ORIGINAL

RECEIVED
NOV 23 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Aiken County

G. Thomas Cooper, Circuit Court Judge

---

IN THE MATTER OF THE CARE AND TREATMENT OF RANDALL WADE MCCOY,

APPELLANT

APPELLATE CASE NO. 2015-000485

---

# INITIAL BRIEF OF APPELLANT

---

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

## Cases



## Other Authorities



## Rules

## STATEMENT OF ISSUE ON APPEAL

Did the court abuse its discretion by qualifying Dr. Marie Gehle as an expert in forensic psychology under Rule 702, SCRE, where there was insufficient evidence of the reliability of the substance of her testimony and, under Rule 403, SCRE, where the probative value was substantially outweighed by its prejudicial effect?

## STATEMENT OF THE CASE

On November 13, 2013, James G. Bogle, Jr., an attorney with the South Carolina Office of Attorney General, filed a petition pursuant to the Sexually Violent Predator Act (SVPA) alleging Appellant was a sexually violent predator. R. * (Petition). The trial commenced on February 23, 2015 before the Honorable G. Thomas Cooper, and a jury. Tr. 1. James Bogle represented the state, and Aimee J. Zmroczek represented Appellant. Tr. 1.

On February 24, 2015, the jury found Appellant was a sexually violent predator under the SVPA. Tr. 269, ll. 10. Judge Cooper ordered Appellant be committed to the Department of Mental Health for long-term control, care, and treatment. Tr. 271, ll. 16-21; R. *(Order of Commitment).

This appeal follows.

## ARGUMENT

The court abused its discretion by qualifying Dr. Marie Gehle as an expert in forensic psychology under Rule 702, SCRE, where there was insufficient evidence of the reliability of the substance of her testimony and, under Rule 403, SCRE, where the probative value was substantially outweighed by its prejudicial effect.

**Pretrial Objection and *In Camera* Testimony**

Appellant moved pretrial to suppress the testimony of Dr. Marie Gehle, the chief psychologist at the South Carolina Department of Mental Health who was court appointed to evaluate Appellant, on grounds that the substance of her testimony regarding the likelihood Appellant would reoffend was not reliable. Tr. 129, ll. 2-7. To address Appellant's objection, the state proffered Dr. Gehle's testimony.

Dr. Gehle's testimony on direct examination during the proffer was similar to her testimony before the jury, which is outlined below. She discussed Appellant's prior convictions in Alabama and South Carolina, his treatment history, and opined that he suffers from a pedophilic disorder, nonexclusive type. See Tr. 87, l. 2 - 106, l. 13.

When questioned by Appellant, Gehle said she was unaware of whether any established guidelines existed to assist psychologists in predicting the potential recidivism rate of an individual sex offender. To her knowledge, no organization, including the American Psychological Association (APA) and its numerous divisions, such as the American Psychology and Law Society, had issued any guidelines or standards for experts in the field to rely on when evaluating individuals pursuant to a sexually violent predator program. Tr. 109, l. 18 – 110, l. 13. Instead, she maintained that certain books and

textbooks discuss "how to approach these evaluations" and she had "read plenty of research that says here's what other people use in these evaluations." Tr. 110, ll. 14-25.

Gehle admitted there was more than one way to conduct this type of evaluation and several different techniques that experts in the field rely on when attempting to determine an individual's likelihood of reoffending. Tr. 111, ll. 1-3. She said she uses an "actuarial risk assessment," which the "research says [is] . . . the most accurate way to . . . predict future sexual recidivism." Tr. 111, l. 22 – 112, l. 1. However, other psychologists may rely on a different tool or different information when predicting an individual's future sexual recidivism.

Gehle described four "categories" of "risk assessments" that are used in the field by different psychologists. A risk assessment is a method used to predict the risk or likelihood of reoffending. According to Gehle, the first category is "the actuarial," which is the method Gehle uses and supposedly "has the most research to support" it. The "second is you can adjust the actuarial findings based on other factors," but this method is "not typically recommended." A third is a "structured clinical judgment which is where you know what risk factors you're looking for in advance of the . . . evaluation and you look for those things and then you use your clinical judgment to come to a determination." The fourth category or method is a "clinical judgment where you don't go in with any preset risk factors before the evaluation and you just use your clinical judgment to determine whether that person is at risk or not." Tr. 115, l. 11 – 116, l. 4.

As mentioned above, according to Gehle, the Static-99R, which is the "actuarial risk assessment" instrument Gehle uses, is "the most accurate way to . . . estimate or predict future sexual recidivism." Tr. 111, l. 22 – 112, l. 1; Tr. 127, ll. 1-3. However, Gehle

admitted the Static-99R is only "moderately successful in predicting sexual recidivism" and that "[p]redicting the future is a very difficult task." Tr. 126, ll. 14-17; Tr. 126, l. 25. Therefore, the "most accurate" tool available in the field is only "moderately accurate" at predicting sexual recidivism. Gehle admitted the Static-99R is "not perfect" and conceded there are often "false positives" when using this method. Tr. 127, l. 4 – 128, l. 3. Due to the inaccuracy and moderate success rate of the Static-99R, Gehle agreed that her testimony could be confusing to the jury. Tr. 128, ll. 4-8.

Moreover, Gehle acknowledged that various psychologists in the field use different information when determining whether an individual suffers from a volitional impairment or the lack of ability to control his or her behavior. She refused to admit there was "no agreed upon scientific basis" used to determine volitional impairment, instead claiming "[t]here are behavioral cues that have been found in the research" that are used to determine whether an individual lacks the ability to control his or her behavior. Tr. 112, l. 1 – 113, l. 17. According to Gehle, some of these behavioral cues are "whether they have offended in high risk situations; whether they have offended after legal sanction; whether they verbalized difficulty controlling their behavior;" and "[w]hether they sort of have insight into their behavior. You know, who they offend, when they offend. Things like that." Tr. 122, l. 19 – 123, l. 12. She claimed there are not a "certain number" of behavioral cues that a psychologist must "check off" to determine an individual suffers from a volitional impairment. Instead, the psychologist simply looks to see "whether there's evidence of inability" based on the behavioral cues. Tr. 123, ll. 16-23. Lastly, Gehle admitted there was no "one method" to determine volitional impairment that had "been accepted as scientific and reliable in court." Tr. 113, ll. 18-22.

At the conclusion of Dr. Gehle's *in camera* testimony, Appellant objected to the reliability of the substance of her testimony. Specifically, defense counsel argued that the portion of her testimony concerning "whether or not he [Appellant] will [re]offend is not reliable." Tr. 129, ll. 2-7. Counsel stressed Gehle's testimony that she relies exclusively on the Static-99R as an "actuarial risk assessment," but that the tool is only "moderately accurate" at predicting sexual recidivism. Tr. 128, ll. 10-17. Counsel argued that "all they're [the jurors are] going to hear is likely to [re]offend" and that Gehle's opinion testimony will simply "confuse and prejudice the issue." Tr. 128, ll. 10-21.

The judge ultimately ruled that Dr. Gehle was qualified to testify as an expert in forensic psychology and could give an opinion as to Appellant's likelihood of reoffending. He said, "[N]ot every expert can testify as to certainty and particularly not in a case like this where you're predicting the future. Juries can hear both sides that it's not predictive at all. And they can hear Dr. Gehle say it's moderately predictive. But . . . *without testimony or evidence that it's not predictive at all, I don't have much choice* other than to allow her to testify as to what she knows and can opine about." Tr. 129, ll. 8-25 (emphasis added).

**Evidence Presented to the Jury**

Appellant pled guilty to two counts of lewd act upon a child in June 2009. Tr. 193, l. 15 – 194, l. 13; R. * (Petition). Thus, it was undisputed that Appellant had been convicted of a sexually violent offense as defined by the SVPA.[1] After pleading guilty, Appellant was sentenced to fifteen years imprisonment suspended upon the service of ten years imprisonment and five years probation. Tr. 196, l. 18 – 197, l. 2; R. * (Petition). He was

[1] See S.C. Code Ann. § 44-48-30(2) (listing offenses defined as sexually violent offenses under the SVPA).

also ordered to register as a sex offender and be subject to lifetime global positioning satellite (GPS) monitoring pursuant to S.C. Code Ann. § 23-3-540. R. * (Petition).

The state alleged Appellant had improperly touched an eight year old female on two occasions in 2008 at a convenience store where the child's mother worked and Appellant visited as a customer. Appellant allegedly rubbed the child's back under her shirt and "touched her buttocks over her pants" while the child was sitting on a counter at the store. On a separate occasion, Appellant allegedly touched the child "under her shorts, but on top of her panties" while at the convenience store. Tr. 198, ll. 3-9. These allegations led to Appellant's lewd act convictions.

Before his release from the Department of Corrections, the state sought to involuntarily commit Appellant as a sexually violent predator under the SVPA. He was evaluated by Dr. Gehle, the chief psychologist at the Department of Mental Health. Tr. 157, ll. 22-23. Dr. Gehle was qualified as an expert in forensic psychology over Appellant's objection. Tr. 129, ll. 2-7; Tr. 162, ll. 13-22.

In addition to Appellant's 2009 South Carolina convictions, Gehle testified Appellant had been convicted in 1993 in Alabama of six counts of "sexual abuse in the first degree" based on allegations that he improperly touched a nine year old female who was the daughter of a woman he was dating. Tr. 186, ll. 1-4. Appellant allegedly lived with the woman and her daughter and improperly touched the daughter while she was sleeping in her bed at night. Tr. 168, ll. 9-10; Tr. 169, ll. 6-17. There were no allegations of penetration. According to Gehle, the daughter told her mother and when the mother confronted Appellant about the allegations, Appellant allegedly said "he needed help" and voluntarily "sought treatment in Louisiana." While Appellant was undergoing inpatient treatment in

Louisiana, he allegedly told a therapist about his actions with the nine year old daughter, and the therapist, who was "mandated by law to report child sexual abuse," reported the allegations to law enforcement. Tr. 183, l. 15 – 184, l. 24. When Appellant was released from the inpatient treatment facility and returned to Alabama, he was arrested and later pled guilty. Tr. 184, l. 24 – 185, l. 2.

Dr. Gehle testified that, in her opinion, Appellant "suffers from pedophilic disorder nonexclusive type." Tr. 205, ll. 7-14. Pedophilic disorder "is when somebody is sexually aroused by prepubescent children." Tr. 205, ll. 15-18. She claimed this mental abnormality predisposes Appellant to commit sexually violent offenses in the future. According to Gehle, her opinion is based on the fact that Appellant "offended in extremely high risk situations" even after undergoing sex offender treatment and after having been convicted of a prior sex offense. Tr. 206, ll. 3-24. She also claimed Appellant told her "he had trouble controlling his behavior." Tr. 206, ll. 10-13.

Additionally, Gehle testified that she completed the Static-99R, which is "an actuarial risk assessment" instrument used to determine if an individual "is likely to engage in acts of sexual violence in the future." Tr. 199, ll. 15-23. According to Gehle, the Static-99R is the most "widely used instrument for estimating or predicting sexual recidivism." Tr. 201, ll. 3-5. She claimed Appellant scored a five, which is "considered moderate high risk" of reoffending. She further maintained that of individuals who scored a five in a sample studied, 19.6 percent reoffended within five years and 27.7 percent reoffended within ten years. Tr. 202, ll. 2-10.

Lastly, Gehle opined that because of Appellant's mental abnormality, specifically pedophilic disorder, he is "likely to engage in acts of sexual violence unless he is confined

for long-term control, care, and treatment." She also opined that he meets the criteria of a sexually violent predator under the SVPA.[2] Tr. 208, l. 20 – 210, l. 16.

Dr. Gehle was the only witness presented during trial. The state relied solely on her testimony to establish Appellant met the criteria of a sexually violent predator. Therefore, her qualification as an expert in forensic psychology and opinion testimony was crucial to the state's case. Based on Gehle's testimony alone, the jury found Appellant met the criteria of a sexually violent predator under the SVPA and the court ultimately committed him to the Department of Mental Health for long-term control, care, and treatment. Tr. 269, l. 6 – 271, l. 21.

**Discussion**

The court abused its discretion by qualifying Dr. Gehle as an expert in forensic psychology when there was insufficient evidence of the reliability of the substance of her testimony. Specifically, the court erred by allowing Gehle to give an opinion regarding Appellant's likelihood of engaging in acts of sexual violence in the future if not confined and whether he meets the criteria of a sexually violent predator under the SVPA since the underlying science of the method she relied upon to reach her conclusion is unreliable and, by her own testimony, only "moderately accurate." Additionally, the trial court's reasoning for overruling Appellant's objection is respectfully outdated given our Supreme Court's holding in State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009).

---

[2] See S.C. Code Ann. § 44-48-30(1) defining a sexually violent predator as a person who "has been convicted of a sexually violent offense" and "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."

"All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." White, 382 S.C. at 270, 676 S.E.2d at 686; See Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (holding "the trial court must evaluate the substance of the testimony and determine whether it is reliable."). Rule 702, SCRE, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"Reliability is a central feature of Rule 702 admissibility." White, 382 S.C. at 270, 676 S.E.2d at 686. In White, our Supreme Court held that all expert testimony must pass a threshold reliability determination by the trial court prior to its admission into evidence. 382 S.C. at 273, 676 S.E.2d at 688. When determining whether the underlying science is reliable, several factors must be considered. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); State v. Jones, 343 S.C. 562, 573, 541 S.E.2d 813, 819 (2001). These factors include: (1) the publications and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Jones, 343 S.C. at 573, 541 S.E.2d at 819 (citing State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)).

In Jones, 343 S.C. 562, 541 S.E.2d 813 and State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009), our Supreme Court held "barefoot insole impression" evidence was not scientifically reliable and reversed the defendant's convictions and death sentence. In both

cases, the Court found the "barefoot insole impression" evidence did not meet the Jones reliability factors listed above. Jones, 383 S.C. at 556, 681 S.E.2d at 591; Jones, 343 S.C. at 573-574, 541 S.E.2d at 819. Despite evidence that research on the method had been presented and published, the Court found this fact did not satisfy the requirement of "peer review" since "experienced examiners, *i.e.*, peer reviewers" had "not accepted [the] evidence as reliable." Jones, 383 S.C. at 556-557, 681 S.E.2d at 591(internal quotation marks omitted). Moreover, the Court "found there was no established protocol or quality control procedure in place." Jones, 383 S.C. at 557, 681 S.E.2d at 591.

Here, the state failed to establish the reliability of the methodology relied upon by Dr. Gehle to predict future sexual recidivism and, therefore, the court erred by admitting her testimony on Appellant's likelihood of engaging in acts of sexual violence over Appellant's objection. Gehle admitted there were no established guidelines or standards for experts in the field to rely upon when evaluating individuals pursuant to a sexually violent predator program. See Tr. 109, l. 18 – 110, l. 13. Instead, according to Gehle, there are merely books and textbooks that discuss "how to approach these evaluations" and "research that says here's what other people use in these evaluations." Tr. 110, ll. 14-25. However, despite published research on the methodology, there was no evidence presented that the method or underlying science was peer reviewed and found to be reliable. See Jones, 383 S.C. at 556-557, 681 S.E.2d at 591. In fact, Gehle admitted that the Static-99R, which is the instrument she relied upon in reaching her opinion regarding Appellant's likelihood of engaging in acts of sexual violence in the future, was only "moderately accurate" at predicting sexual recidivism, suggesting it is unreliable.

Further, there was absolutely no evidence regarding the quality control procedures used to ensure the reliability of the method used by Dr. Gehle or the individual reliability of her conclusions. There was no testimony that another expert had reviewed Gehle's conclusions and agreed with her opinion that Appellant scored a five on the Static-99R and that he met the criteria of a sexually violent predator under the SVPA. Moreover, there was no evidence that the Department of Mental Health or any other institution that conducts these evaluations has any quality control procedures in place to ensure reliability.

Finally, the evidence established there was no consistency of the methodology. Gehle testified that different psychologists in the field rely on at least four different approaches or "risk assessments" to predict sexual recidivism and that there are various accuracy rates depending on the method utilized. See Tr. 115, l. 11 – 116, l. 4. While she claimed the method she uses is the most accurate, there was no evidence to support her statement, and Gehle herself admitted it was only "moderately accurate." Also, there was no evidence that when utilizing the Static-99R experts in the field consistently came to the same conclusion or score regarding a specific individual.

Additionally, the trial court's reasoning for overruling Appellant's objection is respectfully outdated given our Supreme Court's opinion in White, 382 S.C. at 273, 676 S.E.2d at 688. When ruling, the trial judge stated, "Juries can hear both sides that it's [the method utilized by Dr. Gehle is] not predictive at all. And they can hear Dr. Gehle say it's moderately predictive. But . . . without testimony that it's not predictive at all, I don't have much choice other than to allow her to testify as to what she knows and can opine about." Tr. 129, ll-8-25. The judge's statements seem to suggest that the reliability of the

underlying science of the evidence and the admitted inaccuracy of the method used by Dr. Gehle go merely to the weight of the evidence as opposed to its admissibility.

However, in White, our Supreme Court held, "The familiar tenant of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." 382 S.C. at 273; 676 S.E.2d at 688. Thus, the trial judge is required under White to properly execute its gatekeeping function and determine the reliability of the subject matter of an expert's testimony before admitting it before the jury. Here, it is apparent the trial judge failed to properly conduct his gatekeeping function given his statements that suggest the reliability of the science and the accuracy of the underlying methodology go to the weight of the evidence, not its admissibility. This was error.

Moreover, the prejudicial effect of Gehle's testimony on Appellant's likelihood of reoffending and her opinion that he meets the criteria of a sexually violent predator under the SVPA outweighed any probative value under Rule 403, SCRE, due to the admitted limited accuracy of her conclusions. Appellant argued, and Gehle conceded, that due to the inaccuracy and moderate success rate of the Static-99R, her testimony could be confusing or misleading to the jury. Tr. 128, ll. 4-8. The admitted inaccuracy of the method and unreliability of the science ultimately led the jury to speculate about whether Appellant was likely to engage in acts of sexual violence in the future. The confusing nature of Gehle's testimony limited its probative value and ultimately made it highly prejudicial to Appellant. In absence of scientific reliability, the evidence could only operate to provide inaccurate

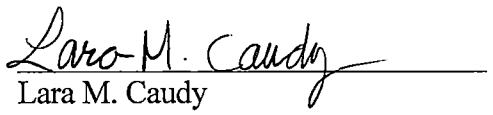
information for the jury. Thus, under Rule 403, the trial court should have excluded this evidence.

Because the state failed to present sufficient evidence of the scientific reliability of the methodology used to predict sexual recidivism, the trial court erred by qualifying Dr. Gehle as an expert and permitting her to testify before the jury about her opinion on Appellant's likelihood of reoffending and whether he meets the criteria of a sexually violent predator under the SVPA. Due to this error, this Court should reverse the order of the trial court committing Appellant to the Department of Mental Health for his long term control, care, and treatment and remand for a new trial.

## CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse the order of the trial court committing him to the Department of Mental Health for his long term control, care, and treatment and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

NOV 23 2015

SC Court of Appeals

---

Appeal from Aiken County

G. Thomas Cooper, Circuit Court Judge

---

IN THE MATTER OF THE CARE AND
TREATMENT OF RANDALL WADE MCCOY,

APPELLANT

APPELLATE CASE NO. 2015-000485

---

CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R. J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of November, 2015.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of November, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.