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NO. 70129-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Detention of:

KEVIN MAGERA,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

At Kevin Magera's 2013 sexually violent predator trial, the State presented evidence that his pervasive sexual attraction to children was a component of a mental abnormality that made him likely to commit future sex offenses. He denied that he suffered from a sexual disorder or a mental abnormality. The jury disagreed and found he met civil commitment criteria. This court should affirm.

While Mr. Magera asserts prosecutorial misconduct, the statements made in closing argument were not flagrant and ill-intentioned, and Mr. Magera has not shown that they impacted the outcome of the trial. Moreover, the trial court properly declined to deviate from the pattern "to commit" jury instruction because Mr. Magera's proposed instruction was inconsistent with the law and would have amounted to a comment on the evidence. Because all arguments at trial were based on the evidence and his proposed jury instruction was improper, this Court should affirm his civil commitment.

II. ISSUES PRESENTED

1. Whether the State engaged in prosecutorial misconduct during closing argument when (1) Mr. Magera failed to object to the comments he claims were flagrant and ill-intentioned; (2) the arguments were based on evidence presented to the jury; and (3) even if the comments were improper, no prejudice has been demonstrated.

2. Whether the trial court's refusal to present his proposed "to commit" instruction to the jury deprived Mr. Magera of his right to a unanimous verdict when (1) only one means of civil commitment was presented to the jury; (2) precedent holds that such an instruction is not required; and (3) his proposed instruction constituted an improper judicial comment on the evidence.

III. STATEMENT OF THE CASE

A. Procedural Facts

On January 6, 2011, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Kevin Magera pursuant to RCW 71.09. CP 826. When the petition was filed, Mr. Magera was in the custody of the Department of Corrections (DOC), and was scheduled to be released into the community. CP 828. A few months later, the trial court entered an order determining that probable cause existed to believe Mr. Magera was an SVP. CP 873. Pursuant to this order, Mr. Magera was transported to the Special Commitment Center (SCC) on McNeil Island. *Id.*

A jury trial on the petition began on February 25, 2013. Ten days later, the jury returned a verdict finding that Mr. Magera was an SVP. CP 6. On the same day, the trial court entered an Order of Commitment. CP 4. On March 29, 2013, Mr. Magera filed a Notice of Appeal. CP 2.

B. Sexually Violent Predator Trial

1. Mr. Magera's Offense History

Kevin Magera has stated that if it were not against the law, he would have sex with children often and exclusively. CP 372-373.[1] He was born on January 13, 1977, and since a young age has sexually victimized at least ten children. CP 41, 371.[2] While he has had many sex offender treatment attempts, he has been discouraged by his inability to control his sexual thoughts and feelings towards children. CP 375.

From ages 5 to 8, Mr. Magera himself was the victim of sexual abuse by his biological father, a stepfather, and one of his stepfather's friends. 2RP 132. At age 7, Child Protective Services removed him from his home. CP 65. He continued as a ward of the State until age 19. CP 66. As a ward of the State, he was moved from placement to placement frequently due to his temper and sexual acting-out with other residents at each placement. CP 71.

Mr. Magera's first sexual assault victim was his sister, M.M. CP 75. The sexual abuse began when M.M. was 4 years old and Mr. Magera was 8. 2RP 130. The sexual assaults of his sister included pulling

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[1] Portions of the February 11, 2013, deposition of Paul Martin were published to the jury. 2RP 149, Ex 61, CP 362-394.

[2] Portions of the January 31, 2013, and February 14, 2013, depositions of Kevin Magera were published to the jury. 2RP 162, 165, 173; 3RP 5-7; Ex. 62; CP 33-154, 286-322.

her pants down and looking at her nude, rubbing his penis between her buttocks, and fondling her vagina. CP 76-77.

At around age 10 or 11, Mr. Magera victimized a girl in his special education class. CP 70-71, 2RP 130. In secluded area, he would coerce her into playing sexual games. 2RP 130-131. These games included fondling of the girl's genitals and anal intercourse. 2RP 131.

In July 1990, Mr. Magera was convicted of Assault 4. CP 81, Ex. 1-3. He assaulted a 9 year-old boy, named L.W. 2RP 144. After about two weeks after L.W. arrived at the facility, Mr. Magera rubbed his penis against L.W.'s buttocks and stroked the young boy's penis. 2RP 129-130.

After his conviction, Mr. Magera was moved to another placement, where he engaged in mutual genital fondling with another 13 year-old resident. CP 87-88. He also massaged the buttocks of another 12 year-old resident. *Id.* After being sent to another group home, Mr. Magera was convicted of Assault 4 with sexual motivation for assaulting a staff member. CP 89-90, Ex. 4-5. He was sent to Echo Glen, a Juvenile Rehabilitation Agency facility, in 1991 pursuant to this conviction, where he continued acting out sexually. CP 89-90, 93.

Mr. Magera was released from Echo Glen to a group home in the Spokane area. CP 98-99. At this facility, he continued his inappropriate

sexual behaviors. CP 100-101. For example, he performed oral sex on anther male resident. *Id.* He was removed from this group home for his sexual conduct. CP 102.

Now 16 years-old, Mr. Magera was placed into yet another group home. CP 103. At this placement, he was charged with Assault 4 and Indecent Exposure for sexual misconduct with a male resident at the home. CP 108, Ex. 10-12. He was sent to Green Hill School, another Juvenile Rehabilitation Agency facility after this conviction. CP 108. There Mr. Magera participated in further sex offender treatment. CP 110. When he was released in 1994, he did not believe he would commit any further sex offenses. CP 108, 112. His parole ended in late 1994, but Mr. Magera continued sex offender treatment until age 19. CP 115-116.

In 1999, Mr. Magera crossed paths with an ex-girlfriend while he was working as a children's ride operator at an amusement park in Seattle. CP 122-123. He eventually became the live-in babysitter for his ex-girlfriend's young children. CP 126. E.M. was the older of the two children as a 5 year-old kindergartener. 2RP 116. Mr. Magera began sexually abusing E.M. after about a week of moving in to babysit her. CP 127. Mr. Magera had previously been babysitting for someone else in a similar situation, but had been told to leave by the mother of the children. 3RP 103.

Mr. Magera's offenses against E.M. were extensive. He would use the term "fun fun" with E.M. as a way of communicating to her that he wanted to have sex with her. CP 127. He had names for each of the sexual acts he performed on E.M. He called vaginal oral sex "lick lick." CP 128. "Front front" involved E.M. lying naked on top of Mr. Magera while he was nude from the waist down. CP 128-130. He would then place his penis between her vaginal lips and rub her back and forth on top of him until he ejaculated. *Id.* When Mr. Magera ejaculated onto E.M., it was called "wet wet." 2RP 118. "Butt butt" was similar to "front front," but Mr. Magera would place his penis between E.M.'s buttocks. CP 130.

The sexual assaults of E.M. occurred approximately three to four times per day over a six month period. CM 130-132, 2RP 119. Mr. Magera convinced E.M. that they were in love, that people who were in love did these kinds of things together, and that one day they would run away and get married. 2RP 120. He told her that if she ever told anyone about "fun fun" that he would go away and they could never get married. 2RP 121.

Mr. Magera also sexually assaulted a male playmate from E.M.'s kindergarten class named J.B. 2RP 122. Mr. Magera exposed himself to J.B. during the child's bath time and fondled the boy's penis while he was sleeping over. CP 140. Mr. Magera also made attempts to have J.B. and

E.M engage in sexual activity together while he observed them, 2RP 123. In 2000, Mr. Magera was convicted of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree for his offenses against E.M. and J.B. CP 138, Ex. 13-16.

2. Dr. Hupka's Trial Testimony

The State presented expert testimony from licensed psychologist Dr. John Hupka at the commitment trial. 3RP 68 - 5RP 51. Dr. Hupka has over 15 years of experience evaluating sex offenders and has conducted SVP evaluations since 1996. 3RP 72-73.

Dr. Hupka conducted an SVP evaluation of Mr. Magera in 2009 for the Department of Corrections. 3RP 76. He updated that evaluation in 2013. 3RP 77. For his evaluations Dr. Hupka interviewed Mr. Magera and reviewed multiple documents related to Mr. Magera, including police reports, psychological evaluations, and confinement records. 3RP 77-78, 81.

Dr. Hupka found that Mr. Magera had an established pattern of sexual attraction to children aged 6 to 12, and a pattern of no control or willingness to control his sexually violent behavior. 3RP 110. He assigned Mr. Magera a primary diagnosis of a sexual disorder, pedophilia. 3RP 116. Dr. Hupka also diagnosed Mr. Magera with a personality disorder that complicated his pedophilia. *Id.* Pedophilia involves a

chronic sexual attraction to children. 3RP 115-117. The personality disorder includes antisocial and narcissistic characteristics. 3RP 136.

Mr. Magera's pedophilia and personality disorder each impair his emotional and volitional capacity. 3RP 137-140. Dr. Hupka opined that Mr. Magera's condition predisposes him to the commission of criminal sexual acts due to his inability to contain his sexual attraction to children to fantasy. 3RP 140. This condition constituted a mental abnormality for Mr. Magera, an opinion Dr. Hupka held to a reasonable degree of psychological certainty. 3RP 141.

Dr. Hupka also testified that Mr. Magera's mental abnormality made him likely to engage in acts of future sexual violence. 3RP 144. Using a generally accepted risk assessment method, Dr. Hupka determined this likelihood by examining actuarial data, dynamic risk factors, Mr. Magera's clinical issues, and protective factors. 3RP 147-148.

Actuarial data provided Dr. Hupka with a starting point in his risk assessment by indicating Mr. Magera was at higher risk for re-offense than other sex offenders. 3RP 165-166. Dynamic risk factors are individual and changeable risk factors that are addressed in sex offender treatment. 3RP 166. Assessment of Mr. Magera's dynamic risk revealed deficiencies, including intimacy issues, poor social support, and poor sexual regulation. 3RP 171. Clinical factors, such as Mr. Magera's mental disorders are an

additional risk factor indicative of high risk for re-offense. 3RP 172-173. Protective factors, such as sex offender treatment completion and a supportive release environment can mitigate an offender's risk. 3RP 174, 178. Dr. Hupka opined that Mr. Magera's treatment acumen was worsening over time and that his proposed release environment was inadequate. 3RP 177-180. He concluded that Mr. Magera could not be safely released into the community. 3RP 182.

IV. ARGUMENT

Mr. Magera argues that the State engaged in misconduct and that he was denied his right to a unanimous jury verdict at his SVP trial. His arguments lack merit. He has failed to meet his burden of proof that there was prosecutorial misconduct during closing argument. Also, a unanimity instruction was not required at trial because his mental abnormality was the only basis presented for his civil commitment. His arguments must be rejected and the jury verdict finding he is a SVP should be affirmed.

A. The State's Arguments to the Jury Were Proper and Based on the Evidence Presented at Trial.

Mr. Magara argues that the State engaged in "flagrant and ill-intentioned" misconduct during the closing arguments of the trial. App.'s Brief at 4. He is incorrect. As a preliminary matter, Mr. Magera failed to object to any of the alleged misconduct and must demonstrate on appeal

that no curative instruction from the trial court could have remedied any impropriety. Further, his arguments that the State urged the jury to punish Mr. Magera and sought to appeal to the jury's passions and prejudices are without merit. The State's arguments were based on the record presented to the jury. Even if any of the State's comments were improper, Mr. Magera has failed to demonstrate sufficient resulting prejudice.

1. Mr. Magera Failed to Object to Any Arguments Made by the State to the Jury

At trial, Mr. Magera did not object to any of the conduct now identified as flagrant, ill-intentioned, and prejudicial. App's Brief at 4, 7. To prevail on a claim of prosecutorial misconduct, one "must show both improper conduct and prejudicial effect." *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 717 (2000). "A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Failure to request a curative instruction or move for a mistrial "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *In re Law*, 146 Wn. App. 28, 51, 204 P.3d 230 (2008) (citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). In those circumstances

"where the defense attorney does not object, move for a mistrial, or request a curative instruction, appellate review is only appropriate if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice they engendered by the misconduct." *State v. Kendrick*, 47 Wn. App. 620, 638, 736 P.2d 1079 (1987). Mr. Magera fails to meet this standard.

In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). When reviewing a prosecutor's closing remarks, the court must look at "the context of the total argument, the issues in the case, the evidence, and the instructions provided by the trial court." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Because all of the State's arguments were based on the evidence and law presented to the jury, Mr. Magera's claim of misconduct fails.

2. Mr. Magera's Lack of Accountability Demonstrated Poor Treatment Progress and High Risk for Future Offense.

Mr. Magera argues that in closing argument, the State "urged the jury to commit [him] as a way of holding him accountable for his past crimes. App's Brief at 5. This is not true. In the context of the total

argument, the issues in the case, and the evidence, it is clear that the comments made by the State related to Mr. Magera's risk for re-offense.

One component of Dr. Hupka's risk assessment of Mr. Magera examined protective factors, or factors that might reduce an individual's risk for re-offense. 3RP at 147. Completion of sex offender treatment was one of the protective factors he considered. 3RP 174. Dr. Hupka testified that Mr. Magera had not participated in any sex offender treatment for three years at the time of trial. 3RP 176. From the time Dr. Hupka interviewed Mr. Magera in 2009 until his most recent interview in 2013, any treatment benefits had "largely gone by the wayside." *Id.*

Since 2009, when Mr. Magera had finished the sex offender treatment program at the Twin Rivers Correctional Center, Dr. Hukpa opined that he had "essentially backpedaled" in terms of his treatment. *Id.* In his 2013 interview with Dr. Hupka, Mr. Magera was unaware how his sex offenses affected his child victims, was less willing to discuss his sexually deviant attraction to children, and could not recall risk factors he had previously identified for himself to avoid re-offending. 3RP 177-178.

During closing argument, the State highlighted for the jury other evidence that supported Dr. Hupka's opinion. 6RP 16. This evidence demonstrated several areas where Mr. Magera's treatment knowledge was particularly lacking. For example, Mr. Magera had demonstrated that he

was unwilling or unable to see that his sexual attraction to children accounted for his offending behavior:

> We need to see Mr. Magera taking accountability for his actions. Pleading guilty and avoiding trial is not taking accountability. Not all those who suffer the terrible abuse that Mr. Magera suffered end up being pedophiles or else it would be a risk factor that Dr. Hupka and other practitioners in this field consider. There's something else here that needs to be acknowledged by Mr. Magera that he was partially able to acknowledge in 2009 and is not able to acknowledge right now.

6RP 17-18.

This argument was amply supported by the record. Mr. Magera testified that after his 2009 treatment, he discovered that his offending was related to his desire for a relationship with someone who would accept him. CP 146-147. This "discovery" fails to account for why he chose child victims when peer sexual partners were available. Mr. Magera also testified that he was "no longer attracted to children," but in the next breath stated that "it would be so easy, you know to slip back" into offending. CP 296.

When asked if he was open to having a relationship with a person who has children, Mr. Magera responded it would make him "nervous" and he would want to disclose his offending history to the person and ensure that the person "still thinks that it's okay." CP 296. Yet, when reciting the risk factors related to re-offense he can recall, Mr. Magera

includes "I'm not to be in a relationship with somebody who has kids." CP 277. The evidence clearly indicated Mr. Magara failed to take accountability for his chronic and pervasive sexual attraction to children and the role it plays in his offending.

Mr. Magera likens the State's argument to *Gaff*, where the prosecutor made an improper closing argument. *In re Gaff*, 90 Wn. App. 834, 954 P.2d 943 (1998). While this case is distinguishable, it also fails to support Mr. Magera's claim of prosecutorial misconduct. In *Gaff*, the prosecutor argued that the civil commitment process could be a "tool" the jury could use to correct lenient sentences imposed on the respondent in the past. *Id.* at 840. The Court ruled that prosecutors in SVP matters must take care to ensure their arguments do not suggest that the jury "send a message" about lenient past sentences or confuse juries about their function. *Id.* at 844.

The State made no such arguments in Mr. Magera's case. There was no argument or suggestion that any of Mr. Magera's criminal sentences had been lenient. If fact, the State explicitly stated to the jury that "we're not here to punish the worst of the worst…That's not what this trial is about. This trial is about mental health." 6RP 55. Even if the State's argument was improper, there was no improper purpose behind the argument. In *Gaff*, the Court found the prosecutor's improper arguments

did not result in a jury verdict that "reflects a desire to punish Gaff rather than protect the public." *Gaff* at 844. Likewise, there is no indication in this record that the jury mistook the State's arguments regarding Mr. Magera's lacking treatment skills for an invitation to ignore the evidence and punish him. His argument must be rejected.

3. The State's Rebuttal Arguments Were Based on the Evidence Presented at Trial

Mr. Magera argues that the State made a closing argument that "was a purposeful effort to stoke the jurors' basest fears and prejudices" and "relied upon matters not in evidence." App's Brief at 7. He is incorrect. The argument Mr. Magera claims constituted prosecutorial misconduct was rebuttal to his closing arguments and based on evidence presented at trial.

In his closing argument, Mr. Magera claimed that he did not suffer from pedophilia, and that if he was a pedophile, that it did not constitute a mental abnormality. 6RP 30, 38, 39, 41. The State rebutted this argument:

> So, we have this likelihood [of risk to reoffend] because of a mental disorder. And we know that it's a mental disorder that gives him serious difficulty controlling himself. You imagine a kindergartner, a five or six year-old. You see a little person who's innocent, bushy tailed, wide eyed, dwarfed by the fifth and sixth graders that go to the same elementary school. You feel the need, the desire, to protect this little child, to nurture them, to shield them from bad things. You talk to a kindergartner about their favorite Disney princess or their latest Lego creation. That's what

> you do. Mr. Magera sees a kindergartner and sees a potential sexual partner. Mr. Magera sees a kindergartner and feels sexual urges. He gets aroused. He gets and maintains an erection. Mr. Magera talks to a kindergartner about fun-fun and it being our little secret, because if people found out, they wouldn't understand. Five and six year-olds gave him an erection. Ladies and gentlemen, that is not a normal response. That is mentally abnormal.

6RP 55-56.

The State's rebuttal argument addressed arguments Mr. Magera made about his mental condition based on the record. Dr. Hupka testified that Mr. Magera's pedophilia was the driving force behind his mental abnormality. 3RP 139, 172. His pedophilia impairs his emotional capacity. 3RP 137. Dr. Hupka explained, "The normal response to children is one of caretaking, being concerned about children" and that "sexual arousal and sexual desire and wanting to rape children is not a normal part of emotional experience." 3RP 137-138.

An example of this abnormal emotional response is Mr. Magera's offenses against E.M. and J.B. Both children were in kindergarten when Mr. Magera sexually assaulted them. 2RP 116, 122. Mr. Magera's offenses against E.M. included simulated sexual intercourse with ejaculation, oral sex, and fondling that he referred to as "fun fun." 2RP 117-118. Instead of babysitting E.M., Mr. Magera assaulted her three to four times a day and convinced her that they were in love and "would

run away and get married." 2RP 119-120. The State's rebuttal argument clearly contradicts Mr. Magera's arguments with this evidence.

Comparing Mr. Magera's trial to the cases he cites reveals that the State's arguments do not constitute misconduct. In *Belgarde,* the prosecutor, based in part on his own recollection of Wounded Knee, argued to the jury that the defendant was "strong in" a group which the prosecutor describes as "a deadly group of madmen" that "kill indiscriminately," and likening the American Indian Movement members to "Kaddafi" and "Sean Finn" of the IRA. *State v. Belgarde*, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). While it is not difficult to see how the language at issue in *Belgarde* constitutes an improper emotional appeal to the jury, the State's argument in this case was based on the evidence and rebutted arguments made by Mr. Magera.

In *Gaff*, the prosecutor equated uneasy sleep and noises in the night to the fear of "someone like" Mr. Gaff. *Gaff*, 90 Wn. App. At 839. While the Court held that this argument improperly invited the jury to decide the case based on emotional appeals, it concluded that it was not so flagrant and ill-intentioned that it could not have been neutralized via a curative instruction. *Id* at 841-842. Unlike the fear inspiring arguments at issue in *Gaff*, the State's arguments in Mr. Magera's case described his mental condition.

The jury members in this case were selected, in part, because they demonstrated impartiality and indicated they would not be swayed by emotional appeals. Each potential juror was required to submit a filled-out jury questionnaire addressing sensitive issues such as a juror's experience with sexual victimization. 2RP 2. Some jurors were questioned individually, in open court, concerning answers to questionnaire items they preferred to discuss outside the presence of other jurors. 2RP 16. The questionnaire and individual questioning occurred in addition to the voir dire process. In his closing, Mr. Magera reminded the jurors that they were selected because they indicated they would follow the law in the case despite strong emotions people have about sex offenders. 6RP 52. Even if the State's rebuttal argument inadvertently made an emotional appeal to the jury, it had no impact on the verdict.

4. Mr. Magera Was Not Prejudiced by Any Alleged Prosecutorial Misconduct.

Even if the arguments Mr. Magera points to were improper, he has not demonstrated that he was prejudiced by them. "Comments will be deemed prejudicial only where there is a substantial likelihood the misconduct affected the jury's verdict." *McKenzie*, 157 Wn.2d at 52. Mr. Magera fails to meet this burden on appeal.

At trial, the jurors were provided with a correct statement of the legal standard in their jury instructions. CP 7-30. Moreover, the jury was instructed that they were to accept the court's instructions of law and they were to disregard any comments made by the attorneys that were contrary to the law as stated by the court. CP 9. There is a presumption that the jury follows the instructions of the court. *State v. Grisby*, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).

Because the jurors were properly instructed by the trial court, and in light of the abundance of evidence supporting a finding that Mr. Magera's risk of re-offense stemmed from his untreated mental abnormality, he has not established that the State's remarks created "an enduring prejudice that could not have been cured by an instruction from the trial court." *State v. Barajas*, 143 Wn. App. 24, 38, 177 P.3d 106 (2007). Mr. Magera has failed to meet his burden of showing that the outcome of the trial would have been different. As such, his arguments must be rejected.

B. Mr. Magera's Proposed "To Commit" Instruction was Properly Rejected

Mr. Magera argues that the trial court erred in refusing to instruct the jury using a "to commit" instruction he submitted. App's Brief at 1. He claims that his instruction, which required the jury to find that only

Mr. Magera's pedophilia could constitute a mental abnormality, protected his right to a unanimous jury verdict. App's Brief at 11. He is mistaken.

While Mr. Magera is entitled to a unanimous verdict, no unanimity instruction is required in this case because alternative means for his civil commitment were not presented to the jury. Dr. Hupka's opinion that Mr. Magera suffered from a condition that consisted of pedophilia and a personality disorder that complicated the sexual disorder was the only evidence of a mental abnormality presented. Further, even if more than one mental abnormality was presented to the jury, precedent establishes that no unanimity instruction is required.

Refusal to give a particular instruction is an abuse of discretion only if the decision was manifestly unreasonable, or discretion was exercised on untenable grounds. *In re Aston*, 161 Wn. App. 824, 839, 251 P.3d 917 (2011) (citing *Boeing v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998)). The jury instruction proposed by Mr. Magera was an improper comment on the evidence and was correctly excluded by the trial court in favor of the commonly used pattern instruction.

1. The Jury was Presented with Evidence of One Mental Abnormality

Mr. Magera's claim that his right to a unanimous verdict was violated assumes that more than one basis for his civil commitment was

presented at trial. This assumption is incorrect. A sexually violent predator is a 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 jury deciding whether a person meets these criteria must be unanimous. RCW 71.09.060(1).

At trial, evidence of only a mental abnormality was presented and argued to the jury. While Mr. Magera was diagnosed with a personality disorder, it was not presented to the jury as a sufficient basis for civil commitment. Instead, it was presented as a component of Mr. Magera's mental abnormality. With evidence of only a mental abnormality, as opposed to a mental abnormality and qualifying personality disorder, the jury was unquestionably unanimous in finding Mr. Magera suffers from a mental abnormality.[3]

a. Dr. Hupka's Opinion

A Mental abnormality is a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting

[3] Mr. Magera concedes that he "does not contend the jury was required to unanimously agree that he suffered [from] a 'mental abnormality' as opposed to a 'personality disorder.' In fact, the trial court omitted the term 'personality disorder' from the instruction setting forth the elements in this case." Brief at 10.

such person a menace to the health and safety of others." RCW 71.09.020(8). Mr. Magera's mental abnormality is characterized by a condition that includes two diagnosed mental disorders: Pedophilia and a mixed personality disorder. 3RP 115.

Pedophilia is a sexual disorder that involves sexual attraction to children. 3RP 115. Dr. Hupka based his pedophilia diagnosis on Mr. Magera's lifelong sexual attraction to children and his recurrent pattern of committing sex offenses against children. 3RP 122. Mr. Magera told Dr. Hupka that he "will always be attracted to children." 3RP 123, 126. This is consistent with the professional consensus that pedophilia is a chronic condition, indicating a sexual orientation towards children. 3RP 114, 132.

Mr. Magera's personality disorder has antisocial and narcissistic characteristics. 3RP 135. Antisocial characteristics are indicated by a history of behaviors that violate societal norms and the rights of others. *Id.* In addition to his sex offending, Mr. Magera demonstrated his antisocial traits through stealing, lying, and setting fires while living in the community. 3RP 136. Mr. Magera's narcissistic characteristics are evidenced by his general self-focus and difficulty appreciating the emotions and feelings of others. *Id.*

These diagnoses create a condition in Mr. Magera that affects his emotional and volitional capacity. Dr. Hupka testified that pedophilia impairs Mr. Magera's emotional capacity by causing him to have an abnormal emotional response to children that is sexual. 3RP 137. This disorder is so pervasive in Mr. Magera that he cannot contain his sexual urges of children to fantasy, indicating volitional impairment. 3RP 138.

Dr. Hupka testified that Mr. Magera's personality disorder alone would not predispose him to commit acts of sexual violence. 4RP 13. However, while Mr. Magera's pedophilia is the primary factor driving his sex offending, his personality disorder complicates his sexual disorder. 3RP 136, 139. For example, Mr. Magera demonstrates very little insight into how his sex offending behavior affected his victims. 3RP 136. Dr. Hupka opined that the personality disorder could make Mr. Magera less interested in controlling his pedophilic behavior and more self-focused. 3RP 140.

Dr. Hupka concluded that Mr. Magera's condition predisposed him to the commission of criminal sexual acts against children to a degree where he is a menace to the health and safety of others. 3RP 140. He held this opinion to a reasonable degree of psychological certainty. 3RP 141. No other testimony regarding a mental abnormality or personality disorder

was presented. Therefore, Dr. Hupka's testimony regarding Mr. Magera's mental abnormality was the only opinion considered by the jury.

b. Closing Argument

Mr. Magera argues that the State "pointed jurors to" a personality disorder diagnosis assigned to him by Dr. Hupka as an "independent and sufficient basis" to civilly commit him during closing arguments. App's Brief at 11-12. This contention is not supported by the record. During closing argument, the State relied on Dr. Hupka's testimony to support a finding that Mr. Magera suffers from a mental abnormality that makes him likely to commit future predatory sex offenses against children if released from confinement.

In alignment with Dr. Hupka's testimony, the State described the personality disorder as a diagnosis that "complicates Mr. Magera's pedophilia." 6RP 8. The State also clarified for the jury that while the sexually violent predator definition permits the civil commitment of an individual only suffering from a personality disorder, that this was not Dr. Hupka's opinion. 6RP 9. Dr. Hupka, and the State, argued that Mr. Magera suffered from a mental abnormality. *Id.* At the end of rebuttal argument, the State urged the jury to find that Mr. Magera posed a high risk for re-offense due to his mental abnormality. 6RP 57.

2. Precedent Establishes the Inapplicability of Magera's Proposed Jury Instruction.

Mr. Magera cites cases in support of his argument that his proposed instruction should have been provided to the jury to ensure a unanimous verdict. He misreads the applicable cases he cites and fails to cite additional authority regarding unanimity issues in SVP cases. Case law clearly establishes that his argument is without merit and that Mr. Magera's right to a unanimous verdict was not affected by the trial court's rejection of his proposed jury instruction.

a. In re Halgren

In *Halgren*, an SVP respondent appealed a trial court's rejection of a proposed instruction requiring the jury to reach unanimous agreement as to whether he suffered from a mental abnormality or personality disorder. *In re Halgren*, 156 Wn.2d 795, 807, 132 P.3d 714 (2006). The State expert opined that Halgren suffered from a mental abnormality and a personality disorder. *Id.* at 800. Halgren urged the Supreme Court to apply unanimity standards from *Petrich*, a criminal case, in an SVP context.[4] *Id.* at 808. In *Petrich*, the court held that when several distinct criminal acts have been committed, but the defendant is charged with only one count, the State must elect which act it is relying upon for conviction.

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[4] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

Petrich at 572. If the State fails to make such an election, the court must instruct the jury that all jurors must agree that the same underlying criminal act has been proven. *Id.* Halgren argued that a *Petrich* instruction was required in his case because his multiple diagnoses were analogous to multiple criminal acts. *Halgren* at 808.

The State argued that SVP cases were more analogous to alternative means cases, such as *Arndt* and *Berlin*.[5] *Id.* at 809. Alternative means case law holds that there need not be unanimity with regard to means supported by substantial evidence:

> When there is a single offense committable in more than one way "it is unnecessary to a guilty verdict that there be more than unanimity concerning guilt as to the single crime charged...regardless of unanimity as to the means by which the crime is committed provided there is substantial evidence to support each of the means charged."

Halgren at 809 (citing *State v. Arndt*, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976)). The State argued that SVP cases were analogous to alternative means cases because "mental abnormality" and "personality disorder" are alternative means of establishing the broader proposition that a respondent meets civil commitment criteria. *Id.*

The Court agreed with the State, holding that "mental abnormality" and "personality disorder" are two factual alternatives in making an SVP

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[5] *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976); *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

determination, not a series of uncharged criminal acts.[6] *Id.* at 811. In applying the *Arndt* alternative means test instead of the *Petrich* standard, the Court upheld Halgren's civil commitment because substantial evidence supported findings that he had both a mental abnormality and personality disorder. *Id.* at 812.

Mr. Magera argues that "the unanimity requirement of *Petrich*, adopted in *Halgren*, requires the jury to unanimously agree as to which abnormality made him committable." App's Brief at 10. He is incorrect. The *Halgren* court did not adopt the *Petrich* standard. It held that SVP cases were to be analyzed under the alternative means test.

Regardless, this case is distinguishable from *Halgren* because there were no alternative means for the jury consider. It was presented with evidence of a mental abnormality, only one of the two "alternative means prongs" within the SVP definition. The trial court's instructions to the jury only allowed for consideration of a mental abnormality. CP 14. The State argued that Mr. Magera met SVP criteria due to his mental abnormality. 6RP 57. Because the jury had only one means to consider, as opposed to alternative means, *Halgren* is not applicable.

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[6] The court also recognized that these alternatives "may operate independently or may work in conjunction." *Halgren*, 156 Wn.2d at 810. And "because an SVP may suffer from both defects simultaneously, the mental illnesses are not repugnant to each other and may inhere in the same transaction." *Id.* at 811.

Even assuming the jury was presented with alternative mental abnormalities as the basis for Mr. Magera's civil commitment, his argument still fails under *Halgren*. First, *Halgren*, in adopting the alternative means approach, holds that only two possible alternative means exist in the SVP definition: "mental abnormality" and "personality disorder." *Halgren* at 810. Evidence of more than one mental abnormality does not implicate alternative means.

Second, to the extent *Halgren* requires substantial evidence to support each means argued and presented to the jury, the State met that requirement here. The State argued only one of the two possible alternative means and Mr. Magera does not argue that the State presented insufficient evidence of a mental abnormality. Unchallenged findings are verities on appeal. *In re Estate of Jones,* 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *In re Detention of Anderson,* 166 Wn.2d 543, 549, 211 P.3d 994 (2009). Mr. Magera's argument that the holding in *Halgren* requires reversal of his civil commitment must be rejected.

b. In re Sease

In *Sease*, the respondent was diagnosed with three personality disorders, two of which made him likely to commit a criminal sexual act if not confined. *In re Sease*, 149 Wn. App. 66, 71, 201 P.3d 1078 (2009). The trial court struck the term "mental abnormality" from the jury

instructions because the parties agreed that he did not suffer from a mental abnormality. *Id.* at 70. Mr. Sease argued that the trial court erred by failing to provide a jury instruction requiring unanimity as to which personality disorder was the basis for his civil commitment. *Id.* at 75.

Division Two of this Court disagreed. It found that *Halgren* "makes it clear that the actual diagnosed mental abnormalities or personality disorders are not the alternative means which the State must prove beyond a reasonable doubt; it is whether the person suffers from a mental abnormality or a personality disorder." *Id.* at 77. The Court held that the alternative means analysis does not apply when the State provides evidence of only mental abnormalities or only personality disorders. *Id.*

Mr. Magera argues that the trial court must provide an instruction which ensures the jury unanimously agrees on a single abnormality. App's Brief at 10. This uncited contention is at odds with the holding in *Sease* that the jury need not unanimously decide which personality disorder the respondent suffered from. *Sease* at 78. In making this holding, the Court relied on the Supreme Court's ruling that "where a disputed instruction involves alternatives that may be characterized as 'means within a means'...the alternative means doctrine does not apply. *Sease* at 77 (citing *In re Jeffries*, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988)).

Mr. Magera's argument that the jury "must be unanimous as to the abnormality or disorder suffered" clearly ignores precedent holding that means within a means determinations by a jury need not be unanimous. *See* App's Brief at 2. Like *Sease*, the jury in Mr. Magera's trial was only instructed as to one of the two alternative means under the SVP definition. Even if the jury was presented with multiple mental abnormalities as possible bases for his civil commitment, at most those abnormalities constitute means within the means and are beyond the scope of unanimity requirements.

3. Mr. Magera's Proposed Jury Instruction Constituted an Improper Comment on the Evidence.

Mr. Magera argues that the trial court erred in "refusing to give" his proposed "to commit" instruction. App's Brief at 1. He is incorrect. His proposed instruction was properly rejected as an improper judicial comment on the evidence. 5RP 178.

Article IV, section 16 of the Washington State Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been

established as a matter of law." *State v. Becker,* 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

Mr. Magera's proposed jury instruction violates the latter prohibition. The problematic portion of the instruction read:

> To establish that Kevin Magera is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:
>
> ...
>
> (2) That Kevin Magera suffers from a mental abnormality, *namely Pedophilia* which causes him serious difficulty controlling his sexually violent behavior...

CP 567 (emphasis added). The pattern instruction used by the court is the same as the proposed instruction, but it does not include the "namely pedophilia" language. *See* WPI 365.10, CP 14.

The language added by Mr. Magera constituted a judicial comment on the evidence for several reasons. First, it relieved the jury from considering whether pedophilia could be a mental abnormality. In *Levy*, the Supreme Court held that a trial court's reference to a crowbar as a deadly weapon in a jury instruction constituted a judicial comment because the jury would not need to consider whether the use of the crowbar in the incident at issue qualified as a deadly weapon. *State v. Levy*, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006).

Dr. Hupka testified that not every person diagnosed with pedophilia suffers from a mental abnormality. 3RP 140. Once a person is

diagnosed with a disorder such as pedophilia, Dr. Hupka's next step is to determine whether that diagnosis meets the mental abnormality standard for the individual he is evaluating. 3RP 113. Mr. Magera's instruction prevented the jury from considering and alleviated the State from proving this second step. Like the crowbar in *Levy* was described as a deadly weapon improperly, so was pedophilia described as a mental abnormality when it is not always the case.

Mr. Magera's proposed instruction is also problematic because it prevented the jury from considering the entirety of Dr. Hupka's testimony. For example, when describing Mr. Magera's mental abnormality, Dr. Hupka also discussed how a personality disorder complicated the pedophilia disorder. 3RP 136, 139. The "namely pedophilia" language Mr. Magera attempted to insert into the instruction permitted the jury to ignore these additional components of his mental abnormality.

Reference to specific items in jury instructions are not necessarily judicial comments on the evidence. For example, if the pattern instruction expressly permits the court to indicate that a particular item qualifies as property, such a reference is permissible. *See Levy* at 722 (Pattern jury instructions expressly permit a court to instruct a jury that a revolver is a deadly weapon). It is also permissible to reference specific items if there is no dispute as to the characterization of that item. *Id.* (parties did not

dispute that jewelry was personal property). Here the pattern jury instruction used by the court did not permit the court to indicate to that certain disorders constituted a mental abnormality. Further, Mr. Magera's mental health status was a hotly contested issue at trial. The Court's use of the pattern instruction in lieu of Mr. Magera's manipulated instruction was proper.

V. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Mr. Magera's civil commitment as a sexually violent predator because all arguments at trial were based on the evidence and his proposed jury instruction was improper.

RESPECTFULLY SUBMITTED this 17th day of January, 2014.

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WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of: KEVIN MAGERA, Appellant.	DECLARATION OF SERVICE

I, Joslyn Wallenborn, declare as follows:

On January 17, 2014, I deposited in the United States mail true and correct copies of Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

Gregory Link
Washington Appellate Project
1511 Third Ave, Suite 701
SEATTLE, WA 98101

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

DATED this 17th day of January, 2014, at Seattle, Washington.

Joslyn Wallenborn
JOSLYN WALLENBORN