STATE OF WISCONSIN

COURT OF APPEALS

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

REPLY BRIEF OF RESPONDENT-APPELLANT

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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.

The state and Mr. Jones agree that the circuit court's decision to admit testimony about the disputed actuarials is reviewed for an erroneous exercise of discretion. Appellant's Brief at 8, Respondent's Brief at 4-5. The state asserts that Mr. Jones's argument "ignores" this standard of review, though it does not explain how this might be so. A court properly exercises its discretion where it "examine[s] the relevant facts, applie[s] the proper legal standard and, using a demonstrated rational process, reache[s] a reasonable conclusion." ***May v. May***, 2012 WI 35, ¶39, 339 Wis. 2d 626, 813 N.W.2d 179. Mr. Jones's opening brief argued that the circuit court's determination that the MnSOST-R and RRASOR are "reliable" under Wis. Stat. § 907.022 was erroneous. Specifically, he argued (as he had in the circuit court) that (1) both instruments fail to account for two generally-recognized declines in recidivism: the broad decrease in sexual reoffense rates observed over recent decades and the decline in reoffense rates as an individual ages; (2) the MnSOST-R was developed using faulty methods and assumptions and contains items that fail to correlate with recidivism; and (3) the RRASOR's ten-year recidivism estimates are not based on any empirical observations, but are simply derived by multiplying the five-year rates by 1.5. Appellant's Brief at 11-13, 10-11, 14-15.

The circuit court's decision, quoted in full in Mr. Jones's opening brief, mentions in passing the observed declines in recidivism but does not explain why the outdated and inaccurate estimates associated with the RRASOR and MnSOST are nevertheless reliable. Appellant's Brief at 4-7. As to the other two issues raised by Mr. Jones, the decision does not even mention them, much less explain why they do not render the instruments unreliable. As such, the circuit court's discretionary decision failed either to "examine[] the relevant facts" or to use a "demonstrated rational process." ***May***, 339 Wis. 2d 626, ¶39.

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

As to the merits, the state's response almost entirely ignores the actual issues that Mr. Jones has raised. Like the trial court, the state only briefly mentions the two declines in reoffense rates, characterizing the issue as a "professional disagreement about whether and how age affects sexual offense recidivism and whether the decline in sexual offense recidivism in group data has any bearing on the recidivism rate of a particular individual." Respondent's Brief at 11. But *all three* experts—including the state's—agreed that reoffense rates decline as a person ages. (64:73,118-19,152-53). As to Mr. Jones's other arguments about the specific failings of the MnSOST-R (sample manipulation and the inclusion of items not associated with recidivism) and the RRASOR (the lack of empirical basis for the 10-year recidivism rates), Appellant's Brief at 10-11, 14-15, the state does not even mention them, much less attempt to refute them.

The state instead seems to argue that the simple fact that the MnSOST-R and RRASOR are "actuarial instruments" renders them *per se* reliable. So, in response to Dr. Wollert's criticisms of the two instruments, it first responds that "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.'" Respondent's Brief at 8. But the fact that MnSOST-R has been used in the past is not proof of its validity now; an outdated map, though useful in the past, is no longer reliable.

The state then suggests that other experts' use of *other* actuarial instruments somehow renders the MnSOST-R and RRASOR reliable. First, it is simply incorrect to say, as the state does, that "Dr. Jurek employed the same methodology as Dr. Allen," when Dr. Allen did not use the MnSOST-R or the RRASOR, but instead used the Static-99 and Static-99R. Respondent's Brief at 8, 3. Nor does Dr. Wollert's use of the Static-99R or the Static 2002-R have any bearing on the validity of the RRASOR, even though these instruments "have their genesis" in the RRASOR. Modern chemistry may have its genesis in the experiments of medieval alchemists, but this does not make medieval alchemy reliable—lead still cannot be transmuted into gold.

The state also seeks to question the validity of the Static-99R and Static-2002-R used by Dr. Zander, suggesting there was insufficient testimony as to the merits of those instruments. Putting aside the questionable relevance of the state's claim, the obvious reason there was no such testimony is that the state did not challenge the use of those instruments, so there was no ***Daubert*** hearing on them. They are simply not at issue here.

The state finally cites foreign decisions admitting various actuarials, but provides no discussion of these cases. Respondent's Brief at 12. In fact, neither ***People v. Poe***, 88 Cal. Rptr. 2d 437, 440 (Cal. Ct. App. 1999) nor ***Garcetti v. Superior Court***, 102 Cal. Rptr. 2d 214, 241 (Cal. Ct. App. 2000) involved challenges to the reliability of the RRASOR or the MnSOST. Of the remaining cases the state cites, none considered the specific reliability issues raised by Mr. Jones.

In sum, the state's brief declines to address the actual challenges Mr. Jones has raised to the trial court's admission of the RRASOR and the MnSOST-R. For all the reasons stated in Mr. Jones's opening brief, the circuit court's admission of testimony relying on these instruments constituted an erroneous exercise of discretion, and must be reversed.

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 25th day of July, 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 956 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 25th day of July, 2016.

Signed:

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