STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2018-000426

IN THE MATTER OF THE CARE AND TREATMENT OF
ROBERT POWELL, APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly exercised its discretion in admitting expert testimony about Appellant's prior non-sexual charges and convictions because the very limited testimony was offered as part of the basis for the expert's opinion regarding Appellant's risk to re-offend and its probative value outweighed any prejudice to Appellant; however, if there was error in admitting the testimony, it was harmless beyond a reasonable doubt. (Appellant's Issues I and II).

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On October 9, 2006, Appellant Robert Powell pled guilty to three counts of criminal sexual conduct with a minor first degree. The charges arose from Appellant's molestation of his two minor daughters, and his girlfriend's minor daughter, over a sixteen year period. He molested one daughter when she was five years old, and his other daughter between the ages of three and eleven years old. He molested his girlfriend's daughter between the ages of five and eleven years old. Appellant was sentenced to twelve years incarceration on each count, to run concurrently. (State's Exhibits 1, 2, and 3 [Indictments and Sentencing Sheets]; Record on Appeal [R.], pp. 533, 535, 537).

Prior to his release from prison, Respondent State of South Carolina ("the State") filed a petition pursuant to the South Carolina Sexually Violent Predator Act (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 26, 2018, before the Honorable Carmen T. Mullen, Circuit Court Judge.

Prior to trial, Appellant moved to exclude all evidence regarding a penile plethysmograph (PPG) performed at the request of the State's expert, Emily Gottfried, Psy.D., who is employed at the Medical University of South Carolina (MUSC) Sexual Behavior Clinic and Lab. During the hearing, William P. Burke, Ph.D., was qualified as an expert in the field of assessment and evaluation of sex offenders, and testified he performed evaluations on over 6,000 sex offenders, and he used the PPG in approximately 4,000 of those evaluations. He testified at length about the history and efficacy of the PPG as a measure of sexual arousal, which has been the subject of three major research projects finding the PPG is the number one predictor of recidivism regarding child molesters. Dr. Burke explained the PPG process, including the use of two stimulus sets, both used in MUSC's PPG lab, the Marshall set and the Real Child Voices set, which Dr. Burke

created in his lab and is used in labs throughout the United States. Dr. Burke testified a research article regarding the validity of the Real Child Voices stimulus set was in the peer-review process, but had not been published yet. (Trial Transcript [TT], pp. 122-176; Record on Appeal [R.], pp. 122-176).

Dr. Gottfried testified the State retained MUSC to conduct a full forensic evaluation of Appellant, and the PPG is part of the standard protocol for sex offender evaluations performed at MUSC. She stated if any person being evaluated did not consent to the PPG, the Attorney General's Office would be advised, and the evaluation would not go forward and a report prepared until the issue was resolved, because MUSC tries to be consistent in all its evaluations. (TT, pp. 214-242; R., pp. 214-242).[1]

Appellant's expert, Marie Gehle, Psy.D., testified she is employed at the South Carolina Department of Mental Health (DMH), and conducts evaluations for DMH pursuant to the SVPA. She testified she does not used the PPG because she believes it is unreliable even though it is recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) as the most widely used physiological tool in evaluating sex offenders, and there is research indicating the PPG is reliable and valid. She stated there was no peer-reviewed research indicating the Real Child Voices stimulus set Dr. Burke created is reliable. On cross-examination, Dr. Gehle testified she had only watched the Real Child Voices stimulus set one time, which was not during an actual PPG test, and acknowledged she

[1]Dr. Gottfried was not able to state how MUSC would proceed if the Attorney General's Office was unable to resolve the issue either by agreement with the person's attorney or obtaining a contempt order because the PPG issue was resolved, and the person ultimately cooperated with the PPG in all the cases she had handled.

had never talked with Dr. Burke or anyone at MUSC about the stimulus sets or statistical measurements used by MUSC and Dr. Burke's lab. (TT, pp. 183-213; R., pp.183-213).

The circuit court excluded the PPG evidence, based primarily on the lack of any peer-reviewed articles regarding the Real Child Voices stimulus set. The court acknowledged Dr. Burke's testimony regarding a pending article, and stated the reliability of the stimulus set was "almost there."[2] (TT, pp. 284-292; R., pp. 284-292).

Appellant also moved to exclude any testimony regarding Appellant's past criminal history other than the three criminal sexual conduct convictions, arguing the prior offenses were irrelevant because they were not sexual in nature, and allowing testimony about them would be more prejudicial than probative. Dr. Gottfried testified Appellant's entire criminal history was critical in at least two of the measures she used in the evaluation. Those measures require counting up the number of charges and convictions, and goes to the person's "criminal versatility," which factors in the different kinds of crimes committed as related to psychopathy or future re-offending. She further testified Appellant had a prior domestic violence conviction, which could be considered an offense involving violence. (TT, pp. 261-268; R., pp. 261-268).

The court denied Appellant's motion to exclude Dr. Gottfried's testimony regarding his prior non-sexual charges and convictions, finding she used the information in determining Appellant's risk to re-offend, and "the potential of a past helps you predict what would happen in the future." The court further found the evidence was not being offered to prove Appellant's guilt or that he acted in conformity with those charges, but was only used in connection with Dr.

[2]The PPG has been admitted as evidence in multiple jurisdictions, but the efficacy of the circuit court's ruling on the issue in this case is not before the appellate court.

Gottfried's opinion regarding his risk to re-offend. (TT, pp. 269-270, 321-324; R., pp. 269-270, 321-324).

Before the jury, Dr. Gottfried testified about all the information she considered in connection with her diagnosis of Appellant and her opinion regarding his risk to re-offend, including his criminal history, records relating specifically to his three sexual convictions, his prison records, the report from Dr. Gehle's evaluation of Appellant, results of various tests performed during the MUSC evaluation, and an interview with Appellant. She testified Appellant did not receive any sex offender treatment while he was incarcerated, which was important because Appellant has an illness for which he needed treatment, and if released, Appellant would only be subject to limited monitoring until September 2018 (approximately six months). (TT, pp. 308-320; R., pp. 308-320).

Dr. Gottfried testified it was important to look at the person's entire criminal history, including charges as well as convictions, because some of the psychological measures she uses factor in how many times the person has been charged or convicted of previous crimes. In addition, the different kinds of crimes committed showed "criminal versatility," and a person might be more of a risk to re-offend if they commit different types of crimes rather than one kind of crime. She further testified criminal history goes to the person's general ability to follow the community's rules, as well as showing the length of the person's problematic behavior. (TT, pp. 321-322; R., pp. 321-322).

Specifically as to Appellant, Dr. Gottfried testified Appellant's criminal history included: a 1979 grand larceny charge with no disposition; 1985 driving under the influence, driving left of center, and unlawful carrying of a pistol charges; a 1988 criminal domestic violence charge; a 1991 fraudulent check; a 1995 simple possession of marijuana charge; and the 2004 criminal

sexual conduct charges to which he pled guilty in 2006. She stated the criminal domestic violence charge could involve violent conduct, and some research indicated domestic violence offenses may be a risk to re-offend. (TT, pp. 324-325; R., pp. 324-325).

Dr. Gottfried then testified regarding the underlying facts of Appellant's three criminal sexual conduct convictions, which showed Appellant molested the three prepubescent minors over a total of sixteen years. Even though Appellant pled guilty to the charges, he told Dr. Gottfried he did not engage in any of the alleged conduct, and each victim had "trumped up" the charges as a way to get back at him. (TT, pp. 327-339, State's Exhibit 1, State's Exhibit 2, State's Exhibit 3; R., pp. 327-339; 533, 535, 537).

Dr. Gottfried testified about the reason for, and the result of, various psychological tests she used in evaluating Appellant, and the results of the Static-99R, which is an actuarial measure of static risk factors to re-offend sexually when compared to other sex offenders who have been convicted of a sexual offense and are subsequently charged with another sex offense. She also testified about dynamic risk factors that are not accounted for in the Static 99-R, and stated she found Appellant has a sexual interest in children, which predisposes him to offend against children, he offended over a sixteen year period, during which "he offended and then re-offended and re-offended against another child." In addition, Appellant had never received any treatment for his sexual disorder, which he did not believe he needed and did not intend to seek out, and he had no realistic plans to prevent himself from re-offending, adamantly telling Dr.Gottfried he had a zero chance of re-offending on a scale of one to ten. (TT, pp. 339-357; R., pp. 339-357).

Dr. Gottfried diagnosed Appellant with pedophilic disorder, nonexclusive type, attracted to females, and a severe stimulant use disorder based on his previous powder cocaine and crack cocaine use, in remission in a controlled environment (prison). She stated to a reasonable degree

cocaine use, in remission in a controlled environment (prison). She stated to a reasonable degree of psychological certainty that Appellant's pedophilic disorder affects his emotional or volitional capacity such that he has the propensity to commit future sexually violent offenses. She testified his propensity to commit such acts poses a menace to the health and safety of others, particularly children, and based on his sixteen year record of offending against female children, he has serious difficulty controlling his sexual behavior toward prepubescent female children, who would be at risk if Appellant was released without treatment. (TT, pp. 358-360; R., pp. 358-360).

Dr. Gottfried testified she reviewed Dr. Gehle's report, and noted Dr. Gehle also diagnosed Appellant with pedophilic disorder and a stimulant use disorder, and she reached the same Static-99R score as Dr. Gottried. She stated Dr. Gehle relied solely on Appellant's low Static-99R score, however, and did not consider other risk factors not accounted for by the Static-99R that make Appellant dangerous and a risk to re-offend. (TT, pp. 361-394; R., pp. 361-394).

Dr. Gehle testified on Appellant's behalf, and was qualified as an expert in forensic psychology. She stated she was appointed by the court to evaluate Appellant pursuant to the SVPA, and as part of the evaluation, she reviewed multiple pieces of information and interviewed Appellant for five hours and ten minutes. (TT, pp. 402-405; R., pp. 402-405).

Dr. Gehle agreed with Dr. Gottfried's diagnoses of pedophilic disorder and substance abuse disorder. She testified her pedophilic disorder diagnosis was based on Appellant's criminal sexual conduct convictions, and his sexual conduct against children that lasted longer than the six months required for a paraphilia diagnosis. (TT, pp. 407-408; R., pp. 407-408).

As to Appellant's risk to re-offend, Dr. Gehle testified she used the Static-99R, had Appellant complete the Minnesota Multiphasic Personality Inventory (MMPI), and considered Appellant's dynamic risk factors. Appellant's Static-99R score put him in the low risk to re-

the fact Appellant had never been convicted of a sexual offense and sentenced prior to the date he pled guilty to the criminal sexual conduct charges in 2006 contributed to his low score because he had not re-offended after a previous conviction and sentence. She further stated she rarely recommends commitment of people with a Static99-R score of four or lower. (TT, pp. 414-420; R., pp. 414-420).

Dr. Gehle testified Appellant's dynamic risk factors included a history of sexual preoccupation, a history of sexual preference for prepubescent children, a lack of emotional relationships with adults, lifestyle impulsivity, and some negative social influences. She further testified she did not rate Appellant's lack of sex offender treatment as heavily as Dr. Gottfried did because of mixed research regarding the effect of treatment on "low-risk guys." She stated the other psychological tests used by Dr. Gottfried were primarily unrelated to sexual re-offending or were controversial, and endorsed the Static99-R as leading to "more accurate" results. She opined Appellant was not likely to re-offend and did not meet the criteria for commitment under the SVPA. (TT, 421-430; R., pp. 421-430).

On cross-examination, Dr. Gehle admitted Appellant's Static-99R score was low in part because he pled guilty to all three charges on one date, which counted for one sentencing date on the Static-99R, even though there were three different victims, three different offending timeframes, an offending history spanning sixteen years, and his score would be somewhat higher if he had been convicted of each charge on different dates. She further acknowledged Appellant denied committing any of the offenses even though he pled guilty, does not believe he has a problem with his sexual behavior, and does not believe he needs sex offender treatment. (TT, pp. 431-447; R., pp. 431-447).

The jury found beyond a reasonable doubt that Appellant was a sexually violent predator as defined by the SVPA, and the circuit court ordered his commitment to DMH for long term control, care and treatment. (TT, pp. 529-531, Order of Commitment filed February 28, 2018; R., pp.529-531; 541). This appeal followed.

STANDARD OF REVIEW

"'The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" State v. Patterson, 425 S.C. 500, 823 S.E.2d 217, 221 (Ct. App. 2019) (*quoting* State v. Pagan, 369 S.C. 201, 631 S.E.2d 262, 265 [2006]). "'An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" *Id.* "An appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice." State v. Jackson, 384 S.C. 29, 681 S.E.2d 17, 19 (Ct. App. 2009).

ARGUMENT

The circuit court properly exercised its discretion in admitting expert testimony about Appellant's prior non-sexual charges and convictions because the very limited testimony was offered as part of the basis for the expert's opinion regarding Appellant's risk to re-offend and its probative value outweighed any prejudice to Appellant; however, if there was error in admitting the testimony, it was harmless beyond a reasonable doubt. (Appellant's Issues I and II).

Appellant contends the circuit court erred in admitting Dr. Gottfried's testimony regarding his prior charges and convictions because the charges were not sexual in nature, did not result in a conviction, were not proved by clear and convincing evidence (Appellant's Issue I), and the probative value did not outweigh the danger of unfair prejudice (Appellant's Issue II). Appellant's contentions ignore Dr. Gottfried's explanation of why the prior offenses were important to her evaluation of Appellant's risk to re-offend, and how she used them in reaching her ultimate opinion.

The admissibility of an expert's testimony is a matter within the circuit court's sound discretion. State v. Harris, 318 S.C. 178, 456 S.E.2d 433, 435 (Ct. App. 1995). Otherwise inadmissible evidence may be received for the limited purpose of informing the jury of the basis for an expert's opinion. Jones v. Doe, 372 S.C. 53, 640 S.E.2d 514, 519 (Ct. App. 2006) (an expert may testify to evidence inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth, and it is received only for the limited purpose of informing the jury of the basis for the expert's opinion); *Halbersberg v. Berry,* 302 S.C. 97, 394 S.E.2d 7, 11 (Ct. App. 1990) (an expert witness may state an opinion based on facts not within her firsthand knowledge).

Pursuant to Rules 703 and 705, SCRE, an expert may testify about the facts or data upon which he or she bases an opinion, which need not be admissible as evidence if they are of a "type reasonably relied upon by experts in the particular field." Rule, 703, SCRE; Rule 705, SCRE; *see*

also State v. Slocumb, 336 S.C. 619, 521 S.E.2d 507, 518 (Ct. App. 1999) (same). The "'[f]acts, data or opinions reasonably relied upon under Rule 703 may be disclosed to the jury on either direct or cross-examination to assist the jury in evaluating the expert's opinion by considering its bases.'" Slocumb, 527 S.E.2d at 518 (*quoting* 2 Michael H. Graham, Handbook of Federal Evidence § 703.1, at 110 [4th ed. 1996]). "'This is true even if the facts, data or opinions have not themselves been admitted and thus may not be considered for their truth.'" *Id.*

A. Other Bad Acts

Appellant argues the circuit court erred because the State failed to prove the 1979 grand larceny and 1991 fraudulent check charges, which were ultimately *nolle prossed*, by clear and convincing evidence. Appellant's argument ignores the ultimate purpose of Dr. Gottfried's very limited testimony regarding those offenses.

Rule 402, SCRE, provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Evidence is relevant if it tends to establish, or to make more or less probable, some matter in issue upon which it directly or indirectly bears. Rule 401, SCRE; Judy v. Judy, 384 S.C. 634, 682 S.E.2d 836, 839 (Ct. App. 2009) (*citing* Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774, 782 [Ct. App. 1985]). Relevancy determinations are within the trial court's discretion. Judy, 682 S.E.2d at 839.

"A "'person's dangerous propensities are the focus of the SVP Act,'" and consideration of "'[p]ast criminal history is therefore directly relevant to establishing 44–48–30(1)(a),'" which in turn bears directly on whether one suffers from a mental abnormality under section 44–48–30(1)(b)." Care & Treatment of Ettel, 377 S.C. 558, 660 S.E.2d 285, 287 (Ct. App. 2008) (*quoting*

In re Corley, 353 S.C. 202, 577 S.E.2d 451, 453 [2003]).[3] These offenses can include both convictions and offenses not resulting in convictions if they are relevant to the determination of whether a person is a sexually violent predator. *Id.* (*citing* White v. State, 375 S.C. 1, 649 S.E.2d 172, 176 [Ct. App. 2007]) [past convictions and prior offenses not resulting in convictions are relevant to whether a person is a sexually violent predator and are admissible in a SVP case]).

There is no dispute the prior charges listed by Dr. Gottfried were included on Appellant's criminal history report, Appellant's guilt as to those charges was never at issue, and the State did not use the prior offenses as character evidence to argue Appellant acted in conformity with those prior charges when committing his sexual offenses. Rather, the testimony was offered merely to show the jury all the facts Dr. Gottfried considered in reaching her opinion regarding Appellant's risk to re-offend.

B. Probative Value/Unfair Prejudice

Appellant also contends the circuit court erred in admitting Dr. Gottfried's testimony regarding all of Appellant's prior offenses because it was unfairly prejudicial. Relevant evidence must be excluded if its probative value is **substantially outweighed** by the danger of unfair prejudice. Rule 403, SCRE; State v. Wiles, 383 S.C. 151, 679 S.E.2d 172, 176 (2009); Patterson, 823 S.E.2d at 233 (same); Judy, 682 S.E.2d at 839 (*citing* State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 [2000])(same). Determination of evidence's prejudicial effect must be based on the entire record, and will generally turn on the facts of each case. State v. Cartwright, 425 S.C.

[3]Appellant attempts to limit the Ettel rationale to prior sexual offenses only, but the rationale is not so limited. The prior offenses at issue in Ettel included a murder conviction, and the expert considered the murder in reaching an opinion regarding Ettel's risk to re-offend violently. 600 S.E.2d at 288 ("the murder conviction was relevant due to the crime's level of violence," and the expert testified it went to Ettel's propensity to re-offend even if it was not a sexual crime).

81, 819 S.E.2d 756, 761 (2018). "'Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.'" *Id.* (*quoting* State v. Wilson, 345 S.C. 1, 545 S.E.2d 827, 830 [2001]).

In this case, the circuit court found the probative value of Dr. Gottfried's testimony regarding all of Appellant's prior charges, including the 1979 grand larceny and the 1991 fraudulent check *nolle prossed* charges, outweighed any prejudice to Appellant. (TT, pp. 323-324; R., pp. 323-324). The testimony was directly relevant to explain a critical component (risk to re-offend) of Dr. Gottfried's evaluation and opinion. *See* Patterson, 823 S.E.2d at 233 (reference to a DNA database was relevant and highly probative because it explained a critical step in the investigation). The probative value of the evidence was especially substantial because the jury had to compare Dr. Gottfried's evaluation considerations and opinion regarding Appellant's ability to control his behavior and risk to re-offend, with Dr. Gehle's reliance on the Static-99R as the sole basis for her opinion on that issue.[4]

Further, Dr. Gottfried's testimony listing Appellant's prior offenses was very limited (fifteen lines out of eighty-six transcript pages), and the State only briefly mentioned research linking domestic violence to reoffending when cross-examining Dr. Gehle, and in closing argument. (TT, pp. 324-325, 431-447, 496-505; R., pp. 324-325, 431-447, 496-505). Therefore, any prejudice to Appellant was minimal, while the probative value was significant. *See* Patterson, 823 S.E.2d at 233 (prejudice from reference to DNA database was minimal because the jury was presented with only limited information regarding the DNA database search).

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[4]The Static-99R is only as good as the data it considers, which is limited to sex offenders who were caught re-offending. Since the vast majority of sex offenses are never reported, and therefore, would not be considered in the Static-99R data for comparison purposes, the Static-99R estimates of risk are inherently understated. See TT, pp. 432-433; R., pp. 432-433 (Ge-hle agreeing many sexual offenses are not reported).

C. Harmless Error

Even if it was error to admit Dr. Gottfried's limited testimony regarding Appellant's prior criminal offenses, it was harmless beyond any reasonable doubt. A harmless error analysis is contextual and specific to the circumstances of the case, and a verdict should not be reversed when a review of the entire record establishes the error is harmless beyond a reasonable doubt. State v. Brown, 424 S.C. 479, 818 S.E.2d 735, 743 (2018).

A review of the entire record in this case reveals Appellant pled guilty to molesting three prepubescent female children over a sixteen year period, but then denied his guilt of all the allegations when interviewed by both Dr. Gottfried and Dr. Gehle, instead claiming the children conspired to set him up. He sought no sex offender treatment while incarcerated, and told the two experts he did not need treatment because he had no sexual behavior problems. Both experts diagnosed Appellant with pedophilic disorder, and found he was sexually preoccupied with prepubescent females. Thus, the only issue in dispute was whether Appellant was likely to commit acts of sexual violence if not confined for treatment.

Even though he admitted to "fondling" the children when he testified at trial, Appellant stated he only pled guilty because his attorney recommended it to avoid a potential twenty-five year sentence. He also testified he thought some sex offender treatment would be required during the six months he would be under supervision, but he did not know the name of the treatment program, or who would be providing the treatment, details he "guessed" would be provided by the probation officer when he was released. He stated he would participate in treatment if required, and thought he "probably" would learn something. (TT, pp. 460-477; R., pp. 460-477). In short, Appellant has no insight into his pedophilic disorder, displayed little empathy for his victims, and

has no plan in place to avoid re-offending if released into the community, instead he simply says his risk to re-offend is zero.

The wealth of evidence presented to the jury established Appellant was convicted of three sexually violent crimes against prepubescent children, he has the mental abnormality of pedophilic disorder about which he has no insight, he has never received, and does not believe he needs, any treatment for that disorder, and he has no realistic plans to avoid re-offend beyond simply saying he will not re-offend. In light of the undisputed evidence regarding his long history of sexual offenses against prepubescent females and his lack of insight and treatment, it is highly unlikely the jury's verdict was swayed by the very limited testimony regarding Appellant's non-sexual criminal history. Therefore, if it was error to admit that evidence, and the State submits it was not, the error was harmless beyond a reasonable doubt.

The record amply supports the circuit court's evidentiary ruling and the jury's verdict. Accordingly, the jury verdict finding Appellant is a sexually violent predator, and his commitment for long term control, care and treatment under the SVPA, should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the jury verdict and judgment of the circuit court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 14, 2015, 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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