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COURT OF APPEALS  
DIVISION II  
SEATTLE, WASHINGTON

No. 38903-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Detention of

**Richard Broten,**

Appellant.

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Grays Harbor County Superior Court

Cause No. 98-2-13741-1

The Honorable Judge Gordon Godfrey

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING IRRELEVANT AND PREJUDICIAL EVIDENCE.**

#### **A. Standard of Review**

Evidentiary rulings are reviewed for an abuse of discretion. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). An erroneous ruling requires reversal if there is a reasonable probability that it materially affected the outcome at trial. *State v. Asaeli*, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009).

#### **B. The trial judge should have excluded evidence that Mr. Broten used the N-word.**

Evidence that is irrelevant or overly prejudicial must be excluded at trial. ER 402, ER 403. Here, Mr. Broten's use of the N-word was irrelevant to any issues at trial,<sup>1</sup> and any probative value was substantially outweighed by the danger of unfair prejudice. ER 402, ER 403.

Respondent argues at length that Mr. Broten's ability to handle stress was

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<sup>1</sup> The court indicated that Mr. Broten's use of the N-word was probative of his ability to handle stress. RP (1/28/09) 192-194, 211. However, the court did not explain why his use of a racial epithet was necessary to show his reaction to stress, nor did the court

“a significant issue at trial.” Brief of Respondent, pp. 8-13. But Respondent fails to argue that Mr. Broten’s use of the N-word, specifically, was relevant to this issue. Brief of Respondent, pp. 8-13. The witness could have testified that Mr. Broten was involved in an argument and that he used offensive and derogatory language. Nothing in the record suggests that Mr. Broten’s recidivism and/or ability to handle stress specifically had a racial component. RP (1/28/09) 41-213; RP (1/29/09) 217-444; RP (1/30/09) 445-466. Nor does Respondent explain how his use of the N-word (as opposed to other offensive language) was necessary to show his ability to handle stress. Brief of Respondent, pp. 8-13.

The admission of this irrelevant and prejudicial evidence materially affected the outcome at trial: it is likely that Mr. Broten’s use of the N-word offended jurors and increased their negative feelings toward him. Accordingly, the trial court’s recommitment order must be reversed and the case remanded for a new trial. *Asaeli, supra*.

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consider sanitizing the testimony by allowing the witness to explain that Mr. Broten used “offensive language.”

C. Mr. Broten's ER 403 objection is preserved for review, and he has not abandoned his argument under ER 402.

Respondent suggests that Mr. Broten failed to preserve his ER 403 objection for review. This is incorrect, because even a general objection is sufficient to preserve an error for review if the basis for the objection is apparent from the context. ER 103(a)(1); *State v. Presba*, 131 Wn.App. 47, 57, 126 P.3d 1280 (2005).

Here, in keeping with the trial court's request, Mr. Broten made a brief objection on the record and requested a sidebar. RP 33-34, 193. The court later put the sidebar on the record:

THE COURT: Now, we had a side bar at 3:56 regarding the testimony of our last witness involving an incident where the derogatory remark that we euphemistically refer to as the "N word" was brought up. [Defense counsel] was concerned that it was basically *prejudicing and biasing the jury*...  
RP 211 (emphasis added).

From this statement, it appears that defense counsel specifically raised ER 403 during the sidebar. Furthermore, from the context in which the objection was made, it is apparent that defense counsel intended to argue ER 403, and that the court's ruling was made under ER 403. *Presba*, *supra*; ER 103(a)(1).

Inexplicably, Respondent also suggests that Mr. Broten "abandons the relevancy issue he raised at trial." Brief of Respondent, p. 7. This is incorrect. Mr. Broten's first assignment of error reads as follows:

The trial court erred by admitting irrelevant and prejudicial testimony, in violation of ER 401, ER 402, and ER 403. Appellant's Opening Brief, p. 1.

His first issue pertaining to this assignment of error addresses the erroneous admission of "irrelevant and prejudicial evidence." Appellant's Opening Brief, p. 2. Furthermore, on the first page of his argument, Mr. Broten asserts that the evidence was irrelevant and cites ER 402. Appellant's Opening Brief, p. 10. Respondent is correct that Mr. Broten later assumes (for the sake of argument) that the evidence was minimally relevant; however, this is in the context of his argument under ER 403. Appellant's Opening Brief, p. 11.

Finally, Respondent attempts to blame Mr. Broten for the trial court's failure to balance probative value and prejudice on the record. Brief of Respondent, p. 13. This is unfair, in light of the trial court's specific request that objections be argued at side bar, and the court's specific promise to put all side bars on the record. RP 33-34. It is not clear that the trial court properly balanced probative value and prejudice (even at the side bar); however, the trial court's failure should not be held against Mr. Broten.

D. The error was not harmless.

Respondent argues that any error was harmless, because the "brief testimony [about Mr. Broten's use of the N-word] was of minor

significance when compared to the body of evidence... [and because] [t]here was no further mention of the racial epithet.” Brief of Respondent, p. 14.

Respondent underestimates the offensive power of the N-word. Its injection into the jury’s deliberations—already charged with emotions conjured by the phrase “sexually violent predator”—undoubtedly prejudiced jurors against Mr. Broten. The effect might have been less prejudicial if the jury were required to determine nothing more than historical facts; however, in cases brought under RCW 71.09, jurors make predictions about future behavior. In this context, prejudices, biases, and emotions necessarily influence the outcome.

Mr. Broten was prejudiced by the trial court’s error. Accordingly, the order recommitting Mr. Broten as a sexually violent predator must be reversed and the case remanded for a new trial. *Asaeli, supra*.

**II. THE COURT’S INSTRUCTIONS PLACED UNDUE EMPHASIS ON A SINGLE FACTOR AND VIOLATED MR. BROTEN’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

Irrelevant jury instructions may cause prejudice; accordingly, repetitive and cumulative instructions are disfavored. *Vioen v. Cluff*, 69 Wn.2d 306, 418 P.2d 430 (1966); *Connor v. Skagit Corp.*, 30 Wn. App. 725, 734, 638 P.2d 115 (1981). Likewise, the court’s instructions should

not place undue emphasis upon one factor. *State v. Todd*, 78 Wn.2d 362, 376, 474 P.2d 542 (1970).

Here, the court's instructions placed undue emphasis upon the predatory acts of sexual violence that a person might commit if not confined.<sup>2</sup> *Todd*, 376. By improperly focusing the jury on these other crimes, the trial court prejudiced Mr. Broten. Respondent argues that each instruction was supported by the evidence. Brief of Respondent, pp. 14-17. Respondent's argument overlooks the cumulative effect of these instructions—when considered together, the instructions outlining predatory acts of sexual violence overwhelmed the other instructions. Instructions Nos. 9-13. Because these instructions, when taken as a whole, placed undue emphasis on a single factor, Mr. Broten was denied his Fourteenth Amendment right to due process. The commitment order must be reversed, and the case remanded for a new trial. *Todd*, at 377.

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<sup>2</sup> These included Rape in the First Degree, Rape in the Second Degree, Rape of a Child in the Second Degree, Child Molestation in the First Degree, Child Molestation in the Second Degree, Incest in the First Degree, and Incest in the Second Degree. Instructions No. 9, 10, 11, 12, 13, Court's Instructions to the Jury, filed 1/30/09, CP 13-34.

**III. THE TRIAL COURT ERRONEOUSLY EXCUSED THE JURY FROM FINDING THAT MR. BROTEN IS CURRENTLY DANGEROUS.**

A. Standard of Review

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

B. The court's instructions did not make the "currently dangerous" standard manifestly clear.

Involuntary civil commitment is a "massive curtailment of liberty," and may only be achieved through means narrowly tailored to achieve a compelling government purpose. *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); *In re Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). In proceedings under RCW 71.09, due process requires the state to prove that an individual is currently dangerous. *In re Detention of Paschke*, 121 Wn.App. 614, 622, 90 P.3d 74 (2008).

Here, the court's instructions did not make the "currently dangerous" standard manifestly clear. Jurors were permitted to vote to commit Mr. Broten even if they believed that he was not currently

dangerous: the court's instructions allowed the jury to commit Mr. Broten upon proof that he was statistically likely to reoffend at some point over the remainder of his lifetime, regardless of his current dangerousness.

Although the court did instruct the jury on the statutory elements of RCW 71.09, it failed to explicitly require a finding of "current dangerousness." See Instruction No. 3, CP 29 (outlining what the jury must find to return a verdict for continued commitment). Respondent contends that an instruction reciting the statutory elements is sufficient. Brief of Respondent, p. 19 (citing *In re detention of Moore*, 167 Wn.2d 113, 216 P.3d 1015 (2009)). Respondent fails to address Mr. Broten's argument distinguishing *Moore*. See Brief of Appellant, pp. 16-18.

In *Moore*, the detainee was committed following a bench trial. Thus the Supreme Court did not examine jury instructions, and did not assess whether or not those instructions made the requisite standard manifestly clear to the average juror. *Id*; *Kyllo, supra*. Here, by contrast, Mr. Broten was committed by a jury. Accordingly—since jurors lack tools of statutory construction—the court was required (through its instructions) to make the relevant standard manifestly clear to the average juror. *Kyllo, supra*.

The trial court didn't make the standard manifestly clear. Instead, the court's instructions simply tracked the statute, without making any

effort to convey the “currently dangerous” standard. The trial court in *Moore* was able to correctly apply the statute because courts are generally presumed to be able to properly interpret and apply the law: “The standard for clarity in a jury instruction is higher than for a statute; while [courts can] resolve the ambiguous wording of [a provision] via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction.” *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), *overruled on other grounds by State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). The trial court did not provide such an instruction.

Because the court’s instructions did not require proof of current dangerousness, they were not manifestly clear. *Albrecht, supra; Harris, supra*. Accordingly, Mr. Broten’s commitment violated his Fourteenth Amendment right to due process. *Albrecht, supra*. The order must be vacated and the case remanded for a new trial, with instructions to provide the jury with the correct standard. *Albrecht, supra*.

C. The court’s failure to properly instruct the jury creates a manifest error affecting a constitutional right.

Respondent contends that the court’s failure to instruct on current dangerousness is not preserved for review. Brief of Respondent, pp. 17-19. Respondent acknowledges the exception for manifest errors affecting

a constitutional right, but does not address the rule. Brief of Respondent, p. 18.

Instructional error may be raised for the first time on appeal when it amounts to a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Gordon*, \_\_\_ Wn.App. \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).<sup>3</sup> Failure to instruct the jury on all elements constitutes a manifest error affecting a constitutional right. *See, e.g. Gordon, at \_\_\_*. Because current dangerousness is a core element of commitment under RCW 71.09 (and the Fourteenth Amendment), the court’s failure to instruct the jury amounts to a manifest error affecting Mr. Broten’s right to due process, and the error should be reviewed. *Albrecht, supra; Gordon, supra*.

**IV. THE GOVERNMENT VIOLATED MR. BROTEN’S STATUTORY RIGHT TO A SPEEDY TRIAL.**

Mr. Broten stands on the argument made in his Opening Brief.

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<sup>3</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

**CONCLUSION**

For the foregoing reasons, the commitment order must be reversed  
and the case remanded to the trial court.

Respectfully submitted on January 25, 2010.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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and to:

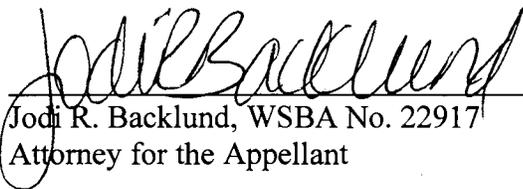
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 25, 2010.

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 January 25, 2010.

  
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Jodi R. Backlund, WSBA No. 22917  
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BY:   
JAN 25 2010  
MAIL ROOM  
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