IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of:	)	DIVISION ONE
KENNETH HERALD,	)	No. 64941-8-I
Appellant.	)	UNPUBLISHED OPINION
	)	Filed: June 13, 2011

Dwyer, C.J. — Kenneth Herald appeals from the order authorizing his commitment as a sexually violent predator (SVP) pursuant to chapter 71.09 RCW. He raises two assignments of error: (1) that the trial court erred in admitting the testimony of a forensic psychologist that sex offenders with no reported sexual misbehavior while in custody commonly reoffend after being released; and (2) that the trial court erred in rejecting a proposed jury instruction. Finding both instances to be proper exercises of the trial court's discretion, we affirm.

I

Herald has been confined or hospitalized since his 1981 conviction for a violent rape and assault of an elderly woman, a stranger, in her home. That conviction resulted in a 20-year sentence, suspended on the conditions that he

complete 10 years of probation and enter the Western State Hospital (WSH) Sex Offender Program. While in WSH, Herald acknowledged an extensive history of raping and molesting young girls, spying on girls and women in public restrooms, and exposing himself to young girls while masturbating. In 1989, after earning outpatient work release, Herald lured a six-year-old girl away from her father in a department store and sexually molested her. He was caught, charged, and convicted of child molestation. He was sentenced to 34 months for the molestation, consecutive to the 20-year sentence imposed for the 1981 rape.

In 2005, with Herald's release date drawing near, the State sought to determine whether he met the criteria for civil commitment as a SVP. Dr. Douglas Tucker evaluated Herald in September 2005, and diagnosed him with pedophilia, voyeurism, paraphilia, schizoaffective disorder, polysubstance dependence, and antisocial personality disorder. Dr. Tucker concluded Herald was at "extremely high" risk of committing sexual violence unless confined in a secure facility. In 2006, the State filed a petition seeking Herald's civil commitment as a SVP, pursuant to RCW 71.09.[1] A commitment proceeding was held before a jury in January 2010.

To establish that Herald was a sexually violent predator, the State was required to prove beyond a reasonable doubt that: (1) Herald had been convicted of or charged with a crime of sexual violence; (2) he suffered from a mental abnormality[2] or personality disorder; and (3) such mental abnormality or

[1] During the pendency of the petition, the trial court found Herald incompetent to stand trial. Subsequently, in September 2008 the court determined that Herald was competent.

[2] Mental abnormality is defined as "a congenital or acquired condition affecting the

personality disorder made him likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(16); In re Det. of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006) (quoting In re Det. of Thorell, 149 Wn.2d 724, 758–59, 72 P.3d 708 (2003)).

At trial, the State presented a videotaped recording of Herald's pretrial deposition, and the testimony of retired Seattle Police Detective Manuel Washington and forensic psychologist Dr. Harry Goldberg. Herald presented the testimony of forensic psychiatrist Dr. Fabian Saleh and Herald's mother.

In his deposition, Herald admitted to committing the 1989 child molestation and the 1981 rape. He acknowledged that when he was 14 he had sexual contact with a six-year-old girl and a three-year-old girl, and molested another three-year-old girl when he was 15. By 1980, he became "overly sexually minded," and "directed that towards minor females." Clerk's Papers (CP) at 517. He stalked girls in grade school or church restrooms five or six times, and molested them or masturbated. In 1981, he raped a nine-year-old girl in a restroom. He also repeatedly raped a two-and-a-half year old child his wife was babysitting. He admitted that, in the weeks before his 1981 arrest, he broke into a 55- or 60-year-old woman's house with the intent of committing sexual violence. He acknowledged that he drank a large amount of alcohol before committing the 1981 rape and the 1989 child molestation for which he was convicted.

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emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

Herald admitted that he had not participated in treatment or counseling to address sexual deviancy or substance abuse since his 1989 conviction. He contended that he did not need treatment to address his pedophilia, had changed since the attacks, and had "outgrown anything that has to do with rape or sex crime." CP at 474. He claimed that he never discussed his sexual attraction to minor females with therapists at WSH, beyond merely disclosing his history of attacks. He stated that "whatever had to do with me and rape was eradicated at Western State Hospital," although he acknowledged that the 1989 attack occurred after he left WSH. CP at 474

Herald testified that he had not thought about sex since he was at WSH, "never indulge[s] in deviant fantasies," and "never" thinks about sex. CP at 487, 508, 532. Yet he acknowledged that once, while incarcerated, he saw a young girl on television and perceived her as sexual. He explained that incident as follows:

> [In] about 1994 I was staying up really late at night, getting about three or four hours of sleep watching late night movies, and a commercial came on with a minor female in a bathing suit about 12 or 13 years old, and I had a recognition of something sexual about her appearance.

CP at 491.

Dr. Goldberg[3] testified regarding his evaluation of Herald. Based on his interview with Herald, Herald's psychiatric records, and several actuarial

[3] At the time of Herald's trial, Dr. Goldberg had completed approximately 400 evaluations of sexually violent individuals in California and approximately 25 in Washington. He had treated approximately 50 sex offenders, and had supervised a program that treats sex offenders for "many years." He had also served as a quality assurance reviewer for other professionals' evaluations of sexually violent offenders.

instruments,[4] he diagnosed Herald with pedophilia, paraphilia, alcohol abuse and schizoaffective disorder. Dr. Goldberg testified that pedophilia is usually chronic. He was troubled that Herald received no treatment for his pedophilia since the 1989 child molestation conviction, and that Herald believed he did not need treatment:

> [Y]ou know, he has acknowledged these attractions, and he has – he talked about them extensively. The thing that concerns me now is that he's telling me he has none, which to me doesn't make any sense. As a 50-year-old man obviously, you know, you don't – your sexual drive is not as strong as it was when you're in your 20s, but a 50-year-old man still has sexual drives and urges. So he – my concern with him is that at this point in time he's not – he's not admitting to any sexual thoughts whatsoever, which makes me a little suspicious, for the most part. And he's not – essentially since 1989 he's not received any treatment. . . . so the dynamics that were present . . . for the most part should be present today.

Report of Proceedings (RP) (Jan. 11, 2010) at 54-55.

Dr. Goldberg also testified that sex offenders may refrain from sexually acting out while incarcerated, yet reoffend upon release. Herald's counsel objected, asserting that the testimony lacked an adequate foundation. Dr. Goldberg explained that his opinion was based on his review of thousands of pages of institutional and hospital records concerning sex offenders' recidivism in prison and after release. The trial court ruled that this was an adequate foundation for Dr. Goldberg's opinion.

Dr. Goldberg testified that this prior research was relevant to his evaluation of Herald, because while Herald did not act out sexually while in

[4] These included the Static-99-R, the Static-2002-R, the MnSOST-R, and the SORAG.

WSH, he reoffended shortly after being placed on work release:

> Well, Mr. Herald, during his first hospitalization, had no known acting out behaviors in a sexual deviant manner in the – in the hospital setting. Yet as soon as he – within, you know, months or within a year after getting out to the outpatient facility was engaged in [the 1989 child molestation]. And it's not uncommon for individuals to have that pattern of behavior between the sexually acting out behavior while incarcerated or in the hospital then while in the community.

RP (Jan. 11, 2010) at 58. Herald's counsel again objected and moved to strike the testimony, asserting that the opinion was based on research regarding "the general population" of sex offenders, and was not specifically relevant to the circumstances of Herald's case. The trial court overruled the objection, explaining : "[W]hen we get into instruments and the consideration of factors, then I think it's all going to come in anyway. So let's proceed." RP (Jan. 11, 2010) at 58.

Dr. Goldberg concluded that Herald was likely to engage in predatory acts of sexual violence if not confined, based on the actuarial instruments and several dynamic factors.[5] He considered Herald's diagnosis of schizoaffective disorder very significant, because when Herald was in an active phase of the illness, he was impulsive, aggressive, irrational, disorganized, and sexually preoccupied. He pointed out that prison staff reported that Herald engaged in excessive masturbation in 2006 when he was refusing psychiatric medication.

[5] These included Herald's contacts in the community, capacity for relationship stability, emotional identification with children, hostility towards women, general social rejection/loneliness, lack of concern for others, sexual preoccupation, deviant sexual interests, lack of cooperation with supervision, impulsivity, poor problem solving skills, negative emotionality/hostility, and lack of treatment.

Dr. Goldberg testified that he did not believe Herald would comply with psychiatric treatment, and that this increased the risk of Herald reoffending once in the community.

During cross-examination of Dr. Goldberg, Herald's counsel returned to the subject of sex offenders' behavior in prison. Dr. Goldberg testified that "Mr. Herald is . . . a fantastic patient in a locked environment. He was great at Western State. All the reports say he was doing wonderfully until he reoffended." RP (Jan. 11, 2010) at 145-46. Dr. Goldberg continued:

> What I'm saying is, is that just because he's not doing those behaviors . . . where he is now doesn't mean that when he gets out he's not going to do these behaviors. I see this all the time. You have patients who [are] wonderful patients in a locked environment. Take them out of that locked environment, watch out. I mean within a year this guy was drinking alcohol and he reoffended against a six-year-old girl.

RP (Jan. 11, 2010) at 146. Herald's counsel raised no objection to this testimony.

Dr. Saleh[6] diagnosed Herald with schizoaffective disorder, a history of alcohol dependence, and marijuana abuse. He testified that schizoaffective disorder does not predispose an individual to engage in sexual offenses, but progressively damages the individual's brain, leading to a "decrease in sexual behaviors and sexual interest, actually, so there is a decline in sexual functioning." RP (Jan. 13, 2010) at 27. Dr. Saleh testified that Herald's

[6] Dr. Saleh has treated paraphilic and non-paraphilic sex offenders. He has published peer-reviewed papers and books on sex offenders, and has received specialized training regarding schizophrenic patients. At the time of trial, he had completed approximately 400 forensic psychiatric examinations, including approximately 300 sexually violent predators.

schizoaffective disorder began to manifest between 1991 and 1995, and that he has not been observed engaging in any sexual behaviors since then. According to Dr. Saleh, Herald did not have a mental abnormality that made him likely to engage in predatory acts of sexual violence if not confined in a secure facility, and was at low risk of reoffending.

The jury determined that the State proved beyond a reasonable doubt that Herald was a sexually violent predator.

Herald appeals.

II

Herald contends that the trial court abused its discretion by permitting Dr. Goldberg to testify that it was not uncommon for individuals to reoffend after release from incarceration, even if they did not act out sexually while incarcerated.[7] He argues that the testimony was irrelevant and lacked an adequate foundation. We disagree.

The admission of expert testimony is governed by ER 702, which provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

State v. Lord, 161 Wn.2d 276, 294 n. 15, 165 P.3d 1251 (2007) (quoting ER

[7] We review a trial court's evidentiary rulings for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." Stenson, 132 Wn.2d at 701 (citing State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

702); State v. Riker, 123 Wn.2d 351, 364, 869 P.2d 43 (1994). The evidence must be relevant and helpful to the trier of fact under the particular facts of the case. State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999); State v. Mitchell, 102 Wn. App. 21, 26-27, 997 P.2d 373 (2000).

Here, Dr. Goldberg's testimony was relevant to the issue of whether Herald was likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(16). Dr. Goldberg testified that his research was particularly pertinent to his evaluation of Herald, because Herald had no reported sexual "acting out" behavior while institutionalized at WSH, but molested a child shortly after being granted work release.

Moreover, the nature of Herald's defense reveals that the subject was relevant in his case. Herald made Dr. Saleh's testimony and other evidence regarding his lack of reported sexual "acting out" central to his defense, claiming that it rebutted Dr. Goldberg's diagnoses of pedophilia and paraphilia and tended to show that he would not likely reoffend. The trial court did not abuse its discretion, in these circumstances, in concluding that Dr. Goldberg's testimony was relevant to a material issue in Herald's case.

The trial court did not abuse its discretion in concluding that Dr. Goldberg's opinion was properly founded on data of a type reasonably relied upon by experts in his field. The proper basis for expert opinions or inferences is defined by ER 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type

> reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

See In re Det. of Marshall, 156 Wn.2d 150, 161, 125 P.3d 111 (2005). An expert's own experience is a frequent basis for reliable testimony. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 156, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."). Dr. Goldberg's observation, that it is not uncommon for individuals who do not act out while confined to reoffend once released, was founded on his experience and his review of thousands of pages of institutional records regarding sex offenders' recidivism.

The crux of Herald's foundation argument is that the data Dr. Goldberg relied on was based on a general population of sex offenders, and was not limited to those with Herald's diagnosis. Accordingly, he contends, the evidence was not sufficiently representative to allow a valid inference in his specific case. But Herald's concern bears on the weight of Dr. Goldberg's opinion, not its admissibility. Experts' opinions are not dispositive, but are subject to cross-examination; the trier of fact can then determine what weight, if any, it will give to their testimony. Mitchell, 102 Wn. App. at 27. Herald's ability to cross-examine Dr. Goldberg and present contrary evidence provided the appropriate mechanisms to attempt to refute the validity of any inference based on the sample referenced in Dr. Goldberg's research.

Herald's vigorous cross-examination of Dr. Goldberg raised substantial questions regarding the weight of Dr. Goldberg's opinion. On cross-examination Dr. Goldberg conceded that he had never published a scholarly article, case study, or analysis regarding the research underlying his opinion, and had not done a statistical analysis since he was in graduate school 25 years earlier. Herald's counsel also established that Dr. Goldberg had no documentation of Herald sexually attacking anyone or seeking out pornographic materials while confined.

Herald's expert likewise sought to rebut the validity of Dr. Goldberg's opinions. He criticized Dr. Goldberg's conclusions, asserting that no research establishes any correlation between schizoaffective disorder and a predisposition to sexual recidivism. He observed that Dr. Goldberg's diagnosis of paraphilia not otherwise specified-nonconsent is not a diagnosis generally accepted in the relevant scientific community. Dr. Saleh explained that it was problematic to compare Herald to the sample groups underlying the actuarial instruments because of his intervening mental health diagnosis. He also contended that it would be "malpractice" to diagnose Herald with pedophilia, given the absence of evidence of any sexual acting out behaviors involving children, such as viewing television programs showing children, trafficking in child pornography, or drawing pictures involving children.

The trial court carefully instructed the jury regarding its role in evaluating Dr. Goldberg's testimony, particularly his testimony about the materials

underpinning his opinions. Before Dr. Goldberg testified, the trial court instructed the jury that in contrast to lay witnesses, expert witnesses are permitted to express opinions and "may base those opinions on things that they have learned from outside sources." RP (Jan. 11, 2010) at 18. The trial court further instructed the jury:

> In expressing those opinions and supporting those opinions, or being cross-examined about those opinions, there may be testimony as to underlying facts, facts that have come from some other source, events as to which the witness does not have direct personal knowledge from observing things. If those are matters that are routinely relied upon by someone in that field that that witness comes to us from, then they are allowed to testify to those things.
>
> The tricky thing from the jury's point of view is that you're not [to] consider those -- those facts as if the witness were testifying to them directly, he not having observed those things occurring, for instance, in 1981 in the City of Seattle. But you're fully expected to consider those things in connection with evaluating the opinions that are being expressed by the witness. And the witness, again, is here for the purpose of expressing opinions to you.

RP (Jan. 11, 2010) at 18-19.[8]

Under these circumstances, Herald fails to demonstrate any abuse of the trial court's discretion in admitting Dr. Goldberg's opinion testimony.

III

Herald next contends that the trial court abused its discretion by declining

[8] When the prosecutor later began to question Dr. Goldberg further about his diagnoses, the trial court gave a similar limiting instruction:

> As I indicated to you before the testimony, and I may repeat periodically throughout testimony of this witness or any others of a similar type, you're to consider the statements of the witness as to events that he did not personally witness not as proof that they occurred, but simply as bases for your evaluation of his opinion.

RP (Jan. 11, 2010) at 49.

to give a jury instruction that defined the term "likely to engage in predatory acts of sexual violence if not confined in a secure facility" in numerical terms. We disagree.

A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. In re Det. of Pouncy, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). We review de novo alleged errors of law in jury instructions. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The right to due process of law requires that the jury be fully instructed on the defense theory of the case. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions are sufficient if they allow the parties to argue their theories of the case, are not misleading, and properly inform the jury of the applicable law. Barnes, 153 Wn.2d at 382. When read as a whole, jury instructions must make the applicable legal standard "'manifestly apparent to the average juror.'" State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).

The trial court properly instructed the jury that the State had the burden to prove each element beyond a reasonable doubt. The trial court also properly instructed the jury that to find the element that Herald was "likely to engage in predatory acts of sexual violence if not confined in a secure facility," it had to find that he "more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." CP at 548. Herald does not allege that these instructions were erroneous.

Herald contends, however, that the trial court erred by denying his proposed instruction which provided:

> "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.
>
> To meet the "more probably than not" threshold, the person's risk of committing future acts of predatory sexual[] violence must be greater than 50%.

CP at 344. Herald argues that without the instruction, he "could not effectively convey the correct statistical standard to the jury." Br. of Appellant at 23. However, in closing argument both parties referred to the "more probably than not" language as meaning more than fifty percent. The trial court's instructions did not misstate the law and were not misleading; they made the legal standard "manifestly apparent." See LeFaber, 128 Wn.2d at 900. The instructions allowed both parties to argue their theories of the case. Because Herald's proposed instruction was unnecessary, the trial court did not abuse its discretion in declining to give it.

Affirmed.

Dwyer, C. J.

We concur: