

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of Tommie L. Coleman,
A/K/A THOMAS COLEMAN,

Appellant,

No. 38187-7-II

UNPUBLISHED OPINION

HUNT, J. — Tommie L. Coleman appeals his civil commitment as a sexually violent predator under chapter 71.09 RCW, asking us to reverse his commitment order and to remand for new trial. He argues that defense counsel provided ineffective assistance at trial in failing to object to the State’s expert’s (1) testimony that his (Coleman’s) prison infraction for consensual sex was the index offense for calculating his risk of reoffending and (2) opinion that he (Coleman) had raped two inmates in prison. We affirm.

FACTS

The State petitioned to commit Tommie L. Coleman as a sexually violent predator (SVP) under RCW 71.09.020(16). Clerk’s Papers (CP) at 1. The petition focused on his two guilty-plea convictions for sexually violent offenses—first degree rape while armed with a deadly weapon and second degree rape by forcible compulsion. CP at 1, 9; *see* RCW 71.09.020(15). The petition also asserted that (1) Coleman “currently suffers from [a] mental abnormality,” as

defined under RCW 71.09.020(8), specifically, “Paraphilia, Not Otherwise Specified, Non-Consent”; (2) Coleman suffers from a “Personality Disorder, Not Otherwise Specified, with Antisocial Traits”; and (3) Coleman’s “mental abnormalities and/or personality disorders cause him to have serious difficulty in controlling his dangerous behavior and make him likely to engage in predatory acts of sexual violence unless confined to a secure facility.” CP at 2.

The petition recommended committing Coleman to the Department of Social and Health Services (DSHS) “for placement in a secure facility for control, care, and treatment until such time as [his] condition has so changed that he no longer meets the definition of a sexually violent predator.” CP at 2. Coleman stipulated to the State’s “certification for determination of probable cause,” CP at 3, which included a civil commitment clinical evaluation from Dr. Brian W. Judd, a psychologist and certified treatment provider for sex offenders.

I. Expert Witnesses

Dr. Judd testified as an expert witness for the State that in evaluating Coleman for SVP civil commitment, he examined Coleman’s history of sexual violence, substance abuse, and mental health treatment. Dr. Judd reviewed 2800 pages of material, including Coleman’s previous mental health records and documents from the Department of Corrections (DOC) and DSHS. Dr. Judd also interviewed Coleman and Coleman’s former cellmates, Robert Growcock, aka Robert Lynch, and David Weinert.

During Coleman’s civil commitment evaluation, Dr. Judd conducted a “mental status examination,” IV Verbatim Report of Proceedings (VRP) at 86, the result of which demonstrated that Coleman suffered from a mental abnormality known as “paraphilia not otherwise specified

nonconsent.”¹ IV VRP at 95. A person with a paraphilia disorder “suffers from recurrent, intense sexually arousing fantasies or urges or behaviors, involving a nonhuman object; the suffering and humiliation of one’s self or one’s partner or children or other nonconsenting persons.” IV VRP at 101. Paraphilia disorders “tend to be chronic and lifelong.” IV VRP at 129. Dr. Judd based this diagnosis primarily on Coleman’s having raped two women on two different occasions, separated in time by a period of 10 years.² In addition, Dr. Judd found that Coleman’s two prison disciplinary infractions for sexual misconduct demonstrated his paraphilic sexual behavior.

Coleman’s mental health records from approximately 1977 to 2002 include multiple references to his having recurrent rape fantasies, beginning when he was 12 years old. And certain aspects of Coleman’s 1991 and 2002 prison disciplinary infractions for engaging in sexual contact with inmates Growcock and Weinert “indicate[d] that these victims were nonconsenting.” IV VRP at 109

Dr. Judd also noted that: (1) in 1979, Coleman told a therapist that he had physically abused his wife and fantasized about rape and “forcible [sexual] intercourse,” IV VRP at 115; (2) in 1983, Coleman told a psychologist that “[n]ot all of his sexual relationships bordered on rape, but some did” and that even in a consensual situation, “he was little concerned about [his partner’s] response” and preoccupied with “proving himself master,” IV VRP at 115, 210; (3) in

¹ Dr. Judd explained that “not otherwise specified” is the appropriate designation for mental disorders when “the clinician doesn’t feel that there [is] sufficient information to fully diagnose a specific personality disorder, or that there is some lack of clarity with regard to the diagnostic formulation, but still the individual meets the criteria for having a personality disorder.” IV VRP at 203-04.

² Coleman raped the first victim in 1976 and the second in 1986.

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1983, Coleman told a prison psychologist that his rape fantasies “continued to be present throughout his incarceration,” IV VRP at 117, and made him “very worried about re-offending,” IV VRP at 118, 120, 210; (4) in 2002, Coleman told a prison psychologist that he no longer experienced rape fantasies and that he was avoiding “all situations and/or sources of stimulation which may further such fantasies,” IV VRP at 118, 211; and (5) in 2004, Coleman similarly told Dr. Judd that he no longer had rape fantasies.

When asked on cross-examination about the degree to which he had relied on his clinical judgment in forming an opinion about Coleman’s likelihood of reoffending, Dr. Judd testified that he “minimize[s] the degree to which [his] clinical [and subjective] judgment plays a role” in such evaluations by using actuarial tools, “which are more reliable than clinical judgment.” IV VRP at 183-84. Although Dr. Judd had noticed several inconsistencies in the materials he had reviewed for Coleman’s evaluation, he “did not place any significance on them” because they were minor mistakes. IV VRP at 188.

To analyze Coleman’s likelihood of reoffending, Dr. Judd used the “structured clinical judgment” approach. IV VRP at 139. This approach uses an instrument, such as an “actuarial assessment,” IV VRP at 140, to estimate the probability of an individual’s reoffending by comparing the individual and his attributes against data compiled from offenders with similar attributes and then measuring the probability of an individual’s reoffending. According to Dr. Judd, although “actuarial instruments are not perfect by any stretch of the imagination,” they are currently the best tools for assessing a person’s future risk of reoffending. IV VRP at 140.

Dr. Judd also used two actuarial instruments for Coleman’s evaluation, the Static-99³ and

the Sex Offender Risk Appraisal Guide (SORAG). Dr. Judd “chose these two instruments and ha[s] consistently used the[m] because [they] give[] a fairly broad spectrum of coverage, both in terms of sexually compulsive behavior as well as antisocial conduct.” IV VRP at 142. The Static-99 uses a 10-item scoring table to estimate a sexual offender’s risk of reconviction by focusing on sexually compulsive behavior. These 10 items, or “risk factors,” analyze an offender’s age, marital status, history of non sexual violence, prior sex offenses, sentencing data, and victim type. Petitioner’s Ex. No. 48. Each of these items, which can be scored at zero or one, uses an index offense, namely the offender’s “most recent referring offense,” which can be a charge, a conviction, or “an institutional rule violation of a sexual nature.” IV VRP at 147. Dr. Judd testified that Coleman’s index offense was “the sexual assault with Robert [Growcock].” IV VRP at 147.

Dr. Judd calculated Coleman’s index score at seven, which predicted a 52 percent probability of reconviction during a 15-year period. When asked whether this data demonstrated that “Coleman, himself, is 52 percent likely to be re-convicted of an offense in 15 years,” Dr. Judd replied, “No, it means that he shares traits with individuals that were reconvicted of a sexual offense in 15 years.” IV VRP at 152. Defense counsel did not object to this testimony.

Next, Dr. Judd explained that, unlike the Static-99, the SORAG estimates the risk of reoffense, not reconviction, yielding a broader and more general measure of reoffense. In contrast

³ The Static-99, “the most widely used sex offender risk assessment instrument in the world,” is a 10-item actuarial assessment instrument for use with adult male sexual offenders who are at least 18 years of age at time of release to the community. Static-99 <http://www.static99.org/> (last visited February 10, 2010).

to the Static-99, the SORAG evaluates 14 risk-factor items and focuses on a sex offender's "psychopathy or antisocial behavior," IV VRP at 142, as opposed to his "sexually compulsive behavior." IV VRP at 141. According to Dr. Judd, Coleman's SORAG score of 27 was "associated with a higher risk of recidivism." IV VRP at 155-56.

In addition to the actuarial assessments, Dr. Judd used a standard psychotherapy checklist, the "Psychopathy Checklist Revised," to examine Coleman's "lifetime functioning" and behavior. IV VRP at 159. Dr. Judd testified that Coleman received a "relatively high score" of 25 on the checklist, which tends to demonstrate an "excessively high risk for re-offense." IV VRP at 161, 162. Based on the results of these three tests, Dr. Judd testified, "Coleman constitutes a high risk for re-offense for violent and sexually violent re-offense." IV VRP at 156. And Dr. Judd opined that to a reasonable degree of psychological certainty, "Coleman is going to commit predatory acts in the future." IV VRP at 161, 68.

Turning to whether Coleman's prison infractions for sexual misconduct with other inmates⁴ was consensual, defense counsel asked Dr. Judd about Growcock's prostituting himself to Coleman in exchange for cigarettes. Dr. Judd agreed that "when taken at face value," Coleman's sexual acts with Growcock were consensual. V VRP at 228-29. But Dr. Judd noted that although the prison had disciplined both men for this misconduct, Growcock received only one day of segregation, while Coleman received 30 days segregation and a 90-day loss of good

⁴ After Dr. Judd finished testifying, the State moved to admit and to publish for the jury an edited portion of Weinert's videotaped deposition testimony. Defense counsel did not object to the State's playing or publishing this videotape. The State also offered and the trial court admitted the videotaped deposition testimony of Coleman's two rape victims for publication to the jury over no objection from defense counsel.

conduct time.

When asked about Coleman's sexual acts with Weinert, Dr. Judd noted that Weinert had characterized them as rape. Dr. Judd also noted that when the prison disciplined the two men for their misconduct, Weinert received several days of medical segregation, but Coleman received 20 days of segregation, plus 10 days of additional isolation. And according to Dr. Judd, these two prison incidents revealed Coleman's paraphilia, or "persistence of a prior pattern of behavior," which "continues to periodically recur even in 1993 and, again, in 2002." V VRP at 241.

Forensic psychologist Dr. Theodore Donaldson testified as an expert witness for Coleman. In preparing to testify, Dr. Donaldson interviewed Coleman and reviewed his mental health records and related materials, including Dr. Judd's civil commitment evaluation. Based on these materials, Dr. Donaldson prepared a written report, in which he noted errors and inconsistencies in Coleman's mental health records. Dr. Donaldson did not, however, perform an independent clinical evaluation or examination of Coleman.

During direct examination of Dr. Donaldson, defense counsel focused on Dr. Judd's clinical judgment or "judgment call" in concluding that Coleman's sexual misconduct in prison constituted rape and in using actuarial instruments, such as the Static-99. VI VRP at 352. Dr. Donaldson testified that Coleman's sexual activity in prison was consensual and that Dr. Judd's evaluation of Coleman's likelihood of re-offending failed to consider his advancing age.

II. Closing Argument

Defense counsel argued in closing that the two actuarial instruments Dr. Judd had used failed to provide a reliable estimate of the likelihood of Coleman's reoffense. Defense counsel

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also challenged Dr. Judd's use of Coleman's sexual acts with prison inmates as the index score for the Static-99 assessment, which calculated Coleman's score at seven and estimated the probability of his reoffending at 52 percent. Defense counsel argued, "If you follow the coding rules, as Dr. Donaldson has done, the score is four." VI VRP at 581.

Defense counsel also argued:

[T]he scoring instructions say do not count consensual sexual activity in prison. Dr. Judd counts it. That's inappropriate, but he has to. As the State's expert, if he's going to get to a more likely than not, which is what he has to get for the third prong . . . he has to have a score of six or above, because the only number on this whole chart that puts you over 50 percent . . . [is] a six or greater."

VII VRP at 581.

On August 12, 2008 the jury found, "[T]he State [has] proved beyond a reasonable doubt that [Coleman] is a sexually violent predator." CP at 386. Coleman appeals.

ANALYSIS

Coleman argues that his trial counsel provided ineffective assistance in failing to object to the State's expert's (1) testimony that his (Coleman's) prison infraction for consensual sex was the index offense for calculating actuarial risk and (2) opinion that he (Coleman) had raped Weinert and Growcock in prison. But his argument fails to show how defense counsel's performance was deficient or prejudiced his case.

I. Standard of Review

Washington courts apply the *Strickland*⁵ analysis to determine whether counsel provided

⁵ *In re Detention of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

ineffective assistance during a civil commitment trial.⁶ To succeed on an ineffective assistance of counsel claim, Coleman must show that (1) defense counsel's performance fell below an objective standard of reasonableness and (2) but for this deficient performance, a reasonable probability exists that the outcome of his jury trial would have differed.⁷ He may do so by showing that there was no legitimate tactical reason for defense counsel's allegedly prejudicial acts and omissions.⁸ But Coleman must overcome a strong presumption that his counsel's representation was effective.⁹

II. Civil Commitment for Sexually Violent Predators

Under Washington law, the State may file a petition to confine indefinitely sex offenders likely to "engage in sexually violent behavior." RCW 71.09.010. A court may civilly commit a person to a secure "facility" if it determines that he is an SVP beyond a reasonable doubt. RCW 71.09.060. An SVP is "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 engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(16).

To commit a person as an SVP, the State must prove that the individual (1) has a record of convictions or charges for a crime of sexual violence; (2) suffers from a mental abnormality or

⁶ *In re Detention of Stout*, 128 Wn. App. 21, 27-28, 114 P.3d 658 (2005), *aff'd*, 159 Wn.2d 357, 150 P.3d 86 (2007) (citing *In re Detention of Smith*, 117 Wn. App. 611, 72 P.3d 186 (2003)).

⁷ *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *In re Detention of Taylor*, 132 Wn. App. 827, 838, 134 P.3d 254 (2006).

⁸ *McFarland*, 127 Wn.2d at 336.

⁹ *McFarland*, 127 Wn.2d at 335.

personality disorder; and (3) is more likely than not, because of the disorder, to engage in predatory acts of sexual violence if not committed to a secure treatment facility. RCW 71.09.020(16); *In re Detention of Thorell*, 149 Wn.2d 724, 742, 72 P.3d 708 (2003). The State must also show that the defendant's mental abnormality or personality disorder causes him to have serious difficulty controlling his dangerous behavior. *Thorell*, 149 Wn.2d at 736. The State has made such a showing.

A. No Deficient Performance

Coleman first argues that his defense counsel's failure to object to Dr. Judd's use of his (Coleman's) prison infraction for consensual sex as the index offense "was deficient performance that prejudiced [his case]." Br. of Appellant at 22. He contends, "[T]here was no legitimate reason for defense counsel not to object to Judd's error in scoring the Static-99," Br. of Appellant at 30, which "left this key question to be resolved by the jury's view of the battle of experts, rather than by the court, where it belonged." Br. of Appellant at 26. We disagree.

We first note that, contrary to Coleman's argument that defense counsel should have objected to Dr. Judd's testimony about the index offense, this testimony was clearly admissible under ER 702. The rule provides:

[I]f 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, expertise, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Dr. Judd's expert testimony assisted the jury in understanding the scientific medical and behavioral facts contained in both doctors' reports. Moreover, Coleman

provides no legal authority to undermine our note in *In re Detention of Reimer* that the Static-99 “[is] considered [a] reliable measure of risk of violent and sexually violent behavior.” 146 Wn. App. 179, 196 n. 24, 190 P.3d 74 (2008).

Second, Coleman’s sexual misconduct in prison may be scored as an index offense because it satisfies the Static-99 Coding Rules requirements. The Coding Rules¹⁰ instruct evaluators: “Do not count consenting offences such as . . . consenting sex [or sexual activity] in prison.” Br. of Appellant Appendix at 13. But these Coding Rules also provide: “Institutional rule violations resulting in institutional punishments can be counted as sex offences” when the following two criteria are satisfied: (1) The sexual behavior was “sufficiently intrusive that a charge for a sex offence would be possible were the offender not already under legal sanction,” and (2) “the evaluator must be sure that the sexual assaults actually occurred and the institutional punishment was for the sexual behavior.” Br. of Appellant Appendix at 16. Coleman’s sexual misconduct in prison satisfied both Coding Rules criteria because Weinert’s videotaped deposition and Dr. Judd’s trial testimony showed that Coleman sexually abused Weinert on several occasions, during which Weinert did not consent. Thus, defense counsel was not deficient in failing to object to Dr. Judd’s testimony on this basis.

Coleman also fails to show that it was unreasonable for defense counsel to rebut Dr. Judd’s testimony by using cross-examination and opposing testimony from Coleman’s expert witness in lieu of objecting. On the contrary, defense counsel skillfully elicited testimony that supported Coleman. For example, on direct examination, Dr. Donaldson testified that Coleman’s

¹⁰ In discussing these Coding Rules, we reference the appendix to the Brief of Appellant, which contains a photocopy of the “Static 99 Coding Rules Revised.”

sexual activity in prison was consensual and that Dr. Judd's evaluation of Coleman's likelihood of re-offense failed to consider his advancing age. And during closing argument, defense counsel challenged Dr. Judd's use of Coleman's sexual misconduct in prison as the index offense for the Static-99 assessment. Defense counsel argued, "If you follow the coding rules, as Dr. Donaldson has done, the score is four." VI VRP at 581. Thus, defense counsel reasonably relied on expert defense testimony and closing argument to rebut Dr. Judd's testimony about the likelihood of Coleman's reoffense.

Furthermore, because the trial court played Weinert's videotaped deposition for the jury, it was reasonable for defense counsel to elect not to object to Judd's testimony for tactical reasons, namely to avoid drawing more attention to Coleman's alleged raping of Weinert. Thus, the record fails to support Coleman's argument that defense counsel had no legitimate tactical reason for failing to object to Dr. Judd's testimony. *McFarland*, 127 Wn.2d at 336. Because Coleman fails to establish the deficient performance prong of the ineffective assistance of counsel test, we need not address the second prong.

B. No Prejudice

Nevertheless, assuming without deciding that defense counsel rendered deficient performance, Coleman fails to demonstrate how such performance caused prejudice to his case. Coleman asserts that defense counsel's closing argument that Dr. Judd had manipulated the index offense "was too late" because "[t]he damage had been done" and "th[is] deficient performance prejudiced the result" of his case. Br. of Appellant at 29-30. But this broad assertion does not demonstrate how defense counsel's performance specifically affected the outcome of Coleman's

case; nor does it articulate what the outcome might have been if defense counsel had objected to Dr. Judd's index-offense testimony or had cross-examined him on this point.

On the contrary, the record demonstrates that (1) the jury viewed Weinert's videotaped deposition about Coleman's anally raping him in prison; (2) the jury viewed videotaped deposition testimony from Coleman's two previous rape victims; and (3) the jury heard Dr. Judd's trial testimony about Coleman's record of sexual violence, rape fantasies, and abusive relationships with others. In light of this evidence, Coleman does not show that but for defense counsel's performance, the outcome of his commitment trial would have differed. *McFarland*, 127 Wn.2d at 335-36. We hold, therefore, that Coleman fails to establish ineffective assistance of counsel.

Accordingly, we affirm Coleman's civil commitment as a sexually violent predator.

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 pursuant to RCW 2.06.040, it is so ordered.

We concur:

Hunt, PJ.

Quinn-Brintnall, J.

Houghton, JPT.