

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
The Honorable James R. Barber, Circuit Court Judge
Appellate Case No. 2017-000610

IN THE MATTER OF THE CARE AND TREATMENT
OF JAMES GIBSON,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

RECEIVED

MAY 16 2018

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
The Honorable James R. Barber, Circuit Court Judge
Appellate Case No.2017-000610

IN THE MATTER OF THE CARE AND TREATMENT
OF JAMES GIBSON,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
ARGUMENT	7
The circuit court properly denied Appellant's request to qualify a witness as an expert and allow her to testify regarding Appellant's pedophilia diagnosis because the witness' experience in education, including courses in psychology, and counseling did not qualify her to evaluate and render a clinical opinion regarding a particular person's diagnosis and mental status for purposes of the SVPA..	7
CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases:

<u>Bluffton Towne Ctr., LLC v. Gilleland-Prince</u> , 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015)...	9
<u>Burke v. Republic Parking Sys., Inc.</u> , 421 S.C. 553, 808 S.E.2d 626 (Ct. App. 2017).....	9
<u>Creed v. City of Columbia</u> , 310 S.C. 342, 426 S.E.2d 785 (1993).....	7
<u>Gooding v. St. Francis Xavier Hosp.</u> , 326 S.C. 248, 487 S.E.2d 596 (1997).....	7
<u>Jensen v. Conrad</u> , 292 S.C. 169, 355 S.E.2d 291 (Ct. App. 1987)	9
<u>Lee v. Suess</u> , 318 S.C. 283, 457 S.E.2d 344 (1995).....	7
<u>O'Tuel v. Villani</u> , 318 S.C. 24, 455 S.E.2d 698 (Ct. App. 1995).....	7
<u>State v. Williams</u> , No. 2013-002304, 2018 WL 1074369 (S.C. Ct. App. Feb. 28, 2018).....	9
<u>State v. Young</u> , 420 S.C. 608, 803 S.E.2d 888 (Ct. App. 2017).....	9
<u>Teseniar v. Professional Plastering & Stucco, Inc.</u> , 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014).....	8
<u>Walker v. The Bluffs Apartments</u> , 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1996).....	7
<u>Watson v. Ford Motor Co.</u> , 389 S.C. 434, 699 S.E.2d 169 (2010).....	8

Statutes:

S.C. Code §§44-48-10 through -170 (2015).....	3
---	---

STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Appellant's request to qualify a witness as an expert and allow her to testify regarding Appellant's pedophilia diagnosis because the witness' experience in education, including courses in psychology, and counseling did not qualify her to evaluate and render a clinical opinion regarding a particular person's diagnosis and mental status for purposes of the SVPA.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In April 1995, Appellant James Gibson pled guilty in Orangeburg County to one count of Lewd Act upon a Minor under the age of Sixteen, and one count of criminal sexual conduct with a minor first degree, and received consecutive sentences totaling forty years. Prior to Appellant's release from incarceration, Respondent State of South Carolina commenced an action pursuant to the Sexually Violent Predator Act (SVPA), S.C. Code §§44-48-10 through -170 (2015), seeking his civil commitment for long term control, care and treatment in a secure facility. The matter was called for a jury trial on February 23, 2017, before the Honorable James R. Barber, Circuit Court Judge.

Marie Gehle, Psy.D., was qualified as an expert in forensic psychologist, and testified she was appointed by the court to evaluate Appellant and determine if he met the criteria for commitment under the SVPA. As part of the evaluation process, she reviewed extensive documentation regarding Appellant's personal and criminal history, as well as his behavior while incarcerated, which are the type of documents relied on by experts in her field. She also had Appellant complete a psychological test, completed an actuarial risk assessment tool, and conducted an extensive interview with him. (Trial Transcript [TT], pp. 29-38; Record on Appeal [R.], pp. 29-38).

Dr. Gehle testified a person's past sexual conduct relates to his risk to reoffend if it reveals pattern of behavior, which tend to remain stable over time. Appellant's sex offense history showed charges and convictions for sexual offenses between 1982 and 1995, which occurred over multiple states (Kansas, North Carolina and South Carolina). The convictions included lewd and lascivious behavior toward minors, taking indecent liberties with a child, and criminal sexual conduct with a minor. In addition, Appellant had a sexual misconduct

disciplinary while incarcerated in the S.C. Department of Corrections, which resulted from an alleged rape of another inmate. (TT, pp. 38-59; R., pp. 38-59).

Based on all the information she received, Appellant's score on the psychological test and the results of the actuarial based risk assessment tool, Dr. Gehle concluded to a reasonable degree of psychological certainty Appellant has the mental abnormalities of pedophilia and exhibitionism. She also concluded beyond a reasonable degree of psychological certainty Appellant's his mental abnormalities cause him serious difficulty controlling his behavior, and make him likely to commit future acts of sexual violence if not confined for long term control, care and treatment. (TT, pp. 59-68; R., pp. 59-68).

After the State rested its case, Appellant sought to call Charlotte Taylor, Ed.D, as an expert in psychology and counseling, stating she taught college level courses in psychotherapy, psycho-diagnostics and psycho-pharmacology. The State objected, noting the State had no notice she would be called as an expert witness, and arguing she had not conducted an evaluation of Appellant under the SVPA, and she was licensed as a professional counselor and professional counselor supervisor, not a psychologist. The State conceded Dr. Taylor could be qualified as an expert in professional counseling and professional counseling supervision. (TT, pp. 91-93; R., pp. 91-93).

Dr. Taylor then testified *in camera* regarding her education and experience. She had an undergraduate degree in counseling with a major in psychology and a minor in counseling, a master's degree in counseling and a graduate degree in counseling with a minor in psychology. She stated she taught counseling and psychology courses at Clemson University and other state colleges. She further testified she had experience working with crime victims, and had testified

as an expert on behalf of victims. On cross-examination, Dr. Taylor conceded she was not licensed in South Carolina as a clinical psychologist. (TT, pp. 93-98; R., pp. 93-98).

The court ruled Dr. Taylor could not be qualified as an expert in psychology. In support of the ruling, the court noted she was not licensed or trained as a psychologist, she was not a practicing psychologist, she was a counselor in education, which included taking and teaching some psychology related courses, but she was not a professional psychologist. (TT, p. 98; T., p. 98).

Appellant then proffered the testimony Dr. Taylor would give as an expert in psychology. Specifically, she testified Appellant was not a pedophile based on her research, as well as her interaction with Appellant “in instruction and in therapy.” She also testified Appellant’s offenses against children did not indicate pedophilia because “his initial offenses were exploratory,” “he was development delayed at the age of eighteen,” and he “was attempting to determine whether he was homosexual, heterosexual or bisexual.” At the close of her proffered testimony, the court again ruled she could not be qualified as a psychologist because she was not licensed as a psychologist, she was not a practicing psychologist, and she was not a psychologist “at all.” (TT, pp. 98-104; R., pp. 98-104).

Dr. Taylor then testified before the jury, and was qualified as an expert in counseling. She stated she worked with Appellant while he was incarcerated, including teaching him in a life skills class, and facilitating his participation in group and individual therapy. She testified extensively about Appellant’s childhood, which included significant abuse due to physical disabilities, and prevented him from learning about healthy relationships. She also testified in depth about the work she did with Appellant in counseling, and stated she worked with him on

his “sexual identity issues.” Further, she testified about Appellant’s relapse prevention plans after his release. (TT, pp. 112-133; R., pp. 112-133).

Dr. Gehle testified on rebuttal that Dr. Taylor’s testimony did not change her previously stated opinions. Specifically, she stated the pedophilia diagnosis was based on Appellant’s documented sexually inappropriate behavior toward children, and whether he was trying to work out sexual abuse or sexual identity issues was irrelevant to the diagnosis. She further testified Appellant was three times more likely than the average sex offender to commit another sexual offense. (TT, pp. 157-158; R., pp. 157-158).

The jury found Appellant is a sexual predator beyond a reasonable doubt, and the court committed him to the S.C. Department of Mental Health for long term control, care and treatment. (TT, p. 190, Order of Commitment filed February 23, 2017; R., pp. 195).

ARGUMENT

The circuit court properly denied Appellant's request to qualify a witness as an expert in psychology and allow her to render an opinion regarding Appellant's pedophilia diagnosis because the witness' experience in education, including courses in psychology, and counseling did not qualify her to evaluate and render a clinical opinion regarding a particular person's diagnosis and mental status for purposes of the SVPA.

Appellant contends the circuit court erred by refusing to qualify Dr. Taylor as an expert in psychology based "solely" on the fact she was not licensed as a psychologist in South Carolina. To the contrary, the circuit court's ruling was not based "solely" on Dr. Taylor's lack of a psychology license, and when reviewed in its entirety, the record amply supports the court's ruling. Further, even if the circuit court erred, Appellant was not prejudiced and any error was harmless.

A. Standard of Review

The qualification of expert witnesses and the admissibility of their testimony is largely within the discretion of the trial court, and the appellate court will not disturb the trial court's ruling absent a clear abuse of discretion. Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993); Walker v. The Bluffs Apartments, 324 S.C. 350, 353, 477 S.E.2d 472, 473 (Ct. App. 1996). An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support. Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995).

B. Appellant's Witness

To be competent to testify as an expert, a witness must have acquired by reason of study, experience, or both, such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596, 598 (1997); O'Tuel v. Villani, 318 S.C. 24, 455 S.E.2d 698, 701 (Ct. App. 1995). In executing its gatekeeping duties, the trial court must

make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony: 1) whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury; 2) whether the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter; and 3) whether the substance of the testimony is reliable. Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169, 175 (2010).

While non-compliance with licensing requirements or statutory law in a specialized area should not automatically preclude qualifying a witness as an expert, or serve as the sole basis for refusing to qualify the witness, the trial court can consider it as a factor when judging the witness' qualifications. Teseniar v. Professional Plastering & Stucco, Inc., 407 S.C. 83, 754 S.E.2d 267, 271 (Ct. App. 2014). The trial court's inquiry into a witness' expert qualifications should be broad in scope. *Id.*

In this case, all of Dr. Taylor's degrees were in counseling, with some focus on psychology. Her post-graduate field of practice was counseling, not psychology, and she had **no** experience evaluating or treating sex offenders. While Dr. Taylor had taught college level psychology related courses, those would of necessity be theoretical in nature, and she had no clinical or practical experience as a psychologist, especially in connection with sex offenders. Finally, Dr. Taylor's entire interaction with Appellant was as a counselor, not a psychologist.

In determining Dr. Taylor's qualifications, the circuit court listened to her testimony regarding her education and experience, as well as her contact with Appellant. While the court did consider the fact Dr. Taylor was not licensed as a psychologist, the court also determined she was not a practicing psychologist, or even "a psychologist at all." (TT, p. 104; R., p. 104). Thus, the court broadly considered the evidence regarding Dr. Taylor's qualifications, and properly

refused to qualify her as an expert in psychology based on multiple factors, not “solely” on her lack of licensure to practice psychology in South Carolina.

C. Harmless Error

A judgment will not be reversed for insubstantial errors that do not affect the result. Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 772 S.E.2d 882, 892 (Ct. App. 2015) (*citing* Jensen v. Conrad, 292 S.C. 169, 355 S.E.2d 291, 293 [Ct. App. 1987]). The circumstances of a particular case dictate whether an error is harmless, and the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Williams, No. 2013-002304, 2018 WL 1074369, at *4 (S.C. Ct. App. Feb. 28, 2018). Error is harmless when it could not reasonably have affected the result of the trial. *Id.*; *see also* State v. Young, 420 S.C. 608, 803 S.E.2d 888, 897 (Ct. App. 2017) (same); Burke v. Republic Parking Sys., Inc., 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017) (prejudice in this context means there is a reasonable probability the jury's verdict was influenced by the purported error).

Even if the circuit court erred in refusing to qualify Dr. Taylor as an expert in psychology, the error was harmless in light of the testimony Dr. Taylor was allowed to give regarding her work with Appellant. First, she was qualified as an expert in counseling, and testified at great length regarding Appellant's abusive childhood, which resulted in an attachment disorder. She also testified in depth about Appellant's progress in counseling, which she said was “fantastic.” Then she testified Appellant had sexual identity issues that caused his behavioral problems in the past, but he resolved those issues in counseling with her, and developed a relapse prevention plan which included continued counseling and working with an

organization that provided housing, mentoring and employment assistance. (TT, pp. 112-132; R., pp. 112-132).

In short, the **only** thing Dr. Taylor was not allowed to opine about was Appellant's pedophilia diagnosis, but she indirectly attacked the diagnosis by opining Appellant's past problems were due to his detachment disorder and sexual identity issues. Given her qualification as an expert in counseling, the scope and depth of her testimony and the opinions she was able to express, it simply is not reasonable to conclude the court's refusal to qualify Dr. Taylor as an expert in psychology affected the jury verdict. Therefore, Appellant was not prejudiced by the court's refusal to qualify her as an expert in psychology, and any error in the court's ruling was harmless.

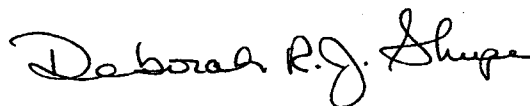
CONCLUSION

For all the foregoing reasons, the State respectfully submits the jury verdict and Appellant's commitment as a sexually violent predator should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098



BY: _____
Deborah R.J. Shupe

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

ATTORNEYS FOR RESPONDENT

May 16, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
The Honorable James R. Barber, Circuit Court Judge
Appellate Case No.2017-000610

RECEIVED

MAY 16 2018

SC Court of Appeals

IN THE MATTER OF THE CARE AND TREATMENT
OF JAMES GIBSON,

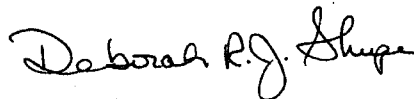
Appellant.

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."

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General



BY: _____
Deborah R.J. Shupe

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

ATTORNEYS FOR RESPONDENT

May 16, 2018