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No. 61923-3-I

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

IN RE: DETENTION OF CURTIS MARTEN

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

CURTIS MARTEN,

Appellant.

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

The Honorable Michael J. Fox

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THIS COURT SHOULD EXAMINE THE FLAWED DIAGNOSES THAT ARE THE BASES FOR MR. MARTEN'S INVOLUNTARY COMMITMENT, AS THEY VIOLATE MR. MARTEN'S RIGHT TO RECEIVE DUE PROCESS.

- a. Mr. Marten may raise this constitutional issue for the first time on appeal. Mr. Marten's trial counsel did not ask for a Frye hearing initially, although objections were raised on several other grounds to Dr. Rawlings' testimony at trial. Normally, appellate courts will not review issues not brought to the attention of the trial court, but the appellate rules provide an exception for constitutional issues, because those issues so often result in a serious injustice to the accused. RAP 2.5(a); State v. Kirkpatrick, 160 Wn.2d 873, 897, 161 P.3d 990 (2007); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988).

In determining whether to review a purported constitutional error for the first time on appeal, the appellate court first determines whether the error is truly of constitutional magnitude, and if so, determines the effect the error had on the trial using the constitutional harmless error standard. Kirkpatrick, 160 Wn.2d at 879-80; Scott, 110 Wn.2d at 688. In other words, an error is manifest if it has "practical and identifiable

consequences in the trial of the case.” Kirkpatrick, 160 Wn.2d at 879 (quoting State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)).

Here, the error in permitting the involuntary commitment of an individual based upon flawed and imprecise diagnoses was manifest in this case.

b. Due process requires the State to prove that an involuntary civil commitment is based upon a valid, medically recognized mental disorder. The right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed.2d 437 (1992). The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty, and consequently, the State may only commit persons who are both currently dangerous and have a mental abnormality. Id. at 77; Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed.2d 501 (1997); In re Detention of Thorell, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Current mental illness is a constitutional requirement of continued detention. O'Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S. Ct. 2486, 45 L. Ed.2d 396 (1975).

c. The diagnoses of paraphilia-NOS-nonconsent and personality disorder-NOS with asocial and schizoid features violate due process, because they are invalid diagnoses, not accepted by the profession, including the APA and the DSM-IV-TR. The State expert's diagnoses are invalid, and their use as predicate for Mr. Marten's involuntary civil commitment therefore violate due process. The Supreme Court has upheld involuntary civil commitment only in cases in which the diagnosed disorder was one that "the psychiatric profession itself classifies as a serious mental disorder." Hendricks, 521 U.S. at 360; id. at 372 (Kennedy, J., concurring); id. at 375 (Breyer, J., dissenting); Kansas v. Crane, 534 U.S. 407, 410, 412, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); see also Foucha, 504 U.S. at 88 (O'Connor, J., concurring in part and concurring in the judgment) (involuntary civil commitment requires "some medical justification").

As the Supreme Court has twice suggested, and consistent with the APA's official position, APD -- and by analogy, personality disorder-NOS -- is simply too imprecise and overbroad a diagnosis to survive constitutional scrutiny. See Foucha, 504 U.S. at 82-83; Crane, 534 U.S. at 412-13. The diagnosis does nothing to satisfy the State's constitutional obligation to distinguish "the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to

civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." Crane, 534 U.S. at 413. To the contrary, as numerous studies now indicate, it comes perilously close to justifying the civil commitment of "any convicted criminal." Foucha, 504 U.S. at 82-83. Under Foucha and its progeny, personality disorder-NOS – and despite the State's attempt to make a false distinction here – personality disorder-NOS with asocial and schizoid features, as appellant argued in his Opening Brief -- is not a valid basis for civil commitment, and Mr. Marten's continued detention on that ground violates due process.

d. Mr. Marten's commitment violates due process because it is based on unreliable evidence. The Due Process Clause imposes limits on the use of unreliable evidence. State v. Dahl, 139 Wn.2d 678, 686, 990 P.2d 396 (1999); State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999); accord White v. Illinois, 502 U.S. 346, 363-64, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring in part and concurring in judgment).

Washington courts apply the Frye¹ standard in determining the reliability and admissibility of scientific evidence. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). In the context of involuntary civil commitment proceedings, where the State seeks to impose a significant

¹ Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923).

deprivation of liberty solely on the basis of psychiatric testimony, the Frye standard is a practical and appropriate proxy for the reliability that due process requires.

Here, the relevant question to be resolved by the trier of fact was whether Mr. Marten had a serious mental disorder that caused him difficulty controlling his sexually violent behavior. Thorell, 149 Wn.2d at 736, 740-41; Crane, 534 U.S. at 413. The expert testimony regarding the diagnosis of personality disorder-NOS did absolutely nothing to satisfy the State's constitutional obligation to differentiate "the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." Crane, 534 U.S. at 413. To the contrary, the disorder merely describes a majority of convicted criminals and therefore is not a valid basis for civil commitment. In addition, the use of the diagnosis of personality disorder-NOS in civil commitment proceedings has not found general acceptance among the relevant community. While personality disorder-NOS is recognized by mental health professionals, as well as the DSM-IV-TR, as a potentially useful diagnosis for clinical or research purposes, it is not considered a valid basis for civil commitment.

Thus, even though the diagnosis of personality disorder-NOS may have gained general acceptance in the psychiatric community as a potentially useful diagnosis for clinical or research purposes, it is not helpful to the trier of fact in sexually violent predator proceedings and was therefore inadmissible under ER 702.

2. MR. MARTEN'S COMMITMENT IS BASED UPON INSUFFICIENT EVIDENCE, AS HIS CONDUCT DID NOT RISE TO THE LEVEL OF A "RECENT OVERT ACT" UNDER THE STATUTE.

None of the evidence presented by the State at trial indicated that Mr. Marten's behavior in 2002 included incidents of violence, sexual offenses, or even physical touching of any kind. 5/29/08 RP 167-87; 5/22/08 RP 118; 6/4/08 RP 73; Supp. CP ____, sub. no. 234B, at 4 (Deposition of My Vo Phan).

Defense expert Dr. Donaldson testified that Mr. Marten is terribly socially inept and because of this, perhaps "a pain in the neck in society," but essentially non-violent. 6/9/08 RP 51. Foremost in this determination was the undisputed evidence that with over 100 apparent sexual partners, Mr. Marten had never committed a rape. Id. at 48.

Without more, the State failed to show that Mr. Marten's behavior caused harm, or that his actions created an apprehension of harm that was reasonable under the circumstances -- even in the mind of an

objective person who knows Mr. Marten's history and his mental condition. Mr. Marten's behavior may have been irritating or even harassing, but this conduct was neither of a sexually violent nature, nor was it sufficient to show dangerousness under the statute. In re Harris, 98 Wn.2d 276, 284-85, 654 P.2d 109 (1982); In re Detention of Young, 122 Wn.2d 1, 40, 857 P.2d 989 (1993).

Furthermore, construing Mr. Marten's actions to constitute a recent overt act would violate the narrow-tailoring requirement of due process. In order to pass strict scrutiny, a civil-commitment statute must require "proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); see also Kansas v. Hendricks, 521 U.S. 346, 357, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

Washington's recent overt act element – as it has been applied to other respondents – comports with this requirement. The statute would be unconstitutional if extended to Mr. Marten's actions, however, because Mr. Marten did control his behavior. Indeed, he did exactly what our society should be encouraging former sex offenders to do: he controlled his behavior by walking or driving away if and when he was tempted. He did not touch any of these women – indeed, he barely spoke with any of them. He seems to have learned from his experiences

and from his therapy sessions; indeed, there is no indication that he has sexually offended since 1997.

3. THE MISCONDUCT OF DR. RAWLINGS TAINTED THE JURY, REQUIRING REVERSAL.

a. The trial court remarked upon the fact that Dr. Rawlings made “gratuitous” comments on the record and conducted himself as an “advocate,” rather than as an expert witness. The State argues that appellant fails to provide support for his claims of Dr. Rawlings’s hostile tone and purposeful violation of the motion in limine prohibiting the use of the word “rape” in reference to Mr. Marten’s relationship with his wife. Resp. Brief at 46.

It is clear, however, that Dr. Rawlings’s tone was adversarial throughout his testimony, as the trial court noted on the record:

I was a bit disappointed, frankly, in Dr. Rawlings in his overall testimony where he consistently added things that were not called for. And I was concerned about his adopting the role of an advocate rather than an expert witness that I would expect. I certainly hope Dr. Donaldson [the respondent’s expert] does not engage in the same type of gratuitous comments that are not responsive as to questions that are asked of him.

6/5/08 RP 3 (emphasis added); App. Brief at 45-46 (appellant cited in Opening Brief).

It is also clear, the State's argument notwithstanding, that the "rape" testimony was not inadvertent. The prosecutor stated on the record that he had fully prepared his expert witness in accordance with the court's pre-trial instructions to avoid the use of the word "rape." 6/3/08 RP 199. Dr. Rawlings, a seasoned expert witness, did not make this error inadvertently.

Dr. Rawlings' remarks -- labeling Mr. Marten a "rapist" -- created an enduring prejudice which so infected the proceedings that the curative instruction could not have been -- and was not -- effective. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997); see also U.S. v. Murray, 784 F.2d 188, 189 (1986) ("Such an instruction ... is very close to an instruction to unring a bell"); Bruton v. U.S., 391 U.S. 123, 129, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (citations omitted) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction").

The hostile tone of this witness who, as the trial court noted, took the position of an advocate, rather than an expert, magnified the impact of the misconduct, requiring a greater remedy than would a mere slip of the tongue by a civilian witness. In addition, the implication that Dr. Rawlings knowingly gave testimony that he knew to be contrary to the

statements contained in his notes, 6/3/08 RP 198, and contrary to the court's pre-trial order, requires an extreme remedy.

For these reasons, the trial court abused its discretion when it denied Mr. Marten's mistrial motion. When a trial court's exercise of its discretion is "manifestly unreasonable or exercised on untenable grounds, or for untenable reasons," an abuse of discretion exists. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941). Since the court's abuse of discretion resulted in an enduring prejudice to the entire proceedings – a prejudice which the court's curative instruction was inadequate to repair -- reversal is required.

F. CONCLUSION

For the reasons set forth above, Mr. Marten respectfully requests that this Court reverse his order of commitment as a sexually violent predator.

DATED this 14th day of December, 2009.



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