unconvicted charges, but there was evidence in the form of both experts' testimony. Judge Gibbons agreed with the State and overruled Appellant's objection. (R., pp. 284-286).

Appellant then asked for a jury instruction regarding the term "records." The jury charge Appellant proposed included the statement that "[h]earsay testimony about records does not, in and of itself, validate a record or make it reliable." After discussion, Judge Gibbons denied Appellant's request. (R., pp. 286-290, 307-310).

The jury found beyond a reasonable doubt that Appellant is a sexually violent predator as defined by the SVPA, and Judge Gibbons ordered that he be committed to the custody of DMH for long term control, care and treatment. (R., pp. 303-304, 1). This appeal followed.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice." State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009). "'The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion.'" State v. Prather, 429 S.C. 583, 840 S.E.2d 551, 559 (2020) (*quoting* State v. Chavis, 412 S.C. 101, 771 S.E.2d 336, 338 [2015]). "'A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion,'" which "'occurs when the conclusions of the [trial] court are either controlled by an error of law or are based on unsupported factual conclusions.'" *Id.* (alteration in original). *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

I. Judge Gibbons properly allowed the State's expert witness to testify about the underlying details of Appellant's sexual offenses that she considered in reaching her diagnoses and risk assessment.

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

Admissibility of Testimony Regarding Underlying Facts of Sex Offenses

"Because 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 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 in SVPA cases to assist the factfinder when evaluating the efficacy of the expert's methodology and opinions. In *Ettel*, the expert testified about underlying details of Ettel's sexually violent offense, which included binding, gagging and choking the victim, raping her and forcing her to perform oral sex on him. 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 the underlying facts and possible sexual component of Ettel's prior murder conviction. 660 S.E.2d at 286-287.

In finding the trial court did not abuse its discretion by admitting the testimony regarding the underlying facts of Ettel's sex offenses, the court of appeals 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 a 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 facts 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 and relied on by 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 that an evaluator is looking for patterns of behavior and offense/victim characteristics to try and determine the reason for the offenses and the characteristics for possible future offenses/victims. (R., pp. 93-94).

When Dr. Gottfried testified about Appellant's sexual offenses, she made it clear she got the underlying facts of those offenses from official records. She never vouched for the accuracy of the information, just that the records contained the information. Indeed, when Dr. Gottfried was asked during cross-examination about relying on the records, the following colloquy occurred:

> Appellant: Your report is based on either allegations on paper, conversations with [Appellant], various tests, and assessment tools, right?
>
> Dr. Gottfried: Right. My opinions are based on all of the collateral information I received and officially reported documents, records, clinic interview, the testing, yes.
>
> Appellant: But not personal knowledge?
>
> Dr. Gottfried: Correct.
>
> Appellant: And, in that case, some of the things that you've looked at to make your assessment might not be accurate, correct?
>
> Dr. Gottfried: Certainly. I mean the information is only as good as the report itself, I guess.

(R., p. 167). Thus, contrary to endorsing the reliability of the records as Appellant contends, Dr. Gottfried acknowledged that the information in the records might be inaccurate.

Appellant concedes the information at issue was "not asserted for the truth of the matter." (Brief of Appellant, p. 14). This concession seriously undermines his contention that the information was inadmissible hearsay. By definition, hearsay is "a statement, other than one made by the declarant while testifying at the trial hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE.[1]

Appellant further concedes "it was made clear that the hearsay testimony was admissible because it helped Dr. Gottfried identify patterns, score risk assessments, make a diagnosis, and reach her opinion of Appellant's eligibility as a sexually violent predator." (Brief of Appellant, p. 14). Pursuant to Rule 703, SCRE, the facts and data on which an expert bases an opinion may be those "perceived by or made known to the expert at or before the hearing, and if the information is of a type experts in the particular field reasonably rely on in forming opinions or inferences, the information need not be admissible in evidence." Again, Dr. Gottfried specifically testified that the records she relied on were the type of documents experts in the field relied on in conducting similar evaluations. (R., pp. 83-85).

Appellant's interpretation of Rule 703 would merely allow an expert to list the records she considered, but she could not testify about what was important in those records or how the information from those records factored into her opinions. That limitation has never been the law in South Carolina.

> An expert witness may state an opinion based on facts not within his firsthand knowledge. He may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions. Also, an expert may testify as to matters

[1]Even if the information is hearsay, the documents Dr. Gottfried referenced are public records and reports, which is an exception to the hearsay rule, and the documents themselves could be submitted as evidence (subject to a Rule 403 analysis). See Rule 803(8), SCRE. For argument purposes in this case, however, the State will assume the information is hearsay.

> of hearsay for the purpose of showing what information he relied on in giving his opinion of value.

Hundley ex rel. Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 529 S.E.2d 45, 50 (Ct. App. 2000) (internal citations omitted). "'Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony.'" Id. at 51 (*quoting United States v. Williams*, 447 F.2d 1285, 1290 (5th Circuit, 1971 (en banc)).

> The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. *Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.*

Id. at 51-52 (*quoting Williams*, 447 F.2d at 1290) (emphasis in original).

In SVPA cases, experts may consider both convicted and unconvicted criminal offenses when diagnosing an individual with a mental abnormality for the purposes of section 44-48-30(1)(b). *See White v. State,* 375 S.C. 1, 649 S.E.2d 172, 175-76 (Ct. App. 2007) (finding the legislature did not intend to limit the word "offense" to charges resulting in convictions when determining whether an offender is an SVP); *Ettel*, 660 S.E.2d at 287 (explaining an expert witness may consider "both convictions and offenses not resulting in convictions as long as they are relevant to the determination of whether a person is a[n] [SVP]"). It is necessary for the expert to testify about the underlying facts of the person's offenses in order to explain how the expert arrived at his opinion. *Ettel* at 287.

Dr. Gottfried testified repeatedly that it was necessary to consider the facts of Appellant's sexual offenses, including those for which he was not convicted, in order to determine if there was

a pattern to Appellant's offense behavior and the characteristics of his victims, and she only relayed the offense facts that she considered important in reaching her opinions regarding Appellant's diagnoses and risks for future offending. Her diagnosis of sexual sadism was based on the pattern of violence and the "really similar" characteristics of the sexual offenses. (R., pp. 93-109, 122-125).

It is now well established that experts in SVPA cases may testify about the underlying facts of the person's sexual offenses on which the expert relied in reaching her opinions about whether the person meets the criteria for commitment under the SVPA. This is not absolute, and the expert's testimony should be centered around the information the expert found important for diagnoses and risk assessment purposes. That is exactly what Dr. Gottfried did in the case, and Judge Gibbons did not abuse his discretion by allowing the testimony.

II. Judge Gibbons did not abuse his discretion by denying Appellant's request for a curative jury instruction regarding a portion of the State's closing argument.

Appellant contends Judge Gibbons abused his discretion by denying his request for a curative instruction regarding a purported implication during the State's rebuttal argument that the records from dismissed and unconvicted offenses were substantiated. He further contends this "infected" the trial "with unfairness" and denied Appellant due process. These contentions are meritless and not supported by the record.

To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *State v. Burkhart,* 350 S.C. 252, 565 S.E.2d 298, 303 (2002). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." *Id.* at 304. It is axiomatic that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578, 583–84 (2010).

As a threshold matter, the State's statements during its rebuttal argument were in direct response to statements made during Appellant's closing argument to the effect that there was "no evidence" Appellant committed the unconvicted offenses. (R., pp. 270-271). The State's response merely alluded to the fact that both experts had testified about the details of the offenses based on "the records they reviewed, the law enforcement records, the incident reports, the victim statements that they reviewed," which was evidence regarding the allegations against Appellant. (R., p. 281). "When a party argues something in closing, it is not error for the opposing party to respond in kind." *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 509 S.E.2d 269, 271 (1998); *see also State v. Singleton*, 284 S.C. 388, 326 S.E.2d 153, 156 (1985), *overruled on other grounds by State v. Torrence*, 305

S.C. 45, 406 S.E.2d 315 (1991) ("We have held argument of counsel is not so inflammatory as to constitute a ground for reversal where counsel responds in kind to previous argument of opposing counsel.").

Further, Appellant does not contend the jury charges Judge Gibbons gave the jury were erroneous in any way. Judge Gibbons appropriately charged the jury to only consider evidence from the witness stand and any exhibits submitted during the trial. Significantly, he then charged the jury:

> Now, you heard closing arguments from the lawyer, and like I told you at the outset, opening statements from lawyers and closing arguments from lawyers is (sic) not evidence. Arguments of counsel are a beneficial part of every trial. You should remember that statements made by counsel are not evidence.
>
> In presenting arguments, counsel refers to the evidence often, but you should base your verdict on the evidence as you remember it. It is - - therefore, if there are any conflicts between what the lawyers say and about the way you remember something, you rely upon your understanding and memory of it when you start to discuss it.

(R., pp. 293-294).

In addition to the language above, Appellant asked Judge Gibbons to instruct the jury that it "may have heard testimony about criminal records," "the only evidence you are to consider is the evidence before you," and "[h]earsay testimony about records does not, in and of itself, validate a record or make it reliable." (R., p. 287). The jury charge Appellant proposed was a charge on the facts, it essentially told the jurors to take some of the evidence they heard with a grain of salt, and to disregard some of the evidence they heard from the witness stand rather than weigh the evidence themselves. It drew specific attention to one type of evidence and introduced a legal determination to the jury deliberations on a matter reserved for judicial determination – the determination of

hearsay. Noting that the jury did not even know what hearsay is, Judge Gibbons appropriately declined to give Appellant's proposed jury charge, and his ruling should be affirmed.

CONCLUSION

For all the foregoing reasons, the State respectfully submits that Judge Gibbons' rulings and the jury verdict that Appellant is a sexually violent predator as defined by the SVPA should be affirmed.

Respectfully submitted,

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October 3, 2025

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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The Honorable Briam M. Gibbons, Circuit Court Judge
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In the Matter of the Care and Treatment of
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PROOF OF SERVICE

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kjohnson@johnsonlawfirm.com

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

This 3RD day of October, 2025.

ABIGAIL HAWLEY-BROWDER
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

Abigail Hawley-Browder

From: Abigail Hawley-Browder
Sent: Monday, October 6, 2025 3:31 PM
To: 'kjohnson@kjohnsonlawfirm.com'
Cc: Chris Runyan
Subject: In the Matter of the Care and Treatment of Alonza V. Gibson Jr. (2024-002086)
Attachments: Gibson FBOR.pdf

Good afternoon,

Please see attached Final Brief of Respondent for In the Matter of the Care and Treatment of Alonza V. Gibson Jr. (2024-002086) to be filed with the Court of Appeals today.

Thank you,

Abigail Hawley-Browder, Legal Assistant
South Carolina Attorney General's Office
Sexually Violent Predator's Unit | Office 803-734-4156
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