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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

NO. 37617-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

MYOUNG PARK,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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PM 3-20-09

TABLE OF CONTENTS

I. ISSUES PRESENTED 1

A. Where the instruction given to the jury closely tracked existing statutory language, and where Appellant did not object to use of the instruction, is Appellant now entitled to a new trial because the disputed instruction deviated from the Washington Pattern Instructions? 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 1

A. Appellant Has Waived Objection To The Jury Instruction He Now Challenges 2

B. The Instructions As Given Were Sufficient 3

C. Even If There Was Error, It Was Harmless Error 13

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Borromeo v. Shea,
138 Wn. App. 290, 156 P.3d 946 (2007) 4

Cox v. Spangler,
141 Wn.2d 431, 5 P.3d 1265 (2000) 3

Goodman v. Boeing Co.,
75 Wn. App. 60, 877 P.2d 703 (1994),
aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995) 4

Griffin v. West RS, Inc.,
143 Wn.2d 81, 18 P.3d 558 (2001)
citing *Douglas v. Freeman,*
117 Wn.2d 242, 814 P.2d 1160 (1991) 4

In re Detention of Audett,
158 Wn.2d 712, 147 P.3d 982 (2006) 3

Keller v. City of Spokane,
146 Wn.2d 237, 44 P.3d 845 (2002) 4

State v. Bailey,
114 Wn.2d 340, 787 P.2d 1378 (1990) 2

State v. LeFaber,
128 Wn.2d 896, 913 P.2d 369 (1996) 6

State v. Salas,
127 Wn.2d 173, 897 P.2d 1246 (1995) 2, 3

State v. Wanrow,
88 Wn. 2d 221, 559 P.2d 548 (1977) 6

Statutes

RCW 71.09 14

RCW 71.09.060(1) 4, 5

Other Authorities

WPI 365.14 ..... 5, 6, 13

Rules

CR 51(f) 2

CR 51(g) 7

CR 51(h) 7

RAP 2.5(a) 2

RAP 2.5(a)(3) 3

I. ISSUES PRESENTED

A. Where the instruction given to the jury closely tracked existing statutory language, and where Appellant did not object to use of the instruction, is Appellant now entitled to a new trial because the disputed instruction deviated from the Washington Pattern Instructions?

II. STATEMENT OF THE CASE

Respondent accepts Appellant Park's statement of the case except as otherwise noted below.

III. ARGUMENT

Park argues that this case should be reversed because the trial court gave a WPI instruction that closely tracked existing statutory language but had, by the time of trial, been superseded by a substitute WPI. Appellant's Brief at 15. This argument must be rejected. First, Park, by failing to object to the now-disputed instruction at the time of trial, has waived any objection he might have had to it. Even if permitted to raise this argument for the first time on appeal, it is without merit. The disputed instruction closely tracked existing statutory language, was legally sufficient and did not prevent Park from arguing his theory of the case. The instruction, when read in conjunction with the other instructions, informed the jury of the applicable law. Finally, even if the instruction was error, any error was harmless.

A. Appellant Has Waived Objection To The Jury Instruction He Now Challenges

Park argues, for the first time on appeal, that the trial court erred in

giving Instruction 6. Park waived this issue by not objecting at the time, and cannot raise it now for the first time on appeal.

An appellant must take exception to a jury instruction at trial to preserve the issue for appeal. *State v. Salas*, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995); CR 51(f); RAP 2.5(a). That rule, as the *Salas* Court noted it had explained "clearly and often," "is not a mere technicality." 127 Wn.2d at 181.

> CR 51(f) requires that, when objecting to the giving or refusing of an instruction, "[t]he objector shall state distinctly the matter to which he objects and the grounds of his objection." The purpose of this rule is to clarify, at the time when the trial court has before it all the evidence and legal arguments, the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction.
>
> Therefore, the objection must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal.

Id., 127 Wn.2d at 181, citing *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990) (internal citations omitted). Opposing parties should have an opportunity at trial to respond to allegations of error "rather than facing newly asserted errors or new theories and issues for the first time on appeal." *In re Detention of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006). An exception to this rule exists in the case of "manifest error affecting a constitutional right." *Salas*, 127 Wn.2d at

183; *see also* RAP 2.5(a)(3).

Here, Park has waived any objection he might have had to this instruction. After all the evidence had been presented, the parties went on the record to discuss jury instructions. Park, who had not proposed any instructions of his own (8RP at 699), raised no objection to the now-disputed Instruction 6. Had Park raised this issue at the time, the parties could presumably have obtained a copy of the then-current WPI and used it instead. Park cannot rely upon his own failure to have given both the State and the trial court an opportunity to respond to his concerns only now to argue that he is entitled to a new trial. He has waived this issue by not objecting at trial, and cannot raise it now for the first time on appeal.

B. The Instructions As Given Were Sufficient

Even if permitted to raise this issue for the first time on appeal, Park's argument fails, because he has not established 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). 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). 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).

The jury instructions in Park's case were sufficient to inform the jury of the applicable law. Instruction 6 reads as follows:

> "Likely to engage in predatory acts of sexual violence if not confined in a secured 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 only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention in this proceeding.*

CP at 22 (emphasis added). This instruction was based on the language of former WPI 365.14, which in turn tracked language contained within RCW 71.09.060(1):

> The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. *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...*

71.09.060(1) (emphasis added).

In 2006, the above WPI was modified to read as follows:

> "Likely to engage in predatory acts of sexual violence if not confined in a secured 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.]

WPI 365.14 (as amended in 2006) (brackets in original, emphasis added).

Explaining the revision, the Comment to the revised WPI notes that:

> 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.

Comment to WPI 365.14. (emphasis added).

As is clear from the above, Instruction 6 was and is a correct statement of the law, in that it tracked what was then and what remains the

applicable statutory language. This is in stark contrast to the cases relied upon by Park, in which the court concluded that the various disputed jury instructions did not, in fact, accurately reflect the law. See e.g. *State v. Wanrow*, 88 Wn. 2d 221, 559 P.2d 548 (1977) (reversal warranted where instructions, of "critical importance" to the defendant's theory of the case, incorrectly sets forth law of self-defense). *See also State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996) (reversal warranted where jury instruction on self-defense erroneously stated law with regard to proof of imminent danger of harm).

Nor does Instruction 6 create confusion when read in conjunction with other instructions. Throughout the court's instructions, the jury is reminded of its duty to consider all of the evidence. This emphasis began prior to trial, during the court's reading of its preliminary instruction, during which the jury was admonished to "decide the facts in this case *based upon the evidence presented to you during this trial.*" (emphasis added) Preliminary Instruction, 3RP 148; CP at 104-09.[1] In that same preliminary instruction, the jury was instructed that they must "not consider or discuss any evidence that I do not admit or that I tell you to disregard;" that the

[1] The court's preliminary instruction is not included in the instructions filed with the court. The record indicates that a preliminary instruction was read to the jury. 3RP at 148. Park did not submit any instructions (8RP at 699), and it is assumed, given the court's various references to WPIs (8RP at 697, 698), that the court read from the preliminary instruction set forth in WPI 365.01, which was submitted by the State.

evidence in the case could come from various sources, including "testimony of witnesses or actual physical objects, such as papers, photographs, or other exhibits;" that the lawyers' comments were not evidence, and that "the evidence is the testimony and the exhibits." *Id.*

After trial, the instructions were both read to and provided to the jury. 8 RP at 704; CR 51(g), (h). Instruction No. 1 instructs the jury that it is their duty "to decide the facts in this case based *upon the evidence presented to you during the trial.*" It states that they are "the sole judges of the credibility of the witness," and "the value or weight to be given to the testimony of each witness" based upon a variety of factors. CP at 15 (emphasis added). Each juror is instructed to "decide the case for yourself, but only after an impartial consideration of *all of the evidence* with your fellow jurors," and that the juror "should not hesitate to re-examine your own views and to change your opinion *based upon the evidence.*" CP at 16-17 (emphasis added). Instruction 2 instructs the jury as to how to consider and weigh the opinion of any expert at trial. Instruction 3 defines "reasonable doubt" as "such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering *all of the evidence or lack of evidence.*" CP at 18 (emphasis added). Instruction 22, the "elements" instruction, instructs the jury that the State "must prove each of the following elements beyond a reasonable doubt:

> (1) That Myoung Park has been convicted of a crime of sexual violence, namely, Child Molestation in the Second Degree, or Assault in the Second Degree with Sexual Motivation;
>
> (2) That Myoung Park suffers from a mental abnormality or personality disorder which causes him serious difficulty in controlling his sexually violent behavior; and
>
> (3) That this mental abnormality or personality disorder makes Myoung Park likely to engage in predatory acts of sexual violence if not confined to a secure facility."

The instruction goes on to say:

> If you find *from the evidence* that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that Myoung Park is a sexually violent predator.
>
> On the other hand, if, *after weighing all of the evidence*, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that Myoung Park is not a sexually violent predator.

CP at 38 (emphasis added). Finally, Instruction 23 instructs the jurors that it is each juror's duty to "discuss each issue submitted for your decision fully and fairly," referring to the jury's review of "the evidence and instructions" as well as exhibits. CP at 39.

These instructions, repeatedly emphasizing the need to consider all of the evidence, permitted Park to fully and fairly argue all aspects of his case. The parties' closing arguments made this equally clear. In its closing, the State discussed all aspects of the evidence presented to the jury, all of which were relevant to the question of Park's likelihood to reoffend. The

State discussed Park's mental condition (9RP 709-22), volitional capacity (9RP at 722-23), apparent failure to admit, on any consistent basis, that he had done anything wrong (9RP at 727, 729), absence of any plans to obtain treatment in the event of his release (9RP at 756), cognitive distortions (9RP at 729), and his inability to follow direction, cooperate with supervision, or otherwise be in the community without reoffending. 9RP at 724-28. Discussing evidence that pointed to Park's "serious difficulty" controlling his behavior (9RP at 730-31), the State's attorney repeatedly linked this evidence to the issue of Park's likelihood to reoffend: She noted, for example, that the state had called certain witnesses "to show the pervasive pattern of Mr. Park's offending, his sheer inability to control his sexual impulses." 9RP at 757-58. His behavior, she noted, "may start with the hug, and it may start with an inappropriate sexual comment, conversation, and it doesn't matter." 9RP at 759. At some point, however, "in Mr. Park's mind it switches over to where he can't control the impulse." *Id.* This, she argued, was evidence of "a mental abnormality that causes him serious difficulty controlling his behavior and makes him likely to commit future predatory acts of sexual violence." *Id.*

> Where you have an individual that is wandering around the neighborhood, walking into people's homes unannounced and uninvited, and sexually assaulting them, grabbing their breasts right in front of their husbands, right next to a –fairly close to a police officer in a mall, that is somebody who has serious difficulty controlling his behavior, and we are

> beyond it at that point. He cannot control it...The problem is that Mr. Park cannot control himself. *It makes him a danger if he is released, and he is likely, which is more than 50 percent, to keep on doing what he has been doing.*

9RP at 759-60 (emphasis added). The State also made extensive reference to Dr. Tucker's testimony regarding likelihood to reoffend, discussing his use of actuarial instruments and the role of treatment in assessing risk. 9RP 724-29.

The defense, as well, discussed the case in its entirety, and referenced various aspects of the testimony relevant to the overall question of Park's likelihood to reoffend. Park's attorney began by comparing a case to a Greek play in which, "Act 2" consists of "witnesses, evidence, things that are admitted in evidence." 9RP at 739. In "Act 3," or closing, "we tell you what we think we have told you and try to explain it." *Id.* Arguing that Park was "a very social guy," he suggested that "everything that he does is not motivated for sexual gratification." 9RP at 741, 753-54. He contested Park's diagnosis, arguing that the DSM was "never designed for use in a forensic setting;" (9RP at 745) that "fixation" was not a "mental problem" (9RP at 741, 754-55), that the State's "parade of witnesses", "from a clinical standpoint," was simply a "red herring," (9RP at 744) and that Dr. Tucker knew nothing about Park's urges and fantasies, essential, he suggested, for purposes of diagnosis of pedophilia. 9RP at 747-49. Park, he argued, did not actually harm anyone (9RP at 744) and his behavior, rather

than demonstrating a preference for children, demonstrated only that Park may be a child molester, "looking for crimes of opportunity." 9RP at 742, 747-49. He challenged Dr. Tucker's conclusions, arguing that the evidence upon which Dr. Tucker relied might or might not be true, and that Park's statements to Dr. Tucker may have been incorrectly translated. 9RP at 746. He also suggested that Dr. Tucker might be biased, noting that he was well paid for his services, and implying that, "if Dr. Tucker wants more work like this," he would testify that Park met criteria for commitment. 9RP at 747.

Park's counsel also specifically discussed Park's risk of reoffense during closing. He challenged both Dr. Tucker's use and scoring of one of the actuarial instruments, the Static 99 (9RP at 749-51), arguing that Park's risk of reoffense was declining with age (9RP at 750), and that, while Park "may very well have a mental disorder," he did not have a "mental disorder that predisposes him to commit future acts of sexual violence." 9RP at 751-52. Although the defense had questioned Dr. Tucker extensively regarding the conditions of release to which Park would be subject during its cross examination (7RP 564-68; Exhibit 6), he did not discuss these conditions in closing, arguing only that past supervision by DOC was inadequate (9RP at 742-43) and that improved supervision would be enough to mitigate Park's risk to a level that would allow the jury "to sleep at night." 9RP at 755. He

ended his argument by urging that "Mr. Park needs treatment. Mr. Park needs care. Mr. Park needs control," but that "commitment to the Special Commitment Center is not the best way for him to get this help." 9RP at 755.

Park now urges that, notwithstanding the court's repeated admonishments to the jury regarding their duty to carefully consider all of the evidence, and counsels' extended discussion of the evidence presented to them, this Court must assume that the jury, having listened to roughly five days of testimony from nine witnesses, including more than two days of expert testimony, and having been presented with numerous exhibits, would conclude, based on one instruction (that in fact correctly states the law), that they were prohibited, in making their decision, from considering almost everything they had just heard.

This argument strains credulity, and dramatically overstates the significance of the change in the WPI 365.14. As noted, the WPI committee was apparently concerned that the statutory language, as reflected in the earlier WPI, *could* be misinterpreted by a jury. There is no indication that the language had in fact ever been misinterpreted, or that it had been determined—whether by a superior or appellate court—to have led to any confusion. Rather, the change appears to have been made in an abundance of caution on the part of the WPI committee, concerned with the mere

possibility—not the probability—of jury confusion.

Park's assertions are not persuasive in light of the other instructions given to the jury, the arguments made by counsel, or common sense. It is clear that Instruction 6 in no way limited the ability of the defense to argue its theory of the case and that the instructions, read in their entirety, properly informed the jury of the applicable law. Park's argument should be rejected.[2]

C. Even If There Was Error, It Was Harmless Error

In the highly unlikely event that the jury in fact believed that, for purposes of determining whether Park was likely to reoffend, it was prohibited from considering most of the evidence it had heard, there was still sufficient information presented regarding the terms of Park's release upon which a reasonable jury would have concluded that Park, if released under those conditions, was likely to reoffend. Thus, even if there was error, it was harmless error, and reversal is not warranted.

Had the jury not committed Park, he would, upon release, been subject to the terms and conditions contained in Appendix H of the

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[2] Nor was there any evidence that the jury was at all confused by the instructions. The record indicates that closing arguments were completed at 4:55 on April 3, 2008, and that court was to be resumed April 4th at 9:00 AM. 8RP at 772. Deliberations began at 9:00 AM on April 4 and the jury reached a verdict by 10:00 AM the same day. 9RP at 777-78; CP at ___ (the State has submitted a supplemental designation of clerk's papers which includes the clerk's minutes for April 4). There is no indication that the jury submitted any questions during deliberations.

October 24, 2001, Judgment and Sentence, submitted to the jury as Exhibit 6. 6RP at 500. The evidence considered in its entirety makes clear that those conditions of supervision would have been wholly inadequate to protect the community. Park testified in his deposition regarding his plans, stating that, if released, he planned to live with his sister for a while and then return to Korea. Ex. 13 at 63-64. Dr. Tucker testified, however, that his planned placement with his family was insufficient. Park's family, he testified, did not appreciate the risk Park posed, as demonstrated both by their failure to adequately monitor him when he lived with them in 2001-2002 (6RP at 502), and by their contacts with staff at the Special Commitment Center since that time.[3] 6RP at 501-02.

Moreover, the jury heard extensive (video) testimony from Park himself regarding his own attitudes toward his danger to the community if released. Asked about his plan to live with his sister, he stated that he had never talked to her about his history of sex offenses (Ex. 13 at 65), and that he did not know if any children lived in his sister's neighborhood or if they would be around her home. Ex. 13 at 65-66. He testified that he had no plans to seek sex offender treatment or to inform any neighbors of his history (Ex. 13 at 66), that he did not think that parents of young girls

[3] The Special Commitment Center (SCC) is a secure facility, located on McNeil Island, where persons detained pursuant to RCW 71.09 are housed both pending and following commitment.

needed to be concerned about his touching their daughters (Ex. 13 at 67), and that he did not believe that there should be any special precautions taken with regard to his being around young girls. *Id.*

In addition, the jury heard testimony to the effect that the conditions that would be imposed if he were released would be less strict than those that were in effect in 2001-02. 6RP at 500-01. Monica Grupp, his parole and probation officer after his 2001 release on his Special Sex Offender Sentencing Alternative (SSOSA) sentence, testified that she had gone over his conditions with him the first time they met, and every time thereafter. 4RP at 234, 238, 239, 257. Although he had repeatedly assured her that he understood that he could not be around minors, he violated that prohibition. 4RP at 238-39, 244, 249. This was not surprising, in light of Park's own apparent failure to grasp the danger he presented to children: Dr. Tucker testified that Park "does not see what the problem would be if he were to approach or be around young children or young girls. He doesn't think that people need to be concerned about that." 6RP at 502. Even after the consequences Park has been forced to suffer, Dr. Tucker observed, "I just don't see any change in Mr. Park that would make me think that things would be any different this time than that they were last

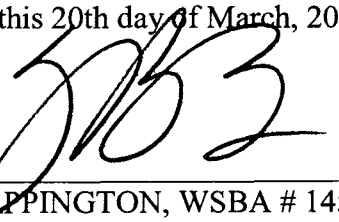
time." 6RP at 502-03.[4]

The instructions given by the court were sufficient, and there was no error by virtue of the court's having given Instruction 6. Even if there was error, however, it was harmless in light of the abundant evidence of Park's risk to reoffend under the proposed conditions of his release to the community.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Park's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 20th day of March, 2009.



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[4] The jury was reminded of most of this testimony during the State's rebuttal closing. 9RP at 766-67.

NO. 37617-2-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: Myoung Park, Appellant.	DECLARATION OF SERVICE

COURT OF APPEALS DIVISION II
09 MAR 23 AM 8:55
STATE OF WASHINGTON
BY DEPUTY

I, Jennifer Dugar, declare as follows:

On this 20th day of March, 2009, I deposited in the United States mail true and correct cop(ies) of Brief Of Respondent and Declaration Of Service, postage affixed, addressed as follows:

Eric Nielsen and Casey Grannis
Law Offices of Nielsen, Broman & Koch, PLLC
1908 E Madison Street
Seattle, WA 98122-2842

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

DATED this 20th day of March, 2009, at Seattle, Washington.

JENNIFER DUGAR

ORIGINAL