DIVISION ONE
FILED: 05/29/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	)	No. 1 CA-MH 11-0057 SP
	)	
	)	DEPARTMENT B
	)	
IN RE DENNIS H.	)	**MEMORANDUM DECISION**
	)	
	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. MS2007-000007

The Honorable Rosa Mroz, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Aubrey Joy Corcoran, Assistant Attorney General
Attorneys for Appellee

Bruce Peterson, Maricopa County Legal Advocate — Phoenix
By Mary Beth Mitchell, Deputy Legal Advocate
and

Daniel R. Raynak — Phoenix
Attorneys for Appellant

J O H N S E N, Judge

¶1 Dennis H. appeals the denial of his petition for absolute discharge from the Arizona Community Protection and

Treatment Center ("ACPTC"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 1993, Dennis was convicted of one count of molestation of a child, a Class 2 felony, and sentenced to 15 years' imprisonment. Before his release in 2007, the State filed a petition pursuant to Arizona Revised Statutes ("A.R.S.") section 36-3704 (West 2012) alleging Dennis was a sexually violent person ("SVP") who should be committed to the ACPTC for supervision and treatment.[1] Dennis admitted the allegation, and the superior court found him to be an SVP and ordered his commitment.

¶3 In February 2011, Dennis petitioned for absolute discharge from ACPTC, asserting that he was no longer an SVP. During a two-day evidentiary hearing, Dr. Nicole Huggins, a psychologist at the Arizona State Hospital who conducted Dennis's annual examination, testified that Dennis's mental disorders had not changed and he remained a danger to others, likely to reoffend if discharged. Dr. Richard Samuels testified on behalf of Dennis and opined that Dennis's condition had changed, that he was no longer at risk of reoffending and that he should be unconditionally discharged from ACPTC.

---

[1] Absent material revisions after the relevant date, we cite a statute's current version.

¶4 On May 9, 2011, the superior court issued a minute entry denying the petition and finding that the State proved beyond a reasonable doubt "that [Dennis's] mental disorder has not changed; that he remains a danger to others; and that it is highly probable that [Dennis] will engage in acts of sexual violence if he is discharged." Dennis timely appealed.[2] We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(10) (West 2012).

DISCUSSION

¶5 Dennis contends the superior court erred in denying his petition because Dr. Huggins is not a "competent professional" as required by A.R.S. § 36-3703 (West 2012). He also argues that her testimony should have been excluded under Arizona Rule of Evidence 702 and *Frye v. United States*, 293 F. 1013 (1923), and, accordingly, there was not sufficient evidence to support the superior court's findings. We review the superior court's admission of expert testimony for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 210, ¶ 69, 84 P.3d 456, 475 (2004) (in the context of Arizona Rule of Evidence 702).

[2] As the court's minute entry was unsigned, Dennis's notice of appeal was premature. This court suspended the appeal and revested jurisdiction in the superior court to allow it to issue a signed order denying Dennis's petition.

¶6 During SVP proceedings, A.R.S. § 36-3703(A) provides that "each party may select a competent professional to perform simultaneous evaluations of the person." A competent professional is defined as a person who is:

> (a) Familiar with the state's sexually violent persons statutes and sexual offender treatment programs available in this state.
>
> (b) Approved by the superior court as meeting court approved guidelines.

A.R.S. § 36-3701(2) (West 2012).

¶7 Dennis argues Dr. Huggins's testimony did not establish that she qualified as a "competent professional." At the hearing, Dr. Huggins answered "yes" when asked if she was familiar with the Arizona's sexually violent persons statutes and with sexual offender treatment programs that are available in Arizona. On cross-examination, she was pressed to demonstrate some of this knowledge. Although she named eight other treatment programs in Arizona, she was unable to name any of the core classes in those programs or to relate the duration of those programs and said she never had observed any treatment at any of those programs. She testified that she had spoken briefly with one of the doctors from Psychological Consulting Services at a continuing education seminar, but otherwise had never spoken with any doctors from those programs. On redirect, Dr. Huggins described the general type of programming that sex

offender treatment programs in Arizona provide and testified that while she keeps a list of treatment programs, she has no need to memorize that list.

¶8 While diligent cross-examination revealed weaknesses in Dr. Huggins's knowledge, we conclude that her overall testimony provided sufficient evidence for the superior court to find she was familiar both with Arizona's sexually violent persons statutes and sexual offender treatment programs. Accordingly, the superior court did not abuse its discretion by determining that Dr. Huggins met the statutory requirements of a competent professional.

¶9 Dennis next argues that Dr. Huggins's testimony should have been excluded under Arizona Rule of Evidence 702. According to Rule 702,

> 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.[3]

"The test for whether a person is an expert is whether a jury can receive help on a particular subject from the witness," *Webb*

[3] Arizona Rule of Evidence 702 since was revised. *See* Order Amending the Arizona Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure, Ariz. Sup. Ct. No. R-10-0035, at 64 (Sept. 7, 2011). We refer to the rule in effect at the time of the hearing.

v. Omni Block, Inc., 216 Ariz. 349, 352, ¶ 8, 166 P.3d 140, 143 (App. 2007), and "[t]he degree of [an expert's] qualification goes to the weight given the testimony, not its admissibility." *Davolt*, 207 Ariz. at 210, ¶ 70, 84 P.3d at 475.

¶10 Dennis contends that Dr. Huggins did not demonstrate any scientific or specialized knowledge that would qualify her as an expert witness. At the hearing, Dr. Huggins testified that she holds a Bachelor's degree in psychology, a Master's degree in clinical psychology and a Doctorate of psychology. She testified that she had been employed as a psychologist by the Arizona State Hospital for more than two years, conducting and supervising evaluations for the ACPTC. We hold that the superior court did not err by finding that Dr. Huggins was qualified to present expert testimony about Dennis's mental disorders and diagnoses.

¶11 Finally, Dennis argues that Dr. Huggins's testimony should have been excluded because it did not meet the *Frye* test for admissibility.[4] Pursuant to *Frye*, 293 F. 1013, and *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962), expert testimony that relies on novel scientific tests or techniques is admissible only if "the proponent can first demonstrate that the underlying scientific principle from which the expert's deductions are made

[4] After the hearings in this matter, the Arizona Supreme Court amended Arizona Rule of Evidence 702 to effectively abandon the *Frye* test. *See supra* ¶ 9, n.3.

has 'gained general acceptance in the particular field in which it belongs.'" *State v. Bogan*, 183 Ariz. 506, 509, 905 P.2d 515, 518 (App. 1995) (quoting *Frye*, 293 F. at 1014). *Frye* hearings are held before trial to resolve the question of "general acceptance." *Id.*

¶12 In *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000), our supreme court further clarified the applicability of *Frye*. It held that the superior court had improperly utilized the *Frye* test to exclude an expert's proposed testimony on repressed memory, stating "expert evidence based on a qualified witness' own experience, observation, and study is treated differently from opinion evidence based on novel scientific principles advanced by others." *Id.* at 480, ¶ 31, 1 P.3d at 123. When an expert reaches a conclusion by inductive reasoning, based on his own observation and experience about human behavior for the purpose of explaining that behavior, *Frye*'s general acceptance test should not be employed to screen such evidence; instead, "the validity of the premise is tested by interrogation of the witness." *Id.* at 490, ¶ 62, 1 P.3d at 133.

¶13 This court examined the appropriate use of the *Frye* test in the context of an SVP hearing in *State ex rel. Romley v. Fields*, 201 Ariz. 321, 35 P.3d 82 (App. 2001). In *Romley*, defendants challenged the admissibility of actuarial data used

by experts to develop opinions on recidivism in SVP commitment proceedings, and the superior court granted their request for a *Frye* hearing. *Id.* at 323, ¶ 1, 35 P.3d at 84. This court reversed, explaining that the holding in *Logerquist* "reiterated that expert behavioral evidence was beyond *Frye*'s reach." *Id.* at 327, ¶ 18, 35 P.3d at 88. The experts there had formed opinions about the defendants' potential recidivism – a behavioral inquiry - based on interpretation of risk assessment tools that do not have the "aura of scientific infallibility" that DNA or other scientific evidence is perceived to possess. *Id.* at 328, ¶ 22, 35 P.3d at 89. Accordingly, this court concluded "the use of actuarial models by mental health experts to help predict a person's likelihood of recidivism is not the kind of novel scientific evidence or process to which *Frye* applies," and "[w]e perceive no reason why the trial court should be allowed to screen this evidence pursuant to *Frye* before it is presented to the jury, the ultimate arbiter of truth." Id. at 328, ¶¶ 22-23, 35 P.3d at 89.

¶14 Here, Dennis argues Dr. Huggins's testimony should have been excluded because she did not employ generally accepted methods in conducting her evaluation of Dennis. We hold that the superior court did not err by failing to conduct a *Frye* hearing. Relying on her experience and education, Dr. Huggins studied Dennis's records and conducted an evaluation of Dennis

before developing her professional opinion that Dennis was still a danger to others and his mental disorders had not changed. Dr. Huggins did not rely on scientific tests or instruments that evoked an "aura of infallibility" – her testimony was based on a review of Dennis's records and her own observation and study. Dennis strongly objected to the methodology Dr. Huggins employed in forming her opinions and vigorously attempted to demonstrate on cross-examination that the method she employed, guided clinical assessment, was not a generally accepted method of evaluation. Ultimately, however, the weight the court gave to Dr. Huggins's testimony did not rest on the general acceptance of a scientific theory, but instead on Dr. Huggins's credibility and experience in the field. It was up to the trier of fact to determine the value of Dr. Huggins's methods of interpretation, without regard to *Frye*.

CONCLUSION

¶15 For the foregoing reasons, we affirm the denial of Dennis's petition.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
JON W. THOMPSON, Judge