

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of

ANTHONY JACKA,

Appellant.

No. 39566-5-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — After a jury denied Anthony Jacka’s petition for unconditional release, the trial court entered an order continuing his civil commitment as a sexually violent predator (SVP). Jacka appeals, arguing that the trial court erred in excluding evidence about his polygraph examinations and the source of his continuing anger. He also argues that the trial court did not properly instruct the jury on the “current dangerousness” requirement. Because the trial court’s ruling on the source of anger evidence deprived Jacka of his due process rights to cross-examine adverse witnesses and present evidence on his own behalf, we reverse and remand for retrial.

Facts

Forty-three-year-old Jacka has a history of sexually violent offenses against women and teenage girls. *In re Det. of Fox*, 138 Wn. App. 374, 384, 158 P.3d 69 (2007). After he admitted

raping a 14-year-old girl at knife point and attempting to rape a woman sleeping next to her child, the trial court sentenced him to prison in 1990. *Fox*, 138 Wn. App. at 384. At the end of that sentence, the State petitioned to commit him as an SVP under ch. 71.09 RCW. *Fox*, 138 Wn. App. at 384. In 1999, the trial court found that Jacka met the SVP criteria and committed him to the Special Commitment Center (SCC). *Fox*, 138 Wn. App. at 384. Pursuant to Jacka's petition, a jury trial was held in 2009 to determine whether he should be unconditionally released to the community because he no longer qualifies as an SVP.

Evidence of Jacka's Transparency

Before trial, the State moved to exclude all references to polygraph examinations. Jacka agreed that the results were inadmissible but argued that the fact that he had taken polygraphs during his commitment was relevant to his transparency "of . . . disclosing what he's done." 3-A Report of Proceedings (RP) at 35. He pointed out that the State's two witnesses had testified in depositions that the purpose of polygraphs is to determine a person's transparency.

The State responded that polygraph evidence is not sufficiently reliable to present to a jury and that introducing evidence that Jacka had taken polygraph tests would invite the jury to speculate about their results. The court postponed a decision pending its review of the law.

The State's first witness then testified. Debra Larowe-Prado is a psychologist who has worked with Jacka at the SCC. When asked whether transparency is an issue for him, she replied that Jacka was "about 90 percent transparent." 3-A RP at 64. As support for this assertion, she cited the discovery of stamp-sized photographs of scantily-clad women on Jacka's personal computer. She was concerned that Jacka had not disclosed the photographs until

confronted with their discovery and that this failure demonstrated a lack of transparency. On cross-examination, she admitted that Jacka had one of the highest transparency rates of anyone on her caseload and that he had been transparent in admitting a minor altercation with another SCC resident.

The State then called Jacka to testify about his criminal history. On cross-examination, Jacka testified that the sexual autobiography he was required to write as part of his treatment demonstrated his transparency.

After this testimony, Jacka's attorney requested a ruling on the polygraph issue, noting that both of the experts to follow had referred to polygraph examinations in their reports on Jacka. The trial court ruled that, without a stipulation, the fact that Jacka had taken polygraphs was inadmissible.

Dr. Leslie Rawlings diagnosed Jacka with a continuing mental abnormality and personality disorder, explaining that Jacka had said a lack of transparency was his most important risk factor for reoffense. Rawlings stated that Jacka had demonstrated a lack of transparency by having R-rated movies as well as photographs of women on his computer without permission. He did not share Larowe-Prado's opinion of Jacka's high rate of transparency, primarily because of the computer issues.

Jacka's expert, Dr. Richard Wollert, found no evidence that Jacka was not being completely forthright. Holly Coryell, a forensic evaluator at SCC, testified that Jacka had demonstrated transparency when she evaluated him in 2007 by volunteering that he had sexual thoughts about staff. A family therapist who worked with Jacka at the SCC testified that he has good transparency and is straightforward. When recalled by the defense, Jacka acknowledged a

fistfight with another resident in an attempt to demonstrate his transparency.

Evidence of Jacka's Anger

Larowe-Prado testified about Jacka's anger as well as his transparency. She stated that Jacka needed to work on his anger toward SCC supervisors and therapists and that his anger was blocking his treatment. She noted that Jacka's criminal history was prompted in part by his anger, and she thought that Jacka needed anger management classes, which he had declined, before an unconditional release was warranted. When defense counsel asked whether she would support Jacka's conditional release, the court sustained the State's objection: "It's not the issue before the court." 3-A RP at 106. Dr. Rawlings also referred to Jacka's anger, noting that Jacka had commented that "his anger was not limited just to sex offending." 4-A RP at 292.

During a break in Dr. Rawlings's testimony, the parties debated the timeliness and admissibility of Dr. Wollert's report on Jacka and its inclusion of a recent conditional release recommendation. Defense counsel argued that Jacka should be able to introduce this and previously denied conditional release recommendations to explain his feelings and behavior; "the jury needs to hear the whole story." 4-B RP at 312. (Apparently, the SCC's most recent conditional release rejection was due to Jacka's computer contraband and his refusal to work with the outside treatment provider the SCC recommended.)

The State responded that the jury was not entitled to know about the conditional release recommendations because Jacka had chosen an unconditional release trial: "When he chose an unconditional release trial, he narrowed the evidence that this jury gets." 4-A RP at 312. The State also maintained that the jury would be confused by testimony about a less restrictive alternative it could not grant. "It would be highly prejudicial to the State to at this point allow

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testimony . . . about [a less restrictive alternative] . . . because this jury cannot in the end send

him there, and they don't get to know why he isn't there now. We would have put on an entirely different case if that was the issue before the jury." 4-B RP at 315. Although the defense insisted that Jacka needed this evidence to explain his anger, the court granted the State's motion to bar any discussion of conditional release.

Dr. Rawlings then testified that Jacka had admitted his anger was a lifelong problem that had caused him difficulty as early as junior high school. He stated that Jacka was angry at their first 2009 interview. He later testified that Jacka was angry at SCC staff and at him "for a number of reasons" and that the state of intense anger Jacka had identified increased his risk of reoffense. 4-B RP at 380. Rawlings added that Jacka felt wronged by and extremely bitter toward the SCC, and he opined that this "negative emotionality" was holding Jacka back. 4-B RP at 386.

During another break in Dr. Rawlings's testimony, defense counsel argued that he needed to be able to cross-examine the doctor about the reasons for Jacka's anger, including the denial of the conditional release recommendations. He maintained that the jury was entitled to know why Jacka was angry and that the State had opened the door to such evidence with Rawlings's testimony. The State again argued that it would be prejudiced if Jacka introduced evidence about the less restrictive alternative. He had elected an unconditional release trial, and the State did not want the jury to be confused about an alternative it had no right to consider. The court ruled that Jacka could cross-examine about the sources of his anger but could not refer to the conditional release alternative.

On cross-examination, Dr. Rawlings acknowledged that Larowe-Prado had told him that Jacka's anger was a defense mechanism to cover up feelings of grief and loss and that anger was the only way Jacka could express himself at times. Dr. Wollert then observed that Jacka had not

acted out in anger during his civil commitment. Jacka's former neighbor added that Jacka had become much less angry over the years, and a prison minister testified that, although Jacka was not happy with the SCC or his treatment, he never got physically angry as a result. The minister acknowledged that Jacka had been a little belligerent but added, "I can't blame him." 6-A RP at 686. Coryell testified that in 2007, Jacka was not happy about his lack of advancement at the SCC but that he had persevered despite his disappointments. In an offer of proof, she said she had recommended Jacka's conditional release in 2007 and that he was angry when it was not approved.

His brother testified that he had seen frustration rather than anger in Jacka because Jacka was trying to do all that was required but did not see progress on the SCC side. Jacka himself admitted that anger was an element in his offending. He admitted further that his anger was "still a valid . . . thing" and that it was well documented that he has issues with SCC authority figures. 6-B RP at 827. Jacka views anger as a valid treatment issue for him.

In an offer of proof at the end of trial, Dr. Wollert stated that Jacka was angry because SCC personnel had recommended his conditional release three times without success and that such release was denied in 2008 even after he agreed to strike an unconditional release trial. Jacka stated in his own offer of proof that he thought he had a deal to get a less restrictive alternative in 2008 and that the deal's failure was the source of frustration and anger, which he had openly expressed. He was also upset because people in the community who could have helped him following his conditional release had recently died.

In closing, the State noted that, among other factors detrimental to his treatment, Jacka was not attending anger management classes and had not been honest about the computer issues.

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The State argued that his mental abnormality and personality disorder had prevented Jacka from finishing needed treatment and asserted that until he set his anger aside, he was not safe to release.

Defense counsel responded that Jacka's anger could be explained by his issues with family deaths and with things not going as smoothly or as quickly as he had anticipated. Counsel pointed out that Jacka had not acted out sexually despite his stress, frustrations, and experiences at the SCC, and he argued that Jacka no longer met the definition of an SVP.

The jury disagreed, and the trial court ordered his continued commitment at the SCC. Jacka appeals.

Discussion

Polygraph Evidence

Jacka argues that the trial court erred in refusing to admit evidence that he voluntarily took polygraph examinations during his treatment and evaluation at the SCC.

Jacka maintains that this evidence was relevant and, thus, admissible because of the State's inquiry into his transparency. *See* ER 402. Relevant evidence may be excluded, however, if the trial court concludes that its probative value is substantially outweighed by the danger of unfair prejudice, if it is wasteful of time or cumulative, or if it is confusing or misleading to the jury. ER 403; *State v. Reay*, 61 Wn. App. 141, 148, 810 P.2d 512, *review denied*, 117 Wn.2d 1012 (1991). We review a trial court's evidentiary rulings for abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). An erroneous ruling is grounds for reversal only if it is prejudicial, as shown by the reasonable probability that it materially affected the trial's outcome. *State v. Asaeli*, 150 Wn. App. 543, 579, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009).

Washington courts have consistently recognized polygraph evidence as unreliable and,

unless stipulated to by all parties, inadmissible. *In re Det. of Hawkins*, 169 Wn.2d 796, 802, 238 P.3d 1175 (2010). This rule is not without its exceptions, as Jacka argues. The mere fact that a jury is apprised of a polygraph examination is not necessarily prejudicial if no inference is raised as to the result or if any such inference, if raised, is not prejudicial. *State v. Sutherland*, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980). Such evidence is liable to be prejudicial, however, and should be admitted only when clearly relevant and unmistakably nonprejudicial. *Sutherland*, 94 Wn.2d at 529-30. Under certain circumstances, the fact that a polygraph was taken may be relevant and admissible for purposes other than establishing the truth or falsity of a disputed fact. *Reay*, 61 Wn. App. at 150 (citing *Barnier v. Szentmiklosi*, 810 F.2d 594 (6th Cir. 1987)).

Here, the State argued that Jacka's failure to reveal the computer contraband demonstrated a lack of transparency, and Jacka sought to introduce evidence that he had volunteered to take polygraphs to demonstrate his transparency. Whether he was transparent thus was a disputed issue and, under the case law above, his willingness to take polygraphs was arguably inadmissible.

This evidence also was cumulative, as witnesses for both the State and the defense testified that Jacka had a high level of transparency that was demonstrated in several ways. The polygraph evidence was potentially misleading as well; testimony that Jacka had volunteered to take polygraphs invited the jury to speculate about the results and to assume that he had passed. Finally, our review of the record reveals no reasonable probability that the result of the trial would have differed had the evidence that Jacka had offered to take polygraph tests been admitted.

Source of Anger Evidence

Jacka argues here that his Sixth Amendment rights to present a defense and to confront adverse witnesses were violated when the trial court refused to allow him to fully explain his anger and limited his cross-examination of Dr. Rawlings in this regard.

Jacka argues that he has the same constitutional rights as any criminal defendant, but this is not the case. Because SVP proceedings are civil and not criminal proceedings, the rights afforded under the Sixth Amendment do not attach to SVP petitioners. *In re Det. of Strand*, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009). A committed person is entitled to due process of law, however, and thus has the right to present evidence on his own behalf and cross-examine adverse witnesses during an unconditional release trial. RCW 71.09.090(3)(a);¹ *In re Det. of Stout*, 159 Wn.2d 357, 368-70, 150 P.3d 86 (2007); *In re Det. of Skinner*, 122 Wn. App. 620, 630, 94 P.3d 981 (2004), *review denied*, 153 Wn.2d 1026 (2005); 13 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure*, §§ 5408, 5416 at 562-63, 574 (3d ed. 2004).

As defense counsel explained at Jacka's trial, these rights were implicated by the trial court's ruling on the source of anger evidence:

This is a case on whether we can present evidence of this issue regarding him being able to explain his anger issues and me being able to cross-examine experts about their perceptions of his anger issues.

. . . . [T]he premise is that all relevant evidence is admissible unless there are some exceptions. . . .

I have not been cited any evidence or any law, any authority that says that us being able—or him being able to comment, talk about what causes his anger is inadmissible.

. . . .
The jury should be entitled to hear and have him explain and have me cross-examine Dr. Rawlings about what makes him angry, why he is angry.

¹ RCW 71.09.090(3)(a) was amended in 2009 and 2010, but those amendments do not affect our analysis.

4-B RP at 402-03.

The trial court refused, however, to permit Jacka to introduce evidence about the conditional release recommendations he had received and his anger over being denied such release. The trial court accepted the State's argument that such testimony would confuse the issues in an unconditional release trial and invite the jury to reach an impermissible middle ground.

Thus, contrary to the State's assertion on appeal, Jacka was not given a full and fair opportunity to present his theory of the case to the jury. By ruling that Jacka could cross-examine Dr. Rawlings and others about the sources of his anger but not about the prior conditional release recommendations, the trial court deprived Jacka of his right to meaningfully cross-examine adverse witnesses. And by barring Jacka and his witnesses from explaining the reasons for his anger, the trial court severely restricted his right to present relevant evidence on his own behalf.

We reverse and remand for a new unconditional release trial in which Jacka is allowed to present evidence about his unsuccessful attempts to gain release from the SCC and his resulting anger. Because of the possibility of confusion caused by introducing evidence of conditional release recommendations into an unconditional release trial, however, the trial court should instruct the jury to consider this evidence only insofar as it explains Jacka's anger and not for any other purpose.²

² In supplemental briefing, the State reports that Jacka has been granted conditional release. Both parties deny that this case is moot, but we question whether, having been granted conditional release, Jacka will seek to introduce evidence of prior denials in a new unconditional release trial.

Current Dangerousness

Finally, Jacka argues that his right to due process was violated because the court's instructions did not require the jury to find that he was currently dangerous. Despite our reversal, we address this issue in order to provide clarity on remand.

“Current dangerousness is a bedrock principle underlying the SVP commitment statute.” *In re Det. of Paschke*, 121 Wn. App. 614, 622, 90 P.3d 74 (2004); *see also In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). Due process requires a showing of current dangerousness before a person qualifies as an SVP. *Albrecht*, 147 Wn.2d at 7; *Paschke*, 121 Wn. App. at 622.

As stated, Jacka faults the jury instructions for failing to make the current dangerousness requirement explicit. Jacka did not object or except to any of the court's instructions, however, so his argument here is arguably waived. RAP 2.5(a). We address it, however, because of the possibility of manifest error affecting a constitutional right. RAP 2.5(a)(3).

In order to commit someone to the SCC, the judge or jury must find beyond a reasonable doubt that the person is an SVP. *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009). 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(18). A person is “[l]ikely to engage in predatory acts of sexual violence if not confined in a secure facility” if he or she “more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition.” RCW 71.09.020(7). By finding these definitions satisfied, the trier of fact impliedly finds that the person

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is currently dangerous.³ The court's instructions properly informed the jury of the statutory elements and did not violate due process. *Moore*, 167 Wn.2d at 124-25.

Reversed and remanded.

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.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.

³ Our Supreme Court recently confirmed that to subject a person to continued commitment as a SVP, the State must prove beyond a reasonable doubt that the person remains both mentally ill and dangerous. *State v. McCuiston*, 169 Wn.2d 633, 640, 238 P.3d 1147 (2010). The court also invalidated recent statutory amendments concerning the showing that a SVP must make to obtain a release trial, but these amendments are not relevant here. *McCuiston*, 169 Wn.2d at 643-44.