COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2386 **Cir. Ct. No. 2005CI3**

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

IN RE THE COMMITMENT OF QUINTON KEITH WASHINGTON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

QUINTON KEITH WASHINGTON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Quinton Keith Washington appeals an order denying his petition for discharge from commitment as a sexually violent person

pursuant to WIS. STAT. Chapter 980 (2009-10).[1] Washington argues: (1) that the circuit court erred in denying his objection to "extrapolation testimony" about his risk to sexually reoffend; and (2) that he was denied his right to equal protection of the law because the State did not have to meet the requirements of the newly enacted modification to the expert testimony statute, 2011 Wis. Act 2, in offering extrapolation testimony against him during his discharge trial. We resolve these issues against Washington. Therefore, we affirm.

¶2 Washington first argues that the circuit court erred in admitting expert testimony by Dr. David Warner about Washington's risk to sexually reoffend. Washington contends that there was no scientific basis for estimating his risk to reoffend over his remaining lifetime based on extrapolating from the results of studies that measured the risk of reoffending over shorter periods of time. Washington argues that the circuit court should have excluded the evidence because the State did not provide an adequate scientific basis for the evidence, such as peer review articles or other data, which substantiate the claim that risk over a longer period of time can be extrapolated from risk measured in shorter term studies.

¶3 The version of WIS. STAT. § 907.02 in effect when the circuit court made its evidentiary rulings in this case provided: "**Testimony by experts.** 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

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

in the form of an opinion or otherwise." WIS. STAT. § 907.02.[2] "[A] witness called upon to provide expert testimony may establish his or her qualifications by means of his or her own testimony." ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶94, 245 Wis. 2d 772, 629 N.W.2d 727. "The determination of whether a witness is qualified to testify as an expert under § 907.02 is a matter within the discretion of the circuit court." ***Id.***, ¶89. "On review, we will sustain the circuit court's discretionary determination so long as the circuit court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." ***Id.***

¶4 The circuit court properly exercised its discretion in admitting Warner's testimony. Warner is an expert in his field; a licensed psychologist for twenty-five years, he has specialized training in the area of assessment of sex offenders for potential recidivism and regularly evaluates individuals to determine whether they should remain committed under Chapter 980. Warner testified at length about different methods of extrapolation used by other experts in the field of forensic psychology focused on sexual offenders and used those analyses as a *starting point* for his own evaluation of Washington's risk to reoffend. The circuit court properly allowed the testimony about extrapolation evidence because Warner explained how he used it and why he used it, and also testified about how other experts in the field extrapolate from studies of risk over shorter time periods to aid in attempting to calculate lifetime risk of reoffense. There is no requirement

[2] This statute was amended effective February 1, 2011. *See* 2011 Wis. Act 2, § 45(5). The amended expert testimony statute codifies the "reliability standard" set forth in ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). Because the effective date of the amended statute was after this action commenced, it does not apply.

in WIS. STAT. § 907.02 that expert testimony be allowed only where it has been verified by published, peer-reviewed articles. There was sufficient foundational support for the circuit court's exercise of discretion in allowing the testimony.

¶5 Washington next argues that he was denied his right to equal protection of the law because the State did not have to meet the requirements of the newly enacted amendment to the expert testimony law, 2011 Wis. Act 2, in offering extrapolation testimony against him. Although he concedes that the statute, by its terms, does not apply to his action based on the date of enactment, he argues that it violates constitutional guarantees of equal protection if the statute is not applied to his action.

¶6 "It is a fundamental principle of appellate review that issues must be preserved at the circuit court." *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190 (citation and quotation marks omitted). "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***Id.*** (citation and quotation marks omitted). Washington forfeited his equal protection claim by not raising it in the circuit court. Moreover, Washington did not file a reply brief challenging the State's argument that he waived the issue by not raising it in the circuit court. A party cannot complain if a proposition of the opponent is taken as confessed where the party does not undertake to refute it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

By the Court.—Order affirmed.

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