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IN RE THE DETENTION OF HOSIER

STATE'S RESPONSE BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

David J. W. Hackett
Senior Deputy Prosecuting Attorney

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

ORIGINAL

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I. INTRODUCTION

Appellant Richard Hosier is a sex offender with a long and deviant history of assaulting others. His most recent sex offenses were explained in detail by the Washington Supreme Court in *State v. Hosier*, 157 Wn.2d 1, 133 P.3d 936 (2006), where the court affirmed his convictions for two counts of felony Communicating with a Minor for Immoral Purposes. Hosier committed this offense in his mid-50's so it is unremarkable that he faced civil commitment five years later after serving his maximum sentence. Because the State's evidence was overwhelming and the trial court committed no prejudicial error, Hosier's commitment as a sexually violent predator should be affirmed.

II. ISSUES

A. Does substantial evidence support Hosier's risk to reoffend when expert testimony and other facts supported a "more likely than not" level of risk, regardless of disagreement by the hired defense expert?

B. Did the trial court abuse its discretion by instructing the jury on the risk element in accord with the specific language of RCW 71.09.020 and RCW 71.09.060(1).

C. May this court determine that timeframe of the danger determination violated due process when the Supreme Court has already rejected the same arguments raised by Hosier?

III. FACTS

Richard Hosier started his sexual deviant behavior at a young age. As a teenager in Alaska, he molested up to five females ages eight and nine -- each on multiple occasions. 9/25/08 VRP 142. Hosier was caught several times but never received any punishment. Id.

Between the age of 30 and 36, Hosier estimated he raped 30 females, both minors and adults. 9/25/08 VRP 142. In each case, he picked them up as they were hitchhiking and always used a knife to force them to engage in anal and vaginal intercourse. Id. One resulted in a conviction in 1983 when he raped Susan Porter multiple times.

Porter was walking to a friend's house around midnight in the Bellevue area. 9/25/08 VRP 104. Hosier had driven by her several times and finally stopped to offer her a ride. She accepted. Id. Susan Porter lied about her name and age telling Hosier her name was Sylvia and that she was fourteen. 9/25/08 VRP 105. She was sixteen. 9/25/08 VRP 141. As Hosier got close to the location Porter was going, he sped up and pulled out a knife. Id. He then grabbed Porter's hair, yanked her head down to his groin and said, "Now you're going to give me head." 9/25/08 VRP 106. Porter complied. Id.

Hosier eventually stopped his car in a secluded area. He forcefully removed Porter from the vehicle and took her to a wooded area. 9/25/08

VRP 107. Hosier told her that he was going to rape her and ordered her down on her hands and knees. 9/25/08 VRP 108. Hosier then raped Susan Porter vaginally and anally. Id. Before leaving her alone in the woods, Hosier told Porter to count backwards from three hundred and that if she ever told anybody about the incident, he would kill her and her entire family. 9/25/08 VRP 109.

Hosier also described other incidents of picking up women, using drugs with them, and then forcibly assaulting them. 9/30/08 VRP 260. He described an incident where he picked up two girls simultaneously and in the process of attempting to rape them, one girl fought back. Id. He beat her up and then raped her anyway. Id.

At age 36, Hosier engaged in fondling and intercourse with his girlfriend's sixteen year old daughter on two occasions. 9/25/08 VRP 141. Hosier said the sexual activity was consensual. Id.

At age 50, Hosier molested three of his friend's children ages three through twelve. 9/25/08 VRP 141. Hosier touched their clad vaginas and had them touch his clad penis on a couple of occasions. Id. Hosier described the 12 year old as jumping around on his lap and touching his penis which flattered him. 9/30/08 VRP 262. Hosier got excited and touched her back. Id.

At age 55, Hosier estimated he wrote 100 notes describing sex with children including bondage. 9/25/08 VRP 140. He left notes at various locations throughout the city of Everett where they were certain to be found. Id. One note found at a cosmetology school read,

"I want to catch some real young girls and take them someplace where I can do anything I want to them (at least two) in parenthesis. First I would tie them up either between trees or stakes, cut all their clothing off of them and play with their pussies, licking, sucking and maybe even finger-fucking them. Then I'd make them play with each other eating pussies, just being real nasty with each other. I'd get all kinds of kinky toys to play with and make movies of them, using them on each other. I'd keep them for at least a week and do everything to them, spankings, all kinds of things in their pussies, assholes and mouths. When I had their pussies stretched big enough to put my whole hand inside them, open and close it, I'd let them go."

9/25/08 VRP 155.

Hosier left another note at a Bartell's store that read,

"I love licking the tight little asshole of a young girl, slipping my hungry tongue in and out while I finger fuck her pussy."

9/25/08 VRP 155-56.

There were two notes left at the residence across the street from where Hosier lived. The first note read,

"I love to eat fat young girls' pussys." 9/25/08 VRP 156.

Hosier said that he wanted to shock "the little fat girl" that lived across the street from him. 9/25/08 VRP 161. The second note read,

"Has your pussy ever been played with by a stranger who just wanted to be as nasty as he could get? Baby, I want to play with yours right now while I stick my tongue in and out of you, tight asshole."

9/25/08 VRP 156-57.

There were also two notes written on children's underwear left at a daycare. The first read,

"I love baby-sitting this little seven year old and already as nasty as big girls ever get. She does everything but fuck and real soon I'll be getting it all. She's ready and willing. Just got to open up the gold mine to heaven... Daddy."

The second read,

"She said she liked for me to play with pussy and let me lick on it and suck on it too... So nice and sweet."

9/15/08 VRP 157.

Upon Hosier's arrest for communicating with a minor, police searched his home. 9/25/08 VRP 159. Police located a "rape kit" (vest containing a rope, a knife, a vibrator, a hood-like cloth, neck ties, change of clothes and candy) 9/25/08 VRP 159. Police also located three pairs of

binoculars and children's clothing with fecal matter smeared upon it.

9/25/08 VRP 160.

Hosier was interviewed and told police that he was battling the "monster" that he suffered from for a long time as far as his sexual dysfunction. 9/25/08 VRP 160. He said that he had not re-offended since he had been out of prison, but he had been battling the urge to re-offend for some time. Id. Hosier was asked about his attitudes towards women and told police that women didn't have any value on this earth other than sexually, no matter how old or young. Hosier said that none of them could be trusted and that is why he dresses as a women - because that's the only way he could have sex with a woman that he would trust. 9/25/08 VRP 161.

Hosier was also deep into pornography. He pursued pornographic magazines on an estimated 1000 occasions. 9/25/08 VRP 144. He entered adult book stores on an estimated 100 occasions. He watched live adult shows on approximately 30 occasions. Id. He entered adult topless establishments on approximately 100 occasions. Id. He watched x-rated videos on approximately 200 occasions. Id. He estimates engaging in sexual activity with approximately 30 to 50 prostitutes. 9/25/08 VRP 145. By age 55, he was wearing female clothing on a daily basis while he masturbated. 9/25/08 VRP 144-45.

Hosier also had a history of non-sexual assaults. While in prison as a teenager in Alaska, he assaulted a prison guard and was transferred to Long Poc [sic]¹ Prison in California. 9/30/08 VRP 270. Hosier was arrested three times in the 1990's for domestic violence assaults. 9/30/08 VRP 269.

As a result of the above, Dr. Lund² diagnosed Hosier with paraphilia, not otherwise specified (NOS), rape; 9/30/08 VRP 240; pedophilia, 9/30/08 VRP 246; and antisocial personality disorder, 9/30/08 VRP 265. Dr. Lund concluded that these diagnoses cause Hosier serious difficulty controlling his sexually violent behavior if not confined to a secure facility. 9/30/08 VRP 176-80.

To evaluate a respondent's risk to reoffend, element 3, Dr. Lund uses three different methodologies. 9/30/08 VRP 284-87. The first method involves a clinical assessment of empirically validated and clinically relevant risk factors and assesses the scientific literature behind those factors. Id. The second method involves looking at sexual recidivism rates for certain classes of offenders which involves statistical survival analyses using long term follow-up studies. Id. The third method

1 Lompoc.

2 Dr. Lund is a licensed psychologist and certified sex offender treatment provider. 9/30/08 VRP 208

involves actuarial risk assessment to determine recidivism rates based on individuals who score similar to a respondent. Id.

Dr Lund considered the following empirically validated and clinically relevant factors, based on scientific literature, when he assessed Hosier:

(1) Early onset of sexual misconduct, involving offenses in adolescence with young females; (2) Early onset and persistence of antisocial behavior involving problems of noncompliance, aggression and theft; (3) Extensive drug and alcohol addiction³; (4) Involvement in a series of assaults in the early 80's that are associated with anger, interpersonal difficulties, and alcohol and drug intoxication; (5) A history of domestic violence with volatile and unstable relationships with women; (6) An extensive criminal history involving violent and non-violent offenses; (7) Meeting criteria for Antisocial Personality Disorder, and having a PCL-R score above the cut point for prototypical Psychopathy. (8) Deviant sexual interests, as evident from adolescent sexual history, self reported history of serial rapes, a rape conviction, diverse forms of sexual activity in 2002, and deviant fantasies evident from notes written; (9) Limited interest and motivation for treatment of sexual deviancy and addiction to alcohol and drugs; (10) Limited social supports; (11) Having no release plans; (12) Denial of risk; (13) Ready victim access in an uncontrolled environment affording mobility and opportunities for noncompliance with external management efforts; and (14) Cognitive distortions as evidenced from

³ Based on an extensive history of drug abuse, Dr. Lund diagnosed Hosier with: Stimulant Dependence, Alcohol Dependence, Opioid Dependence, Cocaine Dependence, and Marijuana Dependence, all in remission in a controlled environment. 9/30/08 VRP 295.

written notes associated with the 2002 conviction;
(15) Limited ability to self manage risk.

9/30/08 VRP 288-315, 10/1/08 VRP 3.

Hosier has limited family contact and people available for him on the outside. He told Dr. Lund that he didn't really have an idea of where he was going to live or how he was going to support himself. 9/30/08 VRP 312-13.

Dr. Lund gave Hosier a score of 31 on the PCL-R,⁴ a scale of psychopathy. 9/30/08 VRP 309. That score places Hosier in the 82nd percentile compared to prison inmates and the 92nd percentile compared to individuals in a forensic mental institution. Id. Dr. Lund confirmed that the empirical literature is considered pretty clear that having an anti-social disorder or psychopathy is fairly highly associated with sexual recidivism; they are two of the most strongly related factors associated with sexual recidivism. 9/30/08 VRP 309-10. He similarly testified that deviant sexual interest is also an empirically compelling risk factor. Id.

The second method Dr. Lund used was survival analysis - a statistical method that looks at graphs or data points that describe the rate at which certain people under certain circumstances fail or certain events occur when they are followed over a long period of time. 10/1/08 VRP 9. Dr. Lund then represented the results of four different studies that looked

at long-term follow-up with respect to sexual reoffending in various populations of individuals released from institutional settings. 10/1/08 VRP 10-18. He concluded Hosier is at high risk to reoffend and that at least two studies are associated with a 60 - 70 percent failure rate within ten to twelve years. Id.

Finally, Dr. Lund used actuarial instruments to assess Hosier's risk to reoffend. 10/1/08 VRP 323. Dr. Lund used the STATIC-99, MnSOST-R (Minnesota Sex Offender Screening Tool - Revised) and PRASOR (Rapid Risk Assessment for Sex Offender Recidivism). 10/1/08 VRP 247. Dr. Lund testified that follow-up studies have validated both the MnSOST-R and STATIC-99 among the best instruments to use in terms of actuarial approaches, and are relatively strong and have moderate accuracy in predicting sexual recidivism. Id. On the STATIC-99, Hosier's risk of being convicted of a new sexual offense within 15 years was associated with a 52 percent recidivism rate. 10/1/08 VRP 333-34. His risk to reoffend on the PRASOR was associated with a 37 percent recidivism rate within a 10 year period. 10/1/08 VRP 335. His risk of re-offense on the MnSOST-R was associated with a recidivism rate of 70 - 92 percent within six years. 10/1/08 VRP 341-49, 410-14.

4 Hare Psychopathy Checklist - Revised 9/30/08 VRP 304.

Dr. Lund testified that the relationship between age and recidivism is not so overpowering that its effects are sufficiently large enough to use as a single factor for determining risk. 9/30/08 VRP 283. Dr. Lund indicated that there was literature that suggests that individuals, after age 60, start to become at markedly lower risk for sexual recidivism. 9/30/08 VRP 281. However, Hosier sexually re-offended multiple times in his 50s. 9/30/08 VRP 281, 446. Dr. Lund noted that during a time when most individuals' antisocial behavior, including sexual assaults, began to remit, Hosier's behavior persisted. 10/2/08 VRP 498-500.

Dr. Lund further elaborated that actuarial instruments are an underestimate of true risk for two reasons. 10/1/08 VRP 349-51. First, official records that use conviction data to develop actuarial instruments only take into account detected and prosecuted crimes. There are a large number of crimes that go unreported or never prosecuted. *Id.* Second, the name of the crime on official records does not always reflect the true factual details. Sexual crimes may be reduced to non-sexual crimes which would not be reflected in official RAP sheets. *Id.*

Dr. Brian Abbott testified on behalf of Mr. Hosier. Dr. Abbott received his psychology license in 2002; he initially failed his written and oral exams. 10/6/08 (pm) VRP 26-27. Dr. Abbott offered testimony related only to issues of science in SVP cases and did not render an

opinion as to Hosier's level of risk. 10/6/08 (pm) VRP 20. In the preceding nine months before this trial, Dr. Abbott testified in 10-12 other SVP trials where he also only discussed the science and never rendered an opinion on an SVP respondent's level of risk. 10/6/08 (pm) VRP 25. He testifies almost exclusively for the defense. 10/6/08 (pm) VRP 22-23. In this case, Dr. Abbott read four reports from other evaluators; he did not read any of the other 3,000 plus pages of discovery including police reports or court documents. 10/6/08 (pm) VRP 20. Dr. Abbott never interviewed Mr. Hosier. 10/6/08 (pm) VRP 21.

At the time of trial, Hosier was 58 years old. 10/6/08 (am) VRP 66. Even though Dr. Abbott acknowledged the science today has data that people recidivate in their 50s and 60s, he testified based on his interpretation of actuarial instruments, no one over 50 would ever meet criteria as an SVP. 10/6/08 (pm) VRP 19-20. Dr. Abbott acknowledged that Hosier reoffended in his 50s. 10/6/08 (pm) VRP 39, 73. During cross-examination, Dr. Abbott refused to place significance in the fact that just five years before his SVP trial, Hosier was arrested with a rape kit after a long history of rapes, was writing notes wanting to sexually molest and rape young girls, and expressed to police that he is constantly battling his feelings not to re-offend. 10/7/08 (am) 556-58.

Following the evidence, the court instructed the jury in accord with the applicable statutes. The court's Instruction No. 8 read:

"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 this issue, you may consider placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention in this proceeding.

CP 266. Respondent did not object to the court's proposed instruction number 8. 10/7/08 VRP 596.

During deliberations, the jury sent an inquiry to the court regarding instruction number 8. The jury asked, "Are we to consider placement conditions in reference to petitioners Exhibit 63⁵ in regards to instruction 8?" CP __, Sub. 104. The court replied, "Yes." Id.

The jury found that the State proved its case beyond a reasonable doubt. CP 286. The trial court entered an Order of Commitment. CP 287-88. Hosier appeals.

⁵ Judgment and Sentence for Communicating with a Minor in 2002.

IV. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S DETERMINATION THAT HOSIER WAS MORE LIKELY THAN NOT TO REOFFEND

Hosier claims that the substantial evidence did not support his civil commitment under third element, which requires a jury to determine that Hosier is "more likely than not" to reoffend in a predatory and sexually violent manner. However, Hosier cannot negate the State's overwhelming evidence in this case merely by pointing to areas where his own expert disagreed with the State's proof.

The "substantial evidence" test, in the context of an SVP case, was explained in *In re Detention of Sease*, 149 Wash.App. 66, 79, 201 P.3d 1078, 1085 (2009):

¶ 29 To determine whether the jury's verdict in an SVP case was based on sufficient evidence, we must determine whether the evidence, "viewed in a light most favorable to the State, is sufficient to persuade a fair minded rational person that the State has proven beyond a reasonable doubt that [the defendant] is a sexually violent predator." *State v. Hoisington*, 123 Wash.App. 138, 147, 94 P.3d 318 (2004). "The substantial evidence test is satisfied if this court is convinced that 'a rational trier of fact *could* have found each means of [fulfilling the SVP requirements] proved beyond a reasonable doubt.'" *Halgren*, 156 Wash.2d at 811, 132 P.3d 714 (quoting *Kitchen*, 110 Wash.2d at 410-11, 756 P.2d 105).

In undertaking a substantial evidence review, the *Sease* opinion correctly notes that disagreement by the defense expert with the opinions of the State's expert is "inconsequential." *Id.* at 80. "Weighing the expert witnesses' testimony requires a determination of their credibility and

credibility determinations are for the trier of fact and are not subject to our review." *Id.*

Hosier claims four reasons why substantial evidence is lacking to support the jury's verdict. These reasons boil down to *Frye* challenges that were not made below and objections to admission of expert testimony that were not made below. Counsel for Hosier, as he did for Charles Post in a prior appeal, tries to use an inappropriate review vehicle to challenge admissibility of the evidence supporting civil commitment, rather than the sufficiency of that evidence. As this court observed in *Post*, "Post improperly attempts to transform that which should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal. In point of fact, Post attempts to sidestep the fact that he did not seek a *Frye* hearing in the trial court, and, thus, has not preserved an evidentiary challenge for review." *In re Detention of Post*, 145 Wash.App. 728, 755-756, 187 P.3d 803, 817 - 818 (2008).

Consistent with *Post*, this court should not transform a sufficient evidence review into a vehicle to make *Frye* and ER 702 objections that were not made below. The question is whether sufficient evidence exists. The question is not, as Hosier tries to frame it, whether substantial evidence exists that was properly admitted according to his scientific theories.

All of Hosier's challenges to substantial evidence fall in the category of claiming that substantial evidence is lacking because the evidence should not have been admitted or lacks credibility. He claims that actuarial instruments cannot be substantial evidence for a civil commitment because none of the instruments measure the "probability of 'predatory acts of sexual violence.'" Opening Br. at 35. He further claims that the actuarial instruments "prove nothing" because they were developed based on sex offenders in other jurisdictions. *Id.* Hosier argues that the substantial evidence is lacking because the "actuarials did not account for Hosier's advanced age, 61 years old." Opening Brief at 36. He claims -- again based on his own expert's testimony -- that the State's case lacked substantial evidence because the "base rates" of reoffense are too low. Opening Brief at 38. Finally, he argues that the alleged weaknesses in the actuarials cannot be overcome by clinical judgment. Opening Brief at 40.

These are the type of arguments that might be relevant to a *Frye* or ER 702 challenge, but Hosier has no such challenge available to him because he failed to object below. *See Post*, 728 Wn. App. at 755-56 (arguments disallowed because Post failed to preserve *Frye* and evidentiary challenges below). In reviewing the record for substantial evidence, this court does not weigh the evidence or view it in the light

most favorable to Hosier. Rather, as noted above, it is viewed in a light most favorable to the state. For these reasons, Hosier's substantial evidence arguments should be rejected.

On this record, there was substantial evidence that Hosier was more likely than not to reoffend in a sexually violent manner. As supported by Hosier's lengthy history of reoffense -- including an offense in his mid-50s -- Dr. Lund opined that Hosier was more likely than not to reoffend in a predatory and sexually violent manner. VRP 9/30/2008 at 229. He testified that Hosier had serious difficulty controlling his behavior. *Id.* at 276-280. He supported his testimony with actuarial analysis, clinical analysis based on his substantial experience and clinical research.

The current case is no different from *Post*, where the court rejected a similar challenge to the "quantity and quality of evidence" supporting the jury's verdict. 145 Wn.App. at 756. In finding sufficient evidence, this court noted that:

¶ 55 The State's expert opined that Post has severe difficulty controlling his sexually violent behavior and is more likely than not to reoffend unless he is in a confined setting. Dr. Rawlings based his opinion on his interview with Post as well as his review of 13,000 pages of records including Post's criminal history, sexual history, client history, relationship history, psychological history, substance abuse history, and sex offender treatment history. *The jury was free to believe the testimony of the State's expert witness.* There was no error.

(Emphasis added).

Likewise, in *In re Fair*, 139 Wash.App. 532, 542, 161 P.3d 466, 471 (2007), this court found that substantial evidence supported a civil commitment due to expert opinion backed up by a long history of deviance, offending and psychopathy. As in *Post*, the court noted that substantial evidence of risk was supported by testimony from the State's expert:

¶ 34 Fair argues that these findings are unfounded because the only evidence he was likely to reoffend was his reluctance to stop fantasizing sexually about minors. But Fair overlooks Doren's testimony that a high degree of psychopathy, coupled with sexual deviance, creates a very high risk of sexual reoffense. Doren relied on the PCL-R to assess the degree of Fair's psychopathy and concluded that Fair had a "high degree of psychopathy." RP at 320. Doren explained that research has established that people such as Fair, who score high in psychopathy and sexual deviancy, recidivate sexually at a very high rate. Doren testified that Fair had "the highest risk combination" and concluded that Fair was more likely than not to commit acts of sexual violence unless confined in a secure facility. RP at 333. This evidence is sufficient to support findings of fact 74 and 78.

Id.

Finally, without any citation to authority or a constitutional provision, Hosier argues that it is unconstitutional to civilly commit individuals based on a risk to reoffend. Opening Brief at 42. However, the very example that Hosier gives to claim the lack of respect for "minimal fairness," was used by the Washington Supreme Court to justify civil commitment:

Applying this notion to the SVP statute yields this: when an expert testifies that a person has a likelihood of reoffending, it means that of the persons *297 who suffer from this mental abnormality or personality disorder, more than 50 percent will engage in predatory acts of sexual violence if not confined in a secure facility. Of 100 similarly afflicted offenders, more than 50 would reoffend if not so confined.

In re Detention of Brooks, 145 Wash.2d 275, 296-297, 36 P.3d 1034, 1046 (2001), *reversed on other grounds In re Detention of Thorell*, 149 Wash.2d 724, 734, 72 P.3d 708, 715 (2003). A 50% plus likelihood to reoffend is sufficient to allow civil commitment. *Id.* As such, minimal fairness and constitutional concerns were amply satisfied in this case.

V. THERE WAS NO INSTRUCTIONAL ERROR

Hosier offers an overly pedantic reading of the instructions to claim that the defense case was not considered by the jury, but overlooks an answer to a jury question that resolved any instructional ambiguity. His further claim of instructional error due to rejection of a 50% plus instruction offered by the defense fails to demonstrate error. Finally, Hosier misquotes the instruction in claiming that the "released unconditionally" language precluded consideration of his existing community placement conditions.

A. The Old WPIC Instruction Was Not Error

Hosier claims that Instruction No. 8, which was based on the prior WPIC , somehow "prevent[ed] the jury from considering evidence that Hosier would be subject to six years of court-ordered conditions of supervision if released." Opening Br. at 43.

As an initial matter, Hosier has failed to show that he preserved any error on this issue. He nowhere cites any portion of the record where he took exception to this instruction. Indeed, he did not object to this instruction. 10/7/08 VRP 596. As a result, the court should refuse to review this issue.

First, the rules applicable to civil cases preclude a party from challenging a jury instruction for the first time on appeal. It is well established that RCW 71.09 proceedings are civil in nature and subject to the rules of civil procedure. *In re Detention of Young*, 163 Wash.2d 684, 689, 185 P.3d 1180, 1183 (2008). Because this is a civil case, a claim of instructional error cannot be raised for the first time on appeal:

CR 51(f) requires the party objecting to an instruction to "state distinctly the matter to which he objects and the grounds of his objection, ..." The purpose of this rule is "to clarify ... the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction." *Stewart v. State*, 92 Wash.2d 285, 298, 597 P.2d 101 (1979). "The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Crossen v. Skagit Cy.*, 100 Wash.2d 355, 358, 669 P.2d 1244 (1983). If an exception is inadequate to apprise the judge of certain points of

law, " 'those points will not be considered on appeal.' " *Crossen* at 359, 669 P.2d 1244 (quoting *Stewart*, 92 Wash.2d at 298, 597 P.2d 101).

Walker v. State, 121 Wash.2d 214, 217, 848 P.2d 721, 723 (1993).

Because Hosier failed to lodge any objection to this instruction, much less a specific one, it would be error on appeal to consider his claim that the jury should have been instructed on unanimity. *Id.* ("This court therefore will not consider Ms. Walker's contention that instruction 18 misstated the law, nor should the Court of Appeals have done so.").

A second independent means for refusing to address Hosier's new claim of instructional error is found in RAP 2.5 (a). This rule of appellate procedure provides that "the appellate court may refuse to review any claim of error not raised in the trial court." The basic policy behind this rule is simple: a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.

State v. Guloy, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986).

Finally, the court should refuse to review this issue under the invited error doctrine. When a defendant has failed to request the alleged missing instruction or proposed the instruction he now claims to be defective, the doctrine of invited error precludes review. *State v.*

Henderson, 114 Wash.2d 867, 868, 792 P.2d 514 (1990). The invited error

doctrine applies even where an alleged error is of constitutional magnitude. *Henderson*, 114 Wash.2d at 871, 792 P.2d 514 (quoting *State v. Alger*, 31 Wash.App. 244, 249, 640 P.2d 44, *review denied*, 97 Wash.2d 1018 (1982)).

Here, Hosier has not preserved his current claim of error. The Washington Supreme Court has applied preservation of error doctrine to sexually violent predator cases because, among other reasons:

[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

In re the Detention of Audett, 158 Wash.2d 712, 725, 147 P.3d 982 (2006) (citing 2A Karl B. Teglund, *Washington Practice: Rules Practice RAP* 2.5(1), at 192 (6th ed. 2004)).

Even if preserved, Hosier fails to demonstrate error. Jury instructions are sufficient when they allow parties to argue their case theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). 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).

Hosier offers an overly literal reading of Instruction No. 8. Despite Instruction Number One, which requires the jury to consider all the evidence, CP 257, Hosier claims that the jury read Instruction No. 8 to exclude relevant evidence on risk. Read in this pedantic manner, the instruction would allow the jury to evaluate risk considering only the SVP respondent's placement conditions and voluntary treatment options. CP 264; Opening Brief at 47. If Hosier is correct in this narrow reading, then he has no ground to complain because the jury would have no means to consider the State's evidence and would limit its consideration to the SVP respondent's placement evidence. It is entirely unlikely that the jury read the instruction in this overly narrow manner, especially when both sides argued the correct meaning in closing arguments and the jury committed Hosier after considering the State's broader evidence. *See* VRP 10/8/08 (closing arguments).

As given by the court, Instruction No. 8 mirror's the statutory language in RCW 71.09.060(1):

In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, *the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition.*

(Emphasis added). An instruction which follows the words of a statute is proper unless the statutory language is not reasonably clear or is misleading. *Borromeo v. Shea*, 138 Wn. App. 290, 294, 156 P.3d 946 (2007).

The placement of “only” in both the former pattern instruction and the statute is reasonably read as limiting the fact finder to consider placement conditions and voluntary treatment options only if they would really exist in the community rather than directing the fact finder to ignore all other evidence in deciding whether the defendant is likely to engage in predatory acts. Certainly, Instruction Number One supports this notion by requiring jurors to decide the case "based upon the evidence presented to you during this trial." CP 257.

Although the current version of WPI 365.14 provides a clearer statement of the law, the prior version was not in error. Indeed, the amendment was preventative to avoid a situation where a party might argue that the instruction should be read to eliminate the evidence. In comments to the amendment, it is noted that the prior version could be error, but only if incorrectly interpreted:

The original version of this instruction, published in 2004, has since been revised. **The original version could have been interpreted as permitting the jury to consider only placement conditions and voluntary treatment options when determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, even if other evidence relevant to the question has been admitted.** The current instruction makes clear that the jury is not prohibited from considering such evidence when it has been admitted by the trial court.

WPIC 365.14 (emphasis added). Importantly, the comment does not condemn the prior version as a misstatement of the law or label the prior version as misleading.

Although the old version of WPIC 365.14 was arguably subject to misinterpretation, there is no indication that it was misinterpreted in the current case. The closing arguments offered by both sides did not misinterpret the instruction. VRP 10/8/2008. To the contrary, both sides noted all the relevant evidence in urging the jury on the risk element. There is no hint in the record that either party tried to convince the jury to ignore any of the evidence beyond placement conditions and treatment options. Both parties vigorously emphasized the testimony of the experts and Hosier's existing placement conditions. Other instructions clearly direct the jury to consider all of the evidence. Rather than presuming that the jury rejected the other instructions, it is reasonable to presume that they read and applied the instructions as a whole.

Hosier also fails to demonstrate a reasonable possibility that the outcome of the trial would have been different if the current version of the WPIC instruction had been given. *See Goodman v. Boeing Co.*, 75 Wash.App. 60, 68, 877 P.2d 703 (1994) (error must be prejudicial). The prior version of the WPIC instruction given by the trial court does not misstate the law. The jury was clearly instructed on the elements required to be proven beyond a reasonable doubt from all of the evidence. The instructions read as a whole clearly direct the jurors to consider all of the evidence admitted at trial.

Both counsel argued the impact of all the evidence on the question whether Hosier was “likely to engage in predatory acts of sexual violence if not confined in a secure facility” focusing primarily upon evidence other than conditions of placement and voluntary treatment options. No one offered any direct or implied argument that the jury was restricted to evidence of placement conditions and voluntary treatment options. Hosier's attorney was clearly able to argue his theory of the case under the instructions given by the court.

Finally, any possible error was resolved by the court's response to a jury question. During deliberations, the jury asked: "Are we to consider placement conditions in reference to petitioner's Exhibit 63 in regards to instruction 8?" CP 254. The court answered simply and appropriately,

"yes." *Id.* at 255. Because the jury is presumed to follow the court's instruction, there is no chance that the jury decided risk absent a full consideration of Hosier's claims.

B. The Court Is Not Required to Depart From Statutory Language to Use "50 Percent Plus" Language

Hosier 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 50. However, it is conceded that the court instructed the jury using the statutory language in the WPIC. Although Hosier 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. *See Griffin*, 143 Wn.2d at 91 (wording of a legally proper instruction is reviewed for abuse of discretion).

Under RCW 71.09.020(7) and the applicable WPIC, "'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). Instruction Number 8, as given by the court, mirrors this language.

Hosier 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% number. Hosier 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.

Finally, the wording of the proposed defense instruction is misleading, or at least, awkward. It is unclear what it means to instruct the jury that "more probably than not" represents a "statistical probability" greater than 50%. A statistical probability of what? By placing it in a number equation, rather than a word equation, the effect of the defense instruction is to overemphasize the actuarial approach. There is no need for a jury to reach a precise reoffense number, or to rely on the actuarial instruments. Rather, they must be convinced that the person more probably than not will reoffend in a sexually violent and predatory manner. By instructing in the language of the statute, the trial court committed no error.

C. Hosier Misstates the "Released Unconditionally" Standard

Hosier claims that Instruction Number 8 required the jury to ignore his existing release conditions. However, Hosier reaches this argument only by misquoting the instruction. Rather than "released unconditionally," it actually says: "if released unconditionally from

detention *in this proceeding.*" CP 266. This means that the jury is required to consider "placement conditions and voluntary treatment options that would exist" in the absence of the court's SVP jurisdiction, *i.e.* things that exist if Hosier is released unconditionally from the SVP petition.

In accord with the statutory language, the instruction thus required the jury to consider Hosier's existing release conditions. Opening Brief at 55. They were argued by defense in closing and reflected in the answer to the jury's question. CP 254. Hosier's argument on this point is frivolous.

VI. THE RISK INQUIRY SATISFIED DUE PROCESS

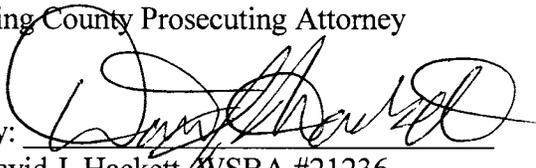
Hosier acknowledges that his arguments on this issue are foreclosed by the Washington Supreme Court decision in *In re the Detention of Moore*, 167 Wn.2d 113, 216 P.3d 1015 (2009). The State agrees. However, it is a fallacy for Hosier to argue that his reoffense rate did not exceed 50% on the Static 99 until he is 75 years old. To the contrary, the *current* risk to reoffend (as measured with only a 15 year follow-up period) exceeds 50% on the Static for the group that best describes Mr. Hosier. If his risk of reoffense one day drops below that threshold, the annual review provisions of RCW 71.09.090 are available to him.

VII. CONCLUSION

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

DATED this 25th day of May 2009.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

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