No. 15AP2665

In the Supreme Court of Wisconsin

IN RE THE COMMITMENT OF ANTHONY JONES:

STATE OF WISCONSIN,
PETITIONER-RESPONDENT,

v.

ANTHONY JONES,
RESPONDENT-APPELLANT-PETITIONER

On Appeal From The Dane County Circuit Court,
The Honorable Rhonda L. Lanford, Presiding,
Case No. 2013CI0004

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUE PRESENTED

1. Whether expert testimony regarding two actuarial risk assessment instruments was admissible under Wis. Stat. § 907.02(1).

The circuit court and Court of Appeals answered yes.

INTRODUCTION

In civil commitment cases for sexually violent persons, expert evaluators commonly use actuarial risk assessment instruments to assist in their evaluations of future dangerousness. Experts in the field created these instruments using well-known statistical techniques, and these and other experts have used, reviewed, debated, tested, and revised these instruments for decades.

Anthony Jones received a prison sentence of over ten years as a result of convictions for multiple sexually violent crimes. Near the end of his prison term, the State petitioned to commit Jones as a sexually violent person and supported its position at trial with the testimony of two expert witnesses. The jury ultimately voted to commit Jones. Jones claims that he should be granted a new trial because the court should not have admitted expert testimony regarding two of the actuarial risk assessment instruments that one of the State's experts utilized. Jones alleges that these instruments are no longer reliable and thus inadmissible under Wis. Stat. § 907.02(1) because they are subject to various criticisms. But Jones misunderstands the role of a circuit court under Section 907.02(1), which adopted the standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under that standard, a circuit court must simply determine whether the scientific method at issue is "reliable": that is, "based upon sufficient facts or data," "the product of reliable principles and methods," and the expert "applied the

principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1). A method's overall correctness and the weight to be accorded the method are issues for the jury, not issues of admissibility.

The circuit court here concluded that the two disputed actuarial risk assessment instruments—the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) and Rapid Risk Assessment Sex Offender Recidivism (RRASOR)—satisfied Section 907.02(1), after applying the proper legal standard. That decision is consistent with decisions of courts around the country regarding these same actuarial risk assessment techniques. In particular, courts agree that testimony regarding the MnSOST-R and/or RRASOR is admissible under various evidentiary standards, including *Daubert* and even the stringent *Frye* standard.[1] *See, e.g.*, *United States v. Shields*, 597 F. Supp. 2d 224, 236 n.18 (D. Mass. 2009); *Goddard v. Missouri*, 144 S.W.3d 848, 851–53 (Mo. Ct. App. 2004); *Roeling v. Florida*, 880 So. 2d 1234, 1239–40 (Fla. Dist. Ct. App. 2004); *In re Detention of Holtz*, 653 N.W.2d 613, 616–19 (Iowa Ct. App. 2002); *In re Commitment of R.S.*, 773 A.2d 72, 95–97 (N.J. Super. Ct. App. Div. 2001) (discussing numerous cases). Indeed, neither the parties nor the courts below were able to find a single case in which these

[1] This "austere standard" requires an expert's methods to have gained "general acceptance" in order for their testimony to be admissible. *Daubert*, 509 U.S. at 588–89 (describing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

instruments were excluded in such a challenge. *See* R.24:1–9; R.65:49; Opening Br. 1–15; Pet. for Review, *In re Commitment of Jones*, No. 15AP2665 (Wis. May 10, 2017); Reply Br., *In re Commitment of Jones*, No. 15AP2665 (Wis. Ct. App. July 25, 2016); Br. of Appellant, *In re Commitment of Jones*, No. 15AP2665 (Wis. Ct. App. March 21, 2016). The circuit court's decision admitting these instruments follows this nationwide-consensus approach and should be affirmed.

ORAL ARGUMENT AND PUBLICATION

By granting the petition for review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

I. Statutory Background

Before 2011, Wisconsin courts applied a simple relevancy test to determine the admissibility of expert testimony. *See* Wis. Stat. § 907.02 (2009–10); *State v. Kandutsch*, 2011 WI 78, ¶ 26, 336 Wis. 2d 478, 799 N.W.2d 865. Under this approach, expert evidence was admissible if the witness was qualified and the testimony "would help the trier of fact understand the evidence or determine a fact at issue." *Id.*

In 2011, the Legislature amended Wis. Stat. § 907.02 to "adopt the *Daubert* reliability standard embodied in Federal Rule of Evidence 702." *Kandutsch*, 2011 WI 78, ¶ 26 n.7. The Legislature created Section 907.02(1) with "language [ ]

identical to the language of Rule 702 of the Federal Rules of Evidence." Wis. S. Amend. Memorandum, 2011 Jan. Spec. Sess. S.B. 1; *see* 2011 Wis. Act 2, § 34m. Now, in order to be admissible, a qualified expert's testimony must not only be helpful, it must also be reliable—i.e., "based upon sufficient facts or data" and "the product of reliable principles and methods," and the expert must have "applied the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1). The trial court must be satisfied by a preponderance of the evidence that the testimony meets these requirements. *See Seifert v. Balink*, 2017 WI 2, ¶ 58, 372 Wis. 2d 525, 888 N.W.2d 816 (lead op.); *id.* ¶ 224 (Gableman, J., concurring in the judgment).

II. Factual And Procedural Background

A. On November 29, 1993, Jones pleaded no contest to three counts of Second Degree Sexual Assault/Use of Force, a sexually violent offense, and received a sentence of 15 years' probation. R.1:1; R.43, Ex. 3. Eight years later, the State revoked Jones' probation after a neighbor reported that Jones had sexually assaulted him while threatening him with a knife. R.1:1; R.43, Ex. 14. Jones received a sentence of ten years' imprisonment, to run consecutive to parole revocation, making his mandatory release date August 15, 2013. R.1:1–2; R.43, Exs. 4, 14.

B. Prior to Jones' release, the State petitioned to civilly commit him as a sexually violent person pursuant to Wis.

Stat. § 980.02. R.1. The State based its petition upon a report of Dr. Anthony Jurek, a licensed psychologist employed by the Wisconsin Department of Corrections. R.1:2. Dr. Jurek opined that Jones suffered from Antisocial Personality Disorder, a mental disorder that predisposed him to engage in sexually violent acts and caused him difficulty in controlling his behavior, and that "this mental disorder makes it more likely than not that [Jones] will engage in acts of sexual violence." R.1:9; *see* Wis. Stat. § 980.02(2).

In conducting his analysis of Jones, Dr. Jurek relied on various sources of information, including "[r]ecords from the Department of Corrections, police records, [and Jones'] history under [government] supervision." R.64:15, 19. Doctor Jurek utilized various actuarial risk assessment tools to compare this and other information regarding Jones with information gathered from other sexually violent offenders. *See* R.64:17–18. Doctor Jurek considered, among other things, the results of these actuarial comparisons, Jones' extensive criminal history, "social history, [ ] mental status, substance abuse history, sexual history, and treatment history" in reaching his conclusions about Jones' mental health and likelihood of reoffending. R.2, Ex. 4; R.64:15, 17–18. After the circuit court found probable cause to believe that Jones fit the definition of a "sexually violent person within the meaning of Wis. Stat. § 980.01(7)," R.5:1, both Jones and the State requested a jury trial on the issue, R.7; R.8.

C. Prior to trial, Jones moved to bar "any and all expert testimony pertaining to [certain] actuarial risk assessments," namely, the MnSOST-R, the RRASOR, and the Static 99. R.24:1. Jones claimed that the instruments—not the proffered testimony—were "not based on sufficient facts or data, [ ] not the product of reliable principles and methods, and [had] not been applied reliably to the facts of this case." R.24:1.[2] In particular, Jones claimed that the instruments "have obsolete norms and fail to adequately take into account the correlation between age and recidivism risk," and are therefore "antiquated" and "unreliable." R.24:1, 5–6. The State responded to Jones' motion, contending, among other things, that the tools are each "sufficiently the product of reliable fact-gathering and statistical analysis [and] meet the standard for admission under Wis. Stat. § (Rule) 907.02(1)," and that "complaints about their effectiveness and continued utility should be tested via the traditional avenues of cross-

[2] The legal standard under Section 907.02(1) is whether the expert's "*testimony* is based upon sufficient facts or data" and whether "the *testimony* is the product of reliable principles and methods." Wis. Stat. § 907.02(1) (emphases added). Jones' challenge, although originally framed as challenging whether the *instruments* are based on sufficient facts or data and are the product of reliable principles and methods, is properly framed as a challenge to whether the instruments are generally reliable, such that an expert's testimony based on those instruments is the product of reliable principles and methods. Jones' counsel clarified this at the motion hearing. R.64:5–6; R.65:41 ("The issue here is whether or not the [MnSOST-R], the [RRASOR], and the Static 99 are reliable and valid.").

examination and the presentation of contrary evidence." R.30:1–2.

The court held a two-day hearing on the issue of whether expert testimony pertaining to these actuarial tools was admissible under Section 907.02(1). R.64; R.65. The court heard from three expert witnesses: two expert state evaluators who had both evaluated Jones, Dr. Jurek and Dr. Allen, *see* R.64:98, 103–05, testified for the State, and Dr. Wollert,[3] a clinical forensic psychologist licensed in Oregon and Washington, testified for Jones, R.64; R.65. At the beginning of the hearing, counsel for Jones clarified that he was not challenging the qualifications of the State's experts, Dr. Jurek and Dr. Allen, nor was he challenging the use of "actuarial instruments generally," but was instead merely challenging the three specific instruments listed in his motion. R.64:5–6.

Doctor Jurek testified first, explaining that actuarial risk assessments are "the use of particular demographic variables [to] score a particular individual on, and then compare their score to individuals in a sample population who have a known rate of recidivism." R.64:18. The risk assessment tools do not predict how likely a particular person is to reoffend, they merely provide a comparison of the individual's data with different sample groups. R.64:24.

[3] The transcript mistakenly refers to Jones' expert as Dr. Waller. R.65:2–3; *see* R.25 (affidavit of Dr. Richard Wollert).

Experts use actuarial risk assessment instruments because their use makes it "more likely" that an evaluator will "make a correct decision as to whether [a] person will [or will] not reoffend." R.64:19–20. However, when using the instruments, it is important for experts "to know how the instruments were normed, what kind of population was used to derive them, . . . how to apply them and what it means when you get an answer out of them," R.64:20, because "[e]very instrument has limitations," R.64:22; *see also* R.64:41–42.

Doctor Jurek testified that there are more than ten different instruments in existence for risk assessment in cases of sexually violent persons, and that different experts "prefer to use different instruments," R.64:20–21, including the four instruments he used in his analysis: the RRASOR, the Static 99 and 99-R, and the MnSOST-R, R.64:25. All of the instruments Dr. Jurek used were "empirically derived and validated" and "comprised of items that were demonstrated to have a correlation with sexual recidivism through the use of statistics." R.64:27. Doctor Jurek also explained that it is better "to use multiple instruments" because "the error [rate] is different with each instrument" and "different instruments appear to be sensitive in different ways" to different "dimensions of offending." R.64:26. He also explained that it is possible for any risk assessment tool to either over- or under-estimate an individual's risk, depending on different factors. R.64:90–92.

Doctor Jurek explained that the different risk assessment tools are reviewed in the professional community through methods such as publications in journals, "conference presentations," and postings "on public websites," R.64:12–13, and that "[n]ew research is being done on a regular basis," including through "cross-validation studies," R.64:10–12, which test the instrument against "a number of different populations . . . [to] see whether the [instrument's] correlation [with sexual recidivism] stays acceptably high," R. 64:35. The tools that Dr. Jurek used, "with the exception of the Static 99-R"—the instrument that Jones did not challenge, *see* R.24:1—have "been the [subject] of extensive review over the years" and "widely written about in the professional literature." R.64:30. Doctor Jurek testified that the MnSOST-R, in particular, "has been found in over 12 research inquiries to have . . . a positive relationship with sexual recidivism," meaning that "higher scores on the [MnSOST-R] are associated with higher rates of sexual recidivism." R.64:33. The MnSOST-R also had a reliability score of 0.72 on a recent meta-analysis (an analysis of analyses performed on the MnSOST-R), which is "consistent with moderate reliability." R.64:34. Doctor Jurek also explained that the RRASOR likewise "has an established history of being used" and "35 [or] 36 studies over the years [ ] have found it to have a relationship with sexual recidivism," meaning that it is "reliable." R.64:49. Although "the original development paper [for the RRASOR] was not published," "a number of

articles [have been] published about it in peer-reviewed journals" since its release. R.64:50.

Both the MnSOST-R and the RRASOR take age into account. The MnSOST-R accounts for age by decreasing the risk factor one point after the age of 30. R.64:44. The RRASOR accounts for age by reducing the individual's risk factor once when he or she reaches "the age of 25." R.64:51–52. And Dr. Jurek testified that "the inclusion of the age item in a more expanded format . . . really doesn't improve" the accuracy of the instrument. R.64:45; *see also* R.64:60.

Finally, Dr. Jurek explained that the Static 99 added six additional demographic factors to the RRASOR. R.64:56. The Static 99 has been the subject of many research and cross-validation studies which have "demonstrat[ed] that it has a statistical relationship with sexual [recidivism]." R.64:57.

The State then called Dr. Allen, who agreed that "an actuarial [instrument] cannot indicate whether [an] individual . . . will or will not reoffend" because it simply "compares the [individual] to other persons." R.64:107. Similar to Dr. Jurek, Dr. Allen testified that there was "some disagreement" among professional evaluators with "regard to the choice of instruments" to use, R.64:103, and that the Static 99, RRASOR, and MnSOST-R "are all [still] in use," R.64:125. Doctor Allen testified that he personally had used the Static 99 and the Static 99-R, R.64:103, 108, because "particularly the Static 99 has been studied quite extensively and sampled [ ] throughout the world with huge data sets,"

and both the Static 99 and Static 99-R are "considered to be very reliable." R.64:108–09.

Doctor Allen explained that the RRASOR was created using "a meta analysis of 61 studies relating to sex offender recidivism," which "contained 23,000 subjects," and drew from that analysis "risk factors that had strong association with recidivism." R.64:110–11. Doctor Allen testified that the RRASOR had also been cross-validated, but that he personally chose not to use it because he "feel[s] that it is an out dated [sic] instrument," although others in the field continue to use it. R.64:111–12. He explained that the RRASOR has "reasonably good" predictive validity and there was nothing "unreliable or even controversial" about the methodology used to construct the RRASOR. R.64:112.

With regard to age, Doctor Allen explained that "when age was accounted for" by an actuarial instrument, "it increased the predictive validity in a somewhat small way." R.64:119. He also noted that the Static 99-R, which takes age into account in a more detailed way than other instruments, "hasn't been cross-validated" and so "there really isn't a great deal of any empirical evidence or information that has supported weighing the age item in this way." R.64:123.

Prior to hearing more testimony, the circuit court stated that "everyone can agree or stipulate that these instruments have error rates," and Jones' counsel agreed, explaining that error rates did not "form the basis or one of the bases for [the] motion to exclude evidence." R.64:126.

Finally, the court heard from Jones' expert, Dr. Wollert, who did not evaluate Jones, but instead testified only about the actuarial instruments used by Drs. Jurek and Allen. R.64:142. Doctor Wollert explained that there is an "extraordinar[ily] large body of literature" regarding sex offender recidivism, and that the trend in the field has been "a shift from clinical judgment to actuarial instruments," R.64:149–50, even though, as Doctor Wollert agreed, "all [ ] actuarial instruments have at best moderate predictive accuracy," R.65:19.

Doctor Wollert testified that he had written papers criticizing the MnSOST-R because its sample size was too small and it might consider factors that do not "contribute to recidivism." R.64:150–53. Doctor Wollert also took issue with the way the MnSOST-R accounts for age. *See* R.65:13. However, Doctor Wollert admitted that, as explained in a published article submitted by Jones, R.24:79–106, the MnSOST-R "has been one of the most widely used sexual recidivism tools" and its "predictive [accuracy] is on the whole similar to that [of] other risk assessment instruments," R.65:25–27; *see also* R.24:80–81. Additionally, Dr. Wollert claimed that the MnSOST-R had not been "peer-reviewed" because it "was never published in a peer reviewed journal." R.64:156–57. Later, however, Dr. Wollert admitted that peer review can take other forms, such as an academic "conference." R.65:21.

Doctor Wollert also criticized the RRASOR because it did not, in his opinion, "fully account for the effect of advancing age on recidivism reduction," and that this made the tool "outdated." R.65:4–5. Doctor Wollert also complained that the RRASOR had simply multiplied the five-year recidivism rates by 1.5 to get the ten-year recidivism rates, and that this "assumption" made the instrument unreliable. R.65:6–9. When asked if the RRASOR is "based on reliable principles and methods," Dr. Wollert simply responded that "[i]t's primitive" and "leav[es] out important predictors." R.65:9–10. However, Dr. Wollert admitted that no one instrument claimed to capture all predictors of sexual recidivism. R.65:19–20.

Finally, Dr. Wollert took issue with the way the Static 99 accounted for age, R.65:12, claiming that "science has moved beyond . . . the assumptions [made by] the Static 99" with regard to age, R.65:14. Doctor Wollert explained that he personally does not use the Static 99, RRASOR, or MnSOST-R because he "regard[s] them as error prone models." R.64:35.

After hearing testimony and closing arguments, the circuit court determined that the expert testimony regarding the instruments was admissible. The court discussed Section 907.02(1), explaining that it "was revised in 2011 and tracks federal rule 702[,] also known as the Daubert standard . . . named after Daubert versus Merrell Dow Pharmaceuticals, 509 U.S. 579, 1993." R.65:47. The court also stated that it could and would "look to federal cases[ ] interpreting" the rule

for guidance. R.65:47. The court explained that its "gatekeeping inquiry must be tied to the facts of a particular case," and that the reliability factors listed in *Daubert* do not "constitute a definitive checklist or test." R.65:48. Finally, the court explained that "Daubert's goal[,] as expressed in [*Kumho Tire*], is to make certain that an expert [ ] employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relative field." R.65:50.

The court then discussed a number of the *Daubert* factors. The court rejected Jones' limited definition of peer review as merely "publication in a journal" and found that the instruments "have [all] been written about," including "in journals and in published papers" and discussed at "conferences and training[s] that peers and experts can attend." R.65:48–49. The court also mentioned that these instruments have been the "subject of extensive review" including in "cross-validation studies." R.65:49. With regard to general acceptance, the court found that "[t]hese actuarial tools are widely used in predicting recidivism in sex offenders." R.65:49. The court also noted that it "was not able to find any cases where these tests were stricken based on admissibility or based on a Daubert challenge." R.65:49. In short, the court found that the instruments are "not junk science, which is what Daubert sought to reject," R.65:49, and that Jones' "criticisms of the actuarial tools are only that,

criticisms, and cannot form the basis for this court to exclude this testimony," R.65:50.

The court also noted that the records the State's experts utilized in coming to their conclusions are "the type of information reasonably relied upon by experts in their field." R.65:49. The court added that "there was no evidence suggesting or even challenging that [the experts] administered the test[s] incorrectly or interpreted the actuarial data incorrectly," and so the "prong" of Section 907.02(1) requiring experts to reliably apply the methods to the facts of the case was "met." R.65:49.

Ultimately, the court denied Jones' motion because the court was "satisfied that [the] testimony [regarding the actuarial instruments] meets all of the requirements for admissibility." R.65:50. The court noted, however, that "the State proceeds at its own peril if Mr. Jones, through cross-examination can convince a jury that [the tools are] antiquated," but reiterated that "the weight to give this testimony is for the jury to decide." R.65:50.

D. At Jones' trial, the jury heard testimony from Dr. Jurek, Dr. Allen, and Dr. Thomas Zander, a forensic psychologist who testified for Jones, *see* R.71:4, including testimony regarding the actuarial instruments, *see generally* R.68, 69, 70, 71. After a four-day trial, the jury unanimously voted to civilly commit Jones as a sexually violent person. R.72:56.

E. Jones appealed his commitment, claiming that the circuit court improperly admitted expert testimony regarding the MnSOST-R and RRASOR. *See* Br. of Appellant, *In re Commitment of Jones*, No. 15AP2665 (Wis. Ct. App. March 21, 2016).[4] The Court of Appeals, on its own motion, summarily affirmed the circuit court's decision, pursuant to Wis. Stat. § (Rule) 809.21. App. 101, 105. The Court of Appeals explained that, under Section 907.02(1), "the circuit court is charged with the gatekeeping function of ensuring that proposed scientific evidence testimony is relevant and reliable," and listed the four factors that the *Daubert* Court identified as useful in the analysis. App. 102–03. The Court of Appeals held that the circuit court had "considered the *Daubert* factors" "[i]n denying Jones's motion." App. 104. The Court of Appeals also held that the fact that Jones' expert disagreed with the State's experts about the reliability of the instruments "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." App. 104. Therefore, the Court of Appeals held that the circuit court "properly exercised its discretion when it denied Jones's motion to exclude evidence." App. 104.

[4] Jones did not re-raise his challenge to the Static 99. *See* Br. of Appellant, *In re Commitment of Jones*, No. 15AP2665 (Wis. Ct. App. March 21, 2016).

Jones then petitioned this Court for review, which this Court granted. Order Granting Petition for Review, *In re Commitment of Jones*, No. 15AP2665 (Wis. Sept. 11, 2017).

STANDARD OF REVIEW

When reviewing a circuit court's decision to admit or exclude evidence, this Court will overturn the circuit court's decision only if the circuit court erroneously exercised its discretion. *Kandutsch*, 2011 WI 78, ¶ 23. In determining whether a circuit court erroneously exercised its discretion, this Court must determine whether the circuit court applied the proper legal standard, as failing to apply the proper legal standard constitutes an erroneous exercise of discretion. *118th St. Kenosha, LLC v. DOT*, 2014 WI 125, ¶ 18, 359 Wis. 2d 30, 856 N.W.2d 486. "Whether the circuit court employed the proper legal standard is a question [this Court] consider[s] de novo." *Kandutsch*, 2011 WI 78, ¶ 24. If the circuit court applied the proper legal standard, then this Court will uphold the decision so long as it is "reasonably supported by the facts in the record,"*118th St. Kenosha*, 2014 WI 125, ¶ 18, or so long as the court, considering the "relevant facts," used a "rational process" to arrive at a "reasonable conclusion," *Kandutsch*, 2011 WI 78, ¶ 23.

SUMMARY OF ARGUMENT

I. Under Section 907.02(1), trial courts must ensure that proffered testimony by a qualified expert witness is both relevant and reliable. Wisconsin's law, modeled after Federal

Rule of Evidence 702 and embodying the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), places upon trial courts a "gatekeeping" obligation, *id.* at 597, to ensure that "junk science" does not reach the jury, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 153 (1997) (Stevens, J., concurring in part and dissenting in part). In undertaking this sometimes-complicated task, trial courts are granted "considerable leeway" and may, but are not required to, consider certain factors the *Daubert* Court articulated as indicative of reliability. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149–52 (1999). These factors are whether the expert's underlying methodology can and has been tested, whether it has been peer-reviewed, whether it has a known error rate and standards controlling its operation, and whether it is generally accepted in the relevant professional community. *Daubert*, 509 U.S. at 593–94. Ultimately, the trial court's determination must be "tied to the facts of [the] particular case" and the particular proffered testimony, and the court's goal is to ensure that the expert utilizes the same "intellectual rigor" in the courtroom as an expert would in the field. *Kumho Tire*, 526 U.S. at 150, 152 (citation omitted).

In this case, the circuit court applied the proper legal standard. The court correctly cited the relevant legal standards from United States Supreme Court caselaw and considered the factors articulated in *Daubert*. The court also correctly held that Jones' criticisms of the instruments were

an issue of weight for the jury to decide, not an issue of admissibility.

II. The circuit court reasonably and rationally applied the legal standard to the facts in the record. The court went through each *Daubert* factor and reasonably found, based on sufficient evidence in the record, that the MnSOST-R and RRASOR had been tested and peer reviewed, had known error rates, and were generally accepted in the professional community. Thus, the circuit court did not erroneously exercise its discretion when it found expert testimony regarding these instruments admissible.

ARGUMENT

I. The Circuit Court Properly Denied Jones' Motion To Exclude Expert Testimony Regarding Certain Actuarial Risk Assessment Instruments

A. The Circuit Court Applied The Proper Legal Standard Under Wis. Stat. § 907.02(1)

1. When reviewing a circuit court's decision to admit or exclude expert testimony under Section 907.02(1), this Court must determine whether the circuit court applied the proper legal standard. *See 118th St. Kenosha*, 2014 WI 125, ¶ 18. Section 907.02(1) directly incorporates the standard set forth in Federal Rule of Evidence 702. *Supra* pp. 4–5.[5] The federal

[5] Because the state statute mirrors the federal rule, this Court may look to federal law for guidance concerning how this rule should be interpreted and applied in Wisconsin. *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995); *Seifert*, 2017 WI 2, ¶ 55 (lead op.); *id.* ¶ 223 (Gableman, J., concurring in the judgment).

rule, in turn, codifies the standard articulated the United States Supreme Court in *Daubert* and *Kumho Tire*. *See* Fed. R. Evid. 702 Advisory Committee's Note to 2000 Amendment.

Under *Daubert*, trial courts are tasked with a "gatekeeping role" with regard to expert testimony, and must "ensure that any and all [expert] testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589, 597; *Kumho Tire*, 526 U.S. at 149 (applying *Daubert* to all expert testimony). Relevance requires that the testimony have "a valid [ ] connection to the pertinent inquiry." *Daubert*, 509 U.S. at 592. Reliability requires that the "reasoning or methodology underlying the testimony [be] scientifically valid" and that the "reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93. In other words, expert testimony must have "a reliable basis in the knowledge and experience of the relevant discipline." *Kumho Tire*, 526 U.S. at 149 (citation omitted).

The *Daubert* Court suggested four factors to help trial courts determine whether an expert's testimony is reliable. Trial courts "*may* consider" these factors, *Kumho Tire*, 526 U.S. at 149, but the inquiry into reliability is "'a flexible one'" and these factors are not a "'definitive checklist or test,'" *id.* at 150 (quoting *Daubert*, 509 U.S. at 593–94). The trial court's "gatekeeping inquiry must be tied to the facts of a particular case," and thus each factor "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his

testimony." *Id.* (citations omitted). As to the first factor, *Daubert* explained that "[o]rdinarily, a key question to be answered in determining whether a theory or technique [is reliable] will be whether it can be (and has been) tested." 509 U.S. at 593. Second, "[a]nother pertinent consideration is whether the theory or technique has been subjected to peer review and publication." *Id.* The Court explained that this factor includes forms of peer review other than publication, as general "submission to the scrutiny of the scientific community is a component of 'good science.'" *Id.* Third, "in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation." *Id.* at 594 (citation omitted). Finally, "general acceptance" in the professional community "can be an important factor in ruling particular evidence admissible." *Id.*

Ultimately, the trial court's gatekeeping function under *Daubert* is to ensure that "junk science" does not reach the jury. *See Joiner*, 522 U.S. at 153 (Stevens, J., concurring in part and dissenting in part). An expert must have "good grounds" for their testimony in order for that testimony to be admissible. *Daubert*, 509 U.S. at 590. The trial court's objective in performing its gatekeeping function is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that

characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

Importantly, the *Daubert* standard "is not designed to have the [trial] judge take the place of the jury to decide ultimate issues of credibility and accuracy." *Lapsley v. Xtek, Inc.*, 689 F.3d 802, 805 (7th Cir. 2012). There is a "range" within fields of expertise "where experts might reasonably differ, and where the jury must decide among the conflicting views of different experts." *Kumho Tire*, 526 U.S. at 153. Admissibility under *Daubert* is not based on "whether [an expert] opinion is supported by the best methodology or unassailable research," but instead on whether the opinion "is based on valid reasoning and reliable methodology." *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999) (citation omitted). "The goal is reliability, not certainty[,]" and so long as the expert's methodology is reliable, "it is for the trier of fact to determine the credibility of the expert witness." *Id.*; *see also Milward v. Acuity Specialty Prod. Grp., Inc.*, 639 F.3d 11, 15 (1st Cir. 2011) (*Daubert* does not empower trial courts "to determine which of several competing [ ] theories has the best provenance." (citation omitted)).

This Court has only once addressed the new standard codified in Section 907.02(1). In *Seifert v. Balink*, this Court considered whether a doctor's expert testimony, based on his personal experience, was admissible as to the standard of care in a medical malpractice case. *See* 2017 WI 2, ¶¶ 17–18 (lead op.). In a fractured opinion, this Court affirmed the trial

court's admission of the testimony under Section 907.02(1). *Id.* ¶ 136 (lead op.); *id.* ¶ 170 (Ziegler, J., concurring); *id.* ¶ 194 (Gableman, J., concurring in the judgment). Despite the fractured opinion, a majority of this Court agreed on several propositions. Most notably for this appeal, a majority of this Court agreed that the new Section 907.02(1) adopted the federal standard in Rule 702, which had adopted *Daubert*, *id.* ¶¶ 6, 51 (lead op.); *id.* ¶ 171 (Ziegler, J., concurring); *id.* ¶ 193 (Gableman, J., concurring in the judgment), and that therefore this Court could look to federal law for guidance in interpreting Section 907.02(1), *id.* ¶ 55 (lead op.); *id.* ¶ 223 (Gableman, J., concurring in the judgment). This Court also agreed that *Daubert* suggested a non-exhaustive list of factors for trial courts to consider when making admissibility determinations, but that the inquiry is a flexible one, and trial courts are not required to consider all, or even any, of the factors in making that determination. *Id.* ¶¶ 64–65 (lead op.); *id.* ¶ 178 (Ziegler, J., concurring); *id.* ¶¶ 225–26 (Gableman, J., concurring in the judgment). Finally, this Court agreed that resolving disputes between qualified experts is an issue properly left to the jury, not an issue of admissibility. *Id.* ¶ 59 (lead op.); *id.* ¶ 227 (Gableman, J., concurring in the judgment); *see id.* ¶¶ 182, 187 (Ziegler, J., concurring).

2. In the present case, the circuit court applied the proper legal standard under Section 907.02(1), consistent with *Daubert*, *Kumho Tire*, and this Court's agreement in *Seifert*. The circuit court correctly explained that Section

907.02(1) "was revised in 2011 and tracks federal rule 702[,] also known as the Daubert standard . . . named after Daubert versus Merrell Dow Pharmaceuticals, 509 U.S. 579, 1993." R.65:47; *Seifert*, 2017 WI 2, ¶¶ 6, 51 (lead op.); *id.* ¶ 171 (Ziegler, J., concurring); *id.* ¶ 193 (Gableman, J., concurring in the judgment). Recognizing the "dearth of case law" interpreting Wisconsin's new *Daubert* standard, the circuit court also correctly acknowledged that it could "look to federal cases[ ] interpreting" the *Daubert* standard. R.65:47; *Seifert*, 2017 WI 2, ¶ 55 (lead op.); *id.* ¶ 223 (Gableman, J., concurring in the judgment).

The circuit court properly explained that there is a "gatekeeping" responsibility for trial courts with regard to expert testimony. *See* R.65:47–48; *Daubert*, 509 U.S. at 597. The court addressed the *Daubert* factors, including peer review, general acceptance, and whether the methods have been tested,[6] although the court correctly noted that the *Daubert* factors "do not constitute a definitive checklist or test" for admissibility. R.65:46–50; *Daubert*, 509 U.S. at 593–94; *Kumho Tire*, 526 U.S. at 149–50. Ultimately, the circuit court correctly noted that what "Daubert sought to reject" was "junk science," R.65:49; *Joiner*, 522 U.S. at 153 (Stevens, J., concurring in part and dissenting in part), and that its gatekeeping inquiry is meant to determine whether the

[6] The court also addressed whether the instruments have known error rates. R.64:126.

expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the [relevant] field," R.65:50; *Kumho Tire*, 526 U.S. at 152.

The court also correctly noted that Jones' "criticisms" of the instruments pertained to the "weight" the jury should assign to the testimony, "not [ ] admissibility." R.65:49–50. These criticisms fell well within the "range where experts might reasonably differ," and assessing such criticisms and competing expert testimony is properly the role of the jury. *Kumho Tire*, 526 U.S. at 153; *see infra* pp. 27–28.

3. Jones' arguments that the lower courts failed to apply the proper legal standard are unavailing.

As an initial matter, Jones' argument that the Court of Appeals failed to apply the *Daubert* standard, Opening Br. 14, is irrelevant, as the legal issue is whether the circuit court applied the correct legal standard. *See Kandutsch*, 2011 WI 78, ¶¶ 23–24. In any event, the Court of Appeals clearly applied the *Daubert* standard. *See* App. 102–03 (explaining that, under Section 907.02(1) "the circuit court is charged with the gatekeeping function" of *Daubert* and listing the four *Daubert* factors); App. 103 (explaining that the *Daubert* factors are "flexible, with the ultimate goal being to test reliability"); App. 104 (explaining that the circuit court "considered the *Daubert* factors," including peer review and general acceptance, in finding that the instruments were not "junk science").

To the extent Jones argues that the circuit court failed to apply the *Daubert* standard, Opening Br. 13–15, Jones is likewise wrong. The circuit court clearly employed the standard that the *Daubert* Court established for a methodology's reliability. *See Daubert*, 509 U.S. at 593–95. The circuit court articulated the *Daubert* standard and its own "gatekeeping" role to screen proffered expert testimony and ensure that the underlying methods are "reliable" rather than "junk science." R.65:47–50. Then it walked through the *Daubert* factors, even though the factors are not a "definitive checklist," and appropriately cited authority for the controlling standards and principles. R.65:47–50. As such, the circuit court applied the proper legal standard under *Daubert* and Section 907.02(1).

In the main, Jones takes issue with the circuit court's leaving for the jury the task of deciding between the conflicting views of the experts, Opening Br. 14–15, but that is precisely the task that the court *must* leave in the hands of the jury. Within the "range" of issues "where experts might reasonably differ," "the *jury* must decide among the conflicting views of different experts." *Kumho Tire*, 526 U.S. at 153 (emphasis added). If Jones believes that his expert is more credible than the State's, or that his expert's criticisms should be given more weight, then those issues should be put to the jury through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert*, 509 U.S. at 596. Because that

is exactly what the circuit court did here, R.65:50, the court acted entirely in accord with the dictates of *Daubert* and Section 907.02(1).

B. The Circuit Court Did Not Erroneously Exercise Its Discretion In Applying The Proper Legal Standard

1. Once a circuit court has identified the proper legal standard under Section 907.02(1), this Court upholds the circuit court's decision so long as it is reasonably supported by the facts or so long as the court rationally came to a reasonable conclusion. *118th St. Kenosha*, 2014 WI 125, ¶ 18; *Kandutsch*, 2011 WI 78, ¶ 23. Circuit courts have "broad discretion to admit or exclude evidence." *Kandutsch*, 2011 WI 78, ¶ 23. And because each case is different, and the same factors will not always apply to every admissibility determination, once the trial court has identified the proper standard for admissibility, the court "must have considerable leeway in . . . determining whether particular expert testimony is reliable." *Kumho Tire*, 526 U.S. at 152. Thus, "'the court's choice of relevant factors within [the *Daubert*] framework and its ultimate conclusion as to admissibility' [are] reviewed for an erroneous exercise of discretion." *Seifert*, 2017 WI 2, ¶ 218 (Gableman, J., concurring in the judgment) (quoting *Lees v. Carthage Coll.*, 714 F.3d 516, 520 (7th Cir. 2013)).

2. The circuit court's application of Section 907.02(1) to the instruments in dispute here—the MnSOST-R and

RRASOR—fell squarely well within its broad range of discretion permissible under *Daubert*, *Kumho Tire*, and Wisconsin law. Indeed, the circuit court's decision admitting these instruments is consistent with the uniform decisions of courts around the country. *See supra* p. 3.

As an initial matter, Jones does not dispute the overwhelming majority of the considerations supporting the admissibility of Drs. Jurek's and Allen's testimony. He conceded below that Drs. Jurek and Allen were qualified, as they had both "worked for the[ir] respective agencies for a number of years and are both licensed psychologists." R.64:5; R.65:46. Jones also conceded that the testimony was helpful, as Chapter 980 cases often rely upon expert testimony as to mental illness and dangerousness. *See* R.24:2; R.65:41, 46; Opening Br. 7–8.

Jones does not appear to claim that the State's experts based their testimony upon insufficient facts or data. As Dr. Jurek explained, he relied upon a significant amount of historical information about Jones, including Jones' "[r]ecords from the Department of Corrections, police records, his history under supervision," including "information concerning . . . Jones's social history, his mental status, substance abuse history, sexual history, [and] treatment history." R.64:15. Doctor Allen also relied on records similar to those "others in the field of psychology use for purposes of conducting evaluations." R.64:103–04. Jones has not contended that the numerous records Dr. Jurek and Dr. Allen relied upon were

somehow insufficient, or that their use of actuarial instruments in general was improper. R.64:5–6; *see generally* R.24:1–9; Opening Br. 1–15; *see also* R.65:49 (circuit court finding that the records and actuarial instruments are "the type of information reasonably relied upon by experts in [the] field" when making these evaluations).

Jones likewise does not appear to challenge the experts' application of the methodology to the facts. Although Jones' original motion alleged, in a conclusory fashion, that the experts "applied [the] methods unreliably to the facts of this case," R.24:9, Jones never claimed that either of the State's experts used the instruments improperly by, for instance, failing to accurately input Jones' data into the instruments or incorrectly scoring the instruments. *See generally* R.24:1–9; Opening Br. 1–15; *see also* R.65:41 (Jones' counsel explaining that the issue is not "the best way to apply a particular actuarial instrument"); R.65:49 (circuit court finding that "there was no evidence suggesting or even challenging that" the experts did not reliably apply the methods to the facts).

Instead, Jones' only claim is that the methodology *itself*—use of the RRASOR and MnSOST-R at all—is unreliable, and therefore Dr. Jurek's testimony was not "the product of reliable . . . methods." Wis. Stat. § 907.02(1); *see* R.64:5–6; R.65:41 (Jones' counsel explaining that the issue is "whether or not the [instruments] are reliable and valid");

Opening Br. 9–13.[7] With regard to this claim, the circuit court acted well within the bounds of its broad discretion in considering the *Daubert* factors—whether the methodology can and has been tested, whether it has been peer reviewed, whether it has a known error rate, and whether it is generally accepted—and found that the methods were reliable.

Testing. "Ordinarily, a key question to be answered in determining whether a theory or technique" is reliable is "whether it can be (and has been) tested." *Daubert*, 509 U.S. at 593. If a technique or theory is refutable, then it will qualify as "scientific" and thus more likely to be reliable. *Id.*; *see also* 1 David L. Faigman, et al., Mod. Sci. Evid. § 1:16 (2016–17 ed.) (explaining the relevance of this factor). And if a theory or technique has been tested, then its merit can be shown based upon "the degree to which it has survived attempts at falsification." Faigman, *supra*, § 1:16.

The circuit court reasonably found, based on the evidence in the record, that the instruments had been tested. R.65:48–49. Doctor Jurek testified that the MnSOST-R had been "found in over 12 research inquiries to have . . . a positive relationship with sexual recidivism." R.64:33, 39. He further testified that the RRASOR had been tested and cross-validated 35 or 36 times and that those studies "found it to

[7] Jones does not challenge either of the instruments that Dr. Allen used: the Static 99 and Static 99-R. R.64:124; *see generally* Opening Br. 1–15. Although Jones originally challenged the Static 99, he has abandoned that challenge on appeal. *Supra* p. 17 n.4.

have a relationship with sexual recidivism." R.64:49. Doctor Allen and Dr. Wollert both also testified that the RRASOR had been cross-validated. R.64:111; R.65:29. And an article Jones himself submitted to the court cited many examples of the MnSOST-R being tested. R.24:80–81.

Jones concedes that these instruments have been tested, but takes issue with Dr. Jurek's explanation of the results of the tests. Opening Br. 12–13. But if Jones disagrees with an expert's opinion regarding the results of various studies and how much weight should be given to those results, the proper forum for that disagreement is before the jury. *Kumho Tire*, 526 U.S. at 153; *Daubert*, 509 U.S. at 595. At the admissibility stage, what is relevant is that the method is capable of being and has been tested, because this indicates that the method is "scientific" and thus more likely to be reliable. *Daubert*, 509 U.S. at 593.

Peer Review. "Peer review" encompasses all "submission [of the methodology] to the scrutiny of the scientific community." *Id.* In professional communities, "peer review" means "critical evaluation [by the community] of the research on which the asserted expertise is based." Faigman, *supra*, § 1:23. Allowing a methodology to be scrutinized by the professional community "is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert*, 509 U.S. at 593. Not all "'flaws in methodology' uncovered by peer review . . . equate to a lack of scientific validity, since . . . the alleged

flaws [might] go merely to the weight, not the admissibility, of the evidence and the testimony." *United States v. Bonds*, 12 F.3d 540, 559 (6th Cir. 1993). Notably, peer review "is not limited to deciding what gets published." Faigman, *supra*, § 1:23. Indeed, publication "is but one element of peer review," and "is not a *sine qua non* of admissibility" because "it does not necessarily correlate with reliability." *Daubert*, 509 U.S. at 593; *see also Smith v. Ford Motor Co.*, 215 F.3d 713, 720–21 (7th Cir. 2000) (holding that trial court had abused its discretion in finding expert testimony unreliable solely because the experts had not been published).

Here, the circuit court reasonably relied on sufficient evidence in the record that the instruments had been peer reviewed. R.65:48–49. Echoing *Daubert*, the circuit court correctly explained that "while publication in a journal is the most rigorous [form of peer review], it is not the only way to peer review." R.65:48. The MnSOST-R, although not originally published in a peer-reviewed journal, has been extensively reviewed by experts in the field, including by Jones' own expert. R.24:80–81; R.25:10; R.64:33–34, 64. For example, at least 12 research studies have confirmed its positive relationship with sexual recidivism. R. 64:33. As for RRASOR, although the original paper was not published in an academic journal, the instrument has been the subject of over 30 research studies and an abundance of review by experts in the field, including, again, Jones' own expert. R.24:107–110; R.64:49–50.

Jones argues that "the fact that instruments have been discussed and criticized says nothing about their reliability." Opening Br. 14. To the contrary, *Daubert* explicitly included peer review as a factor for determining admissibility because methodologies that have been subjected to scrutiny are more likely to be reliable than those that have not. "[S]ubmission to the scrutiny of the scientific community is a component of 'good science.'" *Daubert*, 509 U.S. at 593. And not all criticisms of or alleged flaws in a methodology affect its reliability; some go instead to the weight to be accorded the methodology by the trier of fact. *Bonds*, 12 F.3d at 559; *see Kumho Tire*, 526 U.S. at 153.

Error Rate. When evaluating a particular technique, "the court ordinarily should consider the known or potential rate of error." *Daubert*, 509 U.S. at 594. It is important to note that "[a]ll applied science has some error rate associated with it," Faigman, *supra*, § 1:20, in part because "there are no certainties in science," *Daubert*, 509 U.S. at 590. However, if an error rate is "high enough" it can, "in close cases, determine the admissibility of the proffered testimony." Dana G. Deaton, *The Daubert Challenge to the Admissibility of Scientific Evidence*, 60 Am. Jur. Trials 1, § 15 (Oct. 2017).

In this case, the circuit court noted and Jones' counsel conceded that all of the instruments have known error rates, and Jones' counsel explained that his challenges were not based the instruments' error rates. R. 64:126. Nevertheless, Jones raises arguments here that the circuit court

erroneously credited Dr. Jurek's testimony regarding the instruments' error rates. Opening Br. 12–13. Yet as the circuit court noted, all actuarial instruments have "flaws," R.65:43, but this does not render them inadmissible. Indeed, as "there are no certainties in science," *Daubert*, 509 U.S. at 590, all techniques will have flaws and error rates. As long as the methodology is generally thought reliable in the field, the fact that a methodology has an error rate is not enough to exclude it. *See Bonds*, 12 F.3d at 560 (if a methodology is generally accepted, "it is implicit that the rate of error is acceptable to the scientific community").

General Acceptance. "Widespread acceptance" of a technique or method by the professional community "can be an important factor in ruling particular evidence admissible." *Daubert*, 509 U.S. at 594. The general acceptance test "is designed [ ] to uncover whether there is a general agreement of [experts] in the field that this [method or technique] is not based on a novel theory or procedure that is mere speculation or conjecture." *Bonds*, 12 F.3d at 562 (citation omitted).

The circuit court reasonably found, based on the evidence in the record, that "[t]hese actuarial tools are widely used in predicting recidivism in sex offenders." R.65:49. Jones' own submission to the circuit court confirmed that "[s]ince its inception, MnSOST-R has been one of the most widely used sex offender risk-assessment tools." R.24:80. And even Jones' own expert, Dr. Wollert, and his colleagues had used the RRASOR. R.64:111–12; R.65:28. Indeed, courts

across the country have found that these instruments are generally accepted by the relevant professional community. *See In re Commitment of Simons*, 821 N.E.2d 1184, 1192–96 (Ill. 2004) ("there is no question that [actuarial risk assessment] is generally accepted by professionals who assess sexually violent offenders") (collecting cases).

Jones argues that the circuit court did not have a sufficient basis to conclude that the MnSOST-R and RRASOR are "widely used," Opening Br. 13–14, and cites a survey never presented to the circuit court (as it was published more than three years after the court's decision) as proof that the court erroneously exercised its discretion in this regard, Opening Br. 14 & n.5.[8] Ignoring the fact that Jones himself provided the circuit court with evidence that the instruments were widely used, R.24:80, the court heard sufficient testimony at the hearing to establish this fact, R.64:25; R.64:125 (referencing a published article explaining that the RRASOR and MnSOST-R are both in use in the field);

[8] This is not the only extra-record evidence that Jones relies upon to argue that the circuit court erroneously exercised its discretion. *See* Opening Br. 11–12 & n.4 (relying on an affidavit executed more than a year after the circuit court's decision and submitted in an unrelated case). However, determining whether the circuit court erroneously exercised its discretion depends upon whether the court's decision was reasonably supported by sufficient facts *in the record*. *See 118th St. Kenosha*, 2014 WI 125, ¶ 18. And relying on evidence that not only was not submitted to the circuit court, but was not even in existence at the time the court made its ruling, is wholly improper. *See United States v. Phillips*, 914 F.2d 835, 840 (7th Cir. 1990) ("An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below.").

R.65:28. Thus, there were sufficient facts in the record supporting the circuit court's entirely reasonable conclusion that these instruments are generally accepted in the professional community.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated this 1st day of December, 2017.

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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 8,618 words.

Dated this 1st day of December, 2017.

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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 1st day of December, 2017.

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