COA NO. 32555-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

IN RE DETENTION OF RONALD LOVE:

STATE OF WASHINGTON,

Respondent,

v.

RONALD LOVE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Robert G. Swisher, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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STATUTES, CONSTITUTIONS AND OTHER

A. ARGUMENT IN REPLY

1. THE VERDICT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE UNDER THE LAW OF THE CASE DOCTRINE.

a. No invited error

"The invited error doctrine applies only where the defendant engaged in some affirmative action by which he knowingly and voluntarily set up the error." State v. Phelps, 113 Wn. App. 347, 353, 57 P.3d 624 (2002). The State bears the burden of proving invited error. State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014).

The State argues Love invited the error because he proposed the instruction. Brief of Respondent (BOR) at 6-7. The State is mistaken. The State proposed this instruction. CP 555, 572. If any party set up an error, it is the State. Love's counsel submitted proposed instructions. CP 58-65. None of them include the "to commit" instruction at issue here.

Love's counsel objected to the word "continued" in element (2) of the "to commit" instruction, unsuccessfully arguing it should be replaced with the word "current." 1RP 1816-17. Counsel did not object to the "or" language in element (3) that forms the basis for the argument on appeal. 1RP 1816-19. The failure to object to an instruction proposed by the other party does not establish invited error. State v. Goble, 131 Wn. App. 194, 203 n.5, 126 P.3d 821, 825 (2005); State v. Corn, 95 Wn. App. 41, 56, 975

P.2d 520 (1999). Love's counsel did not object to the disjunctive language in element (3) of the instruction, nor did he propose it. The invited error doctrine does not apply for this reason.

Even if Love's counsel could be said to have proposed the instruction, the invited error doctrine does not bar Love's sufficiency of evidence claim on appeal. The invited error doctrine applies when a party requests an instruction and then argues on appeal that the instruction should not have been given. State v. Medina, 112 Wn. App. 40, 47 n.11, 48 P.3d 1005 (2002). In Medina, the Court of Appeals rejected the State's argument that invited error precluded the defendant from challenging the sufficiency of the evidence under the law of the case doctrine where the defendant proposed the "to convict" instruction. Medina, 112 Wn. App. at 47 n.11. In relation to the sufficiency of evidence claim, Love does not argue the "to commit" instruction is erroneous. He simply requests the appellate court to apply the "law of the case" doctrine to determine the evidence is insufficient. Per Medina, invited error does not apply in this context.

State v. Hickman, 135 Wn.2d 97, 99, 106, 954 P.2d 900 (1998) provides additional support. In Hickman, the Supreme Court reversed the conviction because the State failed to prove a superfluous element under the law of the case doctrine. Hickman, 135 Wn.2d at 99. The *dissent*

argued Hickman waived the error because he proposed the instruction. Id. at 106 (Talmadge, J., dissenting). The *majority* rejected the dissent's position, holding the State acquiesced to the instruction and was therefore bound by the instruction in deciding sufficiency of the evidence. Id. at 99, 105. So even if Love proposed the instruction, he did not waive his sufficiency claim for appeal under the "law of the case" doctrine.

b. The sufficiency claim may be raised for the first time on appeal.

The State argues the constitutional error is not manifest under RAP 2.5(a)(3) and therefore cannot be raised for the first time on appeal. BOR at 8. The State, however, focuses on the wrong prong of RAP 2.5. RAP 2.5(a)(2) is the provision that allows Love to raise the sufficiency of evidence argument on appeal.

RAP 2.5(a) contains several express exceptions from its general prohibition against raising new issues on appeal, including the "failure to establish facts upon which relief can be granted." Roberson v. Perez, 156 Wn.2d 33, 40, 123 P.3d 844 (2005). "This exception is fitting inasmuch as '[a]ppeal is the first time sufficiency of evidence may realistically be raised.'" Roberson, 156 Wn.2d at 40 (quoting Hickman, 135 Wn.2d at 103 n.3). The rule applies when "the proof of particular facts at trial is required to sustain a claim." Mukilteo Retirement Apartments, L.L.C. v.

Mukilteo Investors L.P., 176 Wn. App. 244, 246, 310 P.3d 814 (2013), review denied, 179 Wn.2d 1025 (2014).

Here, as required by the "to commit" instruction, the State was required to prove Love's mental abnormality continues to make him likely to commit predatory acts of sexual violence unless confined to a secure facility *or* that Love's personality disorder continues to make him likely to commit predatory acts of sexual violence unless confined to a secure facility. CP 16. Relief cannot be granted in the absence of such proof. Under RAP 2.5(a)(2), Love's argument that the State failed to prove an element of its case can be raised for the first time on appeal. "RAP 2.5(a) includes 'failure to establish facts upon which relief can be granted' as an express exception from its general prohibition against raising new issues on appeal; an exception separate and in addition to the exception under the rule for constitutional error that is 'manifest.'" State v. Sweany, 162 Wn. App. 223, 268, 256 P.3d 1230 (2011).

c. The evidence is insufficient to establish either the mental abnormality or the personality disorder makes Love likely to reoffend.

Turning to the merits of the argument, the State twists what the argument is in an effort to defeat it. The State argues evidence supports both alternative means. BOR at 3. This is a jury unanimity argument. See In re Detention of Halgren, 156 Wn.2d 795, 811-12, 132 P.3d 714

(2006) (no jury unanimity violation where evidence supported both alternative means of having a mental abnormality and a personality disorder). The State thus cites In re Detention of Ticeson, 159 Wn. App. 374, 387, 246 P.3d 550 (2011). BOR at 3-4. Ticeson argued a unanimity instruction was required because the State failed to present evidence sufficient to prove his personality disorder made him likely to reoffend. Ticeson, 159 Wn. App. at 388. Division One rejected the argument: "Dr. Judd testified that Ticeson's personality disorder causes him serious difficulty controlling his sexually violent behavior. This testimony is sufficient to allow a rational juror to find Ticeson's personality disorder makes him likely to reoffend." Id. at 388-89.[1]

Love does not make a unanimity argument. He makes a sufficiency of evidence argument under the "law of the case" doctrine. That argument does not turn on whether the alternative means are both satisfied. Ticeson and Halgren are therefore inapposite. Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000).

[1] The court instructed the jury it must determine whether Ticeson suffers from "a mental abnormality and/or personality disorder." Ticeson, 159 Wn. App. at 378.

There is no dispute that the evidence, looked at in the light most favorable to the State, establishes that Love has a mental abnormality and a personality disorder. The sufficiency argument is that, under the law of the case doctrine, the State needed to prove one or the other makes Love likely to reoffend. This is where the evidence falls short. The State's expert, Dr. Phenix, was quite clear that the combination of the two made Love likely to reoffend. 1RP 913, 960-61, 988-90. For this reason, the evidence is insufficient to show one or the other, standing alone, made Love likely to reoffend.

Her testimony bears repeating. When asked if Love would be dangerous if released, Phenix answered there was "a very strong contribution of his antisocial personality disorder combined with his sexual deviance to resulting five separate sexual offenses involving child victims, teenagers, adults, males and females, with a very wide victim pool." 1RP 960-61. Phenix testified "there's a way that these three mental disorders work together to -- to cause him to be a danger in the future to commit criminal sexual acts, and that is that he has this abnormal sexual arousal. He's drawn to do that. That is disinhibited by his alcohol dependence and alcohol intake in the community so he's more likely to act out that sexual deviance. And that his antisocial personality disorder doesn't allow him to have the stops a normal person would have. It allows

him to violate the rights of others so in that way it contributes to his sexual offending." 1RP 913. Love's alcohol dependence was not enough to qualify Love as an SVP. 1RP 988. Likewise, Love's personality disorder was not enough to qualify him as an SVP. 1RP 988-99. It was the combination of the paraphilia, the alcohol dependence and the personality disorder that contributed to Love's criminal sexual behavior. 1RP 990.

The State does not argue a jury could disregard Dr. Phenix's testimony and find on its own that either Love's mental abnormality or his personality disorder makes him likely to reoffend. As argued in the opening brief, expert testimony was necessary to enable a valid jury finding that Love was likely to commit predatory acts of sexual violence if not confined in a secure facility. Brief of Appellant (BOA) at 17-18. The "to commit" instruction required the jury to find "[t]he mental abnormality or personality disorder continues to make Ronald Love likely to commit predatory acts of sexual violence unless confined to a secure facility." CP 16. The evidence is insufficient to show one or the other makes Love likely to reoffend because the State's expert did not testify to that. That is why the evidence is insufficient under the law of the case doctrine.

2. THE DISJUNCTIVE "TO COMMIT" INSTRUCTION IS FLAWED BECAUSE IT ALLOWED THE JURY TO BASE ITS VERDICT ON SPECULATION, LESSENED THE STATE'S BURDEN OF PROOF, AND WAS UNWARRANTED BY THE EVIDENCE.

a. The disjunctive language in the "to commit" instruction permitted the jury to choose between the mental abnormality and the personality disorder as the sole condition that made Love likely to reoffend, but the evidence did not support such a finding.

Love agrees "the two means of establishing that a person is an SVP may operate independently or may work in conjunction." Halgren, 156 Wn.2d at 810. Why, then, was the jury instructed in the disjunctive when the State's expert testified the means worked in conjunction? That is instructional error when applied to the facts of this case.

The State argues the instruction was proper because it is based on WPI 365.34. BOR at 8. But pattern instructions are supposed to be individually tailored to the facts of a particular case. 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 0.10 (6th ed.). Further, "an instruction that is correct in the abstract, or correct as applied to one set of facts, may become misleading when applied to another set of facts." State v. Irons, 101 Wn. App. 544, 553, 4 P.3d 174 (2000). The set of facts at play here is Dr. Phenix's testimony that the combination of the mental abnormality and personality disorder makes Love likely to reoffend. The jury needed to be instructed in the conjunctive to avoid submitting an issue to the jury that

was not supported by substantial evidence and to avoid lowering the State's burden of proof. See BOA at 19-25.

The language used in the statutory definition of an SVP does not mirror element (3) of the "to commit" instruction. RCW 71.09.020(18).[2] Halgren teaches the alternative means can work in conjunction, which means in a particular case the conjunctive "and" is appropriate in a jury instruction instead of the disjunctive "or" when it comes to the mental conditions that contribute to risk of reoffense. It cannot plausibly be maintained that the legislature intended for a person to be committed as an SVP *only* where one alternative means is present or where the alternative means operate in a disjunctive sense in relation to risk of reoffense. On the facts of this case, the conjunctive use of "and" in element (3) of the "to commit" instruction is consistent with the legislative intent behind the statutory definition of an SVP.

b. The instructional error may be raised for the first time on appeal as a manifest constitutional error.

The State's argument that the error is not a manifest constitutional error under RAP 2.5(a)(3) rests on the notion that Dr. Phenix's testimony

[2] "'Sexually violent predator' means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

provided a basis for the jury to find either the mental abnormality or the personality disorder standing alone makes Love likely to reoffend. As shown, the record does not support the State's contention.

The State contends Love cannot show the instruction affected the outcome. BOR at 8. But the effect of instructional error is measured by what happens if the instruction is followed. In State v. Lamar, an erroneous instruction to a reconstituted jury to deliberate together on whatever remained to be decided "had practical and identifiable consequences in Lamar's trial because if followed, its effect was to bar the reconstituted jury from deliberating together on all aspects of the case against him." State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014). The error was manifest because it altered the deliberative process, even though it could not be shown that the outcome would have differed. The requirements under RAP 2.5(a)(3) must not be confused with a harmless error analysis. Lamar, 180 Wn.2d at 583.

In Love's case, the "to commit" instruction, if followed, allowed the jury to find Love met the SVP definition on a basis that is not supported by expert testimony. Love does not need to show the jury in fact did so. It is enough to show the instruction gave free reign to the jury to reach a decision in a manner unsupported by the law as applied to the facts of Love's case. That constitutional error requires the State to prove it

was harmless beyond a reasonable doubt. The State has made no attempt to satisfy its burden. See Lamar, 180 Wn.2d at 588 ("The State makes no attempt in its briefing to this court to show harmless error, and accordingly the presumption of prejudice stands.").

c. In the alternative, Love's counsel provided ineffective assistance in relation to the "to commit" instruction.

Again, the State argues Love invited the error because he proposed the instruction. Brief of Respondent (BOR) at 6-7. As argued in section A.1.a., supra, the State is mistaken. The State proposed this instruction. CP 555, 572. Love's counsel did not object to element (3) of the "to commit" instruction. 1RP 1816-19. Failure to objection does not trigger invited error. Goble, 131 Wn. App. at 203 n.5; Corn, 95 Wn. App. at 56. Love's counsel did not propose the disjunctive language in element (3) of the instruction. The invited error doctrine does not apply for this reason.

Even if counsel could be said to invite the error, Love's ineffective assistance claim is still available for review. The invited error doctrine does not preclude review where counsel was ineffective in proposing the defective instruction. State v. Kyllo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009).

Proposing a detrimental instruction, even when it is a pattern instruction, may constitute ineffective assistance of counsel. State v.

Woods, 138 Wn. App. 191, 197-98, 156 P.3d 309 (2007). The WPI committee specifically cautions lawyers that pattern instructions "provide a neutral starting point—not an ending point—for the preparation of instructions that are individually tailored for a particular case. Trial judges and attorneys must consider whether modifications are needed to fit the individual case." 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 0.10 (6th ed.). This case-sensitive approach "can involve adding new language for points not addressed in the pattern instructions; it can mean omitting language that does not apply to an individual case; it can involve substituting more specific language for the necessarily general language of a pattern instruction; it can involve combining or reorganizing instructions that address related points." Id.

Bracketed language in a pattern instruction, such as the "[mental abnormality] [or] [personality disorder]" language in element (3) of WPI 365.34, signifies "the enclosed language may or may not be appropriate for a particular case." Id. Brackets "are inserted to alert the judge and attorneys that a choice in language needs to be made." Id. Counsel failed to tailor the pattern instruction to the particular facts of Love's case.

Use of the disjunctive "or" lessened the State's burden of proof, allowed the jury to base its verdict on speculation, and was not supported by substantial evidence. BOA at 19-25. The flawed "to commit"

instruction made it easier for the State to prove and the jury to find Love met the SVP definition. Love's counsel performed deficiently in this regard. As the State makes no argument on the prejudice prong of the ineffective assistance standard, there is no need for Love to repeat the argument from the opening brief. BOA at 26-29.

3. THE COURT COMMITTED REVERSIBLE ERROR IN ADMITTING PRIOR WITNESS TESTIMONY BECAUSE THE STATE FAILED TO ESTABLISH THE WITNESS WAS UNAVAILABLE TO TESTIFY AT THE PRESENT TRIAL.

To its credit, the State acknowledges the State made no effort to secure A.P.'s voluntary attendance at trial. BOR at 12. The State nonetheless contends A.P. was unavailable to testify under ER 804. BOR at 12-14. It does so without citing any relevant authority. Argument for which no authority is cited may not be considered on appeal. King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 717, 846, 846 P.2d 550 P.2d 550 (1993). The failure to cite authority constitutes a concession that the argument lacks merit. State v. McNeair, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997). Instead, the State makes a public policy argument. Basically, it wants to create an SVP exception to ER 804. BOR at 14. ER 804 applies to all cases. There is no exception. There is no authority supporting the State's argument.

The State claims the error is harmless because the jury heard evidence of other sexual offenses and Dr. Phenix's testimony incorporated the same facts as A.P.'s erroneously admitted testimony. BOR at 14-23. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). At trial, the State successfully argued A.P.'s former testimony was important to rebut Love's version of events. 1RP 1024-25. At trial, the State did not view A.P.'s testimony as trivial. The State is poorly positioned on appeal to argue the opposite. Its harmless error argument is premised on the notion that the jury attached no particular significance to the A.P. incident in light of other crimes committed. That is speculation. Dr. Phenix attached importance to the A.P. incident in arriving at her opinion. 1RP 885-86. And the State at trial wanted to the jury to hear A.P.'s former testimony because it constituted substantive evidence, whereas Phoenix's testimony did not. The State's trial counsel recognized full well the importance of this testimony. For the reasons stated in the opening brief, the error was not harmless. BOA at 32-34.

4. THE COURT WRONGLY ADMITTED EXPERT TESTIMONY ON RISK ASSESSMENT UNDER THE FRYE STANDARD.

Love relies on the argument set forth in the opening brief.

B. CONCLUSION

For the reasons stated above and in the opening brief, Love requests that this Court vacate the jury's verdict and reverse the court's commitment order.

DATED this 18th day of November 2015.

Respectfully submitted

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI

State v. Ronald Love

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Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 18th day of November, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Thomas Howe
Attorney General's Office
thomash1@atg.wa.gov
crjsvpef@atg.wa.gov

Ronald Love
Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

Signed in Seattle, Washington this 18th day of November, 2015.

x Patrick Mayovsky