OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

December 15, 2017

To:

Hon. Juan B. Colas
Circuit Court Judge
215 South Hamilton, Br.10, Rm. 7103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Jeffrey M. Gabrysiak
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Andrew Hinkel
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Ismael R. Ozanne
District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Everett W. Mosher
Sand Ridge Secure Treatment Center
P.O. Box 800
Mauston, WI 53948

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

2016AP536-NM In re the commitment of Everett W. Mosher: State of Wisconsin v. Everett W. Mosher (L.C. # 2014CI1)

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Everett Mosher appeals an order committing him to the care and custody of the Department of Health and Family Services following his adjudication as a sexually violent person under Chapter 980 of the Wisconsin Statutes. Attorney Andrew Hinkel has filed a no-

merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2015-16);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744, 87 S. Ct. 1396 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals, Dist. 1***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence and several evidentiary and procedural issues that arose before and during trial. Mosher was sent a copy of the report but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. We therefore affirm the commitment order.

Preserved Objections

First, Mosher filed a motion in limine seeking to exclude any expert testimony from the DOC psychologist, Dr. Michael Woody, regarding: the Revised Psychopathy Checklist, 2nd Edition (PCL-R); the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR); the Minnesota Sex Offender Screening Tool, Revised (MnSOST-R); and the original and revised versions of the 1999 Static Risk Assessment (Static 99 and Static 99R). Mosher asserted that Woody's testimony about these risk assessment tools would not meet the standard for admissibility set forth in ***Daubert v. Merrell Dow Pharm.***, 509 U.S. 579, 133 S. Ct. 2786 (1993), which has been adopted by this state in WIS. STAT. § 907.02. That statute provides:

> 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.

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

WIS. STAT. § 907.02(1). Specifically, Mosher argued that Woody "failed to apply the PCL-R and actuarial instruments reliably to the facts of this case" because his conclusions differed from those of another expert, Dr. Richard Elwood, and because none of the actuarial scores from the challenged instruments placed Mosher in a category of offenders with a recidivism rate higher than 50%.

We agree with the circuit court that the mere fact that experts disagree does not mean that either of them failed to reliably apply reliable scientific principles or methods. There can be reasonable disagreements among the relevant scientific communities. Rather, it is for the jury to determine which of the competing scientific methods or expert opinions that have met the threshold for admissibility carries more weight. *See* ***State v. Giese***, 2014 WI App 92, ¶23, 256 Wis. 2d 796, 854 N.W.2d 687. In particular, we note that a difference in opinion between experts about the *significance* of actuarial scores does not mean that scientific methods were not reliably followed in reaching those scores. Furthermore, as the circuit court observed, Woody reliably applied the actuarial scores here by explaining why recidivism rates based upon static factors of less than fifty percent *over a fifteen-year period* did not rule out a conclusion that an offender was more than likely to reoffend *during his lifetime*, when considered with dynamic factors.

Second, the circuit court denied Mosher's motion to be referred to at trial only as "Mr. Mosher," and not as "the respondent." We see no rule prohibiting—and no prejudice stemming from—referring to Mosher by his party designation at trial.

Third, Mosher asked for all experts to be referred to as "court appointed," rather than being associated with the State or Mosher. The court denied the request on the grounds that it would be misleading, since Mosher had in fact selected Dr. Elwood.

Fourth, Mosher asked that a jury questionnaire be sent out in advance. Again, this was a discretionary decision and we see no prejudice arising from the circuit court's denial of Mosher's request because the voir dire did not reveal bias on the part of any of the selected jurors.

Fifth, Mosher asked to exclude testimony from each expert relating to how many or what percentage of individuals the expert has examined met the criteria for commitment in the expert's opinion. The circuit court reasonably determined that such testimony was relevant to the weight of the experts' opinions.

Sixth, Mosher objected to the dismissal for cause of a potential jury member who had clinical experience as a social worker and who stated that she would find it difficult to decide the case based solely on what she heard in the courtroom. Regardless of whether there was sufficient cause to strike the juror as a matter of law, there is no indication that the juror was dismissed for a discriminatory or other impermissible reason, and there was no indication of bias on the part of any members of the impaneled jury. Therefore, there would be no grounds for relief on appeal.

Seventh, Mosher objected to the introduction of documents from his parole proceedings showing that he had refused sex offender treatment and had been disciplined for having inappropriate materials in his cell. However, the record shows that the circuit court reasonably exercised its discretion in ruling that the materials were admissible because the State's expert had considered them in reaching an opinion.

Eighth, the circuit court excluded evidence that Mosher's recividism risk might be reduced by the fact that he will be on supervision until 2034. The court's ruling was directly supported by ***State v. Mark***, 2006 WI 78, 292 Wis. 2d 1, 718 N.W.2d 90.

Ninth, the circuit court rejected a request for a modified jury instruction that would tell the jury that the phrase "more likely than not" means that the probability that Mosher would reoffend must be higher than 50%. However, there is no arguable basis to challenge the actual instruction that the circuit court gave, which was a pattern jury instruction. *See* WIS JI—CRIMINAL 2502.

Sufficiency of the Evidence

In the first phase of the bifurcated proceeding, the State needed to prove beyond a reasonable doubt: that Mosher had a prior conviction for a sexually violent offense; that he had a mental disorder which predisposed him to commit sexually violent offenses; and that he was more likely than not to reoffend. *See* WIS. STAT. §§ 980.01(7) and 980.05(3); WIS JI—CRIMINAL 2502.

The State produced a prior judgment of conviction to establish that Mosher had been convicted of a sexually violent offense. Three expert witnesses provided opinions that Mosher suffered from pedophilic and personality disorders that predisposed him to commit sexually violent offenses. Although only one of the three expert witnesses further concluded that Mosher was more likely than not to reoffend, the jury was entitled to rely on that expert's opinion.

In the second phase of the proceeding, the circuit court properly committed Mosher to the custody of the Department of Health and Family Services based upon the verdict that he was a sexually violent person. *See* WIS. STAT. § 980.06.

Upon our independent review of the record, we have found no other arguable basis for reversing the commitment order. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786

N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Therefore,

IT IS ORDERED that the commitment order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Andrew Hinkel is relieved of any further representation of Everett Mosher in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals