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WA State Court of Appeals, Division III

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

In re the Detention of:	)	No. 29811-6-III
	)	
GRANT LEROY KENNEDY,	)	
	)	
Respondent.	)	
	)	UNPUBLISHED OPINION
	)	
	)	

Brown, J. • Grant L. Kennedy appeals his civil commitment as a sexually violent predator (SVP) under RCW 71.09.060. He contends (1) the record fails to show the State's prosecution authority, (2) instructional errors, (3) evidence rulings violated "real facts" and res judicata principles, (4) penile plethysmograph (PPG) evidence violated his due process rights, and (5) ineffective assistance of counsel. Mr. Kennedy failed to raise his first three contentions below and is precluded now from raising them for the first time on appeal. His PPG constitutional concerns are unsupported by sufficient argument and have been decided against him by controlling authority. Finally, Mr. Kennedy fails to show deficient performance by his trial counsel. Accordingly, we affirm.

FACTS

Preliminarily we decide Mr. Kennedy's authority concerns against him. On October 10, 2007, the Attorney General's Office (AAG) petitioned to declare him a SVP. No objection was raised to the AAG's authority to prosecute this case rather than Spokane County; he raises no constitutional concerns and suggests no remedy for this alleged defect. RAP 2.5(a) precludes Mr. Kennedy from raising his authority concerns at this juncture. Moreover, Spokane County and the AAG are both statutorily permitted under RCW 71.09.030 to file and prosecute SVP petitions without any effect on the trial court's jurisdiction over SVP proceedings. We next turn to the background facts.

Mr. Kennedy was incarcerated for a 2002 third degree child rape conviction when the State filed this petition. He had been convicted of first degree statutory rape in 1989 and has two convictions for communication with a minor for immoral purposes from 1993 and 1999. Additionally, he was charged with and acquitted of first degree incest in 1994 based on an alleged rape of his 17 year old son without consideration of deoxyribonucleic acid (DNA) evidence; before the SVP trial, a DNA analysis strongly suggested a match with Mr. Kennedy. Mr. Kennedy's son described the alleged rape at the SVP trial.

While incarcerated for his 1999 conviction, Mr. Kennedy participated in a sex

offender treatment program (SOTP) during which he indicated "there is nothing wrong with having sex with a minor as long as the sex was consensual," and "a child as young as ten years of age was able to give consent for sexual acts," and that he had had sex with approximately 25 minor males. Report of Proceedings (RP) (Mar. 14, 2011) at 481. Mr. Kennedy later assaulted the 15-year-old victim of his 2002 third degree child rape conviction and, while incarcerated, he began but did not complete another SOTP.

Regarding Mr. Kennedy's "real facts" and res judicata concerns, several months before the SVP trial, the State moved under *In re Detention of Marshall*, 156 Wn.2d 150, 125 P.3d 111 (2005) for an order determining as a matter of law that Mr. Kennedy's 2002 third degree child rape conviction qualified as a recent overt act (ROA). At the ROA hearing, Mr. Kennedy's counsel stated that he had "reviewed the materials submitted by the State" and had "no quarrel with the materials that are submitted, in terms of the police report surrounding the offense, the judgment and sentence, and some of the other documentation regarding that particular conviction as well as the report that was submitted by the State." RP (May 21, 2010) at 12. Among those documents was Mr. Kennedy's guilty plea statement in which Mr. Kennedy admitted that he "willfully committed this crime" and checked a box stating that "instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea." Clerk's Papers (CP)

at 179. The trial court determined Mr. Kennedy's third degree child rape conviction constituted a ROA for purposes of chapter 71.09 RCW. CP at 419-23.

Before trial, a PPG was administered on Mr. Kennedy as part of the psychological evaluation ordered pursuant to RCW 71.09.040. CP at 424-25. He unsuccessfully moved to preclude discussion of the PPG as well as discussion of another PPG, administered on him in 2006.

At Mr. Kennedy's March 2011 SVP trial, the jurors completed questionnaires. The questionnaire contained a range of responses. During voir dire, juror 20 was not challenged for cause or questioned and was seated on the jury.

At trial, the State presented the testimony of several lay witnesses, Mr. Kennedy's son and victim, R.K, and the expert testimony of Dr. Brian Judd. Dr. Judd is a licensed psychologist and a certified sex offender treatment provider. He has conducted numerous evaluations to determine whether an individual meets the statutory criteria for civil commitment pursuant to chapter 71.09 RCW. Dr. Judd reviewed thousands of pages of court documents, police reports, criminal history information, jail records, and the results of both PPGs. During trial, Dr. Judd briefly mentioned the underlying facts of Mr. Kennedy's 2002 third degree child rape conviction. Defense counsel did not object.

Dr. Judd diagnosed Mr. Kennedy with paraphilia not otherwise specified, "denote attraction to adolescents with a rule out diagnosis of pedophilia sexually attracted to

males non-exclusive type." RP (Mar. 16, 2011) at 686-87. He opined Mr. Kennedy was attracted to adolescents as well as children. In diagnosing those conditions, Dr. Judd relied upon a classification system used universally by mental health workers found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). Dr. Judd diagnosed Mr. Kennedy with alcohol abuse, cannabis dependence, and antisocial personality disorder. Dr. Judd additionally diagnosed Mr. Kennedy as a psychopath. He testified Mr. Kennedy's combination of sexual deviancy and psychopathy is a "toxic combination" as it relates to likelihood to reoffend. RP (Mar. 16, 2011) at 799.

Dr. Judd conducted a risk assessment and determined Mr. Kennedy was statistically very likely to commit a future sex offense. Defense counsel cross-examined Dr. Judd regarding the various tools used for risk assessment. When asked his opinion as to whether Mr. Kennedy's behavior was "likely to involve criminal sexual acts in the future?" Dr. Judd testified, "he is at risk for engaging in criminal acts of sexual violence in the future." RP (Mar. 16, 2011) at 744. Defense counsel unsuccessfully objected. Based upon his education and experience and his review of the records, Dr. Judd opined it was his professional opinion that Mr. Kennedy was likely to commit predatory acts of sexual violence if he was not confined in a secure facility. Mr. Kennedy's defense consisted solely of countering testimony from his expert, Dr. Ted Donaldson.

Both the State and Mr. Kennedy submitted proposed jury instructions, including identical "elements" instructions, modeled on 6A Washington Practice: Washington Pattern Jury Instructions: Civil 365.10 (Instruction 2), at 508 (5th ed. 2005) (WPI) and identical instructions defining "mental abnormality" based on WPI 365.12 (Instruction 4), at 514.

The jury found Mr. Kennedy was a SVP. He appealed.

ANALYSIS

A. Jury Instructions

The issue is whether the trial court erred by giving instruction 2 and instruction 4. Mr. Kennedy appears to argue the instructions are inherently contradictory and effectively relieved the State of its burden of proof. However, Mr. Kennedy did not object at trial to the jury instructions and proposed the very instructions he now complains about.

We review challenged jury instructions de novo. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

"RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The purpose for this rule is that "the trial court, if given the opportunity, might have been able to correct to avoid an appeal." *Id*. To overcome RAP

2.5(a) and raise an error for the first time on appeal, an appellant must first demonstrate that the error is "truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). We will not assume an error is of constitutional magnitude, *Id*. at 98 (citing *Scott*, 110 Wn.2d at 687); rather, the appellant must identify the constitutional error. *Id*. (citing *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)).

Given all, we decline to review Mr. Kennedy's instruction concerns raised under RAP 2.5(a). RAP 2.5(a) has specific applicability regarding claimed errors in jury instructions in criminal cases through CrR 6.15(c). Although an exception exists for manifest constitutional error, Mr. Kennedy fails to raise any constitutional concerns. And, when a defendant proposes the instruction claimed defective, the invited error doctrine will preclude appellate review. *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514 (1990) (citing *State v. Alger*, 31 Wn. App. 244, 249, 640 P.2d 44 (1982)). Mr. Kennedy does not allege ineffective assistance concerning the instructions, likely because the instructions accurately state the law.

B. Third Degree Child Rape Evidence

Mr. Kennedy broadly suggests the trial court improperly admitted evidence regarding his third degree child rape conviction. He contends admission of "the underlying facts" of that charge violates the "real facts" and res judicata principles. It appears Mr. Kennedy is challenging the evidence admitted following the *Marshall* motion

hearing related to the State's burden to meet ROA requirements. But the record shows Mr. Kennedy waived such a challenge by stipulating to admit the documents. And, his guilty plea statement allowed consideration of those documents. Mr. Kennedy similarly appears to argue that any trial testimony regarding the underlying facts was inadmissible. But again, he did not object to that testimony at trial.

Mr. Kennedy presents no authority showing the "real facts doctrine" applies in a civil commitment context. And, our state Supreme Court has rejected the argument that res judicata will bar admission of underlying facts because the SVP issue is whether the defendant is a SVP, separate from the issue in the underlying criminal case. *See In re Stout*, 159 Wn.2d 357, 150 P.3d 86 (2007). While Mr. Kennedy appears to argue the State and the trial court relied on the third degree child rape conviction to satisfy the element of a sexually violent offense, the record belies such an assertion. The State made clear the third degree child rape constituted a statutory ROA. The State relied on Mr. Kennedy's first degree statutory rape conviction to satisfy the element of a sexually violent offense.

Given all, we decline to review Mr. Kennedy's argument pursuant to RAP 2.5(a).

C. PPG Evidence

The issue is whether the trial court erred by admitting PPG testing evidence. Mr. Kennedy contends the use of PPG testing violated his due process rights.

Mr. Kennedy primarily relies on *United States v. Weber*, 451 F.3d 552 (2006). But the *Weber* court did not hold PPG testing unconstitutional, deciding instead that before PPG testing can be imposed as a term of supervised release, the trial court must make an individualized determination that the testing is necessary, considering the constitutional rights of the offender. *Id*. at 569-70.

Mr. Kennedy has not developed an argument that Washington's use of PPG testing should be declared unconstitutional. We do not consider constitutional claims "unsupported by sufficient argument." *In re Pers. Restraint of Erickson*, 146 Wn. App. 576, 588, 191 P.3d 917 (2008) (citing RAP 10.3(a)(5); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)); *see also In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) ("'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'") (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

Regarding the trial court's admission of the PPG results and Dr. Judd's related opinions, Mr. Kennedy likewise fails to develop an argument. A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *In re Det. of Coe*, 160 Wn. App. 809, 817, 250 P.3d 1056, *review granted*, 172 Wn.2d 1001 (2011). Mr. Kennedy does not suggest the trial court abused its discretion. Accordingly, we decline to consider contentions unsupported by argument. RAP 10.3(a). Moreover, our State

Supreme Court has rejected similar PPG arguments. *In re Det. of Halgren*, 156 Wn.2d 795, 805-07, 132 P.3d 714 (2006); *In re Det. of Petersen*, 145 Wn.2d 789, 802, 42 P.3d 952 (2002). And, any error in allowing the PPG testing or admitting the results is harmless; Dr. Judd's opinions regarding sexual deviance were based on many underlying factors, not just the PPG results.

D. Assistance of Counsel

The issue is whether trial counsel was ineffective. Mr. Kennedy contends his counsel failed to object to inadmissible testimony and failed to challenge a biased juror.

We review effective assistance of counsel challenges de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). A defendant possesses the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 889 P.2d 1251 (1995). To prove ineffective assistance of counsel, Mr. Kennedy must show (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Regarding inadmissible testimony, Mr. Kennedy claims Dr. Judd improperly invaded the province of the jury by opining he was a SVP, elements the jury was required

to determine. He claims counsel's representation was deficient because the court would have sustained an objection if made. The State correctly responds the argument should not be considered by the court pursuant to RAP 10.3(a) because Mr. Kennedy provides no citation to this lengthy record for his argument. In any event, Dr. Judd opined Mr. Kennedy was "at risk for engaging in criminal acts of sexual violence in the future," to which defense counsel did unsuccessfully object. RP (Mar. 16, 2011) at 744. And, Dr. Judd opined Mr. Kennedy was likely to commit predatory acts of sexual violence if he was not confined in a secure facility. Under ER 704, "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Dr. Judd's testimony was proper and thus defense counsel was not deficient for failing to object.

Regarding juror 20, Mr. Kennedy argues defense counsel should have challenged her for cause because her answers to the questionnaire "provid[e] a sufficient factual basis to establish that juror 20 was not a fair and impartial juror." Br. of Appellant at 27. A claim of deficient performance cannot be based on matters of trial strategy or tactics. *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)). "The defendant must therefore show an absence of legitimate strategic reasons to support the challenged conduct." *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). Based on the questionnaire

responses, Mr. Kennedy cannot show his trial counsel's decisions regarding juror 20 were not tactical. Indeed, it is a legitimate trial strategy not to challenge a juror who indicates she will demand proof that commitment is appropriate. Therefore, defense counsel was not deficient regarding juror 20.

In sum, Mr. Kennedy fails to show his defense counsel's representation was deficient. If an ineffective assistance claim can be resolved on one prong of this test, the court need not address the other prong. *State v. Staten*, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Siddoway, A.C.J.

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Sweeney, J.