NO. 96484-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

In re the Detention of:

CHARLES URLACHER,

Petitioner.

ANSWER TO AMENDED PETITION FOR REVIEW

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I. INTRODUCTION

Charles Urlacher, a sexually violent predator (SVP), petitioned for conditional release to a less restrictive alternative. Urlacher's status as a mentally ill and dangerous SVP was not at issue. At trial, the jury unanimously found that the State proved beyond a reasonable doubt that his proposed less restrictive alternative plan is not in his best interest and does not include conditions that will adequately protect the community.

On appeal, Urlacher argues that the trial court should have defined the phrases "best interest" and "adequate to protect the community." The Court of Appeals followed well-established law in finding that the trial court did not abuse its discretion in declining to define commonly understood words. Contrary to Urlacher's claims, *Bergen*[1] did not provide definitions for these phrases or conclude that they have "specific meanings." Rather, *Bergen* concluded that it was not necessary to define these commonly understood phrases. Further, the Court of Appeals applied the proper legal standard to the jury instructions, consistent with well-established law. These instructions allowed each party to argue its theory of the case, were not misleading, and properly informed the jury of the applicable law.

The Court of Appeals also applied well-established case law in

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

rejecting Urlacher's claims of prosecutorial misconduct. The prosecutor did not misstate the law and because Urlacher did not object to the alleged misconduct, he fails to meet his burden to show that a curative instruction would not have obviated any prejudicial effect.

The Court of Appeals' decision is consistent with *Bergen* and settled decisions of this Court. Urlacher's petition does not raise significant constitutional issues or issues of substantial public interest that justify review under RAP 13.4(b). This Court should deny discretionary review.

II. RESTATEMENT OF THE ISSUES

The issues in this case do not warrant review by this Court. However, if the Court grants review, the issues would be:

A. Were the jury instructions sufficient where they accurately informed the jury of all elements the State was required to prove beyond a reasonable doubt and where they allowed each party to argue its theory of the case, were not misleading, and properly informed the jury of the applicable law?

B. Did the jury instructions relieve the State of its burden of proof where the trial court declined to define the phrases "best interest" and "adequate to protect the community" because they involve commonly understood words that require no definition?

C. Does the "best interest" standard satisfy substantive due process where it directly relates to the State's compelling interest in treating dangerous sex offenders and protecting society?

D. Did the Court of Appeals properly reject Urlacher's prosecutorial misconduct claims where he failed to object at trial and where he fails to show that a curative instruction would not have obviated any

prejudicial effect of his claimed misconduct?

III. RESTATEMENT OF THE CASE

A. Procedural History

Charles Urlacher has a history of sexually assaulting young boys, including his sons who he used as bait to gain access to other victims. RP at 28-30, 44-45, 51-76.[2] In 2011, he was civilly committed as an SVP and placed in the custody of the Department of Social and Health Services until such time as his condition has so changed that he longer meets criteria as an SVP. CP at 267-68. In 2015, he petitioned for conditional release to a Less Restrictive Alternative (LRA), and the trial court ordered an LRA trial. CP at 267-70. At trial, the State had the burden to prove beyond a reasonable doubt that Urlacher's proposed LRA either is not in his best interest or does not include conditions adequate to protect the community. CP at 668.

B. Expert Testimony at Trial

During pretrial motions, the State sought to prohibit Urlacher's expert from testifying about his interpretation of SVP case law. CP at 335. The trial court granted the motion, but allowed the experts to testify about their general understanding and "working definitions" of the phrases "best interest" and "adequate to protect the community." CP at 507; 9/27/16 RP

[2] Citations to the trial transcript are referred to as "RP." Citations to any hearings will include the date of the hearing.

at 93-98.

At trial, the experts for both parties testified regarding their opinions on the appropriateness of Urlacher's proposed LRA. Urlacher's expert, Dr. Paul Spizman, testified that the LRA is in Urlacher's best interest and includes conditions that will adequately protect the community. RP at 569-79, 642-43. The State's expert, Dr. Harry Goldberg, testified that the proposed LRA is not in Urlacher's best interest and does not include conditions adequate to protect the community. RP at 269. Dr. Goldberg explained that Urlacher still needed to address numerous risk factors before he is safe to be released and expressed concerns about his treatment progress, his lack of transparency, and his ability to manage his arousal in the community. RP at 256-72, 278-90, 330, 375-76, 396. He testified that Urlacher has "a lot of issues to work on" before he is ready for an LRA in the community. *See* RP at 285-90, 396.

1. Expert Testimony Regarding "Best Interest"

At trial, Urlacher asked both experts to explain the meaning of "best interest." RP at 314-18, 326-27, 533-34, 567-75. The State's expert, Dr. Goldberg, testified that the term is not defined in the statute or in the psychological literature and that he considers whether the person is ready both clinically and behaviorally and can demonstrate consistent motivation and skills to be successful in the community. RP at 314-18, 326-27

Dr. Spizman testified that he considers a variety of factors in determining if an LRA is in the person's "best interest," including treatment progress, management of risk factors, community support, and the housing plan. RP at 533-34, 567-75, 642-43.

2. Expert Testimony Regarding "Adequate To Protect the Community"

At trial, Urlacher asked both experts to explain the meaning of "adequate to protect the community." RP at 338-50, 575-76. Dr. Goldberg testified that this is not a term with a precise definition and that he considered a variety of factors in determining whether the proposed LRA is "adequate to protect the community," including the treatment plan, housing, and supervision. RP at 338-50. Dr. Spizman also testified that he considers a variety of factors in deciding this issue, including the housing plan, support network, the restrictions in the plan, and whether the person can safely manage his risk factors, RP at 575-76.

C. Jury Instructions

Urlacher proposed the following jury instruction defining "best interest:"

> 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 434, 456. He proposed the following jury instruction defining "adequate to protect the community:"

> 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 435, 457. The State objected to the proposed instructions based on the *Bergen* court's explanation that these commonly understood terms required no definition. CP at 474-75; RP at 965.

The trial court declined to give the proposed "best interest" instruction, explaining that "*Bergen* said instructions weren't needed." RP at 965. The trial court noted that "some kind of instruction might be useful" for the "best interest" element, but disapproved of the language in Urlacher's proposed instruction and declined to give it. RP at 965. Urlacher did not propose different language or a different instruction. The trial court declined Urlacher's proposed instruction that "adequate to protect the community" means jurors must consider the individual aspects of the release plan, rather than Urlacher himself. RP at 965-66; *see* CP at 435, 457, 671. However, the trial court granted his request to instruct the jury that it is not necessary that all risk be removed. RP at 965-66; CP at 671.

D. Jury Verdict and Appeal

The jury unanimously found that the State proved beyond a reasonable doubt that Urlacher's proposed LRA is not in his best interest and does not include conditions that would adequately protect the community. CP at 659, 668. Urlacher appealed the trial court's order denying his conditional release to an LRA. CP at 679-80. The Court of Appeals affirmed. *In re Det. of Urlacher*, ___ Wn. App. ___, 427 P.3d 662 (2018). The court held that the jury instructions were sufficient and did not violate Urlacher's due process rights and that the trial court did not abuse its discretion by not providing his proposed instructions defining "best interest" and "adequately protect the community." *Id.* at 669-73. The court also held that the State did not commit prosecutorial misconduct. *Id.* at 673-75. Urlacher now seeks discretionary review in this Court.

IV. ARGUMENT

A. Standard of Review

Urlacher seeks review under RAP 13.4(b)(2), (3), and (4). But he fails to provide any analysis on the applicability of this rule to his individual claims. Instead, he merely cites the rule in his conclusion and baldly asserts that each basis for review is satisfied. *See* Amended Petition for Review (Pet.) at 29. This is insufficient to establish that further review is warranted. In any event, the Court of Appeals correctly resolved the constitutional

issues presented in this case, the decision is consistent with *Bergen*, and the decision provides sufficient guidance to lower courts about jury instructions in LRA trials. For these reasons, review of this case is unwarranted.

B. The Court of Appeals Applied the Proper, Well-Settled Legal Standard to the Jury Instructions

The Court of Appeals applied the proper, well-settled legal standard to the jury instructions in Urlacher's case. "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Consistent with established law, the court properly rejected application of the "manifestly apparent" standard to review the sufficiency of the jury instructions in Urlacher's civil commitment case.

1. The Court of Appeals Followed Established Precedent in Rejecting Application of a Heightened Standard of Review for Jury Instructions

The Court of Appeals properly declined to adopt a heightened standard for reviewing jury instructions in Urlacher's case. The court's decision is consistent with established law rejecting application of the "manifestly apparent" standard to review the sufficiency of jury instructions in SVP civil commitment cases. *See In re Det. of Taylor-Rose*, 199 Wn. App. 866, 880 n.2, 401 P.3d 357 (2017), *review denied*,

189 Wn.2d 1039 (2018). The Court of Appeals applied the well-settled legal standard, which requires that 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. *Urlacher*, 427 P.3d at 670.

The Court of Appeals' decision does not conflict with any decision of this Court, which has applied this heightened standard only in self-defense and double jeopardy criminal cases. *See Urlacher*, 427 P.3d at 669, n.7. It is well-established that SVP proceedings are "resolutely civil in nature" and are neither criminal nor quasi-criminal. *In re Det. of Reyes*, 184 Wn.2d 340, 347-38, 358 P.3d 394 (2015). The cases relied on by Urlacher are distinguishable. *See* Pet. at 8 (citing *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) and *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997)).

Jury instructions on self-defense must "more than adequately convey the law" and must make the relevant legal standard "manifestly apparent to the average juror." *Kyllo*, 166 Wn.2d at 864.[3] In *Kyllo*, the Court was tasked with determining whether one incorrect instruction and one correct instruction read together made the correct legal standard in a self-

[3] Self-defense jury instructions involve not only subjective and objective elements, but also shifting burdens of proof and are subject to heightened appellate scrutiny. *State v. Woods*, 138 Wn App. 191, 196-99, 156 P.3d 309 (2007).

defense case "manifestly apparent" to the jury. *Kyllo*, 166 Wn.2d at 864-65. Urlacher does not argue that the trial court gave contradictory instructions as in *Kyllo*. In *Miller*, the jury instructions omitted a necessary *element* of the crime. *Miller*, 131 Wn.2d at 90-91. Here, the trial court properly instructed the jury as to all elements the State was required to prove beyond a reasonable doubt at trial. CP at 668.

2. Jury instructions are not subject to a procedural due process balancing test

The Court of Appeals properly rejected Urlacher's argument that jury instructions are subject to a procedural due process balancing test and nothing in its decision conflicts with any decision of this Court or any other court of appeals case. As the court explained, Urlacher fails to cite any supporting legal authority for his assertion that the standard to review the sufficiency of jury instructions is a "procedure" subject to a *Mathews*[4] balancing test. *Urlacher*, 427 P.3d at 670. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962); *see State v. Johnson,* 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) ("[N]aked castings into the constitutional sea are not sufficient to command judicial

[4] *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

consideration and discussion."). Nothing in Urlacher's petition raises an issue of substantial public interest or a significant question of constitutional law.

3. The Court of Appeals applied well-settled law in rejecting Urlacher's substantive due process challenge to the jury instructions

The Court of Appeals applied well-settled law in rejecting Urlacher's assertion that substantive due process requires application of the "manifestly apparent" standard to jury instructions. Urlacher argues that substantive due process requires that "civil commitment *statutes* be narrowly drawn to serve compelling state interests." Pet. at 12 (emphasis added). However, he does not challenge any statutory provision; rather, without any supporting authority, he applies a strict scrutiny analysis to a trial court's decision not to define words used in a jury instruction. *See* Pet. at 12-14.[5] Appellate courts do not consider fleeting and unsupported assertions of constitutional claims. *State v. Hoisington*, 123 Wn. App. 138, 145, 94 P.3d 318 (2004).

The constitutional requirement is only that the trial court instruct the jury on each element. *State v. Scott*, 110 Wn.2d 682, 689, 757 P.2d 492

[5] Urlacher does not claim that the trial court failed to instruct the jury on all elements or that it gave contradictory, misleading instructions; rather, he argues that the trial court should have defined the phrases "best interest" and "adequately protect the community." Pet. at 14-21.

(1988). "[W]e find nothing in the constitution, as interpreted in the cases of this or indeed any court, requiring that the meanings of particular terms used in an instruction be specifically defined." *Id.* at 691. The requirements of due process usually are met when the jury is informed of all elements and instructed that the State must prove each element beyond a reasonable doubt. *Id.* at 690. Here, due process was satisfied when the trial court accurately instructed the jury on the law, including each element that the State was required to prove beyond a reasonable doubt. *See* CP at 668. Consistent with well-settled decisions of this Court, the Court of Appeals properly declined to impose the "manifestly apparent" standard and held that courts "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." *See Urlacher*, 427 P.3d at 670.

C. The Court of Appeals Applied Well-Settled Law in Finding That the Trial Court Did Not Abuse Its Discretion by Not Defining the Phrase "Adequate To Protect the Community"

The Court of Appeals applied well-settled law in finding that the trial court did not abuse its discretion by declining to define the phrase "adequate to protect the community."[6] The phrase contains commonly

[6] Although the Court of Appeals did not reach this issue as to the "best interest" phrase, the same rationale applies. *See Urlacher*, 427 P.3d at 669 n.6.

understood words that require no definition.

Jury instructions are sufficient when they permit each party to argue its theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 117, 323 P.3d 1036 (2014); *In re Det. of Greenwood*, 130 Wn. App. 277, 287, 122 P.3d 747 (2005) (applying general rule to SVP case). A trial court's decision not to give a proposed jury instruction is reviewed for abuse of discretion. *Rekhter*, 180 Wn.2d at 120; *In re Det. of Pouncy*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). Whether words used in an instruction require definition is within the discretion of the trial court. *State v. Guloy*, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985). Trial courts "need not define words and expressions that are of ordinary understanding or self-explanatory." *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997); *Pouncy*, 168 Wn.2d at 390; *Guloy*, 104 Wn.2d at 417 (commonly understood words require no definition).

This Court has recognized that failure to give a definitional instruction is not failure to instruct on an essential element. *Brown*, 132 Wn.2d at 612. Here, the trial court properly instructed the jury as to all elements the State was required to prove at trial. The jury was instructed that in order to establish that the proposed LRA should not be granted, the State must prove one of the following beyond a reasonable doubt: (1) that

the LRA is not in Urlacher's best interest; or (2) that the LRA does not include conditions that will adequately protect the community. CP at 668.

The Court of Appeals applied well-settled case law in finding that the trial court did not abuse its discretion in declining to instruct the jury on commonly understood words. The court's decision is consistent with *Bergen* and established case law, and Urlacher's petition does not raise an issue of substantial public interest or of constitutional proportions. The jury instructions allowed Urlacher to argue his theory of the case and did not relieve the State of its burden of proof.

1. The trial court's decision not to define "best interest" did not relieve the State of its burden of proof

The trial court properly exercised its discretion in not defining the phrase "best interest," and the jury instructions did not relieve the State of its burden of proof. The trial court instructed the jury that the State had the burden to prove "beyond a reasonable doubt" that the proposed LRA is not in Urlacher's best interest. CP at 668. This clearly placed the burden of proof on the State, and the lack of an instruction defining "best interest" did not relieve the State of its burden of proof.

Urlacher argues that the jury instructions were inadequate and that the "Court of Appeals' contrary conclusion is unsupported." Pet. at 17. The record does not support this claim. First, the Court of Appeals did not

address this issue as Urlacher claims, but instead based its decision on the community protection element. *See Urlacher*, 427 P.3d at 669 n.6. Second, the jury instructions were proper and allowed each party to argue its theory of the case.

In *Bergen*, the court held that the "best interest" standard is not unconstitutionally vague and rejected Bergen's argument that the trial court should have defined "best interest" in the jury instructions. *Bergen*, 146 Wn. App. at 530-31. The court explained that "an ordinary person would understand that determining whether an LRA is in his 'best interests' involves considering whether it would adequately serve his treatment needs as an SVP." *Id.* at 531. The "best interest" standard does not relate *only* to treatment as Urlacher asserts. *See* Pet. at 16. Rather, the treatment needs of an SVP are just one aspect of the "best interest" standard, which could include a variety of scenarios:

> ...some jurors might have believed continued confinement was in his best interest because he was not at risk to reoffend against a minor, while others might have believed that community notification requirements might pose threats to his safety if released to his proposed LRA placement, and still others might have believed that continued confinement would be in his best interest because he was unlikely to succeed in his LRA placement and would be more angry when returned to the SCC than if he were never released at all.

Bergen, 146 Wn. App. at 531. As the *Bergen* court explained, "*all* of these

scenarios fall reasonably within the 'best interests' determination contemplated by the statute" and "implicate treatment concerns of a mentally ill and dangerous sex offender." *Id.* (emphasis added). The "best interest" determination also includes other considerations such as reoffending, which could result in treatment termination, criminal charges, or a return to prison. *Id.* at 532.

Urlacher's proposed instruction would have improperly limited the evidence the jury was entitled to consider in determining whether the proposed LRA is in his "best interest." *See* CP at 434, 456. His proposed instruction informed jurors that they could only consider whether the proposed LRA "properly incentivizes successful treatment participation" and is "the appropriate next step" in his treatment. CP at 434, 456. However, even Urlacher's expert, Dr. Spizman, testified that the "best interest" determination includes factors beyond treatment, such as community support and the housing plan. RP at 533-34, 567-75, 642-43. In fact, Dr. Spizman's lengthy explanation of the meaning of "best interest" illustrates the problem with Urlacher's proposed instruction:

> The way that I look at that is, how is the individual progressing in treatment; are they doing well enough. And you can think of sort of it as ball player analogy; is somebody in high school ball doing so well that they're able to step up to college play at this point in time. Do they have the skills? Do they have the knowledge? Are they applying them? Are they participating effectively? So in somebody like

> Mr. Urlacher's case, I'm going to ask do they understand things such as their dynamic risk factors; if so, do they have interventions in place. For example, in his testimony the other day he was talking about intervening on his problematic sexual thoughts. Or has he improved in areas such as his emotional containment. And as you heard earlier this morning, that he is able to effectively participate in group sessions, that sort of thing that says are they ready for the next step; are they ready to move out in the community. And, of course, in the community you want to examine things such as their housing placement to assure it's adequate; do they have community support out there to assist them as necessary, those types of things. So are they ready to move on, is the essence of it.

See RP at 533-34. Similarly, Dr. Goldberg testified that he considers a variety of factors as part of the "best interest" determination, including whether the person can demonstrate consistent motivation and skills to be successful in the community. *See* RP at 314-18, 326-27.

Relying on *Bergen*, the trial court properly declined to define "best interest." *See* RP at 964-66. Urlacher's claim that he urged the trial court "to provide a definition drawn directly from the language in *Bergen*" implies that *Bergen* supports a definitional instruction for "best interest". *See* Pet. at 16. It does not. *Bergen* determined that the "best interest" standard can be "understood by persons of common intelligence and reasonably applied within the statute's intent." *Bergen*, 146 Wn. App. at 520.

Further, the trial court's instructions did not prohibit Urlacher from

arguing his theory of the case — "that his proposed plan was the appropriate next step in his treatment" — as he asserts with no further explanation. *See* Pet. at 17. In closing argument, Urlacher argued that the LRA is in his best interest and that he is "ready for that next step in treatment." RP at 999-1001. He stressed his treatment progress, the strength of his treatment plan, and his expert's testimony that the LRA is in his best interest. RP at 998-1003, 1011-16. The record shows that Urlacher argued his theory of the case throughout closing argument. *See* RP at 993-1028.

In rebuttal argument, the State informed jurors that it was their role to decide what the "best interest" determination means as it applies to Urlacher. RP 1033-34. This is a proper argument, as it is the jury's role to decide whether the facts presented meet a particular standard. *See Bergen*, 146 Wn. App. at 533. The trial court did not abuse its discretion in rejecting Urlacher's proposed instruction, which provided a narrow definition of "best interest" that was not supported by the law or the experts' testimony.

2. The Court of Appeals properly determined that the jury instructions on "adequate to protect the community" did not relieve the State of its burden of proof

The Court of Appeals properly determined that the jury instructions on "adequate to protect the community" did not relieve the State of its burden of proof. Urlacher's assertion that jurors "had no way of knowing that the community protection element required the State to prove the plan

inadequate" is not supported by the record. *See* Pet. at 19-20. The trial court explicitly instructed the jury that the State had the burden to 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. Jurors are presumed to follow the trial court's instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The Court of Appeals correctly concluded that this instruction "clearly placed the burden of proof on the State" and "did not relieve the State of its burden of proof." *Urlacher*, 427 P.3d at 672.

In Urlacher's trial, the trial court declined to instruct jurors that "adequate to protect the community" required them to consider the individual aspects of the plan, rather than Urlacher himself. RP at 966; *see* CP at 435, 457, 671.[7] Consistent with *Bergen*, the Court of Appeals properly recognized that a definitional instruction was not necessary because each word in the phrase is commonly used and understood and should be given its ordinary meaning. *See Bergen*, 146 Wn. App. at 520, 532-34. In *Bergen*, the court held that principles of statutory construction did not support giving Bergen's proposed instruction on "adequate to

[7] At Urlacher's request, the trial court instructed the jury that it is not necessary that all risk be removed in order for the proposed LRA to be "adequate to protect the community." *Id.*

protect the community" and that the phrase should be given "its ordinary meaning, which is not the definition Bergen proposed." *Id.* at 534. The Court of Appeals' decision is consistent with *Bergen.*

The Court of Appeals applied well-settled case law in rejecting Urlacher's claim that the jury instructions violated his due process rights. The requirements of due process usually are met when the jury is informed of all elements and instructed that the State must prove each element beyond a reasonable doubt. *Scott*, 110 Wn.2d at 690. Nothing in the constitution requires that the meanings of particular terms used in an instruction be specifically defined. *Id.* at 691.

The decision of the Court of Appeals does not conflict with *Bergen* or any other court of appeals case. Contrary to Urlacher's assertion, *Bergen* does not "forbid" consideration of risk in evaluating whether a proposed LRA plan fails to include conditions adequate to protect the community. *Bergen* held that the phrase "adequate community safety" is not unconstitutionally vague and rejected Bergen's proposed instruction defining it as "a risk of reoffense less than 50 percent." *Bergen*, 146 Wn. App. at 532-33. Although the *Bergen* court determined that the *focus* of "adequate community safety" is on the plan and not the person, nothing in the court's decision indicates that evidence of risk must be excluded as part of the analysis. *Id.* at 532-34. Rather, the *Bergen* court

concluded that it would have been error to instruct the jury that the phrase related to "risk of reoffense *rather than* the sufficiency of the proposed LRA." *Id.* at 533-34 (emphasis added).

Although the focus is on the plan, it is not at the exclusion of all other factors. Even Urlacher's expert, Dr. Spizman, testified that he considers a person's ability to manage his risk in determining whether the LRA is adequate to protect the community. RP at 575. In fact, Dr. Spizman testified in detail about factors associated with Urlacher's risk at trial. *See* RP at 534-64, 642-43. Urlacher incorrectly asserts that the State's expert, Dr. Goldberg, testified that "the plan's adequacy specifically referred to Mr. Urlacher's risk[.]" *See* Pet. at 19 (citing RP at 290, 338-39). On the contrary, Dr. Goldberg testified that he considered a variety of factors in determining whether the LRA included conditions adequate to protect the community, including the specific course of treatment, the housing plan, and the level of supervision. RP at 338-51. To the extent Urlacher argues that Dr. Goldberg's reliance on risk as part of this analysis was error, Urlacher intentionally elicited this testimony and any claimed error is invited. *See* RP at 358-68.[8] "The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on

[8] Urlacher asked Dr. Goldberg two leading questions based on information from his prior deposition in order to elicit his opinion on risk. *See* RP at 358-59, 404-05.

appeal." *In re Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003).

Finally, the State accurately informed jurors in closing argument that it was their role to decide what "adequate to protect the community" means as it applies to Urlacher. RP 1033-34. This is a proper argument, as it is the jury's role to decide whether the facts presented meet a particular standard. *See Bergen*, 146 Wn. App. at 533.

The Court of Appeals' decision is consistent with *Bergen* and established case law, and Urlacher's petition does not raise an issue of substantial public interest or of constitutional proportions.

D. The "Best Interest" Standard Satisfies Substantive Due Process

Although the *Urlacher* court did not address Urlacher's argument that the "best interest" standard fails to satisfy substantive due process,[9] the Court of Appeals previously rejected this same argument in *Bergen*. *See Bergen*, 146 Wn. App. at 523-29, *review denied*, 165 Wn.2d 1041 (2009). In *Bergen*, the Court of Appeals held that the "best interest" standard satisfies substantive due process because it is directly related to the State's compelling interest in treating dangerous sex offenders and protecting society. Despite Urlacher's claims to the contrary, the "best

[9] The Court of Appeals did not reach Urlacher's claims regarding the "best interest" standard because it affirmed on the community protection element and noted that the State was only required to prove that the LRA was not in his best interest *or* did not include conditions adequate to protect the community. *Urlacher*, 427 P.3d at 669 n.6.

interest" standard does not pose a constitutional problem. *Bergen* properly determined that the "best interest" standard is directly related to an SVP's dangerousness and unique, long-term treatment needs. *Bergen*, 146 Wn. App. at 527-29. There is no basis for this Court to revisit this issue.

At an LRA trial, the statute requires the State to prove beyond a reasonable doubt that conditional release to any proposed LRA either (1) is not in the best interest of the person; or (2) does not include conditions that would adequately protect the community. RCW 71.09.090(3)(d). Statutes are presumed constitutional, and the burden is on the challenger to prove unconstitutionality beyond a reasonable doubt. *In re Det. of Danforth*, 173 Wn.2d 59, 70, 264 P.3d 783 (2011). A facial challenge must be rejected unless there is "no set of circumstances" in which the statute can be constitutionally applied. *State v. McCuistion*, 174 Wn.2d 369, 389, 275 P.3d 1092 (2012). Urlacher has not met this high burden.

In reviewing substantive due process challenges to the SVP statute, this Court has recognized that "the State has a compelling interest both in treating sex predators and protecting society from their actions." *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993), *superseded by statute on other grounds*. Urlacher remains an SVP, and thus "likely to engage in predatory acts of sexual violence." RCW 71.09.020(18). This Court has consistently upheld the SVP statutory scheme against substantive due

process challenges because it requires the State to prove both mental illness and dangerousness. *Id.* at 27; *McCuistion*, 174 Wn.2d at 387-92.

By seeking an LRA placement, Urlacher does not challenge his classification as an SVP or contest that he continues to be mentally ill and dangerous. *See* CP at 666 (previous finding that Urlacher is an SVP is not an issue in LRA trial). Rather, Urlacher seeks only an alternative placement as an SVP. "The LRA determination is a separate inquiry and is focused on whether the SVP—who has already been found to be dangerous and mentally ill—should be transferred to an LRA that will continue to serve the statutory objectives of treating the SVP and keeping the community safe." *Bergen*, 146 Wn. App. at 528. Because Urlacher remains an SVP, the State maintains a compelling interest in ensuring his treatment and protecting society.

In *Bergen*, the court applied strict scrutiny and concluded that the "best interest" standard is "directly related to the SVP's dangerousness and mental illness and is narrowly tailored to serve the State's compelling interest in appropriately treating dangerous sex offenders." *Bergen*, 146 Wn. App. at 527-29. Even under the heightened standard of review applied in *Bergen*, the "best interest" standard satisfies substantive due process because it is narrowly tailored and applies only to individuals who are found beyond a reasonable doubt to be both mentally ill and dangerous

and who are in need of continued treatment for the protection of society. The "best interest" standard "accounts for the inherent dangerousness of SVPs and their unique, extended treatment needs[.]" *Id.* at 529.

Urlacher's reliance on *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) is misplaced. *O'Connor* involved the involuntary civil commitment of a *nondangerous* mentally ill person who was not receiving treatment and held that the State cannot constitutionally confine a person who is "dangerous to no one and can live safely in freedom." *Id.* at 573-75. It does not apply here, where Urlacher remains committed as an SVP and continues to be both mentally ill and dangerous, a finding he does not challenge.

There is nothing in Urlacher's petition raising an issue of public importance. The Court of Appeals did not address this issue and nothing in its decision conflicts with *Bergen* or any other court of appeals case. In addition, this Court has already held that the commitment process satisfies substantive due process. The "best interest" standard achieves the dual goals of protecting society and providing continued treatment to Urlacher, who remains a sexually violent predator.

E. The Court of Appeals Applied Well-Established Case Law in Rejecting Urlacher's Claims of Prosecutorial Misconduct

The Court of Appeals applied well-established case law in rejecting

Urlacher's claims of prosecutorial misconduct. As the court correctly concluded, Urlacher's first claim fails because the prosecutor did not misstate the law during rebuttal. And Urlacher's second claim fails because Urlacher did not object to the alleged misconduct, and he fails to show that a curative instruction would not have obviated any prejudicial effect. Review of these issues is unwarranted. The decision of the Court of Appeals is consistent with *Bergen* and established case law, and nothing in Urlacher's petition raises an issue substantial public importance or a significant question of constitutional law.

1. It is well-established that a heightened standard applies when a party fails to object at trial

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire trial. *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *In re Det. of Sease,* 149 Wn. App. 66, 80, 201 P.3d 1078 (2009) (applying prosecutorial misconduct standard from criminal cases to SVP cases). Where, as here, the defendant failed to 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 the resulting prejudice." *State v. Emery,* 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). "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 *Thorgerson*, 172 Wn.2d at 455).

"Reviewing courts should 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. In analyzing prejudice, courts look at 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).

2. The prosecutor did not misstate the law during rebuttal

The Court of Appeals applied well-established case law and properly concluded that the prosecutor did not misstate the law during rebuttal. As the court explained, when read in context, the prosecutor's argument was a proper statement of the law and was in response to Urlacher's argument about his proposed housing.

During rebuttal, the prosecutor referenced Urlacher's closing argument that his proposed housing is "the gold standard and you couldn't ask for anything better." RP at 1033. The prosecutor then argued that it was the jury's role to make that determination. RP at 1033-34. In doing so, the prosecutor explained 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." RP at 1034. Urlacher did not object to this argument. RP at 1034.

Despite Urlacher's assertions to the contrary, the prosecutor's argument did not invite jurors "to make up their own standards." *See* Pet. at 24. Rather, the prosecutor correctly informed jurors that it was their role to decide whether the "best interest" and "adequate to protect the community" elements were satisfied regarding Urlacher's proposed housing. The Court of Appeals correctly concluded that this is a proper statement of law. Urlacher incorrectly asserts that *Bergen* determined that these phrases have "specific meanings." *See* Pet. at 26. On the contrary, *Bergen* concluded that it was not necessary to define these phrases as they "can be understood by persons of common intelligence and reasonably applied within the statute's intent." *Bergen*, 146 Wn. App. at 520, 531-34. Further, even if the prosecutor's argument was improper, an instruction could have cured any prejudice.

3. Urlacher waived any error by failing to object to the prosecutor's argument about "grooming"

The Court of Appeals also correctly rejected Urlacher's second claim of prosecutorial misconduct. As the court properly concluded,

Urlacher did not object to the prosecutor's argument about "grooming" and fails to show that a curative instruction would not have obviated any prejudicial effect.

In closing argument, Urlacher argued that he is not just "talking the talk" but is "walking the walk" and has worked hard to learn skills and change his behavior. RP at 997-1002, 1024-27. In rebuttal, the prosecutor responded that the few gains Urlacher has made are only recent and that jurors should use their common sense while deliberating and not to be "fooled by Charles Urlacher" or "subject to his grooming." RP at 1040. Urlacher did not object to this argument. RP at 1040.

The prosecutor's argument was akin to telling jurors not to be tricked or manipulated by Urlacher or misled by his testimony. It was not an improper appeal to the jury's passion or an invitation for jurors "to imagine themselves as the future child victims of a sexual offense perpetuated by Mr. Urlacher" as Urlacher asserts. Pet. at 28. However, even assuming this argument was improper, Urlacher fails to show that it was "so flagrant and ill intentioned" that an instruction could not have cured any prejudice. Relying on well-established case law, the Court of Appeals held that Urlacher fails to show that a curative instruction would not have obviated any prejudicial effect. *Urlacher*, 427 P.3d at 675. As the court properly explained, if Urlacher had objected to the statement, the trial court

could have instructed the jury to disregard the prosecutor's remark. *Id.* Moreover, the remark was brief, and the prosecutor made it in direct response to Urlacher's testimony and arguments that he was a changed man.[10]

V. CONCLUSION

For the foregoing reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 24th day of January, 2019.

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[10] Urlacher's claim that the trial court "specifically prohibited" the prosecutor from asking this question misrepresents the record. *See* Pet. at 27. It was a juror, not the prosecutor, who proposed asking Dr. Spizman if Urlacher could be "grooming the jury" through his testimony. RP at 638. The trial court stated that the question "seems a bit argumentative" and did not ask it. RP at 638.

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