

64941-8

64941-8

No. 64941-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

IN RE THE DETENTION OF KENNETH HERALD

STATE'S RESPONSE BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

David J. Hackett
Senior Deputy Prosecuting Attorneys

W554 King County Courthouse
Seattle, Washington 98104
(206)205-0580

2010 OCT -8 PM 14:30
FILED
CLERK OF COURT
JANICE M. WILSON

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE..... 1

III. ISSUES 10

**IV. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION BY ADMITTING DR. GOLDBERG'S
TESTIMONY 11**

A. STANDARD OF REVIEW 11

B. HERALD FAILED TO PRESERVE ERROR 13

**C. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION 15**

D. ANY ERROR WAS HARMLESS..... 18

**V. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION BY INSTRUCTING THE JURY WITH
THE LANGUAGE OF THE STATUTE..... 18**

VI. CONCLUSION 21

TABLE OF AUTHORITIES

Cases

| | |
|--|--------|
| <i>Douglas v. Freeman</i> , 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991) . | 20 |
| <i>Estate of Ryder v. Kelly-Springfield Tire, Co.</i> , 91 Wash.2d 111, 114, 587 P.2d 160 (1978). | 13 |
| <i>Goodman v. Boeing Co.</i> , 75 Wn. App. 60, 68, 877 P.2d 703 (1994) .. | 20 |
| <i>Griffin v. W. RS, Inc.</i> , 143 Wn.2d 81, 91, 18 P.3d 558 (2001) | 19 |
| <i>Griffin v. West RS, Inc.</i> , 143 Wn.2d 81, 91, 18 P.3d 558 (2001) | 20 |
| <i>In re Fair</i> , 167 Wn.2d 357, 219 P.3d 89 (2009)..... | 17, 18 |
| <i>In re Young</i> , 122 Wn.2d 1, 41, 857 P.2d 989 (1993)..... | 16 |
| <i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 249, 44 P.3d 845 (2002). . | 20 |
| <i>Smith v. Shannon</i> , 100 Wash.2d 26, 37, 666 P.2d 351 (1983)..... | 13 |
| <i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 p.2d 775 (1971) | 12 |
| <i>State v. Brown</i> , 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997) | 12 |
| <i>State v. Castellanos</i> , 132 Wn.2d 94, 97 935 p.2d 1353 (1997). | 12 |
| <i>State v. Cunningham</i> , 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). | 18 |
| <i>State v. Davis</i> , 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000) | 13 |
| <i>State v. Guloy</i> , 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)..... | 13 |
| <i>State v. Lillard</i> , 122 Wn.App. 422, 431, 93 P.3d 969 (2004). | 12 |
| <i>State v. Powell</i> , 126 Wn.2d 244, 258, 893 P.2d 615 (1995) | 12 |
| <i>State v. Silvers</i> , 70 Wn.2d 430, 432, 423 P.2d 539 (1967)..... | 13 |
| <i>State v. Thomas</i> , 150 Wash.2d 821, 856, 83 P.3d 970 (2004) | 13 |
| <i>In re Twining</i> , 77 Wn. App. 882, 894 P.2d 1331 (1995) | 19 |
| <i>Seattle Western Industries v. David A. Mowat Co.</i> , 110 Wn.2d 1, 750 P.2d 245 (1988)..... | 19 |

I. INTRODUCTION

In response to his civil commitment as a sexually violent predator, appellant Kenneth Herald raises two issues challenging the discretionary rulings of the trial court. His challenge to expert testimony on the lack of a relationship between institutional behavior and reoffense in the community cannot survive the discretion afforded the trial court in evidentiary rulings, especially since the appellate case law has readily recognized that institutions provide little or no opportunity for sexual reoffense by pedophiles because no children are present. [cite]. His request for a "50%" plus instruction also cannot survive the deference afforded the trial court in instructing the jury because the trial court used statutory language that carried the same meaning. Herald's commitment should be affirmed.

II. STATEMENT OF THE CASE

Kenneth Herald was born on September 8, 1958, in Leavenworth, Washington. From early on, Mr. Herald was pre-occupied with sex. His first sexual encounter came at the age of twelve when he engaged in what he claimed was consensual intercourse with a female cousin. CP 510-11, CP 513. About a year later, he commenced a relationship with a young man in his late teens. The teen engaged in anal sex with Mr. Herald multiple times over the next year. CP 514-515. Although he felt "grossed

out" afterwards, Mr. Herald didn't report the sexual encounters. During this same period, Mr. Herald inappropriately touched at least three girls ranging in age from three to six. CP 512-514.

By the age of twenty, Mr. Herald began peeping on women in public restrooms and changing rooms. Often, he would sit in a stall or changing room next to a woman and masturbate while she used the facilities. This activity continued until he got caught approximately four months into it. CP 527-528. At age twenty-two, Mr. Herald offered a ride on his motorcycle to an unsuspecting six-year old girl. He admitted that he "had thought to molest her," but inexplicably decided against it and let her go. CP 517-519.

In 1981, Mr. Herald started scouting grade schools for his young victims. On five to seven occasions, he entered these schools undetected and made his way into the girls' restrooms. Once inside, he would sexually attack any unsuspecting girl he happened upon. During his first attempt, he found a girl sitting on the toilet. He put his hand over her mouth but stopped short of molesting her, although that was his intention. He explained that he was too afraid that time. CP 519-521. On another occasion, he made his way into the restroom and peeped at a young girl with the aid of a mirror, masturbating as he watched her use the toilet. CP

521. He also lured a six-year-old girl into a church with promises of milk and cookies. There, he raped her orally. CP 522.

Even when his victims were not alone, Mr. Herald could not help himself. Once, after sneaking into a bathroom, he found two young unsuspecting girls approximately seven years of age standing with their backs to him. Stealthily, he came up behind one of them, lifted up her skirt, touched her vagina and then masturbated until ejaculation while staring at her. CP 523-524. Another time, he came upon a young girl and her father in the men's room. Aware that the father was distracted and with his back to him, Mr. Herald, his sexual urges overwhelming, pulled out his penis and masturbated until ejaculation in front of the five-year-old girl. CP 524-525. Several months later, Mr. Herald orally raped a two and a half year old girl that his ex-wife was babysitting for a friend. CP 526. Herald's ex-wife left for a period of time. Herald took the little girl's clothes off and placed his penis in her mouth. Herald then put his mouth on her vagina and masturbated until he ejaculated. CP 526.

In 1981, while just twenty-three years of age, Kenneth Herald forced his way into eighty-year-old Martha Brock's home and brutally raped her. Herald grabbed Ms. Brock as she entered her home, punched her several times, forced her down to the ground and dragged her into another room. 6RP 37. Herald force her clothes off and raped her. He

then picked her legs up and attempted to sodomize her but was unable. Before Herald left, he said to Ms. Brock that she better not dare tell anyone what happened. 6RP 37. Ms. Brock was bleeding from an injury to her head when police arrived. CP 500. When apprehended by police, Mr. Herald admitted to the attack. CP 496-500. Herald entered a guilty plea to the crimes of Rape in the First Degree and Burglary in the First Degree for the sexual assault of Martha Brock. The court imposed a twenty year suspended sentence on condition that Mr. Herald remain crime free for a ten year probationary period and complete the Western State Hospital (WSH) Sex Offender Program. PP 12-13.

Eight months prior to this incident, Herald admitted that he attempted to rape a 55 to 60 year old female. He broke into her house, grabbed her around the throat and she fell down. He became scared and left. 6RP 47.

In 1989, while on outpatient work release status at WSH, Mr. Herald encountered six-year-old M.U. at a local department store. 6RP 39-40. After luring her away from her father, Mr. Herald pulled down her pants and fondled her vaginal area. CP 489-490, CP 494-495. He was sentenced to a thirty-four month prison term for Child Molestation, consecutive to the twenty-year sentence remaining for the 1981 rape. CP 8-12, 6RP 40.

Following a detailed evaluation by Dr. Douglas Tucker (CP 31-59), the State filed a Sexually Violent Predator petition to commit Mr. Herald pursuant to RCW 71.09. CP 1-3. At the subsequent jury trial, the State played Mr. Herald's videotaped deposition and called two witnesses, Seattle Police Detective Manuel Washington (retired) and Dr. Harry Goldberg, a forensic clinical psychologist. 6RP 8, 19. Mr. Herald called two witnesses, his retained expert, Dr. Fabian Saleh and his mother. 7RP 4, 161.

Dr. Goldberg received his Bachelor's Degree in Psychology from the State University of New York in 1976. He then received his Master's Degree and later, his Ph.D in Psychology from the California School of Professional Psychology in 1980 and 1983, respectively. In 1983, the state of California granted him a license to practice psychology. 6RP 19.

For a short period following his licensing, Dr. Goldberg worked with seriously emotionally disturbed adolescents. But, in 1986, he became the Clinical Director of the Gateways Satellite Clinic in Los Angeles, California. His duties included the overseeing of the treatment of individuals who had been adjudicated by the courts as not guilty by reason of insanity or mentally disordered. In addition to the treatment of said individuals, Dr. Goldberg also oversaw the administration of the program

which called for him to determine whether they were safe to remain in the community facility or had to be returned to the state hospital. 6RP 20.

In 1990, Dr. Goldberg left Gateways and established his own practice where he continued to evaluate and treat individuals who were being released from the state hospital into the community. He also developed an expertise in forensic evaluations and soon became a member of the Superior Court Panel of Los Angeles where he was tasked with evaluating people to determine if they were insane during the commission of crimes. He joined the California Mentally Disordered Offender Panel where he was asked to determine if a person's mental disorder contributed to their criminal behavior and whether they were amenable to treatment. 6RP 21.

In 1996, Dr. Goldberg was hired as one of the first panelists on California's Sexually Violent Predator Panel. He continues to serve on the panel to this day. As part of his duties, Dr. Goldberg is required to evaluate sex offenders to determine whether they meet California's statutory criteria for commitment as sexually violent predators. 6RP 21-22. Based in large part on his experience and his service on California's panel, Dr. Goldberg was hired in 2004 by the state of Washington to serve on its Sexually Violent Predator Panel. His duties on Washington's panel are virtually the same as those of California's. 6RP 22.

In all, Dr. Goldberg has performed over four hundred initial sexually violent predator evaluations in California. He has performed another one hundred or more follow-up/update evaluations and approximately fifty or more recommitment evaluations. As a Washington panelist, Dr. Goldberg has performed about twenty-five sexually violent predator evaluations. 6RP 22-23.

Dr. Goldberg's expertise extends beyond evaluations, however. He has directly treated over fifty sex offenders in the past as well as supervised the treatment of countless others. 6RP 23. He is also a quality assurance reviewer in California where he is responsible for reviewing other evaluators' and their work to assure they meet statutory and scientific standards. 6RP 24. As a member of the Association of Treatment for Sexual Abusers (ATSA), Dr. Goldberg receives regular trainings and scientific literature on the evaluation and treatment of sex offenders. 6RP 24-25.

Asked at trial to summarize a typical sexually violent predator evaluation, Dr. Goldberg explained that in addition to an interview of the subject (and the administration of psychological tests), it usually involves the review of voluminous records, "anywhere from a thousand to six thousand pages of records." Included in these records are police and probation reports, charging and sentencing documents, court transcripts of

prior trials or proceedings, institutional records (including documentation of infractions, rule violations and day-to-day behavior), medical and psychological records, as well as medications dispensed/prescribed. 6RP 26-28. In his evaluation of Mr. Herald, Dr. Goldberg followed this detailed procedure. 6RP 34-35.

With the aid of the Diagnostic and Statistical Manual, Fourth Edition, Text Revised (DSM IV, TR), Dr. Goldberg diagnosed Mr. Herald with the following mental abnormalities: 1) Pedophilia, sexually attracted to females, nonexclusive type; 2) Paraphilia not otherwise specified; 3) Voyeurism; 4) Alcohol Abuse; and 5) Schizoaffective Disorder, bipolar type. 6RP 33.

Dr. Goldberg testified that Pedophilia is usually chronic, meaning that "it's always around." He explained that for the most part, sexual disorders are formed in early childhood or adolescence. Therefore, one's sexual attraction does not fundamentally change as one gets older. This does not mean, however, that one will never be able to control one's sexual attraction. With the proper tools and treatment, some are able to manage or control their disorder(s). The chronic nature of Pedophilia is well documented in the literature and the DSM. 6RP 52.

In Mr. Herald's case, Dr. Goldberg found an abundance of evidence supporting his Pedophilia diagnosis. From an early age, Mr. Herald was

sexually offending against younger children ranging in age from two-and-a-half to six. Mr. Herald's offending also endured for several years, more than the requisite six month duration for the DSM diagnosis.

Additionally, Mr. Herald himself admitted to Dr. Goldberg that his sexual attraction to children spanned many years and as recently as 2004, when, as he was watching television while incarcerated, he saw a young girl and "thought he might have some sexual issues going on there." 6RP 54.

Dr. Goldberg acknowledged that since 2004, there was no documentation of Mr. Herald admitting or outwardly displaying any sexually inappropriate thoughts or desires. This made him "suspicious", however, especially since Mr. Herald had received no sexual deviancy treatment since 1989 and because Mr. Herald insisted that he did not need treatment for his sexual deviancy or alcohol abuse and would probably not take his anti-psychotic medications if released from confinement. 6RP 54-55, 61-62, 105-105, 156. Dr. Goldberg added that the lack of evidence of sexual touching, inappropriate discussions about children, alcohol seeking behavior or use, possession of pornography or sex with another inmate while in confinement was not particularly significant in terms of his diagnosis. After all, institutions like prisons or the facility where Mr. Herald was housed for some duration prior to trial are not conducive to

Pedophilia because there are no children in prison. 6RP 58-59, 121, 139-140, 145-147.

Following Mr. Herald's counsel's objection on foundational grounds, Dr. Goldberg explained that the bases for his statement that prisons and the like are not conducive to Pedophilia or sexually acting out are: his review of thousands of pages of institutional records in both California and Washington; and his familiarity of the institution where Mr. Herald was housed prior to trial. 6RP 55-57. Furthermore, Dr. Goldberg highlighted that during Mr. Herald's first hospitalization, he never acted out sexually. But, within a short time of being released to the outpatient facility, he sexually molested six-year-old M.U. 6RP 58.

On January 14, 2010, a unanimous jury found Herald to be a sexually violent predator beyond a reasonable doubt. CP 539. This appeal followed.

III. ISSUES

A. Did the trial court manifestly abuse its discretion by allowing Dr. Goldberg to testify, relying on his expert knowledge and experience, that a lack of sexual offending in a secure environment does not significantly reduce the likelihood of offending in the community?

No.

B. Did the trial court abuse its discretion by refusing to give an instruction that stated the risk threshold in numerical terms, rather than in the language of the statute, especially when the court's instruction allowed the parties to easily argue their theory of the case? No.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING DR. GOLDBERG'S TESTIMONY

Herald complains that the trial court allowed Dr. Goldberg to testify that "it was not unusual for sex offenders to refrain from sexually acting out while hospitalized or in prison but then to reoffend when released." Opening Br. at 13. Although he acknowledges that trial counsel's objection was not specific, he claims that the testimony was not relevant and that it lacked a proper foundation. His theory is that Dr. Goldberg could not rely on his own expert experience -- involving many hundred evaluations -- but must instead quote a specific study. Even though Herald claims that the testimony was not relevant, he then claims prejudice because the testimony "went to a critical component of Herald's defense" and contradicted the testimony of his own expert that the lack of sexual deviance while incarcerated indicated that Herald was no longer a dangerous pedophile. Opening Br. at 19. Herald has failed to demonstrate any abuse of discretion by the trial court.

A. STANDARD OF REVIEW

On a daily basis, trial judges throughout our state make thousands of discretionary decisions regarding the scope of testimony. If trial courts are to function effectively, it is important that our judges enjoy substantial latitude to make routine and timely, good-faith evidentiary decisions without unnecessary fear of reversal by appellate courts. Recognizing this important reality, our appellate courts have repeatedly emphasized that trial courts have wide discretion in admitting evidence and balancing the value of evidence, including any prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997); *State v. Lillard*, 122 Wn.App. 422, 431, 93 P.3d 969 (2004).

A trial court abuses its discretion only when its decision is based on untenable grounds or is manifestly unreasonable. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 p.2d 775 (1971). Importantly, abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97 935 p.2d 1353 (1997). To state it more positively, a trial judge does not abuse his or her discretion when the decision falls within the broad range of decisions that any reasonable trial judge might adopt. “[T]he trial court's decision will be reversed only if no reasonable person would have decided the matter as the

trial court did.” *State v. Thomas*, 150 Wash.2d 821, 856, 83 P.3d 970 (2004). Herald fails to satisfy this standard.

B. HERALD FAILED TO PRESERVE ERROR

It is well-established that a party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *State v. Davis*, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). One reason that parties are required to lodge objections at appropriate times below is so that parties and trial courts can operate to protect the record and correct any error. *Smith v. Shannon*, 100 Wash.2d 26, 37, 666 P.2d 351 (1983), citing *Estate of Ryder v. Kelly-Springfield Tire, Co.*, 91 Wash.2d 111, 114, 587 P.2d 160 (1978). In addition, a party must object on specific grounds to preserve error. A party is not only obligated to object, but to specify the correct grounds for the objection. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Here, Herald's counsel did not object on relevance grounds. VRP 1/11/2010 at 55-58. The objection was exclusively to "foundation." *Id.* After the foundation was laid, the defense asked to further voir dire the witness on foundation. *Id.* at 57-58. The trial court directed counsel to take up this inquiry on cross. *Id.* The trial court was correct in this

approach because the further voir dire went to weight and not admissibility.

Defense counsel then allowed the expert to explain that Herald had reoffended despite prior good behavior in a secure institution and that "it's not uncommon for individuals to have that pattern of behavior." *Id.* at 58. The defense made no timely objection to the question that precipitated the answer, but only asked that the answer be struck. The untimely defense objection, which did not specify relevance, did not preserve error. *See State v. Gray*, 134 Wn.App. 547, 558-59, 557, 138 P.3d 1123 (2006), *rev. denied*, 160 Wn.2d 1008 (2007) (to challenge a trial court's admission of evidence on appeal, a party must raise a timely and specific objection at trial). By failing to object on these grounds, Herald has abandoned any error related to this testimony. *Guloy*, 104 Wn.2d at 422

Further, the defense has not preserved an objection on foundation. Although there were early objections to foundation, the defense did not re-raise the objection after the prosecutor established the foundation. The purpose of a foundation objection is to alert the court and the opposing party to the need to establish a foundation. The lack of objection after additional efforts by the opposing party to establish the foundation indicates that trial counsel was satisfied with the foundation for admissibility purposes.

The fact that the trial court indicated that any additional foundation requirements needed to be addressed in cross-examination does not change this preservation analysis. Herald had the opportunity to cross Goldberg on foundational issues and re-raise the objection. Following cross-examination, he made no effort to move to strike the prior testimony. Instead, Herald challenged Dr. Goldberg's conclusions by seeking admissions that some pedophiles do engage in deviant activities in prison. VRP 1/11/2010 at 139-42. Consistent with allowing the final testimony to come in on direct without a follow-up foundation objection, defense counsel indicated no concern in cross with the foundational knowledge of Dr. Goldberg. Indeed, it would have been difficult to challenge the foundational knowledge of Dr. Goldberg without also leaving Herald's own expert open to challenge on an issue that appellate counsel now claims was a "key element" of the defense case. The decision to allow both experts to argue this point based on their experience and expertise was strategic. Herald's strategy, as demonstrated in cross, was to attack Dr. Goldberg's conclusions on the likelihood of prison deviance by a pedophile and urge the jury to adopt his expert's point of view.

**C. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION**

The trial court did not abuse its discretion by admitting the testimony. Given Herald's admission that his lack of deviant behavior in prison was a "key feature" of the defense case, it was certainly relevant to explain to the jury whether it was reasonable to expect bad behavior in prison from a pedophile like Herald. The testimony was relevant because it informed Herald's risk of reoffense by looking at his behavior compared to other typical recidivists.

Apart from preservation, Herald cites no case requiring an expert to disclose the name of a published journal article before relating his experience and expertise. In this case, Dr. Goldberg testified that he had conducted over 400 evaluations of sexually violent predators. By his own experience, he could testify on whether an absence of prison behavior was predictive of future reoffense. Indeed, Dr. Goldberg was able to point out that Herald himself reoffended despite a lack of misbehavior during a prior stay in a secure facility.

In evaluating the parameters of the recent overt act doctrine, Washington Courts have noted that deviant behavior is unlikely when a person -- especially a pedophile -- is serving time in prison. Due process does not require proof of a recent overt act in prison in order to commit an individual because such proof would be "absurd." *In re Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993). The lead opinion in *In re Fair*, 167

Wn.2d 357, 219 P.3d 89 (2009) held that no recent overt act is required to address a pedophile's time in prison: "Requiring proof of a recent overt act for an incarcerated sex offender is absurd because incarcerated sex offenders do not have access to potential victims." 167 Wn.2d at 364-65 (lead opinion). Likewise, the concurrence by Justice Fairhurst explained that:

Because Fair's diagnosis and pattern of behavior is focused toward young children, particularly minor girls, and because Fair's several years of incarceration prevented him from having the opportunity to again victimize that segment of society, I agree with the lead opinion that the State was not required to prove Fair committed a recent overt act.

* * *

Applying that standard to this case, Fair has been diagnosed with pedophilia, urophilia, and paraphilia. He has a behavioral pattern of committing acts against young children, particularly minor girls. In June 2004, at the time the State filed its SVP petition, Fair had been incarcerated *374 since November 1989, in part because of a sentence for a sexually violent crime.^{FN4} During that time, Fair did not have access to young children, the segment of society he is predisposed to victimize. As a result, it would be absurd to require the State to prove a recent overt act because it is entirely possible that Fair has a mental illness that renders him a danger to society, particularly young children. Due process does not require the State to prove Fair committed a recent overt act against a young child given incarceration has prevented Fair from having access to young children since November 1989.^{FN5} Because**98 Fair's lengthy incarceration prevented him from having the opportunity to commit a recent overt act against a young child, I concur with the majority that the State was not statutorily or constitutionally required to prove a recent overt act.

167 Wash.2d at 373-374.

Herald cannot claim error when Dr. Goldberg was allowed to testify to the same proposition readily recognized by our Supreme Court in *Young, Fair*, and a number of other cases. The trial court did not abuse its discretion.

D. ANY ERROR WAS HARMLESS

An evidentiary error is reversible only if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). It is unlikely that Dr. Goldberg's testimony on the general relationship between prison behavior and recidivism was the key to the outcome on this case, especially when Herald had an opportunity to cross-examine on this point and his own expert also testified.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY INSTRUCTING THE JURY WITH THE LANGUAGE OF THE STATUTE

Herald argues that the trial court erred by refusing to instruct the jury in numerical terms, rather than in the language of the statute. Both parties correctly referenced the statutory standard throughout the case, using both the language of the statute and a 50-percent plus standard. Herald fails to establish any instructional error.

Herald claims that the trial court erred by rejecting his proposed instruction that the jury is required to find "a statistical probability greater

than 50%." Opening Brief at 20. However, it is conceded that the court instructed the jury using the statutory language in the WPIC. Although Herald would prefer different wording, it cannot be said that the trial court abused its discretion by using statutory and WPIC language that correctly reflected the law.

Trial courts have discretion in determining whether to give a proposed jury instruction. *In re Twining*, 77 Wn. App. 882, 895 (1995). *See Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001) (wording of a legally proper instruction is reviewed for abuse of discretion). Jury instructions are not erroneous if they are sufficient to allow the parties to argue their theory of the case, if they are not misleading, and if they properly inform the jury of the applicable law. "No more is required." *Seattle Western Industries v. David A. Mowat Co.*, 110 Wn.2d 1, 750 P.2d 245 (1988); *In re Twining*, 77 Wn. App. 882 (1995).

Under RCW 71.09.020(7) and WPI 365.14, "'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person *more probably than not* will engage in such acts if released unconditionally from detention on the sexually violent predator petition." (Emphasis added). The instruction Number 6, as given by the court, mirrors this language.

Herald nowhere explains how it can be error to use the language of the statute to instruct the jury on the danger standard. From this statutory "more probably than not" language, both sides were able to argue danger effectively, including a 50 percent plus argument. Herald fails in his burden of demonstrating how the outcome would have differed if the trial court had departed the statute to offer the defense instruction. At the end of the day, "more probably than not" is a better reflection of the statutory standard because it is the statutory standard.

Herald fails to demonstrate error under the abuse of discretion standard. 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). 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). *See also Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

Herald to demonstrate a reasonable possibility that the outcome of the trial would have been different if his instruction had been given to the jury. *See Goodman v. Boeing Co.*, 75 Wash.App. 60, 68, 877 P.2d 703

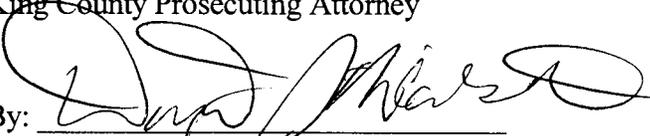
(1994) (error must be prejudicial). In closing, both parties correctly referred to the statutory language as establishing a 50 percent threshold. The prosecutor pointed out that it was the State's burden to prove that Herald is more likely than not to reoffend, which means that the State must prove "there is a 51 [percent] chance . . . that Herald will reoffend again." VRP 1/14/10 at 36 (prosecutor closing). Similarly, the defense closing questioned whether the State's proof "push[ed] Mr. Herald up over the 50 percent mark, the magic number of this proceeding." VRP 1/14/ at 51 (defense closing). With both sides free to argue their theory of the case, there was no error.

VI. CONCLUSION

For the foregoing reasons, the jury's decision and the Order of Commitment should be affirmed.

DATED this 8th day of October, 2010.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

David J. Hackett, WSBA #21236
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner