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COURT OF APPEALS
STATE OF WASHINGTON
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NO. 61871-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In re the Detention of:

NATHAN J. KERR,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT- CORRECTED

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ORIGINAL

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I. ISSUES PRESENTED

- A. Was defense counsel ineffective where he proposed an instruction closely tracking the existing statutory language as well as the previous WPI?**
- B. Where the instruction adopted by the court closely tracked existing statutory language and was a correct statement of the law, is Appellant now entitled to a new trial because that instruction deviated from the Washington Pattern Instructions (WPI)?**

II. STATEMENT OF THE CASE

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

III. ARGUMENT

Kerr argues that this case should be reversed and he should be given a new trial because, due to his trial counsel's deficient performance, the trial court gave an outdated WPI instruction which had, by the time of trial, been modified. He further argues that, because of this allegedly erroneous instruction, the jury was precluded from considering relevant evidence. Kerr's argument must be rejected. First, Kerr's attorney was not ineffective in failing to propose the current WPI where both the instruction he proposed and the WPI adopted by the trial court closely tracked the statutory language and adequately conveyed the law. Moreover, Kerr has failed to demonstrate that, but for counsel's allegedly deficient performance, the result of his civil commitment trial would have

been different. The instruction adopted by the court was legally sufficient and did not prevent Kerr from arguing his theory of the case. When read in conjunction with the other instructions, the disputed instruction informed the jury of the applicable law. Kerr's commitment should be affirmed.

A. Kerr's Counsel Was Not Ineffective In Failing To Propose The Current WPI

Kerr argues, for the first time on appeal, that the trial court erred in giving Instruction 7. Kerr concedes that, by proposing an instruction based on and very similar to the outdated WPI,¹ his trial counsel invited this alleged error below, and that, ordinarily, this would preclude appellate review. App. Br. at 23. He argues, however, that trial counsel's submission of this instruction (and, presumably, his failure to take exception to the instruction ultimately adopted by the trial court) rendered him ineffective. As such, Kerr argues, he is permitted to raise a claim of ineffective assistance of counsel, an issue of constitutional magnitude, for the first time on appeal. App. Br. at 23.

¹ Kerr's Instruction 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 only community, custody, community supervision, probation, or other forms of court-ordered restrictions on liberty and voluntary treatment options that would exist for the person if unconditionally released from detention in this proceeding." CP at 366.

In order to prevail on an ineffective assistance of counsel claim, the claimant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *In re Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). In applying this two-part test, the court presumes counsel was effective. *Id.* In addition, the court presumes that defense counsel's decisions are strategic. *In re Stout*, 128 Wn. App. 21, 28, 114 P.3d 658 (2005).

Arguing that "there is no evidence that counsel's proposal of a deficient WPIC [sic] instruction was the product of a deliberate strategy," Kerr argues that it appears simply that counsel "did not consult the updated version of the WPIC [sic]," and was deficient in "failing to notice that WPIC [sic] 365.14 had been revised." App Br. at 25.

This argument fails. Although it seems likely that there was no strategic reason to propose an outdated jury instruction, (or some version thereof), the analysis does not end with that inquiry. It is not enough that there be an absence of a strategic reason for doing something; the conduct must be deficient. Because both the instruction proposed by defense

counsel and that adopted by the trial court correctly conveyed existing law (See Sections B(1) and (2), below) and allowed the defense to argue its case (see Section B(3), below), defense counsel's performance cannot be said to be deficient.

B. Even if Counsel's Performance Was Deficient, This Deficiency Made No Difference In the Outcome Of The Trial

Even if Kerr's trial counsel's performance was deficient, his claim must still be rejected in that there is no "reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *Stout*, 159 Wn.2d at 377. The instructions in this case, read as a whole, properly instructed the jury on the law and allowed Kerr to argue his theory of the case.

1. The Instructions As Given Were Sufficient To Inform The Jury Of The Applicable Law

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). 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 Kerr's case were sufficient to inform the jury of the applicable law and allowed Kerr to argue his theory of the case. Instruction 7 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 141 (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 (current as of 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. *[current as of 2006.]*

Comment to WPI 365.14. (Emphasis in original).

As is clear from the above, Instruction 7 was and is a correct statement of the law, in that it tracked what was then and what remains

the applicable statutory language, thus properly informing the jury of the law to be applied.

Rather than applying this well-established standard, Kerr argues that instructions “must more than adequately convey the law. They must make the relevant legal standards *manifestly apparent* to the average juror.” (citing *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008). App. Br. at 19. In so doing, he attempts to import a standard from the criminal law, frequently expressed in the context of jury instructions in cases involving self-defense. As noted by Division III:

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. But our Supreme Court subjects self-defense instructions to more rigorous scrutiny. “Jury instructions on self-defense must more than adequately convey the law.” The instructions read as a whole must make the relevant legal standard “manifestly apparent to the average juror.”

State v. Rodriguez, 121 Wn. App. at 185 (internal citations omitted). “The precedent, the principle, and indeed the reasons for singling out this particular type of instruction-self-defense-for increased appellate scrutiny,” Division III noted, “are a bit murky. But, that said, it is the announced standard.” *Id.* 121 Wn. App. at 185. While this standard is applied in other contexts, such as that of jury unanimity or double jeopardy, (See, e.g. *State v. Borsheim*, 140 Wn. App. 357, 165 P.3d 417

(2007); *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008)) Kerr cites to no authority suggesting that this standard is appropriate to civil cases,² and this Court, in analyzing a jury instruction question in a sex predator case, has applied the standard articulated in civil cases. *In re Wright*. 138 Wn. App. 582, 155 P.3d 945 (2007).

Moreover, most of the (criminal) cases relied upon by Kerr are unhelpful, in that, in those cases, the court concluded that the various disputed jury instructions did not 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). Here, where the disputed instruction in fact simply recites existing law, there can be no such argument.

² Indeed, Kerr seems to be under the mis-impression that the SVP pattern instructions are contained within the Washington Pattern Instructions for criminal cases in that he repeatedly refers to “WPIC 365.14.” (*See App. Br.* at 13, 14, 15, 22, 25). In fact, because sex predator cases are civil cases (*In re Young*, 122 Wn. 2d 1, 857 P.2d 989 (1993), *recon.den.* (1993),) the instructions are contained within the Washington Pattern Instructions for civil cases.

2. **Instruction 7 Does Not Create Confusion When Read In Conjunction With The Other Instructions**

Nor does Instruction 7 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, 2RP 64-65; CP at 442.³ 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 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." CP at 442.

After trial, the instructions were both read to and provided to the jury. 9RP at 986; CR 51(g), (h). Instruction 1 instructs the jury that it is

³ 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. 2RP at 64-65. Kerr did not submit a preliminary instruction (CP at 354-370), and it is assumed that the court read from the preliminary instruction set forth in WPI 365.01, submitted by the State. CP at 440.

their duty “to decide the facts in this case based *upon the evidence presented to you during the trial.*” CP at 133. Later, the same instruction reiterates that “[i]n deciding this case, you must consider *all of the evidence* that I have admitted.” *Id.* (Emphasis added). 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. *Id.* 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 134 (emphasis added). Instruction 2 instructs the jury as to how to consider and weigh the opinion of any expert at trial. CP at 136. Instruction 3, the “elements” instruction, instructs the jury that the State “must prove each of the following elements beyond a reasonable doubt:

- (1) That Nathan Kerr has been convicted of a crime of sexual violence, namely, Child Molestation in the Second Degree;
- (2) That Nathan Kerr 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 Nathan Kerr 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 Nathan Kerr 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 Nathan Kerr is not a sexually violent predator.

CP at 137 (emphasis added). Instruction 4 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 138 (emphasis added). These instructions, repeatedly emphasizing the need to consider all of the evidence, permitted Kerr to fully and fairly argue all aspects of his case.

3. The Instructions, As A Whole, Allowed The Parties To Argue Their Theories Of The Case

The parties’ closing arguments made equally clear that the parties were able to fully and fairly argue their respective theories of the case. Both parties discussed the evidence and its relationship to Kerr’s status as an SVP in its entirety, drawing from testimony presented over the course of six days from thirteen witnesses.

In its closing, counsel for the State discussed all aspects of the evidence presented to the jury, all of which were relevant to the question of Kerr’s likelihood to reoffend. Noting that Kerr had various mental

disorders that caused his sexually deviant behavior, the State discussed Kerr's history of offending when in the community despite community supervision, regular meetings with a parole officer, steady employment, friends, and extensive community support. 9RP at 987. She referred extensively to Dr. Tucker's evaluation, including his review of "thousands of pages of documents," (9RP at 993), and the importance of considering all of those documents ("if you're not familiar with the records, how can you offer an opinion about this particular individual, because each case is different...you have to look at the individual factors about this person's history, about their makeup, *everything about them*, in order to come up with your opinion to determine, based on your expertise, is this person a risk.") 9RP at 994. She discussed Kerr's diagnoses at length (9RP at 995-98), as well as his demonstrated arousal to minors as demonstrated on a penile plethysmograph (PPG). 9RP at 1010-11.

State's counsel also discussed Kerr's behavior in the community at length. She noted that Kerr had been in a relationship with an age-appropriate female at the same time he was supplying alcohol to and having sex with a 12-year-old girl. 9RP at 1015. She reminded the jury of the conditions of Kerr's release in the community in 1995, including the clear prohibition against having contact with children, which Kerr defied by living with a woman with four minor children, including one to

whom he gave genital warts and impregnated. 9RP at 1020. She discussed the connection between Kerr's dysfunctional, violent relationships with adult women, and the concept of "intimacy deficits," a "huge risk factor for him if he's released." 9RP at 1026. She discussed other previous parole violations, such as being seen alone in a car with an eight-year-old girl, sexual contact with a minor male, his flight from supervision after arrest, and his almost-immediate involvement with a 13-year old girl. 9RP at 1026-28. She stressed that his failure to do treatment had nothing to do with money: "He had a job. He had money. He had a couple of trailers. He had a car. He had a truck. He had a gun. He had a pager." 9RP at 1028. She also pointed to the support in the community he had had at that time, with a [friend], Don May, having spent roughly \$17,000.00 on legal fees on Kerr's behalf. 9RP at 1029. She pointed to the fact that, despite all this, Kerr was "still making excuses. He does not get it. He has not changed." 9RP at 1029. She argued that the fact that Kerr now denies having made certain statements to the State's expert spoke, as well, to his continuing risk because "he's still not getting it. He's still being deceitful. He's still minimizing. He's still making excuses. He hasn't done anything wrong." 9RP at 1029-30.

Finally, the State's counsel discussed risk assessment. The issue, she stated, was "whether or not these disorders that he has make Mr. Kerr

likely to engage in predatory acts of sexual violence.” 9RP at 1030. She noted that “past behavior is the best predictor of future behavior,” 9RP at 1031. She explained Dr. Tucker’s use of actuarial instruments, such as the Static-99 and the MnSOST, in assessing risk, and indicated that both instruments indicated that his risk of re-offense was high. 9RP at 1032-33. She discussed Dr. Tucker’s adjustment of those scores based on various other factors, such as the presence of a Paraphilia, the PPG results, his intimacy deficits, his antisocial personality disorder, cognitive distortions, and failure to complete treatment. 9RP at 1034.

The defense, as well, discussed the case in its entirety, and referenced various aspects of the testimony relevant to the overall question of Kerr’s likelihood to reoffend. In discussing the State’s burden to prove its case beyond a reasonable doubt, he admonished the jury to “*consider all the evidence* in terms of deciding whether the second and third elements have been established to this very high level of proof, beyond a reasonable doubt.” 9RP at 1042. He indicated that Kerr had “never denied he screwed up royally when he was out of custody before” (9RP at 1042) and repeatedly stressed Kerr’s remorse for his past actions, his efforts to change, and his determination not to reoffend (9RP at 1070). He stressed Kerr’s efforts at self-improvements, such as obtaining a GED (9RP at 1045-46), taking a course on stress and anger management (9RP

at 1046), completion of an inpatient and outpatient course on alcoholism (9RP at 1046), working while incarcerated (9RP at 1047), a “certificate for self awareness,” and two different courses for victim awareness (9RP at 1048), sex offender treatment (9RP at 1050), and his increased age. 9RP at 1049, 1065. He attacked the credibility of the State’s expert, referring to him as a “hired gun,” saying “the State uses him because he gives them opinions that they like. He charges \$450 for those opinions.” 9RP at 1052. He stressed Kerr’s support in the community, his change since release after prison in Idaho, his past failure to take responsibility for his actions, and his remorse. 9RP at 1054. He attacked the State’s expert’s diagnosis of Paraphilia, adding that, even if Kerr did in fact suffer from a Paraphilia, “[t]he fact of the diagnosis does not in any way predict future behavior, because a person may have that and yet control that.” 9RP at 1057; *see also* 9RP at 1069.

Noting to the jury that their task was to “see whether you can predict what [Kerr]’s going to do in the future,” (9RP at 1058), defense counsel emphasized that:

[w]e’re talking about the human mind and the human condition. And Nathan Kerr is not a statistic. He’s a 40-year-old man here. You know his history. You know what he wants to do in the future. You know his support group, the people who have worked with him, and the evidence in this case does not show beyond a reasonable doubt that he has a condition that’s going to make him likely to engage

in predatory acts of violence beyond a reasonable doubt.

9RP at 1059. Defense counsel criticized the actuarial tools used by the State's expert, suggesting that the samples used were inadequate, that they overestimated the risk of reoffense (9RP at 1059), that the criteria were in a state of flux (9RP at 1059-60), and that, overall, risk assessment "is a professional guessing game." 9RP at 1060. He disputed the State's assertion that even as he was involved with age-appropriate females, he was seeking sex with children. 9RP at 1070. He emphasized Kerr's attraction to age-appropriate females, and sought to characterize his sexual contact with underage females as largely serendipitous, arguing that, while his offending "may be predatory in terms of the legal definition," (9RP at 1063) "it wasn't like he was out trolling the streets trying to find some kind of victim." 9RP at 1062.

Defense counsel spent considerable time at trial discussing the terms of Kerr's release pursuant to his 2000 J&S (4RP at 324-28) and specifically referenced disputed Instruction 7 twice during his closing. Drawing the jury's attention to the instruction's reference to the phrase 'if released unconditionally from detention in this proceeding,' he stressed,

does not mean that he would just be released with no conditions into the community...it says, "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.” He’s told you the information that you have in Exhibit 3 sets all sorts of conditions, plus Nathan Kerr has told you that he’s willing to continue to get—well, it’s not optional. He has to get sex offender treatment if he’s released into the community. But he wants to do it. He knows he needs it.

9RP at 1068-69. This explanation clearly reflects the actual meaning of the instruction, and in no way suggests that the instruction should have the effect of limiting the evidence the jury was permitted to consider in reaching its decision.

The State’s rebuttal addressed those arguments: The State’s counsel pointed out that, although Kerr argued that he had changed, as recently as two years prior to trial he had written a letter contacting Fresh Start Ministries about his desire to establish a ranch to help runaway teens. 9RP at 1072. This, she suggested, demonstrates lack of insight into his behavior. She noted that, even after he had begun his so-called process of change, he demonstrated no remorse for his victims, and told Dr. Tucker that he was not attracted to young girls and did not need sex offender treatment.. 9RP at 1073. Noting the entrenched nature of Paraphilias, she noted repeatedly that such conditions “don’t change overnight.” (9RP at 1085), that Kerr was only at the beginning phases of treatment, and that, when his hours of treatment had been added up, he had done roughly 20 hours of individual treatment and 12 hours of group.

9RP at 1087. She noted his obvious failure to grasp basic treatment concepts such as that of an “offense cycle” (9RP at 1087), his lack of a plan to avoid re-offense (9RP at 1086), his failure to have internalized important treatment concepts, (9RP at 1087) his generally superficial approach to treatment (9RP at 1089) and the relationship of these shortcomings to the probability of reoffense in the community. 9RP at 1089. She noted that Dr. Tucker, who had reviewed Kerr’s homework assignments while in treatment at the SCC, was skeptical of any real change on Kerr’s part, and that Dr. Tucker “sees no sign of any remorse, no sign of any work that had been done.” 9RP at 1085. She reminded jurors of Kerr’s changing versions of events, including the ages of his sexual partners and wives. 9RP at 1073-74; 1077. She compared and contrasted the two experts, emphasizing Dr. Tucker’s superior expertise and thorough knowledge of this case. 9RP at 1075-82. She discussed the experts’ respective views on actuarials, noting that “the research out there shows that the best method, the best way to determine likelihood to reoffend is based on these actuarials.” 9RP at 1081.

Kerr 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 analyses of all of the evidence presented to them, this Court must assume that the jury, having listened to

roughly six days of testimony from thirteen witnesses, including more than two days of expert testimony, and having been presented with roughly 23 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. In this sense, this Court’s decisions in two similar cases are instructive. In *State v. Peterson*, 35 Wn. App. 481, 486, 667 P.2d 645, 648-49 (1983), the parties used a reasonable doubt instruction that this Court had previously considered in *St. v. Walker*, 19 Wn. App 881, 884, 578 p.2d 83 (1977). The *Walker* Court, while declining to reverse on the basis of that instruction, had agreed that the instruction could be confusing if read in isolation and had recommended that it be modified. The WPIC in question was still in effect at the time of Peterson’s trial, but was modified along the lines suggested by the *Walker* Court while Peterson’s appeal was pending. Peterson argued that reversal

was required because the outdated WPIC was used at his trial. The *Peterson* Court rejected that claim. Referencing its decision in *Walker*, and again acknowledging the potential for confusion if the disputed instruction were read in isolation, the court found no error “because the instructions, when read as a whole, accurately informed the jury” of the State’s burden of proof. *Peterson*, 35 Wn. App. at 486. The court went on to note that the modification “was to clarify the statement of law... not to correct an erroneous statement of law.” *Id.*⁴ Likewise, the change to the instruction in this case appears to have been made in an abundance of caution on the part of the WPI committee, which noted that the earlier instruction “could have been” misconstrued, and notes that the revision “makes clear” that the jury is not precluded from considering all of the evidence. The Committee, then, appears to have been concerned with the possibility—not the probability—of jury confusion, and certainly not that the earlier WPI was not an accurate statement of the law.

Kerr’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 7 in no way limited the ability of the defense to argue its theory of the case and that the instructions, read in

⁴ See also *State v. Evans*, 26 Wn. App. 251, 262, 612 P.2d 442, 449-50 (1980) (Not error to use instruction other than WPI where alternate instruction correctly informs jury of the applicable law.)

their entirety, properly informed the jury of the applicable law.⁵

In the highly unlikely event that the jury in fact believed that, for purposes of determining whether Kerr 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 Kerr's release upon which a reasonable jury would have concluded that Kerr, if released under those conditions, was likely to reoffend.

Had the jury not committed Kerr as an SVP he would, upon release, been subject to the terms and conditions contained in the 2000 Judgment and Sentence for the 1996 rape of Melissa Sharkey, and submitted to the jury as Exhibit 13. 3 RP at 242; 4 RP 325-27; 9 RP 1068. The evidence considered in its entirety makes clear that those conditions of supervision would have been wholly inadequate to protect the community. Those standard release conditions, Dr. Tucker testified, were similar to those in effect when Kerr had last offended. 4RP at 265. Dr. Tucker noted, for example, that when Kerr offended against Christi Farris, he was working and living with family members. 4RP 349-50.

⁵ While Kerr correctly points out that the jury submitted one question relating to Instruction 7, they appear to have resolved any question they had without undue difficulty. The record indicates that the case was sent to the jury at 3:11 on May 22, 2008. 9 RP at 1099. The court indicated that the jury would probably be released at 4:30 that day, and would be instructed to resume the following day, May 23, at 9:00 AM. 9RP at 1095. The jury reached a verdict at some point prior to 1:43 on May 23rd, at which point the parties reconvened to take the verdict. 10 RP at 1100.

“Showing up to see a community corrections officer,” Dr. Tucker commented, even when combined with the other conditions imposed by the J&S, was insufficient to mitigate Kerr’s risk. 4 RP at 266. While Dr. Tucker conceded that, if Kerr were in fact able to follow all of the conditions imposed, his risk would be reduced, he noted that historically, Kerr had never demonstrated the ability to do that. 4 RP at 327.

As pointed out by State’s counsel during closing, Kerr did not have a viable release plan, nor did he have sex offender treatment lined up in the community. 9 RP at 1092. Kerr’s “plan,” according to what Kerr had told his own expert, Dr. Rosell, was to release to his mother in Illinois. 4RP at 348. Testimony at trial made abundantly clear that this was not a viable option. Although his mother, Katherine Kerr, testified that she had been aware of his contact with his girlfriend’s children (7RP at 737), there is no indication that she took any steps to prevent or limit that contact, and indeed seemed to blame the fact that the children’s mother had never supplied her with the name of Kerr’s parole officer for that failure. 7RP at 746. Moreover, her concern appears to have primarily focused on the danger that her son might once again being sent to prison rather than any potential danger to the children. 7RP at 746-47. Mrs. Kerr admitted that she had no insight into what sex offender treatment involved (7RP at 746-47), and that, while it was important to

understand her son's risk factors, she does not know what they were. 7RP at 748. Kerr had told her that he "doesn't have any of those tendencies" (that lead up to offending) (7RP at 749) and she testified that she did not believe that he would reoffend. 7RP at 751. She did not know the facts of his previous offenses (7RP at 754) and, at the time of trial, had a grandchild living on the property she was proposing to share with her son. 7RP at 750.

Likewise, release to his father's residence was not a viable option: During his trial testimony, Kerr's father testified that he had never contacted Kerr's CCO or parole officer regarding Kerr's contact with his girlfriend's children, although he knew—and knew that his son knew-- that such contact was prohibited. 7RP at 776. Although Kerr had testified that he had told his family details about his offending history, his father knew very little about the facts of many of his offenses, nor had he ever discussed with his son why his son had offended against children. 7RP at 777. He knew nothing about his son's history of sex offender treatment, and could not remember what factors would increase Kerr's risk in the community. 7RP at 779-80. Finally, when asked what he would do if he learned that his son was having sexual thoughts of children, Kerr, Sr. indicated that he would not report his concerns to the authorities, and would report suspected sexual misconduct only after his

own investigation had convinced him that Kerr was in fact “guilty.” 7RP at 780.⁶

Nor was Kerr’s own testimony regarding his release plan reassuring. Although he testified at trial that he had many friends in the community available to support him, he had previously testified, in a deposition shown at trial, that he had no friends available to support him. 8RP at 963-65. He testified at trial that, if released, he intended to go to a “rehab center” that was both inpatient and outpatient, but could not remember the name of the facility. 4RP at 969.

Thus, even in the exceedingly unlikely event that the jury was in fact confused by the instructions, there was more than enough substantive evidence introduced at trial from which a jury might reasonably conclude that Kerr, a convicted sex offender with numerous offenses against young girls and a continuing interest in young girls, would be likely to reoffend if not confined to a secure facility. There is no reasonable probability that, but for counsel’s alleged deficient conduct, the result of this trial would have been any different.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm

⁶ The jury was reminded of most of this testimony during the State’s rebuttal closing.

Kerr's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 30th day of July, 2009.



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