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DISTRICT IV

April 10, 2017

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

2015AP2665 In re the commitment of Anthony Jones: State of Wisconsin v. Anthony Jones (L.C. # 2013CI4)

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

Anthony Jones appeals a judgment finding him to be a sexually violent person pursuant to WIS. STAT. § 980.02(1)(a) (2015-16).[1] Jones argues that the circuit court erred in admitting expert testimony derived from actuarial instruments that he believed to be unreliable and, therefore, inadmissible. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In 1993, Jones was convicted of three sexually violent offenses. Prior to his release from prison, the State filed a petition alleging Jones was a sexually violent person within the meaning of WIS. STAT. § 980.01(7) and, therefore, eligible for commitment under WIS. STAT. § 980.05(5). Prior to trial, Jones filed a motion pursuant to WIS. STAT. § 907.02(1)[2] to bar any and all expert testimony pertaining to three actuarial risk instruments: Minnesota Sex Offender Screening Tool-Revised (MnSOST-R), Rapid Risk Assessment Sex Offender Recidivism (RRASOR), and Static-99.[3] The circuit court held a ***Daubert***[4] hearing and concluded that the proffered expert testimony was admissible.

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. *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 592-93 (1993). The circuit court must determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." ***Id.*** at 592. The ***Daubert*** court identified a list of factors that a court may utilize in its analysis. These factors are: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been peer reviewed;

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[2] WISCONSIN STAT. § 907.02(1) 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.

[3] On appeal, Jones does not renew his challenge to the admissibility of evidence pertaining to the Static-99 tool. The defense expert who testified at trial utilized the Static-99 tool.

[4] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

(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 are not a "checklist" or rigid; rather they are flexible, with the ultimate goal being to test reliability. ***Id.*** at 593-94.

Appellate review of a ***Daubert*** decision 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. The circuit court's "gatekeeping" role was stressed in ***Kumho Tire Co., Ltd. V. Carmichael***, 526 U.S. 137 (1999), where the Supreme Court stated, "the law grants a [circuit] court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." ***Id.*** at 142.

With these principles in mind, we consider Jones's arguments, which are drawn from the testimony of the expert who testified on Jones's behalf at the ***Daubert*** hearing.

Jones argues that the MnSOST-R instrument is "unreliable." Jones argues that the instrument's design "'virtually guarantees a high false positive rate overestimating the probability of recidivism'" and "fails to account for the decline in recidivism rates as offenders pass through the middle decades of life." Jones also argues that the norms used in the MnSOST-R instrument are "outdated" and do not account for the "observed decline in recidivism in recent decades."

Jones attacks the RRASOR as "unreliable" because it does not account for the decline in recidivism after age 25. Jones takes issue with the method used to determine the ten-year risk estimate. Finally, Jones notes that the studies that have validated the instrument are undated so that it cannot be determined whether the instrument reflects the decline in recidivism.

In denying Jones's motion, the circuit court considered the ***Daubert*** factors. The court found that the State's expert witnesses testified that the instruments "were the product of sufficient facts or data and the product of reliable principals [sic] and methods." *See* ***Daubert***, 509 U.S. at 593 (whether a theory or technique has been tested). The court found that the instruments have been the "subject of extensive review." *See* ***id.*** at 593 ("submission to the scrutiny of the scientific community is a component of 'good science'"). The court noted that the challenged instruments were not "junk science" and were "widely used in predicting recidivism in sex offenders." *See* ***Daubert***, 509 U.S. at 594 ("[w]idespread acceptance can be an important factor in ruling particular evidence admissible").

The circuit court cited with approval an analogy offered by the defense expert—these instruments were older cars that may not have all the safety features of a newer car but they still were able to get the user from Point A to Point B. By relying on the instruments, the State was running the risk that Jones could discredit the State's expert testimony through cross-examination but that presented a question of the weight of the evidence, not its admissibility.

At the ***Daubert*** hearing, the defense expert disagreed with the State's expert witnesses about the reliability of the actuarial instruments. That disagreement, however, does not lead inexorably to the exclusion of the evidence, but rather goes to the weight of the evidence—a decision for the trier of fact. The court properly exercised its discretion when it denied Jones's motion to exclude evidence under WIS. STAT. § 907.02(1).

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals