STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP2665

IN RE COMMITMENT OF ANTHONY JONES:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ANTHONY JONES,

Respondent-Appellant.

APPEAL FROM AN ORDER OF COMMITMENT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE RHONDA L. LANFORD, PRESIDING

BRIEF OF THE PETITIONER-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision is warranted because of the lack of Wisconsin case law addressing the admissibility of actuarial instruments in Chapter 980 cases under the new *Daubert* standard.[1]

STATEMENT OF THE CASE

The State petitioned to commit Anthony Jones as a sexually violent person pursuant to Wis. Stat. ch. 980. (1.) Jones filed a pre-trial motion to exclude any testimony by Drs. Jurek or Allen regarding three instruments—the Static-99, the RRASOR,[2] and the MnSOST-R[3]—on the ground that they did not meet the requirements of Wis. Stat. § 907.02 and *Daubert*.[4] (24; Jones' Br. 2.) The circuit court held a *Daubert* hearing. (64; 65.) As the circuit court saw it, "[t]he primary criticism of the test[s] centered around the fact that they did not adequately account for Mr. Jones' 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." (65:47.) Drs. Jurek and

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[1] *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993). This issue is also raised in another pending appeal relating to the Static-99, *State v. Jimmie L. Mable*, No. 2015AP0376, 2015 WL 5003514 (Wis. Ct. App. Aug. 6, 2015) (unpublished).

[2] Rapid Risk Assessment of Sexual Offense Recidivism. *In re Commitment of Richard*, 2014 WI App 28, ¶ 2, 353 Wis. 2d 219, 844 N.W.2d 370.

[3] Minnesota Sex Offender Screening Tool—Revised. *Id.*

[4] On appeal, Jones abandons any claim of error regarding the Static-99.

Allen testified for the State and Dr. Wollert testified for Jones. (64; 65.)[5]

Dr Jurek testified that all of the instruments are empirically derived and validated. (64:27.) He uses more than one instrument because the error is different in each of the instruments. (64:26.) All have demonstrated a correlation with sexual recidivism. (64:27.) All of the instruments are what is known as meta studies, that is, statistical analysis of a number of other individual studies; the meta studies determined factors correlated with sexual recidivism. (64:27-28.) These factors were then used to construct the actuarial instruments. (64:28.) All of the instruments have been extensively reviewed and widely written about in the professional literature except the Static-99R[6] which is one of the newer instruments. (64:30.) All have been subjected to critique by e-mail, as well as, discussed and debated within the professional community. (64:30-31.) There are debates over norms and base rates. (64:31-32.) All of the creators of the instruments offer training except for the MnSOST-R. (64:30.) All of the instruments have rules for scoring, some requiring examiner judgment. (64:30.) There are disagreements over the results of the scoring and the interpretation of the ultimate result. (64:32.)

The MnSOST-R has been in use for 15 years. (64:34.) There are 12 research studies which indicate it has a positive relationship with sexual recidivism. (64:33.) A high score on the MnSOST-R has correlated with a high recidivism rate. (64:33.) It has remained strong on cross-

[5] The transcript mistakenly refers to Jones' hearing expert as Dr. Waller. (65:2-3.)

[6] The Static–99R is the updated version of the Static–99. *In re Commitment of Schulpius*, 2012 WI App 134, ¶ 10 n.8, 345 Wis. 2d 351, 825 N.W.2d 311.

validation. (64:35.) The instrument does account for age by giving one point up to 30 years of age and zero points after 30 years of age. (64:44.)

The RRASOR was the first actuarial instrument developed. (64:25.) There have been 35 or 36 studies showing that the RRASOR has a strong relationship to sexual offense recidivism. (64:25, 49.) The RRASOR is more sensitive to individuals with deviant arousal patterns. (64:26.) The RRASOR provides valuable information despite not being updated or reducing the overall score after age 25 years as the Static-99 does. (64:51-52.) There has been at least one paper in the last two or three years which has looked at the predictive accuracy of the RRASOR as compared to the Static-99 and the Static-99R. (64:52.)

Dr. Bradley Allen also testified at the *Daubert* hearing. He used only the Static-99 and the Static-99R. (64:108.) Dr. Allen testified that there is some disagreement in the professional community over the choice of actuarial instruments and also disagreement on interpretation of results. (64:103.) All of the actuarials have limits, one of which is that the instruments do not indicate whether an individual will or will not re-offend. (64:107.) They are all moderately predictive of sexual recidivism. (64:108.) He stated that the RRASOR and the MnSOST-R are still in use. (64:125.) Dr. Allen testified that the RRASOR was based on empirical research and had been cross-validated. (64:111.) He had used the RRASOR in the past. (64:111.) He stopped using it because he felt it outdated as the norms had not been updated but he acknowledged that others in the field still use it. (64:111-12.) The data underlying the RRASOR was reliable as was the statistical methodology. (64:112-13.)

Jones presented the testimony of Dr. Richard Wollert. (64:142.) He testified that in his view, the MnSOST-R and

the RRASOR were not based on sufficient data nor did they employ reliable principles or methodology. (64:161; 65:9.) He did acknowledge that the RRASOR had been "referenced quite a bit" and has the same accuracy as other instruments that don't take age and base rate into account. (65:3-4.)

On cross-examination, he agreed that all of the instruments were at best moderately predictive. (65:19.) He agreed that all of the instruments yield recidivism rates for groups sharing the same score on the particular instruments. (65:20.) Group data does not directly translate to individual risk. (65:20.) He also conceded that peer review includes more than just review in academic journals but, according to Dr. Wollert, academic journals carry more weight. (65:21.) He acknowledged that the MnSOST-R has been one of the most widely used sexual recidivism tools. (65:25.) On the whole, it had a similar predictive value as the other instruments. (65:27.) He admitted he had used the RRASOR in the past. (65:28.)

The circuit court ultimately held that all three instruments met Wis. Stat. § 907.02 and *Daubert*. (65:46-50.) The court concluded all three experts were knowledgeable about the instruments. While Dr. Jurek was the only one who currently used the RRASOR and MnSOST-R, both Dr. Allen and Dr. Wollert had used the RRASOR in the past. (65:47.) The court found that "[a]ll of the instruments were subject of extensive review. They have been written about, and even criticized . . . ." (65:48.) The court observed, "This is not junk science, which is what *Daubert* sought to reject. These actuarial tools are widely used in predicting recidivism in sex offenders." (65:48.)

STANDARD OF REVIEW

Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous

exercise of discretion standard. *State v. Giese*, 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687 (applying erroneous exercise of discretion standard to a *Daubert* ruling); *State v. Chitwood*, 2016 WI App 36, ¶ 30, ___ Wis. 2d ___, ___ N.W.2d ___; s*ee also General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997). A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record. *Giese*, 356 Wis. 2d 796, ¶ 16; *Chitwood*, 2016 WI App 36, ¶ 30. If the record supports the trial court's evidentiary decision, an appellate court "will not reverse even if the trial court gave the wrong reason or no reason at all." *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted).

ARGUMENT

The only issue that Jones raises in this appeal is whether the trial court erred when it permitted Dr. Anthony Jurek to testify about his use of the RRASOR and MnSOST-R actuarial instruments in assessing Jones' risk of committing another sexually violent offense. (*See* Jones' Br. 2, 10-15.) Actuarial instruments "are statistical research-based instruments that are created using data obtained by studying various factors associated with recidivism in groups of people who were convicted for sexual offenses, released, and followed over time." *In re Commitment of Combs*, 2006 WI App 137, ¶ 4, 295 Wis. 2d 457, 720 N.W.2d 684. Jones claims that Wis. Stat. § 907.02 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) should have barred Dr. Jurek's expert testimony about his use of two of the four actuarial instruments he used in assessing Jones' risk to re-offend.

I. The *Daubert* standard and Wis. Stat. § 907.02.

Wisconsin Stat. § 907.02 governs the admission of expert testimony. *See Giese*, 356 Wis. 2d 796, ¶ 17. Prior to

2011, that statute made expert testimony admissible "'if the witness [was] qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue.'" *Id.* (quoting *State v. Kandutsch*, 2011 WI 78, ¶ 26, 336 Wis. 2d 478, 799 N.W.2d 865).

In January 2011, the Legislature amended § 907.02 to make Wisconsin law on the admission of expert testimony consistent with "'the *Daubert* reliability standard embodied in Federal Rule of Evidence 702.'" *Id.* (quoting *Kandutsch*, 336 Wis. 2d 478, ¶ 26 n.7). Federal Rule 702 codified the trilogy of United States Supreme Court cases *Daubert*, *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999).

The amended rule provides as follows:

> 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) (2013-14).

Under the new § 907.02, the circuit court performs a "gate-keeper function . . . 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 court must focus on the principles and methodology the expert relies upon, not on the conclusion generated. *Id.*; *see also Daubert*, 509 U.S. at 595. The standard envisions a "flexible" inquiry "to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Giese*, 356 Wis. 2d 796, ¶ 19. The expert's testimony must be grounded in an

accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. Fed. R. Evid. 702 advisory committee note (2000 amendment) (Rule 702 committee note).

Prior to the adoption of the *Daubert* standard, Wisconsin courts upheld the admissibility of expert testimony concerning actuarial instruments because they are "'the type of information commonly and reasonably relied up[on] by experts in the field of sex offender risk assessment to draw conclusions about future risk.'" *In re Commitment of Tainter*, 2002 WI App 296, ¶¶ 5, 20, 259 Wis. 2d 387, 655 N.W.2d 538; *see also In re Commitment of Smalley*, 2007 WI App 219, ¶¶ 15-16, 305 Wis. 2d 709, 741 N.W.2d 286; *In re Commitment of Richard*, 2014 WI App 28, ¶ 2, 353 Wis. 2d 219, 844 N.W.2d 370.

II. The circuit court did not misuse its discretion in admitting Dr. Jurek's expert opinion using the RRASOR and the MnSOST-R.

Although Jones' brief acknowledges at the outset of his argument that this Court applies the deferential erroneous exercise of discretion standard of review to the circuit court's decision, (*see* Jones' Br. 8), the remainder of his brief ignores the standard of review, arguing the admissibility of Dr. Jurek's testimony as though this Court were making the admissibility decision in the first instance. Because Jones has not shown that the circuit court erroneously exercised its discretion when it admitted Dr. Jurek's testimony, this Court should affirm the circuit court's evidentiary ruling and the judgment of commitment.

Jones argues, based on Dr. Wollert's testimony, that the MnSOST-R sample size is too small and "there has never been an analysis of which items contribute to recidivism rates, and which ones are totally useless." (64:151-53.) He

also claims the MnSOST-R fails to account for the decline in recidivism rates. (Jones' Br. 11.) Jones faults the RRASOR on the same grounds he claims make the MnSOST-R unreliable: a small sample size and the failure to take age and the decrease in recidivism rates generally into account. (Jones' Br. 12-13.) Jones relies on Dr. Wollert's testimony that the development methods for the MnSOST-R "'virtually guarantees a high false positive rate overestimating the probability of recidivism.'" (Jones' Br. 11.) But Dr. Wollert acknowledged that an article he cited in his affidavit stated the MnSOST-R "has been one of the most widely used sexual recidivism tools." (65:25.) Despite Dr. Wollert's testimony, the circuit court credited the testimony of Drs. Jurek and Allen when it found "[a]ll of the instruments were subject of extensive review. They have been written about, and even criticized [in] the papers that he [Jones] has submitted." (65:48.)

Moreover, Wis. Stat. § 907.02 and its Federal counterpart, Rule 702, do not require "a complete and flaw-free set of data," it requires data that is "sufficient." *United States v. Mikos*, 539 F.3d 706, 711 (7th Cir. 2009). A prediction tool which has been used some 15 years, (64:34), is the most widely used tool available, (65:25), and is as predictive as other tools of like design, (64:108; 65:27), qualifies as "sufficient." This is not a case of *ipse dixit* ("because I said so") testimony. Dr. Jurek employed the same methodology as Dr. Allen, who Jones no longer challenges. And his own trial expert, Dr. Thomas Zander, used two actuarial instruments, the Static-99R and the Static 2002-R, both of which have their genesis in the RRASOR and Static-99. (64:111-14; 71:53.)

The focus of the circuit court's inquiry "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. This focus raises

the question of whether an opponent of experts such as Jones, can raise a *Daubert* challenge merely on the basis of opposing views, when he or she presents an expert of his/her own who uses the same principles, the same methodology and the same or similar data. "[E]xpert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results." *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 160 (3d Cir. 1999).

It is possible to exclude expert testimony when the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. Rule 702 committee note (citing *General Elec. Co.*, 522 U.S. 136, 146 (1997). *See State v. Cardenas-Hernandez*, 219 Wis. 2d 516, 528, 579 N.W.2d 678 (1998) ("Wisconsin courts look to federal cases interpreting and applying the federal rules of evidence as persuasive authority.").

But if any such extrapolation has occurred in this case, it is the Static-99R and the Static-2002-R that have, based on this record, unjustifiably extrapolated from an accepted premise to an unfounded conclusion. The Static-99R has not been cross-validated and there is only one study that looks at the age weighing on that instrument. (64:123.) The only testimony concerning the Static-2002-R is Dr. Zander's statements that the developers were trying to improve the Static-99 and the Static-99R. He gave no details of how the Static-2002-R had been received in the psychological community. There is no discussion of any type of peer review or attempts to validate the "new" data nor even a comment

on whether the Static-2002-R is widely accepted or accepted at all beyond Dr. Zander.[7] (71:53, 63.)

Jones argues the RRASOR has "not [been] published in a peer-review . . . ." (Jones' Br. 12.) "Publication is not a *sine qua non* of expert testimony." *Mikos*, 539 F.3d at 711 (citing *Daubert*, 509 U.S. at 593); *see also Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). Additionally, the circuit court did not accept Jones' view of peer review. (65:47.) "[W]hile 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 [*sic*] are conferences and training that peers and experts can attend." (65:47-48.) As the United States Supreme Court observed in *Kumho Tire Co., Ltd.*, 526 U.S. 137, 142 (1999), "the law grants a [circuit] court the same broad latitude when it decides how to determine reliability [under *Daubert*] as it enjoys in respect to its ultimate reliability determination."

Although the circuit court did not directly address the criticism regarding the small sample size of the RRASOR or the MnSOST-R, the testimony that the circuit court was entitled to credit—that the RRASOR and MnSOST-R had been studied and shown to be valid in various populations and were widely used—would seem to belie that criticism. "The question is whether the scientific principles and methods that the expert relies upon have a reliable foundation 'in the knowledge and experience of [the expert's]

[7] The State does not take issue with Jones' use of the Static-99R and the Static-2002-R at trial. In view of the testimony below, the expert testimony was admissible; its weight was for the jury.

discipline.'" *Giese*, 356 Wis. 2d 796, ¶ 18 (citing *Daubert*, 509 U.S. at 592). Wis. Stat. § 907.02 "is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise." Rule 702 committee note.

The dispute in this case reduces to a professional disagreement about whether and how age affects sexual offense recidivism and whether the decline in the sexual offense recidivism rate in group data has any bearing on the recidivism rate of a particular individual. Such disputes are beyond the gatekeeper role of the circuit court. "*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance." *Ruiz-Troche v. Pepsi Cola Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998). Such disputes are best left to the jury. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596; *Giese*, 356 Wis. 2d 796, ¶ 28.

The circuit court's conclusion finds further support under *Daubert* or a similar test in *United States v. Shields*, 597 F. Supp. 2d 224, 236 n.18 (D. Mass. 2009), ("'[A]ctuarial risk assessments (RRASOR, STATIC–99, and any adjusted actuarial approach, including the 'guided clinical method' and the 'adjusted actuarial method') are reliable under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).'"); *In re Detention of Holtz*, 653 N.W.2d 613, 616-19 (Iowa Ct. App. 2002)[8] ("The district court did not abuse its

[8] Iowa does not require trial courts to follow *Daubert* but permits it if the court finds it helpful. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 533 (Iowa 1999).

discretion in admitting [RRASOR, Static-99, MnSOST and MnSOST-R.]"); *Goddard v. State*, 144 S.W.3d 848, 853 (Mo. Ct. App. 2004)[9] ("[T]here was an abundance of evidence showing that the [Static-99 and MnSOST-R] met the requirements of scientific validity.").

In assessing the law in other jurisdictions, the admissibility of the actuarial instruments present a particular problem because the evidentiary law in the states varies substantially. Many states still follow the test for admissibility enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* test holds "expert opinion based on a scientific technique is inadmissible unless the technique is 'generally accepted' as reliable in the relevant scientific community." *Daubert*, 509 U.S. at 584 (citing *Frye*, 293 F. at 1129-30). The RRASOR, MnSOST-R and other actuarial instruments have been admitted in other states although the exact evidentiary standards vary. *See People v. Poe*, 88 Cal. Rptr. 2d 437, 440 (Cal. Ct. App. 1999) (use of RRASOR upheld); *Garcetti v. Superior Court*, 102 Cal. Rptr. 2d 214, 241 (Cal. Ct. App. 2000) (use of PCL-R, RRASOR and Static-99 upheld); *In re Detention of Strauss*, 20 P.3d 1022, 1024 (Wash. App. 2001) (use of MnSOST, RRASOR and VRAG upheld); *In re Commitment of R.S.*, 773 A.2d 72, 95 (N.J. Super. Ct. App. Div. 2001) ("[A]ctuarial instruments are an accepted and advancing method of helping to assess the risk of recidivism among sex offenders."); *In re Commitment of Simons*, 821 N.E.2d 1184, 1192 (Ill. 2004) (whether or not actuarial risk assessment is subject to *Frye,* there is no question that it is generally accepted by professionals who assess sexually violent offenders and therefore is perfectly admissible in a court of law).

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[9] The Missouri evidence rule is "essentially the same" as Rule 702. *Goddard v. State*, 144 S.W.3d 848, 852 (Mo. Ct. App. 2004).

Finally, the State notes that proponents "'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable . . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.'" Rule 702 committee note. The evidence of record, which the circuit court was entitled to credit, and the case law in other jurisdictions establishes that the RRASOR and the MnSOST-R are sufficiently reliable to meet Wis. Stat. § 907.02's admissibility requirement. The circuit court did not misuse its discretion in admitting Dr. Jurek's testimony.

CONCLUSION

For the reasons stated above, this Court should hold the circuit court did not misuse its discretion in admitting Dr. Jurek's expert opinion and testimony regarding the RRASOR and MnSOST-R actuarial instruments. It should affirm the judgment of commitment.

Dated at Madison, Wisconsin, this 5th day of July, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 3,628 words.

_____
WARREN D. WEINSTEIN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 at Madison, Wisconsin, this 5th day of July, 2016.

_____
WARREN D. WEINSTEIN
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