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I. FACTS AND PROCEDURAL HISTORY

Respondent State of Washington accepts Appellant Coleman's statement of facts except as otherwise noted below.

On August 12, 2008, Tommie Coleman was committed as a Sexually Violent Predator following a five-day jury trial. At trial, the State presented the testimony of David Weinert by way of video deposition.¹ Weinert testified that, when he was 20 years old, he shared a cell with Coleman at Airway Heights Correctional Center. CP at 120-24. Coleman was roughly 30 years Weinert's senior. RP at 534. At some point, Weinert broke his ankle and had to move out of the cell for about a week. CP at 125. When he moved back into the cell, Coleman told Weinert he had sexual desires for him. CP at 126. A couple of days later, while Weinert was icing his ankle, Coleman asked if he could give Weinert a back massage. CP 126. Weinert initially declined the invitation, but due to his "inferiority complex," eventually gave in to Coleman's request. CP at 126-27. Coleman proceeded to massage Weinert's back, but then put his finger into Weinert's anus. CP at 127. Weinert told Coleman to stop, but Coleman pushed Weinert onto the bed, pulled Weinert's pants down, and penetrated Weinert's anus with his penis. CP at 127. Weinert testified that

¹ Although the transcript does not reflect the fact that Mr. Weinert's deposition video was played at trial, Coleman correctly notes in his brief that the August 6, 2008 clerk's minutes reflect that the video was played for the jury on that date. App. Br. at 18. An edited transcript of the video was submitted to the Court as Exhibit 11 (CP at 116-147).

he was “in shock,” and “didn’t know how to deal with the situation.” CP at 127.

The next day, Weinert told Coleman that he was not interested in a sexual relationship. CP at 128. Coleman then told Weinert “that you can’t give a baby a piece of candy and then take it away, you can’t give a crack head a piece of crack and take it away...” CP at 128. Further remarks by Coleman led Weinert to believe that Coleman would kill him if he disclosed the sexual behavior. CP at 135-36. On another occasion, Coleman produced a piece of paper with the name and address of one of Weinert’s relative’s on it. CP at 131. Coleman told Weinert that he had given his [Coleman’s] brother this address over the phone and that, should anything happen to Coleman, his brother “knew what to do.” CP at 131.²

Eventually, Weinert “basically had given up trying to say no” to Coleman’s sexual advances. CP at 129. Coleman raped Weinert approximately seven times over a two to three-week period. CP at 129, 131. Weinert finally reported the rapes to a friend while visiting the prison chapel. CP at 132. Both Weinert and Coleman were put into segregation and received infractions for the behavior. RP 132-33; 536-37. Dr. Judd testified that Weinert received a more substantial infraction than did Weinert for this incident: Weinert was placed in medical administrative

² This testimony, while more detailed, was consistent with file material referenced by Dr. Judd during trial. RP at 239.

segregation on the medical unit and received a sanction there, while Coleman was placed in 20 days of administrative segregation and then 10 days of additional isolation. RP at 240.

II. COLEMAN WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Coleman argues that trial counsel were ineffective because counsel “failed to object” to the State’s expert’s “improper scoring” of the Static-99 and to the state’s expert’s opinion that Coleman had raped two other inmates, “despite a contrary prison disciplinary finding that the sex was consensual.”³ App. Br. at 1.

Generally, failure to object to evidence at trial constitutes a waiver and does not preserve the error for appellate review. RAP 2.5. Claims of ineffective assistance of counsel, on the other hand, are of constitutional magnitude and may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Davis*, 119 Wn. 2d 657, 835 P.2d 1039 (1992). In order to prevail on an ineffective assistance of counsel claim, the claimant must show that counsel’s performance fell below an objective standard of reasonableness

³ Elsewhere, Coleman refers to “an affirmative prison disciplinary finding that the sexual contact was consensual.” App. Br. at 26. He does not, however, cite to any testimony in the record that supports that assertion. The witnesses refer at various points to both Coleman and Weinert having received infractions for their sexual contact (RP at 110, 240, 355, 537) but no documentation of the infraction was submitted as an exhibit, nor do any witnesses testify with any specificity as to any specific “affirmative prison disciplinary finding.” Thus while there appears to be of agreement that the prison treated this sexual contact as “consensual,” whether this was an official determination following an adversarial hearing or simply a notation as a result of some sort of institutional plea bargain is not clear.

and that the deficient performance prejudiced the defendant, “i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). The proper measure of attorney performance is whether the actions by counsel were reasonable under prevailing professional norms. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The court will “strongly presume effective representation” and will not consider strategic or tactical decisions ineffective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). The decision of when or whether to object is a classic example of trial strategy. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). Here, there was no reason for Coleman’s counsel to object to the challenged evidence in that any objection would have been overruled, and there was no showing of prejudice. Therefore, he does not have a legitimate claim of ineffective assistance of counsel.

A. Coleman’s Trial Counsels’ Conduct Did Not Fall Below An Objective Standard Of Reasonableness

Coleman fails to demonstrate that his trial counsels’ failure to object to Dr. Judd’s testimony that he believed that Coleman had raped Weinert fell below an objective standard of reasonableness. Because Judd’s testimony was both relevant and admissible, there was no reason for trial counsel to have objected, knowing as they presumably did that an objection

would not have been sustained. Instead, trial counsel chose, for tactical reasons, to address disagreements between experts through cross examination and rebuttal testimony. This decision was reasonable.

It is not at all clear on what basis trial counsel might have objected to Dr. Judd's testimony. The testimony regarding Coleman's sexual contact with Weinert was clearly relevant. "Relevant evidence" means 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. The overarching question before the jury was whether Coleman suffered from a mental abnormality or personality disorder that made him likely to commit predatory acts of sexual violence if not confined to a secure facility. RCW 71.09.020(16). Coleman's history of sexual behavior was relevant to this inquiry: "In assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence." *In re Young*, 122. Wn. 2d 53, 857 P.2d 989(1993).

Coleman argues that the Static-99 coding rules do not permit treatment of the "consensual" sexual behavior between Coleman and Weinert as a "sexual offense," and that trial counsel's failure to object to Dr. Judd's testimony as without foundation under ER 702 constituted deficient performance. App. Br. at 23-25. This argument is not persuasive.

ER 702 provides that “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto in the form of an opinion or otherwise.” Dr. Judd’s determination that Coleman’s rape of David Weinert could be treated as the “index” offense for purposes of scoring the Static-99 was clearly admissible under ER 702.⁴ Dr. Judd is an experienced expert (RP at 69-81) who has done SVP work both for the prosecution and for the defense. RP at 80-81. He has received extensive training on the use and application of the Static-99 and was familiar with that instrument’s comprehensive rules. RP at 143. In addition to considering file materials, he had personally interviewed both Growcock/Lynch and Weinert and had considered those interviews in forming his opinion. RP at 87-88. Any argument that Dr. Judd was not qualified as an expert for purposes of this trial would be frivolous.

Moreover, Coleman’s assertion Dr. Judd’s opinions were without

⁴ Coleman repeatedly asserts that it was not clear whether Dr. Judd was relying on the sexual contact with Mr. Growcock/Lynch or Mr. Weinert as the “index offense” for purposes of scoring the Static-99. App. Br. at 19, 24, 25. This is not true. While it is correct that, at one point, Dr. Judd’s testimony was not entirely clear on this issue (RP at 147), he made completely clear, on re-direct, that he was relying on the rape of Mr. Weinert:

Q: So, would you consider, then, his latest sex offense, then, at age 49?

A: for purposes of scoring, yes, I do.

Q: Who was that?

A: That was David Weinert.

RP at 172

foundation because the Static-99 coding rules prohibited Dr. Judd from considering Coleman's rape of Weinert as the "index offense" is without merit. For purposes of a Static-99 assessment, a "sexual offence"⁵ includes any "officially recorded sexual misbehavior or criminal behavior with sexual intent." Coding Rules at 13.⁶ For those already incarcerated, "the sexual misbehavior must be serious enough that individuals **could** be charged with a sexual offence if they were not already under legal sanction." Coding Rules at 13. The rules explicitly exempts "poorly timed or insensitive homosexual advances" even though this type of behavior "might attract institutional sanctions." Coding Rules at 16. In order to be considered a "sexual offence" for purposes of scoring such an institutional rule violation, the sexual contact at issue must be "sufficiently intrusive" "that a charge for a sexual offence would be **possible** were the offender not already under legal sanction" and the evaluator must be "sure that the sexual assaults actually occurred..." Coding Rules at 16.

Both of these criteria were met in this case. First, a charge for a sexual offense would clearly have been possible under the facts of the incidents described. Weinert described, both his deposition testimony and

⁵ The British spelling of "offense," (offence), is used throughout the Static-99 coding rules, which were developed in Canada.

⁶ The Static-99 coding rules were admitted at trial as an illustrative exhibit (RP at 353, Ex. 36). Relevant portions were attached to Coleman's opening brief.

in his earlier description to prison officials,⁷ having been repeatedly and forcibly anally penetrated by Coleman. The fact that no criminal charges were actually filed does not mean that none were “possible” or that none “could” (Coding Rules at 13) have been pursued. There was no testimony presented at trial as to whether the information was conveyed to the prosecutor, or how, if this information was in fact conveyed, the prosecutor responded. It goes without saying, however, that there are many reasons other than evidentiary insufficiency that a prosecutor may decide not to file criminal charges for conduct occurring while both parties are in prison.

Second, Dr. Judd appears to have been “sure” that the sexual assault actually occurred. He testified, both on direct and on cross, that he believed that Coleman had assaulted Weinert, basing this on his interview with Weinert, a report prepared by prison officials describing Weinert’s description of the events, and upon the discrepancy in sanctions received by Coleman and Weinert. RP at 88, 239-40. There is nothing in the Coding Rules that suggests that he was not permitted to exercise his professional judgment in this way.

Indeed, the authors of the Coding Rules seem to have anticipated precisely this sort of situation in allowing the evaluator discretion to determine what is or is not a “sexual offence.” For example, the Rules

⁷ This was read into the record by Dr. Judd. RP at 239.

provide that “an offence need not be called ‘sexual’ in its legal title or definition for a charge or conviction to be considered a sexual offence,” and “offences that directly involve illegal sexual behavior are counted as sex offences even when the legal process has led to a ‘non-sexual’ charge or conviction.” Coding Rules at 13.

The coding rules, as well, clearly reflects the authors’ understanding that official charges may not reflect the reality of the underlying offense: “In addition, offences that involve non-sexual behavior are counted as sexual offences if they had a sexual motive. For example, consider the case of a man who strangles a woman to death as part of a sexual act but only get charged with manslaughter. In this case the manslaughter charge would still be considered a sexual offence. Similarly, a man who strangles a woman to gain sexual compliance but only gets charged with Assault; this Assault charge would still be considered a sexual offence. Further examples of this include...assaults “pled down” from sexual assaults.” Coding Rules at 13-14.

Both trial counsel and Coleman’s expert were acquainted with the Coding Rules, introduced as an illustrative exhibit to assist Dr. Donaldson with his testimony. RP at 353; Ex. 36. Dr. Donaldson himself testified that the Static-99 coding rules require an evaluator to make a “judgment call” as to whether the sexual activity in prison was consensual. RP at 351-52. In

the end, it was Dr. Donaldson's "judgment" that Coleman's sexual activity with Weinert was consensual. RP at 352.

Rather than objecting to Dr. Judd's testimony, trial counsel chose to both cross examine on that issue, and to present rebuttal testimony. In addition to challenging Dr. Judd's scoring of the Static-99, Dr. Donaldson testified regarding what he considered to be problems with the accuracy and validity of the Static-99 in risk assessment. RP at 359-60. He explained what he believed to be the importance of applying Bayes Theorem to the Static-99 as well as problems with the instrument's development. RP at 360-63. Dr. Donaldson also opined that Coleman's advancing age should be taken into account when assessing his risk. RP at 364.

In light of the above, it cannot be said that Coleman's trial counsel were ineffective in failing to object to testimony that was both relevant and admissible. The decisions of Coleman's counsel to instead challenge the testimony through a combination of cross-examination and rebuttal testimony was sound and reasonable.

B. Even If Trial Counsel Had Objected To Dr. Judd's Testimony, The Outcome Of The Trial Would Not Have Been Different

In order to prevail on his claim, Coleman must show that his counsels' deficient performance prejudiced him, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *Stout*, 159 Wn.2d at 377. He has not

made this showing, nor can he. As Coleman himself notes, the defense “presented persuasive expert testimony rebutting the state’s case” (App. Br. at 1), vigorously cross-examining Dr. Judd as to his interpretation of the significance of Coleman’s sexual contact with Weinert, suggesting that it should simply be treated as “institutional sex” and noting that both Coleman and Weinert received infractions for their sexual contact. RP at 239-41. Coleman’s expert, Dr. Donaldson, testified at length as to why he did not believe that the sexual contact with Weinert constituted rape (RP at 352-55) and explained, with the help of the Static-99 coding rules marked as an illustrative exhibit and published to the jury, why he did not believe that, under the coding rules, Coleman’s sexual contact with Growcock/Lynch and Weinert should be considered “index offenses” (CP at 355-56; Ex. 36), why he did not believe that Coleman had had any male “victims” (RP at 359, 407, 446) and that he did not think that Coleman could have been prosecuted for his contact with Weinert. RP at 411-12. As such, Coleman’s after-the-fact attempt to “prove” that his own expert’s scoring of the Static-99 is the only possible way to score it, and hence, that trial counsel’s failure to “object” to incorrect scoring, fails.

Although Coleman seems to assert that the entire case hinged on the score of one actuarial instrument (“Had [Dr. Judd] properly scored the index offense as the 1986 conviction, the score would have been 4 or 5

points and the corresponding recidivism rates well under the 50% threshold.” App. Br. at 21), this is not persuasive. First, Coleman’s reference to “the 50% threshold” conflates the score on a particular actuarial instrument with the State’s burden to demonstrate beyond a reasonable doubt that the offender is “likely” to reoffend. RCW 71.09.020(16). Secondly, it ignores the fact that the Static-99 was but one part of Dr. Judd’s risk assessment. Finally, it ignores the overwhelming evidence presented at trial that supported the jury’s verdict.

As noted by Dr. Judd, a person’s score on the Static-99 indicates only that the person scored shares traits with individuals who were re-convicted of a sexual offense at a rate of 52 percent within 15 years. RP at 151-52. The instrument, Dr. Judd explained, is “conservative” in the sense that it measures re-convictions, a much smaller “pool” than the number of persons who commit a new sexual offense, but may never be convicted or even detected. RP at 151-52. Thus even if both experts had agreed that Coleman should receive a lower score on the Static- 99, this lower score would not have been dispositive of the ultimate question before the jury, that is, whether Coleman was “likely to engage in predatory acts of sexual violence if not confined to a secure facility.” RCW 71.09.020(16). This was obviously clear to Dr. Donaldson, who responded, during cross examination on the issue of scoring the Static-99, “[I]f you like, if it would

make things simpler, we can give him a one for [a male victim], and he would have a score of six. Because it wouldn't make a difference in the outcome, you still wouldn't get anywhere near 50 percent, **no matter what his Static-99 score is.**" RP at 411.

Secondly, Coleman's argument overlooks the fact that the scoring of the Static-99 was but one part of Dr. Judd's risk assessment. RP at 139-74. In addition to scoring the Static-99, Dr. Judd considered the Sex Offender Risk Appraisal Guide, or "SORAG," which indicated Coleman shared traits with a group of offenders who recidivated at a rate of 75 percent within 7 years of release, and 89 percent within 10. RP at 155. In addition, Coleman's score of 25 on the Hare Psychopathy Checklist, or PCL-R, coupled with deviant arousal measured by a penile plethysmograph, made Coleman an "excessively high risk for re-offense." RP at 159-63.

Finally, Coleman's argument ignores the enormous amount of evidence considered by the jury over the course of the five-day trial. That evidence included the testimony of the adjudicated victims (J.B. (CP at 87-115; Ex. 15-16) and M.D. (CP at 148-81; Ex. 12-14.)), Weinert, Coleman, and both side's respective experts. Even if the experts had been required to accept the prison's characterization of the contact between Coleman and Weinert as "consensual," the jury was not. The jury was entirely free to determine, based on all of the testimony, that they believed that Coleman

had repeatedly raped Weinert, and that those assaults were further evidence of Coleman's risk of future sexual violence.

That they might have done so would not be surprising in light of Coleman's own apparent confusion about the nature and extent of his sexual contact with Weinert. At trial, he initially denied ever having had consensual sexual intercourse with Mr. Weinert at all (RP at 299), then stated that "it was more of an attempt at that, you know what I'm saying?" RP at 299. When asked to explain the nature of his attempt, he responded by stating that "David Weinert is a liar, okay," (RP at 299), then went on to state that Weinert "made the proposition, not me" (RP at 299) and that he and Weinert had agreed to have sex before Weinert moved into Coleman's cell (RP at 299-300), that they had in fact had consensual sexual contact (RP at 301), and that "[i]t was a mutual, consenting relationship. And I cared about David, and I still care about David." RP at 300. He was then reminded that, in his deposition, he had initially testified that he had not had sexual contact with Weinert (RP at 301),⁸ but that he had, later in that same

⁸ The following exchange occurred between the AAG and Coleman:

Q: All right. So I will have you turn to page 92 of your deposition, Mr. Coleman. Are you there?

A: Yes, Ma'am.

Q: So, I am looking at line 4, and I asked you, "Did you have sexual contact with this inmate?" And your answer was no. Did I read that correctly?"

A: Uh-huh (affirmative).

Q: So, today, you are telling me that you did have consensual sex with Mr. Weinert?

A: Uh-huh. (affirmative).

deposition, gone on to testify that the extent of the sexual contact was touching (RP at 301-02). Still later, when examined by his own trial counsel, he testified that “I told [Weinert] that if he moved in we would probably have a physical relationship, and he agreed to that.” RP at 535. He then went on to say that he (Coleman) had “attempted” to have a physical relationship, apparently consisting of one attempt at anal sex (RP at 536) but that he “wasn’t comfortable” with “a homosexual thing.” RP at 535.

Expressed most simply, Coleman argues that his attorneys were ineffective because the jury found the State’s case to be more persuasive than his. The State presented testimony to the effect that Coleman had raped Weinert; Coleman presented testimony that he had not. The State presented testimony that this rape should be considered the “index” sexual offense for purposes of scoring one of the actuarial instruments considered by their expert; Coleman presented testimony that it should not. “Resolving such conflicts in testimony requires a determination of the credibility of the witnesses; witness credibility lies within the jury’s province. Credibility determinations are for the trier of fact and are not subject to [the court’s] review. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Q: Is that a yes, Mr. Coleman?

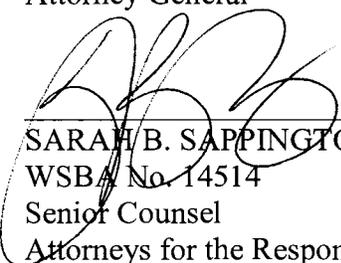
A: Yes, yes.

III. CONCLUSION

Coleman has not demonstrated that his trial counsel were unreasonable in failing to object to the State's expert's testimony. Testimony by an expert is not objectionable simply because it is contrary to the testimony presented by the other side; indeed, this is the nature of adversarial proceedings. Differences of opinion between experts are typically explored during cross examination, as was done in this case. For the foregoing reasons, the State respectfully requests that this Court affirm Coleman's commitment as an SVP.

RESPECTFULLY SUBMITTED this 14th day of August, 2009.

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NO. 38187-7-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

TOMMIE L. COLEMAN

DECLARATION OF
SERVICE

I, Jennifer Dugar, declare as follows:

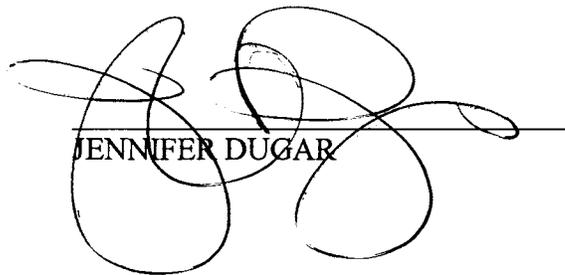
On this 14th day of August, 2009, I deposited in the United States mail true and correct cop(ies) of Opening Brief Of Respondent and Declaration Of Service, postage affixed, addressed as follows:

Eric Broman
Law Offices Of Nielsen, Broman, & Koch, PLLC
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Seattle, WA 98122

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY JD
DEPUTY

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

DATED this 14th day of August, 2009, at Seattle, Washington.


JENNIFER DUGAR

ORIGINAL