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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
The Honorable Daniel D. Hall, Circuit Court Judge
Appellate Case No. 2017-001345

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SC Court of Appeals

IN THE MATTER OF THE CARE AND TREATMENT
OF FRANKLIN MOSIER,

Appellant,

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court did not abuse its discretion in allowing the State's expert to testify about Appellant's penile plethysomgraph (PPG) results because the Confrontation Clause does not apply to this civil action, and the PPG is widely used and accepted by the mental health community in evaluating sex offenders, and issues regarding the doctor who conducted the PPG went to the evidence's weight.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In 2011, Appellant Franklin Mosier pled guilty (no contest) to one count of assault and battery of a high and aggravated nature – indecent liberty, and was sentenced to ten years incarceration. The sentencing judge specifically found the offense should be considered a sexually violent offense for purposes of the South Carolina Sexually Violent Predator Act (SVPA). (State's Exhibit 1; Record on Appeal [R.], pp. 178-180). Prior to his release from prison, the State commenced a civil proceeding pursuant to the SVPA, seeking his commitment for long term control, care and treatment as a sexually violent predator. The case was called for a jury trial on June 12, 2017, before the Honorable Daniel D. Hall, Circuit Court Judge.

Before the jury was sworn, Appellant moved to exclude any testimony regarding a penile plethysmograph (PPG) on which the court appointed evaluator, Amy C. Swan, Psy.D., relied in forming the basis for her opinion that Appellant met the criteria for commitment as a sexually violent predator. Appellant argued the testimony would violate the Confrontation Clause because the PPG was performed by another doctor who would not testify at trial and could not be cross-examined, and the PPG was not reliable. (Trial Transcript [TT], pp. 39-40; R., pp. 13-14).

The State argued the PPG is now a widely recognized and valuable tool in the evaluation and treatment of sex offenders, the doctor who performed Appellant's PPG was a recognized expert in the field, and Dr. Swan relied on the results much like a doctor relies on the results of blood tests and x-rays performed by other professionals. Dr. Swan then testified, *in camera*, about the procedures used in performing PPGs, what a PPG is designed to reveal in terms of sexual deviance and the risk of sexual recidivism, and the wide acceptance of PPG testing in the mental health community. (TT, pp. 40-51; R., pp.14-25).

Dr. Swan stated she was originally trained in plethysmography in 1999, with updated

training in 2013, and Appellant's PPG, which she used as one piece of data in a comprehensive evaluation, confirmed the sexually deviant interests exhibited by his sex offenses, specifically arousal to preschool and grammar school females. On cross-examination, Dr. Swan testified there are standardized stimulus sets used for the particular type of PPG used in Appellant's case, and the doctor who performed the PPG, Dr. William Burke, has performed PPGs for many years. She further testified there has been much research regarding the validity of PPG testing, and it has been found to be a valid indicator of a male's sexual interest. (TT, pp. 52-61; R., pp. 26-35).

The circuit court denied Appellant's motion to exclude the PPG evidence, finding the facts or data contained in the PPG report on which Dr. Swan relied "is of a type that's reasonably relied upon by experts in her particular field." As to the Confrontation Clause, the court found Rule 703, SCRE, governed the admissibility of evidence relied on by experts, which included any confrontation issues, and declined to rule further on the issue. (TT, pp. 61-62; R., pp. 35-36).

After the jury was sworn, Dr. Swan was qualified, without objection, as an expert in psychology and forensic psychology. She testified she is a licensed psychologist, has been practicing for nineteen years, during which she testified as an expert hundreds of times, and she is a member of the Association for the Treatment of Sex Abusers (ATSA). (TT, pp. 75-82; R., pp. 49-56).

Dr. Swan stated she was appointed by the court to evaluate Appellant under the SVPA. Her evaluation protocol includes obtaining and reviewing all available documentation regarding the individual and the criminal offenses, including police reports, court documents, victim statements, psychological evaluations, probation and parole notes, and anything else the legal system has regarding the individual. She then conducts an extensive interview with the individual, which covers everything from birth to the date of the interview, including family

history, educational history, occupational history, relationship history, medical history, legal history and sexual history. She testified this is the type of information typically and reasonably relied on and used by experts in her field of expertise, and she followed the protocol in evaluating Appellant. (TT, pp. 83-85; R., pp. 57-59).

The documents Dr. Swan reviewed in this case revealed Appellant was indicted on one count of criminal sexual conduct with a minor first degree in 1998, arising from his molestation of a ten year old female, he pled guilty in 2000 to one count of ABHAN, and was sentenced to seven years incarceration suspended to five years probation. She testified this arrest and conviction should have been a “wake-up call” for Appellant because he knew such conduct could get him arrested and sent to prison, but he reoffended by molesting his female cousin multiple times when she was eight to ten years old. The molestation of his cousin resulted in 2010 charges of criminal sexual conduct with a minor first degree and lewd act on a minor, and Appellant’s guilty plea to ABHAN in 2011. (TT, pp. 85-95, State’s Exhibit 1; R., pp. 59-69, 178-180.

When Dr. Swan discussed the 1998 charge with Appellant, he stated he “messed” with the victim “a little bit here and there,” and admitted touching the victim, but denied penetrating her. (TT, p. 91; R., p. 65). Regarding the 2010 charges, Appellant admitted touching the victim on her vagina, butt and breasts, but could not remember how many times he did it, and denied ever holding her down or penetrating her. He also told Dr. Swan about other previously unidentified minor victims, and stated he “would still like to get some help meaning help for his sexual problems.” (TT, pp. 96-97; R., p. 70-71).

Appellant told Dr. Swan “he had sexual interest in children from the ages of five up to seventeen, with forty percent of his current fantasies involving that age group and sixty percent

involving females over eighteen. He also told her “he had been having weird dreams about molesting children while he was in prison and he wakes up sweating.” (TT, pp. 97-98; R., pp. 71-72).

Dr. Swan testified about the PPG Dr. William Burke performed on Appellant at her request, and stated she has sent many cases to Dr. Burke for PPG testing. She explained the PPG process, and what it is designed to measure. In Appellant’s case, the PPG confirmed what Appellant told her about his current sexual fantasies, with his greatest arousal to adult females, but a significant arousal to prepubescent and adolescent females. (TT, pp. 98-103; R., pp. 72-77)

Based on Appellant’s history of sexual deviance toward children, his acting on that sexual deviance by molesting multiple prepubescent children over a period exceeding six months, the results of actuarial (Static 99-R) and physiological (PPG) tests, his lack of sex offender treatment, and her interview with Appellant, Dr. Swan diagnosed Appellant with pedophilic disorder (attracted to female prepubescent children), other specified paraphilic disorder (attracted to young pubescent or non-consenting partners), and anti-social personality disorder. She testified to a reasonable degree of psychological certainty Appellant’s mental disorders predispose him to offend against children, and make him likely to commit acts of sexual violence against children if not confined for treatment, especially when combined with his personality disorder. (TT, pp. 103-118; R., pp. 77-92).

Appellant cross-examined Dr. Swan extensively regarding the financial compensation she receives from evaluating sexual predators in South Carolina, and the contents of her report in Appellant’s case. He also questioned her extensively regarding the PPG, particularly its reliability and acceptance in the mental health community. Dr. Swan acknowledged that while there is a standard set of stimuli for the type of PPG administered by Dr. Burke, there could be

some difference in results depending on the experience of the person administering the test. She further acknowledged some evaluators will not use the PPG, with particular criticism regarding the twenty to thirty percent of individuals who show no response at all to any stimuli. She also stressed the PPG results were not the sole basis for her opinion regarding whether Appellant meets the criteria for civil commitment. (TT, pp. 120-152; R., pp. 94-126).

The jury found beyond a reasonable doubt Appellant is a sexually violent predator, and after denying Appellant's post-trial motion, the circuit court committed him to the South Carolina Department of Mental Health for long term control, care and treatment. (TT, pp. 200-202, Order of Commitment filed June 13, 2017; R., pp. 174-176, 303). This appeal followed.

ARGUMENT

The circuit court did not abuse its discretion in allowing the State's expert to testify about Appellant's penile plethysomograph (PPG) results because the Confrontation Clause does not apply to this civil action, and the PPG is widely used and accepted by the mental health community in evaluating sex offenders, and issues regarding the doctor who conducted the PPG went to the evidence's weight.

Appellant contends the circuit court erred in denying his motion to exclude evidence regarding the PPG conducted by Dr. Burke because he was entitled to cross-examine Dr. Burke under the Confrontation Clause, and there are no South Carolina appellate court cases finding the PPG is reliable. The Confrontation Clause does not apply in this case, and the evidence before the circuit court amply supported admission of the PPG evidence.

A. Standard of Review

The decision to admit or exclude expert testimony is within the sound discretion of the circuit court. State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 249 (Ct. App. 2015) (*citing* State v. Price, 368 S.C. 494, 629 S.E.2d 363, 365 [2006]). The circuit court's decision to admit expert testimony will not be reversed on appeal absent “a manifest abuse of discretion accompanied by probable prejudice, which occurs when the circuit court's conclusions “either lack evidentiary support or are controlled by an error of law.” *Id.* (*quoting* State v. Douglas, 369 S.C. 424, 632 S.E.2d 845, 848 [2006]); *see also* In re Care & Treatment of Manigo, 389 S.C. 96, 697 S.E.2d 629, 633-34 (Ct. App. 2010) (same), *aff'd* In re Manigo, 398 S.C. 149, 728 S.E.2d 32 (2012). “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]) (alteration in original).

B. Expert Testimony

An expert witness may state an opinion based on facts not within his or her firsthand

knowledge, and may base his or her opinion on information, whether or not admissible, made available before the hearing if the information is of the type reasonably relied upon in the field to make opinions. Manigo, 697 S.E.2d at 634. Further, the expert may testify as to matters of hearsay for the purpose of showing what information he or she relied on in giving an opinion of value. *Id.* (expert psychiatrist testified she relied on information she received from another doctor to form the basis of her opinion the respondent was a sexually violent predator); *see also* Rule 703, SCRE (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”). In determining whether to admit expert testimony, the trial court must make three inquiries: (1) whether the evidence will assist the trier of fact; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in that particular subject matter, and (3) whether the substance of the testimony is reliable. State v. Jones, No. 2016-001933, 2018 WL 3297908, at *2 (S.C. July 5, 2018).

C. Confrontation Clause

Relying solely on a criminal case, Appellant makes the conclusory argument the Confrontation Clause entitled him to cross-examine Dr. William Burke, who actually administered the PPG test at issue. This argument is facially meritless.

The right to confront witnesses is found in the Sixth Amendment to the United States Constitution.

In all **criminal prosecutions**, the accused **shall enjoy the right** to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be**

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI (emphasis added). Thus, on its face, the Confrontation Clause **only** applies to criminal prosecutions.

Actions pursuant to the SVPA are civil in nature. “While the Act bestows some of the rights normally associated with criminal prosecutions, it is not intended to be punitive in nature; rather, it sets forth a civil process for the commitment and treatment of sexually violent predators.” In re Care & Treatment of Canupp, 380 S.C. 611, 671 S.E.2d 614, 617 (Ct. App. 2008). Accordingly, the Confrontation Clause does not apply to SVPA proceedings.¹

D. Penile Plethysmography

The PPG’s history goes back to 1908, when a type of plethysmograph was used to check the effect of certain drugs on the vasomotor reflexes in dogs. Barker, James, and Howell, Robert, The Plethysmograph: A Review of Recent Literature, Bull Am. Acad. Psychiatry Law, 20(1): 13-25 (1992). In the 1930s, the plethysmograph was used to assess erectile difficulties. *Id.*

Beginning in 1957, the PPG was used in Czechoslovakia as a method to determine the validity of homosexuality claims by soldiers attempting to avoid military service, and now, it “is a widely recognized means of measuring male sexual arousal to given stimuli.” Murphy, L., *et. al.*, Standardization of Penile Plethysmography in Assessment of Problematic Sexual Interests, J. Sex. Med. 12(9): 1853-1861 (2015). It “has become a standard objective measure of arousal and is considered by some researchers and clinicians to be essential in the assessment and treatment of male sex offenders and men with paraphilic interests.” *Id.*; *see also* Murphy, L., *et. al.*,

¹The circuit court found any confrontation issues were covered by Rule 703, SCRE, which allows an expert to base an opinion or inference on facts or data “perceived by or made known to the expert at or before the hearing.” (TT, pp. 61-62; R., pp. 35-36).

Assessment of Problematic Sexual Interests with the Penile Plethysmograph: an Overview of Assessment Laboratories, Current Psychiatry Reports 17(5):567 (2015) (PPG “is an objective assessment of sexual arousal based on the change in penis circumference and volume due to increased vasocongestion in the penis”); Howes R. J. & Howes, S. E., Sexual Arousal as a Function of Stimulus Mode: Implications for Phallometric Assessment, J. Forensic Res. 8(6):398 (2017) (PPG is “[p]erhaps the best means of objectively measuring deviant sexual interest”).

The PPG’s general purpose is to measure male sexual arousal regardless of how the result is used, including assessing erectile dysfunction, checking function after a prostatectomy, or to determine the efficacy of a sexual behavior treatment. The PPG has undergone Federal Drug Administration review, and the FDA has approved several PPG systems, including the Limestone system used by Dr. Burke in this case. *See* 501(k) Summary – Limestone Technologies, Inc. (https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf).

In addition, the Medicaid/Medicare regulations provide coverage for PPG tests. *See* Federal Register Volume 72, Number 61, Addendum III and Addendum V (Friday, March 30, 2007) (<https://www.gpo.gov/fdsys/pkg/FR-2007-03-30/html/07-1414.htm>). Major insurance companies, such as Blue Cross Blue Shield, also recognize the PPG as a medical procedure, and either provide limited coverage, or exclude it from coverage. *See* Blue Cross Blue Shield of Texas, Treatment of Male Sexual Dysfunction, Special Comment on Contract Exclusions (January 7, 2003) (<https://www.bcbstx.com/provider/pdf/medicalpolicies/surgery/717-010.pdf>). The Federal Government’s and insurance companies’ recognition of the PPG as a valid medical device and procedure amply demonstrates its general acceptance.

The PPG’s principal purpose in sexual offending behavior evaluations is determining an individual’s level of risk to commit acts of sexual aggression by measuring the extent to which

the individual is dominated by sexual arousal to deviant stimuli, and predictions of risk to re-offend “are rendered much more accurate by the inclusion of data from this technique.” Howes, R. J., Measurement of Risk of Sexual Violence Through Phallometric Testing, Legal Medicine 11:368-369 (2009). “Although not universally embraced, there nonetheless remains widespread acceptance and recognition of the value of phallometric assessment,” and it “is certainly an assessment procedure which has come a long way since it was first devised.” Howes & Howes, *supra*.²

Further evidence of the PPG’s general acceptance in the mental health community, and perhaps the strongest evidence, is found in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed. (DSM-V), which mental health professionals often refer to as “the bible” for mental health diagnosis purposes. In the section regarding paraphilic disorders, the DSM-V provides:

The most widely applicable framework for assessing the strength of a paraphilia itself is one in which examinees’ paraphilic sexual fantasies, interest and behaviors are evaluated in relation to their normophilic sexual interests and behaviors. In a clinical interview or on self-administered questionnaires, examinees can be asked whether the paraphilic sexual fantasies, urges or behaviors are weaker than, approximately equal to, or stronger than their normophilic sexual interest sexual interests and behaviors. The same type of **comparison can be, and usually is, employed in psychophysiological measures of sexual interest, such as penile plethymography in males** or viewing time in males and females.

DSM-V 686 (emphasis added). It also provides:

² Both the polygraph and the PPG measure physical changes, but the PPG differs significantly in that it measures the size of an erection, which is either there or it is not. Unlike the polygraph, during which the examiner makes subjective interpretations of responses as they occur, the PPG technician makes no such interpretation. The PPG results, i.e., the size of the penis erection during certain stimuli, are recorded by the machine with the technician in a separate room. The evaluator then reviews the results and compares the level of arousal to one stimuli set versus another set, which is done by mathematical formula. Experts can disagree about the significance of one arousal over another, but that is no different than any other issue subject to expert opinion.

Psychophysiological measures of sexual interest may sometimes be useful when an individual's history suggest the possible presence of pedophilic disorder but the individual denies strong or preferential attraction to children. **The most thoroughly researched and longest used of such measures is penile plethysmography**, although sensitivity and specificity of diagnosis may vary from one site to another.

DSM-V 699 (emphasis added). Previous DSM versions did not recognize the PPG, however, by the time the DSM-V was published in 2013, there was sufficient research indicating the PPG's validity as a tool to measure an individual's sexual interest.

Courts have also recognized the general acceptance and admissibility of the PPG in sexually violent predator cases. In In re Detention of Halgren, 156 Wash. 2d, 132 P.3d 714 (2006), the Washington Supreme Court found PPG results were admissible as part of the diagnostic process, and the PPG testimony would assist the jury in understanding the expert's sexual deviancy diagnosis. *Id.* at 719. The court further found the issue of the PPG's reliability goes to the weight of the evidence rather than its admissibility *Id.*; *see also* In re Detention of Herrick, 198 Wash. App. 439, 393 P.3d 879, 885 (2017), *aff'd*, 190 Wash. 2d 236, 412 P.3d 293 (2018)(same).

The Illinois appellate court also found PPG evidence was admissible in In re Commitment of Sandry, 367 Ill.App.3d 949, 858 N.E.2d 295 (2006). As to the admissibility of a particular test or methodology, the court stated: "once it is determined that a methodology is generally accepted, it follows that it has achieved a sufficient degree of reliability and validity to cross the threshold of admissibility." *Id.* at 309. The court then engaged in an exhaustive analysis of case law (use of PPG mentioned in at least 21 states, including South Carolina), statutes (eleven state statutes) and regulations. *Id.* at 310-313.

The court also discussed numerous academic articles, which it determined provided ample support "to conclude that PPG testing is accepted by a substantial number of experts in

this field such that it may be used to support a qualitative assessment of the future dangerousness of an individual.” *Id.* at 309-316. Acknowledging some experts have criticized and rejected PPG testing, the court noted the existence of contrary authority is not dispositive because many people could disagree on the acceptance of any given methodology, but those who accept it may still constitute a significant subset of experts in any given field. *Id.* at 316; *see also State v. Graham*, 275 Kan. 176, 183, 61 P.3d 662, 667 (2003) (some disagreement in the scientific and medical community as to the reliability of a particular test method is a matter affecting the weight of such evidence and not its admissibility; such evidence is admissible if a qualified expert witness testifies the particular test method is reliable and accurate, and it is generally accepted as such by other experts in the field).

In this case, Dr. Swan explained the PPG procedures, and testified the PPG is the greatest indicator of sexual reoffense, particularly related to children, and it can indicate an individual’s areas of sexual arousal. She stated she had been evaluating sex offenders for eighteen years, and she was trained on the PPG in 1999, with updated training in 2013, and described in detail the quality control methods used for the PPG. She further stated the PPG is consistent with recognized scientific laws and principles, and while she used the PPG in forming her opinion, it was not the sole basis for her opinion, but one piece of a comprehensive evaluation. (TT, pp. 46-53; R., pp. 20-27).

On cross-examination, Dr. Swan testified there are standardized stimulus sets for the PPG utilized by Dr. Burke during Appellant’s test. She acknowledged the sensitivity and specificity may vary among testing sites, which may be caused by the test administrator’s experience, or lack thereof, but stated Dr. Burke has many years experience conducting PPG tests. She further testified there has been research regarding the PPG’s reliability since the 1950s, with many types

of research studies conducted, and the studies have determined the PPG is reliable. (TT, pp. 53-61; R., pp. 27-35).

The evidence presented satisfied all three requirements for admissibility. There can be no doubt the PPG evidence would assist the trier of fact in understanding Dr. Swan's diagnosis and how she formed it. Dr. Swan's qualifications as an expert in the field of evaluating sex offenders generally, and use of the PPG specifically, were essentially undisputed. Finally, her testimony that the PPG had been thoroughly researched and found to be reliable was also virtually undisputed. Therefore, the circuit court properly admitted the PPG evidence.

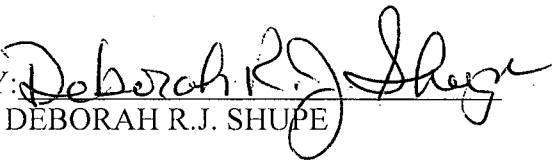
CONCLUSION

Based on the foregoing, Respondent submits the jury's verdict and Appellant's commitment for long term, control, care and treatment should be affirmed.

Respectfully submitted,

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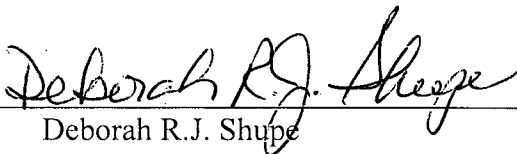
CERTIFICATE OF COUNSEL

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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