

NO. 36600-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

MICHAEL SEASE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
08 APR 28 AM 9:17
STATE OF WASHINGTON
BY DEPUTY

RESPONDENT'S OPENING BRIEF

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TABLE OF CONTENTS

- I. ISSUES PRESENTED1
 - A. Did the State present sufficient evidence at trial that appellant Michael Sease is a sexually violent predator?.....1
 - B. Is a unanimity instruction required when several mental illnesses form the basis of commitment as a sexually violent predator (SVP) pursuant to RCW 71.09?1
 - C. Has Appellant Sease met his burden of showing that the state committed prosecutorial misconduct during closing argument?.....1
- II. STATEMENT OF THE CASE1
 - A. Substantive History1
 - 1. Sease’s Criminal Sexual History1
 - 2. Expert Opinion Evidence: Dr. Dennis Doren.....4
 - B. Procedural History7
- III. ARGUMENT9
 - A. Substantial Evidence was Presented at Trial to Support a Finding that Sease is a Sexually Violent Predator.....9
 - 1. Standard of Review9
 - 2. Sufficient Evidence was Presented at Trial to Permit a Rational Jury to Conclude Sease’s Personality Disorders Cause him Serious Difficulty Controlling his Sexually Violent Behavior.....10
 - B. A Unanimity Instruction is Not Required When Several Mental Disorders Form the Basis of Commitment as a Sexually Violent Predator Pursuant to RCW 71.09.....13

1.	Sease Failed to Object to the Court’s Instructions and he Failed to Request a Unanimity Instruction.	14
2.	The Alternative Means Test is the Appropriate Analysis in Sexually Violent Predator Cases.	15
3.	The Presence of Multiple Mental Illnesses does not Mandate an Unanimity Instruction.	18
C.	Sease Fails to Meet his Burden of Proving Prosecutorial Misconduct.	21
1.	Sease Failed to Object to the Allegedly Improper Statements of the Prosecutor	21
2.	Sease Fails to Allege Facts Supporting his Claim that the Prosecutor Sought a Verdict “Based Upon Passion and Prejudice”.	22
3.	The Prosecutor did not Encourage the Jury to Ignore the Question of Whether Sease’s Personality Disorders Cause him Serious Difficulty Controlling his Sexually Violent Behavior.	23
4.	Even if the State’s Comments in Closing Were a Misstatement of the Law, Sease has Failed to Show That it Affected the Outcome of the Trial and Thus it was Harmless Error.	24
IV.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>In re Detention of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	10
<i>In re the Detention of Audett</i> , 158 Wn.2d 712, 147 P.3d 982 (2006).....	14
<i>In re the Detention of Halgren</i> , 156 Wn.2d 795, 132 P.2d 714 (2006).....	passim
<i>Kansas v. Crane</i> , 269 Kan. 578, 7 P.3d 285 (2000).....	11, 12
<i>Kansas v. Crane</i> , 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).....	11
<i>Kansas v. Hendricks</i> , 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).....	11, 12
<i>State v. Arndt</i> , 87 Wn.2d 374, 553 P.2d 1328 (1976).....	16
<i>State v. Barajas</i> , ___ Wn. App. ___, 177 P.3d 106, 114 (Div. III 2007).....	22, 25
<i>State v. Crane</i> , 16 Wn.2d 315, 804 P.2d 10 (1991).....	16
<i>State v. Grisby</i> , 97 Wn.2d 493, 647 P.2d 6 (1982).....	24
<i>State v. Kendrick</i> , 47 Wn. App. 620, 736 P.2d 1079 (1987).....	22
<i>State v. Kitchen</i> , 110 Wn. 2d 403, 756 P.2d 105 (1988).....	17

<i>State v. McKenzie</i> , 57 Wn.2d 44, 134 P.3d 221 (2006).....	21, 24
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	15
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 717 (2000).....	21
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	22

Statutes

RCW 71.09	1, 13, 14, 16
RCW 71.09.020(16).....	10, 18

Rules

RAP 2.5(1).....	14
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I. ISSUES PRESENTED

- A. Did the State present sufficient evidence at trial that appellant Michael Sease is a sexually violent predator?
- B. Is a unanimity instruction required when several mental illnesses form the basis of commitment as a sexually violent predator (SVP) pursuant to RCW 71.09?
- C. Has Appellant Sease met his burden of showing that the state committed prosecutorial misconduct during closing argument?

II. STATEMENT OF THE CASE

A. Substantive History

1. Sease's Criminal Sexual History

Michael Sease has a history of raping and attempting to rape women and children. That history includes the following incidents, charges and convictions:

On November 27, 1980, Sease attacked and raped 31 year-old Annette Hanson, a woman previously unknown to Sease. 3RP at 116. At Sease's SVP trial, Annette Hanson testified that Sease met Ms. Hanson at a bar, and some time later left the bar with Ms. Hanson and three of her friends. *Id.* Two of Ms. Hanson's friends, both males, attempted to rob and assault Sease outside the bar, then fled the scene leaving Sease, Ms. Hanson and her female friend behind. Sease turned to Ms. Hanson following the assault, and told Ms. Hanson that her friends had robbed him and he was going to take it out on her. *Id.* Ms. Hanson's friend fled, and

Sease proceeded to beat Ms. Hanson to unconsciousness. He then raped her. *Id.* Sease was subsequently arrested and treated at the hospital for injuries. 3RP at 117. Sease pleaded guilty to Assault in the Third Degree. 5RP at 359.

On November 3, 1987, Sease kidnapped and attempted to rape 15 year-old M.A., a child previously unknown to Sease. M.A. was a high school student who was outside during the school lunch hour. 3RP at 117. At Sease's SVP trial, the jury heard testimony that Sease approached M.A. in his car, and tried to strike up a conversation with her. *Id.* M.A. turned and walked away from Sease. Sease approached M.A. from behind, grabbed her and forced her into his vehicle. *Id.* While Sease was driving, M.A. began to struggle with Sease. 3RP at 117-18. Sease threatened to kill M.A. if she continued to struggle. 3RP at 118. While driving, Sease attempted to put his hand up M.A.'s skirt. *Id.*

Sease drove to a park, where he forced M.A. out of the car, forced her to the ground and climbed on top of her. *Id.* Sease attempted to remove M.A.'s panties, however M.A. continued to struggle and ultimately was able to kick Sease off of her and run away. *Id.* Sease was found guilty after a jury trial of Kidnapping in the First Degree. CP at 62.

On November 25, 1987, Sease raped and assaulted Ami Hayward, an adult female previously unknown to Sease. Sease approached

Ms. Hayward, who was waiting for her husband to donate blood at the local plasma center. 3RP at 118. Sease asked Ms. Hayward if she wanted to have sex for \$100. Ms. Hayward turned Sease down, indicating that she was married and had a young child. 3RP at 119. Sease asked Ms. Hayward to accompany him to his car so he could retrieve something from the glove box. Sease opened the passenger door, and Ms. Hayward sat in the car with her legs out of the opened passenger side door. *Id.* Sease grabbed Ms. Hayward's legs, pulled her into the car, and pulled out a knife. Sease put the knife to Ms. Hayward's side, and told her if she did anything that he could cut her. *Id.*

Sease then drove Ms. Hayward to a clearing near some railroad tracks. Once there, Sease threw Ms. Hayward onto the ground, put the knife to her chest, and told her to undress. *Id.* Ms. Hayward was scared and therefore unable to disrobe, angering Sease. Sease began to cut Ms. Hayward with the knife, saying he would continue to cut deeper until she removed her clothes. 3RP at 120. Ms. Hayward removed one leg from her pants, and Sease proceeded to remove her panties and rape her vaginally. *Id.* While raping her, Sease lifted up Ms. Hayward's shirt and licked her breast. Sease then ejaculated on her stomach, and told her that he had AIDS, and now she had AIDS. *Id.* Sease then laughed and ran from the scene, leaving Ms. Hayward lying in the mud by the railroad

tracks. Sease was convicted after a jury trial of Rape in the First Degree. CP at 52. The jury also returned a special verdict finding that Sease was armed with a deadly weapon during his attack on Ms. Hayward. CP at 53.

2. Expert Opinion Evidence: Dr. Dennis Doren

At trial, the State offered the expert opinion testimony of clinical and forensic psychologist Dennis Doren, PhD. Dr. Doren has considerable experience in the evaluation, diagnosis, treatment, and risk assessment of sex offenders. 3RP at 99-112; CP at 9-24. Dr. Doren has been licensed as a psychologist since 1984 and holds licenses to practice in Wisconsin, Iowa, and Washington. CP at 9. Dr. Doren has evaluated approximately 200 individuals to determine whether they meet the statutory criteria for civil commitment pursuant to SVP laws. 3RP at 106. Of those 200 evaluations, Dr. Doren has found that the individual he is evaluating meets SVP criteria about two-thirds of the time. 3RP at 110.

As part of his evaluation, Dr. Doren interviewed Sease, reviewed court documents, police reports, presentence investigation reports, criminal history information, Department of Corrections (DOC) records, SCC records that document Sease's progress there, and Sease's deposition testimony. 3RP at 111-13. Dr. Doren testified that the records he reviewed were of the type that he and other mental health professionals commonly rely upon when evaluating sex offenders. 3RP at 112-13.

Dr. Doren testified that, in his professional opinion, Sease suffers from three personality disorders: Antisocial Personality Disorder, Borderline Personality Disorder, and Narcissistic Personality Disorder. 3RP at 123-24. Dr. Doren also diagnosed Sease with Alcohol Abuse. 3RP at 126. In diagnosing those conditions, Dr. Doren relied upon a classification system that is used universally by mental health workers, and is found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). 3RP at 124; 3RP at 235. Dr. Doren opined that it was Sease's Antisocial Personality Disorder and Borderline Personality Disorders that predisposed him to the commission of sexually violent crimes. 3RP at 211.

Dr. Doren explained that Antisocial Personality Disorder involves the general concept of, "I'm going to do what I want, and it doesn't matter to me what happens to you." 3RP at 125. Dr. Doren explained the diagnostic criteria for Antisocial Personality Disorder to the jury, and provided factual support for his diagnosis. 3RP at 145.

Dr. Doren also described Borderline Personality Disorder to the jury, as a general instability in one's emotions, thoughts, interactions with people, or impulse control. 3RP at 125. Dr. Doren testified regarding the diagnostic criteria for Borderline Personality Disorder, and provided factual support for his diagnosis. 3RP at 156. Dr. Doren testified that, in

his professional opinion, Sease's Antisocial Personality Disorder and Borderline Personality Disorder qualify as personality disorders under the SVP statute. 3RP at 176. It is also his opinion that Sease's personality disorders cause him serious difficulty controlling his sexually violent behavior. 3RP at 172.

Dr. Doren also conducted a risk assessment to determine whether Sease was likely, as a result of his personality disorder, to commit another sex offense. 3RP at 176. He used actuarial instruments, then considered other risk factors outside these instruments that research has identified as associated with sexual offending. 3RP 178-79; 3RP 206-09. An actuarial instrument is a list of factors associated with a certain outcome, which are then weighted statistically. 3RP at 179. They have been used for assessing risk in other fields, such as the life insurance industry, and are widely used by professionals in assessing risk for sexual offenders. 3RP at 179; 3RP at 181. Dr. Doren cautioned that these instruments underestimate the overall risk of a sex offense because they assess risk of committing an offense that is detected and results in rearrest or reconviction, rather than estimating the risk of any reoffense. 3RP at 193-94. Dr. Doren testified that the actuarial instruments employed in Sease's case indicate that Sease is likely to engage in predatory acts of sexual violence if not confined to a secure facility. 3RP at 211.

Dr. Doren specifically testified about the connection between Sease's personality disorders and his risk assessment, finding that the two were linked in a variety of ways. 3RP at 210-11. Dr. Doren opined that Sease's risk of reoffense comes from his two personality disorders. 3RP at 211.

Based upon his education and experience and his review of the evidence, Dr. Doren testified that it was his professional opinion that Sease has a personality disorder that causes him serious difficulty controlling his behavior and makes him more likely than not to commit predatory acts of sexual violence if he is not confined in a secure facility.

Id.

B. Procedural History

This SVP civil commitment action was initiated on March 31, 2005. CP at 1. On that date, Michael Sease was serving a sentence on a 1989 conviction for Kidnapping in the First Degree and Rape in the First Degree. Shortly before Sease was scheduled to be released, the State filed the SVP Petition. This SVP commitment trial began on June 27, 2007. CP at 36; 1RP at 4.

At trial, the State presented the testimony of one of Sease's rape victims, Annette Hanson, as well as, Detective Melvin D. Margeson, Dr. Dennis Doren, and Appellant Sease. In his defense, Sease presented

the testimony of Dr. Theodore Donaldson and a number of lay witnesses, including Dr. Leslie Sziebert from the Special Commitment Center (SCC).

During the course of pretrial motions, Sease's attorney requested that the court remove the language "mental abnormality" from the State's proposed jury instructions and corresponding exhibits. 1RP at 54. The State objected, anticipating that Sease's expert, Dr. Donaldson, would argue that commitment based upon a diagnosis of a personality disorder alone was insufficient. 1RP at 51. Since Dr. Donaldson's opinions were contrary to the statute, the State sought to cross-examine on the differences between "mental abnormality" and "personality disorder" that are enumerated in the law. *Id.* The court granted Sease's motion and ordered that all reference to "mental abnormality" be removed from the state's proposed jury instructions and illustrative exhibits. 1RP at 62.

On July 11, 2008, the trial court prepared its instructions to the jury. Sease did not propose any jury instructions, and had no exceptions to the court's instructions of law. 8RP at 601. At no time did Sease request a "unanimity" instruction, or object to the lack of such an instruction. On July 12, 2007, the jury unanimously agreed that the State had proven all three elements beyond a reasonable doubt. CP at 114. Sease was committed to the SCC where he remains today. CP at 115-16. This appeal follows. CP at 117.

III. ARGUMENT

Sease essentially makes three arguments on appeal, all of which are without merit. First, there was more than sufficient evidence presented at trial for a finding that Sease is a sexually violent predator. Second, a unanimity instruction was not required in this case because there was overwhelming evidence to support a finding that Sease suffers from two qualifying mental disorders that form the basis of the commitment. Finally, Sease has failed to meet his burden of proof that there was prosecutorial misconduct during closing argument. Therefore, this Court should deny Sease's appeal, and affirm his civil commitment as a sexually violent predator.

A. Substantial Evidence was Presented at Trial to Support a Finding that Sease is a Sexually Violent Predator.

Sease argues that there was insufficient evidence presented at trial that his risk of reoffense stems from his personality disorders. Brf. of Appellant at 10. Appellant's arguments lack merit and should be rejected.

1. Standard of Review

A SVP is an individual "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure

facility.” RCW 71.09.020(16). Proof is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found those elements beyond a reasonable doubt. *In re Detention of Thorell*, 149 Wn.2d 724, 744-45, 72 P.3d 708 (2003).

When examining a claim that a jury’s verdict in an SVP case was based upon insufficient evidence, the court must determine whether the evidence, “viewed in a light most favorable to the State, is sufficient to persuade a fair minded rational person that the State has proven beyond a reasonable doubt that [Respondent] is a sexually violent predator.” *Thorell*, 149 Wn.2d at 744.

2. Sufficient Evidence was Presented at Trial to Permit a Rational Jury to Conclude Sease’s Personality Disorders Cause him Serious Difficulty Controlling his Sexually Violent Behavior

Sease argues that the State did not sufficiently prove that Sease’s risk of reoffense is linked to his personality disorders. Brf. of Appellant at 10.

“[A] diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a jury to find a serious lack of control. Such a diagnosis, however, when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP.”

Thorell, 149 Wn.2d at 761-62.

Similarly, a risk of recidivism alone does not qualify an individual for civil commitment as a sexually violent predator. *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Rather, there must be a link between an individual's mental abnormality or personality disorder and the individual's ability to control their behavior. *Id.* This link is established even if the individual's risk is linked only to a diagnosed personality disorder. *Kansas v. Crane*, 269 Kan. 578, 579, 7 P.3d 285 (2000) (*overruled on other grounds by Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002)).

These requirements were clearly met in the trial. Dr. Doren, a highly qualified and experienced clinical and forensic psychologist, provided ample evidence to the jury that Sease's personality disorders predisposed Sease to the commission of crimes of sexual violence. 3RP at 172; 3RP at 210-11. Dr. Doren testified that Sease's personality disorders were part and parcel of why he offended initially, and that it is those personality disorders that continue to make Sease likely to reoffend if released to the community. 3RP at 173; 3RP at 175; 3RP at 210.

Dr. Doren relied on the information he gleaned during his interview of Sease; his comprehensive review of Sease's extensive records; his application of the validated actuarial tools; and his analysis of

empirically validated risk factors to form his opinions. It is Dr. Doren's professional opinion that Sease's Antisocial Personality Disorder and Borderline Personality Disorder predispose him to sexual crimes, and that they continue to cause him serious difficulty controlling his sexually violent behavior. 3RP at 210-11. Dr. Doren's testimony clearly established that Sease is compelled to commit future crimes of sexual violence as a result of his personality disorders, and thus the evidence was not only sufficient, but consistent with the statutory and constitutional requirements outlined in *Hendricks* and *Crane*.

Sease argues that his expert, Dr. Donaldson, repeatedly made the argument that (contrary to the plain language of the statute) it was improper to opine that a personality disorder can predispose an individual to commit crimes of sexual violent. Brf. of Appellant at 14. Although Sease's expert provided testimony contrary to Dr. Doren's, the jury was entitled to give more weight to Dr. Doren than to Dr. Donaldson. *In re the Detention of Halgren*, 156 Wn.2d 795, 811, 132 P.2d 714 (2006). As Dr. Doren's is a qualified mental health expert, and his testimony was based upon facts amply supported in the record, the jury had more than enough evidence to support their decision that Sease is a currently dangerous sexually violent predator. As such, Sease's appeal should be denied.

B. A Unanimity Instruction is Not Required When Several Mental Disorders Form the Basis of Commitment as a Sexually Violent Predator Pursuant to RCW 71.09.

Sease argues that the trial court erred by failing to give a unanimity instruction to the jury. Sease fails to alert the Court that a unanimous jury of twelve found that the State had proven all three required elements beyond a reasonable doubt. CP at 114. Specifically, Sease erroneously claims that when an expert diagnoses two personality disorders, the State must either present those personality disorders as alternatives or must elect which personality disorder is the basis for commitment. Brf. of Appellant at 10. Sease's argument is without legal or factual merit and should be rejected.

First, Sease failed to object to the Court's instructions, nor did he offer a proposed unanimity instruction. Second, neither case law nor statute requires a unanimity instruction regarding which personality disorder Sease suffers from. Finally, the relevant personality disorders diagnosed by Dr. Doren, Antisocial Personality Disorder and Borderline Personality Disorder, are alternative mental disorders that may form the basis of the commitment, and are not incongruous. Thus the State is not required to elect which personality disorder is the basis for commitment.

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1. Sease Failed to Object to the Court's Instructions and he Failed to Request a Unanimity Instruction.

Sease waived any objection to the Court's instructions of law when he failed to object at trial. There are compelling reasons to find that Sease failed to preserve the issue of whether or not a unanimity instruction was required in this case.

The preservation of error doctrine applies in civil commitment cases pursuant to RCW 71.09. *In re the Detention of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006) (citing Karl B. Teglund, Washington Practice: Rules Practice RAP 2.5(1), at 192 (6th ed.2004)). Opposing parties should be afforded an opportunity at trial to respond to possible claims of error. *Id.* Furthermore, "it is the obligation of the parties to draw the trial court's attention to errors, issues, and theories, or be foreclosed from relying upon them on appeal." *Id.*

Here, despite a lengthy discussion regarding the term "personality disorder", Sease did not propose a unanimity instruction, nor did he object to the State's proposed instructions and the Court's instructions to the jury. 1RP at 51-62; 8RP at 601. Had Sease proposed a unanimity instruction or objected, the issue could have been addressed by all parties and by the trial court. After argument, the trial court would have had an opportunity to rule on the proposed instruction, and the remedy would have been to

include an instruction at Sease's request. However, since Sease did not propose any instructions, the State and the trial court were not given an opportunity to address the theory that Sease now raises. Given these compelling reasons, Sease's failure to propose a unanimity instruction should constitute a waiver and the issue should not be addressed for the first time on appeal.

2. The Alternative Means Test is the Appropriate Analysis in Sexually Violent Predator Cases.

Sease argues that a *Petrich*¹ unanimity instruction was required in this case. Sease's position is without legal merit and he asks this court to undertake a legal analysis that is in appropriate. He is correct that unanimity rules are applicable in SVP cases. *Halgren*, 156 Wn.2d at 809. However, "alternative means" analysis is appropriate when the individual suffers from multiple mental disorders either of which could form the basis of the commitment. *Id.* at 809-10.

A unanimity instruction is not required in criminal cases involving alternative means where either a single offense may be committed in more than one way, or where a continuing course of conduct forms the basis of one charge in an information. *State v. Arndt*, 87 Wn.2d 374, 377,

¹ In a criminal case, where several distinct criminal acts have been committed by a defendant who is not charged for each act, the prosecutor must elect the acts she or he is relying upon, or the jury must receive a unanimity instruction. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

553 P.2d 1328 (1976); *State v. Crane*, 116 Wn.2d 315, 325-26, 804 P.2d 10 (1991). Alternative means statutes identify a single crime and provide more than one means of committing the crime. *Arndt*, 87 Wn.2d at 376-77. Unanimity is not required as to the means by which the crime was committed, as long as substantial evidence supports each alternative means. *Crane*, 116 Wn.2d at 325-26.

In *Halgren*, the State's expert testified that Halgren suffered from *at least one* mental abnormality and one personality disorder. *Halgren*, 156 Wn.2d at 800 (emphasis added). At the close of trial, Halgren requested a jury instruction that would have required unanimous agreement as to the specific mental abnormality or personality disorder necessary for a finding that Halgren was an SVP. *Id.* The trial court rejected Halgren's argument and instructed the jury they were required to find that Halgren suffered from a mental abnormality and/or a personality disorder; the court did not include the specific names of the mental abnormalities and personality disorder. *Id.* at 801.

On appeal, the Washington Supreme Court determined that a diagnosed personality disorder is one of the "alternative means" of civil commitment, and that RCW 71.09 allows for either a mental abnormality or a personality disorder to be the basis for civil commitment. *Halgren* at 810-11. The court did not require that the State plead which mental

abnormality or personality disorder was the basis for commitment, nor did the court require that the jury indicate which mental illness was the basis for commitment. *Id.* Thus, the jury need not unanimously agree on the type of personality disorder that exists as long as substantial evidence exists to support the finding that Sease is a sexually violent predator beyond a reasonable doubt. *Id.*

At Sease's request, the court eliminated the alternative means of a "mental abnormality" as a basis for commitment from the jury instructions. 1RP at 54. Given that the only testimony the jury heard, from the state's expert (and acknowledged by the defense expert), consisted of testimony linking his personality disorders with his predisposition to commit acts of sexual violence, the only "means" by which the jury could have found Sease to meet criteria was a personality disorder. The jury was properly instructed that they needed to be unanimous in their verdict that he was a sexually violent predator, which they were. CP at 106; CP at 113. As the Court found in *Halgren*, the substantial evidence test is satisfied if this court is convinced that 'a rational trier' of fact *could* have found that Sease suffers from either personality disorder. *Halgren*, 156 Wn.2d at 811, citing *State v. Kitchen*, 110 Wn. 2d 403, 410-11, 756 P.2d 105 (1988).

Here, there was overwhelming evidence to support the commitment, and this argument should be rejected.

3. The Presence of Multiple Mental Illnesses does not Mandate an Unanimity Instruction.

Sease argues that his two personality disorders necessitated a unanimity instruction because they are “the equivalent of alternative acts in the criminal setting.” Brf. of Appellant at 8. He essentially asks this court to ignore *Halgren* and require a jury to single out one of multiple qualifying personality disorders as the basis for their verdict. *Id.* The result to be accomplished in a SVP civil commitment proceeding (commitment as an SVP) is the same regardless of the type of personality disorder that is diagnosed. RCW 71.09.020(16). Further, multiple mental illness diagnoses that are used to establish that a person is an SVP may operate independently or may work in conjunction. “Thus, because an SVP may suffer from [multiple] defects simultaneously, the mental illnesses are not repugnant to each other and may inhere in the same transaction. *Halgren*, 156 Wn.2d at 810. Since the personality disorder diagnoses assigned to Sease by Dr. Doren are closely connected and not incongruous, either or both of the personality disorders can properly be the predicate for an SVP determination. *See Halgren*, 156 Wn.2d at 810.

Here, the jury's verdict was unanimous that Sease met the criteria for civil commitment as a sexually violent predator. Sease fails to explain how, if one juror believed that Sease's risk of reoffense was caused by his antisocial personality disorder, and another juror believed his risk of reoffense was caused by his borderline personality disorder, it would have resulted in a jury that did not unanimously believe Sease "suffers from a personality disorder which causes serious difficulty in controlling his sexually violent behavior." CP at 106.

Dr. Doren opined that Sease's antisocial personality disorder and his borderline personality each predisposed Sease to commit criminal sexual acts and make him likely to commit a criminal sexual act in the future if not confined. 3RP at 173. Furthermore, Dr. Doren opined that certain aspects of Sease's Antisocial Personality Disorder and Borderline Personality Disorder may operate independently or may work in conjunction. 3RP at 210-11. Thus, because Sease may suffer from more than one personality disorder simultaneously, the personality disorders are not repugnant to each other and may inhere in the same transaction. *See Halgren*, 156 Wn.2d at 810.

Sease alleges that Dr. Donaldson did not diagnose Sease with Antisocial Personality Disorder, and therefore that diagnosis is in dispute. However, Dr. Donaldson testified that he did not attempt to diagnose any

personality disorders in Sease because, in his opinion, it was irrelevant. 6RP at 426. In fact, Dr. Donaldson testified that he didn't disagree with a diagnosis of Antisocial Personality Disorder, rather he didn't think it was "worth arguing about." 6RP at 464; 6RP at 466. On cross-examination, Dr. Donaldson was confronted with his deposition testimony, in which he testified under oath that "[Sease has] got Antisocial Personality Disorder." 6RP at 465. Furthermore, Dr. Donaldson conceded that Sease suffers from some adult antisocial behavior, and that he has historically been diagnosed with Antisocial Personality Disorder due to his antisocial behavior. 6RP at 465-66. Dr. Donaldson also specifically agreed that Sease suffers from Borderline Personality Disorder, leaving no issue of material fact regarding that diagnoses. 6RP at 428.

Although Dr. Donaldson provided testimony that was contrary to that of Dr. Doren's, he also provided testimony contrary to his deposition testimony and rendered an opinion that was contrary to the law. Given these facts, the jury was entitled to give more weight to the State expert's testimony than to the testimony of Sease's expert. *See Halgren*, 156 Wn.2d at 811. The jury unanimously agreed that Sease suffered from a personality disorder that predisposed him to the commission of criminal sexual acts. Thus, Sease's commitment as an SVP was proper, and his appeal should be denied.

C. Sease Fails to Meet his Burden of Proving Prosecutorial Misconduct.

Sease argues that the State committed prosecutorial misconduct during closing argument. Brf. of Appellant at 15. However, Sease's argument is without factual or legal merit and should be rejected for several reasons.

First, Sease failed to object to the allegedly improper statements. Second, Sease fails to articulate any statements made by the State that would seek a verdict based upon bias or prejudice. Brf. of Appellant at 15-16. Third, the prosecutor did not encourage the jury to ignore the requirement that Sease's personality disorders cause him serious difficulty controlling his sexually violent behavior. Finally, even if the State's closing arguments were a misstatement of law, it was harmless error and Sease has failed to show that the outcome would have been different.

1. Sease Failed to Object to the Allegedly Improper Statements of the Prosecutor

To prevail on a claim of prosecutorial misconduct, one "must show both improper conduct and prejudicial effect." *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 717 (2000). "A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). In those

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

Sease and his counsel failed to object to the State’s closing arguments, and therefore Sease has the burden to prove that the comments were “so flagrant and ill intentioned” that a curative instruction would not have cured the harm. When reviewing a prosecutor’s closing remarks, the court must look at “the context of the total argument, the issues in the case, the evidence, and the instructions provided by the trial court.” *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

2. Sease Fails to Allege Facts Supporting his Claim that the Prosecutor Sought a Verdict “Based Upon Passion and Prejudice”.

Sease correctly informs this Court that a prosecutor seeking a verdict based upon passion and prejudice commits misconduct. Brf. of Appellant at 15. “Appeals by the prosecutor to the jury’s passions and prejudice are inappropriate.” *State v. Barajas*, ___ Wn. App. ___, 177 P.3d 106, 114 (Div. III 2007). Such an argument, however, must be rejected if not supported by the record.

Here, Sease has not identified any facts to support his allegation that the State sought a verdict based upon the passions and prejudices of the jury. To the contrary, the State argued that the evidence presented at trial proved beyond a reasonable doubt that Sease is a SVP. 8RP at 622. As such, Sease's argument fails.

3. The Prosecutor did not Encourage the Jury to Ignore the Question of Whether Sease's Personality Disorders Cause him Serious Difficulty Controlling his Sexually Violent Behavior.

The State's argument was not misconduct because it was a permissible characterization of the evidence.

The State's comments in closing were in response to Sease's closing argument regarding Dr. Donaldson's opinions. The State's comments criticized Dr. Donaldson's confusion of the issues before the jury, namely whether Sease rapes because he wants to or because he has a personality disorder that predisposes him to the commission of sexually violent crimes. RP at 751-52. The evidence presented at trial by Dr. Doren was that Sease rapes because he is driven by his personality disorders. 3RP at 173. Dr. Donaldson opined that a personality disorder will never drive a person to commit sexual crimes. RP at 434. The State rightfully argued to the jury that they must decide whether or not it was Sease's personality disorder that causes him to rape women, which was

the law of the case. 8RP at 611; 8RP at 619; 8RP at 656. The State urged the jury to find Dr. Doren's opinions on that issue more credible than Dr. Donaldson's, and provided ample evidence as to why Dr. Doren's opinions were more credible. 8RP at 612-16. Clearly, the jury agreed.

4. Even if the State's Comments in Closing Were a Misstatement of the Law, Sease has Failed to Show That it Affected the Outcome of the Trial and Thus it was Harmless Error.

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

At trial, the jurors were provided with a correct statement of the legal standard in their jury instructions. CP at 106. Moreover, the jury was instructed that they were to accept the court's instructions of law and they were to disregard any comments made by the attorneys that were contrary to the law as stated by the court. CP at 101. There is a presumption that the jury follows the instructions of the court. *State v. Grisby*, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).

The State's remarks at issue in this case were a small portion of the overall argument regarding Sease's personality disordered predisposition

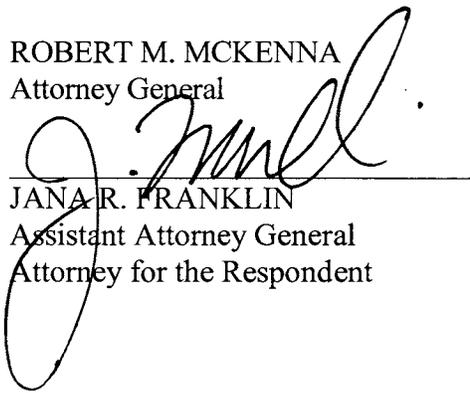
to rape women. Because the jurors were properly instructed by the trial court, and in light of the abundance of evidence supporting a finding that Sease's risk of reoffense stemmed from his personality disorders, Sease has not established that the State's remarks created "an enduring prejudice that could not have been cured by an instruction from the trial court." *Barajas*, ___ Wn. App. at 114. Sease has failed to meet his burden of showing that the outcome of the trial would have been different. Therefore, his argument is without merit, and his appeal should be denied.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court deny Sease's appeal, and affirm his civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 25th day of April, 2008.

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STATE OF WASHINGTON
BY 
DEPUTY

NO. 36600-2-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

MICHAEL SEASE,

Appellant.

DECLARATION OF
SERVICE

I, Martha Neumann, declare as follows:

On April 25, 2008, I deposited in the United States mail, postage
affixed, addressed as follows:

Gregory Link
Washington Appellate Project
1511 3rd Avenue Suite 701
Seattle, WA 98101

a copy of the following documents: RESPONDENT'S OPENING BRIEF;
and DECLARATION OF SERVICE.

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

DATED this 25th day of April, 2008, at Seattle, Washington.


MARTHA NEUMANN