

IN THE COURT OF APPEALS OF IOWA

No. 2-315 / 01-1151

Filed October 16, 2002

IN RE THE DETENTION OF HAROLD JOHNSON,

Respondent-Appellant.

Appeal from the Iowa District Court for Story County, Kurt L. Wilke, Judge.

Harold Johnson appeals from the district court's ruling determining he is a sexually violent predator. **AFFIRMED.**

Mark Smith, First State Public Defender, and Catherine E. Johnson, Assistant Public Defender, for appellant.

Thomas J. Miller, Attorney General, and Andrew B. Prosser and Roxann M. Ryan, Assistant Attorneys General, for appellee.

Heard by Huitink, P.J., and Zimmer and Miller, JJ., but considered en banc. Peterson, S.J., takes no part.

MILLER, J.

Harold Johnson appeals from the district court's ruling determining he is a sexually violent predator. He contends (1) the district court erred in reversing its prior ruling excluding the use of actuarial instruments, and violated his constitutional right to due process by overturning its prior ruling, (2) the district court erred in admitting expert testimony based on unreliable actuarial instruments for the purpose of establishing that Johnson is likely to reoffend in the future, and violated his constitutional right to due process by allowing the actuarial evidence, and (3) Iowa Code chapter 229A (1999) violates his right to substantive due process. We affirm.

I. BACKGROUND FACTS.

The State alleged Harold Johnson was a sexually violent predator based on his three prior convictions for sex offenses and a mental abnormality, anti-social personality disorder, which predisposed him to engage in future acts of sexual violence. Dr. Caton Roberts assessed Johnson. He conducted a preliminary review of a corrections file for an earlier report. For a report dated January 31, 2000, he used four actuarial instruments, as follows: the Minnesota Sex Offender Screening Tool (MnSOST), the Minnesota Sex Offender Screening Tool—Revised (MnSOST-R), the Static-99, and the Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR). According to these instruments, Johnson is a high risk for reoffending. Dr. Roberts concluded Johnson suffered from a mental abnormality, which made it likely he would engage in predatory acts constituting sexually violent offenses if he was not confined in a secure facility. Dr. Roberts based his conclusions on his clinical interview of Johnson, a review of the corrections file on Johnson, a collateral report by a correctional officer employed at the correctional facility at which Johnson was held during this proceeding, and the actuarial-type risk instruments.

Prior to trial, Johnson filed an Iowa Rule of Evidence 5.104(a) motion, requesting that Dr. Roberts's testimony "to the extent that he attempts to predict dangerousness and recidivism . . . be excluded on the grounds of relevance." The district court, Judge Carl Peterson presiding, granted Johnson's motion in a ruling entered July 14, 2000. The State twice moved to reconsider that ruling. On April 24, 2001, the district court, Judge Kurt Wilke presiding, reversed its prior ruling and determined the evidence regarding the actuarial instruments would be admissible.

The parties proceeded to a stipulated trial before the district court. The court found that Johnson is a sexually violent predator and ordered him committed to the custody of the Director of the Department of Human

Services. Johnson appeals.

II. SCOPE OF REVIEW.

Ordinarily the district court's evidentiary rulings are reviewed for an abuse of discretion. *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 5 (Iowa 2001). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *In re Estate of Rutter*, 633 N.W.2d 740, 745 (Iowa 2001) (quoting *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997)). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). The district court has wide latitude regarding admissibility, and we will reverse only where the losing party was prejudiced by an unreasonable decision. *Kurth*, 628 N.W.2d at 5.

We review claims that the court violated a person's constitutional rights de novo, "making our own evaluation of the totality of the circumstances." *Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001) (citing *Stanley v. Fitzgerald*, 580 N.W.2d 742, 744 (Iowa 1998)).

III. REVERSAL OF RULING.

Johnson contends the trial court erred in reversing its prior ruling excluding Dr. Roberts's testimony regarding the actuarial instruments. Johnson argues that the trial court does not have authority to reverse a prior ruling made pursuant to Iowa Rule of Evidence 5.104(a). He further argues that the reversal of the ruling violates his right to substantive due process.

A. Authority to reverse ruling. Although the State used language suggesting the prior ruling it sought to have overturned was an adjudication of law points, the ruling admitting Dr. Roberts's testimony was not a ruling adjudicating a law point but instead was a ruling concerning admissibility of evidence entered pursuant to rule 5.104(a). An interlocutory order is not the law of the case, as the court is free to change it at a later time. *Ahls v. Sherwood/Div. of Harsco Corp.*, 473 N.W.2d 619, 624 (Iowa 1991). District court rulings in a case ordinarily do not prevent the district court, whether through the same or another judge, from ruling otherwise in the later progress of the case. *Avoca State Bank v. Merchants Mut. Bonding Co.*, 251 N.W.2d 533, 539 (Iowa 1977). We conclude the trial court did not abuse its discretion by reconsidering its prior ruling regarding the admissibility of testimony involving the actuarial instruments.

B. Due process. The Due Process Clause of the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In similar language, the Iowa Constitution provides the same protection: "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9. Our supreme court has traditionally considered the federal and state due process provisions to be equal in scope, import, and purpose. See *In re C.P.*, 569 N.W.2d 810, 811 (Iowa 1997); *Exira Cmty. Sch. Dist. v. State*, 512 N.W.2d 787, 792 (Iowa 1994). Therefore, the following discussion applies to both constitutional claims.

Under principles of substantive due process, the government is prohibited from engaging in arbitrary or wrongful actions "regardless of the fairness of the procedures used to implement them." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 437, 448 (1992) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100, 113 (1990)). A person's interest in freedom from bodily restraint is "at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions." *Id.*

This liberty interest is not, however, absolute. See *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 2079, 138 L. Ed. 2d 501, 512 (1997). The government may detain mentally unstable individuals who present a danger to the public. *In re Det. of Garren*, 620 N.W.2d 275, 284 (Iowa 2000) (citing *United States v. Salerno*, 481 U.S. 739, 748-49, 107 S. Ct. 2095, 2102, 95 L. Ed. 2d 697, 710 (1987)).

The reversed ruling came forty-nine days before the scheduled trial and eighty days before the trial was actually held. After the court's initial ruling, the State twice moved to reconsider it. Johnson knew for months that the State was attempting to get the prior ruling overturned. This is not a case in which the ruling was changed during or immediately before trial or without lengthy advance notice. We need not speculate on the resolution of this issue on different facts. Based on the facts before us, we conclude there was no due process violation in the court's reversal of its prior ruling.

IV. EXPERT TESTIMONY REGARDING ACTUARIAL INSTRUMENTS.

Johnson contends that the district court erred in admitting expert testimony based on unreliable actuarial instruments for the purpose of establishing that he is likely to reoffend in the future. He argues the evidence should not have been admitted pursuant to Iowa Rules of Evidence 5.702 and 5.403. Johnson additionally maintains that admission of the evidence violates his right to substantive due process.

A. Admissibility of evidence pursuant to rule 5.702. Our supreme court has set forth the test for the

admission of expert testimony:

[T]he evidence, of course, must be relevant. Iowa R. Evid. [5.]402. Second, it must be evidence in the form of “scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.” Iowa R. Evid. [5.]702. Third, the witness must be “qualified as an expert by knowledge, skill, experience, training, or education.” *Id.* In addition, any potential for an exaggerated effect of the proffered evidence should be considered.

Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 533 (Iowa 1999). Rule 5.702 provides as follows:

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.

“[W]e are committed to a liberal view on the admissibility of expert testimony, and we have been quite deferential to the district court in the exercise of its discretion in that area.” *Mensink v. Am. Grain*, 564 N.W.2d 376, 380 (Iowa 1997).

Johnson contends that the district court failed to consider “all of the relevant legal, scientific, and equitable principles involved in the issue of admissibility of actuarial instruments.” He argues the district court failed in its duty to “make a determination first, that the underlying reasoning and methodology of the actuarial instruments is scientifically valid and then to determine whether that reasoning and methodology could properly be applied to the facts in issue.”

We note, however, that this two-part inquiry is found in *Leaf* in a quote from *Daubert* concerning admission of ex parte testimony pursuant to Federal Rule of Evidence 702. *Leaf*, 590 N.W.2d at 531 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469, 482 (1993)). The *Daubert* analysis is not required in Iowa. *Leaf*, 590 N.W.2d at 533. Consequently, we conclude the district court’s “failure” to apply a *Daubert* analysis in this case does not constitute an abuse of discretion.

Johnson’s argument relies on applying the *Daubert* “considerations” to the instruments to show they do not reach the level of reliability to be admissible. See *Daubert*, 509 U.S. at 593-94, 113 S. Ct. at 2796-97, 125 L. Ed. 2d at 482-83 (cited in *Leaf*, 590 N.W.2d at 533)). However, in Iowa, “trial courts may, in their discretion,” consider the factors enumerated in *Daubert*. *Leaf*, 590 N.W.2d at 533. We find no abuse of discretion in the trial court’s analysis of the admissibility of Dr. Roberts’s testimony. Therefore, we affirm the district court’s decision to admit Dr. Roberts’s testimony as to his conclusions regarding the likelihood that Johnson would recidivate, which

was based only in part on the results obtained from the actuarial instruments in question. We note that Dr. Roberts's opinion that "Johnson's mental abnormality makes it likely that he will engage in predatory acts constituting sexually violent offenses if not confined in a secure facility" is grounded not only in his analysis of the results of the actuarial instruments but also in his review of the corrections file on Johnson, his clinical judgment based on an interview with Johnson, and the recent collateral report by a correctional officer.

B. Admissibility of evidence pursuant to rule 5.403. Johnson argues that the jury would give the expert's opinion more weight because the testimony is given by an expert. He maintains giving the jury a clinical explanation and statistical probability of his dangerousness would unduly encourage the jury to find dangerousness. He asserts cross-examination attacks on the statistical and methodological problems of these instruments would confuse and mislead the jury.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403. Unfair prejudice is defined as "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001) (quotation omitted). We conclude that the district court did not abuse its discretion in determining, as it implicitly did in ruling the evidence admissible, that the probative value of Dr. Roberts's testimony is not substantially outweighed by the danger of unfair prejudice.

C. Due process. Johnson alleges his constitutional due process rights were violated by admitting the testimony regarding the actuarial instruments because this denied him "the ability for a fair opportunity to defend against the State's accusations of his risk assessment." Specifically, Johnson argues he could not "present a complete defense and a complete cross-examination" of Dr. Roberts because "Dr. Epperson, creator of the MnSOST-R, refused to provide the raw data on both the MnSOST and MnSOST-R to other experts for assessment."

In a hearing, Dr. Epperson responded to the claim that he refused to provide the raw data he used. He offered to allow access to and analysis of the raw data, but declined to release it from his custody until after publication of his findings. The access to the data offered by Dr. Epperson would serve the same purpose for the defense as release of the data. Johnson's claim that he could not prepare to cross-examine Dr. Roberts is without merit.

V. IOWA CODE CHAPTER 229A.

Johnson claims that chapter 229A violates his right to substantive due process. He contends

that the chapter violates substantive due process because it does not require the State to prove that, due to the existence of a "mental abnormality" that makes the respondent likely to engage in predatory acts constituting sexually violent offenses if not confined in a secure facility, the respondent has "serious difficulty in controlling his behavior." See *Kansas v. Crane*, 534 U.S. 407, ___, 122 S. Ct. 867, 870, 151 L. Ed. 2d 856, 862 (2002).

Our error preservation rules require that issues be presented to and passed upon by the district court prior to being raised and decided on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998). In his appellate brief, Johnson states the following as to how he preserved error on this issue in the trial court: "The issue of substantive due process was raised in this motion and overruled by the trial court." He cites to a May 2, 2000 motion to dismiss and resulting order. In reviewing that motion to dismiss and order we find no indication Johnson raised before the trial court the issue he now attempts to present on appeal. His motion to dismiss alleged generally that "Chapter 229A violates Due Process under the Iowa Constitution, Art. I, Sect. 9 and the United States Constitution, 5th and 14th Amendment."^[1] The ruling does not indicate that Johnson raised his present claim in his motion to dismiss. We conclude error has not been preserved on this claim.

VI. CONCLUSION.

We conclude that there was no abuse of discretion in the trial court's reconsideration of its prior ruling pursuant to Iowa Rule of Evidence 5.104(a), and that reconsideration did not violate substantive due process. We determine the trial court did not abuse its discretion in admitting testimony concerning the actuarial instruments. We find that admission of that evidence did not offend substantive due process. We conclude Johnson has not preserved error on his present claim that chapter 229A violates substantive due process. We affirm the trial court's ruling.

AFFIRMED.

^[1] Johnson filed a second motion to dismiss, alleging "Chapter 229A as applied to the respondent violates Due Process under the Iowa Constitution, Art. I, Sect. 9 and the United States Constitution, 5th and 14th Amendment." In the court's ruling on that motion, it appears that Johnson's specific claim was that chapter 229A fails to consider less restrictive alternatives to placement of the individual in prison. This does not preserve error on Johnson's present due process claim.