NO. 42552-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE DETENTION OF

DARNELL McGARY, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Ronald Culpepper, Judge

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF ARGUMENT IN REPLY

In addition to the arguments and authorities set forth in the Appellant's Brief, Appellant adds the following.

The MATS-1 was admissible under ER 702 and therefore this is not an alternative basis for this court to affirm the trial court's decision.

In addition, this Court should reject the State's suggestion that it consider the credibility of the defense expert, Dr. Wollert, when this is a determination that is left to the trier of fact. Further, the State has asked this Court to evaluate Dr. Wollert's credibility based on the unpublished court orders of trial court judges in other, unrelated, cases. This evidence was not considered by the trial court below and is an inappropriate basis for decision in this case.

II. STATEMENT OF THE CASE

The facts of this case are fully set forth in Appellant's Brief.

III. ARGUMENT

A. IT IS ERROR FOR THE APPELLATE COURT TO WEIGH THE ADMISSIBILITY OF EVIDENCE BY EXAMINING THE EXPERT'S CREDIBILITY.

In its Response Brief, the State has urged the appellate court to consider "various court orders" of trial judges in other cases in which Dr. Wollert testified as an expert and, essentially, find as a matter of law that Dr. Wollert is not a credible witness and that this is an alternate basis for affirming the trial court's decision to exclude his testimony about the MATS-1 actuarial table. RB at 11-12, 17, 18-19. It would be error for the appellate court to base its decision in this case on an evaluation of Dr. Wollert's credibility or on the hearsay opinions of trial court judges in other cases.

The credibility of an expert is a question to be evaluated by the trier of fact at trial. Detention of Fox, 128 Wn. App. 374, 408, 158 P.3d 69 (2007). The appellate court is to defer "to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970, abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The trial court's decision was based on ER 703. 7RP 858. The trial court in this case specifically declined to consider the orders of other trial court orders in reaching its decision that were presented by the State below. 7RP 866. The relevant question under ER 703 is whether the MATS-1 is admissible as the type of test reasonably relied on by experts in the field. ER 703, AB 22-33. The credibility of the expert submitting the testimony is not a part of that evaluation—that would go to the weight of the evidence, not its admissibility. See In re Detention of Campbell, 139 Wn.2d 341, 358, 986 P.2d 771 (1999).

Furthermore, the opinion of other trial judges on the credibility of a witness is irrelevant and inadmissible hearsay. In re Detention of Pouncy, 168 Wn.2d 382, 393, 229 P.3d 678 (2010).[1] Such evidence cannot be used in the evaluation of the admissibility of the expert's opinion because it is irrelevant and "highly prejudicial." Pouncy, 168 Wn.2d at 393. This evidence is also inadmissible hearsay. Id., at 393.

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[1] Interestingly, in Pouncy, the State was also attempting to use the orders of other trial courts to argue that Dr. Wollert was not a credible expert: "Despite their designation as findings of fact, the Yakima judge's credibility determinations about Dr. Wollert involved a discretionary exercise not contemplated by the public records exception to the hearsay rule." Pouncy, 168 Wn.2d at 393.

Therefore, it would be improper for the appellate court to consider trial court opinions in other cases in evaluating the trial court's decision to exclude the MATS-1 in this case.

B. THE MATS-1 ACTUARIAL TABLE IS ADMISSIBLE UNDER ER 702.

The MATS-1 actuarial instrument is admissible under ER 702. The State has also argued that ER 702 is an alternate basis for the exclusion of the MATS-1. RB 17-19. This court should reject the State's argument. ER 702 scientific testimony is admissible where the witness (1) qualifies as an expert, (2) the expert's opinion is based on a theory generally accepted in the relevant scientific community, and (3) the testimony is helpful to the trier of fact. ER 702, State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

The trial court in this case did not exclude the MATS-1 under ER 702. 7RP 866-67. The court permitted Dr. Wollert to testify as an expert and there was no hearing challenging his qualifications as an expert witness. Thus, part one of the test for admissibility under ER 702 is met.

Parts two and three of the test are also met. The subject of the testimony was to be the MATS-1 actuarial table. Courts routinely admit actuarial instruments under ER 702. See State v.

Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003); In re Detention of Campbell, 139 Wn.2d 341, 358, 986 P.2d 771 (1999). Testimony regarding other actuarial tables was admitted at trial, so, clearly, the trial court determined that such testimony would be "helpful to the trier of fact." The MATS-1 would have further aided to the jury's evaluation of McGary's future dangerousness because it was the only table to take into account the effect of McGary's age on his potential for recidivism. 7RP 837, 843. According to the offer of proof, age is commonly recognized by other experts in the field as a factor strongly correlated with the rate of recidivism. 7RP 837-38.

The State argued that because (in the State's opinion) Dr. Wollert is not a credible expert, this could be considered as a part of the "facts of the case" to permit the exclusion of his testimony about the MATS-1. RB 18-19. This is not a proper reason for the exclusion of evidence under ER 702. The Court held in Campbell that arguments about the reliability of the expert's opinion go to the weight of the evidence, not its admissibility under ER 702. Campbell, 139 Wn.2d at 358.

The MATS-1 was admissible under ER 702 and therefore is not an alternative ground for affirming the trial court's exclusion of this actuarial instrument.

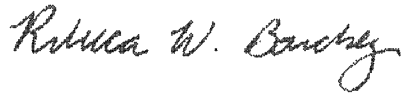
V. CONCLUSION

The commitment order must be reversed because the trial court erred by excluding necessary evidence that was an actuarial table admissible under ER 702 and 703.

DATED: June 12, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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CERTIFICATE OF SERVICE

I certify that on June 12. 2012, I caused a true and correct copy of this Reply Brief to be served on the following via first class mail:

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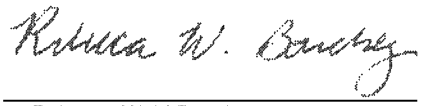

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