NO. 42573-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

JACK LECK, II,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

STATE'S SUPPLEMENTAL BRIEF ON MOTION FOR RECONSIDERATION

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I. INTRODUCTION

This Court should withdraw the initial opinion in this matter and conduct a civil rules analysis of the pleading standards pursuant to Civil Rule ("CR") 15 to determine whether Leck consented to be tried on the issue of a personality disorder. The Court applied a criminal "essential elements" analysis, relying upon *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), and determined that the trial court erred in instructing the jury on uncharged alternative means.

Three weeks after the opinion in this case, the Washington State Supreme Court issued *In re the Pers. Restr. of Brockie*, No. 86241-9 (Wash. Sept. 26, 2013), in which the Supreme Court held that *Kjorsvik* does not apply to cases where a criminal defendant claims for the first time on appeal or in a personal restraint petition ("PRP") that the jury was instructed on an uncharged alternative means. *Brockie*, Slip. Op. at 5. Instead, *State v. Severns*, 13 Wn.2d 542, 125 P.2d 659 (1942) applies and the State has the burden to prove that the error in instructing the jury on uncharged alternative means was harmless. *Brockie*, Slip Op. at 4.

The Court has asked the parties to file additional briefing and to address *Brockie* and its impact on this matter. While *Brockie* makes clear that *Severns* applies to criminal cases in which a criminal defendant alleges for the first time on appeal that the trial court erred in instructing

the jury on uncharged alternative means, as Leck has done in this case, the State maintains that neither *Severns* nor *Kjorsvkik* apply in sexually violent predator cases. Rather, because sexually violent predator cases are civil in nature, the Court should conduct a civil rules analysis and determine whether Leck expressly or impliedly consented to be tried on the issue of a personality disorder.

When the record is considered as a whole, it is obvious that Leck had notice and an opportunity to be meaningfully heard on the issue of a personality disorder. Leck had notice that the State's expert diagnosed him with a personality disorder nearly a year prior to his August 2011 trial. Indeed, Leck's own expert diagnosed Leck with a personality disorder and Leck elicited testimony from his expert about that diagnosis at trial. Leck sat quietly through two trials, a mistrial in February 2011 and a re-trial in August 2011, without objecting at any point to the State's allegation that he suffered from a personality disorder. Leck did not express surprise at the allegation or lack of preparedness to defend against the allegation. Leck did not submit his own jury instructions in either trial and did not object to the State's jury instructions that included the allegation that he suffered from a mental abnormality or a personality disorder. Leck fully defended against the allegation that his personality disorder made it likely that he would reoffend sexually in both trials.

There would be no value to providing Leck with a third opportunity to defend against this claim based solely upon a procedural defect that did not prejudice him, surprise him or prevent him from defending against the allegation that he suffered from a personality disorder. The error was harmless and under CR 15(b), it is evident that Leck consented to be tried on the issue of a personality disorder. The pleadings should be deemed amended to conform to the evidence presented by both parties.

Additionally, pursuant to this Court's recent published opinion in *State v. Lindsey*, No. 43219-6-II (Wash. Oct. 15, 2013), the Court should refuse to review claims of error that are not raised in the trial court. Leck did not object during either trial to the jury instruction he now challenges for the first time on appeal. While Leck alleges that the error is a manifest error affecting a constitutional right, he has failed to prove that it resulted in actual prejudice or made a plausible showing that the error had practical and identifiable consequences to him. To the contrary, Leck vigorously cross-examined the State's expert on the issue and argued his own theory of the case based upon the fact that he suffers from a personality disorder. Leck did not suffer any prejudice or identifiable or practical consequences based upon the State's allegation that he suffered from a personality disorder.

Leck consented to be tried on the issue of whether he suffered from a personality disorder. Leck should not be permitted to benefit by waiting to raise a procedural defect for the first time on appeal when he had notice of and fully defended against the claim at trial. This Court should withdraw its opinion in this case and the jury's verdict should be affirmed.

II. STATEMENT OF RELIEF SOUGHT

The State moves for reconsideration of this Court's holding that the petition fails to meet the criminal "essential elements" standard of review and asks the Court to apply a civil rules analysis and affirm the verdict in Leck's case pursuant to CR 15(b), which provides that the pleadings shall be treated as amended when a party expressly or impliedly consents to the trial of an issue not raised in the pleadings.

III. ARGUMENT

Because the SVP statute is civil in nature, the civil rules govern SVP proceedings. *In re Det. of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002). *Brockie, Kjorsvik* and *Severns* are criminal cases that are premised upon criminal rights, specifically the Sixth Amendment to the United States Constitution; Article 1, Section 22 of the Washington State Constitution; and Criminal Rule 2.1(b). *Brockie*, Slip Op. at 3; *see also Kjorsvik*, 117 Wn.2d at 97. Washington courts have repeatedly refused to extend the rights conferred upon criminal defendants under the

Sixth Amendment, Article 1, Section 22, and the criminal rules to respondents in SVP cases. *In re Det. of Petersen*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999); *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007); *In re Det. of Ticeson*, 159 Wn. App. 374, 380-81, 246 P.3d 550 (2011). Rather, Washington courts have consistently held that SVP cases are civil actions and as such, criminal constitutional protections beyond those supplied in RCW 71.09 are not applicable. *See e.g. In re Twining*, 77 Wn. App. 882, 895, 894 P.2d 1331 (1995) (abrogated on other grounds by *In re Det. of Pouncy*, 168 Wn.2d 382, 229 P.3d 678 (2010)). While those facing civil commitment are entitled to due process protections, courts apply the factors in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d (1976), to determine what process is due in a given context. *In re Det. of Law*, 146 Wn. App. 28, 43, 204 P.3d 330 (2008) *citing In re Pers. Restr. of Young*, 122 Wn.2d 1, 43-44, 857 P.2d 989 (1993). Therefore, the Washington State Supreme Court's opinion in *Brockie* has no effect on the analysis that must be conducted in this civil case.

A. *Brockie* Is A Criminal Case, Applying Criminal Constitutional Rights and Has No Effect on the Issues in this Civil Case.

In *Brockie*, the Washington State Supreme Court held that *Severns* applies to claims of errors in jury instructions, rather than *Kjorsvik*, which

applies only to errors in the charging document. *Brockie*, Slip Op. at 5. In this case, Leck claims error because the jury was instructed on an alternative means not set forth in the charging document.[1] Thus, if this were a criminal case, pursuant to *Brockie*, the *Severns* line of cases apply to Leck's appeal, rather than *Kjorsvik*, which this Court applied in its opinion.

Following a jury trial, Benjamin Brockie was convicted of two counts of first degree robbery, fifteen counts of first degree kidnapping and two counts of making bomb threats. *Brockie*, Slip Op. at 2. In a PRP, Brockie claimed that his convictions should be vacated because the jury was instructed on a means of committing first degree robbery that was not included in the charging information. *Id.* at 3. At trial, evidence was admitted that Brockie displayed what appeared to be a gun during the robberies and the prosecutor made references to the "gunman" and said bank employees were forced "at gunpoint" to remove money from a vault. Brockie maintained that he was not involved in the robberies. *Id.* at 2.

The issue in *Brockie* was that the means of committing first degree robbery in the charging information did not match the means described in the jury instructions. *Id.* at 2-3. The charging information indicated that

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[1] Leck claims in his first assignment of error on appeal that his "statutory and due process right to notice was violated when the jury was instructed on an alternative means not alleged in the petition." App. Br. at 17.

Brockie "displayed what appeared to be a firearm or other deadly weapon," while the jury instructions described two alternative means of first degree robbery, that the person "*is armed with a deadly weapon or* displays what appears to be a firearm or other deadly weapon." *Id.* at 2 (emphasis in original).

In *Brockie*, the Washington State Supreme Court analyzed whether the jury instruction on the uncharged alternative means was error. The parties disputed whether the determination should be based on *Severns* and errors in jury instructions on uncharged alternative means or *Kjorsvik* and errors in the charging information. *Id.* at 3. Under the *Severns* line of cases, Washington courts have determined that it is error for a trial court to instruct the jury on uncharged alternative means. *Id.* at 4. On direct appeal, it is the State's burden to prove that the error was harmless. *Id.* On the other hand, *Kjorsvik* applies to alleged errors in the charging information that are raised for the first time on appeal. *Id.* Under *Kjorsvik,* Washington courts apply a two-prong rule, construing the charging information liberally to determine if the defendant actually received notice of the means of committing the crime and if so, proceeds to a prejudice analysis. *Id.* If not, the court does not conduct a prejudice analysis. *Id.*

In *Brockie,* the Supreme Court determined that the *Severns* line of cases applies when a defendant claims for the first time on appeal that the jury was instructed on an uncharged alternative means. *Brockie*, Slip Op. at 5. The Court found that *Kjorsvik* does not apply to jury instruction cases, as doing so would require overturning the *Severns* line of cases and the Court did not find a reason to do so. *Id.* Thus, the Supreme Court applied *Severns* to the facts of the case and determined that nothing in the charging information put Brockie on notice that he would be charged with first degree robbery while *armed with a deadly weapon* (rather than by *displaying what appeared to be a firearm or other deadly weapon*). *Id.* at 6. The Court then considered whether the lack of notice was prejudicial to Brockie. *Id.* at 7. Because the petition in *Brockie* was a PRP, or a collateral attack on his conviction, the standard for prejudice is actual and substantial prejudice. *Id.* For a direct appeal, as in Leck's case, the State has an opportunity to show that the error was harmless. *Id.*, *citing State v. Bray*, 52 Wn. App. 30, 34-36, 756 P.2d 1332 (1988).

The *Brockie* Court determined that there was no prejudice to Brockie by the uncharged alternative means of being armed with a deadly weapon. *Brockie*, Slip Op. at 8. In reaching its' decision, the Supreme Court noted that Brockie's defense at trial was a complete denial of involvement in the robberies and that Brockie did not make any arguments

about whether or not he displayed or was armed with a weapon. *Id.* Further, Brockie did not argue that he would have mounted a different defense if he had been charged with the alternative means of being armed with a deadly weapon. *Id.* at 8-9. The Supreme Court denied Brockie's PRP and upheld his convictions, despite the fact that the jury was instructed on an uncharged alternative means. *Id.* at 9.

Because SVP cases are civil actions, *Brockie* does not apply to Leck's appeal. The *Brockie* Court cites *Kjorsvik*, the Sixth Amendment and Article 1, Section 22 as the premise of its analysis. *Brockie*, Slip Op. at 3. The *Kjorsvik* Court made clear that its opinion was premised upon criminal constitutional protections and the criminal rules:

> All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him....
>
> This conclusion is based on constitutional law and court rule. Const. art. 1, § 22 (amend. 10) provides in part: In criminal prosecutions the accused shall have the right...to demand the nature and cause of the accusation against him, ...
>
> U.S. Const. amend. 6 provides in part: In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation against him, ...
>
> CrR 2.1(b) provides in part that the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged

Kjorsvik, 117 Wn.2d at 97. Criminal constitutional protections and criminal rules do not apply to SVP cases. *Twining*, 77 Wn. App. at 895. Rather than criminal constitutional protections, Leck has the rights and protections provided in RCW 71.09. *Id.*

Nonetheless, even if the Court were to apply the criminal standard set forth in *Severns* to this civil case, the error is plainly harmless, as Leck had notice of the State's allegation that he suffered from a personality disorder eleven months in advance of trial, defended fully against the allegation in the first trial in February 2011 and again defended fully against the allegation in the August 2011 trial – all without objection. Nothing would have been different in the August 2011 trial had the State included an allegation that he suffered from a personality disorder in an amended petition, and like Brockie, Leck fails to claim that he would have defended the case differently had the petition been amended. Under a *Severns* analysis, the error was harmless and the jury's verdict should be affirmed.

B. Civil Rule 15 Governs the Amendment of Pleadings in SVP Cases

In determining what rights Leck has in this matter, the Court must look to the statute, the civil rules and apply the *Mathews* factors to determine what process is due in this context. Here, RCW 71.09.030

provides that "[a] petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation...." RCW 71.09.030(1). There is nothing in RCW 71.09.030 that is comparable to CrR 2.1 or that requires a statement of all essential elements constituting the offense charged.

RCW 71.09.030 governs the information that must be contained in the petition, but there is no statute that discusses the amendment of pleadings in SVP cases. As a result, the Court must look to the civil rules to determine the rules that apply to the amendment of pleadings or the trial of issues not raised in the pleadings in SVP cases. *In re Det. of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002). CR 15 governs the amendment of pleadings in civil cases. In accordance with CR 15(b), when an issue that is not raised in the pleadings is tried with the express or implied consent of the parties, then the issue shall be treated as if it had been raised in the pleadings. The pleadings may be amended to conform to the evidence presented, but failure to amend the pleadings does not affect the result of the trial on that issue. CR 15(b). In determining whether the parties consented to the trial of an issue, the Court must consider the record as a whole, including whether the issue was mentioned before trial, in arguments, and the evidence on the issue admitted at trial. *Mukilteo*

Retirement Apartments, L.L.C. v. Mukilteo Investors, L.P., No. 69039-6-I, 2013 WL 4432233 (Wash. Aug. 19, 2013).

When the record as a whole is considered, it is clear that Leck consented to be tried on the issue of whether he suffered from a personality disorder. Leck knew at least ten months before his August 2011 trial that both the State's expert and his own expert had diagnosed him with a personality disorder. CP 356, 358, 1636. The State alleged in its Trial Memorandum filed before the February 2011 trial that the State would prove that Leck suffered from a mental abnormality and/or a personality disorder. CP 525, 529. The State submitted jury instructions in advance of the February 2011 trial, as well as the August 2011 trial. Leck did not submit his own jury instructions and did not object to the State's jury instructions, which included the "to commit" instruction indicating that the jury could commit Leck if it found he suffered from a mental abnormality or a personality disorder. RP 2/28/11 at 1212-13; RP 8/15/11 at 1073, 1079; CP 1574-97. At both trials, Leck vigorously cross-examined the State's expert about whether his personality disorder caused him to offend sexually. RP 2/16/11 at 457-62, 466-68, 516, 543-44; RP 8/9/11 at 371-83. Leck elicited testimony from his own expert who also testified that Leck suffered from a personality disorder. RP 2/23/11 at 820-26; RP 8/11/11 at 838-41, 903-04, 923-28, 944-45,

965-67. Leck never once objected to testimony that he suffered from a personality disorder, the State's argument that he suffered from a personality disorder or the instructions that provided that the jury could commit him if it found he suffered from a mental abnormality or a personality disorder. Leck clearly consented to be tried on the issue of a personality disorder and the pleadings should be deemed amended pursuant to CR 15(b).

C. Leck Had Notice and Fully Defended Against the Allegation that He Suffered from a Personality Disorder

In spite of all of the evidence to the contrary, Leck claims that his statutory and due process right to notice was violated. App. Br. at 17. Due process is a flexible concept and to determine what process is due in a particular context, courts apply the *Mathews* balancing test. *Stout*, 159 Wn.2d at 370. The *Mathews* factors include: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest including costs and administrative burdens of additional procedures. *Id.*

Here, Leck erroneously claims that he did not have sufficient notice that the State would allege he suffered from a personality disorder. Leck's claim is based solely upon the lack of an allegation in the petition

filed years earlier, in 2007, that he suffered from a personality disorder. For the reasons set forth above, the pleadings are not determinative in civil cases and may be freely amended as justice requires. CR 15. The issue in this case is whether Leck was provided with a meaningful opportunity to be heard on the issue of a personality disorder. Leck claims that by failing to include the allegation in the petition, he did not receive notice of the allegation. However, "[t]he central purpose of providing a person with 'notice' is 'to apprise the affected individual of, and permit adequate preparation for, an impending hearing." *In re Cross*, 99 Wn.2d 373, 382, 662 P.2d 828 (1983). Leck had adequate notice and fully defended against the allegation that he suffered from a personality disorder.

Leck does not argue that he would have mounted a different defense if the SVP petition included an allegation that he suffered from both a mental abnormality and a personality disorder. Nor does Leck argue that he was surprised by the allegation that he suffered from a personality disorder; or unprepared to address the allegation at trial. Leck does not make these arguments for good reason – Leck's own expert diagnosed him with a personality disorder and Leck's counsel elicited testimony from his expert that Leck suffered from a personality disorder. In short, Leck conceded that he suffered from a personality disorder. Rather than challenging evidence that he suffered from a personality

disorder, Leck's theory of the case was that he did not suffer from a mental abnormality (Pedophilia) and that his Antisocial Personality Disorder, while admittedly present and active, would not cause him to sexually reoffend. RP 8/15/11 at 1133. It is clear in this context that Leck had the opportunity to be meaningfully heard on the issue of a personality disorder and the balance of the *Mathews* factors weigh heavily in favor of the State.

The first factor weighs in favor of Leck, but the remaining factors weigh in favor of the State. Because Leck had notice that both the State's expert and his own expert diagnosed him with a personality disorder, Leck was fully prepared to address the issue at trial and there was no risk of erroneously depriving Leck of his liberty by trying the issue. Leck's theory at trial was that he suffered from a personality disorder, but not a mental abnormality, and that his personality disorder did not make him likely to reoffend sexually. Leck took this position already at his first trial in February 2011 and did so without objection or claims of surprise or unpreparedness to meet the allegation. RP 2/16/11 at 457-68, 466-68, 543-44; RP 2/23/11 at 820-26, 910-11, 952. Certainly, following the mistrial in February 2011, Leck knew the State was alleging that his personality disorder was a basis for commitment. Leck did not lodge any objections to the testimony, argument or jury instructions in the first trial.

By the re-trial in August 2011, Leck could not argue that he was not aware that the State was alleging that he suffered from a personality disorder that made him eligible for commitment. Leck again used the same theory, elicited the same testimony from his expert and argued that his personality disorder did not make him likely to reoffend sexually. RP 8/11/11 at 838-41; 903-04; 944-45; 965-67. Again, Leck did not object at any point in the second trial and did not object to the jury instructions alleging that the jury could commit him if it found suffered from either a mental abnormality or personality disorder. RP 8/15/11 at 1073, 1079. Leck had notice and had a meaningful opportunity to be heard on the issue of a personality disorder. There is no risk of erroneous deprivation of liberty and there would be no value in requiring that the case be tried again in order to give Leck notice and an opportunity to be heard on the issue.

Finally, the third *Mathews* factor weighs in favor of the State. The State has a substantial interest in protecting the community from dangerous sexual predators like Leck. The cost and administrative burden of re-trying this case is substantial and nothing would be different in a new trial. The August 2011 trial lasted nine days. It was a jury trial. There were two expert witnesses and several lay witnesses who testified in the case. It would be extremely costly and burdensome to give Leck a third opportunity to mount the exact same defense he used in the prior two

trials, solely due to a technical pleading violation when Leck had notice and a full and meaningful opportunity to defend against the claim that he suffered from a personality disorder. The purpose of notice has been served in this case. There is no due process that would be added by reversing this case to give Leck a third chance to argue his theory.

D. Leck Has Failed to Provide Any Proof That the Alleged Error is a Manifest Error Affecting a Constitutional Right.

Leck did not object to any of the jury instructions in either of his trials, including the "to commit" instruction that provided that he could be committed if the jury found he suffered from a mental abnormality or a personality disorder. RAP 2.5(a) provides: "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." However, certain types of errors may be raised for the first time on appeal, including a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Leck states that "[a] jury instruction that is erroneous because it includes a statutory alternative not charged in the information is a 'manifest error affecting a constitutional right' that may be challenged for the first time on appeal." App. Br. at 21. However, Leck does nothing more than identify the exception to RAP 2.5(a). He does not provide any support for his assertion. Pursuant to this Court's recent opinion in

State v. Lindsey, No. 43219-6-II, Slip Op. at 12, the Court should not address his claim.

Merely asserting that the instruction is a manifest error affecting a constitutional right does not mean he has met his burden of proof. Rather, since Leck did not object to the jury instruction at trial, he must establish that the error is both "manifest" and "truly of constitutional magnitude." *In re Det. of Reyes,* --- Wn. App. ----, 309 P.3d 745 (Sept. 19, 2013). An error is "manifest" if it either (1) results in actual prejudice to Leck, or (2) Leck makes a plausible showing that the error had practical and identifiable consequences. *Id.* Leck has not made any attempt to satisfy his burden of showing that the error resulted in actual prejudice or had practical and identifiable consequences. Leck ignores this burden because he cannot point to any prejudice or consequences. Leck knew that both the State's expert and his own expert had diagnosed him with a personality disorder months before his first trial in February 2011. Leck did not object to the testimony from the State's expert that he cites in his brief. App. Br. at 23. Instead, Leck vigorously cross-examined the State's expert about the testimony. Leck even elicited testimony from his own expert that Leck suffered from a personality disorder. Leck conceded in closing arguments that he suffered from a personality disorder, but argued that it did not cause Leck to offend sexually. Based upon this record, there

is no basis for Leck to assert that he was prejudiced by the allegation that he suffered from a personality disorder and Leck does not attempt to establish prejudice. Further, Leck does not argue that there was an identifiable or practical consequence and there is none. Leck has not met his burden of demonstrating that the constitutional error he alleges is a "manifest" error and therefore, this Court should refuse to consider his challenge to the jury instructions for the first time on appeal.

IV. CONCLUSION

Criminal constitutional protections and rules do not apply to SVP cases and this Court should not have applied the *Kjorsvik* standard to this case. For the same reasons, *Brockie* and *Severns* do not apply either. The Court should have analyzed this case using the civil rules. CR 15 mandates finding that the pleadings were amended by consent in this case. Leck had adequate notice and not only fully defended against the allegation that he suffers from a personality disorder, but actively argued that theory at trial to explain his sexual offending. There would be no

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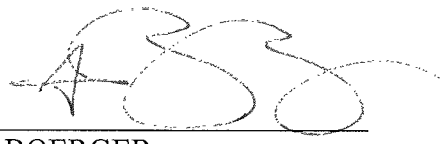
additional due process provided to Leck by awarding him a new trial. This Court's opinion should be withdrawn and the jury's verdict affirmed.

RESPECTFULLY SUBMITTED this 18th day of October, 2013.

ROBERT W. FERGUSON
Attorney General



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NO. 42573-4-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: JACK LECK II Respondent.	DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

On this 18th day of October, 2013, I deposited in the United States mail true and correct cop(ies) of State's Supplemental Brief On Motion For Reconsideration and Declaration of Service, postage affixed, addressed as follows:

Maureen Cyr
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of October, 2013, at Seattle, Washington.

Kelly Hadsell
KELLY HADSELL

WASHINGTON STATE ATTORNEY GENERAL

October 18, 2013 - 3:56 PM

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