

64941-8

64941-8

NO. 64941-8-I

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

In re Detention of Kenneth Herald

STATE OF WASHINGTON,

Respondent,

v.

KENNETH HERALD,

Appellant.

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King County Prosecuting Attorney's Office
Criminal Division
Civil Commitment Unit

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

The Honorable William L. Downing, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by permitting the state's expert witness to tell jurors it was not uncommon for repeat sex offenders to behave properly while incarcerated and then to reoffend after being released.

2. The trial court erred in refusing the proposed defense instruction that explained the threshold for the "likely" and "more probably than not" standards as "greater than 50%." CP 344.

Issues Pertaining to Assignments of Error

1. Did the trial court commit reversible error by permitting the state's expert witness – over defense objection -- to tell jurors it was not uncommon for repeat sex offenders to refrain from sexually acting out while incarcerated and then to reoffend after being released when the testimony was not linked to the particular facts of the case and was not supported by a sufficient foundation?

2. Where a defense proposed instruction correctly stated the law and was factually supported, did the court err in refusing to instruct the jury that the term "more probably than not" represents a statistical probability greater than 50%? CP 344.

B. STATEMENT OF THE CASE

Kenneth Herald was about to be released from prison after serving time for a 1981 first degree rape conviction and 1989 first degree child molestation conviction when, in February 2006, the state filed a petition to have him indefinitely committed under RCW 71.09. CP 1-3. Five months later, the court found Herald incompetent and appointed a guardian ad litem. Supp. CP ___ (sub. no. 48, Findings of Fact and Conclusions of Law, filed 7/21/2006); 1RP 30-31.¹ On September 11, 2008, the court entered an order finding Herald competent. CP 183-87.

At the subsequent jury trial, the state played Herald's videotaped deposition and called two witnesses, a police officer involved in the 1981 rape case and Harry Goldberg, a forensic clinical psychologist. 6RP 8, 19. Herald called two witnesses, Dr. Fabian Saleh, a psychiatrist, and Herald's mother. 7RP 4, 161.

Herald first experienced sex at age 12 when he had consensual sexual intercourse with his 12-year-old female cousin. CP 510-11, 513.²

¹ Herald refers to the 8-volume report of proceedings as follows: 1RP – 5/12/06; 2RP -- 3/6/08; 3RP -- 10/29/09, 1/6/10, 1/7/10; 4RP – 1/6/10; 5RP – 1/7/10; 6RP 1/11/10; 7RP – 1/13/10; 8RP – 1/14/10.

² Herald's "testimony" consisted of a videotaped deposition played for the jury. The video is not of record. Herald cites to the trial judge's working copy of a transcript of the deposition, filed January 7, 2010.

When he was 13, Herald began a "friendship" with a young man who anally raped him multiple times in the next year or two. CP 515. During this time Herald also inappropriately touched young girls on three occasions. CP 512-14, 516-17.

At about age 20, Herald peeped on adult women in restrooms for three or four months until he got caught. CP 527-28. His next contact with a young girl did not occur until he was about 22, when he gave a six-year old a ride on his motorcycle. CP 517-19. He "had a thought to molest her," but decided against it. CP 518-19. During the following year, 1981, Herald entered girls' restrooms about six or seven times intending to "approach a minor female sexually." CP 519-21. He masturbated a few times and touched one girl's vagina. CP 521-25. Another time Herald lured a girl into a church and raped her orally. CP 522. In a different circumstance several months later, Herald orally raped a little girl his wife was watching for a friend. CP 526.³

Toward the end of 1981, Herald broke into an elderly woman's home and raped her after a day of excessive drinking. CP 496-500. An officer arrested him nearby and the woman identified him as her assailant.

³ Herald apparently had gotten married about two years earlier. He had a normal, satisfying sexual relationship with his wife during this period. CP 501-02; 6RP 47.

CP 500; 6RP 11-16. Herald pleaded guilty to first degree rape. He was given a suspended sentence, placed on probation, and ordered to attend and complete the Sex Offender Treatment Program at Western State Hospital. CP 13-14, 475-77. Herald remained at the hospital for four years. He participated in treatment that consisted primarily of group meetings with fellow offenders six days a week. CP 477-80, 484, 488-89.

Herald progressed to work release in the community and outpatient treatment, but began drinking alcohol in violation of a probation condition. CP 484-85. He was later cited for and pleaded guilty to driving under the influence and his probation was eventually revoked. CP 485-87, 489.

After more time in the hospital, Herald again earned outpatient status. CP 485. He began drinking again and, after a day of heavy drinking in April 1989, entered a department store with "a thought to touch a little girl's vagina." CP 489-92. He acted on the thought, touching a six-year-old's vaginal area outside her bathing suit. CP 489-90, 494-95. Herald ultimately pleaded guilty to first degree child molestation and was sentenced to 34 months in prison to run consecutively to the prison time remaining for the 1981 conviction. CP 8-12.

In the early 1990s, Herald began to display signs of schizoaffective disorder. 6RP 63-64, 124-25; 7RP 15-19, 46-47. He was diagnosed in

1995. 7RP 19. Herald resisted medication until 2001, when a court ordered involuntary administration of drugs. 6RP 64; 7RP 49. He stopped taking the medication in 2004 and decompensated. In 2007, after the commitment petition had been filed, the court again ordered involuntary medication. CP 178-82; 6RP 64-65; 7RP 50. Herald decided to voluntarily take the medication and the court lifted the order in February 2009. CP 207-10; 7RP 50. Herald continued to voluntarily use the medicine up to time of the January 2010 commitment trial.

At the trial, Herald did not dispute the existence of his two convictions. Rather, the issues were whether (1) he suffered from a mental abnormality that causes serious difficulty controlling sexually violent behavior; and (2) the abnormality made him likely to engage in predatory sexually violent acts if not securely confined. RCW 71.09.020(8), (18).⁴

⁴ RCW 71.09.020(8) defines a "mental abnormality" as

a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."

RCW 71.09.020(7) provides:

"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.

Herald testified his mental health was "okay as far as I'm concerned." CP 529. Neither state's expert witness Harry Goldberg nor defense witness Dr. Fabian Saleh agreed. Goldberg said Herald's primary mental abnormality was pedophilia. 6RP 49-51. Others were paraphilia not otherwise specified, voyeurism, alcohol abuse, and schizoaffective disorder, all of which exacerbated the pedophilia. 6RP 33, 152-54.

Goldberg testified pedophilia does not go away. 6RP 51-52. Herald told him in an August 2009 interview that he had been attracted to children for many years. 6RP 53-54, 156. He also disclosed he saw a young girl on television in 2004, which caused him to think he might have a sexual issue going on from that. 6RP 54. Yet Herald maintained that after that incident and during the period leading up to trial, he had no sexual thoughts and no longer had a sexual problem. This made Goldberg suspicious, especially since Herald had received no treatment since his 1989 child molestation conviction. 6RP 54-55. Herald also said he did not believe he needed treatment for either sexual deviancy or alcohol abuse, and probably would not take his anti-psychotic medications if released from confinement. 6RP 55, 61-62, 104-05, 156.

At the same time, Goldberg acknowledged that from 1991 until trial, there were no documented incidents of violent or sexual touching,

inappropriate discussions about children or adult women, alcohol-seeking behavior or use, possession of pornography, or sex with another inmate. 6RP 129-34. Goldberg attributed that absence of evidence to Herald's incarceration, saying his place of confinement was not conducive to pedophilic conduct because there are no children in prison. 6RP 58-59, 121, 139-40, 145-47.

Goldberg testified, "[W]hen sex offenders are in institutions, you think they'll be acting out sexually all the time, but the reality is –" at which point Herald's counsel made a foundation objection. 6RP 55. The following then occurred:

Q. Are you familiar with the research in this area of the – I guess the statistics and research of individuals in institutional settings and their behavior with regard to recidivism?

A. Yes.

Q. And where does that research come from and what is it?

A. Well, just the compilation of surveys of individuals in institutions and the acting out behaviors is quite lacking.

Q. And in your evaluation of Mr. Herald, was it important and was it information that you relied upon to come to an opinion?

A. Yes, it was.

Q. And I would ask you, could you relate to the jury what that consideration was from the literature.

6RP 55-56.

At that point counsel renewed her foundation objection, stating Goldberg did not identify any specific research to support his testimony.

6RP 56. When the court directed the prosecutor to establish what the research and studies were, the following took place:

Q. Are you familiar with some of these studies?

A. The actual – the actual surveys as far as sexual acting out in prison, no, it's mostly based on my – my review of the records.

Q. What records are you referring to?

A. Institutional records and both – and hospital records I've seen, both in California and Washington.⁵

Q. And how many of these records are we talking about that you looked at?

A. Thousands of pages.

Q. And you've reviewed the records and analyzed how these people act in prison and then subsequent when they are released?

A. Yes.

Q. And so you have personal knowledge of this information?

⁵ Goldberg had earlier testified he completed about 400 sex offender commitment evaluations in California and 25 in Washington. 6RP 22.

A. Yes.

6RP 56-57.

The prosecutor then sought the court's permission to "relay what his personal experience is with -- ." 6RP 57. The court ruled that Goldberg could address the topic insofar as it related to the evaluation of the factors he considered. 6RP 57. Goldberg testified the information was important in his evaluation because while Herald did not act out sexually at Western State Hospital, he reoffended shortly after being released. Goldberg said, "[I]t's not uncommon for individuals to have that pattern of behavior between the sexually acting out behavior while incarcerated or in the hospital then while in the community." 6RP 58.

Herald's counsel objected and moved to strike on the ground the answer referred to the general population rather than specifically to Herald. The court allowed the answer to stand. 6RP 58.

Goldberg testified Herald's mental abnormalities caused him serious difficulty controlling his sexually violent conduct. He cited as evidence Herald's alcohol use in violation of his 1981 probation, commission of child molestation shortly after having received treatment and earning his release, and admissions to difficulty with impulse control before committing those crimes. 6RP 69-70.

As for the final element, Goldberg opined Herald more probably than not would engage in sexually violent acts if released unconditionally from detention. 6RP 71. He supported this prediction by testifying about four risk assessment instruments and several dynamic risk factors that indicated Herald was at moderate to high risk to reoffend. 6RP 76-106.⁶ Goldberg also cited to one study that concluded the combination of a serious mental illness, such as schizoaffective disorder, combined with a sexual disorder greatly increased the risk to reoffend. 6RP 154-55. But he acknowledged that a more comprehensive study, done in 2003, indicated there was no correlation between serious mental illness and sexual recidivism. 6RP 164-66.

For Dr. Saleh, the key feature in Herald's case was the intervening discovery of schizoaffective disorder rather than pedophilia. 7RP 15-18, 23-27, 99-100. He said the research showed no correlation between schizoaffective disorders or other serious mental illnesses and either an inability to control sexual impulses or a predisposition to offend sexually. 7RP 17-18, 32-36. Based on his review of Herald's institutional

⁶ Based on three of the instruments, Herald's estimated chances of reoffending within 10 years of release ranged from 35 percent to 59 percent. According to the fourth, the estimated chances of reoffense were anywhere from 40 percent to 72 percent. 6RP 90-95.

behavioral records, Saleh testified the schizoaffective disorder changed his sexual presentation for the better. 7RP 35-36; 121-22. He "is not the same person as he was in '89 or in the '70s," according to Saleh. 7RP 100. For example, there were no reports indicating Herald sought out other inmates for sex, openly masturbated in common areas, or inappropriately approached female staff members, for 19 years. 7RP 35. Therefore, although a serious mental illness, Herald's schizoaffective condition did not rise to the level of a "mental abnormality" as defined by statute. 7RP 17-18, 36.

As for pedophilia, Saleh said the disorder is not always chronic and lifelong. 7RP 37. He would have diagnosed pedophilia based on Herald's records through 1989, but not at the time of trial. 7RP 44-45, 96-98, 126-28. Saleh said "[i]t would be malpractice" to ignore 20 years of a person's life and instead reason that once a pedophile, always a pedophile. 7RP 42. He acknowledged there were no children in prison, but noted that if Herald remained a pedophile, he would have watched television shows depicting children, possessed child pornography, or drawn pictures of children. 7RP 43. Saleh testified if a person had pedophilia, he cannot "turn off the switch" when in prison and suddenly control his urges for fear the state

will otherwise initiate commitment proceedings in the future. 7RP 101-02.

Because Herald did not have a qualifying mental abnormality, there was no required connection between an abnormality and a likelihood of reoffending. 7RP 53-54. Saleh nevertheless considered whether Herald was a likely future risk to reoffend. 7RP 54.

In contrast to Goldberg, Saleh used one actuarial instrument, the Static-99, because it was the most studied and had the fewest flaws. 7RP 54-63, 75-76.⁷ Saleh focused on two of the instrument's specified risk factors, the existence of (1) a paraphilic disorder, such as pedophilia; and (2) substance abuse. 7RP 68. The absence of pedophilia was a mitigating factor, and Herald's past abuse of alcohol was not a risk factor because he also sexually offended while sober. 7RP 71-72.

Saleh testified Herald's schizoaffective disorder was also not a risk factor because, even when un-medicated and psychotic, Herald did not engage in inappropriate sexual behavior. 7RP 134. Finally, Saleh said it was a well-accepted medical fact that sexual recidivism decreases with advancing age. 7RP 77-79. For all these reasons, Saleh concluded Herald

⁷ According to Saleh's application of the instrument, Herald had an 11.8 percent to a 32.1 percent chance of sexually reoffending within 10 years of release. 7RP 65.

was not more likely than not to engage in a predatory act of sexual violence if released from confinement. 7RP 79.

After considering this evidence, the jury found the state had proven beyond a reasonable doubt that Herald met the elements necessary for commitment under RCW 71.09. CP 539. The trial court accordingly ordered Herald committed. CP 537-38.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY PERMITTING GOLDBERG TO OFFER IRRELEVANT EXPERT TESTIMONY THAT ALSO LACKED A SUFFICIENT FOUNDATION.

The trial court permitted state's expert witness Goldberg to testify it was not unusual for sex offenders to refrain from sexually acting out while hospitalized or in prison but then to reoffend when released. Goldberg based this sweeping assertion only on his review of "thousands of pages" of institutional and hospital records he had seen. Such anecdotal information from an unknown number of cases, presumably involving a wide range of sex offenders, was not a sufficient basis to support his testimony. The trial court erred by allowing it over Herald's relevance and foundation objections.⁸

⁸ Herald's counsel did not use the word "relevance" when she objected to Goldberg's conclusion and moved to strike the answer.

This Court reviews a trial court's decision to admit expert testimony for an abuse of discretion. In re Detention of Anderson, 166 Wn.2d 543, 549, 211 P.3d 994 (2009). Expert testimony is admissible under ER 702 only if it "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]"⁹ The evidence must be "helpful to the trier of fact under the particular facts of the specific case in which the evidence is sought to be admitted." State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000) (quoting State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999)). In other words, expert testimony will assist the jury only if it is relevant; "[h]elpfulness and relevancy are intricately intertwined." State v. Riker, 123 Wn.2d 351, 364, 869 P.2d 43 (1994).

As counsel articulated during her relevance objection, Goldberg's "database," as it were, consisted of information from a general group of

Counsel instead said, "We're talking about Mr. Herald here specifically, not the general population." 6RP 58. Because it is apparent from the context that counsel was objecting on relevance grounds, the error was adequately preserved. ER 103(a)(1); State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992).

⁹ ER 702 provides:

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, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

incarcerated sex offenders Goldberg had evaluated. But Herald was a special offender; Goldberg did not dispute that Herald showed obvious signs of schizoaffective disorder in prison and after his 1989 offense. 6RP 63-64, 120-23. Goldberg also testified a person who suffers from such a disorder undergoes significant change. 6RP 143-45. Despite these facts, Goldberg did not limit his review of his files to seriously mentally ill offenders. He instead applied the prison behavior of all sex offenders to Herald. Because Goldberg's database was not relevant to the specific facts of Herald's case, his testimony was not helpful to the jury. It was therefore inadmissible under ER 702.

Even if the testimony could have assisted the jury, Goldberg's conclusion that good prison behavior among repeat sex offenders was common lacked sufficient foundation to establish it was reliable under ER 703. That rule provides the framework for analyzing questions of foundational sufficiency of an expert's opinion. Davidson v. Municipality of Metropolitan Seattle, 43 Wn. App. 569, 575, 719 P.2d 569, review denied, 106 Wn.2d 1009 (1986). The rule allows a trial judge to evaluate the reliability of underlying facts or data upon which an expert's opinion is based. State v. Maule, 35 Wn. App. 287, 295, 667 P.2d 96 (1983).

ER 703 states:

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.

Before a trial court admits expert opinion evidence, it should find the underlying data are of a kind reasonably relied upon by experts in the particular field in reaching conclusions. State v. Ecklund, 30 Wn. App. 313, 317-18, 633 P.2d 933 (1981). To do this, a court must look behind an expert's conclusion and assess the adequacy of its foundation. Richardson by Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 829 (D.C. Cir. 1988).

The court in Herald's case did not find anecdotal information from one expert's own files was of a kind reasonably relied on by experts in Goldberg's field. Such a finding would have been without support on the record before the court. See Maule, 35 Wn. App. at 296 (record failed to show underlying facts or data were of a kind experts in same field reasonably rely on; "[t]here is no evidence that [the expert witness] conducted any statistical study or that any other expert in the field made such a study.").

In related contexts, courts have held expert evidence must be based on more than mere anecdotal information derived from the witness's

unverified personal experiences. See, e.g., State v. Aspeytia, 130 Idaho 12, 18, 936 P.2d 210, 216 (Idaho App. 1997) (prosecutor's questions regarding incidence of false accusations of sexual abuse based solely on pediatrician's experience in examining 800 children were objectionable because false accusation evidence must be based on more than anecdotal information); State v. Parkinson, 128 Idaho 29, 35, 909 P.2d 647, 653 (Idaho App. 1996) (trial court correctly excluded therapist's opinion on statistical frequency of false accusations for lack of adequate foundation because it was based only on anecdotal information derived from therapist's personal experience); State v. York, 564 A.2d 389, 390 (Me. 1989) (trial court committed obvious error by permitting expert to testify that alleged child sexual assault victim displayed clinical behavior characteristic of someone who had been sexually abused within the family; court held that "the anecdotal clinical experience of the witness lacked any evidence of solid empirical research" despite expert's assertion her observations were generally accepted in her profession).

These authorities indicate the underlying anecdotal information upon which Goldberg relied did not provide sufficient foundation for his broad declaration that convicted sex offenders typically do not act out sexually while they are incarcerated. The trial court abused its discretion

by allowing Goldberg's evidence to stand because it lacked sufficient foundation. Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 683-84, 15 P.3d 115 (2000); Walker v. State, 121 Wn.2d 214, 218, 848 P.2d 721 (1993); Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), review denied, 118 Wn. 2d 1010 (1992).

The court's abuse of discretion was not harmless error. The test for determining whether erroneously admitted evidence requires reversal is whether, within reasonable probabilities, the trial's outcome would have been materially affected if the error had not occurred. State v. Braham, 67 Wn. App. 930, 939, 841 P.2d 785 (1992). An evidentiary error is harmless if it is of little significance to the overall, overwhelming evidence as a whole. State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006). The Court's error is not harmless under this standard.

First, courts must be mindful that admission of expert testimony can be particularly prejudicial because it carries an "aura of special reliability." City of Seattle v. Heatley, 70 Wn. App. 573, 583 n.5, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987)), review denied, 123 Wn.2d 1011 (1994); see Davidson, 43 Wn. App. at 572 ("the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert").

Goldberg was hardly an unimpressive witness. He testified that in 1996, he became one of the first experts on California's Sexually Violent Predator Panel, was hired in 2004 to do the same type of work in Washington, and had done more than 400 sex offender evaluations. 6RP 21-23. His unsupported testimony likely carried great weight.

Second, the trial court's error went to a critical component of Herald's defense. Defense expert Saleh relied heavily on the absence of sexually inappropriate acts during Herald's incarceration for his conclusion Herald did not suffer from a sexual abnormality that caused him serious difficulty controlling his sexually violent behavior. 7RP 34-36. Defense counsel noted Herald's non-sexualized behavior during closing argument, stating that in none of the "hundreds of mental health records" was there evidence that Herald continued to suffer from pedophilia. 8RP 48. Goldberg's testimony undermined Herald's defense theory. It therefore was not merely of minor significance.

Third, while it is true there are no children in prison, Saleh pointed out there were other ways for Herald to act out sexually, such as by masturbating in a common area, concentrating on television shows that featured children, possessing child pornography, or drawing inappropriate pictures of children. 7RP 43. Because there was no evidence Herald did

any of those things, a reasonable juror could have inferred Herald was no longer a pedophile and therefore decided against the state. But when the trial court permitted Goldberg to testify it was common for sex offenders to control themselves while incarcerated, yet reoffend on the outside, the reasonable inference was destroyed.

Finally, the state's evidence was not "overwhelming." There were competent experts on each side. It was not disputed that Herald had a schizoaffective disorder that altered his behavior, and that the disorder did not become evident until after he committed his last sexual offense.

In light of these features, it is reasonably probable admission of Goldberg's testimony materially affected the jury's conclusion. The error was not harmless, and this Court should reverse the trial court's order of commitment.

2. THE COURT VIOLATED HERALD'S RIGHT TO A FAIR TRIAL WHEN IT REFUSED TO INFORM THE JURY THAT "MORE PROBABLY THAN NOT" MEANS A STATISTICAL PROBABILITY GREATER THAN 50 PERCENT.

A trial court errs when it refuses a timely proposed instruction that is supported by the evidence and correctly states the law. In re Detention of Pouncy, 168 Wn.2d 382, 389-91, 229 P.3d 678 (2010). That is what

happened in Herald's case. This Court should reverse Herald's commitment order.

The state must prove beyond a reasonable doubt that the respondent has a mental abnormality that makes him "[l]ikely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(7); In re Detention of Danforth, 153 Wn. App. 833, 841, 223 P.3d 1241 (2009), review granted, 168 Wn.2d 1036 (2010). Defense counsel timely proposed the following instruction to define this element:

"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 in this proceeding.

CP 344 (attached as Appendix A). This paragraph mirrored the first paragraph of WPI 365.14, the corresponding pattern jury instruction. (attached as Appendix B).

In a second paragraph, Herald's counsel proposed the following:

To meet the "more probably than not" threshold, the person's risk of committing future acts of predatory sexually [sic] violence must be greater than 50%.

CP 344 (citing In re Detention of Brooks, 145 Wn.2d 275, 295-97, 36 P.3d 1034 (2001)), overruled on other grounds, In re Detention of Thorell, 149 Wn.2d 724, 752-53, 72 P.3d 708 (2003). Counsel advocated for the paragraph in a conference on the instructions, but the trial court refused to

include it. The court found the paragraph articulated a "proper argument," but added that it did not need to be in the instruction. 6RP 176. The court said, "[Y]ou're certainly free to and I would expect you to put that in numerical terms for the jury as a greater than 50 percent likelihood." 6RP 176.

The trial court instead gave the following instruction:

The term "likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than will not engage in such acts if released unconditionally from detention on the sexually violent predator petition. In determining this likelihood, you may give consideration to other legal requirements or conditions to which the individual may be subject as well as to voluntary treatment options that you find would be in place.

CP 548 (attached as Appendix C).

The state should concede the second paragraph of Herald's proposed instruction is factually supported. Both Goldberg and Saleh used actuarial instruments and discussed Herald's estimated risk of reoffense in percentage terms. 6RP 89-95; 7RP 63-66. Saleh testified "more probable than not" could be expressed as 51 percent. 7RP 53. Finally, because it relies on probability assessments, predicting possible future risk is necessarily a statistical inquiry.

The state should also concede the paragraph is legally correct. Our Supreme Court has held the proof necessary to establish "more likely than

not" is a statistical probability of more than 50 percent. Brooks, 145 Wn.2d at 295-96. "[T]he fact to be determined is not whether the defendant will reoffend, but whether the probability of the defendant's reoffending exceeds 50 percent." Brooks, 145 Wn.2d at 298.

Finally, and contrary to the trial court's reasoning, counsel could not effectively convey the correct statistical standard to the jury without a supporting instruction. As the Supreme Court recently observed, "It is not sufficient that counsel were able to argue to the jury their respective understandings of the term based on expert testimony; lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is." Pouncy, 168 Wn.2d at 392. The trial court therefore abused its discretion by denying the second paragraph of Herald's proposed instruction without legitimate grounds. See In re Detention of Anderson, 166 Wn.2d 543, 552, 211 P.3d 994 (2009) (court abuses its discretion when it acts on unreasonable grounds).

The court's error was not harmless. Prejudice may be demonstrated where an erroneous instruction is applied to a close or disputed factual question. State v. Brown, 36 Wn. App. 549, 554, 676 P.2d 525, review denied, 101 Wn.2d 1024 (1984). The error prevented the jury from correctly hearing, from the court, that the state had to prove a statistical

probability greater than 50 percent. This was critical because Goldberg and Saleh came to different conclusions on the close question of whether Herald would more probably than not engage in future predatory acts of sexual violence. Moreover, the term in question implicated an element of the state's case. Pouncy, 168 Wn.2d 392-93. This Court should reverse the commitment order.

D. CONCLUSION

The trial court incorrectly permitted state's expert Goldberg to provide testimony about the typical behavior of recidivist sex offenders while incarcerated. The court also erred by refusing to properly instruct the jury on the definition of an element the state had to prove beyond a reasonable doubt. Neither error was harmless. This court should reverse Herald's commitment order and remand for a new trial.

DATED this 30 day of July, 2010.

Respectfully submitted,

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APPENDIX A

Defense proposed instruction

JURY INSTRUCTION NO. 7

“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 in this proceeding.

To meet the “more probably than not” threshold, the person’s risk of committing future acts of predatory sexually violence must be greater than 50%.

Authority: WPI 365.14 [modified per In re Brooks, 145 Wn.2d 275, 295-97 (2001) (“Washington's SVP statute is a prediction of the same level of statistical probability: more likely than not, that is, more than 50 percent.”)]

APPENDIX B

WPIC 365.14

**WPI 365.14 Sexually Violent Predators—Likely to Engage—
Definition**

“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 in this proceeding.

[In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering [placement conditions or] voluntary treatment options, however, you may consider only [placement conditions or] voluntary treatment options that would exist if the respondent is unconditionally released from detention in this proceeding.]

APPENDIX C

Court's instruction

INSTRUCTION NO. 6

The term "**sexually violent predator**" means any person who has been convicted of a crime of sexual violence and who suffers from a mental abnormality which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

The term "**crime of sexual violence**" includes rape in the first degree and child molestation in the first degree.

The term "**acts of sexual violence**" includes the crimes of child molestation (knowingly having sexual contact with a person under the age of 14 who is not one's spouse) and indecent liberties (knowingly causing another person, of any age but not one's spouse, to have sexual contact by forcible compulsion). Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party. Forcible compulsion means physical force that overcomes resistance or an express or implied threat that places a person in fear of death or physical injury.

The term "**mental abnormality**" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts to a degree making such person a menace to the health and safety of others.

The term "**volition**" refers to the power or capability of choosing one's actions.

The term "**predatory**" refers to acts of sexual violence directed toward strangers or casual acquaintances with whom no substantial personal

relationship exists or toward individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

The term **“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. In determining this likelihood, you may give consideration to other legal requirements or conditions to which the individual may be subject as well as to voluntary treatment options that you find would be in place.