IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA, **CASE NO.: 15-00226-CF**

v. **UCN: 522015CF000226000APC**

JOHN N. JONCHUCK, **DIV.: I**
Person ID: 2923683, Defendant. /

ORDER DENYING DEFENDANT'S AMENDED MOTION FOR NEW TRIAL

THIS CAUSE came before the Court on the Defendant's Amended Motion for New Trial, filed June 21, 2019, pursuant to Florida Rules of Criminal Procedure 3.600(b)(5)-(8). On August 26-27, 2019, the Court conducted a hearing on the Defendant's motion. Having reviewed the motion, having heard argument from both parties, having considered the record, and applicable law, the Court finds as follows:

Procedural History

On February 13, 2015, the Defendant was indicted on one count of murder in the first degree. On March 18, 2019, trial commenced. On April 16, 2019, the jury returned a verdict of guilty as charged. That same date, the Defendant was sentenced to life imprisonment. On April 26, 2019, the Defendant timely filed a motion for new trial and, on June 21, 2019, the Defendant filed his amended motion for new trial. On August 26-27, 2019, the Court held a hearing on the Defendant's amended motion, at which the Court heard argument from both parties; however, no testimony was presented.

Motion for New Trial

Florida Rule of Criminal Procedure 3.600(b) provides that the trial court shall grant a new trial if the Defendant establishes any of the enumerated grounds, and substantial rights of the Defendant were prejudiced thereby. The grounds raised by the Defendant are pursuant to 3.600(b)(5) – that the prosecuting attorney committed misconduct; 3.600(b)(6) – that the court erred in the decision of a matter of law arising during the course of the trial; 3.600(b)(7) – that the court erroneously instructed the jury on a matter of law or refused to give a proper instruction requested by the Defendant; and 3.600(b)(8) for any other cause not due to the Defendant's own fault, he did not receive a fair and impartial trial.

The Defendant raises thirteen total grounds for relief but the crux of his motion (and argument at the hearing) relates to the admission of the PCL-R test and the testimony relating to that test. On May 23, 2019, the Florida Supreme Court changed the standard for the admissibility of expert testimony from the *Frye*[1] standard back to the *Daubert*[2] standard. *See In re Amendments to Fla. Evidence Code*, No. SC19-107, 2019 WL 2219714 (Fla. May 23, 2019). While the Florida Supreme Court indicated that the adoption of the amendments to Sections 90.702 and 90.704, Florida Statutes (codifying the *Daubert* standard), is effective immediately upon the release of the opinion, both the Defendant and the State agree that *Daubert* would be applicable to this instant case because the change is procedural in nature and thus retroactive to pending cases. *See Bunin v. Matrixx Initiatives, Inc.*, 197 So. 3d 1109, 1110 (Fla. 4th DCA 2016) (citing *Alamo Rent–A–Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). Indeed, this Court acknowledges that if (and when) this case is on appeal, the "pipeline rule" would apply. *See Bledsoe v. State*, 764 So. 2d 927, 928 (Fla. 2d DCA 2000) ("disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered.") (internal quotation omitted). However, both the Defendant and the State indicated their positions at the hearing on this motion that there is no way in which to conduct a *Daubert* hearing at this procedural posture; i.e., post-trial/judgement but prior to direct appeal. Thus, the Defendant contends a new trial is required in order for the Court to consider the expert testimony under the *Daubert* standard.

The Court notes that a defendant must timely request a *Frye* hearing. In this instant case, the Defendant did not make such a request. The Court acknowledges that the Defendant attempted to exclude an expert witness, specifically Dr. Emily Lazarou, on a multitude of grounds as well as the PCL-R test Dr. Lazarou utilized in her evaluation of the Defendant. Specifically, the Defendant filed a motion to exclude the testimony of Dr. Lazarou and cited *Ramirez v. State*, 810 So. 2d 836, 848 (Fla. 2001) and *Chavez v. State*, 12 So. 3d 199, 205 (Fla. 2009) as well as Sections 90.401, 90.402, and 90.403, Florida Statutes, as reasons to exclude Dr. Lazarou's testimony; the Defendant also relied on these cases and statutes in argument at the hearing on the motion. Indeed, the defense repeatedly stated that it was not asking for a *Frye* hearing, but for the trial court to consider Dr. Lazarou's testimony under the admissibility standard utilized in *Ramirez* and *Chavez*, and the

[1] *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).
[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

evidence statutes mentioned in their motion (and above). Both *Ramirez* and *Chavez* rely on a prior version of Section 90.702, Florida Statutes; and are thus inapplicable to this case. The *Frye* standard was the applicable standard at the time of the hearing and trial yet the defense adamantly refused to request a *Frye* hearing. Additionally, the Court found the evidence admissible as relevant and not unduly prejudicial under sections 90.401, 90.402, and 90.403.

Subsequent to this ruling but before trial, the defense filed a motion in limine to exclude the use of the term "psychopath" and reference to the PCL-R on the grounds that they are not relevant to the defense of insanity and are unduly prejudicial. A hearing was held on this motion, after which the Court denied the motion to exclude the PCL-R and Dr. Bursten's testimony regarding his use of the test. The Court found it probative to rebut the defense of insanity and that its prejudicial effect did not outweigh its probative value; i.e. the Court ruled on what the defense asked it to rule on. There was no request for a *Frye* hearing.

After the State's case in chief and the defense's case, but prior to the State's rebuttal, the defense filed a motion to reconsider the Court's ruling as to the PCL-R. The motion takes issue with the relevance of the PCL-R test as to the determination of insanity and for the first time attempts to argue that the PCL-R should be inadmissible under a *Frye* analysis. However, the defense again argued that the PCL-R is firstly not relevant and thus a *Frye* hearing is unnecessary and, even if it were relevant, it would be unduly prejudicial. The State contended that they had not been noticed[3] as to a purported *Frye* hearing and no testimony or evidence was being presented so it was not in reality a *Frye* hearing. The State further pointed out that the PCL-R has previously passed the *Frye* analysis to determine psychopathy and their experts were merely using the test to buttress their opinions that the Defendant was sane. The Court ultimately maintained its ruling.

The record is clear that each and every time the Defendant challenged the PCL-R, it was on the basis of relevance and undue prejudice. While the defense mentioned perhaps entertaining a *Frye* analysis mid-trial, the defense maintained that it was challenging the evidence on the basis of relevancy and prejudice. Each and every time the Court asked prior to the start of trial if the defense was requesting a *Frye* hearing, the defense responded that it was not. The Court did not

[3] *See, e.g., Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir.2001) (explaining that "because *Daubert* generally contemplates a 'gatekeeping' function, not a 'gotcha' junction [sic]," untimely *Daubert* motions should be considered "only in rare circumstances"); *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004). ("A *Daubert* objection not raised before trial may be rejected as untimely.").

conduct a *Frye* analysis because the Defendant essentially waived a *Frye* hearing. Consequently, the failure to request a *Frye* hearing forecloses the substitution of a *Daubert* analysis.

Lastly, the Court would point out that in addition to the PCL-R having been previously *Frye* tested and found admissible, although in another context, the PCL-R has apparently passed muster under the *Daubert* standard as well. *See, e.g.*, *U.S. v. Barnette*, 211 F.3d 803, 815-16 (4th Cir. 2000) (finding the PCL-R evidence to pass the *Daubert* standard for admissibility); *U.S. v. Mahoney*, 53 F. Supp. 3d 401, 414 (D. Mass. 2014), aff'd, 661 F. App'x 1 (1st Cir. 2016) (finding the PCL-R to be admissible under *Daubert*). The Court finds that a new trial is not warranted based on the grounds raised in the Defendant's motion for new trial relative to the PCL-R testimony.

The Court further finds that the allegedly prejudicial evidence the Defendant takes issue with in his motion for new trial did not come in as *Williams*[4] rule evidence. Rather, the evidence came in as part of the expert opinions in the State's rebuttal case to the mental health/insanity issue raised by the defense. *See* Fla. Stat. § 90.704; *see also Jones v. State*, 289 So. 2d 725, 728 (Fla. 1974) (stating that when the issue of insanity is raised, if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt, the State can inquire within the scope opened by the defense). It was relevant evidence to the expert's diagnoses and opinion as to whether or not the Defendant was sane at the time he committed the crime of murder. *See* Fla. Stat. § 90.401. The State is permitted to rebut the Defendant's insanity defense with another explanation of the crime. *See, e.g.*, *Joseph v. State*, 65 So. 3d 587 (Fla. 4th DCA 2011) (To rebut the defendant's three experts who testified that the defendant was insane at the time he murdered his father, the State put on an expert who testified that the defendant was sane at the time of the murder and opined that the defendant's behavior was due to the consumption of ecstasy and other drugs); *see also Cozzie v. State*, 225 So. 3d 717, 728 (Fla. 2017) (stating that to rebut the defendant's mental health experts, the State was entitled to present testimony from its own mental health expert to testify as to why the State's expert reached a contrary opinion from the defendant's mental health experts. Further finding that the State was entitled to have its expert explain the factual basis for his diagnosis of antisocial personality disorder.). Thus, the Court will not grant a new trial based on the grounds raised in the Defendant's motion for new trial relating to allegedly prejudicial evidence presented by the State's rebuttal witnesses.

[4] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

The remained grounds raised in the Defendant's motion for new trial are without merit and do not warrant comment. The Defendant's motion for new trial is denied.

ORDERED AND ADJUDGED that the Defendant's Amended Motion for New Trial is hereby **DENIED**.

THE DEFENDANT IS HEREBY NOTIFIED that he has thirty (30) days from the date of this order in which to file an appeal, should he choose to do so.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this ____ day of September, 2019. A true and correct copy of this order has been furnished to the parties listed below.

_____
Chris Helinger, Circuit Judge

xc: Doug Ellis, Esq., Assistant State Attorney
Paul Bolan, Esq., Assistant State Attorney
Jessica Manuele, Esq., Assistant Public Defender