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COA NO. 61871-7-I

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

IN RE DETENTION OF NATHAN KERR,

STATE OF WASHINGTON,

Respondent,

v.

NATHAN KERR,

Appellant.

FILED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ellen J. Fair, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. KERR'S TRIAL COUNSEL WAS INEFFECTIVE IN PROPOSING AN INSTRUCTION THAT PROHIBITED THE JURY FROM CONSIDERING RELEVANT EVIDENCE ON THE ISSUE OF WHETHER KERR WAS LIKELY TO COMMIT FUTURE ACTS OF PREDATORY SEXUAL VIOLENCE.

The State claims jury instructions in SVP cases need not be manifestly clear because that standard applies only in criminal cases. BOR at 8-10. The "manifestly clear" standard derives from the recognition that juries lack the interpretive tools of appellate courts when faced with the need to resolve ambiguous language in a jury instruction. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). The State cites no authority for the proposition that juries in civil cases possess the extraordinary interpretive skills that their counterparts in criminal cases lack. Nor does it cite any authority that jury instructions pass muster when they are less than clear. The stakes are just as high in SVP cases as they are in criminal ones. The "manifestly clear" standard is appropriate.

The State claims Instruction 7 was an accurate statement of the law because it follows the wording of RCW 71.09.060(1). BOR at 7-8. An instruction that follows the words of a statute is improper when the statutory language is misleading or not reasonably clear. Borromeo v. Shea, 138 Wn. App. 290, 294, 156 P.3d 946 (2007). The words of RCW

71.09.060(1) are misleading or at best ambiguous when converted into a jury instruction limiting the type of evidence the jury may consider in deciding the issue of risk of reoffense. WPI 365.14 was changed due to the committee's realization that the statutory language, when reproduced verbatim as a jury instruction without qualifying language, could be interpreted by the jury in a manner that misstates the law. Comment to WPI 365.14.

"Jury instructions are meant to instruct the jury on what law to apply to the facts it finds." State v. Tang, 75 Wn. App. 473, 476, 878 P.2d 487 (1994). "[A]n instruction that is correct in the abstract, or correct as applied to one set of facts, may become misleading when applied to another set of facts." State v. Irons, 101 Wn. App. 544, 553, 4 P.3d 174 (2000). Kerr's argument is precisely that the statutory language used in Instruction 7 was misleading and unclear because it distorted what law jurors were to apply to the facts of Kerr's case on the risk of reoffense issue. The jury was indisputably entitled to consider *all* evidence relevant to the issue of risk of reoffense, not just the evidence specified in RCW 71.09.060(1).

The State asserts Instruction 7 does not create confusion when read in conjunction with other instructions. BOR at 10-13. But when faced with Instruction 7's specific command to limit the type of evidence to be

considered on a particular issue and generalized instructions to consider all the evidence in reaching a verdict, a jury is likely to treat the specific command on a specific issue as trumping the generalized instructions to consider all the evidence in reaching a verdict.

For example, Instruction 1 provides "You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case." CP 133. This instruction tells the jury to follow Instruction 7 command to only consider certain evidence in determining the issue of risk. Instruction 1, however, further states: "In deciding this case, you must consider all of the evidence that I have admitted. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it." CP 133. Instruction 1, which generally tells the jury to consider all admitted evidence in reaching its verdict, cannot be reconciled with Instruction 7, which specifically prohibits the jury from considering evidence directly relevant to a particular issue. Jurors in LeFaber and Wanrow¹ were doubtless instructed they could consider all the evidence too, but the single self-defense instruction restricting the evidence that could be considered on a particular issue in those cases remained reversible error.

¹ State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977).

Internally inconsistent jury instructions are ambiguous. Irons, 101 Wn. App. at 553. When jury instructions read as a whole are ambiguous, the reviewing court cannot assume that the jury followed the legally valid interpretation. State v. McLoyd, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997), aff'd sub nom., State v. Studd, 137 Wn.2d 533, 73 P.2d 1049, (1999). Even if the instructions here are not in outright conflict, Instruction 7 is still ambiguous and misleading because a jury could consider all the evidence in relation to other issues, but still follow Instruction 7's directive to only consider certain evidence in relation to the issue of whether Kerr was likely to reoffend.

The State emphasizes the instructions allowed each side to argue their theory of the case. BOR at 13-20. The contention is irrelevant. Kerr's argument is that Instruction 7 could be read in a manner that is an incorrect and misleading statement of the law. A legally erroneous instruction cannot be saved by the fact that each side was allowed to argue their theory of the case. LeFaber, 128 Wn.2d at 903; State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

To the extent the State argues there was no error because closing argument informed jurors of the correct statement of the law, such an argument must fail. "The jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422,

431, 894 P.2d 1325 (1995). "Rather, it is the judge's 'province alone to instruct the jury on relevant legal standards.'" Id. (quoting State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002)). For this reason, "[i]nstructions should tell the jury in clear terms what the law is. Jurors should not have to speculate about it, nor should counsel have to engage in legalistic analysis or argument in order to persuade the jury as to what the instructions mean or what the law is." State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995).

Moreover, jurors were instructed to disregard arguments and statements of counsel that were not supported by the law as explained by the trial court. CP 134 (Instruction 1); see State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) ("election" in closing insufficient to cure double jeopardy violation because jurors are told to rely on evidence and court's instructions rather than counsel's arguments). The courts will not presume jurors ignore an instruction. State v. Grisby, 97 Wn.2d 493, 509 647 P.2d 6 (1982) ("if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure."). Closing argument did not cure the defective instruction. The error here resulted from misleading language in the jury instructions, not the State's proof or counsel's arguments. State v.

Berg, 147 Wn. App. 923, 935, 198 P.3d 529 (2008) (applying this logic to double jeopardy violation resulting from insufficient instructions).

Finally, the State contends that even if Instruction 7 misled the jury, there was no prejudice because the evidence was sufficient to commit Kerr as an SVP. BOR at 22-26. The contention is misplaced. "Where jury instructions are inconsistent, the reviewing court must determine whether the jury was misled as to its function and responsibilities under the law." Irons, 101 Wn. App. at 559. Sufficient evidence never saved a prejudicial jury instruction.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the verdict and remand for a new trial.

DATED this 27th day of July, 2009.

Respectfully Submitted,

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STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 61871-7-I
)	
NATHAN J. KERR.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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x. *Patrick Mayovsky*

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