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Washington State
Court of Appeals
Division Two

December 18, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Detention of: JOEL REIMER, Appellant.	No. 49881-2-II UNPUBLISHED OPINION

SUTTON, J. — Joel Reimer appeals the trial court's order committing him to the Special Commitment Center (SCC) as a sexually violent predator (SVP). Reimer argues that (1) his right to testify was violated, (2) the trial court erred by denying his motion for a mistrial after the State impeached his expert with Reimer's prior diagnoses, (3) the prosecutor committed misconduct in his cross-examination of Reimer's expert witness, and (4) the SVP statute is unconstitutional. We affirm.

FACTS

In 1992, Reimer was found to be an SVP and was committed to the SCC. After 22 years, Reimer was granted an unconditional discharge trial under RCW 71.09.090(2)(c)(ii)(A). At trial, the State relied on the expert opinion of Dr. Harry Hoberman to argue that Reimer continued to meet the statutory definition of an SVP. Reimer relied on the expert testimony of Dr. Henry Richards to argue that he no longer met the definition of an SVP.[1] The jury found that the State

[1] "'Sexually violent predator' means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engaged in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

proved beyond a reasonable doubt that Reimer continued to be an SVP. Based on the jury's verdict, the trial court entered an order of commitment which ordered that Reimer remain committed at the SCC.

I. REIMER'S TRIAL PARTICIPATION

Before trial, Reimer expressly waived his presence for the majority of the trial. However, Reimer did not waive his right to testify. And Reimer agreed to come to court to testify if the State called him as a witness during the State's case-in-chief. Reimer's testimony was scheduled for October 19, 2016, and the trial court made arrangements to have him transported from the SCC on October 18. The trial court also informed Reimer to notify his attorneys if he changed his mind and wanted to be present.

On October 18, the State called Reimer to testify. The next day, the trial court informed Reimer's attorneys that Reimer wanted to speak with them before he returned to the SCC. After the verdict, the trial court held a hearing on Reimer's attorneys' motion to withdraw. At the hearing, Reimer stated that his relationship with his attorneys had broken down, he was dissatisfied with their representation, and he wanted to proceed pro se. After some discussion, Reimer decided to allow the trial court to appoint new counsel rather than to proceed pro se. However, Reimer requested that copies of his pro se "[p]ost-[v]erdict [m]otions," previously rejected by the trial court, be filed. IX Verbatim Report of Proceedings (VRP) at 1411-12. The trial court agreed to file Reimer's pro se motions "for posterity." IX VRP at 1411. However, based on the record before this court, the trial court did not consider or rule on the motions.

Reimer's post-verdict CR 59[2] motion for a new trial was based in part on the denial of his right to testify in his defense. In his declaration supporting the motion, Reimer stated that, while in jail on October 19, he sent messages to his attorneys requesting to attend court on any of the days he was still being held in jail prior to being transported back to the SCC. Reimer also stated that, despite knowing that he was being held in the jail, his attorneys did not contact him to determine whether he wanted to testify.

Reimer also asserted that his attorneys left him in jail and prevented him from testifying because they did not agree with his position that spiritual Native American healing practices constituted treatment for an SVP. Reimer also set out his proposed testimony regarding his Native American heritage, which he had intended to present on his own behalf.

II. EXPERT TESTIMONY

Reimer filed a pretrial motion in limine to prevent the State from impeaching expert witnesses with contradicting opinions of non-testifying experts as prohibited by ER 705.[3] After hearing arguments by both parties, the trial court ruled,

[2] CR 59(a) states, "On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted." CR 59(a) provides nine specific grounds on which a motion for a new trial may be granted.

[3] ER 705 states,

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

> The best explanation I've ever been able to give on this particular issue, the 704/705 thing, is the experts can testify to facts other people have. The experts can't testify to opinions other people have, and that's going to be our starting point.
>
> Again, this is one where the field can really change as we're going along, depending on the questions that are asked. So I guess I would just use that as my beginning point.
>
> If anybody thinks that it's really opened up, my preference would be that we get the high sign and can talk about it outside the presence of the jury.

II VRP at 131.

The State's expert, Dr. Hoberman, testified that he diagnosed Reimer with sexual sadism, antisocial personality disorder, and high psychopathy. Dr. Hoberman also testified that, based on his diagnosis, Reimer continued to meet the definition of an SVP.

Reimer's expert, Dr. Richards, was the superintendent of the SCC from 2004 to 2007. Dr. Richards diagnosed Reimer with narcissistic personality disorder and a mild mood disorder. Dr. Richards testified that Reimer did not meet the criteria for a sexual sadism diagnosis.

During cross-examination, Dr. Richards testified that when he was superintendent of the SCC, he would review SVP evaluations and, if he disagreed with a particular evaluation, he would send the evaluator a letter. If the evaluator addressed the issues Dr. Richards identified and Dr. Richards continued to disagree with the recommendation in the report, he would allow the evaluator to submit the report, but he would send the court a letter indicating his disagreements with the evaluator's report. Then the following exchange took place:

> [STATE]: And so, Dr. Richards, while you were there for several years there was [sic] several evaluations at that time on Mr. Reimer, and, in fact, each of those evaluations diagnosed him with several paraphilias --
>
> [DEFENSE]: Objection --
>
> [STATE]: -- antisocial --
>
> [DEFENSE]: -- pretrial motions.

> [COURT]: I'll allow it.
>
> [DEFENSE]: Your Honor --
>
> [COURT]: I'll allow it.
>
> [STATE]: He was diagnosed with multiple paraphilias, including sexual sadism. He was diagnosed with antisocial personality and high psychopathy by all of them. So you never wrote a letter to them in regards to Mr. Reimer in terms of those cases; is that right?
>
> [RICHARDS]: That's correct. Because it doesn't fit the scenario that I told you. They didn't write a report that undermined the basis of his commitment which would have brought it to my attention. They didn't write a report saying he now has so much control he has changed. If they had done that, I would have gotten involved because of the history, and I would have had to decide, do I have enough problem [sic] with this to ask the psychologist to revisit the issues.
>
> So I think that explains why, and I do believe I would have followed my routine with Mr. Reimer like anyone else, but . . . it was on an exception basis because the superintendent's job is to decide is an exception needed.

VIII VRP 1179-80.

Reimer then moved for a mistrial based on the State's reference to Reimer's prior SVP evaluations during cross-examination. The trial court denied the motion for a mistrial, but did agree that the testimony was improper. Therefore, the trial court agreed to give the jury an oral curative instruction:

> Ladies and gentlemen, previously, there was a ruling that we were not going to discuss or consider prior evaluations of Mr. Reimer by people who were not brought in here as witnesses for a variety of reasons, including the fact that they're not subject to cross-examination. It wouldn't be proper to consider that evidence in this case.
>
> To the extent that there's any discussion about that, I'm asking you now or ordering you now to disregard that evidence and not consider it in your deliberations.

VIII VRP 1190-91. The trial court also agreed to include a written curative instruction in the jury instructions. The written curative instruction stated,

> You have heard testimony about the diagnostic opinions of forensic evaluators at the Special Commitment Center who have offered their opinions in prior reports. This evidence is not admissible. You must not consider it for any reason in your deliberations.

Clerks Papers at 1249.

After the jury returned its verdict finding that the State proved beyond a reasonable doubt that Reimer continued to meet the definition of an SVP, Reimer filed a CR 59 motion for reconsideration of the trial court's ruling on the motion for a mistrial, again based on the State's cross-examination of Dr. Richards. The trial court denied the motion for reconsideration.

Based on the jury's verdict, the trial court entered an order of commitment which ordered that Reimer remain committed at the SCC. Reimer appeals.

ANALYSIS

I. RIGHT TO TESTIFY

Reimer argues that he is entitled to a new trial because he was denied his constitutional right to testify in his own defense. We disagree.

As explained below, because Reimer is arguing that his attorneys, not the trial court, interfered with his right to testify, we address his argument as an ineffective assistance of counsel claim. *Compare State v. Thomas*, 128 Wn.2d 553, 910 P.2d 475 (1996) (trial counsel allegedly prevented the disruptive defendant from testifying by removing the defendant from the courtroom until the court obtained assurances that the defendant would conduct himself appropriately) with *State v. Robinson*, 138 Wn.2d 753, 982 P.2d 590 (1999) (defense counsel interfered with the right to testify by refusing to make a motion to the court to reopen the defendant's case to allow the

defendant to testify). Because Reimer fails to establish that his attorneys' performance was deficient, based on the record here, his ineffective assistance of counsel claim fails.

"In Washington, a criminal defendant's right to testify is explicitly protected under [the] state constitution." *Robinson*, 138 Wn.2d at 758. This right is extended to defendants facing commitment under the SVP statute. RCW 71.09.060(2); *In re Det. of Haga*, 87 Wn. App. 937, 943 P.2d 395 (1997), *abrogated on other grounds by Robinson*, 138 Wn.2d at 768.

The right to testify is fundamental and "cannot be abrogated by defense counsel or by the court." *Robinson*, 138 Wn.2d at 758. Only the defendant may decide to waive the right to testify. *Robinson*, 138 Wn.2d at 758. Although the defendant's waiver of the right to testify need not be obtained on the record, the waiver must be made knowingly, voluntarily, and intelligently. *Robinson*, 138 Wn.2d at 758-59.

When an appellant alleges that his right to testify was interfered with by defense counsel, we address that claim as a claim of ineffective assistance of counsel. *Robinson*, 138 Wn.2d at 765-66. Therefore, we apply the *Strickland* test to determine whether the appellant has met his burden to establish an ineffective assistance of counsel claim. *Robinson*, 138 Wn.2d at 765-66 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Under the *Strickland* test, the appellant must prove both that the attorney's performance "'fell below the objective standard of reasonableness' and that he was prejudiced by the attorney's deficient performance." *Robinson*, 138 Wn.2d at 766 (quoting *Strickland*, 466 U.S. at 694). Prejudice is met by showing that there is "'a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.'" *Robinson*, 138 Wn.2d at 766 (quoting *Strickland*, 466 U.S. at 694).[4]

An appellant who is able to prove that his attorney actually prevented him from testifying has shown that his attorney's performance fell below the objective standard of reasonableness. *Robinson*, 138 Wn.2d at 766. An attorney may actually prevent his client from testifying by using misrepresentation or coercion. *Robinson*, 138 Wn.2d at 762-63. An attorney can also prevent a client from testifying "by refusing to call the defendant as a witness even though the attorney knows that the defendant wants to testify." *Robinson*, 138 Wn.2d at 763. "If the decision to testify is made against the will of the defendant, it is axiomatic that the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify." *Robinson*, 138 Wn.2d at 763.

Here, Reimer affirmatively waived his right to be present at his trial. Reimer did not expressly waive his right to testify; however, he waived his right to be present which implicitly waived his right to testify because a person must be present in court to testify in court. At any point, he could have affirmatively asserted that he wanted to exercise his right to testify. He could have communicated his desire to testify to either the trial court or his attorneys. The trial court also expressly informed Reimer that he should inform the trial court or his attorneys if he changed his mind about being present in court. Reimer failed to do so.

The record before us establishes only that Reimer requested to speak to his attorneys before he was transported back to the SCC. The substance of what Reimer wished to discuss with his

[4] Reimer asserts that violation of the right to testify is per se prejudicial and, therefore, should be treated as structural error subject to automatic reversal. However, this argument was explicitly rejected by our Supreme Court. *Robinson*, 138 Wn.2d at 767.

attorneys is not in the record before this court. Because the contents of the discussion are not before us, Reimer has failed to establish that he affirmatively asserted to his attorneys his desire to testify after previously waiving his right to attend trial. The burden shifted to him only because he waived his right to be present. Therefore, the record before us does not establish that Reimer's attorneys actually prevented him from testifying.

We hold that Reimer has not established deficient performance on behalf of his attorneys. Accordingly, Reimer's ineffective assistance of counsel claim must fail.

II. MOTION FOR A MISTRIAL

Reimer argues that the trial court abused its discretion by denying his motion for a mistrial and admitting Dr. Richards's testimony regarding non-testifying experts at the SCC over the defense's objection, and in violation of the court's pretrial ruling. Dr. Richards testified that "[Reimer] was diagnosed with multiple paraphilias, including sexual sadism. He was diagnosed with antisocial personality and high psychopathy by all of them," referring to prior evaluators at the SCC who did not testify. VIII VRP 11780. Because the trial court gave multiple instructions, oral and written, to disregard the improper testimony, the trial court did not abuse its discretion in denying Reimer's motion for a mistrial.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court abuses its discretion when no reasonable judge would have reached the same conclusion. *Emery*, 174 Wn.2d at 765. We determine whether a mistrial should have been granted by considering (1) the seriousness of the trial irregularity, (2) whether the trial irregularity involved cumulative evidence, and (3) whether a proper instruction to disregard the evidence cured the prejudice against the defendant. *Emery*,

174 Wn.2d at 765. We give deference to the trial court because the trial court is in the best position to discern any prejudice. *State v. Garcia*, 177 Wn. App. 769, 776-77, 313 P.3d 422 (2013).

The first factor, the seriousness of the trial irregularity, does not necessarily weigh in favor of granting a mistrial. The questions and answers regarding the opinions of non-testifying experts arguably were improper, as the trial court found. However, the jury knew that Reimer had been classified as an SVP and had been detained for 22 years at the SCC. The fact that prior evaluators had diagnosed Reimer with conditions that supported a finding that he was an SVP would not have been surprising. Therefore, the irregularity was not so serious as to weigh in favor of granting a mistrial..

As to the second factor, even assuming the evidence of Reimer's prior diagnosis by non-testifying experts was cumulative, the operative question here is whether the trial court abused its discretion by determining that the curative instructions were sufficient to cure the prejudice. The jury was given two specific instructions to disregard the opinions of the non-testifying experts. We presume that the jury follows the trial court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009). Here, the improperly admitted evidence was the result of a single question to Dr. Richards that did not go into specific details about the prior evaluations. Therefore, we presume that the jury followed the trial court's instruction to disregard the improper evidence.

Because the trial court is in the best position to determine prejudice, the trial court did not abuse its discretion by determining that curative instructions were sufficient to cure the prejudice caused by the improper testimony.

III. PROSECUTORIAL MISCONDUCT

Reimer also argues that the prosecutor committed misconduct by violating the trial court's ruling on motions in limine. The State argues that the prosecutor did not violate the motion in limine because the trial court deferred a specific ruling until specific questions were asked. We agree with the State because the prosecutor did not directly violate the trial court's ruling on the motions in limine.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *Emery*, 174 Wn.2d at 756. First, we determine whether the prosecutor's conduct was improper. *Emery*, 174 Wn.2d at 759. If the prosecutor's conduct was improper, the question turns to whether the prosecutor's improper conduct resulted in prejudice. *Emery*, 174 Wn.2d at 760-61. Prejudice is established by showing a substantial likelihood that the prosecutor's misconduct affected the verdict. *Emery*, 174 Wn.2d at 760.

When ruling on the motion in limine, the trial court noted the general rule regarding ER 705, but noted that specific issues would have to be dealt with by objection to specific questions. Here, the prosecutor was not impeaching Dr. Richards's testimony based on the opinions in reports that he relied on. Therefore, the prosecutor's question did not fall squarely within the trial court's ruling on the motion in limine.

Because the prosecutor did not directly violate the trial court's motion in limine, the prosecutor's conduct was not improper. Accordingly, Reimer's prosecutorial misconduct claim fails.

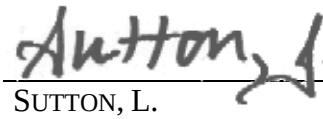
IV. CONSTITUTIONALITY OF RCW 70.09.020

Reimer argues that the statutory definition of an SVP is unconstitutional because it reduces the State's burden to a constitutionally impermissible preponderance of the evidence standard. Reimer recognizes that his argument has been explicitly rejected by our Supreme Court in *In re Det. of Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001). However, Reimer argues that we should reexamine the holding in *Brooks* in light of subsequent holdings in *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002), and *In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003).

"[O]nce [the Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts until [the Supreme Court overrules] it." *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Here, neither *Crane* nor *Thorell* overrules the holding in *Brooks* because those cases address a different section of the SVP statute. *Crane*, 534 U.S. at 413 (addressing whether mental abnormality or personality disorder must be related to a lack of ability to control behavior); *Thorell*, 149 Wn.2d at 735-36 (same). Because the Supreme Court's holding in *Brooks* is still good law and it is not our role to overrule established Supreme Court precedent, we reject Reimer's argument that RCW 71.09.020 is unconstitutional.

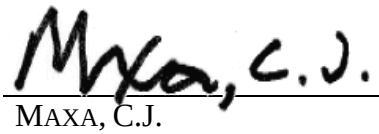
We affirm the trial court's order committing Reimer to the SCC.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

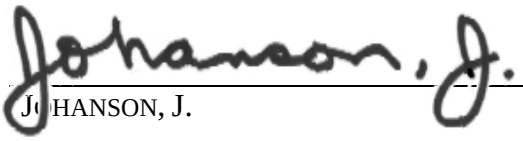


SUTTON, L.

We concur:



MAXA, C.J.



JOHANSON, J.