IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of	)	NO. 61871-7-I
	)	
NATHAN JAMES KERR,	)	
	)	
Appellant,	)	UNPUBLISHED OPINION
	)	
v.	)	
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent.	)	FILED: October 26, 2009

BECKER, J. — In this sexually violent predator proceeding, Nathan Kerr contends his trial counsel was ineffective for failing to propose the most current version of the pattern jury instruction defining the phrase "likely to engage in predatory acts of sexual violence if not confined in a secure facility." Because he fails to establish any prejudice resulting from the use of the prior version of the pattern instruction, we affirm.

FACTS

When Nathan Kerr was nearing the end of his incarceration for his third

degree rape of a child conviction, the State petitioned to commit Kerr as a sexually violent predator. At trial, the State relied upon the expert opinion of Dr. Douglas Tucker, who focused on Kerr's history of sexual contact with adolescent children.

In early 1990, 21-year-old Kerr began a relationship with 12-year-old SG. On several occasions, Kerr took SG and her 11-year-old best friend, EM, to the Seattle Center, bought them carnival ride tickets, took them to the beach, bought them beer, and got them "stoned." Kerr tried to kiss EM and remove her bra. He engaged in sexual intercourse with 12-year-old SG several times over a four week period. Knowing that SG's mother was looking for SG, Kerr helped hide SG out at an apartment where he was staying with his girlfriend. Kerr threatened EM not to tell anyone. Ultimately, Kerr was convicted of second degree child molestation based upon this conduct with SG.

In the fall of 1990, Kerr was living in Idaho with relatives. He met five girls from age 11 to 15. Kerr complimented 13-year-old KF, told her she was different than the other girls he knew, told her he wanted to marry her and that he would give her his car when she turned 16. Kerr provided beer and cigarettes to KF, hugged her, kissed her, and touched her breasts and buttocks. He asked KF to have sex with him and to run away with him. He also made advances toward the other girls, bought them beer and tried to kiss them. He forcefully hit the girls

and play wrestled on occasion. His conduct with KF resulted in a conviction in Idaho for sexual abuse of a child under 16.

From April to July 1996, while still on community supervision for his Washington second degree child molestation conviction, Kerr had a relationship with 14-year-old MS and her mother. Kerr helped pay their bills and rented a trailer for the mother and MS to live in. Kerr had intercourse with MS several times over the course of several weeks. Kerr frequently hit the mother in front of MS and was frequently angry with MS. Kerr told MS it was her fault that she seduced him. Based on his conduct with MS, Kerr was convicted of third degree rape of a child.

In May of 1996, a 13-year old boy spent the night at Kerr's residence. Kerr fondled the boy and threatened to hurt him if he told anyone. This incident resulted in a parole violation.

Dr. Tucker diagnosed Kerr with a sexual attraction to pubescent or post-pubescent adolescent boys and girls (paraphilia Not Otherwise Specified ephebophilia), substance abuse, an intellect below the normal range, but above mental retardation (borderline intellectual functioning), and an antisocial personality disorder. Although not listed specifically in the DSM diagnostic manual, ephebophilia has been described for more than 100 years and is recognized in authoritative publications as a form of paraphilia Not Otherwise

Specified. Kerr's sexual impulses act in combination with his other conditions. He has an impulsive, aggressive, callous and remorseless character style so he does not have internal brakes on his deviant sexual impulses. These are lifelong disorders for which there is no cure, but which can be treated "reasonably effectively."

Dr. Tucker's review of records revealed that Kerr had not received any sexual deviancy treatment. He met with a psychologist in 1995 for community treatment as a condition of his release from prison, but because Kerr did not acknowledge his offenses and blamed his victims, the psychologist concluded that he was not able to treat Kerr. In 1997, Kerr was found not to be amenable to sex offender treatment because of his lack of comprehension. Beginning in 2007, Kerr received some special needs treatment at the Sexual Commitment Center, but Tucker did not consider the therapy actual sexual deviancy treatment.

Based upon the age of the children Kerr had sexual contact with, Kerr's use of grooming techniques, his use of physical abusiveness and intimidation in his relationships, and his manipulation of vulnerable victims, Dr. Tucker concluded that Kerr is likely to engage in predatory acts in the future. Based upon two actuarial risk assessment factors, Kerr has a high risk to sexually reoffend. Static and dynamic risk factors indicate that his actual risk to reoffend

is even higher.

Dr. Tucker concluded that releasing Kerr on the conditions contained in his judgment and sentence would not mitigate Kerr's risk if he was released into the community, although "if he stuck to the letter and the exact wording of his release conditions, which he's not demonstrated an ability to do, that would go towards some level of mitigation of risk." Dr. Tucker cast doubt on Kerr's proposed alternative of living with his mother in Illinois where he would have a job and community support from his mother, sister, and three aunts. Because Kerr had previously acted on his sexual attraction to adolescent children while living with relatives, Dr. Tucker concluded that family support in the community is not sufficient to mitigate Kerr's risk.

Kerr called psychologist Luis Rosell. Dr. Rosell agreed with the diagnosis of borderline intellectual functioning, alcohol dependence and an antisocial personality disorder, but challenged the paraphilia diagnosis on the basis that paraphilia NOS ephebophilia is not a recognized category of mental abnormality. Dr. Rosell concluded that Kerr does not have a mental abnormality or personality disorder that would cause him serious difficulty in controlling his behavior. If he did have a paraphilia, it could be treated in the community. He questioned the precision of the actuarial risk assessments and did not rely upon them. Dr. Rosell recommended community sexual deviancy treatment for Kerr.

Group and individual therapy are ideal, but either one may be effective.

Karen Green provided Kerr special needs treatment for several months. She saw progress, genuine remorse and increased maturity. Green considers the special needs treatment as a form of sexual deviancy treatment.

Kerr testified that he has matured and recognizes he cannot be around adolescent children. He plans to pursue treatment in the community, but he does not know the name of any potential treatment provider. He denied ever seeing EM prior to the trial. Just a year prior to trial, he had proposed that he work at a ranch for teens.

Kerr's mother testified she was willing to have him live with her in Illinois. His father testified he was willing to have Kerr live with him in the Tri-Cities. But neither had more than a general idea of the kind of limitations Kerr would be subject to.

The trial court instructed the jury on the required elements to establish that Kerr is a sexually violent predator and that "if, after weighing all of the evidence" the jury had a reasonable doubt as to any of the elements the jury must find that Kerr is not a sexually violent predator. Other instructions directed the jury to decide the facts "based upon the evidence presented to you during this trial" and to decide the case based on "all of the evidence" that was admitted and to consider "all of the evidence" with fellow jurors. The court also gave the

pre-2006 version of WPI 365.14 without objection:

> Instruction No. 7
>
> "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.

In closing argument, both the State and Kerr's counsel discussed at length the evidence of Kerr's history of sexual conduct with adolescent children, and the opinions expressed by Dr. Tucker and Dr. Rosell. They only made limited comments about the supervision Kerr would receive if released into the community. Kerr's attorney noted Kerr's stated intention to undertake treatment. The State's attorney questioned his stated intentions. There was no direct or indirect argument that the jury was restricted to the evidence of placement conditions or voluntary treatment options in deciding whether Kerr was likely to engage in predatory acts unless confined in a secure facility.

During deliberations, the jury inquired as to what are the "placement conditions and voluntary treatment options that would exist for Nathan Kerr? Please refer to Instruction number 7." The court responded that the jury should refer to their collective memories and/or notes regarding the evidence admitted in the case.

The jury found Kerr was a sexually violent predator.

ANALYSIS

The sole issue raised on appeal is Kerr's assertion that his trial attorney was ineffective for failing to object to Instruction No. 7 containing the prior version of WPI 365.14 defining the phrase "Likely to engage in predatory acts of sexual violence if not confined in a secure facility."

To be successful on an ineffective assistance claim, the defendant in a sexually violent predator proceeding must establish that counsel's conduct fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability the outcome would have been different. In re Det. of Stout, 128 Wn. App. 21, 27-28, 114 P.3d 658 (2005); In re Det. of Smith, 117 Wn. App. 611, 617-18, 72 P.3d 186 (2003). In evaluating whether there is a reasonable probability the outcome of a trial would have been different, the court may consider the actual argument by counsel and evaluate whether defense counsel was able to argue his or her theory of the case under the instructions given by the trial court. See State v. Cienfuegos, 144 Wn.2d 222, 230, 25 P.3d 1011 (2001)(the Strickland standard for ineffective assistance of counsel was not met where both counsel were able to extensively argue their theories of the case under the incomplete instructions given to the jury. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). As to the

broader question whether an instruction is erroneous, an instruction that is potentially confusing is not error if the instructions, read as a whole, accurately inform the jury of the law. State v. Peterson, 35 Wn. App. 481, 486, 66 P.2d 645 (1983) (holding that a jury instruction based on a subsequently clarified WPI did not result in reversible error where the change was made to clarify the instruction and not to correct an erroneous statement of law). Additionally, the jury is presumed to read the court's instructions as a whole, and all instructions should be read in light of all other instructions. State v. Alford, 25 Wn. App. 661, 670, 611 P.2d 1268 (1980), aff'd, State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981).

The central premise of Kerr's argument is that Instruction No. 7 misstated the law or, at the very least, was ambiguous and misled the jury by directing them to ignore evidence other than placement conditions and voluntary treatment options. But Instruction No. 7 did not misstate the law. It tracks precisely the language of RCW 71.09.060(1):

> In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition.

The placement of "only" in both the former pattern instruction and the

statute is reasonably read as limiting the fact finder to consider placement conditions and voluntary treatment options only if they would really exist in the community rather than directing the fact finder to ignore all other evidence in deciding whether the defendant is likely to engage in predatory acts.

The current version of WPI 365.14 provides a clearer statement:

> "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 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.**

(Emphasis added).

And the comment to the current version notes the possibility the prior version might be misinterpreted:

> The original version of this instruction, published in 2004, has since been revised. **The original version could have been interpreted as permitting the jury to consider only placement conditions and voluntary treatment options when determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, even if other evidence relevant to the question has been admitted.** The current instruction makes clear that the jury is not prohibited from considering such evidence when it has been admitted by the trial court.

(Emphasis added). But the comment does not condemn the prior version as a misstatement of the law or label the prior version as misleading.

Here, there is no hint that either party tried to convince the jury to ignore any of the evidence beyond placement conditions and treatment options. Both parties vigorously emphasized the testimony of the experts, Kerr's own testimony regarding his plans, and his history of prior sexual contact with adolescents. Other instructions clearly direct the jury to consider all of the evidence. Rather than presuming that the jury rejected the other instructions, it is reasonable to presume that they read and applied the instructions as a whole. The instructions do not relieve the State of its burden to prove each element beyond a reasonable doubt based on all the evidence.

Kerr argues that Instruction No. 7 fails to make the law "manifestly apparent" to the jury, focusing on three cases that are distinguishable. In LeFaber, our Supreme Court disapproved of an instruction stating homicide was justifiable "when the defendant reasonably believe[d] that the person slain intend[ed] to inflict death or great personal injury and there [was] imminent danger of such harm being accomplished." State v. LeFaber, 128 Wn.2d 896, 898-99, 913 P.2d 369 (1996)(emphasis added). Though the court acknowledged that it was possible to correctly interpret this instruction, it determined that the misplaced conjunction "and" compelled an impermissible interpretation as

requiring a showing of actual danger. In State v. Wanrow, 88 Wn.2d 221, 234, 559 P.2d 548 (1977), the court found an affirmative misstatement of the law of self-defense where an instruction directed the jury to consider only acts and circumstances occurring "at or immediately before the killing." This instruction was in total disregard of the established standard that the reasonableness of self-defense is to be evaluated in light of all the facts and circumstances known to the defendant. Finally, in State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984), the trial court gave an incomplete though accurate self-defense instruction. Because, when the instructions were read as a whole, the jury received only partial instruction on the law, the court found that a key element of the defense was misrepresented.

Unlike LeFaber, there is no grammatical signal in Instruction 7 compelling an erroneous interpretation over an accurate one; there are simply two plausible constructions. In Wanrow the instruction was determined to be an affirmative misstatement of law. Here, Instruction 7 tracks the language of RCW 71.09.060(1), and does not misstate the applicable law. Of the cases cited, Allery is the most analogous, but even there, the court relied upon reading the instructions as a whole to conclude an essential element of self-defense had been omitted.

Kerr fails to demonstrate a reasonable possibility that the outcome of the

trial would have been different if the current version of the WPI instruction had been given. The prior version of the WPI instruction given by the trial court does not misstate the law. The jury was clearly instructed on the elements required to be proven beyond a reasonable doubt from all of the evidence. The jury's inquiry about Instruction No. 7 does not change the standard of viewing the instructions as a whole. The instructions read as a whole clearly direct the jurors to consider all of the evidence admitted at trial. Both counsel argued the impact of all the evidence on the question whether Kerr was "likely to engage in predatory acts of sexual violence if not confined in a secure facility" focusing primarily upon evidence other than conditions of placement and voluntary treatment options. No one offered any direct or implied argument that the jury was restricted to evidence of placement conditions and voluntary treatment options. Kerr's attorney was clearly able to argue his theory of the case under the instructions given by the court.

Kerr does not establish any prejudice and therefore fails to demonstrate ineffective assistance of counsel.

Affirmed.

Becker, J.

WE CONCUR:

Grosse, J.

Ajid, J.