NO. 42573-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

JACK LECK,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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The State accepts Leck's Statement of the Case except as otherwise noted below.

II. ISSUES PRESENTED

1. **Where Leck neither proposed jury instructions of his own, nor objected to those proposed adopted by the trial court, and where he had at least 11 months' actual notice that the State alleged the presence of a personality disorder, and where his own expert agreed that he suffered from an Antisocial Personality Disorder, were Leck's rights to due process violated by inclusion of a jury instruction referencing "mental abnormality or personality disorder"?**

2. **Where Leck was telephonically present at a hearing involving purely legal matters, did the trial court abuse its discretion where it denied Leck's motion to continue that hearing to allow Leck to be physically present?**

3. **Where an expert is permitted to testify as to the basis of that expert's opinion, did the trial court abuse its discretion in permitting Dr. Arnold to testify regarding the significance of Leck's application for membership in the YMCA?**

4. **Where Leck was convicted of 46 counts of Possession of Depictions of a Minor Engaged In Sexually Explicit Conduct in Kitsap County, did the State properly file a sex predator petition against him in that county?**

III. ARGUMENT

A. The Court's Instructions Did Not Violate Leck's Rights To Due Process

Leck argues that his due process rights were violated because the Court submitted an instruction that permitted the jury to commit him based on the presence of a "mental abnormality or personality disorder" although the State, in its petition, alleged only that he suffered from a mental abnormality. App. Br. at 21. Because Leck made no objection to the jury instructions to which he now objects, had ample notice that the State alleged both conditions, and did not contest the presence of this condition, this argument fails.

1. Leck Has Waived Any Challenge To The Jury Instructions

Although Leck frames his challenge as one of notice involving principles of due process, his argument is essentially a challenge to the jury instructions issued by the trial court. Because he did not raise this claim at the time of trial, he has waived this arguments and this Court should decline to consider them.

An appellant must take exception to a jury instruction at trial to preserve the issue for appeal. *State v. Salas*, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995); CR 51(f); RAP 2.5(a). That rule, as the *Salas*

Court noted it had explained "clearly and often," "is not a mere technicality." 127 Wn.2d at 181.

> CR 51(f) requires that, when objecting to the giving or refusing of an instruction, "[t]he objector shall state distinctly the matter to which he objects and the grounds of his objection." The purpose of this rule is to clarify, at the time when the trial court has before it all the evidence and legal arguments, the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction.
>
> Therefore, the objection must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal.

Id., 127 Wn.2d at 181, citing *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990) (internal citations omitted). Opposing parties should have an opportunity at trial to respond to allegations of error "rather than facing newly asserted errors or new theories and issues for the first time on appeal." *In re Detention of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006).

Prior to trial, the State submitted a packet of proposed jury instructions. 8/15/11 at 1073. Leck did not submit any jury instructions of his own and did not take exception to the instructions referencing the term "personality disorder."[1] As such, this argument has been waived.

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[1] Leck's only objection to the State's proposed instructions related to certain instructions that he characterized as "extraneous" insofar as they contained "references to certain adult crimes that didn't involve children." 8/15/11 RP at 1073. The State

2. Even If Permitted To Contest The Court's Instructions, Leck Has Not Shown Error Or Prejudice

An exception to the general rule that errors cannot be raised for the first time on appeal exists where appellant is able to show a "manifest error affecting a constitutional right." RAP 2.5(a)(3). *Salas*, 127 Wn.2d at 183; *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1955). Although Leck claims that his rights to due process were violated, he has provided little beyond that bare assertion, and has not demonstrated that any constitutional rights are implicated.

Jury instructions are sufficient when they allow parties to argue their case theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). An instruction which follows the words of a statute is proper unless the statutory language is not reasonably clear or is misleading. *Borromeo v. Shea,* 138 Wn. App. 290, 294, 156 P.3d 946 (2007). Whether an instruction which accurately states the law should not be given to avoid confusion is a matter within the trial court's discretion, not to be disturbed absent abuse. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001) citing *Douglas v. Freeman,* 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991).

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responded to this by removing two instructions related to definitions of rape in the first and second degrees. *Id.* at 1074, 1076.

Even if an instruction is misleading, the party asserting error still bears the burden to establish consequential prejudice. *Goodman v. Boeing Co.,* 75 Wn. App. 60, 68, 877 P.2d 703 (1994), *aff'd,* 127 Wn.2d 401, 899 P.2d 1265 (1995).

Assuming, *arguendo,* that Leck is correct in asserting error, any error was harmless. In all likelihood, Leck failed to raise his argument regarding notice or to object to the jury instructions at the time of trial because it was not, in fact, an issue at all: Despite the fact that the State's Petition did not mention Leck's personality disorder, Leck had ample notice that the State would be presenting evidence of the presence of a personality disorder at trial, and the presence of an Antisocial Personality Disorder was not in fact disputed at trial.

The State's case was filed in Kitsap County on July 24, 2008. CP at 3. Dr. Arnold's report had been completed more than two years earlier, on January 25, 2006 CP at 16-56.[2] It was provided to the defense no later than December 10 2008, as indicated by the report submitted by Dr. Wollert, attached to Leck's December 19, 2008 Motion to Dismiss. CP at 67-113. Dr. Arnold's initial report indicated that, while antisocial traits had been "noted," and while Leck had been diagnosed with

[2] The State had initially filed the case in Thurston County on April 10, 2007. CP at 8.

personality disorders in the past, he could not, in the absence of a current clinical interview, assign a diagnosis of Personality Disorder. CP at 49. Dr. Arnold submitted a second report in September of 2010. This time, with the benefit of a personal interview, he was able to diagnose a personality disorder. CP at 356. Thus the record demonstrates that, at the very latest, Leck had notice that the State's expert had diagnosed a personality disorder no later than 11 months before trial.[3]

Had Leck in fact been surprised by this diagnosis at trial, his counsel could have objected to the State's submission of evidence on this issue and requested a continuance in order to respond. CR 15(b). The State could then have submitted amended pleadings pursuant to CR 15(a) (leave to amend to be "given freely when justice so requires"). Leck was, however, clearly not surprised. He did not object when the subject of Leck's personality disorder was initially raised (8/8/11 RP at 229), and nothing in his cross examination on the issue of personality disorder suggested surprise or lack of notice. 8/8/11 RP at 371-384.

This is in all probability because Leck did not dispute Dr. Arnold's diagnosis of an Antisocial Personality Disorder. His expert, Dr. Wollert,

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[3] It is perhaps useful to note that, between the time of Dr. Arnold's second report and this trial, there had been a previous trial. Although the record in that case is not before this Court, it is reasonable to assume that this earlier trial provided Leck with ample opportunity to fully explore the State's case, including the opinions of the State's expert.

first assigned that diagnosis in his November 4, 2010 report, at least three months prior to the first trial. CP at 1646. He then testified extensively regarding that diagnosis at trial. 8/10/11 RP at 753; 8/11/11 RP at 838-865, *passim.* From Leck's perspective, the question was not whether he suffered from an Antisocial Personality Disorder, but whether that position made him likely to reoffend. 8/11/11 RP at 838. This is illustrated by defense counsel's closing, in which he argued that Leck "may have an antisocial personality disorder, but that does not make him incapable of making choices. He still has some free will." 8/15/11 RP at 1133. There was no error, and Leck's argument must be rejected.[4]

B. Leck Was Not Denied Due Process When The Trial Court Denied Leck's Motion To Continue A Hearing On Trial Court's Reconsideration Of A Prior Ruling Involving Purely Legal Arguments

Leck next argues that his rights to due process were denied because he was not permitted to be present at a hearing on January 14, 2011 where "disputed facts" were at issue. App. Br. at 9. This argument fails. Although Leck attempts to elevate this issue to one of constitutional proportions, the question, properly framed, is simply

[4] Finally, although Leck does not argue that his right to a unanimous jury was violated by the offending instruction, such an argument would clearly fail. In light of Dr. Arnold's testimony regarding the presence of Pedophilia, and the two experts' agreement on the presence of an Antisocial Personality Disorder, there was substantial evidence to support each, and Leck's right to unanimity was not violated. *See In re Halgren,* 156 Wn. 2d 795, 132 P.3d 714 (2006).

whether the trial court abused its discretion in denying Leck's motion to continue a hearing on the State's motion for reconsideration of a prior ruling at which purely legal issues were to be considered. Because the trial court acted well within its discretion in denying Leck's request to continue the hearing in order to allow him to be physically present at a purely legal hearing, his argument fails.

1. Procedural History

In October of 2010, the State filed a motion asking the trial court to make a ruling on the question of whether Leck's June 30, 2003 conviction for Possession of Depictions of Minors Engaged In Sexually Explicit Conduct qualified as a recent overt act (ROA) as a matter of law, thereby relieving the State of proving a recent overt act at trial pursuant to *In re Detention of Marshall*, 156 Wn.2d 150, 1125 P.3d 111(2005). CP at 293-502. In its motion, the State outlined Leck's criminal history, which included a 1984 conviction for Sexual Abuse of a Minor in the Second Degree involving a 13-year-old boy, and a 1985 conviction for Attempted Sexual Abuse of a Minor in the Second Degree involving a 12-year-old boy. CP at 293-295. Both of these convictions occurred in Alaska. In addition, the motion detailed Leck's conviction in Kitsap County for 46 counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct for which he was incarcerated on the date the sexually

violent predator petition was filed. CP at 296-297. Attached to the motion were roughly 200 pages of documents, including 2 reports by the State's expert, Dr. Dale Arnold (CP 306-379); parole violation reports from 1997 and 2001 (CP 381-388), and the Verdict on Submission of Stipulated Facts for Leck's 2003 conviction, to which documents related to that conviction were attached. CP 390-502.

A hearing on the State's motion took place on November 5, 2010.[5] The court heard argument, although it indicated that it had not read the State's pleadings because it had not received a response from Leck who, through counsel, indicated that he would simply respond orally. 11/5/2010 RP at 2. At no point during that hearing did Leck's attorney indicate that Leck wished to be present, whether physically or by telephone.

The parties next met on November 30, 2010 in order to hear the court's decision on the State's ROA motion. Both Leck and the State's attorney appeared telephonically. 11/30/2010 RP at 2-3. The trial court denied the State's motion, stating that, because the parties' experts held conflicting opinions regarding Leck's mental condition—resulting in a disputed material fact—summary judgment could not be granted. *Id.* at 11.

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[5] The trial court had actually considered and ruled on this issue as part of its May 13, 2009 Findings of Fact, Conclusions of Law and Orders re: Probable Cause, Custodial Evaluation and Motion to Dismiss. CP at 244, No. 13. At the hearing on November 11, 2010, the State indicated that the procedure that preceded entry of that Order made unclear whether Leck had had a full opportunity to brief and argue that issue. 11/5/2010 RP at 3.

Following the trial court's oral ruling on November 30, the State filed a motion for reconsideration, arguing that the trial court had erroneously applied a summary judgment standard (genuine dispute of material fact) to the ROA analysis. CP at 1649-1659. A hearing on the State's reconsideration motion took place on January 14, 2011, at which Leck appeared telephonically. 1/14/2011 RP at 2. After the court had established that Leck could hear the attorneys, his attorney asked that the hearing be continued in order to allow Leck to be present, indicating that "Mr. Leck did wish to be here today...and ... I think his request would be to continue this with his ability to be present, but we'll leave that to Your Honor." *Id.* at 2-3. In asking that the hearing be continued, Leck's attorney objected to the characterization of the hearing as "purely legal," noting that "there are certain assertions, for example, made in Ms. Boerger's argument," and stating that "[h]aving Mr. Leck here, to me, is always helpful, because he's a constant reminder of things factual, which are important to this case, as are the legal." *Id.* at 3-4.

The trial court, in denying the motion to continue, stated that "the determination that I ultimately have to make here and that I made in December [sic] and I'm now reconsidering, has to be made ***based on the paper record*** that's presented to the Court. It's not something that I can take testimony on," and adding that [i]f, at the conclusion of today's

argument, Mr. Naon feels the need to submit any additional materials for my consideration on the merits of the motion, I'll consider that request at the time." 1/14/2011 RP at 4 (emphasis added). Noting that he understood Leck's desire to be personally present, the court observed that "[w]e're getting awfully close to the trial date here" and that, "since I'm reviewing this based on a record that's already been submitted," the motion to continue would be denied. *Id.* The trial court, in making his ruling, indicated that it would rely on only those facts which were not controverted. *Id.* at 28, 29.

After the hearing, the court entered written Findings of Fact and Conclusions of Law. The court found that:

> 6. Shortly after his release from prison in July 2001, Respondent violated his parole conditions again by accessing pornographic websites on a state-owned computer. His parole was revoked and he was returned to prison in Alaska until September 2002.
>
> 7. In April 2003, Bremerton police learned that Respondent had traveled to Bremerton and had applied for a membership at a local YMCA. When Bremerton police officers investigated the address Respondent provided to the YMCA, they found a local charitable organization where Respondent had been volunteering for about a week. The officers were advised that Respondent had access to one of the company's computers and an authorized search of the computer revealed images of child pornography, including images of young girls and boys engaged in sexually explicit conduct. Police also found a printed picture of a partially-nude boy torn into pieces in a trash can in the office that Respondent was using. When

> confronted by police officers, Respondent spontaneously stated that "he had a problem" and that he had been "trying so hard to stay away from this."
>
> 8. On or about June 30, 2003, Respondent was convicted of 46 counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct in Kitsap County Superior Court Cause No. 03-1-00591-4.

CP at 767. Finally, the court vacated its (oral) ruling of November 30, 2010, and found that "the act(s) leading to [Leck's] June 30, 2003 conviction for Possession of Depictions Of Minors Engaged In Sexually Explicit Conduct qualifies as a recent overt act, and as such the [State] is thereby relieved of the burden of proving a recent overt act at the civil commitment trial in this matter. " CP at 769.

2. Leck Had No Constitutional Right To Be Present At The Hearing On January 14, 2011, Which Was Purely Legal In Nature

Leck asserts that his constitutional rights were violated because he was not present at the January 14, 2011 hearing on the State's motion for reconsideration. In so doing, he attempts to elevate the trial court's denial of his motion for a continuance to one of constitutional proportions. This attempt should be rejected. The hearing of January 14 was a purely legal proceeding at which the critical issue was the correct legal standard to be applied to the question of whether Leck's 2003 conviction relating to possession of child pornography constituted a recent overt act under the

law. Leck's physical—as opposed to telephonic—presence would have added nothing to this analysis, and the trial court acted within its discretion in denying his motion.

The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *State v. Miles,* 77 Wash.2d 593, 597, 464 P.2d 723 (1970). The Court reviews trial court decisions to grant or deny motions for a continuance under an abuse of discretion standard. *State v. Hurd,* 127 Wn.2d 592, 594, 902 P.2d 651 (1995); *Skagit Ry. & Lumber Co. v. Cole,* 2 Wn.2d 57, 62, 65, 25 P. 1077 (1891).

The trial court's decision will not be disturbed unless the appellant makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *State v. Eller,* 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

Here, the trial court acted within its discretion where Leck had no right to be at the hearing where purely legal matters were being considered, and the hearing occurred shortly before trial.

Leck concedes that, pursuant to *In re Morgan*, 161 Wn. App. 66, 253 P.3d 394 (2011), a respondent in an SVP case has no right to be present at a hearing that is purely legal in nature. App. Br. at 26. He attempts to distinguish his case from both *Morgan* and *In re Brown,* 154 Wn. App. 116, 225 P.3d 1028 (2010), however, by asserting that the trial court "made factual findings and consider[ed] disputed facts" at the January 14th hearing, and that as such, he was entitled to be physically present. App. Br. at 26. His assertion regarding "disputed facts" is, however, not correct. While it is true that it was only after the January 14th hearing that formal findings and conclusions were entered, the court made clear at the time that it was relying on an existing record that had already been established and that the hearing was purely legal in nature. 1/14/2011 RP at 4.

Moreover, although Leck alleges three "disputed facts" which, he argues, the trial court identified as "significant" (App. Br. at 10, 29), none of these "disputed facts" were in fact in dispute. First, apparently referring to Finding of Fact No. 6,[6] Leck argues that he did not actually "access" pornography sites, but simply submitted a resume to "gaytruckers.com,"

[6] "Shortly after his release from prison in July 2001, Respondent violated his parole conditions again by accessing pornographic websites on a state-owned computer. His parole was revoked and he was returned to prison in Alaska until September 2002." CP at 767.

which resulted in adult pornographic "pop-ups" on his computer. App. Br. at 10. Second, in apparent reference to Finding of Fact No. 7,[7] he argues that he applied for membership at the YMCA not because he wanted to meet children, but because he and a friend often stayed at the YMCAs, which had "large gay contingencies," in the 1970s. App. Br. at 11, 29. Finally, again in apparent reference to Finding of Fact No. 7, Leck argues that, by telling police that he "was trying so hard to stay away from this," he was actually attempting to convey his intent to stay away from law enforcement officers, not from pictures of partially nude boys. App. Br. at 29.

These protestations, each a different version of "this was all just a terrible misunderstanding," go only to his subjective intent and do nothing to establish that the trial court relied on any "disputed facts." Indeed the trial court, in making certain of its findings, explicitly relied in large part on facts as set forth in the report of Leck's expert, Dr. Richard Wollert, based on Leck's admissions to Dr. Wollert. CP at 766, Nos. 2, 3; CP at

[7] "In April 2003, Bremerton police learned that Respondent had traveled to Bremerton and had applied for a membership at a local YMCA. When Bremerton police officers investigated the address Respondent provided to the YMCA, they found a local charitable organization where Respondent had been volunteering for about a week. The officers were advised that Respondent had access to one of the company's computers and an authorized search of the computer revealed images of child pornography, including images of young girls and boys engaged in sexually explicit conduct. Police also found a printed picture of a partially-nude boy torn into pieces in a trash can in the office that Respondent was using. When confronted by police officers, Respondent spontaneously stated that 'he had a problem' and that he had been 'trying so hard to stay away from this.'" CP at 767

1605-1646 (Wollert Report). Nor is anything that Leck now argues actually in conflict with any of the trial court's findings, which make no reference to Leck's intent or subjective state, and draw no explicit inferences from the identified behaviors except to conclude that "[b]ased on the record in this case and materials filed in support of Petitioner's motion, the facts of Respondent's conviction in 2003 constitute an act or acts that could create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows of the history and mental condition of the Respondent." CP at 768. To accept Leck's argument—that his subjective intent in engaging in certain conduct creates a "disputed fact" such that an evidentiary hearing is necessary-- would be to eviscerate the well-established process for deciding *Marshall* motions and transform each such hearing into a re-trial of the underlying conviction in violation of *Brown, supra.* His argument must be rejected.

3. Even If The Trial Court Erred, Any Error Was Harmless

Even if the trial court's denial of his motion to continue was error, it was harmless error. Leck fails to show that his failure to be physically present at the hearing made any difference at all, and as such has not shown prejudice. By arguing that the court's consideration of "disputed facts" required his physical presence, he appears to argue that he was

somehow prevented from presenting evidence that he might have presented had he been present. He has, however, failed to demonstrate this. An error in the admission or exclusion of evidence that is harmless, i.e., an error that poses no substantial likelihood that it affected the verdict, is not grounds for reversal. *Carnation Co. v. Hill,* 115 Wn.2d 184, 186, 796 P.2d 416 (1990). Pursuant to ER 103(a)(2), error may not be predicated upon a ruling that excludes evidence unless the substance of the evidence was "made known to the court by offer or was apparent from the context within which questions were asked." "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." *State v. Ray,* 116 Wn.2d 531, 538, 806 P.2d 1220 (1991).

Here, even if the court had been inclined to take testimony—which it indicated it was not—Leck never established, through an offer of proof or any other means, what his testimony would have been had he been physically present. Nor did he establish that he could not have provided precisely the same testimony telephonically. By failing to make an offer of proof, Leck failed to preserve error. In addition, Leck cannot

demonstrate that he was prejudiced by the court's denial of his request to continue the hearing and permit him to be physically present.

The purpose of the January 14, 2011 hearing was reconsideration of the trial court's November 30, 2010 oral ruling on the *Marshall* issue. The trial court indicated that it would decide the matter on the existing record, and regarded the hearing as purely legal. What Leck would have testified had he been physically present was never made known to the trial court, nor is it "apparent from the context." As such, there is no way to know whether what he might have said could possibly have affected the trial court's rulings, and impossible to assess prejudice.

Moreover, Leck had every opportunity to speak at the hearing had he had anything to say. It is clear from the record that he could hear what was being said (1/14/2011 RP at 2) and that he was aware that, if he had something to say, he could ask to be heard.[8] That said, it is difficult to imagine what difference it could have made had Leck had been physically present to testify, in that he had already conveyed his version of the facts to Dr. Wollert, whose report had been submitted to the court (CP at 1605-46) and which was referenced in the court's findings. Leck has not

[8] The history of the case shows that Leck was well aware that he could speak and be heard if he so desired. At one point in the hearing on November 30, 2010, Leck, speaking on his own behalf, indicated to the court that he would sign a waiver of time for trial. 11/30/10 RP at 14.

demonstrated that the fact that he was not physically present during the reconsideration prejudiced his case in any way.

C. The State's Expert's Witness Properly Testified Regarding Leck's Sister's Report to Law Enforcement.

Leck next argues that his rights to due process were violated when the State's expert relayed a "highly prejudicial" out-of-court statement made by Leck's sister where he had no opportunity to cross examine her. App. Br. at 30. In so arguing, Leck again attempts to elevate an issue regarding the admission or exclusion of evidence to one of constitutional significance. This attempt fails, because the trial court properly permitted the State's expert to explain the basis for his expert opinion regarding Leck's risk to reoffend.

On rebuttal, the State asked Dr. Arnold to explain the significance of Leck's having applied for membership at the YMCA. Dr. Arnold responded, saying:

> One reason is because it's very clear that he had obtained victims for child molestation in the past at the YMCA. And the other reason I think it's particularly important, is because that's how he was really caught in 2003 is because his sister knew that he had this pattern of contacting YMCAs, and she informed local law enforcement to watch out for him.

8/15/11 RP at 1043. Counsel for Leck objected on hearsay grounds, conceding that Leck had met a previous victim at the YMCA, but objecting to the use of the term "pattern." *Id.* His objection was overruled. *Id.* at 1044. Leck now argues that this testimony "seriously undermined the credibility of Mr. Leck's testimony" and "portrayed Mr. Leck as a predator and was highly prejudicial." App. Br. at 34.

Leck's argument fails for several reasons. First, the testimony was proper under ER 703 and 705, and it was within the broad discretion of the trial court to permit such testimony. Even if there was error, Leck has not demonstrated that there was any prejudice.

1. The Trial Judge Properly Exercised Its Discretion In Permitting Dr. Arnold To Testify Regarding The Basis Of His Opinions

The trial court properly overruled Leck's' objection to Dr. Arnold's testimony regarding the significance of Leck's having applied for admission to the YMCA. Under ER 402, all relevant evidence is admissible, unless otherwise excluded by the evidence rules. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Trial court rulings on admissibility of evidence are generally reviewed under an abuse of discretion standard. *Brouillet v. Cowles Pub'g Co.,* 114

Wn.2d 788, 801, 791 P.2d 526 (1990). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *In re Marriage of Kovacs,* 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Because Dr. Arnold's opinion regarding the significance of Leck's having attempted to join the YMCA was clearly relevant, his testimony was properly admitted. In addition, the rules of evidence permit Dr. Arnold to explain the basis of his opinion, which included reference to Leck's sister's call to law enforcement.

2. An Expert Is Permitted To Testify Regarding Facts and Data Upon Which That Expert Relied In Formulating His Opinion

In commitment proceedings pursuant to RCW 71.09, two of the three elements the State must prove are dependent on expert testimony; 1) the presence of a mental abnormality and/or personality disorder, and 2) the likelihood of sexual reoffense. Expert opinion is therefore central to the State's case, and it is necessary for the jury to understand the expert's opinion so that they may come to a conclusion about each element. There is a clear difference between evidence admitted for substantive purposes and non-substantive expert testimony revealing the underlying facts or data that the expert has "reasonably relied" upon. With an appropriate limiting instruction, the latter type of testimony may be presented to the jury for non-substantive purposes:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. *If of a type reasonably relied upon by experts in the particular field* in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence.*

ER 703. A limiting instruction was read to the jury during expert testimony (8/8/11 RP at 243) and again at the conclusion of the case with all other jury instructions. CP at 1579.

Our State Supreme Court has made it abundantly clear that, in SVP cases, expert witnesses are permitted to testify regarding the underlying facts that form the basis of their opinions. *In re Marshall*, *supra*. *See also In re Young*, 122 Wn.2d 1, 58, 857 P.2d 989 (1993). (Testifying expert may legitimately rely on the respondent's "psychological reports and criminal history.") In *Marshall*, the State's expert, Dr. Phenix, based her opinions solely on a review of records relevant to Marshall. 156 Wn.2d at 155. These records included criminal records, psychological records, legal records, treatment records, juvenile records, psychological evaluations, psychiatric evaluations, medical records, and a phallometric ("PPG") assessment. *Id.* Dr. Phenix testified at trial that these records are of the type that professionals in her field rely upon when conducting SVP evaluations. *Id.* Rejecting the SVP's claim that the evidence should have been excluded because the expert related

inadmissible hearsay as factual assertions, the Court noted that "ER 703 permits an expert to base his or her expert opinion on facts or data that are not otherwise admissible provided that they are of a type reasonably relied on by experts in the particular field." *Id.* at 162. The Court continued, "[t]hus, the rule allows expert opinion testimony based on *hearsay data that would otherwise be inadmissible in evidence*." *Id.* The Court also rejected the SVP's claim that inadmissible hearsay could not be related to the jury, noting that ER 705 permits the witness to relate the hearsay to the fact finder to explain the reasons for her expert opinion. *Id.* at 163.

Here, Dr. Arnold's reference to Leck's sister's report to law enforcement was offered for the limited purpose of explaining why he attached importance to Leck's application for membership in the YMCA. As such, it forms part of the basis for his expert opinion and was properly permitted.

3. Even If There Was Error, There Was No Prejudice

Nor can Leck demonstrate that Dr. Arnold's reference to Leck's sister's report to law enforcement prejudiced him or affected the verdict in this case. There had already been substantial testimony regarding Leck and the YMCA. Dr. Arnold told the jury that Leck had told him that he had met Ryan, his most recent victim, at the YMCA where the two had

played pool together. 8/8/11 RP at 253. Asked to discuss significant events following Leck's release from prison in 2002, Dr. Arnold testified that Leck, after "saturating himself in the child pornography" for several days,

> went to get a membership at the YMCA. That's really important to me because that's how he found his last victim was at the YMCA in Anchorage. So those are the things that I think are especially important, because I think that he was really interrupted from progressing through what we call the sexually violent cycle or something. He's starting to saturate himself in child pornography, and he's placing himself in a position to have access to a child. I think that he's moving down a path that leads to reoffense. And he was arrested before he was actually able to reoffend.

Id. at 262-263. *See also Id.* at 290.

Leck also argues that, had Leck's sister been available for cross examination, he could have provided testimony that would have demonstrated that she was biased against him. In support of this assertion he cites to Leck's testimony at the first trial, in which Leck testified that the "bad blood" between them related in part to competition for their father's affections.[9] App. Br. at 35. Leck provides no explanation, however, for why he could not have attempted to neutralize the offending remark by offering the same "bad blood" testimony at this trial. Moreover, Leck had ample opportunity to deny deviant motives in applying to the YMCA and in fact did so: At trial, he denied that his purposes in applying

[9] This testimony has not been made part of the record in this appeal, is not properly before the Court, and should be stricken.

for membership to the YMCA had to do with meeting young victims, arguing that he knew from past experience that the YMCA "welcomed gay men" and that he simply needed a place to shower. 8/09/11 RP at 558-59; 581. Nor were Leck's motives in applying for membership to the YMCA critical for Dr. Arnold for purposes of forming his opinion regarding Leck's risk of reoffense: Dr. Arnold testified that, even if Leck had in fact sought to join the YMCA only so that he could take showers, it would not change his opinion because Leck had informed him and others "that he recognizes that being in close proximity to children is high-risk behavior." 8/15/11 at 1046. Likewise, the State, in closing, said nothing about a "pattern" of seeking out young boys at the YMCA, noting simply that "it doesn't matter if he went there to shower. If he's going there to shower, he's in a place where there's [sic] other naked young boys around. That's opportunity." 8/15/11 at 1111.

Leck also argues that Dr. Arnold's reference to Leck's sister's actions undermined his credibility. This is not persuasive. The record is replete with references to Leck's lying; indeed, "deceitfulness as indicated by repeated lying" was identified by Dr. Arnold as one of the criteria he identified as applying to Leck when assigning the diagnosis of Antisocial Personality Disorder. Leck, Dr. Arnold explained, "lies somewhat indiscriminately," at one point telling Dr. Arnold that he had had between

80 and 100 sexual partners; on another occasion, he said that he had had 400, and on still another occasion, he indicated that he "just sort of threw that number out." 8/8/11 RP at 279. Even his trial counsel conceded to the trial court that Leck "do[esn't] always tell the truth," (1/14/11 at 15) and Leck's own mother told the Department of Corrections that Leck "lies, so if you want the truth, contact me." 8/8/11 RP at 278. In this context, Dr. Arnold's reference to Ms. Leck's report to the police cannot reasonably be seen to have added anything to Leck's existing problems with credibility.

Finally, Leck argues that the limiting instructions given were not effective, citing several cases to the effect that "if the jury is likely to rely on the evidence as proof of the matters asserted, a limiting instruction may have little curative effect." App. Br. at 37. A trial court's ruling on the propriety of a limiting instruction is reviewed for abuse of discretion. *State v. Ramirez,* 62 Wn. App. 301, 305, 814 P.2d 227 (1991). Leck does not demonstrate that the failure of the trial court to, *sua sponte*, propose additional or different limiting instructions constitutes an abuse of discretion.

In support of his assertion that the limiting instruction given may have been insufficient, Leck cites to a series of cases in which the evidence at issue was dramatic and potentially dispositive of the ultimate

issue in the case, such as the admission of a codefendant's confession implicating the defendant at a joint trial (*Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)) or the statement of a dying woman to the effect that her husband had murdered her (*Shepard v. United States,* 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed.2d 196 (1968)). Such comparisons suggest that the contested evidence in this case was far more significant and dramatic than it in fact was. Moreover, Leck never objected to the limiting instruction(s) given, and, while he now observes that "the court did not instruct the jury when it returned on the limited purpose of the evidence," (App. Br. at 16), it is worth noting that Leck did not ask that the court do so. Nor did Leck ever propose an alternative limiting instruction to those actually administered. It is likely that this represents a tactical decision on that part of the defense: Rather than loudly arguing that, contrary to Ms. Leck's (apparent) statement that Leck had a "pattern" of seeking out young boys at YMCAs and thereby drawing more attention to this statement, Leck might well have preferred to emphasize only his own testimony that he applied to the YMCA so that he could take a shower and play handball. 8/15/11 RP at 998, 1006, 1138. This strategic decision presumably also explains why Leck did not cross

examine Dr. Arnold regarding his reliance upon the extent or source of Ms. Leck's alleged knowledge regarding Leck's history with the YMCA.

D. *Martin* Does Not Require Dismissal Of The State's Kitsap County Proceeding Against Leck

Finally, Leck argues that the Kitsap County case against him must be dismissed pursuant to *In re Martin,* 163 Wn. 2d 501, 182 P.3d 951 (2008), urging that, because Leck's sexually violent crimes were committed outside of Washington State, the State does not have authority to file the petition in any Washington county. App. Br. at 40.

This Court rejected identical arguments in *In re Durbin,* 160 Wn. App. 414, 248 P.3d 124 (2011), holding that "Durbin's claim that the State could not file an SVP petition against him in Clark County because his sexually violent offense occurred outside Washington fails." 160 Wn. App. at 429. Durbin had been convicted in Montana of what would be considered a sexually violent offense in Washington and was released from custody before being convicted of attempted residential burglary in Clark County in 2003. The State initially filed an SVP petition in Thurston County in 2004 but, after issuance of the *Martin* decision in 2008, re-filed in Clark County. Durbin argued, as does Leck here, that, pursuant to *Martin,* former RCW 71.09.030 did not permit the case to be re-filed in Clark County. Rejecting those arguments, this Court

determined that the State "had statutory authority to file the petition in Clark County under former RCW 71.09.030 (2008) because Durbin had been convicted of a sexually violent offense, he had formerly been released to the community, he was currently confined for an act that allegedly constituted a recent overt act, and he was about to be released." *Id.* at 429. This Court likewise rejected Durbin's argument—identical to that of Leck—that those amendments could not be applied to Durbin retroactively, holding that "[r]etroactive application of RCW 71.09.030(2)(a)(iii) and RCW 71.09.030(2)(b) (2009), which expressly authorize the county prosecutor (or attorney general on request) to file a petition under the same circumstances as those in *Martin* and under former RCW 71.09.030 (2008), does not contravene our Supreme Court's interpretation of the process due each person who is the subject of an SVP petition." *Id.* at 431.

Leck, while acknowledging this Court's decision in *Durbin* and making no attempt to distinguish the facts of that case from his own, suggests only that, because that decision "contravenes" his argument, this Court "should not follow it." App. Br. at 36. Leck's argument, like that of Durbin, fails.

IV. CONCLUSION

For the foregoing reasons, the trial court's order committing Jack Leck should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of June, 2012.

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NO. 42573-4

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: JACK LECK II Respondent.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On June 21, 2012, I sent via e-mail and United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

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1511 Third Ave
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21 day of June, 2012, at Seattle, Washington.

Allison Martin
ALLISON MARTIN

WASHINGTON STATE ATTORNEY GENERAL

June 29, 2012 - 2:54 PM

Transmittal Letter

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