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

In the Matter of the Detention of	)	No. 62508-0-I
	)	
RICHARD HOSIER	)	
	)	
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	
RICHARD HOSIER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: December 6, 2010
	)	

Ellington, J. — Richard Hosier was committed as a sexually violent predator (SVP). In this appeal, he asserts the State failed to prove that he is likely to reoffend if released. He also assigns error to the court's use of an outdated jury instruction, and to the court's refusal to provide the jury with an explanation of "more probably than not" as "a statistical probability greater than 50%."[1] Finally, he argues the court erred by refusing to narrow the risk assessment to "the foreseeable future."[2] The evidence was sufficient, the jury instructions were not error, and risk prediction in an SVP case need not be limited to "the foreseeable future." We affirm.

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[1] Appellant's Br. at 1.

[2] Id. at 2.

BACKGROUND

On October 8, 2008, a jury found Richard Hosier to be a sexually violent predator under chapter 71.09 RCW (SVP statute), and the court ordered an indefinite term of civil commitment. The jury considered Hosier's history of sexually deviant behavior, his criminal record, and the testimony of experts for both Hosier and the State.

Hosier's undisputed history of sexually deviant behavior began when he was a teenager. Between the ages of 12 and 18, he lured five 8- to 10-year-old girls into the woods for sexual purposes, attempted sex with a dog, had sex with his 11-year-old sister, and molested a 6-year-old girl. Between the ages of 30 and 36, he raped approximately 30 females at knifepoint. In 1983, he was convicted of the violent rape of a 16-year-old girl and sentenced to 20 years in prison.

After his release in 1989, he sexually molested three girls between 3 and 12 years of age and had sex with his girlfriend's 14-year-old daughter. In 2002, he wrote an estimated 100 lewd notes (some written on girls' panties) describing bondage and sex with children, and distributed them around Marysville and Everett. As a result, he was convicted of two counts of communication with a minor for immoral purposes, attempted communication with a minor for immoral purposes, and two counts of harassment. He was sent back to prison for the maximum term of 5 years.

Hosier was scheduled for release to community custody in 2007, but in July of that year, the King County Prosecutor's Office petitioned for his continued confinement under the SVP statute. Hosier was 61 at the time of his civil commitment trial.

The State was required to prove beyond a reasonable doubt that (1) Hosier has been convicted of a crime of sexual violence; (2) Hosier suffers from a mental abnormality and/or personality disorder; and (3) Hosier's abnormality and/or disorder makes him likely to engage in predatory acts of sexual violence if he is not confined to a secure facility.[3] Hosier's prior conviction and his mental abnormality and/or personality disorders are undisputed.

In addressing whether Hosier is likely to engage in predatory acts of sexual violence if not confined to a secure facility, the parties each presented expert testimony. The State presented Dr. Charles Lund, a psychologist and certified sex offender treatment provider. Lund used three different methods to evaluate Hosier's risk of reoffense: clinical risk assessment, analysis of statistical sexual recidivism rates, and actuarial risk assessment. Lund diagnosed Hosier with pedophilia; paraphilia, not otherwise specified (NOS), rape; and antisocial personality disorder. Lund opined that these conditions make it difficult for Hosier to control his sexually violent behavior.

Hosier's expert was Dr. Brian Abbott, a clinical psychologist and social worker. Abbott testified about the scientific foundation for risk assessment and how risk estimates should be applied to Hosier's case. Abbott opined Hosier's risk of reoffense is below the "more likely than not" threshold for commitment.

In closing, both parties addressed the placement conditions Hosier would face if not committed and confined to a secure facility: six years of community custody, with

[3] See RCW 71.09.020(18), .060(1).

requirements for sexual deviancy treatment, substance abuse treatment, plethysmograph and polygraph examinations, and other conditions as directed by his supervising community corrections officer. These conditions were delineated in his 2003 judgment and sentence, presented to the jury as exhibit 63.

Instruction 6 told the jury that the State must prove beyond a reasonable doubt that Hosier is "likely to engage in predatory acts of sexual violence if not confined to a secure facility." Instruction 8 further explained,

> 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.[4]

Hosier's counsel proposed an instruction that defined "more probably than not" as a "statistical probability of greater than 50%."[5] The court declined to provide this instruction.

The jury requested clarification about the latter part of Instruction 8, asking the court, "Are we to consider placement conditions in reference to Petitioner's Exhibit 63 in regards to instruction 8?"[6] The court answered, "Yes."[7]

The jury determined the State had proven beyond a reasonable doubt that Hosier is a sexually violent predator. The court ordered Hosier committed until further order.

DISCUSSION

[4] Clerk's Papers at 266.

[5] Id. at 154.

[6] Id. at 254.

[7] Id. at 255.

State's Evidence of SVP Risk

Hosier argues the State failed to prove he is likely to engage in predatory acts of sexual violence if not confined in a secure facility. He urges courts to "segregate junk science from legitimate theories" to prevent jurors from being mislead by experts who "expound theories not accepted in the scientific community."[8] He critiques the State's expert's clinical and actuarial tools as inaccurate and points out disagreements between the State's expert and his own. Hosier's argument implies both admissibility and sufficiency issues.

The Frye[9] standard governs admissibility of scientific evidence in Washington and requires that a scientific theory or principle be generally accepted in the relevant scientific community before it is admitted into evidence.[10] Both clinical and actuarial determinations of future dangerousness have been held to satisfy the standard.[11] The admissibility of these methods and instruments as a basis for expert opinion testimony is thus assessed under ER 702 and ER 703.[12]

An expert opinion is admissible under ER 702 if the witness qualifies as an expert and the testimony would be helpful to the trier of fact.[13] Differences in opinion

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[8] Appellant's Br. at 34.

[9] Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923).

[10] In re Det. of Post, 145 Wn. App. 728, 755 n.15, 187 P.3d 803 (2008) (quoting In re Det. of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003)).

[11] In re Det. of Taylor, 132 Wn. App. 827, 836–37, 134 P.3d 254 (2006) (citing Thorell, 149 Wn.2d at 756).

[12] Id. at 837 (citing Thorell, 149 Wn.2d at 731); Thorell, 149 Wn.2d at 754–55.

[13] State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007).

go to the weight of the evidence and not its admissibility; such disputes are for the jury to resolve.[14]

To determine whether the verdict in an SVP case was based on sufficient evidence, an appellate court determines whether the evidence, viewed in the light most favorable to the State, is sufficient to persuade a fair-minded, rational person that the State has proved beyond a reasonable doubt that the defendant is an SVP.[15] The evidence is sufficient if a rational trier of fact could have found each of the three SVP elements beyond a reasonable doubt.[16]

Hosier's challenges to the State's evidence go primarily to the reliability of its expert testimony. Hosier contends the State's expert relied upon actuarial measures that fail to consider Hosier's age and other factors. Hosier failed to lodge an objection below, and a party who fails to object to the admissibility of evidence may not raise the issue on appeal.[17] We see no grounds for excluding the evidence in any event. The State's expert gave his opinion based upon methods and instruments generally accepted in the relevant scientific community; the weight to give the evidence was a

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[14] Thorell, 149 Wn.2d at 755–56 (discussing In re Det. of Campbell, 139 Wn.2d 341, 355, 986 P.2d 771 (1999)); In re Det. of Sease, 149 Wn. App. 66, 80, 201 P.3d 1078, rev. den., 166 Wn.2d 1029 (2009); see also Barefoot v. Estelle, 463 U.S. 880, 896–903, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) (holding predictions of future dangerousness should be admitted and evaluated by the fact finder).

[15] Sease, 149 Wn. App. at 79 (quoting State v. Hoisington, 123 Wn. App. 138, 147, 94 P.3d 318 (2004)); Thorell, 149 Wn.2d at 744.

[16] Sease, 149 Wn. App. at 79. The State must prove the person facing commitment has serious difficulty controlling their behavior. In re Det. of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006) (citing Thorell, 149 Wn.2d at 758–59).

[17] Post, 145 Wn. App. at 755–56 (citing Taylor, 132 Wn. App. at 836).

question for the jury.[18]

Further, insofar as the parties' experts disagreed with one another, this also goes to the weight of the evidence rather than to its admissibility. Weighing expert testimony requires a credibility determination for the trier of fact and is therefore not subject to review.[19]

The jury considered not only the expert testimony but also Hosier's sexually deviant history and criminal record. Viewed in the light most favorable to the State, the evidence was sufficient to persuade a fair-minded, rational person that Hosier is likely to engage in predatory acts of sexual violence if not confined in a secure facility. The State's evidence was sufficient.

Jury Instruction

Hosier argues for the first time on appeal that Instruction 8 misled the jury by suggesting it ignore certain evidence related to whether he is likely to reoffend, particularly evidence of the placement conditions that would apply if he were released.[20]

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.[21] Even if an instruction is misleading, the party asserting error

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[18] Thorell, 149 Wn.2d at 756.

[19] Sease, 149 Wn. App. at 80.

[20] Hosier also contends Instruction 8 "commented on the evidence." Appellant's Br. at 55. He does not provide support for this contention.

[21] Rollins v. King Cnty. Metro Transit, 148 Wn. App. 370, 379–80, 199 P.3d 499, rev. den., 166 Wn.2d 1025 (2009).

still bears the burden to establish prejudice.[22]

Hosier failed to object to the instruction below and has not preserved the issue.[23] Further, his assertion that the instruction misled the jury is not persuasive.

Instruction 8 was based on a 2004 pattern instruction, although a 2006 updated version was available. The disputed portion of the 2004 instruction reads:

[22] Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

[23] Postema v. Postema Enters., 118 Wn. App. 185, 193–94, 72 P.3d 1122 (2003) (instructional error cannot be raised for the first time on appeal).

> "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 [placement conditions and] voluntary treatment options that would exist for the person if unconditionally released from detention in this proceeding.[24]

The 2006 version reads:

> [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.][25]

The Washington Supreme Court Committee on Jury Instructions explained that the updated version makes clear the jury is not prohibited from considering relevant evidence including, but not limited to, existing placement conditions and voluntary treatment options.[26]

Although the court did not give the 2006 version of the instruction, there is no indication that the jury in this case was misled by the 2004 language. Instruction 1 told the jury, "In deciding this case, you must consider all of the evidence that [the court has] admitted."[27] Taken as a whole, the instructions adequately instructed the jury to consider all relevant evidence admitted by the court. A jury is presumed to follow the

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[24] 6A Washington Practice: Washington Pattern Jury Instructions: Civil, WPI 365.14, at 516 (5th ed. 2005 & Supp. 2009).

[25] Id. at 207 (Supp. 2009).

[26] Id., cmt. at 209 (Supp. 2009).

[27] Clerk's Papers at 257.

court's instructions.[28] Further, any conceivable prejudice was cured by the court's response to the jury inquiry directing that the jury consider the evidence about Hosier's potential placement conditions if released.

Hosier did not preserve this issue for appeal. Even if he had, he fails to show that Instruction 8 caused prejudice.

Meaning of "More Probably Than Not"

Hosier contends the court deprived him of a fair trial by refusing to instruct the jury that "more probably than not" means a "statistical probability greater than 50%."[29] He refers to In re Detention of Brooks,[30] which defined "more likely than not," in the context of Washington's SVP statute, as a prediction of statistical probability of more than 50 percent.[31]

A court's refusal to give a proposed instruction is reviewed for abuse of discretion.[32] A court must define technical words and expressions, but need not define words or expressions that are of ordinary meaning or are self-explanatory.[33] Determining whether a word is technical in nature falls within the discretion of the trial court.[34]

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[28] State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

[29] Appellant's Br. at 1.

[30] 145 Wn.2d 275, 36 P.3d 1034 (2001).

[31] Id. at 295–96. Both "more probably than not" and "more likely than not" refer to a determination of probable dangerousness in this case.

[32] In re Det. of Pouncy, 168 Wn.2d 382, 390, 229 P.3d 678 (2010).

[33] Id.

[34] Id.

The court reasoned that providing an explanation of "more probably than not" would be error because it would be "contrary to long established law that when we give instructions, preponderance of the evidence or beyond a reasonable doubt, we are still dealing with the subjective rather than an objective."[35] This is not correct. Consistent with Brooks, the court could have provided the jury with an explanation of "more probably than not" as "a statistical probability of more than 50 percent."

However, the court was not obliged to give this explanation and Hosier cannot show prejudice resulting from its absence. "More probably than not" is an expression of ordinary understanding, not a technical term in need of explanation. Refusal to provide this instruction was not error.

Limitation on Risk Prediction

"In order to commit an individual and thus significantly curtail his or her rights, due process requires the State to prove that the alleged SVP is mentally ill and currently dangerous."[36] Hosier argues that due process requires narrowly tailoring the risk assessment to "the foreseeable future."[37] This argument is foreclosed by In re Detention of Moore.[38] The Moore court held it is not necessary for the State to show the SVP respondent will reoffend in "the foreseeable future" because finding that a person is an SVP beyond a reasonable doubt necessarily implies that the person is currently dangerous.[39] The court did not err when it declined to narrow Hosier's risk

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[35] Report of Proceedings (Oct. 7, 2008) at 598.

[36] In re Det. of Moore, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009).

[37] Appellant's Br. at 62.

[38] 167 Wn.2d 113, 216 P.3d 1015 (2009).

assessment to "the foreseeable future."

We find no error and affirm.

Ellington, J.

WE CONCUR:

Leach, A.C.J.

Cox, J.

[39] Id. at 125.