Supreme Court No. 96484-0
Court of Appeals No. 49781-6-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Detention of

Charles Urlacher,

Appellant/Petitioner

Pierce County Superior Court Cause No. 10-2-13180-4
The Honorable Judge Ronald E. Culpepper

Amended PETITION FOR REVIEW

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DECISION BELOW AND ISSUES PRESENTED

Petitioner Charles Urlacher asks the Court to review four issues presented by the Court of Appeals Published Opinion:[1]

1. Does the requirement that conditional release satisfy a jury's unguided assessment of the patient's "best interests" violate substantive due process because it does not relate to treatment or community protection?

2. In civil commitment cases, must jury instructions make the law manifestly clear to the average juror?

3. Did the court's deficient instructions improperly allow jurors to reject conditional release even if Mr. Urlacher's LRA plan was in his best interests and adequate to protect the community?

4. Did the State's attorney commit reversible misconduct by telling jurors they were free to apply their own definitions to the phrases "best interests" and "adequately protect the community" after opposing instructions that defined those terms in accordance with the law, and by improperly inviting jurors to imagine themselves as child victims of a sexual offense perpetrated by Mr. Urlacher?

STATEMENT OF THE CASE

Charles Urlacher's years of participation in treatment enabled him to seek conditional release from the Special Commitment Center (SCC) based on a well-respected evidence-based treatment program. RP[2] 121-122, 408-503, 744-771; RP (12/11/15) 23, 25-29; CP 109-231, 267-270. At his trial, the jury would address two issues: (a) whether the less restrictive alternative (LRA) plan was in Mr. Urlacher's best interests, and (b) whether it was adequate to protect the community.

[1] A copy of the Opinion, entered July 3, 2018, is attached.

[2] The trial transcript will be referred to as "RP;" other transcript citations include the hearing date.

Pretrial litigation focused on these issues. Both parties agreed that the only published opinion addressing the "best interests" and community protection elements was "settled law." RP (9/27/16) 78; CP 420-427, 474; *see In re Det. of Bergen,* 146 Wn. App. 515, 527, 195 P.3d 529 (2008). Mr. Urlacher sought to present expert testimony addressing the *Bergen* factors, and to cross-examine the State's expert about them. RP (9/27/16) 94-96. The court refused. The judge did not allow questions on the *Bergen* court's definitions, instead allowing the experts to provide their own competing "working definitions" of the elements. CP 507; RP (9/27/16) 97-98.

Mr. Urlacher's conditional release plan was admitted into evidence. He presented testimony in support of his plan, including his proposed treatment provider, his current case manager, a release planning specialist, several chaperones and spiritual leaders, as well as the apartment manager where Mr. Urlacher plans to live. RP 649-787, 790-804, 825-955; Ex. 101.

He also presented the testimony of Dr. Spizman, a clinical psychologist and certified sex-offender treatment provider who worked at the Special Commitment Center for eleven years.[3] RP 523-526. Dr. Spizman concluded that the proposed plan was in Mr. Urlacher's best interests and that it was adequate to protect the community. RP 533, 569, 575, 579.

[3] During his tenure there, Dr. Spizman eventually rose to manage the center's forensic unit. RP 526-527.

Although he relied on the *Bergen* factors, Dr. Spizman did not mention *Bergen's* legal framework to the jury. He explained that conditional release is in a patient's "best interests" if treatment progress has made the patient "ready for the next step," or "ready to move on" to receive treatment in a community setting. RP 533-534. He opined that the proposed LRA plan will "continue to incentivize successful treatment participation." RP 575. Dr. Spizman also outlined Mr. Urlacher's planned support systems, the restrictions to be imposed, and the enforcement mechanisms that will be in place. RP 575-579. He concluded that the plan included enough safeguards to adequately protect the community. RP 579.

The State's expert, Dr. Goldberg, "just use[d] [his] own definition" of "adequate to protect the community." RP 339. According to Dr. Goldberg, adequate community protection requires the elimination of all risk.[4] RP 358.[5] Instead of examining the plan, Dr. Goldberg used actuarial instruments and clinical judgment to assess Mr. Urlacher's risk; based on his risk assessment, he concluded that the proposed LRA would not adequately protect the community. RP 290, 338-339.

Dr. Goldberg described "best interests" as a "fairly nebulous term," and told the jury it was not defined by statute or science. RP 316. Instead, he relied on his own clinical judgment to determine that the plan was not in Mr. Urlacher's best interests. RP 290, 315-316.

[4] Q: [I]n your interpretation of the phrase 'adequate to protect the community,' we must make it a [zero] percent risk of re-offense; is that right?
A: Correct.
RP 358.

[5] Mr. Urlacher requested a mistrial based on this testimony. RP 404-407.

Mr. Urlacher proposed instructions defining the "best interests" and community protection elements. CP 434, 435. The proposed instructions drew language directly from the *Bergen* case. CP 434, 435.[6]

On the "best interests" issue, Mr. Urlacher asked the court to instruct the jury "to consider whether the proposed less restrictive alternative plan properly incentivizes successful treatment participation and whether it is the appropriate next step in the Respondent's treatment." CP 434.

On the community protection issue, he proposed to instruct the jury to consider "the individual aspects of the Respondent's release plan, rather than the Respondent himself. It is not necessary that all risk be removed in order for the proposed less restrictive alternative plan to be "adequate to protect the community." CP 435.

The State objected but did not propose alternatives. RP 964-965; CP 474-475. The trial judge mused that "some kind of instruction might be useful" to explain the community protection element. RP 965. However, the court did not provide a definition, other than to say that "[i]t is not necessary that all risk be removed." CP 671. Nor did the court supply any other instruction on the issue of adequate community protection and did not define the best interests standard. CP 660-675.

During closing argument, the State's attorney told jurors that they were responsible for defining the key terms: "because best interests and adequate to protect the community are not defined in your jury instructions, you, as the trier of fact, will be the individuals who will decide

[6] See *Bergen*, 146 Wn.App. at 529-534.

amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher." RP 1034. The prosecutor also suggested that Mr. Urlacher was "grooming" jurors to get them to accept his proposed plan. RP 1040.[7]

The jury found in favor of the State, and the court ordered that Mr. Urlacher's confinement continue indefinitely. RP 1047-1053; CP 659, 676. Mr. Urlacher appealed, and the Court of Appeals affirmed. CP 679.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT DUE PROCESS REQUIRES CONDITIONAL RELEASE FOR PATIENTS WHO CAN BE SAFELY TREATED IN THE COMMUNITY.

Washington's civil commitment scheme forces some patients to remain in total confinement even if they could safely and successfully receive treatment in the community. The State can defeat an otherwise-perfect release plan by convincing jurors that it is somehow not in the detainee's "best interests." This paternalistic standard violates substantive due process.

The substantive component of the right to due process has "fundamental significance in defining the rights of the person." *Lawrence v. Texas*, 539 U.S. 558, 565, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *see also Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Substantive due process goes beyond mere procedural protections: it limits the government's ability to operate in certain realms. *Lawrence*,

[7] Earlier, the judge had explicitly prohibited the State from asking Dr. Spizman if Mr. Urlacher was grooming the jury. RP 638. The question originated with the jury. CP 683.

539 U.S. at 578; *Troxel,* 530 U.S. at 65. The "best interests" standard oversteps these limits.

A statute can "create due process liberty interests where none would have otherwise existed." *Bergen,* 146 Wn. App. at 525. The statutory provisions authorizing conditional release create such a constitutionally protected interest. *Id.,* at 527. The "best interests" standard improperly interferes with this protected liberty interest.

Courts apply strict scrutiny to determine whether the statutory procedures governing conditional release are "narrowly tailored to serve a compelling state interest." *Id.* The state's compelling interest is in "treating sex predators and protecting society from their actions." *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). The "best interests" standard does not serve that compelling interest.[8]

Strict scrutiny requires the government to use the least restrictive means of achieving the government's purpose. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (applying strict scrutiny in the free speech context). Failure to use the least restrictive means renders a statute unconstitutional. *Id.; see also Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1011 (9th Cir. 2003); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 280 n. 6, 106 S.Ct. 3320, 92 L.Ed.2d 728 (1986).

[8] The "best interests" provisions set forth in Chapter 71.09 do not define or limit the phrase. *See* RCW 71.09.094(2); RCW 71.09.090; RCW 71.09.096. The *Bergen* court believed the undefined phrase relates only to the patient's treatment needs. *See Bergen,* 146 Wn. App. at 529. This limitation does not appear in the statutory language.

Washington's conditional release scheme violates substantive due process. The statute denies conditional release to any patient who can be safely and successfully treated in the community if jurors decide—without any guidance—that a less restrictive alternative to total confinement is not in the patient's "best interests." RCW 71.09.094(2); *see also* RCW 71.09.090; RCW 71.09.096.

The "best interests" requirement is not the least restrictive means of meeting the government's compelling interest in "treating sex predators and protecting society from their actions." *Young*, 122 Wn.2d at 26. The "best interests" standard does not promote treatment or protect society. Nor does it promote any compelling justification independent of treatment or protection. *Playboy*, 529 U.S. at 813. This requirement fails strict scrutiny, and thus violates substantive due process. *Id.; Right to Life*, 320 F.3d at 1011; *Wygant*, 476 U.S. at 280 n. 6.

There is no state objective that warrants forcing citizens to live in harmony with their best interests. *See O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493, 45 L. Ed. 2d 396 (1975) ("[T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.") Accordingly, the "best interests" standard cannot be part of a narrowly tailored statutory scheme.

II. THE SUPREME COURT SHOULD ACCEPT REVIEW TO DETERMINE THE PROPER STANDARD OF CLARITY FOR INSTRUCTIONS IN CIVIL COMMITMENT CASES.

Jury instructions in criminal cases must be manifestly clear. This same standard should apply to civil commitment proceedings, including

conditional release trials. The Supreme Court should accept review and require manifestly clear instructions in all civil commitment cases.

A. Appellate courts have fashioned a heightened standard for instructional clarity in criminal cases.

In criminal cases, instructions must make legal standards "manifestly apparent to the average juror." *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (internal quotation marks and citation omitted). To determine whether an instruction is misleading, courts look at "the way a reasonable juror *could have* interpreted the instruction." *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (emphasis added) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

The Court of Appeals erroneously suggests that the "manifestly apparent" standard is limited to criminal cases involving self-defense and double jeopardy. Opinion, p. 10 n. 7. This is incorrect; the "manifestly apparent" standard has also been applied to the elements instruction for an offense (*State v. Smith*, 174 Wn. App. 359, 361, 298 P.3d 785 (2013)), to unanimity instructions (*State v. Watkins*, 136 Wn. App. 240, 243, 148 P.3d 1112 (2006)), to instructions on insanity (*State v. Applin*, 116 Wn. App. 818, 825, 67 P.3d 1152 (2003)), and to instructions defining dominion and control in possession cases. *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

The Court of Appeals ignored these authorities. The "manifestly apparent" standard reduces the risk that jurors will reach a verdict based

on an erroneous interpretation of an ambiguous instruction.[9] The standard applies in criminal cases and should likewise apply in civil commitment proceedings.

B. The government violates procedural due process when it prolongs civil commitment by means of a jury trial with insufficiently clear instructions.

Patients committed to the special commitment center have a protected liberty interest in conditional release. *Bergen*, 146 Wn. App. at 527. Civil commitment procedures must comport with procedural due process. *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); U.S. Const. Amend. XIV. To avoid constitutional violations, trial courts should provide very clear instructions to juries considering conditional liberty for patients who have been civilly committed.

The process due under the Fourteenth Amendment depends on a balance of (1) the private interest affected by governmental action; (2) the risk of erroneous deprivation of that interest under current procedures; and (3) the government's interest, including any fiscal or administrative burden. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). The balance of interests in civil commitment trials favor application of a heightened standard for instructional clarity.

A trial with unclear instructions is a flawed procedure. Arbitrarily prolonging commitment based on a flawed procedure violates procedural

[9] Conditional release alleviates the "massive" deprivation of liberty inflicted by civil commitment. *See In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) ("massive" deprivation of liberty requires narrow construction of statute). Because of this, both procedural and substantive due process require application of the *Kyllo* and *Miller* standards to conditional release trials such as Mr. Urlacher's.

due process. The procedural flaw can be fixed by requiring instructions that are manifestly apparent to the average juror. The Court of Appeals' suggestion that instructional clarity has no relation to due process implies that the fairness of the trial is not subject to review under the constitution. *See* Opinion, pp. 11-12.

In civil commitment cases, procedural due process requires instructions that do more than allow each side to argue its theory of the case; the instructions must not merely fail to mislead or clear the low bar of "properly" informing the jury. *Cf. Wilcox v. Basehore*, 187 Wn.2d 772, 782, 389 P.3d 531 (2017) (outlining the standard for reviewing jury instructions in civil cases that do not involve a massive curtailment of liberty). Instead, as in criminal cases, jury instructions in civil commitment proceedings must make the law "manifestly apparent" to the average juror and preclude any possible misunderstandings by such a juror. *See Kyllo*, 166 Wn.2d at 864; *Miller*, 131 Wn.2d at 90. The balance of interests under *Mathews* requires the highest standard of clarity for jury instructions in civil commitment proceedings.

The first *Mathews* factor involves the private interest at stake. A patient's individual interest weighs in favor of a high standard of clarity, because civil commitment involves a "massive" curtailment of liberty. *Hawkins*, 169 Wn.2d at 801. Patients have a significant interest in transitioning from total confinement—living in a secure island facility not unlike a prison—to a less restrictive alternative in a private apartment in the

community. The first *Mathews* factor thus merits greater clarity in instructions, to ensure that the elements and burden of proof are unmistakable.

The second factor—the risk of error— supports the higher standard as well. Instructions may be clear "to the trained legal mind" without adequately communicating an important legal standard to the average juror. *State v. Fischer*, 23 Wn.App. 756, 759, 598 P.2d 742 (1979) (cited with approval by *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). Any miscommunication regarding the correct legal standard has the potential to result in an erroneous finding, maintaining total confinement for a person who should be released to a less restrictive setting.

This potential for error supports the "manifestly apparent" standard in the criminal context. *See Kyllo*, 166 Wn.2d at 864; *see also State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). No lesser standard should apply in conditional release trials, where the massive curtailment of liberty is based on predictions of the future rather than on past criminal conduct.

Finally, the third factor – the state's interest - also weighs heavily in favor of applying a heightened standard for clarity in civil commitment proceedings. The state has a "'compelling interest both in treating sex predators and protecting society from their actions.'" *In re Det. of Morgan*, 180 Wn.2d 312, 322, 330 P.3d 774 (2014) (quoting *Young*, 122 Wn.2d at 26). This interest is furthered by jury instructions that clearly and unmistakably communicate the applicable law.

Jurors who misinterpret their instructions may well authorize conditional release for a predator who should remain in total confinement. Alternatively, ambiguity in the court's instructions may unnecessarily burden the government with the cost of maintaining a patient in total confinement when safe treatment in the community is possible.

The state's interest thus aligns with the interests of residents seeking conditional release. Furthermore, there are no financial or administrative costs associated with ensuring that jury instructions are manifestly clear and capable of only one (correct) interpretation.

All three *Mathews* factors favor application of a heightened standard of clarity for instructions in conditional release trials. *Mathews,* 424 U.S. at 335. As in criminal cases, instructions in civil commitment proceedings must make the law "manifestly apparent" to the average juror. *See Kyllo,* 166 Wn.2d at 864. Any reasonable juror, upon reading the instructions, must reach only one conclusion as to their meaning. *See Miller*, 131 Wn.2d at 90.

C. The government violates substantive due process when ambiguous jury instructions result in denial of conditional release for patients who could be safely treated in the community.

Substantive due process requires that civil commitment statutes be narrowly drawn to serve compelling state interests. *State v. McCuistion,* 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). The government must use the least restrictive means of meeting those compelling interests. *See Playboy,* 529 U.S. at 813 (applying strict scrutiny in the free speech context). Failure to use the least restrictive means renders a statute unconstitutional. *Id.;*

see also Right to Life, 320 F.3d at 1011; *Wygant*, 476 U.S. at 280 n. 6.

Conditional release furthers this constitutional requirement: "'[m]ental health treatment, if it is to be anything other than a sham, must give the confined person the hope that if he gets well enough to be safely released, then he will be transferred to some less restrictive alternative.'" Lieb, R, "After Hendricks: Defining Constitutional Treatment for Washington State's Civil Commitment Program," Ann. N.Y. Acad. Sci. 989, p. 485 (2003)[10] (quoting *Turay v. Weston*, May 2000 Order, No. C91–664–WD (W.D.Wash.1994) (*Turay* I))

In conditional release cases, instructions that are not manifestly clear do not meet substantive due process. If "a reasonable juror could have interpreted the instruction[s]"[11] to relieve the State of its burden, the patient will remain in total confinement even if conditional release would meet the state's goals of ensuring public safety and providing treatment.

Total confinement of a patient eligible for conditional release violates the patient's right to substantive due process. Total confinement is not the least restrictive means of achieving the government's interests. *See McCuistion*, 174 Wn.2d at 387; *see also Playboy*, 529 U.S. at 813; *Right to Life*, 320 F.3d at 1011; *Wygant*, 476 U.S. at 280 n. 6.

Trials conducted with instructions that do not meet a high standard of clarity and thereby permit total confinement of residents who should be conditionally released are not narrowly tailored. *See McCuistion*, 174

[10] Available at: http://www.wsipp.wa.gov/Reports/93 (accessed 11/6/18).

[11] *Miller*, 131 Wn.2d at 90.

Wn.2d at 387. The higher standards for clarity used in criminal cases must apply in conditional release trials. Heightened standards for clarity will reduce the risk of error, ensuring that residents who can safely transition to less restrictive alternative placements do not remain in total confinement.

Substantive due process requires courts to provide instructions that make the law manifestly apparent to the average juror. *Kyllo,* 166 Wn.2d at 864. If "a reasonable juror could have interpreted" the court's instructions in a manner that denied conditional release to an eligible resident, a new trial must be granted. *Miller*, 131 Wn.2d at 90.

III. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE BECAUSE THE INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN.

Mr. Urlacher's release trial turned on whether his release plan (a) was in his "best interests" and (b) would "adequately protect the community." RCW 71.09.094(2); CP 668, 672. The court did not define these phrases for the jury. CP 660-675. The State's attorney told jurors they should "decide amongst yourselves" how to define them. RP 1034. The court's instructions were not manifestly clear, and the State's argument compounded the problem. Reasonable jurors could have interpreted the instructions to deny conditional release even if the State failed to meet its burden. This violated Mr. Urlacher's Fourteenth Amendment right to due process.

A. A reasonable juror could have interpreted the court's instructions to relieve the State of its burden on the "best interests" element.

The State has the burden of proving beyond a reasonable doubt that any conditional release plan is not in the patient's "best interests."

RCW 71.09.090(3)(d). According to the *Bergen* court, the "best interests" standard "relates to the SVP's successful treatment, ensuring that the LRA does not remove 'incentive for successful treatment participation' or 'distract[ ] committed persons from fully engaging in sex offender treatment' and is the 'appropriate next step in the person's treatment.'" *Bergen*, 146 Wn. App. at 529 (quoting Laws of 2005, Ch. 344 §1).[12]

This treatment-focused interpretation of "best interests" permitted the *Bergen* court to uphold the statute against a substantive due process challenge. *Id.*, at 529. According to the *Bergen* court, the "'best interests' standard… is narrowly tailored to serve the State's compelling interest in appropriately *treating* dangerous sex offenders." *Id.* (emphasis added).

Here, the trial court did not define the phrase "best interests" for the jury. CP 660-675. Nothing in the instructions communicated the *Bergen* court's interpretation or directed jurors to consider Mr. Urlacher's "best interests" in the context of his treatment needs.[13] CP 660-675. The instructions did not make the relevant legal standard "manifestly apparent to the average juror." *See Kyllo,* 166 Wn.2d at 864.

[12] The *Bergen* court interpreted the phrase "best interests" by resorting to the statement of legislative intent that accompanied the 2005 amendments to RCW 71.09.090. This was, at best, a questionable strategy, because "statements of legislative intent are irrelevant to a court's analysis when the statutory language is unambiguous." *Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC LLC,* 169 Wn.2d 265, 270, 236 P.3d 193 (2010). The *Bergen* court decided that the phrase "best interests" is so unambiguous that jurors can understand its proper legal meaning even when it is presented in a vacuum. *Bergen,* 146 Wn. App. at 531-32. Thus, resort to the statement of legislative intent was likely improper. *Little Mountain Estates,* 169 Wn.2d at 270.

[13] The *Bergen* opinion suffers from significant internal tension. One portion of *Bergen* limits the meaning of "best interests" to comply with substantive due process; another portion indicates that this limited meaning need not be explained to the jury. *Bergen,* 146 Wn. App. at 527-532.

Jurors had no way of knowing that the "best interests" element related specifically to Mr. Urlacher's interest in progressing to the "'appropriate next step in [his] treatment'" to achieve "successful treatment." *Bergen*, 146 Wn. App. at 528 (quoting Laws of 2005, Ch. 344 §1). At least some jurors "could have interpreted the instruction[s]" far more broadly than the *Bergen* court found constitutionally permissible. *Miller*, 131 Wn.2d at 90.

Mr. Urlacher's counsel urged the court to provide a definition drawn directly from the language in *Bergen.* The proposed instruction asked jurors "to consider whether the proposed [plan] properly incentivizes successful treatment participation and whether it is the appropriate next step in the Respondent's treatment." CP 456; *see Bergen*, 146 Wn. App. at 529. The court should have given the instruction; its refusal to do so meant the jury had no way of knowing that "best interests" relates to only to treatment, and not to Mr. Urlacher's general welfare. RP 964-965.

As argued further in the next section, the State took advantage of this in closing:

> [B]ecause best interests and adequate to protect the community are not defined in your jury instructions, you, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher.
>
> RP 1034.

Jurors were left with no guidance to interpret the "best interests" element.

The court's instructions permitted the jurors to rely on their own private idiosyncratic beliefs—on any topic whatsoever—when deciding

what they thought would be best for Mr. Urlacher. This is the very problem that the *Bergen* court purported to resolve when it found the "best interests" standard related to treatment, and thus was "narrowly tailored to serve the State's compelling interest in appropriately treating dangerous sex offenders." *Bergen*, 146 Wn. App. at 529.

The court's instructions did not make the proper standard "manifestly apparent to the average juror." *Kyllo*, 166 Wn.2d at 864. Furthermore, the instructions were inadequate even under the more lenient general standard for clarity in jury instructions. *See Wilcox*, 187 Wn.2d at 782. Under that standard, instructions must allow each side to argue its theory of the case, must not be misleading, and (when read together) must properly inform the jury of the applicable law. *Id.*

Here, the court's instructions did not satisfy any part of this test.

They did not allow Mr. Urlacher to argue his theory of the case—that his proposed plan was the appropriate next step in his treatment, even if it were not in his best interests in some other way. Second, the instructions were misleading because they allowed jurors to consider irrelevant factors when determining Mr. Urlacher's best interests. Third, they failed to inform the jury of the applicable law: without additional instructions, the jury had no way of knowing that "best interests" referred to Mr. Urlacher's treatment, rather than other aspects of his life.

Thus, even under the more lenient standard for assessing instructional sufficiency, the instructions here are inadequate. *Id.* The Court of Appeals' contrary conclusion is unsupported. *See* Opinion, pp. 12-13. An

attorney "should not have to convince the jury what the law is." *State v. Acosta*, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984). The trial court's failure to provide proper instructions left it to Mr. Urlacher's attorney to convince jurors "what the law is." *Id.*

The judiciary is tasked with interpreting the law. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 184, 157 P.3d 847 (2007). Determining the meaning of a statutory provision is a judicial function; a trial court "cannot defer this decision to the jury." *State v. Kindell*, 181 Wn. App. 844, 851, 326 P.3d 876 (2014).

The trial court's instructions (and the State's closing argument) permitted jurors to provide their own definitions for the "best interests" standard to deny conditional release. This relieved the State of its burden and violated Mr. Urlacher's Fourteenth Amendment right to due process. *See In re Det. of Turay*, 139 Wn.2d 379, 424, 986 P.2d 790, 813 (1999), *as amended on denial of reconsideration* (Dec. 22, 1999) (Turay II).

B. A reasonable juror could have interpreted the court's instructions to relieve the State of its burden on the community protection element.

A petition for conditional release may be denied if the State proves beyond a reasonable doubt that the proposed plan does not "include conditions that would adequately protect the community." RCW 71.09.090(3)(d)(ii); RCW 71.09.094(2)(b); CP 668. Here, the trial court did not explain this element or define the phrase "adequately protect the community," other than to say that "[i]t is not necessary that all risk be removed." CP 671.

The *Bergen* court addressed the meaning of the community protection element. *Bergen*, 146 Wn. App. at 533. Because a patient seeking conditional release admits that he qualifies as a sexually violent predator, trial is premised on a likelihood that he will reoffend if unconditionally released. Thus, the community protection element turns on "whether the proposed LRA will prevent an otherwise-likely offense." *Bergen*, 146 Wn. App. at 533.

As the *Bergen* court put it, the jury's focus must be "on the plan, not the person." *Id.* A jury may not assess community safety by examining the detainee's "risk of re-offense rather than the sufficiency of the proposed LRA." *Id.*, at 534.

The court's instructions did not make this standard "manifestly apparent to the average juror." *Kyllo*, 166 Wn.2d at 864. A reasonable juror "could have interpreted the instruction[s]" to permit (or even require) consideration of Mr. Urlacher's specific risk of recidivism when evaluating the adequacy of community protection. *Miller*, 131 Wn.2d at 90.

This is especially true given Dr. Goldberg's testimony. Dr. Goldberg's discussion of the plan's adequacy specifically referred to Mr. Urlacher's risk, as measured through actuarial instruments and clinical judgment. RP 290, 338-339. The State further compounded the problem by improperly inviting jurors to apply their own definition. RP 1034.

As with the "best interests" standard, nothing in the instructions relayed the *Bergen* court's understanding of the phrase. Jurors had no way of knowing that the community protection element required the State to

prove the plan inadequate. Instead, jurors "could have"[14] believed the instructions allowed the State to meet its burden by proving that Mr. Urlacher had a high risk of recidivism, which is exactly the approach taken by Dr. Goldberg. RP 290, 338-339.

Mr. Urlacher asked the court to instruct jurors on the *Bergen* standard. His proposal explained that the community protection element required the jury to "consider the individual aspects of the Respondent's release plan, rather than the Respondent himself." CP 457.[15] The court agreed that "some kind of instruction might be useful here," but refused to give the proposed instruction "because this is not approved." RP 965.

The trial judge should have given the proposed instruction. His failure to do so left a gap in the instructions, improperly requiring Mr. Urlacher's attorney to "convince the jury what the law is." *Acosta*, 101 Wn.2d at 622. Absent a proper instruction, jurors had no help in interpreting the community protection element. They "could have interpreted the instruction[s]"[16] to permit consideration of Mr. Urlacher's risk of predatory sexual violence when evaluating the State's proof on this element. The State encouraged this, but *Bergen* forbids it.

Mr. Urlacher's risk level was not at issue: a resident seeking conditional release "does not challenge the finding that he meets the commitment criteria, including the fact that he is more likely than not to reoffend

[14] *Miller*, 131 Wn.2d at 90.

[15] The court did adopt the second part of the proposed instruction, which explained that the plan need not eliminate all risk. CP 457, 671.

[16] *Miller*, 131 Wn.2d at 90.

if released." *Bergen*, 146 Wn. App. at 533.

The court's instructions allowed jurors to deny conditional release absent proof that the plan provided inadequate protection to the community. If a juror believed that Mr. Urlacher's recidivism risk would unduly jeopardize community safety, that juror could find the State's evidence adequate without even considering "the sufficiency of the proposed LRA." *Id.*, at 534. The State's attorney encouraged this approach by suggesting that jurors make up and apply their own standard. RP 1034.

The Court of Appeals ignored this problem, and instead suggested that "'adequately protect the community' is commonly understood and does not require a definition." Opinion, p. 17. According to the Court of Appeals, "the plain meaning of [adequately protect the community] would be understood by the jury." Opinion, p. 15.

But the phrase does not convey the jury's obligation to assess "whether the proposed LRA will prevent an otherwise-likely offense." *Bergen*, 146 Wn. App. at 533. Instead, using the ordinary meaning of the phrase, jurors were free to examine Mr. Urlacher's "risk of re-offense rather than the sufficiency of the proposed LRA." *Id.*, at 534. The instructions were constitutionally insufficient because they relieved the State of its burden to prove the community protection element as defined by the *Bergen* court. *See Kyllo,* 166 Wn.2d at 864; *Miller,* 131 Wn.2d at 90. The State's improper argument compounded the problem.

C. By itself, the statutory language does not adequately convey the best interests and community protection standards outlined in *Bergen*.

The standard for clarity in jury instructions is higher than the standard for statutes. *Watkins*, 136 Wn. App. at 243. A court "may resolve ambiguous wording in a statute by utilizing rules of construction, but jurors lack such interpretative [sic] tools." *Id.*

By itself, the phrase "best interests" is not inherently limited to treatment-related considerations. The *Bergen* court imposed this limitation (and saved the statute from unconstitutionality) by referring to the statement of legislative intent. *Id.*, at 528-529. Similarly, without engaging in statutory construction, a fair reading of the community protection element allows consideration of the risk of recidivism. The plain language does not require an exclusive focus on "the plan, not the person." *Id.*, at 533. *See* RCW 71.09.090(3)(d)(ii); RCW 71.09.094(2)(b); CP 668.

The *Bergen* court relied on interpretive tools to discern the meaning of the best interests and community protection elements. *Bergen*, 146 Wn. App. at 528-534. Most notably, the court examined the statement of legislative intent that accompanied the 2005 amendments to RCW 71.09.090. *Id.*, at 528, 531 (citing Laws of 2005, Ch. 344 §1). The court also relied on basic principles of statutory construction. *Id.*, at 534.

But juries do not have access to statements of legislative intent, tools of statutory construction, or other similar resources. Neither the *Bergen* jury nor the jury in this case had the opportunity to examine the civil commitment statute, the cases interpreting it, or even the context in which each phrase appears.

The *Bergen* court's blithe statements regarding the clarity of the

statutory language are undermined by its own resort to outside sources to interpret that same language. Juries should not be denied the instructions they need to do their job. At a conditional release trial, jurors must be told the meaning of each element. The patient's attorney "should not have to convince the jury what the law is." *Acosta*, 101 Wn.2d at 622.

Absent proper definitions consistent with the *Bergen* court's analysis, detainees who can safely receive treatment in the community will instead remain in total confinement in violation of their constitutional rights.

D. The instructional errors and the State's argument violated Mr. Urlacher's Fourteenth Amendment right to due process, requiring reversal and remand for a new trial.

The instructional deficiencies violated due process in three ways. First, due process requires the State to bear the burden of proof and the instructions here relieved the state of that burden, as noted above. *Turay* II, 139 Wn.2d at 424; *State v. Reed*, 168 Wn. App. 553, 574, 278 P.3d 203 (2012) (addressing State's burden in criminal case).

Second, due process obligates the government to comply with RCW 71.09's procedural requirements. *In re Det. of Martin*, 163 Wn.2d 501, 511, 182 P.3d 951 (2008). These include a finding on the elements of best interests and community protection under RCW 71.09.090(3)(d) and RCW 71.09.094(2).[17] Again, as argued above, the instructions here allowed the State to evade its burden of proof and permitted the jury to return verdicts without understanding each element.

[17]The statute must be interpreted to require a trial with instructions sufficient to hold the State to its burden and to allow the jury to accurately answer the questions outlined in RCW 71.09.094(2).

The third way the instructions violated due process was their failure to protect Mr. Urlacher's liberty interest. The statutory provisions governing conditional release "dictate a particular outcome based on particular facts." *Bergen*, 146 Wn. App. at 527. The failure to properly instruct the jury violated Mr. Urlacher's protected liberty interest by denying him the "particular outcome" he was entitled to if the jury believed the "particular facts" presented at trial. *Id*. Instead, jurors were required to guess at the meaning of the two terms central to the State's burden of proof at trial.[18] This denied Mr. Urlacher a fair trial and violated his Fourteenth Amendment right to due process. *Turay* II, 139 Wn.2d at 424; *Martin*, 163 Wn.2d at 511; *Bergen*, 146 Wn. App. at 527; *Addington*, 441 U.S. at 425.

IV. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE BECAUSE THE STATE'S EGREGIOUS MISCONDUCT IN CLOSING VIOLATED MR. URLACHER'S RIGHT TO A FAIR TRIAL.

Rather than tying its argument to the *Bergen* definitions, the State invited jurors during closing argument to make up their own standards. The prosecutor further suggested that Mr. Urlacher was "grooming" jurors, even after a ruling forbidding questioning on the issue. This misconduct violated Mr. Urlacher's right to due process.

The state and federal constitutions guarantee the right to a fair trial as a "fundamental liberty." *In re Glasmann*, 175 Wn.2d 696, 703, 286

[18] As argued elsewhere in this brief, the prosecutor's improper argument compounded the problem by inviting jurors to make up their own definitions. RP 1034. This was especially unfair given the State's successful resistance to Mr. Urlacher's proposed instructions defining the terms consistent with *Bergen*. CP 434, 435.

P.3d 673 (2012). This right is violated by prosecutorial misconduct, applied to civil commitment proceedings as well as criminal cases, because it "may deprive a [person] of his constitutional right to a fair trial." *Id.*, at 703–04;[19] *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009); *In re Det. of Law*, 146 Wn. App. 28, 50, 204 P.3d 230 (2008). Reversal is required when there is a substantial likelihood that improper statements affected the jury's verdict.[20] *Glasmann*, 175 Wn.2d at 704.

Prior to trial, the State described *Bergen* as "settled law." CP 474. That case held that the best interests element relates to a resident's treatment needs. *Bergen*, 146 Wn. App. at 528. It also held that the community protection element relates to "the plan, not the person." *Id.*, at 533. Jurors must decide "whether the proposed LRA will prevent an otherwise-likely offense;" requiring focus on "the sufficiency of the proposed LRA" rather than the risk of re-offense. *Id.*, at 533-534.

But instead of urging the jury to return a verdict consistent with the "settled law" outlined in *Bergen*, the State's attorney invited jurors to choose their own definitions for the best interests and community protection elements: "[Y]ou, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher." RP 1034. This misconduct was "particularly egregious," especially after the State's attorneys fought to keep the jurors

[19] S*ee also State v. Walker*, 182 Wn.2d 463, 475, 341 P.3d 976, 980 (2015) (*Walker* I).

[20] Misconduct that is flagrant and ill-intentioned requires reversal even absent an objection at trial. *Id.*

from hearing the *Bergen* definitions. *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015); CP 434-435; RP (9/27/16) 94-98; RP 957-965.

Even by the State's own agreement, it was not correct to say that jurors can decide without limitation what each phrase means. Although not defined by statute, the two phrases have specific meanings outlined by *Bergen.* The Court of Appeals erroneously concluded that the State's attorney "did not misstate the law when it argued that the jury would decide what 'best interest' and 'adequate to protect the community' meant." Opinion, p. 19.

Another instance of prejudicial misconduct came when the State urged the jurors to consider themselves "groomed" by Mr. Urlacher. The jury heard a definition of grooming that included preparing a victim to be sexually offended against. The Court of Appeals found that the State's application of this concept to the jury was an appeal to passions and prejudices constituting misconduct. Opinion, pp. 21-22. The State "framed its argument as if the members of the jury were Urlacher's potential victims; the State did not merely ask the jury to not be fooled." Opinion, p. 21.

Such deliberate appeals to passion and prejudice constitute flagrant misconduct, requiring reversal even absent objection.[21] *See State v. Belgarde*, 110 Wn.2d 504, 507–08, 755 P.2d 174 (1988); *State v. Hecht*, 179 Wn. App. 497, 507, 319 P.3d 836 (2014). No one had testified that Mr. Urlacher was currently grooming anyone.[22] Despite this, the prosecutor

[21] Asking a jury "to place itself in the shoes of [a] victim[ ]" is an appeal to passion that can contribute to incurable prejudice. *Pierce,* 169 Wn. App. at 553.

[22]The State sought in trial to ask the defense expert Dr. Spizman if Mr. Urlacher was

told the jury: "[Y]ou should not be fooled by Charles Urlacher. You should not be subject to his grooming…" RP 1040.

Counsel for the State made this remark even though the court had specifically prohibited him from asking if Mr. Urlacher was grooming the jury through his testimony. RP 638; CP 683. Besides appealing to passions and prejudice, the argument introduced "facts" not in evidence. *State v. Pierce*, 169 Wn. App. 533, 537, 555-56, 280 P.3d 1158, 1161 (2012) , *State v. Thierry*, 190 Wn. App. 680, 690, 360 P.3d 940, 946 (2015), *review denied,* 185 Wn.2d 1015, 368 P.3d 171 (2016)169 Wn. App. at 553; *Glasmann*, 175 Wn.2d at 704; *Pierce*, 169 Wn. App. at 537, 555-56.

Although brief, the remark was enormously prejudicial.[23] Evidence about grooming pervaded the trial, including by Mr. Urlacher himself. RP 37, 57, 59, 64, 66, 68, 72, 74, 78, 88, 101. He admitted that he groomed his son's friends to offend against them. RP 57, 59, 63-64. Dr. Goldberg testified that the purpose of grooming is "to achieve child molestation." RP 212-213.[24] In closing argument, the State's attorney told jurors that "Mr. Urlacher has been grooming people his whole life." RP 1028.

"grooming the jury" through his testimony. RP 638. The question was not posed, and neither Dr. Spizman nor anyone else testified that Mr. Urlacher was grooming the jury.

[23] It is misconduct for a prosecutor to argue facts that have not been admitted into evidence. *Pierce*, 169 Wn. App.at 537, 555-56. Nor may a prosecutor make arguments calculated to inflame the passions or prejudices of the jury. *Thierry*, 190 Wn. App. at 690; *Glasmann*, 175 Wn.2d at 704.

[24] Dr. Goldberg also testified that he found indications of grooming in Mr. Urlacher's records, and related his grooming activity to one of his dynamic risk factors (emotional congruence with children). RP 250, 263. Other witnesses also mentioned grooming briefly in testimony about treatment. RP 464, 631.

Because the record contained so much evidence relating to grooming, because Mr. Urlacher committed his crimes by grooming his victims, because the purpose of grooming is "to achieve child molestation," and because the prosecutor had already told jurors that Mr. Urlacher had spent "his whole life" grooming people, the remark, although brief, caused enormous prejudice. RP 212-213, 1028.

The State invited jurors to imagine themselves as the future child victims of a sexual offense perpetrated by Mr. Urlacher. The Court of Appeals recognized this when it found the remarks improper. Opinion, pp. 21-22. References to sexual offending are inherently prejudicial, especially when the jury is tasked with predicting the future.[25] By putting jurors in the shoes of Mr. Urlacher's child victims, the State's attorney committed misconduct that was flagrant, ill-intentioned, and incurably prejudicial. *Glasmann*, 175 Wn.2d at 704. Even when considered by itself, the misconduct requires reversal. *Id.*

Both instances of misconduct could not have been cured with additional instruction. Because the court elected not to provide the *Bergen* standards, an instruction to disregard the State's argument would have left jurors in the same position, allowing each juror to supply a personal definition of the best interests and community protection standards. Nor would instruction correct the appeal to passion and prejudice, which has subtle

[25] *State v. Bluford*, 188 Wn.2d 298, 315, 393 P.3d 1219 (2017) (addressing cross-admissibility of evidence for joinder purposes); *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982) (addressing admission of prior bad acts under ER 404(b)).

and subconscious emotional effects on the listener. This impact is not necessarily overcome by a rational directive to ignore improper argument. *See Glasmann*, 175 Wn.2d at 710 n. 4.[26]

CONCLUSION

The Supreme Court should accept review because this case presents significant constitutional questions, these questions are of substantial public interest, and because portions of the Opinion conflict with *Bergen. In re Det. of Bergen*, 146 Wn. App. 515, 527, 195 P.3d 529 (2008). Review is appropriate under RAP 13.4(b)(2), (3) and (4).

Specifically, the Court should invalidate the "best interests" provisions of RCW 71.09.[27] To uphold procedural and substantive due process rights, the Court should require that jury instructions in civil commitment cases be readily apparent to the average juror and unambiguous. The Court should further hold that because the Court of Appeals' decision conflicts with *Bergen*, that failure to constrain a jury's application of the "best interests" standard in conditional release cases violates due process, as does the failure to provide adequate instruction on the community protection ele-

[26]The cumulative effect of the prosecutor's misconduct also deprived Mr. Urlacher of a fair trial. *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012) (Walker II). Here, the prosecutor improperly argued facts that had not been admitted into evidence, appealed to jurors' passions and prejudices, and misstated the law, encouraging the jury to return a verdict based on impermissible factors rather. Whether considered individually or together, the improper arguments violated Mr. Urlacher's Fourteenth Amendment right to due process and require reversal. *Walker* II, 164 Wn. App. at 737; *Glasmann*, 175 Wn.2d at 704.

[27] Alternatively, the Court should adopt a limiting construction. *See, e.g., United States v. Stevens*, 559 U.S. 460, 481, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

ment. Finally, the Court should reverse due to prejudicial and ill-intentioned prosecutorial misconduct.

Respectfully submitted November 14, 2018.

BACKLUND AND MISTRY

_____

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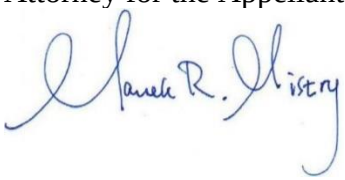

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Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Amended Petition for Review, postage pre-paid, to:

Charles Urlacher
McNeil Island Special Commitment Ctr
P.O. Box 88600
Steilacoom, WA 98388

and I sent an electronic copy to

Office of the Attorney General
kristieb@atg.wa.gov, crjsvpef@atg.wa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 14, 2018.

_____
Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Court of Appeals Published Opinion, filed on July 3, 2018.

Filed
Washington State
Court of Appeals
Division Two

July 3, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of: CHARLES URLACHER, Appellant.	No. 49781-6-II UNPUBLISHED OPINION

LEE, A.C.J. — Charles Urlacher, a sexually violent predator (SVP), appeals the trial court's order entered after a jury trial, denying his conditional release to a less restrictive alternative plan (LRA), arguing that (1) the trial court's jury instructions on "best interest" and "adequately protect the community" were insufficient, (2) the trial court abused its discretion by not providing his proposed jury instructions defining "best interest" and "adequately protect the community," (3) the trial court's instructions violated his due process rights, and (4) the State committed prosecutorial misconduct. We affirm.

FACTS

A. COMMITMENT AND PETITION FOR CONDITIONAL RELEASE

Urlacher was committed to the Special Commitment Center (SCC) on McNeil Island as an SVP in 2011. Urlacher was diagnosed with pedophilic disorder[1] and narcissistic personality

[1] Pedophilic disorder refers to having a sexual interest in children.

disorder.[2] While at the SCC, he participated in sex offender treatment and other treatment addressing distorted thinking, and he made some improvements.

In 2015, Urlacher petitioned for a trial to determine whether he should be conditionally released to an LRA. The petition was granted and a trial date was set.

B. PROPOSED LRA

Urlacher's proposed LRA included conditions that he would have to follow if the trial court granted conditional release. The conditions covered housing, treatment, supervision, and other areas.

For housing, Urlacher would live at an apartment complex in Tukwila. He would not leave his home, except for pre-approved activities during which he would be accompanied by a trained chaperone. Urlacher would have to submit requests for any travel, which would have to be approved by his supervising community corrections officer (CCO).

For treatment, Urlacher would participate in sex offender treatment with a certified treatment provider and comply with the provider's set treatment plan. The treatment provider would provide monthly reports to the court with Urlacher's progress.

For supervision, Urlacher would have an electronic monitoring device at all times, and a CCO from the Department of Corrections (DOC) would supervise him. Urlacher would provide departure and arrival times to the CCO when leaving his home. The CCO would also be alerted of any problems with the monitoring device.

[2] Narcissistic personality disorder refers to a "pervasive pattern of grandiosity, need for admiration, and lack of empathy." Clerk's Papers (CP) at 92 (quoting the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) (5th ed. 2013)).

Additionally, Urlacher would not have any contact with persons under the age of 18 without court approval, and if approved, would be accompanied by a chaperone. Urlacher would also submit to polygraph and plethysmograph testing. .

C. TRIAL

1. Goldberg Testimony

The State called Dr. Harry Goldberg, a forensic psychologist, to testify. Dr. Goldberg had evaluated Urlacher four times. Dr. Goldberg testified that Urlacher's dynamic risk factors[3] were sexual interest in children, pre-occupation with sex, lack of emotional adult relationships, emotional congruence with children and awkwardness with adults, callousness, impulsiveness, resistance to rules and supervision, viewing himself as a victim, and coping in a destructive manner.

Dr. Goldberg opined that release to the proposed LRA would not be in Urlacher's best interest. Dr. Goldberg defined an LRA to be in a person's "best interest" when the person has demonstrated consistent motivation and skills to be successful once released to an LRA. He had seen treatment gains in Urlacher but believed it was premature to think that Urlacher was ready for the next step. Dr. Goldberg had concerns about Urlacher's ability to manage his problems with transparency in treatment, arousal to thoughts of children, and accepting feedback.

Dr. Goldberg also opined that the conditions of the proposed LRA would not adequately protect the community. He defined "adequately protect the community" as a plan that would eliminate the chance of re-offense. Dr. Goldberg believed that the adequacy of chaperones was a

[3] Dynamic risk factors are areas of risk.

fluid situation and that the travel aspects were not fully fleshed out. Dr. Goldberg used his clinical judgment to form his opinions.

On cross-examination, Dr. Goldberg was asked:

> Q And in your interpretation of the phrase "adequate to protect the community," in order to be adequate, we must protect the community from all risks of sexual violent re-offense; is that right?
>
> A Correct.
>
> Q In other words, in your interpretation of the phrase 'adequate to protect the community,' we must make it a 0 percent risk of re-offense; is that right?
>
> A Correct.

Verbatim Report of Proceedings (VRP) (Oct. 6, 2016) at 358.

2. Spizman Testimony

Urlacher called Dr. Paul Spizman, a licensed psychologist, to testify. Dr. Spizman met with Urlacher twice. Although several dynamic risk factors came up as areas of concern from time to time, Dr. Spizman believed that Urlacher had made a lot of gains and was ready for the next step.

Dr. Spizman opined that the proposed LRA was in Urlacher's best interest and adequate to serve his treatment needs. Dr. Spizman defined "best interest" as whether the individual was progressing in treatment and ready for the next step in moving into the community. Urlacher had demonstrated gains in managing his dynamic risk factors and made significant progress in treatment, so placing him in the community would allow him to further those gains, establish himself in the community, and develop his support network. Dr. Spizman believed that Urlacher was ready to move on, and the program in place would continue to incentivize successful treatment.

Dr. Spizman also opined that the proposed LRA conditions were adequate to protect the community. For community protection, Dr. Spizman considered the individual themselves, whether the person understood their dynamic risk factors and had interventions in place to adequately contain them, and other factors such as the restrictions imposed and the support network in place. Urlacher had demonstrated a strong ability to manage his dynamic risk factors, and the proposed conditions, such as electronic monitoring, pre-approval for travel, and CCO supervision, would adequately protect the community.

3. Urlacher Testimony

Urlacher also testified. Urlacher had molested his sons. He told his younger son that talking about sex was natural and that doing it was okay; this was a part of his grooming process to obtain immediate sexual gratification. Urlacher also groomed other children who were his sons' friends, and molested and raped them. Urlacher testified that "grooming" refers to "[s]etting somebody up for an action whether it be legal or illegal" and "breaking down natural barriers that a person . . . would have."[4] VRP (Oct. 3, 2016) at 57. He further testified that sex offender treatment was an integral part of the proposed LRA and that he had signed an agreement with a therapist to continue treatment. Urlacher believed he was ready for conditional release. The trial court admitted Urlacher's proposed LRA into evidence.

[4] On cross-examination, Dr. Goldberg testified that "grooming" meant developing trust with the victim and their family with the goal of child molestation. Dr. Spizman testified that "grooming" involved setting up an individual.

4. Jury Question

The jury was allowed to present questions to the trial court to ask the witnesses. The jury submitted one question for Dr. Spizman. The question asked, "Could Urlacher's testimony be him grooming the jury?" VRP (Oct. 11, 2016) at 638. The trial court stated that the question "seem[ed] a bit argumentative" and declined to pose the question to Dr. Spizman. VRP (Oct. 11, 2016) at 638.

C. JURY INSTRUCTIONS

Before the conclusion of trial, Urlacher proposed jury instructions that included definitions of "best interest" and "adequately protect the community." CP at 456-57. Urlacher's proposed instruction for "best interest" stated:

> In evaluating whether or not the proposed less restrictive alternative plan is in the Respondent's best interests, you are to consider whether the proposed less restrictive alternative plan properly incentivizes successful treatment participation and whether it is the appropriate next step in the Respondent's treatment.

CP at 456. Urlacher's proposed instruction for "adequately protect the community" stated:

> When evaluating whether the Respondent's proposed less restrictive alternative plan is "adequate to protect the community", you are to consider the individual aspects of the Respondent's release plan, rather than the Respondent himself. It is not necessary that all risk be removed in order for the proposed less restrictive alternative plan to be "adequate to protect the community".

CP at 457. The State objected to both jury instructions.

The trial court declined to give the proposed jury instructions. For "best interest," the trial court stated that "some kind of instruction might be useful" but declined to give the proposed instruction because it was not an approved instruction. VRP (Oct. 12, 2016) at 965. For "adequate to protect the community," the trial court said that the phrase would be easily understood by the

jury. The trial court ruled that, based on *Bergen*,[5] the proposed jury instructions were not necessary.

The trial court instructed the jury that

> [t]o establish that the respondent's proposed less restrictive alternative placement should not be granted, the State must prove one of the following beyond a reasonable doubt:
>
> (1) That the proposed less restrictive alternative placement plan is not in the respondent's best interests; or
>
> (2) That the proposed less restrictive alternative placement plan does not include conditions that will adequately protect the community.

CP at 668. The trial court also instructed the jury that the community protection factor did not require "that all risk be removed." CP at 671. The trial court further instructed that Urlacher was previously found to be an SVP, which meant he was "likely to engage in predatory acts of sexual violence if not confined to a secure facility," and that this was not at issue in the case. CP at 666.

D. CLOSING AND REBUTTAL ARGUMENTS

The State argued in closing that the jury was tasked with answering whether Urlacher's proposed LRA was in his best interest and whether the conditions of that plan were adequate to protect the community.

In his closing argument, Urlacher told the jury that Dr. Goldberg's testimony was contrary to the law. He argued that Dr. Goldberg's standard for conditions to be adequate to protect the community was "that the risk to reoffend must be reduced to zero." VRP (Oct. 13, 2016) at 1005.

[5] *In re Det. of Bergen*, 146 Wn. App. 515, 195 P.3d 529 (2008), *review denied*, 165 Wn.2d 1041 (2009).

Urlacher reminded the jury of the court's instruction that not all risk had to be removed for an LRA plan to be adequate to protect the community.

Urlacher also reminded the jury that Dr. Spizman believed that the proposed LRA was in his best interest and was adequate to protect the community. Regarding housing, Urlacher stated that the apartment complex was not just housing, but a ministry, and that he and the community "really could not ask for a better housing transitional plan in the community, period." VRP (Oct. 13, 2016) at 1018. The ministry and DOC had a good working relationship; others were living there that were being checked on by DOC. The ministry also had a transition program and provided supervision through its leadership team. Such housing was the next step.

On rebuttal argument, the State discussed Urlacher's proposed LRA conditions on housing:

> [Urlacher] tells you that the housing is the gold standard and you couldn't ask for anything better. Well, you'll have to determine that because at the end of the day these are all the questions that you're being asked to do as 12 people from our community, that you come with your life experiences and you bring your collective conscious together and you talk about these things and you say, because best interests and adequate to protect the community are not defined in your jury instructions, you, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher.
>
> There's no thought whatsoever by [the apartment manager] as to who he might place as Mr. Urlacher's roommate: Well, the next person up, we're going to put them in there; if there's an empty room, well, we'll put Mr. Urlacher there by himself until I get a different person.

VRP (Oct. 13, 2016) at 1033-34. The State then concluded by arguing:

> So take the opportunity to use your recollection of the evidence, your common sense. Don't leave it here in the jury box. Use it as you deliberate with your fellow jurors, and we would submit to you that you should not be fooled by Charles Urlacher. You should not be subject to his grooming, that, in fact, the plan that he has proposed is not in his best interests and that the conditions that he currently has proposed before you are not adequate to protect the community. And

> with that we're asking that you answer each of these questions in the affirmative, that has the State proven beyond a reasonable doubt, that the answer is yes.

VRP (Oct. 13, 2016) at 1040-41. Urlacher did not object to the State's arguments.

E. VERDICT AND APPEAL

The jury returned a verdict specifically finding that Urlacher's proposed LRA was not in his best interest and did not contain conditions that would adequately protect the community. Thus, Urlacher's petition for conditional release was denied.

Urlacher appeals.

ANALYSIS

A. JURY INSTRUCTIONS

Urlacher argues that the trial court's instructions on "best interest" and "adequately protect the community" were insufficient and violated his due process rights. Urlacher also argues that the trial court abused its discretion by failing to give his proposed jury instructions on these terms. We hold that the jury instruction on "adequately protect the community" was sufficient and that the trial court did not abuse its discretion by not giving Urlacher's proposed jury instruction.[6]

At a trial to determine if an SVP should be conditionally released to a less restrictive alternative, the State has the burden "to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed

[6] Urlacher raises a number of arguments regarding the "best interest" jury instruction and the "best interest" standard itself. However, the State only needed to prove that the proposed LRA was not in Urlacher's best interest *or* did not include conditions that would adequately protect the community. RCW 71.09.090(3)(d). Because the jury found that Urlacher's proposed LRA did not contain conditions that would adequately protect the community and we affirm on the community protection prong, we do not reach Urlacher's claims regarding "best interest."

person; *or* (ii) does not include conditions that would adequately protect the community." RCW 71.09.090(3)(d) (emphasis added). "Adequately protect the community" is not defined by statute. *See* RCW 71.09.020.

1. Sufficiency of Jury Instructions

Urlacher argues that the trial court's instruction on "adequately protect the community" was insufficient. We disagree.

a. Applicable standard of review

We review the sufficiency of jury instructions de novo. *State v. Walker*, 182 Wn.2d 463, 481, 341 P.3d 976, *cert. denied*, 135 S. Ct. 2844 (2015). We consider jury instructions in the context of the instructions as a whole. *In re Det. of Taylor-Rose*, 199 Wn. App. 866, 879-80, 401 P.3d 357 (2017), *review denied*, 189 Wn.2d 1039 (2018). Jury instructions are generally sufficient if they allow each party to argue its theory of the case, are not misleading, and properly inform the trier of fact of the applicable law when read as a whole. *Id*. at 879; *In re Det. of Wright*, 138 Wn. App. 582, 586, 155 P.3d 945 (2007), *review denied*, 162 Wn.2d 1017 (2008).

Urlacher argues that we should apply a heightened standard of review and determine if the trial court's jury instructions made the law "'manifestly apparent to the average juror.'" Br. of Appellant at 13 (quoting *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009)). We decline to do so.

We have previously rejected application of the "manifestly apparent" standard to review the sufficiency of jury instructions in the civil commitment context.[7] *Taylor-Rose*, 199 Wn. App.

[7] The "manifestly apparent" standard has been applied to only self-defense and double jeopardy related jury instructions in criminal cases. *See State v. Fuentes*, 179 Wn.2d 808, 824, 318 P.3d

at 880 n.2. Instead, the standard remains whether the instructions allow each party to argue its theory of the case, are not misleading, and properly inform the trier of fact of the applicable law when read as a whole. *Id*. at 879; *Wright*, 138 Wn. App. at 586.

Urlacher also argues that procedural and substantive due process require us to apply the "manifestly apparent" standard. We disagree.

"Procedural due process refers to the procedures that the government must follow before it deprives a person of life, liberty, or property." *Dellen Wood Prod., Inc. v. Dep't of Labor & Indus.*, 179 Wn. App. 601, 626-27, 319 P.3d 847, *review denied*, 180 Wn.2d 1023 (2014). "Substantive due process protects against arbitrary and capricious government action." *State v. Shelton*, 194 Wn. App. 660, 666, 378 P.3d 230 (2016), *review denied*, 187 Wn.2d 1002 (2017).

Here, Urlacher, without persuasive legal citation or supporting authority, merely states that the standard for reviewing the sufficiency of jury instructions is a procedure that deprives a person of life, liberty, or property, and is subject to the test in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Furthermore, Urlacher does not provide persuasive

257 (2014) (double jeopardy case); *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011) (double jeopardy case); *Kyllo*, 166 Wn.2d at 864 (self-defense case); *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (self-defense case); *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), *abrogated by*, 167 Wn.2d 91 (2010) (self-defense case); *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (self-defense case); *see also State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) (self-defense case), *review denied*, 176 Wn.2d 1015 (2013); *State v. Carter*, 156 Wn. App. 561, 565, 234 P.3d 275 (2010) (double jeopardy case); *State v. Marquez*, 131 Wn. App. 566, 575, 127 P.3d 786 (2006) (self-defense case); *State v. Harris*, 122 Wn. App. 547, 554, 90 P.3d 1133 (2004) (self-defense case); *State v. Fischer*, 23 Wn. App. 756, 759, 598 P.2d 742, *review denied*, 92 Wn.2d 1038 (1979) (self-defense case). Our Supreme Court has made it clear that SVP commitment proceedings are not criminal proceedings. *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). *See also In re Det. of Peterson*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999) (SVP proceedings "are civil, not criminal.").

supporting legal authority for his argument that the standard to review the sufficiency of jury instructions is a government action or statutory scheme subject to a substantive procedural due process analysis.[8]

Thus, we decline to impose the "manifestly apparent" standard. Rather, we review the sufficiency of the jury instructions by determining whether the instructions allowed each party to argue its theory of the case, were not misleading, and properly informed the trier of fact of the applicable law when read as a whole.

b. Jury instruction sufficient

Urlacher argues that the trial court's instruction on "adequately protect the community" relieved the State of its burden to prove that his proposed LRA plan did not include conditions that would adequately protect the community. However, the record fails to support this argument.

The trial court's instruction on "adequately protect the community" told the jury that the State had the burden to prove the proposed LRA plan did not contain conditions that would

[8] Urlacher cites to *Wilcox v. Basehore*, 187 Wn.2d 772, 782, 389 P.3d 531 (2017), and *Kyllo*, 166 Wn.2d at 864, to argue that procedural and substantive due process require application of the "manifestly apparent" standard. However, we do not find those cases persuasive because *Wilcox* and *Kyllo* make no mention of procedural or substantive due process, respectively. *See Wilcox*, 187 Wn.2d at 782, *see also Kyllo*, 166 Wn.2d at 864.

Urlacher also cites to *State v. McCuistion*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012) *cert denied*, 568 U.S. 1196 (2013), and *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), for the proposition that substantive due process requires civil commitment statutes to be narrowly drawn to serve a compelling state interest and that the government must use the least restrictive means to meet such interests. However, the standard to review the sufficiency of jury instructions is not a statute that the government is using to serve its interests. Thus, *McCuistion* and *Playboy* do not support Urlacher's claim to apply the "manifestly apparent" standard.

adequately protect the community. Thus, the trial court's instruction did not relieve the State of its burden of proof, properly informed the jury of the applicable law, and was not misleading.

Furthermore, we note that the trial court's instruction on "adequately protect the community" allowed Urlacher to argue his theory of the case. Urlacher argued that, under his proposed LRA, there was "amazing accountability that is going to ensure conditions that are going to adequately protect the community"; there would be layers of protection for the community and for accountability; there were legal requirements of supervision and the plan would include GPS monitoring, sex offender registration, notification, pre-approved travel, chaperones, searches, and polygraphs; DOC was currently supervising others in the apartment complex he was to live in; and there would be a number of people available to support him. VRP (Oct. 13, 2016) at 1014. Thus, the trial court's instruction did not inhibit Urlacher's arguments that his proposed LRA plan adequately protected the community, and Urlacher's challenge fails.

2. Refusal to Provide Requested Instruction

Urlacher argues that the trial court erred by failing to give his proposed jury instruction defining "adequately protect the community." We disagree.

a. Legal principles

We review a trial court's refusal to provide a proposed jury instruction for an abuse of discretion. *In re Det. of Pouncy*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Taylor-Rose*, 199 Wn. App. at 880. A decision is based on untenable grounds when it relies on an incorrect interpretation of the law or applies the wrong legal standard. *State v. R.G.P.*, 175 Wn. App. 131, 136, 302 P.3d 885, *review denied*, 178 Wn.2d 1020 (2013). A trial court properly refuses an

instruction that does not correctly state the law. *In re Det. of Bergen*, 146 Wn. App. 515, 533, 195 P.3d 529 (2008), *review denied*, 165 Wn.2d 1041 (2009).

Whether words used in an instruction require definition is a matter of discretion to be exercised by the trial court. *Pouncy*, 168 Wn.2d at 390. Courts do not need to define words and expressions that are of ordinary understanding. *Id*.

b. Adequately protect the community

Urlacher proposed a jury instruction defining "adequately protect the community" as requiring the jury to "consider the individual aspects of [Urlacher's] release plan, rather than [Urlacher] himself." CP at 457. Urlacher argues that without his proposed jury instruction, jurors were allowed to deny his conditional release without proof that the plan provided inadequate protection to the community. We disagree.

In *Bergen*, an SVP appealed the trial court's refusal to give a proposed jury instruction defining "adequate community safety." 146 Wn. App. at 532. The *Bergen* court held that the trial court did not abuse its discretion by declining to give the proposed instruction because it was erroneous. *Id*. at 533-34. The court also stated that "adequate to protect the community" was not defined in the statute and should be given its ordinary meaning. *Id*. at 534.[9]

[9] Urlacher also makes a general argument that *Bergen* does not control because (1) the *Bergen* court did not address whether the trial court's jury instructions relieved the State of its burden of proof, and (2) the *Bergen* court incorrectly concluded that the statutory language conveyed the relevant legal standard.

Urlacher is correct that the *Bergen* court did not address jury instructions relieving the State of its burden of proof. But we do not rely on *Bergen* in our determination of Urlacher's claim that the jury instruction's relieved the State of its burden of proof.

Here, the trial court instructed the jury that it was not necessary that all risk be removed for the proposed LRA to be "adequate to protect the community." The trial court also instructed the jury that the State had the burden to prove that Urlacher's proposed LRA did not contain conditions that would "adequately protect the community." The trial court declined to give Urlacher's proposed jury instruction defining "adequately protect the community" because the plain meaning of that phrase would be understood by the jury and the *Bergen* court stated that instructions were not necessary. The trial court did not abuse its discretion by not giving Urlacher's proposed jury instruction.

3. Due Process Claims

Urlacher argues that the trial court violated his due process rights because the court's instruction on "adequately protect the community" relieved the State of its burden of proof, the trial court failed to follow statutory procedure, and the jury was not instructed on the "element" of "adequately protect the community." We disagree.

a. Relieving the State of its burden of proof

We review constitutional challenges de novo. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014). A jury instruction may violate due process if it relieves the State of the burden

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As to Urlacher's second argument, the *Bergen* court did not incorrectly conclude that the statutory language adequately conveyed the relevant legal standard. RCW 71.09.090(3)(d) requires the State to prove that the proposed LRA is not in the SVP's "best interest" or does not contain conditions that would "adequately protect the community." "Best interest" and "adequately protect the community" are not defined by statute and "adequately protect the community" is a commonly understood phrase that does not require a definition. *See Infra* Section A.3.c. Urlacher fails to cite to any legal authority to support the notion that a court errs by using the statutory language to convey the relevant legal standard. Given the language of the statute, the *Bergen* court properly concluded that the statutory language adequately conveyed the correct legal standard.

of proving an element of a crime. *State v. Fedorov*, 181 Wn. App. 187, 199, 324 P.3d 784, *review denied*, 181 Wn.2d 1009 (2014).

Here, assuming without deciding that the "adequately protect the community" prong is an "element," the instruction did not relieve the State of its burden of proof. The trial court specifically instructed the jury that to "establish that [Urlacher's] proposed less restrictive alternative placement should not be granted, the State must prove . . . beyond a reasonable doubt" that "the proposed less restrictive alternative placement plan does not include conditions that will adequately protect the community." CP at 668. This instruction clearly placed the burden of proof on the State. Thus, the trial court's instruction on "adequately protect the community" did not relieve the State of its burden of proof.

b. Failure to comply with statutory procedure

Urlacher argues that the trial court deviated from the statutory procedure by failing to properly instruct the jury with his proposed instruction and, thus, violated his due process rights. We disagree.

Urlacher merely states that the trial court deviated from the statutory procedure by failing to properly instruct the jury, but fails to point to the requisite statutory *procedure* he claims the trial court deviated from. Urlacher also fails to cite to any statute or case that defines "adequately protect the community" in the form proposed in his jury instruction. Therefore, we hold that Urlacher's challenge fails.

c. Instruction on "elements"

Urlacher argues that the trial court violated his due process rights by not instructing the jury on the "element" of "adequately protect the community," citing *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997). We disagree.

In *Smith*, the trial court omitted an element from the "to convict" instructions in a criminal prosecution. 131 Wn.2d at 262. On appeal, our Supreme Court stated that "to convict" instructions must contain all of the elements of the crime. *Id.* at 263.

Urlacher's reliance on *Smith* is misplaced. SVP proceedings and criminal proceedings are not the same. SVP proceedings are civil, not criminal. *In re Det. of Leck*, 180 Wn. App. 492, 503, 334 P.3d 1109, *review denied*, 181 Wn.2d 1008 (2014). *Smith* addressed the omission of an essential element of a crime from a "to convict" instruction, while Urlacher raises issue with the trial court's refusal to give a definitional instruction for the phrase "adequately protect the community."

Furthermore, even if "adequately protect the community" was an element, Urlacher's proposed jury instruction was definitional. The giving of definitional instructions is discretionary. *Pouncy*, 168 Wn.2d at 390. Courts do not need to define words and expressions that are of ordinary understanding. *Id*. A definitional instruction was not necessary here because "adequately protect the community" is commonly understood and does not require a definition. "Adequate to protect the community" should be given its ordinary meaning. *Bergen*, 146 Wn. App. at 534. Therefore, we hold that this claim fails.

B. PROSECUTORIAL MISCONDUCT

Urlacher argues that the State committed prosecutorial misconduct by misstating the law and appealing to the passions and prejudices of the jury. Urlacher also argues cumulative error from the State's misconduct. We disagree.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). We first determine whether the prosecutor's conduct was improper. *Id.* at 759. If the prosecutor's conduct was improper, the question turns to whether the misconduct resulted in prejudice. *Id.* at 760. Prejudice is established by showing a substantial likelihood that such misconduct affected the verdict. *Id.*

Where a defendant does not object at trial, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. *Id.* at 760-61. Under this heightened standard, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making that determination, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.*at 762. To analyze prejudice, we look at the comments in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Warren*, 165 Wn.2d 17, 28, 195

P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009). The jury is presumed to follow the trial court's instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

2. Misstating the Law

Urlacher argues that the State committed misconduct by misstating the law. Specifically, Urlacher takes issue with the State's argument to the jury that "because best interests and adequate to protect the community are not defined in your jury instructions, you, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher." VRP (Oct. 13, 2016) at 1034. We disagree.

A prosecutor commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Such misstatements have "grave potential to mislead the jury." *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). The court shall declare the law, and legal questions are decided by the court, not the jury. *State v. Clausing*, 147 Wn.2d 620, 629, 56 P.3d 550 (2002). Statements as to the law in closing argument are to be confined to the law set forth in the instructions. *State v. Huckins*, 66 Wn. App. 213, 217, 836 P.2d 230 (1992), *review denied*, 120 Wn.2d 1020 (1993).

Here, the State did not misstate the law when it argued that the jury would decide what "best interest" and "adequate to protect the community" meant as it applied to Urlacher. The record shows that the State made the challenged argument in rebuttal. Before making the argument in question, the State argued to the jury that "[Urlacher] tells you that the housing is the gold standard and you couldn't ask for anything better" and that "you'll have to determine that because at the end of the day these are all the questions that you're being asked to do as 12 people from our community, that you come with your life experiences and you bring your collective conscious

together and you talk about these things." VRP (Oct. 13, 2016) at 1033-34. The State then said "because best interests and adequate to protect the community are not defined in your jury instructions, you, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher." VRP (Oct. 13, 2016) at 1034. Read in context, the State correctly informed the jury that "best interest" and "adequate to protect the community" were not defined by the jury instructions, and that the jury would decide whether those factors were satisfied, as they pertained to Urlacher's proposed housing.

Urlacher also argues that the State improperly asked the jury to choose their own definitions of those "elements." However, the record proves otherwise. Read in context, the State made the challenged argument to the jury within its overall argument about the housing situation in Urlacher's proposed LRA. The State argued that the jury would have to consider whether the proposed housing situation was in Urlacher's "best interest" and "adequate to protect the community." Thus, the State did not misstate the law by asking the jury to choose its own definition of "best interest" and "adequate to protect the community."

Furthermore, even if the State's argument was improper, Urlacher fails to show that no curative instruction would have obviated any prejudicial effect or that the misconduct had a substantial likelihood of affecting the jury verdict. *Emery*, 174 Wn.2d at 761. In fact, the jury was instructed that "the lawyers' remarks, statements, and arguments [were] not evidence" and that it "should disregard any remark, statement, or argument that is not supported by the evidence or the law as [the court had] explained." CP at 662. The jury is presumed to follow the court's instructions. *Kirkman*, 159 Wn.2d at 928. Therefore, we hold that this claim fails.

3. Appealing to the Passions and Prejudices of the Jury

Urlacher also argues that the State committed prosecutorial misconduct by appealing to the passions and prejudices of the jury. Specifically, Urlacher takes issue with the State's argument that "[y]ou should not be subject to his grooming, that, in fact, the plan that he has proposed is not in his best interests and that the conditions that he currently has proposed before you are not adequate to protect the community." VRP (Oct. 13, 2016) at 1040. We agree that the prosecutor's argument was improper, but the error was waived.

Prosecutors commit misconduct when they use arguments designed to arouse the passions or prejudices of the jury. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Such arguments create a danger that the jury may convict for reasons other than the evidence. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011).

Here, the State argued on rebuttal, "You should not be subject to his grooming, that, in fact, the plan that he has proposed is not in his best interests and that the conditions that he currently has proposed before you are not adequate to protect the community." VRP (Oct. 13, 2016) at 1040. The jury had previously heard testimony that Urlacher used a grooming process to obtain sexual gratification and that "grooming" referred to "[s]etting somebody up for an action whether it be legal or illegal" and "breaking down natural barriers that a person . . . would have." VRP (Oct. 3, 2016) at 57. The jury also heard that "grooming" meant developing trust with the victim and their family with the goal of child molestation. By arguing that the jury should not be "subject to [Urlacher's] grooming," the State framed its argument as if the members of the jury were Urlacher's potential victims; the State did not merely ask the jury to not be fooled. Such an

argument is designed to arouse the passions or prejudices of the jury, and was improper. *Glasmann*, 175 Wn.2d at 704.

Nonetheless, Urlacher failed to object and waived any error. When a defendant fails to object, he must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761. Urlacher fails to show that a curative instruction would not have obviated any prejudicial effect. If Urlacher had objected, the trial court could have instructed the jury to disregard the State's argument. Therefore, we hold that Urlacher's claim fails.

4. Cumulative Error

Urlacher argues that the cumulative effect of the State's misconduct warrants reversal. "The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless." *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). However, here, the State only committed one instance of improper conduct, which was not objected to, and Urlacher fails to show any resulting prejudice as the trial court instructed the jury that the prosecutor's statements were not evidence to be considered and should be disregarded if not supported by the evidence or the law as instructed. Therefore, we hold that this challenge fails.

APPELLATE COSTS

Urlacher argues that we should decline to impose appellate costs against him if the State substantially prevails. We decline to determine the issue at this time and hold that if the State

makes a request for appellate costs, Urlacher may challenge that request before a commissioner of this court under RAP 14.2.

CONCLUSION

We affirm the trial court's order denying Urlacher's petition for conditional release to an LRA.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, A.C.J.

We concur:

Worswick, J.

Sutton, J.

BACKLUND & MISTRY

November 14, 2018 - 12:08 PM

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