

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Dorchester County
The Honorable George C. James, Jr.
Appellate Case No. 2011-204866

IN THE MATTER OF THE CARE AND TREATMENT OF
BOBBY RUSSELL

Appellant,

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

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

Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

RECEIVED

FEB 26 2013

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 8

 The circuit court properly excluded testimony regarding the results of Russell’s purported polygraph examination because Russell failed to present any evidence regarding the reliability of polygraph examinations in general, or lay a foundation for evidence regarding his purported polygraph examination, and Russell’s self-serving testimony regarding the results of his purported polygraph examination was inadmissible hearsay.

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005) 8

Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (Ct. App. 2008) 9

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999),
cert. denied, 528 U.S. 1050 (1999) 9

State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990) 9

State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) 9

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001) 9

State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006) 8

State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) 8

State v. Samuel, 400 S.C. 593, 735 S.E. 2d 541 (Ct. App. 2012) 9

State v. White, 382 S.C. 265, 676 S.E.2d 684(2009) 8

STATEMENT OF ISSUES ON APPEAL

The circuit court properly excluded testimony regarding the results of Russell's purported polygraph examination because Russell failed to present any evidence regarding the reliability of polygraph examinations in general, or lay a foundation for evidence regarding his purported polygraph examination, and Russell's testimony regarding the results of his purported polygraph examination was inadmissible hearsay.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On November 8, 2010, Appellant Bobby Russell (“Russell”) pled guilty to three counts of lewd act on a child under sixteen. The charges arose from Russell’s 2008 sexual molestation of a four year old female, and his 2009 sexual molestation of a two year old female and her five year old brother. The 2009 molestation occurred while Russell was out on bond from the 2008 incident. (State’s Exhibits 1, 2, and 3; Record on Appeal [R.], pp. 125-134).

In accordance with the Sexually Violent Predator Act (“SVP Act”), prior to Russell’s release from incarceration, Respondent State of South Carolina (the “State”) commenced a civil commitment proceeding in the Dorchester County Court of Common Pleas on February 23, 2011. On March 7, 2011, the circuit court found probable cause to believe Russell met the criteria for commitment as a sexually violent predator, and appointed Peggy C. Wadman, M.D., to conduct a mental health evaluation of Russell. Dr. Wadman diagnosed Russell with the mental abnormality of pedophilia, and found he was a high risk to re-offend sexually which met the criteria for commitment under the SVP Act. (TT, pp. 59-62; R., pp. 29-32).

The case was called for a jury trial on November 1, 2011, before the Honorable George C. James, Jr., Circuit Court Judge. Dr. Wadman testified for the State and was qualified as an expert in forensic psychiatry. (Trial Transcript [TT], pp. 41-44; R., pp. 11-14).

As part of the evaluation, Dr. Wadman reviewed all the documentation regarding Russell’s criminal offenses and sex offender treatment, interviewed Russell, and administered psychological tests designed to assess a sex offender’s risk of re-offending. (TT, pp. 45-48; R., pp.15-18). She testified she relied on information regarding Russell’s sexual offenses

because “a person’s past behavior is probably the best predictor of what somebody will do in the future.” (TT, p. 48; R., p. 18).

Dr. Wadman testified that according to the records, between 2:00 a.m. and 3:30 a.m. on November 2, 2008, Russell entered a neighbor’s home and sexually molested the neighbor’s four year old daughter. The child reported Russell woke her up by placing his hand over her mouth, and then performed oral sex on her and placed his penis against her vaginal and/or anal area. She stated she told him “no” several times, but he kept doing it until he left her room when she started crying. The child’s father found him in the home, and made him leave. While the child was telling her mother what happened, they heard a sound coming from the child’s bedroom, and when the father went to investigate, he found Russell coming into the room through the window. The father then escorted Russell off the property. Russell was originally charged with criminal sexual conduct with a minor, but pursuant to a plea agreement, he pled guilty to lewd act on a child. (TT, pp. 49-51, State’s Exhibit 3; R., pp. 19-21; 133-134).

Dr. Wadman also testified that while Russell was out on bond from the 2008 charge, he sexually molested a two year old female and her five year old brother. The children’s mother, who did not know about the pending charges, allowed Russell to stay in the home with her, her boyfriend and her two children. The mother questioned the children after she found child pornography on her computer. The two year old disclosed that Russell digitally penetrated her vagina, and the five year old son disclosed that Russell fondled him on at least one occasion. Russell was arrested, and ultimately pled guilty to two counts of lewd act on a minor in connection with these incidents. (TT, pp. 51-53, State’s Exhibits 1 and 2; R., pp.

21-23;125-132.

The circumstances of Russell's offenses were significant to Dr. Wadman because they exhibited an "incredible level of impulseitveity (sic) and inability to control his behavior." She testified he had other significant risk factors for re-offending, including the fact that one of his victims was male, his lack of a long term relationship, his victims were not related to him, and his age at the time he re-offended against the last two victims. (TT, pp. 53-57; R., pp. 23-27).

Dr. Wadman testified, without objection, that she also reviewed and relied on an evaluation performed by William Burke, PhD., including the results of a penile plethysmograph ("PPG") Dr. Burke performed on Russell. She reviewed Dr. Burke's draft report, and spoke with him via telephone about the evaluation. According to Dr. Burke, Russell's highest reaction on the PPG was to "a female child in the persuasive." Dr. Burke also found Russell "had a high level of inattention and impulseitvity (sic)." (TT, pp. 57-59; R., pp. 27-29).

Based on all the information available to her, Dr. Wadman diagnosed Russell with the mental abnormality of pedophilia, non-exclusive type. She stated to a reasonable degree of medical certainty that Russell's pedophilia pre-disposed him to commit future sexually violent offenses. She further found to a reasonable degree of medical certainty that Russell had serious difficulty controlling his behavior, and he was likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care and treatment. (TT, pp. 59-63; R., pp. 29-33).

In response to questions on cross-examination, Dr. Wadman testified Russell told her

he had taken a polygraph in connection with his criminal offenses, but she did not have the results of that test. When asked if it would affect her evaluation if the polygraph came out in Russell's favor, Dr. Wadman stated the fact he confessed and pled guilty to the offenses weighed more heavily in her evaluation. (TT, pp. 64-66; R., pp. 34-36). Russell also questioned Dr. Wadman extensively about her reliance on Dr. Burke's evaluation, including the PPG Dr. Burke conducted on Russell. (TT, pp. 66-81; R., pp. 36-51).

After the State rested its case-in-chief, Russell called Dr. Burke, who was qualified as an expert in the assessment and treatment of individuals with sexual disorders. Dr. Burke testified he assessed Russell prior to his guilty pleas on the lewd act charges. He stated he only prepared a draft report, and after Russell's criminal defense attorney chose not to use his report, he did not prepare a final report. (TT, pp. 86-90; R., pp. 53-57).

Dr. Burke testified about various assessment tools he utilized in his evaluation of Russell, including the PPG, which he discussed in great detail. (TT, pp. 93-103; R., pp. 58-68). He also testified he was not aware of any polygraph examination of Russell, and he could not give an opinion regarding whether Russell met the criteria for commitment as a sexually violent predator because he had no current information regarding Russell. (TT, pp. 104-107; R., pp. 69-72).

Russell then testified about his guilty pleas, and when counsel asked him if he took a polygraph, the State objected, arguing polygraphs were not admissible on the issue of guilt or innocence. Russell argued the PPG essentially measured the same things as a polygraph, but admitted he did not have an expert to testify regarding the polygraph. The circuit court sustained the State's objection, finding polygraphs were not reliable, and therefore, Russell's

testimony regarding the polygraph results was not admissible. (TT, pp. 116, 119-121; R., pp. 81; 84-86).

The jury found beyond a reasonable doubt that Russell is a sexually violent predator. (TT, p. 161, Verdict Form dated November 1, 2011; R., pp. 121, 138). Based on the jury's verdict, the circuit court committed Russell to the South Carolina Department of Mental Health for long term control, care and treatment. (Order of Commitment filed November 1, 2011; R., pp. 137). This appeal followed.

ARGUMENT

The circuit court properly excluded testimony regarding the results of Russell's purported polygraph examination because Russell failed to present any evidence regarding the reliability of polygraph examinations in general, or lay a foundation for evidence regarding his purported polygraph examination, and Russell's self-serving testimony regarding the results of his purported polygraph examination was inadmissible hearsay.

Russell contends the circuit court erred in excluding his testimony that he passed a polygraph examination regarding the criminal charges because the State was allowed to present testimony regarding his PPG results. He asserts the polygraph results were admissible because the polygraph measures the same thing the PPG measures.

The admissibility of evidence is within the sound discretion of the trial judge, and the appellate court is limited to determining whether the trial court abused its discretion. State v. White, 382 S.C. 265, 676 S.E.2d 684, 686 (2009) (trial court's decision to admit or exclude testimony will not be reversed absent a prejudicial abuse of discretion); State v. Price, 368 S.C. 494, 629 S.E.2d 363, 365 (2006) (same); State v. Rice, 375 S.C. 302, 652 S.E.2d 409, 415 (Ct. App. 2007) (same). An abuse of discretion occurs when the ruling is based on an error of law, or a factual conclusion without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506, 509 (2005); Rice, 652 S.E.2d at 415.

As a threshold matter, Russell did not object to any testimony regarding the PPG. Rather, during his cross-examination of Dr. Wadman, and his direct examination of Dr. Burke, Russell elicited substantial testimony regarding how the PPG is performed, and the results of his PPG. Therefore, Russell should not now be heard to use the admission of evidence he elicited as a basis for purported error by the circuit court in precluding evidence

regarding a completely different test.

South Carolina's appellate courts have consistently held results of polygraph examinations are generally inadmissible because the reliability of the test is questionable. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30, 35 (2001). Although there is no *per se* rule against admission of polygraph evidence, "admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors." State v. Council, 335 S.C. 1, 515 S.E.2d 508, 519-520 (1999), *cert. denied*, 528 U.S. 1050 (1999); *see also* State v. Samuel, 400 S.C. 593, 735 S.E.2d 541 (Ct. App. 2012)(same); Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771, 778 (Ct. App. 2008). The admissibility of scientific evidence depends on "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom," and whether experts applied scientifically and professionally established techniques to the solution of a particular problem, rather than relying on "untested methods, unproven hypotheses, intuition or revelation." State v. Ford, 301 S.C. 485, 392 S.E.2d 781, 783 (1990) (*citing* State v. Jones, 273 S.C. 723, 259 S.E.2d 120 [1979]).

Russell conceded he did not have an expert to testify regarding the scientific reliability of polygraph examinations. (TT, p. 120; R., p. 85). In addition, he did not even offer evidence from the person who performed Russell's purported polygraph examination. Thus, he failed to lay any foundation for the admission of polygraph evidence, in general, or Russell's purported polygraph examination specifically, under Rules 702 and 403, SCRE, or the Jones factors.

The only evidence proffered regarding the purported polygraph examination was

Russell's own testimony that he took a polygraph and passed it. (TT, pp. 118-119; R., pp. 83-84). The proffered testimony was self-serving, and since Russell could not have administered the test to himself, his testimony regarding any results was necessarily based on the out of court statement of a third party - the polygraph examiner. Russell offered the testimony for the truth of the matter asserted - that he passed a polygraph relating to the criminal charges - and as such, it was inadmissible hearsay. Rule 801(e), SCRE; Rule 802, SCRE.

Russell failed to lay a sufficient foundation for the admissibility of polygraph exam results in general, or the specific examination purportedly administered to him. The testimony he did proffer regarding his purported polygraph examination results was nothing more than self-serving, inadmissible hearsay. Evidence regarding Russell's PPG results was admitted without objection, and explored in depth by Russell himself.

Therefore, admission of the PPG evidence has no bearing on the admissibility of polygraph evidence. The circuit court properly excluded Russell's testimony regarding the results of a purported polygraph examination, and Russell's commitment as a sexually violent predator should be affirmed.

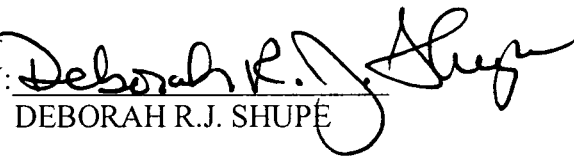
CONCLUSION

Based on the foregoing, the State respectfully submits the jury verdict finding Russell is a sexually violent predator as defined by the SVP Act, and the Order of Commitment based on the jury verdict, should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

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

BY: 
DEBORAH R.J. SHUPE

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

February 26, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Dorchester County
The Honorable George C. James, Jr.
Appellate Case No. 2011-204866

IN THE MATTER OF THE CARE AND TREATMENT OF
BOBBY RUSSELL,

Appellant,

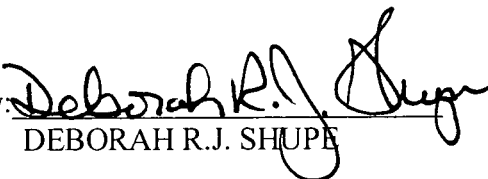
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with
Rule 211(b), SCACR.

Respectfully submitted,

ALAN WILSON
Attorney General

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

By: 
DEBORAH R.J. SHUPE

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

February 26, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Dorchester County
The Honorable George C. James, Jr.
Appellate Case No. 2011-204866

IN THE MATTER OF THE CARE AND TREATMENT OF
BOBBY RUSSELL

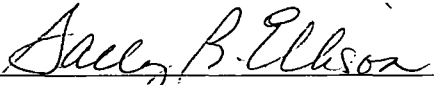
Appellant,

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent and Designation of Matter on Appellant by depositing three copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant
Assistant Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.
This ^{26th} day of J February 2013.


SALLY B. ELLISON
Legal Assistant

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