COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1998 **Cir. Ct. No. 2013CI2**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE COMMITMENT OF ALLEN F. THOMAS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ALLEN F. THOMAS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Allen Thomas was committed under WIS. STAT. § 980.02(1)(a)(1) (2013-14),[1] after a jury found Thomas to be a sexually violent person. Thomas seeks a new trial. On appeal, Thomas argues that the circuit court erred in allowing the State to present scientific evidence through two expert witnesses to support the State's allegation that Thomas was a sexually violent person. Thomas argues that certain parts of the experts' testimonies were based on unreliable methods used to assess whether Thomas was a sexually violent person, and therefore, the challenged testimony should have been excluded. For the reasons that follow, we conclude that the challenged testimony of the State's two experts was properly admitted at the trial, and, on that basis, deny Thomas's request for a new trial. We affirm.

BACKGROUND

¶2 Thomas was convicted of a sexually violent offense. Shortly before he was released from prison, the State filed a petition alleging Thomas was a sexually violent person, within the meaning of WIS. STAT. §§ 980.01(7) and 980.02(3) and therefore eligible for commitment under WIS. STAT. § 980.05(5). Before trial, Thomas filed a motion pursuant to WIS. STAT. § 907.02(1), seeking to exclude expert evidence relating to Thomas's likelihood of sexually reoffending based on scores derived from the use of the Rapid Risk Assessment for Sex Offense Recidivism (RRASOR) actuarial instrument,[2] and a State expert's use of

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] In this context, 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." ***State v. Combs***, 2006 WI App 137, ¶ 4, 295 Wis. 2d 457, 720 N.W.2d 684.

the 2008 recidivism risk norms ("2008 norms") with the Static-99, a separate actuarial instrument. The court held a ***Daubert***[3] hearing on Thomas's motion.

¶3 At the hearing, Thomas expanded the list of evidence he wanted excluded at the trial for the reason that the expert evidence did not meet the ***Daubert*** reliability standards. As is pertinent to this case, Thomas sought to exclude expert testimony based on the following: (1) the application of the 2008 norms to the Static-99 actuarial instrument; (2) use of the "original" recidivism risk estimates ("2000 norms"[4]) applied to the Static-99; and (3) the use of the RRASOR to determine Thomas's "relative risk" to sexually reoffend.[5]

¶4 Two witnesses testified at the Daubert hearing: Dr. William Merrick for the State and Dr. Richard Dr. Wollert for the defense. Dr. Merrick endorsed the use of two actuarial instruments: the RRASOR without the use of the corresponding recidivism rates, and the Static-99, applying "updated recidivism estimates" with the 2008 norms. Dr. Wollert endorsed the use of the Static-99R. Applying the ***Daubert*** and ***Kumho Tire***[6] standards, the circuit court determined that the challenged expert testimony was admissible.

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[3] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

[4] In this argument, Thomas uses the term "original norms." As best we can tell, he is referring to recidivism risk norms developed in 1999 and published in 2000, and applied to the Static-99.

[5] Thomas also moved to exclude expert testimony regarding the use of the constant multiplier for the ten-year recidivism rate for the RRASOR. The court granted this part of Thomas's motion and is not a topic in this appeal.

[6] ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 149 (1999)

¶5 The case proceeded to a jury trial. The jury heard testimony from two State expert witnesses, Dr. Merrick and Dr. Melissa Westendorf, and testimony from Thomas's expert witness. At the conclusion of a three-day trial, the jury found that Thomas was a sexually violent person, and therefore subject to commitment under ch. 980. Thomas appeals.

DISCUSSION

¶6 Thomas argues that the circuit court erred by allowing the State to present testimony by Dr. Merrick and Dr. Westendorf regarding Thomas's risk of reoffending. Thomas argues that the testimony he sought to exclude related to the application of invalid risk recidivism norms to identified actuarial instruments they used in assessing Thomas's risk to reoffend. Stated differently, Thomas argues that the methods used by the experts, i.e., applying purportedly invalid data to the Static-99, was unreliable and therefore scores relied on by the experts derived from this method to assess Thomas's risk of reoffending are unreliable. Thomas separately argues that opinion testimony by Dr. Merrick related to his use of the RRASOR to establish Thomas's "relative risk" was based on an unreliable method. Thomas fails to persuade us that the circuit court misused its discretion.

*WISCONSIN STAT. § 907.02(1) and the **Daubert** admissibility standard*

¶7 WISCONSIN STAT. § 907.02[7] adopts the ***Daubert*** standard for the admission of expert witness testimony. In ***Daubert***, the United States Supreme

[7] WISCONSIN STAT. § 907.02(1) states:

> 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

(continued)

Court explained that the trial court serves as a gatekeeper to ensure that scientific testimony is both relevant and reliable. The Court explained that in order to meet this gatekeeping responsibility, the trial court must determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." ***Daubert***, 509 U.S. at 592. To answer these two questions, the Court provided a list of factors that a trial court *may* utilize in its analysis. ***Id.*** at 592-93. These factors include: (1) whether the expert's theory or technique "can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "the known or potential rate of error" of a particular scientific technique, and (4) whether the subject of the testimony has been generally accepted. ***Id.*** at 593-94. The Court emphasized, however, that these factors did not establish "a definitive checklist or test" and that the test of reliability must be "flexible." *See* ***id.***

¶8 In ***Kumho Tire***, the Supreme Court underlined the importance of the trial court's role in admitting expert testimony, stating "the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." ***Kumho Tire***, 526 U.S. at 142. The Court stated that the ***Daubert*** factors for determining the reliability of an expert's testimony "neither necessarily nor exclusively applies to all experts or in every case." ***Id.*** at 141. The Court reiterated that those factors must be flexible and may not be applicable to all types of expert testimony. *See* ***id.*** at 150.

> 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.

Importantly, the ***Kumho Tire*** Court held that the reliability of an expert's opinion may be established based on the expert's observations from her or his "extensive and specialized experience." *See* ***id.*** at 156.

¶9 With the above legal principles and standards in mind, we turn to Thomas's arguments that the circuit court erred in admitting testimony relating to Dr. Westendorf's application of the 2000 norms to the Static-99, Dr. Merrick's use of the 2008 norms with the Static-99, and Dr. Merrick's use of the RRASOR to determine Thomas's "relative risk" to sexually reoffend.[8] We begin our analysis by explaining in broad strokes the problems with Thomas's arguments.

¶10 Speaking in general terms, the problem with Thomas's argument is that his discussion cherry picks testimony favorable to his view and fails to adequately address contrary evidence and the complex nature of the basis for expert opinions in this area. Similarly, Thomas largely ignores the broad discretion that is clear courts have after ***Kumho Tire*** and focuses almost entirely on the four ***Daubert*** factors. And, even as to the ***Daubert*** factors, Thomas sometimes fails to present a fully developed argument.

Dr. Westendorf's *use of the 2000 norms with the Static-99*

¶11 Thomas argues that the circuit court erred by allowing Dr. Westendorf to testify at trial using the Static-99 with the 2000 norms. Thomas argues that the 2000 norms Dr. Westendorf applied to the Static-99 are "outdated"

[8] In the statement of facts section, Thomas inappropriately "interspersed legal argument and 'spin' into what should have been an objective recitation … of the factual occurrences of this case." The fact section of a brief is no place for argument. ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶5 n.2, 281 Wis. 2d 173, 696 N.W.2d 194.

and "invalid" and were, therefore, improperly admitted at trial. In support of this argument, Thomas points to the fact that Dr. Merrick and Dr. Wollert opined at the ***Daubert*** hearing that the 2000 norms overestimate recidivism rates and do not properly account for the effect of advancing age on recidivism.

¶12 The problem with Thomas' argument is that he fails to relate any of these points to any factor of admissibility under either ***Daubert*** or ***Kumho Tire***. At the center of Thomas's argument are two experts who appear to have conflicting professional opinions, based on their own review of data and literature, that the Static-99 with 2000 norms produces recidivism rates that are too high. But this approach fails to take into account that Dr. Westendorf's testimony is multifaceted and even her reliance on the 2000 norms was qualified because of her own view that its use tends to overestimate recidivism. Notably, Thomas conveniently bypasses Dr. Westendorf's testimony that she uses the same process in this case that she uses in all other cases: the Static-99 with the 2000 norms, the RRASOR with its original norms, and the Static-99R. Dr. Westendorf explained that it is her experience that she obtains a more complete picture of the subject she is assessing when she uses these instruments when evaluating a sexual offender for ch. 980 proceedings. In the words of ***Kumho Tire***, Thomas's argument fails to take into account whether Dr. Westendorf had the sort of "extensive and specialized experience" that would permit her to use the 2000 norms in a way the trial court could deem "reliable." *See* ***Kumho Tire***, 526 U.S. at 150.

Dr. Merrick's use of the 2008 risk assessment norms with the Static-99

¶13 Thomas's attack on Dr. Merrick's use of the Static-99 with 2008 norms is similarly flawed. Thomas's criticism of Dr. Merrick's use of the Static-99 with the 2008 norms rests on recommendations by the developers of the Static-

99 that evaluators such as Dr. Merrick use a different actuarial instrument altogether, the Static-99R. However, Dr. Merrick's testimony reveals that he has "extensive and specialized experience" with the use of the Static-99 instrument with the 2008 norms. For example, he testified about his approach to dealing with the possibility that the 2000 norms overestimate recidivism. He explained that his approach was to use the Static-99 with more contemporaneous data released in 2008 (the 2008 norms), which accounted for the tendency of the 2000 norms to overestimate the rate of recidivism. Dr. Merrick testified that his review of the difference in scoring between his methodology and the methodology used by the developers with the Static-99R was negligible. This testimony and other competing testimony between Dr. Merrick and Dr. Wollert on the same topics demonstrate, in our view, that the hearing consisted largely of two well-qualified experts disagreeing on the best way to deal with what they both believed was a problem with using the Static-99 with the 2000 norms.

¶14 Another problem with Thomas's argument is that it largely assumes that the circuit court was required to accept Dr. Wollert's criticism of Dr. Merrick's approach. It assumes that the circuit court was not free to take into account whether Dr. Merrick had the sort of "extensive and specialized experience" that suggested that his approach was reliable. For example, Dr. Wollert, while testifying at the ***Daubert*** hearing, referred to Dr. Merrick's use of the 2008 norms with the Static-99 as a type of "idiosyncratic" scoring. Dr. Wollert's view of Dr. Merrick's approach rests entirely on the four ***Daubert*** factors. In contrast, Dr. Merrick testified that, where an actuarial instrument has been subjected to a high level of scrutiny, as the Static-99 has, the more important inquiry is whether the instrument itself has been tested, not the norms to which it is applied (the 2000 norms versus the 2008 norms). Thomas does not explain why

this and additional supportive testimony from Dr. Merrick does not provide a basis for the court to admit the evidence under ***Kumho Tire***.

Dr. Merrick's use of the RRASOR

¶15 Thomas's attack on Dr. Merrick's use of the RRASOR to determine Thomas's "relative risk" to reoffend also misses the mark. To first clarify, in his argument, Thomas refers to the following interchangeably: the RRASOR actuarial instrument, the RRASOR recidivism risk norms, and how Dr. Merrick uses the RRASOR. As we understand it, Thomas's argument is directed at whether Dr. Merrick's use of the RRASOR to determine Thomas's "relative risk" to reoffend is invalid and an unreliable method to assess Thomas's risk of reoffending.

¶16 Turning to Thomas's argument, Thomas again erroneously assumes that the circuit court may not take into account Dr. Merrick's "extensive and specialized experience" in using the RRASOR in general, and using the instrument to determine Thomas's "relative risk" to reoffend in particular in determining whether his approach is reliable. In his testimony, Dr. Merrick explained how he uses the RRASOR in light of the unreliable original norms.

> You can think of it as a relative risk. That a person with a score of zero is going to be at less risk than a person with a score of two, who's going to be at less risk than the person with the score of five or six. This scale varies from zero to six…. *And having done this for the years that I've done it, I have a sense of what that relative risk means.*

(Emphasis added).

¶17 Dr. Merrick further testified that the developers of the RRASOR have stated that individual evaluators need "to decide for themselves as

professionals what instruments to apply and what [instruments] are appropriate for any given evaluation." We read ***Kumho Tire*** as holding that this is the type of testimony a circuit court may rely on in determining the reliability of expert testimony, and therefore its admissibility. *See* ***Kumho Tire***, 526 U.S. at 156.

¶18 Thomas's argument incorrectly relies entirely on the application of the ***Daubert*** factors and mostly fails to take into account the Supreme Court's holding in ***Kumho Tire***. Thomas does not explain why Dr. Merrick's testimony regarding his use of the RRASOR to determine Thomas's relative risk to reoffend and additional supportive testimony from Dr. Merrick as to why he uses the RRASOR in this manner does not provide a basis for the court to admit the evidence under ***Kumho Tire***.

Closing thoughts and conclusions

¶19 At the ***Daubert*** hearing, the circuit court was faced with a disagreement between two experts as to scientifically valid methods of applying actuarial instruments in assessing Thomas's risk to sexually reoffend. Viewing the testimony of these two experts as a whole, it was reasonable for the circuit court to conclude that any reliability dispute was the type of dispute properly resolved by a factfinder. Thomas makes some individually valid points about certain testimony as it relates to individual ***Daubert*** factors, but he fails to present a fully developed argument that takes into account ***Kumho Tire*** and testimony that cuts in favor of admission. That is to say, Thomas fails to persuade us that the circuit court erroneously exercised its discretion in admitting the testimonies of Dr. Merrick and Dr. Westendorf related to the methods they applied to certain actuarial instruments in assessing Thomas's likelihood of sexually reoffending. Accordingly, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.