IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Detention of:		**No. 27717-8-III**
JOSEPH DALE CARVER,	)	**Division Three**
Appellant.	)	**UNPUBLISHED OPINION**

Siddoway, J. — Joseph Carver appeals his civil commitment as a sexually violent predator alleging (1) the State presented insufficient evidence of the required element that he is likely to reoffend if not confined and (2) improper opinion testimony as to his credibility was presented, invading the constitutional province of the jury. We agree that some of the expert testimony was improper, but the error was not raised at trial and does not constitute manifest constitutional error that can be raised for the first time on appeal. We reject Mr. Carver's other challenges and therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

Joseph Carver is a young man with a long history of sexual offenses. In December

2003, the State filed a petition to commit him as a sexually violent predator.

The sexually violent predator statute, chapter 71.09 RCW, provides for the involuntary civil commitment of an individual who has been convicted of a charge of sexual violence and who suffers from a mental abnormality making him likely to reoffend. *See* RCW 71.09.010. The commitment is indefinite, although subject to ongoing review. In the initial commitment proceeding the State must prove, beyond a reasonable doubt, that the individual suffers from a mental disorder and is dangerous. *In re Det. of McCuistion*, 169 Wn.2d 633, 638, 238 P.3d 1147 (2010) (citing *In re Pers. Restraint of Young*, 122 Wn.2d 1, 27-33, 857 P.2d 989 (1993)), *recons. granted* by order of the Supreme Court, No. 81644-1, Feb. 9, 2011.

In the initial commitment proceeding below, the State presented evidence that over a 7-year period, from the time he was age 12 to age 19, Mr. Carver was convicted of the following sex offenses:

March 1992	Fourth degree assault—sexual motivation; 12-year-old victim
September 1992	Fourth degree assault—sexual motivation, 13-year-old victims
May 1993	Indecent exposure, adult female victim
August 1993	First degree child molestation, 9- to 11-year-old victim
April 1995	Fourth degree sexual assault—sexual motivation, adult female victim

May 1995	Fourth degree sexual assault—sexual motivation, adult female victim
January 1997	First degree child molestation, victim was Mr. Carver's 4-year-old sister
June 1999	Third degree child molestation, 13-year-old victim

The first eight convictions occurred while Mr. Carver was a juvenile and were served in juvenile facilities. While serving time for these crimes, Mr. Carver received citations and infractions for groping and assaultive behavior, for touching himself in front of a female officer, and for stealing photos of a cellmate's 15-year-old daughter.

Mr. Carver was an adult at the time of the last conviction and was sentenced to 54 months in prison. The State petitioned for Mr. Carver's civil commitment prior to his completing that sentence. The first commitment proceeding resulted in a mistrial. Mr. Carver has been incarcerated in prison or at the Special Commitment Center since the time of his last conviction in 1999.

At trial, Mr. Carver testified that he formerly had rape fantasies but claimed that beginning in 2000 or 2001 he decided to change his life; he no longer wanted to commit sexual or other crimes. He maintains that the rape fantasies ceased in 2002 with the exception of one in 2005. He testified that he does not intend to seek treatment because he does not believe he needs any, but admitted that the risk that he could reoffend,

sexually or otherwise, is always in the back of his mind. He testified "it's what I choose to do with that . . . put things in place to prevent me from reoffending." II-A Report of Proceedings (RP) at 261.

Dr. Leslie Rawlings, a licensed psychologist and certified sex offender treatment provider, testified that he had evaluated Mr. Carver and diagnosed him with pedophilia, opposite sex, nonexclusive; paraphilia not otherwise specified, nonconsent; and antisocial personality disorder. Dr. Rawlings based his diagnoses on Mr. Carver's history of sexual fantasies involving rape, his history of offenses, a penile plethysmograph exam that indicated Mr. Carver was aroused by prepubescent females, and Mr. Carver's admission in a 1995 polygraph examination that he had engaged in 18 instances of nonconsensual sexual contact with females. He also testified to the results of actuarial tests suggesting that Mr. Carver had a high percentage chance of offending again in the future. Dr. Rawlings testified that in his opinion, Mr. Carver "is likely to commit sexual offenses against minor children, primarily females, young children, and also against adults by what would be referred to as indecent liberties with forcible compulsion." III-B RP at 553-54.

In the course of his testimony, Dr. Rawlings answered questions about Mr. Carver's testimony that he had made a choice to change his behavior:

> [COUNSEL FOR THE STATE]: Is it likely, in your opinion, doctor, that this [condition of paraphilia] has just gone away in Mr. Carver?
>
> [WITNESS]: No. I don't think that it's likely that it's just gone away.

> [COUNSEL FOR THE STATE]: Why do you say that?
> [WITNESS]: Well, in part because the nature of the disorder is chronic, and the research would tend to support that. And secondly, although Mr. Carver has more recently denied having fantasies about rape, you have to keep in mind a couple of things. *Mr. Carver is in a setting where there has been the anticipation of a legal process that could result in an indefinite confinement. It's fairly common that when people are anticipating some sort of trial that they tend to reshape their -- disclosures in ways that assist them, to minimize their legal risk. And so it's important to not -- over-emphasize disclosures or lack thereof, particularly the closer you get to -- to a trial.*

III-A RP at 494 (emphasis added). Mr. Carver did not move to strike Dr. Rawlings' testimony.

Dr. Theodore Donaldson, a clinical psychologist, was called by the defense. Dr. Donaldson testified that Mr. Carver had a difficult childhood: that he suffered from a severe speech impediment, had a dire need of orthodontics, had been seriously molested by an older brother, and had been picked on by other children. As a result, the doctor testified, he was a seriously disturbed adolescent with anger issues and "almost no ability to approach women sexually." IV-A RP at 646. But Dr. Donaldson testified that there was an insufficient basis to make a diagnosis of pedophilia, since Mr. Carver had only had one offense when he was over the age of 16 involving a child. He further testified that he did not see any evidence supporting the diagnosis of paraphilia, inasmuch as he saw no evidence that Mr. Carver was aroused by nonconsent.

At the conclusion of Dr. Donaldson's testimony the jurors were allowed to submit

written questions, which the trial court reviewed with counsel for objections at sidebar. One of the juror questions for Dr. Donaldson was "Would you feel comfortable having Mr. Carver living . . . next door to you?" to which defense counsel objected on relevance grounds. IV-B RP at 761. Counsel for the State contended the question was relevant to Dr. Donaldson's confidence in his opinion of Mr. Carver's risk to reoffend, and the judge allowed the question. In response to the juror's question, Dr. Donaldson testified:

> THE WITNESS: Well, -- if I had some vulnerable people living with me, small children, women, whatever, I might not like it. But I'm unwilling to break the law to keep him from living next door to me.

Id. at 772. Counsel were invited to ask follow-up questions. While defense counsel did not follow up on Dr. Donaldson's answer to the juror's question, counsel for the State did:

> [COUNSEL FOR THE STATE]: If you had small children or women living with you why wouldn't you like Mr. Carver -- next-door neighbor?
>
> [WITNESS]: I don't think I would want any risky situation. I mean, why accept any risk at all if you don't have to?
>
> On the other hand, the law tells us that we have to accept a considerable risk here, that we can't violate his rights just because we have some fears about him, and that he has to have a certain mental condition that causes him to be a serious risk.
>
> So I think to keep him from living next door to me I would have to overlook that, say "I don't care what the law says; I don't like him, and I don't like these people, so -- keep him out of here."
>
> [COUNSEL FOR THE STATE]: Regardless of the law you clearly would have some concerns about him living next door to you--
>
> [WITNESS]: Well, I think one has to have concerns for anybody that has a history of criminal behavior, particularly this kind of criminal

> behavior.
>
> [COUNSEL FOR THE STATE]: Thank you, Doctor.
> THE COURT: Anything else, [defense counsel]?
> [DEFENSE COUNSEL]: No.

Id. at 779-80.

At the conclusion of the evidence, the jury was instructed that to establish that Mr. Carver is a sexually violent predator, the State was required to prove each of the following elements beyond a reasonable doubt:

> (1) That Joseph Carver has been convicted of a crime of sexual violence, namely Child Molestation First Degree;
> (2) That Joseph Carver suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior; and
> (3) That this mental abnormality or personality disorder makes Joseph Carver likely to engage in predatory acts of sexual violence if not confined to a secure facility.

CP at 17 (Instruction 4). The jury was also provided with several definitional instructions, two of which, relevant to Mr. Carver's appeal, provided as follows:

> "Sexual violence" or "harm of a sexually violent nature" means:
> - Child Molestation in the First or Second Degree;
> - Indecent Liberties by Forcible Compulsion.
>
> An attempt to commit any of these offenses is also a crime of sexual violence.

CP at 20 (Instruction 7). A different instruction defined the elements of first and second degree child molestation and indecent liberties by forcible compulsion. CP at 21 (Instruction 8).

The jury determined that Mr. Carver was a sexually violent predator and the court entered an order of commitment. This appeal followed.

ANALYSIS

Mr. Carver contends on appeal that (1) under the law of the case doctrine, the State failed to carry its burden of proof, beyond a reasonable doubt, that Mr. Carver meets the criteria for a sexually violent predator and (2) both experts impermissibly commented on Mr. Carver's credibility, thereby invading the province of the jury.

I

Under the law of the case doctrine, jury instructions not objected to by either party become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). *Hickman* held that in criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when added elements are included without objection in the "to commit" instruction.

In the trial below, instruction 4 was the "to convict" equivalent, although in this civil case, a "to commit" instruction. It employed terms defined in instruction 7, which in turn employed terms defined in instruction 8. Mr. Carver argues that because no objection was made to the definitional instructions, the State was required to prove the elements set forth in instruction 4 with reference to those definitions. Specifically, he argues that the requirement of instruction 4 that the State prove, inter alia,

> [t]hat [Mr. Carver's] mental abnormality or personality disorder makes Joseph Carver likely to engage in predatory acts of *sexual violence* if not confined in a secure facility,

(CP at 17 (emphasis added)) is transformed, by the definitions in instruction 7, to a requirement that the State prove,

> [t]hat [Mr. Carver's] mental abnormality or personality disorder makes Joseph Carver likely to engage in predatory acts of *Child Molestation in the First or Second Degree, Indecent Liberties by Forcible Compulsion, or an attempt to commit any of these offenses,* if not confined in a secure facility.

Applying the definitions in instruction 8 in turn, he contends this required that the State prove beyond a reasonable doubt that Mr. Carver's mental abnormality or personality made him likely to engage in one of the following:

> Sexual contact with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim,
>
> Sexual contact with another person who is at least twelve years old but less than fourteen years old and who is not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim,
>
> Knowingly causing another person who is not his spouse to have sexual contact with him or another by forcible compulsion, where
>
> > Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party, and
> >
> > Forcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped,

> or an attempt to commit any of these offenses, if not confined in a secure facility.

See CP at 21 (Instruction 8). Mr. Carver argues that by accepting the definitions included in the instructions, the State made an election that foreclosed it from proving the "likely to reoffend" element with reference to more broadly defined "sexually violent offenses" included in RCW 71.09.020(17).[1]

The State disagrees, insisting that unlike the prosecution in *Hickman*, it did not agree to an additional *element* in the "to convict" instruction but only defined terms; therefore, it argues, the law of the case doctrine does not apply. But this elevates the particular facts of *Hickman* over its rationale. It is true that in *Hickman* what was added by the instructions, and therefore had to be proved, was an element of the crime. But the law of the case doctrine is not limited in its application to elements instructions; it has provided more generally, since 1896, that "whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case." *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896), *overruled on other grounds by Thornton v. Dow*, 60 Wash. 622, 111 P. 899 (1910). It extends to definition instructions. *See*

[1] We cite to the current statute; the 2009 amendments to RCW 71.09.020 renumbered subsection (15) as subsection (17).

Scoccolo Constr., Inc. v. City of Renton, 158 Wn.2d 506, 522-23, 145 P.3d 371 (2006) (Madsen, J., concurring) (narrow and debatable definition of "acting for" accepted in instructions was law of the case); *Englehart v. Gen. Elec. Co.*, 11 Wn. App. 922, 923, 527 P.2d 685 (1974) (definition of "accidental death" was law of the case, no error having been assigned).

While we agree with Mr. Carver that the definitions in the mutually approved instructions are law of the case and bind the State, he does not persuade us that the evidence is insufficient under these instructions. To determine whether the jury's verdict in a civil commitment hearing is supported by sufficient evidence, we must determine whether the evidence, "'viewed in a 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 respondent] is a sexually violent predator.'" *In re Det. of Sease*, 149 Wn. App. 66, 79, 201 P.3d 1078 (quoting *State v. Hoisington*, 123 Wn. App. 138, 147, 94 P.3d 318 (2004)), *review denied*, 166 Wn.2d 1029 (2009). Instruction 6 provided in part that "[i]n 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." CP at 19.

As pointed out by the State, in completing the jury instructions, it sought to identify crimes "'with which the respondent has already been charged and convicted'"

and "'those that the respondent is likely to commit in the future,'" and it therefore identified crimes as to which the evidence supported risk. Br. of Resp't at 13 (quoting 6A Washington Practice: Washington Pattern Jury Instructions: Civil 365.16 (5th ed. 2005)). The State notes in particular that, when asked what crimes Mr. Carver would be likely to commit if not confined, Dr. Rawlings testified "'sexual offenses against minor children'" and "'indecent liberties with forcible compulsion.'" *Id.* at 13-14 (quoting III-B RP at 553, 554). To the extent Mr. Carver presented contradictory evidence, credibility and weight determinations are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Viewed in a light most favorable to the State, the evidence is sufficient to persuade a fair-minded, rational person that the State proved beyond a reasonable doubt that Mr. Carver is a sexually violent predator.

II

Mr. Carver's second assignment of error is to statements made by the two expert witnesses at trial that he contends commented on his credibility in violation of the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. He points to (1) Dr. Rawlings' comment suggesting that Mr. Carver altered his reporting as the trial approached and (2) Dr. Donaldson's response to a juror question asking whether Dr. Donaldson would want Mr. Carver as a next-door neighbor. A witness may not give an opinion as to another witness' credibility. *State v. O'Neal*, 126

Wn. App. 395, 409, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007).

Dr. Rawlings' Testimony. Mr. Carver complains for the first time on appeal about the following remarks made during Dr. Rawlings' direct examination:

> It's fairly common that when people are anticipating some sort of trial that they tend to reshape their -- disclosures in ways that assist them, to minimize their legal risk. And so it's important to not -- over-emphasize disclosures or lack thereof, particularly the closer you get to -- to a trial.

III-A RP at 494.

Dr. Rawlings' testimony was clearly a comment on credibility, albeit not limited to Mr. Carver's credibility; it appears to be a generalization about the credibility of all parties at risk in a criminal or commitment proceeding. Whether a witness has a motive to alter his reporting is a subject matter that attorneys for the parties can legitimately point out in closing argument if it can reasonably be inferred from facts they can point to in evidence, but never as personal opinion.[2] It was not Dr. Rawlings' place to argue. He was not qualified to render an opinion that Mr. Carver had likely succumbed to a motive to lie; his speculation could not possibly assist the jury, *cf.* ER 702; and it invaded the province of the jury.

[2] *See State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996) (prosecutor may argue inferences from the evidence to challenge defendant's truthfulness, citing, inter alia, *State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558 (1969), *rev'd on other grounds*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971) (prosecutor may properly argue in closing that the jury may consider a witness' interest in a case in evaluating the witness' credibility and that a person charged with a crime has a good motive to lie)).

Still, Mr. Carver did not object, ask that the testimony be stricken, or ask for a curative instruction. The State accordingly responds that this error was not preserved for appeal.

An error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). An error is "manifest" if it had "'practical and identifiable consequences in the trial of the case.'" *State v. WWJ Corp*., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)); *see also State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (recognizing that for an error to be "manifest," actual prejudice creating practical and identifiable consequences at trial must be demonstrated by the appellant).

In *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007), our Supreme Court held that not all witness opinion testimony on an ultimate fact admitted without objection is automatically reviewable as manifest constitutional error; manifest constitutional error requires an explicit or nearly explicit witness statement on an ultimate issue of fact. It noted that such a requirement was consistent with earlier precedent that it is improper for any witness to express a personal opinion on a defendant's guilt. *Id*. at 937 (citing *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967)).

Only two of the elements required to civilly commit Mr. Carver were genuinely disputed: whether Mr. Carver had a mental abnormality or personality disorder and

whether, if he did, it created a likelihood that he would reoffend if not confined. Whether Mr. Carver was a reliable reporter of his thoughts and impulses during treatment, evaluation, and at trial was important to these issues, but was not an ultimate issue. And even if we found it to be an ultimate issue, Mr. Carver has not demonstrated actual prejudice. This was a close enough case that Mr. Carver prevailed in the first trial, although by a verdict that the trial court became convinced had been unintentionally coerced. But as objectionable as the testimony was, Dr. Rawlings did not claim that it was a conclusion specific to Mr. Carver, grounded in his interviews, testing, training, and expertise. The fact that it was a generalization was apparent on its face. It could, and likely would, have been disregarded by a juror who was not otherwise persuaded by the State's case.

Dr. Donaldson's Testimony. Mr. Carver also points to the following remark made by Dr. Donaldson in response to a juror question:

> THE COURT: Would you feel comfortable having Mr. Carver living next door to you?
> [DR. DONALDSON]: Well, -- if I had some vulnerable people living with me, small children, women, whatever, I might not like it. But I'm unwilling to break the law to keep him from living next door to me.

IV-B RP at 772. Dr. Donaldson later clarified this answer by saying that he would want to avoid "any risky situation." *Id.* at 779. This question was timely objected to by defense counsel as irrelevant but Mr. Carver does not assign error to the trial court's

ruling on relevancy; he instead argues that this, too, was improper opinion testimony. Br. of Appellant at 11.

A party who objects to evidence on one ground may not raise a second ground for that objection on appeal. *See State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (concluding that the defendant's objection at trial solely on relevancy grounds did not preserve an ER 404(b) challenge on appeal), *cert. denied*, 553 U.S. 1035 (2008). Because Mr. Carver did not object to the testimony as an impermissible opinion, he may only raise this issue for the first time on appeal if he can demonstrate that it amounts to a manifest constitutional error. *Kirkman*, 159 Wn.2d at 936.

Applying the *Kirkman* standard, Dr. Donaldson's statement is not an explicit or nearly explicit witness statement regarding Mr. Carver's credibility or any other ultimate issue of fact.

We affirm the order of commitment.

A majority of the panel has determined that 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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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.