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**DISTRICT IV**

July 8, 2016

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You are hereby notified that the Court has entered the following opinion and order:

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2015AP376

In re the commitment of Jimmie L. Mable: State of Wisconsin v.  
Jimmie L. Mable (L.C. # 2013CI25)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

Jimmie L. Mable appeals a judgment finding him to be a sexually violent person pursuant to WIS. STAT. § 980.02(1)(a) (2013-14),<sup>1</sup> and seeks a new trial. He argues that the circuit court erred in admitting testimony from two of the State's experts regarding their estimates of his risk to reoffend. Based on our review of the briefs and the record, we conclude at conference that

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

Mable was previously convicted of sexually violent offenses. The State filed a petition alleging Mable was a sexually violent person as defined in WIS. STAT. §§ 980.01(7) and 980.02(3), and, therefore, subject to commitment pursuant to WIS. STAT. § 980.05(5). Prior to trial, Mable filed a motion to exclude testimony from two of the State’s experts regarding their use of certain actuarial instruments used to assess Mable’s recidivism risk on the grounds that the testimony did not meet WIS. STAT. § 907.02(1)<sup>2</sup> standards. On appeal, Mable claims error as to the admission of expert testimony related to only one of those instruments, the Static Risk Assessment 99 (Static-99). The circuit court conducted a *Daubert* hearing on Mable’s motion and concluded that the State’s proposed expert testimony was admissible. Our review is limited to whether the circuit court properly exercised its discretion in admitting the expert testimony. *State v. Giese*, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687.

Mable’s claim of error focuses on the general use of an actuarial instrument (Static-99) by the State’s experts Dr. William Merrick and Dr. Melissa Westendorf, and on the specific use of the Static-99 as modified by Dr. Merrick (“Static 99U” or “Static 99 update”). Mable argues

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<sup>2</sup> WISCONSIN STAT. § 907.02(1) adopts the standard for the admission of expert testimony set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

that the creators of the Static-99 discourage the use of the Static-99 as it is outdated and likely overstated the risk of recidivism as a result, and that the creators encourage the use of their updated Static-99R version instead and therefore Drs. Merrick's and Westendorf's use of Static-99 in any fashion produces an unreliable result and testimony related to it is barred from admission under WIS. STAT. § 907.02(1).<sup>3</sup> Similarly, Mable argues that Dr. Merrick's use of his own "Static 99U" modification does not meet the WIS. STAT. § 907.02(1) standards for admission.

Under WIS. STAT. § 907.02(1) the circuit court is charged with the gatekeeping function of ensuring that proposed scientific evidence testimony is relevant and reliable. *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993). Factors the circuit court may consider in exercising its discretion to admit are: (1) whether the expert's theory or technique can be or has been tested; (2) whether the expert's theory or techniques has been peer reviewed; (3) whether the theory or technique has a known or potential error rate; and (4) whether the subject of the proposed testimony is generally accepted. *Id.* at 593-94. These factors do not constitute a "checklist" or establish a rigid system for admission; instead the factors are flexible, with the ultimate goal being to test reliability. *Id.* at 594-95. The Supreme Court emphasized the importance of this flexibility in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) and recognized that each factor may not be applicable to each and every aspect of a given expert's testimony. *Id.* at 141. And importantly, the *Kumho* court held that an expert's

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<sup>3</sup> Dr. Westendorf also evaluated Mable using the Static-99R instrument. Evaluations using Static-99 and Static-99R yielded different results.

testimony may be deemed “reliable” when the expert’s opinions and conclusions spring from “extensive and specialized experience.” *See id.* at 156.

Mable argues that the Static-99 instrument is “unreliable” because its creators now discourage its use and encourage the use of their more recent instrument, the Static-99R. This argument, while attractive, overlooks the importance of the *Kumho* language instructing courts to consider a particular expert’s extensive and specialized experience in a given field and using a given tool. Further, there is no evidence in the record that the Static-99 creators have actually withdrawn the instrument from professional use or otherwise disavowed its usefulness for a particular purpose. Both Drs. Merrick and Westendorf testified they were aware that Static-99 had its limitations resulting from an outdated sample group, but noted that the instrument, *in their experience*, provided useful information nonetheless, and remained confident the instrument retained its reliability.<sup>4</sup> Further, Dr. Merrick testified that the Static-99 was well-researched, commonly accepted in the relevant professional community, subjected to peer review, tested in at least seventy-five studies, and included standards and controls.

Dr. Merrick testified that because he was aware that the normative scoring data underlying the Static-99 became outdated, he did not employ Static-99 as originally created; instead, he used the basic Static-99 instrument but substituted the creator’s updated 2008 recidivism data to make his own calculations related to estimated risk more accurate. While he acknowledged that the Static-99 creators had developed a fully updated instrument known as “Static-99R,” he explained that, in his professional judgment, the revised instrument was flawed

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<sup>4</sup> Dr. Merrick testified that he had conducted 222 Chapter 980 evaluations; Dr. Westendorf testified she had been doing Chapter 980 evaluations since early 2010.

in that it used four age divisions and four ill-defined, “reference groups” rather than the original two, which he continued to use.<sup>5</sup>

Mable produced no expert testimony to counter Drs. Merrick’s and Westendorf’s testimony at the *Daubert* hearing. Thus, Mable’s argument that neither the Static-99 nor the “Static-99U” is currently deemed “reliable” by other professionals in the field is not supported by evidence in the record. Similarly, Mable’s assertions that Dr. Merrick’s “Static-99U” constitutes a wholly new, untested instrument and that the modifications Dr. Merrick made affected the Static-99’s reliability are unsupported by the evidence.

Considering whether to admit Static-99 and “Static-99U” evidence, the circuit court had before it Drs. Merrick’s and Westendorf’s extensive, specialized experience conducting Chapter 980 evaluations using the Static-99 or “Static-99U” instrument, and no countervailing testimony. Further, the State adequately proved up the requisite *Daubert* factors supporting the use—and ultimately the reliability—of the Static-99. While the circuit court did not address Dr. Merrick’s use of the “Static-99U,” there was no need for it to because Mable failed to present his own expert testimony suggesting that the use of updated normative data stripped the instrument as used of its validity and reliability. The circuit court properly exercised its discretion in admitting the evidence.

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<sup>5</sup> Dr. Merrick testified that it was his understanding that the Static-99R creators indicated their intent in the coming months to reduce the reference groups to two, from the four, due to concerns about some of the resulting data sets. The creators’ revision cemented Dr. Merrick’s belief that he was correct in having declined to employ the Static-99R.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*