VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of September, 2022.

Present: Goodwyn, C.J., Powell, Kelsey, McCullough and Chafin, JJ., and Millette and Mims, S.JJ.

Galen Michael Baughman, Appellant,

against Record No. 201348
Circuit Court No. CL17-3009

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Arlington County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the trial court.

In 2003, Galen Michael Baughman ("Baughman") pled guilty to aggravated sexual battery and carnal knowledge in connection with separate acts of sexual conduct with minors in 1997 and 2003. Baughman was sentenced to 30 years' imprisonment with 16 years suspended. In November 2009, when Baughman was scheduled for release, the Commonwealth petitioned to have him civilly committed as a sexually violent predator pursuant to the Sexually Violent Predators Act ("SVPA"), Code § 37.2-900, *et seq*. After a jury trial, Baughman was determined to not be a sexually violent predator and he was released on supervised probation.

On April 8, 2016, a report was filed asserting that Baughman had violated his probation by having unapproved and unsupervised contact with a person under 18 years old. Specifically, Baughman had exchanged several non-sexual text messages with a 16-year-old. Baughman's probation was subsequently revoked and he was sentenced to one year in jail.

In 2017, Baughman was visited by Dr. Ilona Gravers ("Dr. Gravers"), a licensed clinical psychologist designated by the Commissioner of Behavioral Health and Developmental Services (the "Commissioner") to evaluate if Baughman was a sexually violent predator. Baughman refused to be interviewed as part of Dr. Gravers' evaluation. Relying on the relevant records, including Baughman's former charges, the evidence presented against him at his criminal trial

and the text messages which led to his probation revocation, Dr. Gravers diagnosed Baughman with Narcissistic Personality Disorder but opined that this diagnosis "does not create a likelihood of having him commit sexually violent acts." Dr. Gravers further determined Baughman did not have a paraphilia diagnosis or other sexual disorder.

After receiving Dr. Gravers' report, the Commonwealth retained its own psychologist, Dr. Michelle Sjolinder ("Dr. Sjolinder"), for a "file review" of Baughman's records. Unlike Dr. Gravers, Dr. Sjolinder was not designated by the Commissioner pursuant to the SVPA, nor did she attempt to interview Baughman. After conducting her review, Dr. Sjolinder opined that Baughman suffered from both Narcissistic Personality Disorder and Other Specified Paraphilic Disorder; adolescent males. According to Dr. Sjolinder, Baughman's specific paraphilia could likely lead him to reoffend. Her report noted that, although there was no evidence Baughman had reoffended or engaged in explicitly sexual conversations with minors, there was a strong likelihood that he would reoffend in the future based on certain "grooming" behaviors that he had exhibited.

The Commonwealth subsequently initiated proceedings to have Baughman civilly committed as a sexually violent predator. On January 17, 2018, the trial court held a probable cause hearing pursuant to Code § 37.2-906. During the hearing, the Commonwealth offered copies of Baughman's convictions and probation violations into evidence. Additionally, the Commonwealth called Dr. Sjolinder to testify. Through her testimony, a copy of Dr. Sjolinder's report on Baughman was offered into evidence.

On cross-examination, Dr. Sjolinder admitted she had neither been appointed by the Commitment Review Committee (the "CRC") nor designated by the Commissioner to conduct a mental health evaluation of Baughman. According to Dr. Sjolinder, she had been hired to do a "file review based evaluation based upon someone they desired a second opinion on." Baughman moved to dismiss the case or, in the alternative, for a continuation of the hearing to present the testimony of Dr. Gravers. The trial court denied both motions. It found that there was probable cause to believe that Baughman was a sexually violent predator. In reaching this conclusion, the trial court specifically referenced Baughman's previous convictions, Dr. Sjolinder's testimony and her report.

Baughman subsequently moved to have the trial court reverse its finding of probable cause. In his motion, Baughman asserted that Dr. Sjolinder should not have been permitted to

testify at the probable cause hearing. Baughman noted that Dr. Gravers was the properly designated professional under the SVPA and she had opined that he was not a sexually violent predator. He claimed that, under Code § 37.2-906(E), Dr. Sjolinder was not qualified to provide testimony at the probable cause hearing because she was not designated by the Commissioner. The trial court denied the motion, ruling that the Attorney General is vested with the authority to determine the relevant evidence to be presented at a probable cause hearing. The trial court further explained that Dr. Sjolinder was qualified to testify as an expert witness because she is a "licensed psychiatrist or licensed clinical psychologist skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the Commitment Review Committee." Notably, the trial court did not address the fact that Dr. Sjolinder was not designated by the Commissioner.

At trial, the Commonwealth called several witnesses, including Dr. Sjolinder. Over Baughman's objection, Dr. Sjolinder testified that Baughman met the definition for a sexually violent predator and was likely to commit subsequent acts that were sexually violent in nature, although she could not say which specific offenses Baughman was likely to commit. In addition to Dr. Sjolinder's testimony, the jury heard about Baughman's conduct that resulted in his 2003 conviction.

At the close of the Commonwealth's case, Baughman moved to strike and for summary judgment in his favor on the grounds that the court erred in permitting Dr. Sjolinder to testify, the Commonwealth had not demonstrated Baughman was likely to engage in sexually violent acts, and the Commonwealth had not presented sufficient evidence of a material change in Baughman's mental health since 2012. The trial court denied the motion, explaining that the SVPA does not require that the Commonwealth use an expert designated by the Commissioner throughout the trial proceedings and that Baughman's interpretation of the SVPA would divest the court of its role as the gatekeeper for all expert qualifications, which "cannot be" the intent of the General Assembly.

Baughman subsequently called several character witnesses to rebut Dr. Sjolinder's characterization of him. After considering the evidence, the jury found that Baughman was a sexually violent predator.

On appeal, Baughman argues that the trial court erred in permitting Dr. Sjolinder to testify as an expert witness because she was not appointed by the Commissioner. Specifically,

Baughman contends that, under the SVPA, only the psychologist designated by the Commissioner can testify as an expert for the Commonwealth. As Dr. Sjolinder was not designated by the Commissioner, Baughman insists that she was not permitted to testify at either the probable cause hearing or the subsequent trial.

Addressing Dr. Sjolinder's testimony at the probable cause hearing, the Court notes Code § 37.2-906 controls the manner in which such hearings are conducted under the SVPA. Code § 37.2-906(E) states that an expert witness may be permitted to testify at the probable cause hearing "[i]f he meets the qualifications set forth in subsection B of § 37.2-904." Code § 37.2-904(B), in turn, provides that the individual conducting a mental health examination must be "a licensed psychiatrist or a licensed clinical psychologist who is *designated by the Commissioner*, skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the CRC."[1] (Emphasis added.) It is important to note that Code § 37.2-906(E) explicitly conditions expert witness testimony on meeting these qualifications with no exceptions.[2] Thus, the plain language of the statute indicates that the only experts[3] who may testify at a probable cause hearing under the SVPA are those who meet the

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[1] This Court has recognized that the qualifications of an individual administering a test are generally "a matter of substance, not procedure." *Brooks v. City of Newport News*, 224 Va. 311, 315 (1982). Here, Code § 37.2-904(B) is referenced as the source of the qualifications to allow an expert witness to testify under Code § 37.2-906(E). In other words, although the qualifications are derived from Code § 37.2-904(B), they are applied under Code § 37.2-906(E). To hold that the substantial compliance language of Code § 37.2-905.1 is incorporated into Code § 37.2-906(E) by the mere reference to the qualifications in Code § 37.2-904(B) would require that the Court disregard the substantive nature of the qualifications. Further, it would extend the application of Code § 37.2-905.1 beyond its plain language to include Code § 37.2-906, in violation of the time-honored maxim *expressio unius est exclusio alterius*. *See Turner v. Sheldon D. Wexler, D.P.M., P.C.*, 244 Va. 124, 127 (1992) ("This maxim provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute."). Accordingly, the substantial compliance language of Code § 37.2-905.1 is necessarily inapplicable in this context.

[2] *Compare* Code § 37.2-906(E) (permitting the testimony of "the expert witness" who "meets the qualifications set forth in subsection B of § 37.2-904") *with* Code § 37.2-908(C) (permitting the testimony of "any expert witness" who "meets the qualifications set forth in subsection B of Code § 37.2-904 *or* 37.2-907") (emphasis added).

[3] Code § 37.2-904(F) indicates that additional qualified experts may be appointed by the Commissioner "[i]f the CRC deems it necessary." Thus, it is possible that more than one expert

express qualifications stated in Code § 37.2-904(B). *See Commonwealth v. Allen*, 269 Va. 262, 273 (2005) ("Where a statute designates express qualifications for an expert witness, the witness *must* satisfy the statutory criteria in order to testify as an expert.") (emphasis added).

Here, it is an undisputed fact that Dr. Sjolinder was not designated by the Commissioner nor did she take any part in Baughman's mental health examination. She was, instead, retained by the Commonwealth after it received Dr. Gravers' report. Although the Commonwealth is clearly permitted to consult with Dr. Sjolinder, nothing in Code § 37.2-906 permits the Commonwealth to call her as an expert witness at the probable cause hearing. Similarly, any discretion that the trial court had to allow her expert testimony during the probable cause hearing was limited by the plain language of Code § 37.2-906(E), which explicitly conditioned such testimony on whether Dr. Sjolinder met the qualifications set forth in Code § 37.2-904(B).

The Commonwealth, however, takes the position that "designated by the Commissioner" is not a qualification for the purposes of Code § 37.2-906(E). Rather, it insists that "designated by the Commissioner" is merely a descriptor of how a licensed psychiatrist or licensed psychologist is selected to conduct the CRC assessment. In other words, the Commonwealth asserts that "designated by the Commissioner" is only relevant for determining who can conduct a mental health examination under Code § 37.2-904(B), not for who may be permitted to testify as an expert under Code § 37.2-906(E).

The Commonwealth's argument is undermined by the manner in which the General Assembly wrote Code § 37.2-904(B). The phrase "who is," as used in Code § 37.2-904(B), indicates that the subsequent adjective phrases, including "designated by the Commissioner" are all part of the same relative clause. Notably, nothing in the language of either Code § 37.2-904(B) or Code § 37.2-906(E) indicates that the General Assembly intended for some of these adjective phrases to be interpreted in a different manner from the others. Thus, the entirety of the relative clause must be interpreted in the same manner. In other words, all of the adjective phrases are either descriptors or qualifications. As there can be no doubt that the adjective phrases "skilled in the diagnosis and risk assessment of sex offenders" and "knowledgeable about the treatment of sex offenders" are meant to be qualifications, the entire relative clause

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witness may meet the qualifications set forth in Code § 37.2-904(B) and, therefore, be permitted to testify at the probable cause hearing.

must be interpreted in a similar manner. Therefore, contrary to the Commonwealth's argument, the adjective phrase "designated by the Commissioner" is a qualification, not a descriptor. Accordingly, because Dr. Sjolinder did not meet the qualifications set forth under Code § 37.2-904(B), under the plain language of Code § 37.2-906(E), she was not permitted to testify as an expert at the probable cause hearing.

The next question before the Court is whether, in the absence of Dr. Sjolinder's testimony, the evidence was sufficient to establish that probable cause existed to believe that Baughman was a sexually violent predator. Under the SVPA, to establish that an individual is a sexually violent predator, the Commonwealth is required to show that the individual "had been convicted of a sexually violent offense and that, because of a mental abnormality or personality disorder, he finds it difficult to control his predatory behavior which makes him likely to engage in sexually violent acts." *Commonwealth v. Squire*, 278 Va. 746, 749 (2009).

Here, the record establishes that Dr. Sjolinder's report was entered into evidence through her testimony. Thus, without her testimony, the trial court had no basis for considering her report.[4] Therefore, the only evidence that was properly before the trial court were the documents establishing Baughman's prior convictions and probation violations. As the trial court had no evidence regarding Baughman's mental state, it could not have found that there was probable cause to believe that he was a sexually violent predator. Accordingly, the trial court should have dismissed the Commonwealth's petition pursuant to Code § 37.2-906(F).[5]

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[4] Contrary to the Commonwealth's assertion in its letter brief, Baughman did not agree to admit Dr. Sjolinder's report into evidence. Rather, the record establishes that, after the probable cause hearing, a question arose regarding whether Baughman's local counsel was an active member of the Virginia State Bar. This, in turn, led to questions regarding the validity of the initial probable cause hearing, thereby prompting the trial court to schedule a new probable cause hearing. The parties subsequently stipulated that *if* it was necessary to hold another probable cause hearing, the Commonwealth would present the same evidence (i.e., evidence of Baughman's prior convictions and probation violations, a copy of Dr. Sjolinder's report, and Dr. Sjolinder's testimony). Additionally, the parties agreed "that they would present the same arguments for and against probable cause." Taken as a whole, it is apparent that Baughman was not agreeing that Dr. Sjolinder's report was admissible; rather, he was simply agreeing that the subsequent probable cause hearing would be the same as the first.

[5] As the determination that no probable cause existed to believe that Baughman was a sexually violent predator is dispositive of this appeal, the Court does not reach the question of whether Dr. Sjolinder should have been permitted to testify at trial under Code § 37.2-908(C).

In its letter brief, the Commonwealth relies on *United States v. Mechanik*, 475 U.S. 66, 70 (1986), for the notion that any error in admitting Dr. Sjolinder's testimony during the probable cause hearing is harmless error, due to the jury's subsequent determination that Baughman is a sexually violent predator. *Mechanik*, however, involved two witnesses testifying "in tandem" before a grand jury in violation of the Federal Rules of Criminal Procedure. *Id.* at 68. The violation was not discovered until after trial had commenced. *Id.* The Supreme Court ruled that, in that situation, the jury's verdict rendered the pre-trial violation harmless. *Id.* at 73.

In her concurring opinion, Justice O'Connor took issue with the fact that the Supreme Court focused only on the subsequent verdict, not on the nature of the pre-trial violation. *Id.* Justice O'Connor asserted that, because the error occurred during the grand jury proceeding and was not a trial error, the focus of the harmless error analysis must be on the effect it had on the charging decision. According to Justice O'Connor, the majority's approach, especially where an objection to the charging procedure is timely raised, "gives judges and prosecutors a powerful incentive to delay consideration of motions to dismiss based on an alleged defect in the indictment until the jury has spoken. If the jury convicts, the motion is denied; if the jury acquits, the matter is mooted." *Id.* at 77. She insisted that the better alternative is to focus on whether the pre-trial violation prejudiced the defendant and had a "substantial influence" on the outcome of the proceeding. *Id.* at 78 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). In other words, Justice O'Connor took the position that a conviction by a petit jury should only render lesser errors in the charging decision harmless, whereas more significant errors could justify quashing the indictment.

Tellingly, a mere two years later, the Supreme Court adopted Justice O'Connor's approach as the standard to be applied when a court is asked to dismiss an indictment *prior* to the conclusion of trial. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). Thus, the proper approach is to first apply the standard adopted in *Bank of Nova Scotia* and, if that standard is not met, then *Mechanik* controls.[6]

Additionally, the other matters that Baughman raised in his appeal (i.e., the trial court's decision to exclude the testimony of his expert witnesses, its denial of his motion for summary judgment and its failure to dismiss the petition based on res judicata) are similarly rendered moot.

[6] It is worth noting that, in *Bell v. Commonwealth*, 264 Va. 172, 191 (2002), the only case in which this Court has applied *Mechanik*, it is clear that the *Bank of Nova Scotia* standard would

In the present case, Baughman clearly raised the issues related to Dr. Sjolinder's expert testimony before trial. As Dr. Sjolinder's expert testimony provided the only means for the trial court to determine Baughman's mental state, the trial court's error was clearly prejudicial to Baughman and substantially influenced the trial court's determination of probable cause. Indeed, absent the trial court's error, the Commonwealth's petition would have been dismissed and the matter never would have reached the jury. Accordingly, the standard adopted in *Bank of Nova Scotia* has been met and, therefore, the Court is not concerned with the jury's subsequent determination.

For the foregoing reasons, the trial court's decision finding probable cause to believe that Baughman was a sexually violent predator is reversed and vacated, and pursuant to Code § 37.2-906(F), the Commonwealth's petition seeking to have Baughman declared a sexually violent predator is dismissed.

Reversed and dismissed.

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not have been met. In contrast, in *Pease v. Commonwealth*, 24 Va. App. 397, 400 (1997), the Court of Appeals applied the *Bank of Nova Scotia* standard and reversed the defendant's conviction. Indeed, the Court of Appeals specifically distinguished *Mechanik*, noting that the error at issue in *Pease* "was significant enough to justify quashing the indictment." *Id.* at 400 fn.1.