

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County
The Honorable Williams H. Seals, Circuit Court Judge
Appellate Case No. 2017-001464

IN THE MATTER OF THE CARE AND TREATMENT
OF MICAH ALLEN BILTON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly admitted the court appointed expert's testimony regarding Appellant's penile plethysmograph (PPG) test.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In March 2015, Appellant Micah Allen Bilton pled guilty in Horry County to one count of Criminal Solicitation of a Minor, and was sentenced to seven years incarceration, suspended to thirty months and one year probation. 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 June 15, 2017, before the Honorable William H. Seals, Circuit Court Judge.

Prior to trial, 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 her opinion that Appellant met the criteria for commitment as a sexually violent predator. Appellant argued the testimony would violate the Fourth Amendment search and seizure protection, the Fifth Amendment protection against self-incrimination, and the Confrontation Clause, because the PPG was performed by another doctor who would not testify at trial and could not be cross-examined. (Trial Transcript [TT], pp. 17-20; Record on Appeal [R.], pp. 17-20).

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. Dr. Swan acknowledged there was some criticism of the PPG due to the possibility of the subject faking a response, but she considered it to be reliable and used it as only one piece of data in a comprehensive evaluation. (TT, pp. 22-29; R., pp. 22-29).

On cross-examination, Dr. Swan testified the doctor who performed the PPG, Dr. William Burke, has performed PPGs for many years, and he uses the same stimulus sets every

time, which provides a measure of internal reliability in his results. She stated Dr. Burke has quality control measures in place to indicate whether the subject is attempting to affect the results, and she had seen some of his reports indicating issues with the quality control measures, but his report regarding Appellant's PPG did not include any indication of quality control problems during the test. She acknowledged she was not present during the PPG, and she had never witnessed a PPG performed by Dr. Burke. She also acknowledged she testified in a 2004 Florida sexual predator trial that the PPG was not suitable for diagnostic purposes, but the technology had significantly improved since 2004, such that the Fifth Edition of the Diagnostic and Statistical Manual (DSM-V) recognized the PPG as a widely used tool. (TT, pp. 31-40; R., pp. 31-40).

The circuit court denied Appellant's motion to exclude the PPG evidence, finding there was a sufficient foundation to admit it. The court then denied Appellant's motion to exclude testimony regarding a provisional diagnosis given by Dr. Swan based on the PPG results. (TT, pp. 40-41; R, pp. 40-41).

Before the jury, Dr. Swan was qualified as an expert in forensic psychology, and testified she was appointed by the court to conduct an evaluation of Appellant pursuant to the SVPA. The evaluation included review of all documentation regarding Appellant's criminal history, and a two and a half hour interview with Appellant, during which she asked him about his family history, academic history, occupational history, relationship history, medical history and sexual history. Dr. Swan stated this was the type of information typically and reasonably relied on by experts in the forensic psychology field. (TT, pp. 53-61; R., pp. 53-61).

Dr. Swan testified Appellant's criminal history included a conviction for assault and battery of a high and aggravated nature related to the molestation of his four year old stepsister,

and the sentencing judge made a specific finding the conviction was a sexually violent offense for purposes of the SVPA. He was sentenced to the Department of Juvenile Justice until his eighteenth birthday, and was placed in a group home on May 13, 2010, for sex offender treatment. He was released from the group home on July 6, 2012, after he turned eighteen. Eight months later he molested his six year old niece, and was charged with criminal solicitation of a minor (also a SVPA qualifying offense). Dr. Swan found the fact that Appellant reoffended after being investigated, charged, convicted, and receiving two years of sex offender treatment, was significant for diagnosis and risk assessment purposes. (TT, pp. 61-73; R., pp. 61-73).

As to the PPG, Dr. Swan testified Appellant showed deviant arousal to teen female coercive or rape scenario, infant females, preschool female coercive or rape scenario, preschool male persuasive, grammar school female persuasive, teen female persuasive, and teen male coercive. She stated his arousal to preschool girls was consistent with his four year old victim. (TT, pp. 74-77; R., pp. 74-77).

Dr. Swan diagnosed Appellant with pedophilic disorder, sexually attracted to females, non-exclusive type, which she explained is a sexual interest in female children, as well as adults. She testified the diagnosis was based on Appellant's sexual assault of his four year old stepsister and six year old niece, and his PPG arousal to preschool females. (TT, pp. 77-79; R., pp. 77-79).

Dr. Swan then testified about static and dynamic risk factors in relation to the risk to reoffend, and stated Appellant's most prominent static risk factor was sexual preference for pre-pubescent and early pubescent males and females. Using the Static-99R, which is an actuarial based risk assessment tool, Dr. Swan determined Appellant was in the average risk category for sex offenders, and was 1.3 times more likely than the average sex offender to reoffend sexually. She stated the Static-99R is "a dramatic underestimation of risk" because less than ten percent of

sexual crimes result in a conviction. She also testified about multiple dynamic risk factors (not measured by the Static-99R) applicable to Appellant, including low self-control, irresponsible decisions, unrealistic long-term goals, poor problem solving, failure to learn from experience, and dysfunctional coping (responding to feelings of neglect and abandonment by acting out sexually). (TT, pp. 81-86; R., pp. 81-86).

Dr. Swan testified to a reasonable degree of psychological certainty that Appellant had the mental abnormality of pedophilic disorder, which causes him serious difficulty in controlling his behavior. She further opined Appellant was likely to commit future acts of sexual violence if not confined for long term control, care and treatment, and he met the SVPA criteria to be found a sexually violent predator. (TT, pp. 87-88; R., pp. 87-88).

On cross-examination, Dr. Swan testified the Static-99R research was based on 28,000 sex offenders, and Appellant's score of three indicated he was 27% more likely to reoffend than the average sex offender. She stated prior Static-99R rules provided sex offenders with similar scores have a 7% likelihood of reoffending, but the new rules advise practitioners not to use those risk estimates "because they're unstable." She also reiterated that the Static-99R "dramatically underestimates risks." (TT, pp. 88-92; R., pp. 88-92).

As to Appellant's dynamic risk factors, Dr. Swan testified Appellant told her he does not need treatment, which she considered to be unrealistic because sex offenders need continuing treatment. She also considered his plan to move in with his sister, who had a child, to be evidence of poor decision making because Appellant had already committed a sex offense against a child. (TT, pp. 105-106; R., pp. 105-106).

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, pp. 167-168, Order of Commitment filed June 16, 2017; R., pp. 167-168, 177).

This appeal followed.

ARGUMENT

The circuit court properly admitted the court appointed expert's testimony regarding Appellant's penile plethysmograph (PPG) test.

Appellant contends the circuit court violated his due process rights by allowing Dr. Swan to testify about the results of Appellant's PPG test, on which she relied in reaching her diagnosis and risk assessment. He asserts the evidence was inadmissible because Dr. Swan did not personally conduct or observe the PPG, Appellant was unable to confront the person who performed the PPG, and the PPG performed was unreliable because it had not been peer reviewed. Appellant's due process and PPG reliability claims are not preserved for appellate review, and the record amply supports the circuit court's admission of evidence regarding the PPG.

A. Standard of Review

Whether to admit or exclude evidence is a matter committed to the trial court's sound discretion. State v. Heyward, 422 S.C. 488, 812 S.E.2d 432, 435 (Ct. App. 2018); . State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 249 (Ct. App. 2015) (same); State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009) (same). 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. Issue Preservation

In order to be preserved for appellate review, an issue must have been raised to and ruled upon by the trial court, and issues not raised and ruled upon in the trial court will not be considered on appeal. State v. King, Op. No. 2016-001161, 2018 WL 3451232, at *5 (S.C. Sup. Ct., July 18, 2018). While the party does not need to use the exact name of a legal doctrine in order to preserve it, it must be clear the argument has been presented **on that ground**, and the issue must have been raised with **sufficient specificity** to bring into focus the **precise** nature of the alleged error so it can be reasonably understood by the court. State v. Daise, 421 S.C. 442, 807 S.E.2d 710, 714 (Ct. App. 2017); State v. Passmore, 363 S.C. 568, 611 S.E.2d 273, 281 (Ct. App. 2005); State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691, 694 (2003); *see also* State v. Cain, 419 S.C. 24, 795 S.E.2d 846, 851 (2017) (issue preservation also applies to constitutional issues); State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16, 19 (2011) (same). Further, a party may not argue one ground before the trial court, and argue a different ground on appeal. State v. Byram, 326 S.C. 107, 485 S.E.2d 360, 363 (1997); State v. Mealor, Op. No. 2013-002752, 2018 WL 3862993, at *4 (S.C. Ct. App. Aug. 15, 2018).

At trial, Appellant moved to exclude the PPG evidence on the following expressly stated grounds: 1) violation of the “Fourth Amendment rights of search and seizure;” 2) violation of the Fifth Amendment protection against self-incrimination; and 3) violation of the Sixth Amendment Confrontation Clause. (TT, pp. 17-20; R., pp. 17-20). He never asserted admission of the evidence would violate his due process rights under the Fourteen Amendment. Therefore, the due process issue he asserts on appeal is not preserved for appellate review.

Even if the issue is preserved, however, Appellant’s reliance on Goldberg v. Kelly, 397 U.S. 254 (1970), is misplaced. Goldberg involved government proceedings seeking to terminate welfare payments, and the issue was whether a caseworker’s written submissions on behalf of a

recipient, who was not represented by counsel, adequately satisfied the recipient's due process right to be heard by the factfinder. In this case, unlike the recipient in Goldberg, Appellant was afforded legal counsel, who aggressively and vigorously presented Appellant's case, and through his counsel, Appellant had ample opportunity to be heard, and was heard, on the PPG issue.¹

C. 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).

¹Appellant's assertions regarding the PPG reliability are likewise unpreserved. See Subsection D below.

It is obvious Dr. Swan's testimony regarding the PPG would assist the jury in determining whether Appellant met the criteria for commitment under the PPG, particularly as to his risk to reoffend if not confined for treatment. Her testimony established she had the requisite knowledge and skill regarding the process and use of the PPG, and her testimony the PPG is criticized by some but widely accepted was virtually undisputed. Therefore, the record amply supports the circuit court's finding there was a sufficient foundation to admit the PPG testimony.

D. PPG Evidence

As a threshold matter, Appellant did not move to exclude the PPG evidence on the ground the PPG was unreliable. He did question Dr. Swan, both pre-trial and during trial, about the validity and reliability of the PPG, but he never raised the lack of reliability as a basis for excluding it. Since the reliability issue was not raised to and ruled upon by the circuit court, it is not preserved for appellate review. Even if the issue was preserved, however, Appellant's assertions on appeal regarding the acceptance of the PPG by the mental health community and the courts ignore well documented research and court decisions regarding advances in PPG technology and acceptance.

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 medical community began using plethysmograph 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.*, 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 See also Dean Tong, The Penile Plethysmograph, Abel Assessment for Sexual Interest, and MSI-II: Are They Speaking the Same Language?, 35 *Am. J. of Fam. Therapy*, 187, 190 (2007) ("The PPG, when administered properly, represents a direct and objective measurement of a man's level of sexual arousal to normal versus sexualized stimuli. Since there is a strong relationship between an individual's pattern of sexual arousal and the probability that he may or will act upon that arousal, an important first step in gauging one's propensity to sexual deviancy is to obtain an accurate assessment of that person's sexual arousal patterns, which is precisely what the PPG does."); James M. Peters, Assessment and Treatment of Sex Offenders: What

²Both 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.

Attorneys Need to Know, Advocate, 23 (Dec. 1999) (PPG “is invaluable in the evaluation, treatment and management of known sexual offenders.”).

Further evidence of the PPG’s general acceptance in the mental health community, and perhaps the strongest evidence, is found in the 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 further provides:

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 plethysomography**, 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 can indicate an individual's areas of sexual arousal. She stated she had been evaluating sex offenders for eighteen years, 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. 22-30, 74-79; R., pp. 22-30, 74-79).

As discussed above, 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 extensively researched and found to be reliable was also virtually undisputed. Therefore, the circuit court properly admitted the PPG evidence.

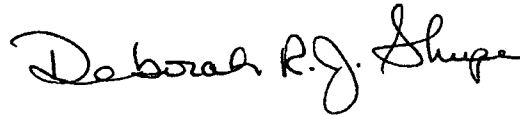
CONCLUSION

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

Respectfully submitted,

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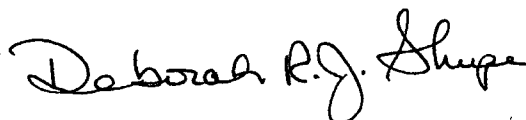
Appellant.

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."

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