STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken county
The Honorable G. Thomas Cooper, Circuit Court Judge
Appellate Case No. 2015-000485

IN THE MATTER OF THE CARE AND TREATMENT
OF RANDAL WADE McCOY,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly qualified the State's expert in the field of forensic psychology, and allowed her testimony regarding sexual predator evaluations in general, and her evaluation of Appellant in this case.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Prior to Appellant Randal Wade McCoy's release from prison on two lewd act convictions, Respondent State of South Carolina ("the State") filed a Petition Pursuant to the Sexually Violent Predator Act (the "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 February 23, 2015, before the Honorable G. Thomas Cooper, Circuit Court Judge.

Before the jury was sworn, Appellant moved to suppress any testimony by the State's expert regarding Appellant's convictions, uncharged offenses and treatment records from other states, arguing the testimony on those issues was hearsay. The State argued the expert relied on the information from other states for purposes of rendering a diagnosis, and formulating her opinion regarding Appellant's risk to reoffend sexually, and it was necessary to explain her conclusions and opinions to the jury. The court ordered the expert's testimony be proffered as to the basis for her opinion. (Trial Transcript [TT], pp, 80-86; Record on Appeal [R.], pp. 88-86).

Marie Gehle, PsyD, who had performed approximately ninety pre-commitment evaluations and approximately ninety annual review evaluations under the SVPA, then testified outside the presence of the jury regarding the protocol she uses when conducting SVPA evaluations. Initially, she reads through all the documentation available at the time, and based on her review, she requests any other documentation she thinks may exist. After she has received all the documentation, she interviews the person and scores an actuarial risk assessment based on the records and information supplied by the person.

Dr. Gehle testified it was "absolutely" necessary to review any unconvicted criminal conduct of a sexual nature because it is part of the risk assessment, provides information to cover during the person's interview, and helps determine if the person has a pattern of deviant sexuality. Asking the person about his complete criminal/sexual history helps reveal his attitudes and opinions, as well as afford an opportunity for him to tell his side of the story. Dr. Gehle testified all the information she considers is the type of information typically and reasonably relied on by experts in the field of forensic psychology. (TT, pp. 86-91 R., pp. 86-91).

Appellant's criminal history included convictions in Alabama on six counts of sexual abuse in the first degree. Dr. Gehle testified the underlying details of the Alabama convictions were particularly important to determining the existence of a mental abnormality, and assessing Appellant's risk to reoffend sexually. The records revealed Appellant offended against the daughter of a woman with whom he was living, including offenses committed while Appellant and the victim were in bed with the victim's mother, which was a high risk situation, and indicated a possible volitional impairment. (TT, pp. 92-94; R., pp. 92-94).

After the victim's mother confronted Appellant about the molestation a second time, he voluntarily went to a residential treatment center in Louisiana, and when he revealed the conduct to a therapist, who was a mandatory reporter under Louisiana law, Appellant was charged in Alabama. Appellant told Dr. Gehle he went to treatment because he recognized he could not stop himself from reoffending and needed help. Dr. Gehle testified the Louisiana treatment records, specifically Appellant's own writings,

referenced undisclosed victims, and when she asked Appellant about those victims, he admitted some and denied some. (TT, pp. 94-98; R., pp. 94-98).

During Appellant's interviews with Dr. Gehle, he also told her he had sexually deviant thoughts about every three days, and sometimes the thoughts were intrusive. Of particular note, Appellant stated he was currently in sex offender treatment in prison, and when he made progress in treatment, "he would reward himself with those fantasies involving a girl he was attracted to when she was 15," which Dr. Gehle assumed included masturbation. (TT, pp. 98-100; R., pp. 98-100).

Dr. Gehle then testified about the factors she found significant from Appellant's offense patterns as they related to a diagnosis and risk assessment. Ultimately, she diagnosed Appellant with pedophilia, non-exclusive type, and concluded he was a high risk to reoffend sexually if not confined for treatment.[1] (TT, pp. 100-106; R., pp. 100-106).

On cross-examination, Dr. Gehle again testified about the sources of information she reviewed. She stated she follows the ethics code of the American Psychological Association, and is a member of the American Psychology and Law Society, which is a division of the American Psychological Association. She is also a member of the Sex Offender Civil Commitment Program Network, as well as some local mental health organizations. She testified none of those organizations typically issue mandates regarding what should be included in sexual predator evaluations, but the subject is discussed in textbooks and other publications, and she is familiar with "plenty of

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[1] Appellant did not challenge the pedophilia diagnosis at trial, and does not

research" indicating how other professionals approach the evaluations. (TT, pp. 106-110; R., pp. 106-110).

Dr. Gehle readily agreed there are other ways to conduct mental health evaluations, and she relies on the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), as a guideline for a diagnosis, and an actuarial risk assessment tool, as well as behavioral cues from prior offenses and/or current behavior, and the person's self-report, to analyze the person's risk to reoffend sexually. She stated while there are different ways to conduct a risk assessment, the method she uses has "the most research support," and has "been found to be the most accurate." (TT, pp. 111-116; R., pp. 111-116).

The circuit court granted Appellant's motion to suppress to the extent it applied to the contents of the Alabama police reports and records, but ruled Dr. Gehle could testify about anything in those records she discussed with Appellant during the two interviews she conducted with him, and if he admitted the particular subject discussed. The court then allowed Appellant to cross-examine Dr. Gehle about the reliability of her evaluation and conclusions. (TT, pp. 116-122; R., pp. 116-122).

Dr. Gehle testified there are identifiable factors she uses in determining whether a person has the ability to control their deviant behavior, which are listed in two publications specifically related to sexual predator evaluations. Those factors include: offending in high risk situations; offending after legal sanctions; verbalizing difficulty controlling their deviant behavior; and insight into their behavior, such as who they

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challenge it in this appeal.

offend against and when they offend. She stated there is no set number of factors the evaluator has to find to conclude a person has difficulty controlling his behavior, and a complete lack of control is not required. (TT, pp. 122-124; R., pp. 122-124).

As to Appellant, Dr. Gehle testified he made statements during the interviews indicating he had difficulty controlling his behavior, and "felt the lack of ability to make a meaningful choice about his behavior." She further testified he offended in very high risk situations, which evidenced an inability to control his behavior. (TT, pp. 124-126; R., pp. 124-126).

Dr. Gehle also testified the risk assessment tool she uses, the Static-99R, is the most accurate actuarial assessment currently available for predicting sexual recidivism, but candidly admitted it is considered "moderately successful," and not perfect. She further stated referring to it as moderately successful could be confusing "for many people." (TT, pp. 126-128; R., pp. 126-128).

Appellant then argued Dr. Gehle's testimony regarding his risk to reoffend because her opinion was based on an actuarial tool that was only "moderately successful." In overruling the objection, the court found:

> You know there are good experts and there are bad experts and there's all range of opinions. And not 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 there's -- without that 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. So as I say, the only way the jury is going to render a decision which contradicts her opinion is to have some other basis for doing that or else a brilliant argument on behalf of your client.

> So I think she's qualified to testify. I think she can testify as to what she saw and heard and that she's able to draw an opinion from that and you can cross examine her until the cows come home. Or you can present evidence on behalf of your client which says that Dr. Gehle is full of hot air. You know, but without that, you're correct, I don't know what the jury will do. But that doesn't mean I can stop her from testifying.

(TT, pp. 128-130; R., pp. 128-130).

Dr. Gehle testified before the jury regarding her education and experience, particularly in evaluating sex offenders under SVPA, and outlined the protocol she follows in SVPA evaluations in general, and the factors she considered in diagnosing Appellant with pedophilia and concluding he was a high risk to reoffend sexually if not confined for long term control, care and treatment. Appellant vigorously cross-examined Dr. Gehle about her protocol and the basis for her conclusions regarding his risk to reoffend, including the validity of the Static-99R assessment tool. (TT, pp. 157-237; R., pp. 157-237).

The jury found Appellant is a sexually violent predator beyond a reasonable doubt, and he was committed to the South Carolina Department of Mental Health for long term control, care and treatment. (TT, pp. 268-269, 271-274, Order of Commitment filed February 24, 2015; R., pp. 268-269, 514-515). This appeal followed.

ARGUMENT

The circuit court properly qualified the State's expert in the field of forensic psychology and allowed her testimony regarding sexual predator evaluations in general, and her evaluation of Appellant in this case.

Appellant contends the circuit court erred in qualifying Dr. Gehle as an expert in forensic psychology, and allowing her to testify regarding his risk to reoffend because there was no evidence her conclusions were reliable. In essence, Appellant asserts the circuit court's gatekeeper function requires the court to both **weigh and accept** an expert's opinion before allowing the jury to hear and weigh the validity of the expert's conclusions.

Whether to admit or exclude expert testimony is a matter committed to the sound discretion of the trial court, and the court's decision will not be reversed on appeal absent an abuse of discretion accompanied by probable prejudice. State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 249 (Ct. App. 2015). An abuse of discretion occurs when the circuit court's conclusions are either unsupported by evidence, or are controlled by an error of law. *Id.* (*citing* State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 495 [2013]). "'A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair.'" *Id.* (*quoting* State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493, 496 [Ct. App. 2003]).

A. Expert Qualification

As a threshold matter, Appellant did not object to Dr. Gehle's qualification as an expert in forensic psychology. To the contrary, when the State offered Dr. Gehle as an expert, the circuit court asked if Appellant had any *voir dire* or objection regarding Dr.

Gehle's qualifications, and counsel stated: "Your honor, we stipulate." (TT, p. 162; R., p. 162). Therefore, the issue of whether Dr. Gehle was properly qualified as an expert in forensic psychology is not preserved for appellate review. *See* State v. White, Op. No. 2013-000638, 2016 WL 1239713, at *3 (S.C. Ct. App., filed March 30, 2016) (an issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

Even if the issue was preserved, however, Appellant's contention is meritless. Pursuant to Rule 702, SCRE, a witness may be qualified as an expert by knowledge, skill, experience, training or education, and may testify in the form of an opinion if the expert's specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in dispute. There can be no dispute Dr. Gehle's very extensive general and specific education and experience in the field of forensic psychology, and her particular experience in evaluating sex offenders under the SVPA, amply, and at a minimum, qualified her to testify as an expert in forensic psychology. Further, it is clear Dr. Gehle's testimony would assist the jury in understanding the mental health evidence necessary to determine the issue in dispute. Thus, the circuit court properly qualified her as an expert in forensic psychology.

B. Reliability

Citing State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), Appellant contends the circuit court failed to determine Dr. Gehle's opinion testimony was reliable, and asserts the court's "weight, not admissibility" reasoning in overruling his objection "was outdated" after White. While White does require the circuit court to make a "threshold"

reliability finding under Rule 702, there is no formula for the court to follow in cases involving the type of nonscientific expert testimony at issue in this case.[2]

As the Supreme Court stated in White:

> The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence **serve no useful analytical purpose when evaluating nonscientific expert testimony.** We have set forth above foundational requirements for Rule 702 expert testimony concerning dog tracking evidence.
>
> We do not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to **nonscientific** expert evidence. Consequently, we offer no formulaic approach that will apply in the generality of cases. Yet the trial court in the discharge of its gatekeeping role in determining admissibility **must initially answer the always present threshold questions of qualification and reliability.**
>
> We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the **threshold** foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only **after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.**

676 S.E.2d at 688-689 (emphasis added).

Appellant basically argues Dr. Gehle's candid testimony regarding different protocols used in conducting SVPA evaluations, and the "moderately accurate" actuarial risk assessment tool she uses, conclusively establishes her evaluation and testimony was unreliable. As support for this contention, Appellant takes portions of Dr. Gehle's

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[2]Notably, the trial in this case took place five years after White, and the presiding judge was an experienced, well-respected jurist. It is reasonable to assume he was aware of the White case, and analyzed Dr. Gehle's testimony accordingly.

testimony out of context, ignores other significant parts of her testimony, and relies on the analysis used for scientific expert testimony, which does not apply in this case.

The most pronounced fallacy of Appellant's argument is his focus on Dr. Gehle's use of the Static-99R risk assessment tool, which she testified was considered "moderately accurate." If the Static-99R was the sole basis for Dr. Gehle's opinion,[3] Appellant might have a legitimate argument. Dr. Gehle testified she considered numerous other factors, however, including the facts of Appellant's offenses, his prior unsuccessful sex offender treatment, and statements he made to her during their interviews, particularly regarding his continuing sexual preoccupation with young girls, and she explained in detail how each factor was significant to her ultimate opinions regarding his diagnosis and his risk to reoffend.. (TT, pp. 162-216; R., pp. 162-216).

The circuit court considered Dr. Gehle's expert qualifications, and made the required threshold determination her evaluation and testimony were reliable. SVPA cases involve mental health diagnoses and determinations regarding an individual's risk to reoffend sexually if not confined for treatment, both of which are complex questions regarding a person's mental status, and neither is capable of precise mathematical calculation. Experts in the field use tools such as the DSM-5 and the Static-99R, combined with information available about the person's past behavior, any treatment experiences, and the person's self-reports, to reach a proper mental health and/or

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[3]The Static-99R developers discourage use of it as a stand-alone risk assessment tool because it is designed to be used as one part of a psychosexual evaluation, and the score should considered in concert with the type of information Dr. Gehle outlined and considered in Appellant's evaluation.

personality disorder diagnosis, and to analyze the person's risk to reoffend sexually if not confined for treatment.

Ironically, Appellant seeks to exclude Dr. Gehle's testimony regarding his risk to reoffend because there was no evidence Dr. Gehle's work had been peer reviewed and another expert in the field concurred with her results in this case. It could easily be implied from the record that another expert **did** review Dr. Gehle's analysis, however, and **agreed** with her ultimate conclusions.

During the pre-trial hearing, Appellant moved to preclude the State from making any reference to an evaluation by Dr. Geoff McKee, who conducted a second evaluation at Appellant's request, but was not going to testify on Appellant's behalf at trial. Under existing case law, the State conceded it was prohibited from mentioning Dr. McKee or the fact he would not be testifying at trial. Given that prohibition, Appellant now seeks to have the cake and eat it too by asserting the circuit court should have suppressed Dr. Gehle's testimony because there was no evidence any other expert reviewed her work and confirmed her findings, while the State is now **precluded** from presenting the very evidence Appellant claims is necessary to prove reliability.

Taken to its logical conclusion, Appellant's argument expands the circuit court's gatekeeper function, as least to the extent it applies to expert testimony, far beyond merely determining reliability of the expert's methodology, and allow expert testimony only if the court actually finds the expert credible, and believes the proffered opinion. White did not expand the court's gatekeeper function to such an extent, but merely made it clear the trial court must make a threshold reliability determination.

Further, Appellant's contention there was no basis for the circuit court's reliability determination in this case is patently incorrect. During the proffer of her testimony, both on direct and cross-examination, Dr. Gehle testified extensively about the research regarding sex offender evaluations, including risk assessments, and how she bases her evaluation protocol on various tools and factors recognized in the field of forensic psychology. She further testified about the specifics of Appellant's evaluation, and indicated the recognized significant factors she considered in reaching her opinions. In addition, she identified certain factors that were previously considered significant, such as empathy and remorse, but the research now indicated they were not as significant. When her testimony is viewed in its entirety rather than isolated snippets referenced by Appellant, it is abundantly clear Dr. Gehle is well versed in the literature and research regarding sex offender evaluations and risk assessment analysis, and applies protocols developed by other professionals in her field.

Appellant's assertion Dr. Gehle's testimony was unreliable simply because she admitted there are other ways to conduct a risk assessment evaluation is nonsensical. In scientific fields such as DNA analysis, blood alcohol content, and other lab functions, the methodology for preparing, analyzing and/or comparing specimens is usually fairly specific and universal, primarily because it is based on math and science with little clinical judgment involved. In nonscientific fields such as mental health evaluations, and even some other medical fields, there is rarely only one method to conduct an evaluation and render an opinion. As the circuit court recognized in this case, different experts in both scientific and nonscientific situations can look at the same documentation and conduct the same examinations, and reach completely different results, but that does

not render their opinions unreliable. Arguably, Dr. Gehle's candid admission her methodology is not the only one used by experts in the field makes her work even more credible and reliable.

Finally, if, as Appellant asserts, White requires evidence of peer review and concurrence with a proposed expert witness' methodology and ultimate opinion every time a party seeks to present expert testimony, parties' access to experts will be significantly curtailed by the sheer expense of hiring at least two experts for trial, and juries will not have the benefit of expert testimony on issues outside the ordinary lay juror's general knowledge. The State submits the White court never intended such a wide sweeping, and ultimately harmful, result, and nothing in subsequent case law supports Appellant's position.

There was ample evidence before the circuit court from which it could make a threshold reliability finding regarding Dr. Gehle's expert testimony, and the court acted well within its discretion in qualifying Dr. Gehle as an expert, and determining her testimony was sufficiently reliable to allow the jury to hear it and give it any weight deemed appropriate in determining the facts of the case.[4] Appellant was able to extensively cross-examine Dr. Gehle about her evaluation methodology and conclusions, and the jury was free to accept or reject her testimony. Therefore, the court's ruling should be affirmed.

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[4]The court clearly found Dr. Gehle's testimony **both** credible and reliable by noting the only way the jury could render a decision contradicting her opinion was to have either some other basis for doing so (*i.e.*, a competing expert), or a brilliant argument by Appellant's counsel. (TT, p. 129; R., p. 129).

CONCLUSION

Based on the foregoing, Respondent submits the jury verdict finding Appellant is a sexually violent predator beyond a reasonable doubt should be affirmed.

Respectfully submitted,

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May 13, 2016

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent by depositing a copy in the United States mail, postage prepaid, addressed to:

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

This 13th day of May, 2016.

Sally B. Ellison

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