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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2015AP002665

In re the commitment of Anthony Jones:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ANTHONY JONES,

Respondent-Appellant.

On Notice of Appeal from an Order
Entered in the Dane County Circuit Court,
the Honorable Rhonda L. Lanford, Presiding

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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ISSUE PRESENTED

Under Wis. Stat. § 907.02(1), Wisconsin's codification of the ***Daubert*** standard for expert testimony, did the circuit court err in permitting opinion testimony founded in the RRASOR and the MnSOST-R?

The circuit court ruled the testimony admissible.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Jones believes the issues for this court's decision can be adequately presented in the briefing, and does not request oral argument. Publication is not warranted, as this case requires only the application of established law to a particular set of facts.

STATEMENT OF THE CASE AND FACTS

The state filed a petition for Anthony Jones's commitment in August 2013, when he was approaching completion of his sentences for convictions of sexual assault. (1:1-2). The petition noted Mr. Jones's history of sexual assault convictions, arrests and allegations, relying on a special purpose evaluation report by Dr. Anthony Jurek. (1:2-9). Jurek opined that Jones suffered from antisocial personality disorder, that this disorder predisposed him to commit sexual assaults, and that he was more likely than not to commit another sexually violent offense. (1:2,9).

As to Jones's likelihood of re-offense, Jurek reached his conclusion based in part on the application of four actuarial instruments: the Rapid Risk Assessment for Sexual

Offense Recidivism (RRASOR); the Static-99; the Static-99R; and the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R). (32:Exh.2:9-11; App. 114-16).

After the court found probable cause and ordered Jones to be detained awaiting trial, the state submitted an additional report prepared by Dr. Bradley Allen. (5; 32:Exh.6). Allen also concluded that Jones was more likely than not to re-offend, also based in part on the application of actuarial instruments; he used the Static-99 and the Static-99R. (32:Exh.6:8).

Jones filed a motion to exclude any testimony by Jurek or Allen regarding three instruments—the Static-99, the RRASOR, and the MnSOST-R—on the ground that they did not meet the requirements of Wis. Stat. § 907.02, Wisconsin's codification of the evidentiary standard described in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993). (24). As relevant to this appeal, the motion argued that

- all three instruments are antiquated because they fail to adequately account for the decrease in recidivism associated with a person's aging. (24:6).

- each instrument was created using samples of offenders that are now decades old, and so do not reflect the observed decline in re-offense rates in recent years. (24:7).

- neither the MnSOST-R nor the RRASOR were published in a peer-reviewed academic journal and both were developed using small samples of offenders. (24:7).

- the MnSOST-R "compounded its small sample size problem by tinkering with the sample, presumably to raise the base rate. For instance, the developers excluded intra-familial sex offenders and non-contact sex offenders. Both types of offenders have historically low base rates. The developers also added *known* recidivists into the sample. Purposeful manipulation of a sample is not an appropriate or reliable method to construct an instrument." (24:8).

- the RRASOR's ten-year recidivism rates are simply the five-year rate multiplied by 1.5, rather than being based on any empirical data. (24:8).

Four journal articles were attached to support the motion's claims. (24:10-110).

Jones also submitted an affidavit from Dr. Richard Wollert criticizing the use of these instruments. (25). As relevant to this appeal, he stated that

- the RRASOR, which was published in 1997, does not account for either the declining rate of recidivism in recent decades or the decrease in recidivism associated with a person's aging, and is therefore antiquated

- the RRASOR's ten-year extrapolation figures have been found invalid,

- the MnSOST-R, which has never been published in a peer-reviewed journal, is antiquated for the same reasons as the

> RRASOR and the Static-99, and has been found to perform "no better than chance for identifying sexual recidivists."

(24:1-2).

The state filed a response contending that the testimony should be admitted. (30). It noted that the general methodologies—that is, the use of *some* actuarial instruments along with other means of assessing risk—of the state's two witnesses and Jones's were the same and not challenged by Jones. (30:10-11). The state argued that the use of individual actuarial instruments, as a "subset of the actuarial component of an expert's overall methodology," was not susceptible to exclusion under ***Daubert***. (30:12). It also posited that the challenged instruments' failure to account for new knowledge did not render them "unreliable." (30:12). Finally, the state described the development and attributes of each instruments, and argued that published sources established their usefulness in predicting recidivism. (30:16-23).

The court held a two-day evidentiary hearing at which Jurek, Allen and Wollert testified. (64; 65). At the conclusion of this hearing, the court gave an oral ruling rejecting Jones's ***Daubert*** challenge[1]:

> The evidence respondent seeks to exclude is evidence acquired through the use of three actuarial tools, the Minnesota Sex Offender Screening Tool Revised, the [MnSOST-R], the [RRASOR], and Static-99 and Static 99-R. Dr. Jurek testified that he used all of these tools in assessing Mr. Jones. Dr. Allen testified

[1] The transcripts of this case contain numerous apparent errors and omissions. Excerpted portions have been edited for accuracy where it is possible to deduce the likely or intended remarks from context; such emendations are indicated by brackets.

that he used Static-99 but not the other two. Mr. Jones called one expert, primitive and were "outdated." The primary criticism of the test[s] centered around the fact that they did not adequately account for Mr. Jones's age in determining his recidivism because it was undisputed by the expert that as a sex offender ages, recidivism goes down. Mr. Jones is currently 55 years old. The other stats, which is Wisconsin statute on expert testimony.

This statute was revised in 2011 and tracks federal rule 702 also known as the ***Daubert*** standard or the Daubert rule named after ***Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 1993***. It is axiomatic. The Court can look to federal cases interpreting those rules. Because there is a dearth of case law, this Court will look primarily at federal law, interpreting rule 702 and parties also in their briefs submitted have relied on federal cases in making their arguments regarding the admissibility of this testimony.

Judges may admit testimony resting on scientific, technical or otherwise specialized knowledge that will assist the trier of facts. Federal courts have interpreted rule 702 states that it does not condition admissibility on the state of the published literature [or] [a] complete and flaw free set of data, that a witness is qualified as an expert by knowledge, skill, experience, training, or education, and that expert may testify in the form of an opinion if the testimony is based upon sufficient facts or data. The testimony is principles and methods, and the witness has applied the principles and methods reliably to the facts of the case, and that was ***United States v. [Mikos]***, seventh circuit, 2008. ***Daubert*** makes clear, do not constitute a definitive checklist or test. Daubert adds that the gatekeeping inquiry must be tied to the facts of a particular case. And that was reiterated in ***[Kumho] Tire versus Carmichael***, 1999.

All three experts who testified were knowledgeable about all three tests that are being challenged. Dr. Jurek

uses all of the tests in his day-to-day practice at DOC. Dr. Jurek uses the Static-99. Dr. [Wollert] has used static and [RRASOR] in the past, but finds them antiquated and no longer uses them. The evidence at the hearing through the witnesses show that all of the tests and the testimony offered were the product of sufficient facts or data and the product of reliable principals and methods.

The Court does not accept Mr. Jones's definition of peer review in his brief or argued at this hearing. And that while publication in a journal is the most rigorous, it is not the only way to peer review. The witnesses testified that these tests are routinely published on both in journals and in published papers. There are websites that are conferences and training that peers and experts can attend. Static-99 alone has 60 cross-validation studies, according to Dr. Jurek. All of the instruments were subject of extensive review. They have been written about, and even criticized [in] the papers that he has submitted.

They have also been used in other cases, in other jurisdictions, and the Court was not able to find any cases where these tests were stricken based on admissibility or based on a ***Daubert*** challenge. The tools have been debated, reviewed, and revised. This is not junk science, which is what ***Daubert*** sought to reject. These actuarial tools are widely used in predicting recidivism in sex offenders. Did the defendants. Both Dr. Jurek, and Dr. Allen testified that they did. They reviewed Mr. Jones's records and all the information they had and testified that this is the type of information reasonably relied upon by experts in their field.

And there was no evidence suggesting or even challenging that they administered the test incorrectly or interpreted the actuarial data incorrectly. So this prong is met. Some analogies reviewed. I actually liked Dr. [Wollert]'s analogy best when he stated that using these actuarial tools is like driving an older car that does

> not have all of the safety devices that new cars have. Just because they are safer cars to drive, and both cars get you from point A to point B regardless of the additional safety features. Much like a person driving a car without modern safety features, the State proceeds at its own peril if Mr. Jones, through cross-examination can convince a jury that Dr. Jurek and Dr. Allen's is antiquated, and does that Mr. Jones's criticisms of the actuarial tools are only that, criticisms, and cannot form the basis for this court to exclude this testimony.
>
> The weight to give this testimony is for the jury to decide. This is a weight, not an admissibility analysis. ***Daubert***'s goal as expressed in [***Kumho Tire***], is to make certain that an expert, whether employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relative field. The Court is satisfied that this testimony presented meets all of the requirements for admissibility, and Mr. Jones's motion to exclude is denied.

(65:46-50; App. 101-05). The court entered a one-page order denying Jones's motion. (34).

The case was tried to a jury; each of the three experts testified. (67-72). The jury found Jones to be a sexually violent person and he was committed. (44; 45). He filed a notice of intent and a notice of appeal. (46:59).

ARGUMENT

The Circuit Court Erred When it Permitted the State to Introduce Testimony About Actuarial Instruments That was Unreliable.

A. Standard of review and the ***Daubert*** standard.

This court reviews a circuit court's decision to admit or exclude evidence, including scientific evidence, under an erroneous exercise of discretion standard. ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687. This means that the decision will be sustained if the circuit court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2006 WI App 248, ¶151, 297 Wis. 2d 70, 727 N.W.2d 857.

The admissibility of expert testimony is governed by Wis. Stat. § 907.02. Prior to a 2011 amendment to the statute, expert testimony was admissible "if the witness is qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." ***Giese***, 356 Wis. 2d 796, ¶11. In 2011, the legislature amended the statute, making it consistent with "the ***Daubert*** reliability standard embodied in Federal Rule of Evidence 702." ***Id.*** The amended statute states:

> (1) 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*.

Wis. Stat. § 907.02(1) (emphasis added). The legislature added the italicized portion in 2011.

The new standard focuses on the reliability of the proposed evidence. Before admitting scientific evidence, the circuit court must now determine that (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, the court's gate-keeper function "is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***Giese***, 356 Wis. 2d 796, ¶18. The focus "must be solely on principles and methodology, not on the conclusions that they generate." ***Daubert***, 509 U.S. at 595. The trial judge has a special obligation to "ensure that any and all scientific testimony … is not only relevant, but reliable." ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137, 147 (1999).

The Court in ***Daubert*** created a non-exhaustive list of appropriate factors to consider when determining whether the principles and methodology of expert testimony is reliable. These factors include: (1) whether the science can be or has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) whether there is a known or potential rate of error and whether there are standards controlling the technique's operation, and (4) whether the theory or technique is generally accepted

in the relevant scientific community. ***Daubert***, 509 U.S. at 593-95.

In ***Kumho Tire***, the Court confirmed "a trial court should consider the specific factors identified in ***Daubert*** where they are reasonable measures of reliability of expert testimony." ***Kumho Tire***, 526 U.S. at 152. The ***Daubert*** factors can help to evaluate the reliability of expert testimony, even when it is experience-based testimony. ***Id.*** at 151.

The fact that some portions of an expert's analysis are reliable (or are unchallenged) does not mean that other aspects pass the test of ***Daubert***. "***Daubert*** is not an all-or-nothing test… a [trial court] can independently consider whether each "particular scientific [or technical] methodology is reliable." ***Dewey v. Volkswagen Aktiengesellschaft***, 681 F.3d 170, 189 (3d Cir. 2012).

B. The court erred in permitting Jurek to offer opinion testimony based on the MnSOST-R.

The MnSOST-R was developed by the Minnesota Department of Corrections to determine treatment needs for Minnesota sex offenders. (24:4). It consists of sixteen items. (24:4). It was developed with an original sample of 256 offenders released between 1988 and 1990. (32:Exh.2:11; App. 116). Wollert testified that sample size is important for determining which items contribute to recidivism, and further that "there has never been an analysis of which items contribute to recidivism rates, and which ones are totally useless." (64:151-53). This results in people who satisfy these "useless" items being arbitrarily placed into a more dangerous group. (64:153). Dr. Jurek agreed that some studies have shown MnSOST-R to contain items with no correlation to recidivism. (64:67-69).

Moreover, the development sample was not randomly selected. Instead, the developers added to the sample known recidivists in order to increase the re-offense rates. (64:154-56). They also excluded from their population any incest-only offenders, who generally have a low recidivism rate. (64:154-56). Though newer norms were released in 2003, the instrument has never been published in a peer-reviewed journal. (64:156-57).

This method of development of MnSOST-R renders it unreliable, because it is neither "based upon sufficient facts or data" nor the "product of reliable principles and methods." Wis. Stat. § 907.02(1). As Wollert explained, constructing a sample by choosing known recidivists and excluding those with a low likelihood of re-offending leads to a high number of false positives: that is, people who are classified as being high risk despite a low likelihood of re-offense. (64:156). Though Jurek testified that the developers believed that their artificially inflated base rate "actually reflected the base rate of actual recidivism in the real world," he did not provide any explanation or basis for this belief. (64:40-41).

Wollert testified that this development method for the instrument "virtually guarantees a high false positive rate overestimating the probability of recidivism." (64:161). For this reason, the instrument is "misleading rather than informative." (64:161). Thus Wollert testified that "it's impossible for the MnSOST-R with a reasonable base rate to identify a group that [is] more likely than not to recidivate." (64:159).

The MnSOST-R is also unreliable because it, like the RRASOR and Static-99, fails to account for the decline in recidivism rates as offenders pass through the middle decades of life. All three experts agreed on this decline (64:73,118-

19,152-53), but the MnSOST-R treats Mr. Jones the same at 55 years old as it would if he were 30. An instrument that fails to reflect known realities cannot be said to be the "product of reliable principles and methods."

Finally, the MnSOST-R, like the RRASOR and the Static-99, is unreliable because its norms are outdated, failing to account for the observed decline in recidivism in recent decades. (65:35; 64:75-76). Though Jurek testified that MnSOST-R has 12 times been found to have a positive relationship to recidivism, he did not explain when these studies were conducted and thus whether they reflect this decline. (64:34).

The trial court thus erred in permitting testimony based in the MnSOST-R. The court's analysis was, in essence, that Jurek is an acknowledged expert in sex-offense recidivism and that there was no claim that he applied the instrument incorrectly. (65:48-49; App. 103-04). But neither Jurek's expertise nor his proficiency with the instrument was the issue; the issue was whether the instrument itself was reliable. The fact that an expert endorsed the MnSOST-R does not pass the test. *See* ***Kumho Tire***, 526 U.S. at 157 (1999) ("nothing in either ***Daubert*** or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert").

C. The court erred in permitting Jurek to offer opinion testimony based on the RRASOR.

The RRASOR was developed in 1997 by a researcher for the Department of the Solicitor General of Canada. (24:11). It was not published in a peer-reviewed journal, but was made publicly available on the Solicitor General's website. (64:50).

Like the MnSOST-R, the RRASOR has one item for offender age, deducting a point at age 25. (64:84). Also like the MnSOST-R, the RRASOR was developed using samples of offenders from several decades ago; some were released as early as 1958. (24:16-18). There have been no new norms released since the instrument's publication in 1997. (64:74-75).

The RRASOR is unreliable for some of the same reasons discussed above with respect to the MnSOST-R: it fails to account for the continued decline in re-offense rates after age 25 and its predicted rates of re-offense do not reflect the fact that these rates have declined overall. (65:9). Even Allen, one of the state's experts, testified that he was not "comfortable" using the RRASOR because it is "an outdated instrument." (64:11-112). Though Jurek testified that he believes the offenders he evaluates "are pretty much the same" as those who were studied to develop the RRASOR, he did not provide any data supporting this claim. (64:53-54). (Curiously, he also testified that the RRASOR's continued utility is in part due to the fact that it is more sensitive to those with a deviant arousal pattern and for male-oriented pedophiles, neither of which describes Mr. Jones. (64:26,75-77).)

Jurek also testified that he uses the RRASOR because "it was the first instrument that became available, and there's a fair number of studies that establish that it is strongly related to risk of sexual recidivism." (64:25). But, as with the MnSOST-R, no indication was ever given as to when these studies were conducted, and hence whether they reflect the reduction in recidivism rates.

The RRASOR is unreliable for an additional reason: the ten-year risk estimate was not derived from data about actual re-offense rates but was instead obtained by multiplying the five-year rate obtained in each sample by 1.5. Though Jurek disputed this in his testimony, (64:55,80-83,92-93), the original paper explaining the RRASOR demonstrates that this was the method used:

> To standardize the rates across studies, certain assumptions concerning the recidivism rates were required. Based on previous long-term follow-up studies, it was assumed that the recidivism rate was quickest during the first five years and then continued at a lower rate (approximately half) for up to 15 years post release. The amount of recidivism following 15 years post release was considered to be negligible. It was also assumed that the ration of the recidivism rates for the different risk levels would be approximately constant across time (i.e, the "proportional hazard" assumption). Consequently, the adjustment was based on the following simple formula:
>
> Total recidivism rate =
>
> YRR* years (for years 1-5) + (½)YRR*years(for years 6-15),
>
> *Where YRR is the estimated yearly recidivism rate for years 1 to 5.*

(24:24-25; App. 107-08) (emphasis added; citations omitted). That is, the yearly recidivism rate for years 6-15 (which includes years 6-10) is simply assumed to be one half the yearly recidivism rate for years 1-5. The paper provides no explanation for the choice of this particular number or for the assumption that it holds across all scores and levels of risk. As Wollert testified, this approach is "just flat wrong"; his

work, included with Jones's ***Daubert*** motion, further explains that the data supporting this assumption "have never been published in a peer-reviewed journal" and that, when compared with the actual data obtained by tracking offenders over 15 years or more, the assumption is consistently proven to be false. (65:9-10; 24:108; App. 111).

As with the MnSOST-R, the circuit court did not provide any specific reasons why the RRASOR satisfied Daubert; it essentially deferred to Jurek's judgment that it was reliable. (65:48-49; App. 103-04). As discussed above, this is not what the ***Daubert*** standard requires and is hence an erroneous exercise of discretion.

CONCLUSION

For the foregoing reasons, Mr. Jones respectfully requests that this court reverse his commitment and remand to the circuit court for a new trial.

Dated this 21st day of March, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,638 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of March, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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