

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN THE INTEREST OF APO, : JV 156-2013
A JUVENILE : OMNIBUS MOTION

OPINION AND ORDER

This matter comes before the Court on the Juvenile's Omnibus Motion seeking to prohibit testimony about results from the administration of a psychological test known as the Estimate of Risk for Adolescent Sexual Offense Recidivism (ERASOR) pursuant to Frye v. United States, 293 F. 103 (D.C. Cir. 1923). In addition to asserting that the relevant scientific community does not general accept this test as being reliable and accurate, the Juvenile also asserts that the evidence is more prejudicial than probative and that the proposed witness lacks the expertise to testify about the test results. After consideration of counsels' arguments, the relevant case law, the expert testimony and the exhibits, the Juvenile's motion is DENIED. The Court believes that the Juvenile's concerns go toward the weight of the evidence rather than the admissibility.

I. Procedural and Factual Background

A brief factual background follows. On June 26, 2013, the Commonwealth filed a Juvenile petition in the above-captioned matter; the Commonwealth alleged that Juvenile was a delinquent child based upon his commission of the following acts: 1) rape, 2) statutory sexual assault, 3) involuntary deviate sexual intercourse, 4) sexual assault, 5) aggravated indecent assault, and 6) indecent assault. The offenses occurred starting in November 2011 with the last date occurring on May 15, 2013. The Juvenile's date of birth is XXXX, making him 12 at the time of the first offense and 14 at the time of the last offense. The victim is the Juvenile's cousin and is approximately 6 years younger than the juvenile. The victim was six at the time of the first offense.

On October 24, 2013, the Court, after counseled admission, found that Juvenile committed the offense of statutory sexual assault, 18 Pa.C.S. 3122.1 (a)(1), a felony of the second degree and indecent assault, a felony of the third degree if committed by an adult. The Court adjudicated Juvenile delinquent and in need of treatment as to the sexual assault.¹ The Court ordered an evaluation to be performed by a privately owned treatment facility, Behavioral Specialists Incorporated (BSI). After the evaluation was completed, the Court held hearings on the disposition and Frye issues. Richard Armstrong, M.S.W., clinical director of BSI, testified on behalf of the Commonwealth. Dr. John Kelsey, PhD., and Juvenile's mother ("Mother") testified on behalf of the Juvenile.

Mr. Armstrong, M.S.W., L.C.S.W., Q.C.S.W., is a licensed clinical social worker with expertise in the area of adolescent sexual offenders, and specifically in the treatment and assessment of adolescents who commit sexually harmful behaviors. Mr. Armstrong has been licensed for 16 years, had in excess of 2000 hours of clinical practice, and has been practicing for 14 years. He has two certifications in sexual offender treatment and training with assessment instruments. Mr. Armstrong was trained by individuals who developed the testing instruments used; he was trained by Hodges in administrating the Child and Adolescent Functional Assessment Scale (CAFAS) and trained personally by Dr. Worling in administering the ERASOR. The ERASOR "is an empirically-guided checklist to assist clinicians to estimate the short-term risk of a sexual re-offense for youth aged 12-18." *See*, Commonwealth Exhibit 2, Dr. James R. Worling, Ph.D., C.Psych., The "ERASOR" (Version 2.0; Worling & Curwen, 2001), Brief Overview of Research Support (May 2013). It identifies 25 risk factors for evaluation. Mr. Armstrong testified that the ERASOR is the most empirically backed instrument in assessing risk. Mr. Armstrong has collaborated on cases using the ERASOR and with assessing risk with

¹ As to the indecent assault, further action was deferred and continued.

Dr. Worling (the individual who developed the ERASOR). As a social worker, Mr. Armstrong focused on psychosocial evaluations; he noted that most risk factors are psychosocial. Mr. Armstrong acknowledged that he is not a psychologist and not qualified to do psychological testing.

Under the direction of Mr. Armstrong, BSI began the evaluation process for juvenile in November 2013. It consisted of 7 personal interviews (5 of which were conducted in November 2013), family interview sessions and a referral for psychiatric evaluation by Dr. Moreau. The primary instrument used was the CAFAS. The CAFAS focuses on behaviors, not psychological factors or diagnosis. The CAFAS assesses psycho-social functioning which can impact risk factors. Mr. Armstrong testified that CAFAS requires a special training (including an initial training and continuing training every two years), a license and fee for each assessment used. The evaluation also utilized the risk assessment tool known as the second version of the ERASOR by Dr. Worling. The ERASOR can be accessed online; Mr. Armstrong has contacted Dr. Worling who has indicated that Mr. Armstrong could use the ERASOR and that it would be appropriate for his purposes. The Commonwealth's Exhibit 1 suggests that the ERASOR is appropriate for individuals in the borderline level of cognitive function and reasonably applicable to those with below-average levels of cognitive functioning. In this case, the ERASOR was completed after all of the interviews.

Mr. Armstrong testified that the ERASOR is one of the top three sex offense specific instruments empirically validated and supported. Mr. Armstrong testified that "this is not an actuarial instrument" and that no such instruments exist at this point. ERASOR does not simply tally numbers but requires use of clinical judgment. Mr. Armstrong's report and testimony

indicate that they were aware of Dr. Kelsey's preliminary report, including juvenile's cognitive limitations, when conducting their assessment.

It is Mr. Armstrong's clinical judgment that juvenile has a **high** risk of re-offending, in light of the nature and presence of 12 out of 25 possible high risk factors. *See*, Commonwealth Exhibit 3, BSI Report. Although there are no actuarial assessments available at this time, "[b]ased on the best available research data and consensus in professional clinical opinion, this clinician's opinion included ... a number of high-risk factors have been identified in the literature." *Id.* Based upon his clinical judgment in conjunction with assessment instruments, Mr. Armstrong believes that "placement in a highly specialized residential treatment facility where the primary focus of the treatment course is on treating juvenile sexual offenders" is clinically indicated. *Id.* Given persistence of a deviant sexual arousal towards a much younger victim and significant sexual acting out, Mr. Armstrong believes juvenile must be "removed from the present influences in his life and immersed in a treatment milieu and culture where it is normative to openly discuss these matters and to seek out and accept help." *Id.* The BSI assessment opines that: "[i]t is clear that [juvenile] has significant difficulty managing his sexual urges and impulses." Mr. Armstrong recommends that juvenile attend an inpatient treatment facility for 12 to 18 months. The extent of the behaviors was severe, there were multiple incidents coupled with deviant sexual arousal. Mr. Armstrong believes juvenile requires a high level of intensity and frequency of treatment. The Court finds Mr. Armstrong's testimony to be credible.

Dr. John W. Kelsey, Ph.D. is a licensed psychologist for the past 35 years. Dr. Kelsey was director for Lycoming County Child Sex Abuse Project in 1985 which lasted about 1 ½ years. In 1994 Dr. Kelsey delivered a paper in Montreal on the research conducted in 1985 on

offenders and victims. Dr. Kelsey evaluated Juvenile and issued preliminary report dated 8-9-13. *See*, Defendant's Exhibit 4. He met with juvenile in July, 2013 and had 6-7 visits over that month with one or both parents. Overall Dr. Kelsey spent about 13 hours with juvenile. Dr. Kelsey's assessment revealed that juvenile suffers from cognitive deficits, with IQ scores in the borderline range: P 70, FS 75, and V 84. Those deficits were reflected in his academic performance. Dr. Kelsey noted that juvenile does not have a mental health diagnosis. Dr. Kelsey emphasized that juvenile does not have any anti-social personality traits, no prior criminal history and no evidence of past behavioral problems. juvenile has poor social judgment. The report indicates that "any spontaneous statements made by [juvenile] regarding the allegations have been treated as an extension of attorney/client privilege and will be reported in a different format under the direction of his attorney and parents." *See*, Defendant's Exhibit 4 at 2.

Dr. Kelsey opines that juvenile is unlikely to develop further delinquent behaviors and that no information suggests a wider pathological deviance of a sexual nature. He believes the conduct at issue was specific and isolated with little potential for repetition. He reports that juvenile is not sexually preoccupied. Dr. Kelsey opines that the Court should not impose a specific number of sessions or require juvenile to participate in group oriented psychotherapy with a stated sexual educational component. Dr. Kelsey cautioned that treatment programs could actually make things worse by reinforcing deviant sexual scripts. Dr. Kelsey testified that there are many positive factors (which were acknowledged by Mr. Armstrong) that support the possibility of desistance from re-offending. Dr. Kelsey testified that 88-92% of juveniles never reoffend. In essence Dr. Kelsey testified that there is no evidence whatsoever that juvenile needs help in a program. Dr. Kelsey opined that there was no need for institutionalization.

Dr. Kelsey disagrees with Mr. Armstrong's assessment and use of the ERASOR or CAFAS instruments in the assessment of juveniles who have committed sexual offenses. Dr. Kelsey was first introduced to the ERASOR in 2001. In 2005 it was discussed along with other risk assessments coming online for juveniles. Dr. Kelsey opines that the ERASOR does not meet the Frye test because it is not predictive. *See*, Defendant's Exhibit 7. Dr. Kelsey believes that the ERASOR was intended to be actuarial but noted there is no such test that always accurately predicts that someone will always reoffend. Dr. Kelsey testified that since late 2000 the literature recognized that predictive tests do not work for juveniles. Dr. Kelsey testified that the tests are not accepted in the field, specifically by the U.S. Department of Justice or the Pennsylvania Sex Offenders Assessment Board as being valid and accurate. Dr. Kelsey further opined that since the ERASOR was not completed within six months of the last incident, it is invalid. Dr. Kelsey also asserted that juvenile's cognitive deficits would impact the results of testing, particularly as it relates to his comprehension of the questions. His higher verbal skills could mask his lack of understanding. Dr. Kelsey submits that Mr. Armstrong's assessment "serves only to misinform and misdirect the court." *See*, Defendant's Exhibit 7.

Mother testified that the home includes both parents and an older daughter. Juvenile has improved significantly in school, and his peer relationships are good. Juvenile shows no difficulty with emotions, anger issues, crying, social isolation, defiance, or discipline problems. Juvenile is never left unsupervised. He volunteers in the community and talks about girls his own age. Mother wants him to get help but does not feel he should be taken from his family.

II. Discussion

a. It is Not Novel Science

In Pennsylvania, the admissibility of expert evidence is governed by Pa. R.E. 702.² When the evidence involves novel science, it is subject to the Frye test.³ It is well settled that a Frye hearing is only required for novel science and is not required every time science enters the courtroom. Commonwealth v. Dengler, 890 A.2 372, 382 (2005). When applicable, Frye requires that the “evidence must be sufficiently established and accepted in the relevant scientific community. Dengler, 890 A.2 at 380, *citing* Frye. While the scientific methodology must be generally accepted in the field, the expert’s conclusions do not require general acceptance in the field for admissibility. Grady v. Frito-Lay, Inc., 839 A.2d 1038, 1045 (Pa. 2003).

In Dengler, the Supreme Court of Pennsylvania concluded that expert testimony - to determine if an offender is a sexually violent predator - does not involve novel scientific evidence and therefore is not subject to the Frye test. Dengler, 890 A.2 at 382. The experts in that case testified that there is a body of research in risk assessment. The experts testified about factors indicative of a higher risk of re-offending. The experts distinguished between the unreliability of “predictions of likelihood,” which are notoriously unreliable, and “assessment of likelihood,” which is more reliable. Dengler, 890 A.2d at 378. This Court concludes that the evidence provided by the Commonwealth in this case is very similar to the evidence that the Supreme Court concluded was not novel science in Dengler. Therefore, like the evidence in

² Pa. R.E. 702 provides as follows.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
- (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
- (c) the expert's methodology is generally accepted in the relevant field.

³ Pennsylvania adopted the standard in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) which “applies the “general acceptance” test for the admissibility of scientific, technical, or other specialized knowledge testimony.” *Comment*, Pa.R.E. 702, *citing*, Grady v. Frito-Lay, Inc., 839 A.2d 1038 (2003). Grady is the seminal case in Pennsylvania on this issue.

Dengler, this Court does not believe the evidence presented in this case is subject to the Frye test.⁴

b. The Evidence is Generally Accepted Within the Field

Even if the evidence is subject to the Frye test, the Court concludes that it meets the Frye test because the methodologies used by Mr. Armstrong in reaching his treatment and placement recommendations are generally accepted in the field of treatment and rehabilitation of adolescents who have committed sexual offenses. In the instant case, Mr. Armstrong indicated that the records he relied upon, the assessment instrumentalities and his clinical judgment are regularly relied upon in his field to provide assessment, treatment and treatment recommendations. Mr. Armstrong testified that the instruments he used were not “actuarial tests.” Mr. Armstrong testified that the ERASOR is one of the top three sex offense specific instruments empirically validated and supported. “The ERASOR is in widespread use throughout Canada and the United States (McGrath, Cumming, Burchard, Zeoli, & Ellerby, 2010). It is also being used by clinicians in many other countries.” *See*, Commonwealth Exhibit 2. Mr. Armstrong testified that he used this risk assessment instrument, along with others, in

⁴The Supreme Court of Kentucky concluded that a Daubert hearing was not required to admit an expert opinion based in part on the ERASOR. W.D.B., v. Commonwealth of Kentucky, 246 S.W.3d 448 (Ky. 2007) (Daubert v. Merrell Dow Pharms., 509 U.S. 579 (U.S. 1993) applies to determine admissibility in some jurisdiction rather than the Frye test.) In W.D.B., an expert with a degree in social work and a certified juvenile sex offender counselor evaluated and prepared a psychosexual evaluation of a juvenile to provide a risk assessment, treatment and placement recommendations to the trial court. She used the juvenile Sex Offender Assessment Protocol-II (J-SOAP-II) and the ERASOR, she interviewed the juvenile and his mother, she reviewed medical records, police reports and school records. She testified that “in her belief and experience, the J-SOAP-II and ERASOR instruments are the most promising in the field” but that no assessment tool is empirically valid. Id. at 457. She assessed the juvenile at a high-risk to re-offend. A second psychological/sex offender evaluation was performed which **relied on the same instruments** but concluded that the juvenile was “moderate risk” to re-offend. Both recommended that a 12 year old juvenile receive treatment in a sex offender treatment program based upon their opinion of his risk to re-offend. In M.T. v. State of Indiana, 787 N.E.2d 509 (2003) the reliability of the ERASOR assessment tool was questioned because it was administered without following the requirements of the tool. It was not alleged to be novel science. In any event, the Court did not decide the merits of that issue, because trial counsel had invited the error by requesting reliance on the report.

combination with his clinical judgment. He further indicated that this was generally accepted in the field for assessing and treating adolescent sexual offenders.

c. Assessments for Dispositional Purposes are Admissible

One of the stated purposes of the Juvenile Act is to provide to children who commit delinquent acts "programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community." 42 Pa.C.S. § 6301(b)(2). In the instant case, Juvenile was already adjudicated delinquent and in need of treatment, supervision, or rehabilitation. The Court ordered an assessment to assist in determining the plan for treatment, supervision or rehabilitation and a disposition under Rule 512. Rule 512 specifically provides that "the Court shall receive any oral or written evidence from both parties and the juvenile probation officer that is helpful in determining disposition, **including evidence that was not admissible at the adjudicatory hearing.**"⁵ (emphasis added). The Juvenile Act defines "Assessment" as follows.

"Assessment." --An individualized examination of a child to determine the child's psychosocial needs and problems, including the type and extent of any mental health, substance abuse or co- occurring mental health and substance abuse disorders and recommendations for treatment. The term includes, but is not limited to, a drug and alcohol, psychological and psychiatric evaluation, records review, clinical interview and

⁵ 42 Pa.C.S. § 6341 (d) states the following:

(d) Evidence on issue of disposition.

(i) In disposition hearings under subsections (b) and (c) all evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and relied upon to the extent of its probative value even though not otherwise competent in the hearing on the petition.

(ii) Subparagraph (i) includes any screening and assessment examinations ordered by the court to aid in disposition, even though no statements or admissions made during the course thereof may be admitted into evidence against the child on the issue of whether the child committed a delinquent act.

the administration of a **formal test and instrument**. 42 Pa.C.S. § 6302:01 (emphasis added)

In this case, the Juvenile seeks to exclude the Court ordered assessment as evidence because it includes the ERASOR which is a risk assessment instrument. The Court believes that even if the evidence would not be admissible in the adjudicatory phase, the more expansive reach and goals of the dispositional hearing permit the evidence in evaluating the rehabilitative and treatment needs of the Juvenile. The evidence is very helpful to the court in reaching a decision on disposition that is consistent with the Juvenile Act.

d. The Court is Capable of Assessing the Expert Evidence.

Moreover, the Court believes that the Court is capable of properly evaluating the evidence. Since this matter is not heard by a jury, the need to conduct a Frye test to ensure that experts do not mislead a lay jury is not at issue here. A “common pleas judge is assumed to be capable of considering evidence for an appropriate, limited purpose, while refraining from any inappropriate use of the evidence.” See Commonwealth v. Davis, 421 A.2d 179, 183 n.6 (Pa. 1980), including the following collection of cases quoted below.

Commonwealth v. A.R., 80 A.3d 1180 (Pa. 2013) A judge, as factfinder, is presumed to disregard inadmissible evidence and consider only competent evidence. Commonwealth v. Glover, 266 Pa.Super. 531, 534, 405 A.2d 945, 947 (1979) (Special Transfer Docket); McCormick, Evidence § 60 (2d ed. 1972). Cf. Commonwealth v. Batty, 482 Pa. 173, 178, 393 A.2d 435, 438 (1978) cert. denied 440 U.S. 974, 99 S.Ct. 1543, 59 L.Ed.2d 793 (1979) (court did not abuse its discretion by admitting inflammatory photographs "because, although inadmissible in a jury setting, a judge, as the trier of fact, possesses the training, skill and experience to enable him to view such photographs [in the proper manner]"). Commonwealth v. Green, 464 Pa. 557, 561, 347 A.2d 682, 683 (1975) (no prejudice when a confession, initially ruled admissible, is later found to be involuntary during a non-jury trial; the Court specifically rejected appellant's claim that "the mere exposure to prejudicial evidence is enough to nullify a judge's verdict in a case."); Commonwealth v. Glover, supra, 266 Pa.Super. at 534, 405 A.2d at 947, no prejudice where judge, as factfinder, hears inflammatory tape recording). Commonwealth v. Davis, 421 A.2d 179, 183 (Pa. 1980)

In the instant case, there was extensive cross examination and a full day of opposing expert testimony to ensure that the Court recognizes and evaluates the weight of the evidence provided.

Accordingly, the Court enters the following Order.

ORDER

AND NOW, this 15th day of May, 2014, based on the foregoing reasons, the Juvenile's Motion to exclude any testimony about the ERASOR and opinions by the Commonwealth's expert witness is DENIED. The Court believes that the concerns raised by the Juvenile go toward the weight of the evidence which the Court will seriously consider when determining disposition and treatment recommendations for the Juvenile. The Disposition hearing will proceed on **May 22, 2014 at 8:30 a.m. in Courtroom No. 3** as previously scheduled.

BY THE COURT,

May 15, 2014
Date

Richard A. Gray, J.

cc: JPO (4)
J. Yates, Esq.
W. Miele, Esq.