

NO. 47414-0

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

In re the Detention of Rick Allen Monroe:

STATE OF WASHINGTON,

Respondent,

v.

RICK ALLEN MONROE,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

A jury committed appellant Rick Monroe as a sexually violent predator, finding beyond a reasonable doubt that he has a mental abnormality or personality disorder that makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. There was substantial evidence presented at trial to support both of the alternative means of “mental abnormality” and “personality disorder” as a basis for commitment. The jury was not required to unanimously determine which mental illness supported commitment. The trial court properly instructed the jury as to the elements the State was required to prove to commit Monroe as a sexually violent predator. It was not error, manifest or otherwise, for the court to instruct the jury that it may commit Monroe on the basis of the mental abnormality or personality disorder. Because Monroe did not object to the jury instruction below, he may not raise the issue for the first time on appeal. Further, trial counsel was not ineffective for choosing not to object to a jury instruction that accurately reflected the law, and Monroe cannot show any resulting prejudice. The State presented substantial evidence at trial that Monroe is a sexually violent predator. This Court should affirm his civil commitment.

II. RESTATEMENT OF THE ISSUES

- A. **Whether sufficient evidence supported the jury's verdict, where Monroe's mental abnormality and personality disorder were alternative means of proving he is mentally ill and each was supported by substantial evidence?**
- B. **Whether Monroe's trial counsel was ineffective for not objecting to a jury instruction that accurately reflected the law?**

III. STATEMENT OF THE CASE

A. Procedural History

In October 2009, the State filed a petition seeking the involuntary civil commitment of Monroe as a Sexually Violent Predator (SVP). CP 1-2. The State alleged that Monroe suffers from a mental abnormality and/or personality disorder that makes him likely to engage in predatory acts of sexual violence. CP 1-2, 5-6. The Kitsap County Superior Court found probable cause to believe Monroe is an SVP and set the matter for trial. CP 3-4, 853-55.¹

On March 25, 2015, the jury found that the State proved beyond a reasonable doubt that Monroe is an SVP. CP 790. The trial court committed Monroe to the custody of the Department of Social and Health

¹ The court initially set the trial for November 2010. CP 855. In February 2011, the court found Monroe in contempt of court for refusing to comply with its order to participate in an evaluation with the State's expert. CP 876; *see also* CP 856-75. The court struck the trial date and stayed all proceedings until Monroe purged his contempt. CP 876. In May 2014, after Monroe complied with the previous court order, the court purged the contempt and set trial for March 2015. CP 877-82, 884-85. Monroe filed a waiver of time for trial to accommodate this trial date. CP 883.

Services at the Special Commitment Center (SCC) for control, care, and treatment until such time as his mental abnormality and/or personality disorder has so changed that he is safe to be released. CP 791. Monroe timely appealed. *See* CP 792-93.

B. Trial Testimony

1. Sexual Offending History and Sexual Deviancy

Monroe has a history of sexual behavior with prepubescent children dating back to age thirteen. *See* RP IV 543, 568; RP IX 1464-66. At age thirteen, Monroe touched a ten-year-old girl's genitals. RP IV 543-44; *see also* RP VII 1173-74, 1180. That same year, Monroe had sexual contact with his ten-year-old brother and fifteen-year-old step-brother. RP VII 1174, 1181. In 1984, sixteen-year-old Monroe sexually assaulted two stranger girls, ages five and seven, at a lake. RP III 422-25, 435; RP IV 532-34, 542, 568. A.P. testified that Monroe carried her into the water and touched her vagina underneath her swimming suit. RP III 433-48. A.C. also testified that Monroe carried her into the water and touched her vagina underneath her underwear. RP III 456, 459. Monroe was convicted of indecent liberties against a

child under the age of fourteen for the incident involving A.C. RP IV 532; CP 824-831.²

In 1998, Monroe sexually assaulted his biological daughter, C.T. RP VII 1079; RP VIII 1234, 1290-93.³ He repeatedly touched her vagina and rubbed his penis on her vagina. RP IV 561-62; RP VIII 1234, 1291. Monroe reported that he “didn’t know how to stop.” RP VII 1194; RP VIII 1292. C.T.’s mother, Michelle T., testified about her five year relationship with Monroe, which ended in 1998. *See* RP VII 1030-84. She learned about his sexual abuse of C.T. after observing her simulate sexual intercourse with nude Barbie dolls. *See* RP VII 1064-68. Monroe admitted to a treatment provider that he molested all three of his children. *See* RP III 325-26, 365-73; RP IV 563.⁴ Monroe admitted that he did not like bathing or changing his daughters because “something clicked” when he saw them naked. RP IV 569-70.

² The charge involving A.P. was dismissed in exchange for a plea to the charge involving A.C. *See* CP 824-31.

³ Records vary as to C.T.’s age at the time of the sexual assaults. Although Monroe told a treatment provider she was one year old, other records indicate she was four years old. RP IV 562; RP VII 1032, 1206-07; RP VIII 1292-93.

⁴ Monroe was twenty-two when he married sixteen-year-old Joanne who was pregnant with his child. RP VII 1175-76; CP 1098-1102. Monroe had one daughter with Joanne and two daughters with Michelle. RP VII 1032-33, 1041-45, 1176; CP 1102, 1105.

In 1999, Monroe repeatedly sexually assaulted two eight-year-old girls, T.M. and A.H. RP II 242-43, 262-73, 294; RP IV 546-50; 568-70; RP VII 1183-86; RP VIII 1254, 1263; CP 832-35, 1071-72, 1079-95. He admitted having similar inappropriate thoughts about these young girls when he saw them naked: "I started having those thoughts. I had thoughts of having sex with them." *See* RP IV 570, 584. Monroe admitted to engaging in more than one hundred sexual acts with these girls over a two-month period. RP IV 548-50, 568-70, 577; RP VI 902-07.

T.M.'s mother, Kelli S., testified that Monroe moved into their home during the summer of 1999 and offered to assist with her special needs children. *See* RP II 280, 287-92. Monroe offered and helped to treat T.M.'s hair for lice while she was nude in the shower. RP II 290-92. The sexual assaults consisted of forcing the girls to masturbate his penis, digital penetration, oral sex, and vaginal sexual intercourse. RP IV 548-56; RP VI 902-04; RP VIII 1270-73, 1291. T.M. testified about some of these sexual assaults at trial. RP II 262-73. Monroe continued to penetrate T.M.'s vagina with his penis even after she told him it hurt. RP IV 549-50; RP VIII 1271-72. T.M. testified that Monroe told her that her vagina was too small and taught her how to insert her fingers in her vagina to stretch it out. RP II 263-64; *see also* RP VIII 1270.

T.M. testified that she was present when Monroe sexually assaulted her friend, A.H. RP II 269-71. Monroe also made T.M. have sexual intercourse with her ten-year-old male cousin while he watched. RP II 272-73; *see also* RP IV 549; RP VIII 1274-75; RP IX 1574-75. During the investigation into these sexual assaults, a mother of two neighborhood girls reported to the police that Monroe fondled her daughters, ages five and six. RP IV 560-61; *see also* RP VII 1188-89. Monroe pleaded guilty to rape of child in the first degree for the incidents involving T.M. RP IV 546; CP 832-52.

Over the years, Monroe has admitted to having sexual fantasies and arousal to young girls. RP IV 563, 569; RP VIII 1233. Monroe admitted to a polygrapher that he viewed child pornography of nude minor girls. RP VIII 1289-90. He told a treatment provider that he emotionally identifies with children because they are easier to get along with and more fun. RP VII 1104. In 2007, Monroe reported that he wanted sex offender treatment to learn how “to function in society without deviant thoughts.” RP IV 569. Monroe has admitted that he needs help because he is not able to control his sexual behaviors. RP IV 618. Monroe has also admitted to having rape fantasies. RP IV 617.

2. Mental Abnormality and Personality Disorder

The State's expert, Dr. Hoberman, diagnosed Monroe with both a mental abnormality and a personality disorder. RP IV 638. Dr. Hoberman diagnosed Monroe with pedophilic disorder⁵ and testified that this disorder meets the definition of a mental abnormality. RP IV 565-66, 576-77, 633-37. Dr. Hoberman testified that Monroe has a strong and intense form of pedophilia that involves sexual penetration of very young girls. *See* RP IV 578-79. He testified that the DSM⁶ does not require an individual to have a preference for sexual contact with children in order to diagnose pedophilic disorder because it includes both an exclusive and nonexclusive category for the disorder. RP IV 574-76; RP V 807-09.

Dr. Hoberman also diagnosed Monroe with a personality disorder, noting that he meets criteria for more than one personality disorder. RP IV 566, 579-80. He diagnosed Monroe with antisocial personality disorder, borderline personality disorder, and traits of narcissistic personality disorder. RP IV 579-89, 590, 601. Dr. Hoberman explained that Monroe's disorder is also known as a "mixed personality disorder."

⁵ Pedophilic disorder is the recurrent, intense, sexually arousing fantasies or sexual urges or behaviors of sexual activity with prepubescent children over a period of at least six months and the person has acted on the urges or the urges or fantasies cause the person marked distress. RP IV 567-68.

⁶ "DSM" is The Diagnostic and Statistical Manual of Mental Disorders that is published by the American Psychiatric Association and provides descriptions of current mental disorders. RP IV 564-65.

RP IV 580-82. Dr. Hoberman testified that Monroe has a lot of maladaptive personality disorder traits:

So if one was to look at the definition of a personality disorder, you would see that what he has is a lot of chronic persistent maladaptive ways of thinking, feeling, relating to others and impulsivity forming categories of a personality disorder, and that they've been in existence for pretty much as long as we know about Mr. Monroe, which is starting when he was evaluated at age 16....

RP IV 580.

Dr. Hoberman testified in detail about the maladaptive traits of Monroe's antisocial personality disorder, including: failure to conform to social norms; deceitfulness and repeated lying; impulsivity and failure to plan ahead; irritability and aggressiveness; reckless disregard for the safety of others; consistent irresponsibility; and lack of remorse.

RP IV 581-87. Dr. Hoberman also testified in detail about the maladaptive traits of Monroe's borderline personality disorder, including: a pattern of unstable interpersonal relationships; identity disturbance; impulsivity; recurrent suicidal behavior; affective instability; chronic feelings of emptiness; and inappropriate and intense anger. RP IV 592-600. Although Dr. Hoberman did not assign a full diagnosis of narcissistic personality disorder, he testified that Monroe possesses several narcissistic traits, including a sense of entitlement, interpersonally exploitative, and lack of empathy. RP IV 590-92, 601.

Dr. Hoberman considered all of the above personality disorder traits and concluded that Monroe has a mixed personality disorder, also known as other specified personality disorder. RP IV 600-01; RP VI 978. Dr. Hoberman testified that Monroe's personality disorder "clearly" meets the statutory definition of personality disorder, which is "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." RP IV 602-03; RP VI 978; CP 807.⁷ Dr. Hoberman testified that a personality disorder, in and of itself, is sufficient under Washington law as a basis for commitment. RP IV 637. He testified that the definition of an SVP requires that the person suffer from "a mental abnormality or personality disorder." RP IV 637-38.

Dr. Hoberman testified that Monroe has "some very specific personality and behavioral features that...contribute to his risk[,] specifically, lack of remorse, shallow affect, callousness, lack of empathy, impulsivity, failure to accept responsibility, and lack of realistic goals. RP V 679-80. He evaluated Monroe for psychopathy and concluded that Monroe meets criteria for psychopathy, which means that he has a higher risk for sexual offending. *See* RP IV 619-26; RP V 678-80. Dr. Hoberman

⁷ The jury was instructed of this definition of personality disorder. *See* CP 807.

testified that only a subset of individuals with antisocial personality disorder meet criteria for psychopathy. RP IV 624.

Dr. Hoberman testified that Monroe's deviant sexual arousal (pedophilic disorder), combined with his antisocial personality traits and psychopathy, have a "very significant" effect on his risk. RP V 680-81. He testified that this is known as the "dynamic duo of sexual re-offending" such that "if both were present, the risk was greater than if either one was present by itself." RP V 680. Dr. Hoberman explained how Monroe's pedophilic disorder pulls him towards children and his personality disorder causes him to lack controls to refrain from sexually acting out:

If someone lacks those kinds of internal inhibitions or controls when they feel the push from the arousal or the pull from the object that they desire, then they don't have the inhibitions or the brakes to refrain from acting on it, or it's much more difficult, I would say, than it would be for someone else to not act on it. And so that's why this sort of dynamic duo becomes so significant.

RP V 681, 786-87.

Dr. Hoberman also diagnosed Monroe with an intellectual disability and hypersexuality, which is compulsive sexual behavior. RP IV 603-05, 628-29. He noted that Monroe has significant deficits in executive functioning, which affects his ability not only to learn from experience but also to self-regulate and control his behavior. RP IV 603-05, 638-39. Dr. Hoberman testified that these diagnoses

increase Monroe's difficulty controlling his sexually violent behavior and contribute to his likelihood of reoffending. *See* RP IV 638-40; *see also* RP V 790-93.

Dr. Hoberman concluded that Monroe has a mental abnormality and a personality disorder that make him likely to reoffend:

My opinion is that Mr. Monroe is characterized by a mental abnormality, pedophilic disorder, and a personality disorder I would describe as a mixed-personality disorder inclusive of antisocial and borderline personality disorder, as well as traits of narcissistic personality disorder and psychopathy, as making him likely to engage in predatory acts of sexual violence if not confined in a secured facility.

RP IV 646. Dr. Hoberman also testified that Monroe's pedophilic disorder "is sufficient as a mental abnormality to cause him serious difficulty in controlling his sexually-violent behavior" and make him likely to reoffend. RP V 791. Dr. Hoberman testified in detail about the in-depth risk assessment he conducted, which included actuarial risk assessment, structured clinical judgment, and an assessment of dynamic risk factors. *See* RP IV 646-62; RP V 672-91. Dr. Hoberman concluded that Monroe's risk is high and that he is likely to reoffend. *See* RP IV 646; RP V 690-91.

3. Sex Offender Treatment Providers

Several of Monroe's treatment providers testified at trial. *See* RP III 312-418; RP VII 1084-1219; VIII 1232-1312, 1333-1435; RP IX 1481-1531. In 2000, Dr. Joseph Jensen conducted a psychosexual

evaluation of Monroe and interviewed him for a possible special sentencing program. RP VII 1113-15, 1143-44. At the time of the 2000 evaluation, Dr. Jensen diagnosed Monroe with pedophilia and a personality disorder. RP VIII 1295-97, 1300-03. He described Monroe's personality disorder as a "mixed type" because he had traits from various categories of personality disorders, including antisocial, avoidant, and dependent traits. RP VIII 1300-03. Dr. Jensen testified that these disorders tend to be long-term, chronic in nature, and very resistant to change. RP VIII 1303.

Dr. Jensen testified that he made it clear to Monroe that he had to make a full disclosure of his sexual history and pass a polygraph examination. *See* RP VII 1144-46, 1160-61. Monroe told Dr. Jensen that he never molested his daughter, C.T., despite being sexually aroused around her. *See* RP VII 1187-88. It wasn't until Monroe faced a polygraph exam that he admitted to the polygrapher that he molested C.T. *See* RP VII 1189-91. When Dr. Jensen confronted Monroe about these inconsistencies, Monroe admitted the sexual abuse. RP VII 1190-91, 1194.

In 2007, Michael Jacobsen was Monroe's sex offender treatment provider in prison. RP III 316. Mr. Jacobsen testified that Monroe admitted to molesting his own children. RP III 325, 365-73. Monroe also told Mr. Jacobsen that he groomed the 1999 victims and became aroused

when he saw them naked. RP III 330-32. Monroe told him that he was going to have sex with the girls “no matter what it took.” RP III 330. Mr. Jacobsen testified that he was very intimidated by Monroe after learning of his fantasies to stab him in the neck with a pencil. RP III 334, 413.

Michelle Peyton was Monroe’s treatment provider in prison after Mr. Jacobsen. RP VII 1085-88. Ms. Peyton testified that Monroe reported a total of four unadjudicated victims and one index victim.⁸ RP VII 1089-91, 1101-02. She confronted him on the inconsistencies between this report and his prior report to a different treatment provider. RP VII 1102. Monroe quit treatment one week later. *See* RP VII 1102. Ms. Peyton testified that Monroe was only in treatment with her for three weeks and that he did not complete any treatment assignments other than the inconsistent disclosure. *See* RP VII 1089, 1104-06.

John Rockwell, Monroe’s case manager at the SCC, testified that Monroe reported getting excited by “roughhousing” and “tickling” children he used to babysit. RP VIII 1333-37, 1342-43. During a search of Monroe’s room at the SCC in 2013, staff found photographs of young-looking females. RP VIII 1348-50. Mr. Rockwell testified that the girls

⁸ An “index victim” refers to the victim Monroe was incarcerated for offending against at the time of treatment, which was T.M. *See* RP VII 1102.

looked “quite young” and appeared to be minors ranging in age from early to late adolescence. RP VIII 1350, 1353. He testified that Monroe refused to do an assignment on possessing this contraband. RP VIII 1353-56. Mr. Rockwell also testified that when Monroe got caught with other contraband, he told Mr. Rockwell, “Catch me if you can.” RP VIII 1390-92. Monroe told various lies to his treatment providers while at the SCC, including claiming he had multiple wives and claiming he was from the Middle East and English was not his primary language. *See* RP VIII 1347; RP IX 1487, 1510-13, 1525-26, 1555-56.

Leslie Cullen, one of Monroe’s treatment providers at the SCC, testified that she had concerns about Monroe’s motivation for treatment. RP VIII 1394-97, 1402. Monroe was suspended from treatment and failed to do any treatment assignments. RP VIII 1401-02, 1406-10. Debra LaRowe-Prado, another one of Monroe’s SCC treatment providers, testified that Monroe never did a disclosure of his sexual offending as requested. RP IX 1492-94. She testified that Monroe rarely attended treatment and missed approximately 75 to 80 percent of the treatment groups. RP IX 1494-96. Monroe was eventually suspended from group for numerous unexcused absences. RP IX 1497-1500. Ms. LaRowe-Prado testified that Monroe refused to do a fantasy and masturbation journal.

RP IX 1502-03. She also testified that Monroe was not willing to discuss any of his sexual deviancy issues. RP IX 1501.

4. Rick Monroe

At trial, Monroe claimed that he could not recall how many children he sexually assaulted and that he was “working on trying to remember them all.” RP IX 1569-70. He then testified that he remembered sexually assaulting six children. *See* RP IX 1569-71. Throughout his trial testimony, Monroe claimed not to remember any details of his sexual offending history, despite the fact that Monroe testified to many of these details in a video deposition taken just two months before trial. *See e.g.* RP IX 1542-46, 1572-85; CP 1070-95, 1127-34, 1166-71.⁹ Despite previously admitting to committing more than one hundred acts of sexual assault against T.M. and A.H., Monroe claimed to not remember any details of these sexual assaults at trial. *See* RP IX 1579-80; RP VI 902-05; *see* CP 1079-95.

He also testified that he did not molest C.T. and that he never told anyone that he did. *See* RP IX 1564-68. Dr. Donaldson, Monroe’s expert, observed Monroe’s testimony and testified that his repeated claims of not

⁹ The State played several portions of Monroe’s video deposition at trial. *See* CP 1063-1185.

remembering various events was his way of shutting down to avoid talking about details that he did not want to discuss. *See* RP X 1738-39.

5. Dr. Donaldson

Monroe's only witness at trial was his retained expert, Dr. Donaldson. Dr. Donaldson testified that Monroe did not have a mental abnormality or antisocial personality disorder. *See* RP X 1652-57, 1691, 1694. However, Dr. Donaldson testified that Monroe "fits the requirements for several personality disorders." RP X 1695.¹⁰ Dr. Donaldson testified that "anyone with serious disturbance is going to have some characteristics of many of the personality disorders" and that Monroe "has some characteristics of all of those things because he is significantly impaired across the board." RP X 1774.

Dr. Donaldson testified that there is evidence that Monroe has borderline personality disorder. *Id.* Dr. Donaldson also noted numerous personality disorder traits present in Monroe, including: impulsivity and failure to plan ahead; reckless disregard for the safety of others; consistent irresponsibility; and narcissistic traits. *See* RP X 1771-74. Dr. Donaldson testified about Monroe's executive functioning deficits and about the "hints all through his file that there was something neurologically wrong

¹⁰ Dr. Donaldson testified that these personality disorders "are not very important" and to "really define a personality disorder with all of [Monroe's] other problems is very difficult." RP X 1695.

with this guy at a very basic level[.]” *See* RP X 1683-91, 1695-96, 1782-83. Dr. Donaldson testified that after reviewing all of the records involving Monroe, he still did not know anything about him due to his variable reporting of his history: “[y]ou couldn’t put any stock in it at all.” RP X 1658-59.

Dr. Donaldson testified that he did not diagnose Monroe with pedophilia because he believes there should be evidence of a preference for sexual contact with children. RP X 1691-92, 1701. Despite not assigning an official diagnosis of pedophilia, Dr. Donaldson admitted that Monroe met all of the criteria required in the DSM for the diagnosis. *See* RP X 1767-71.

6. Jury Instructions

At trial, Monroe did not object to the State’s proposed “to commit” jury instruction or the Court’s instruction to the jury. RP X 1822; *see also* RP XI 1837; *see* CP 993-1028. Monroe also did not propose a unanimity instruction. *See* CP 1029-35.¹¹ The Court instructed the jury in order to commit Monroe as an SVP, the State must prove each of the following elements beyond a reasonable doubt: (1) That Monroe has been convicted of a crime of sexual violence; (2) That Monroe suffers from a

¹¹ Monroe only submitted two jury instructions to the trial court and did not submit a “to commit” instruction. *See id.*

mental abnormality or personality disorder which causes him serious difficulty controlling his sexually violent behavior; and (3) That this mental abnormality or personality disorder makes Monroe likely to engage in predatory acts of sexual violence if not confined to a secure facility. CP 805.

IV. ARGUMENT

A. **There Was Sufficient Evidence to Prove Monroe Suffers From a Mental Abnormality or Personality Disorder.**

Monroe argues that there was insufficient evidence to commit him as an SVP because the disjunctive language in the “to commit” jury instruction allowed the jury to base its verdict on a finding that Monroe had either a mental abnormality *or* personality disorder. Brief of Appellant at 9-10. He argues that the jury should have been instructed that it had to find he suffers from a “mental abnormality *and* personality disorder.” *Id.* at 12 (emphasis added). Monroe’s argument is without merit. Washington courts have held that jurors are not required to unanimously determine whether it was the mental abnormality or the personality disorder that made a person likely to reoffend. “Mental abnormality” and “personality disorder” are alternative means for making an SVP determination and there was substantial evidence presented at trial for the jury to find either alternative means.

1. Standard of Review

The adequacy of jury instructions is reviewed de novo. *State v. Killingsworth*, 166 Wn. App. 283, 288, 269 P.3d 1064 (2012). “Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Id.* When reviewing a challenge to the adequacy of a jury instruction, appellate courts read it as an ordinary, reasonable juror would. *Id.*

In reviewing the sufficiency of the evidence in an SVP case, a reviewing court applies the criminal standard. *In re Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). “Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* The critical inquiry is whether the evidence could reasonably support a finding of guilt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979).

A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *In re Detention of Audett*, 158 Wn.2d 712, 727, 147 P.3d 982 (2006).

The commitment will be upheld if any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Audett*, 158 Wn.2d at 727-28. A reviewing court should defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Detention of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005).

2. Monroe Did Not Object to the Court's Instruction and Monroe May Not Raise This Issue For the First Time on Appeal.

At trial, Monroe did not object to the State's proposed "to commit" jury instruction or the Court's instruction to the jury. RP X 1822; *see also* RP XI 1837; CP 993-1028. Monroe also did not propose a unanimity instruction. *See* CP 1029-35. CR 51(f) required Monroe to make a timely objection and to state distinctly what he was objecting to and the grounds for his objection. *See* CR 51(f).¹² As a general rule, appellate courts will not consider an issue raised for the first time on appeal. RAP 2.5(a); *In re Detention of Reyes*, 176 Wn. App. 821, 842, 315 P.3d 532 (2013), *review granted on other grounds and aff'd by In re Detention of Reyes*, 184 Wn.2d 340, 358 P.3d 394 (2015). This rule reflects a policy of encouraging efficient use of judicial resources and

¹² SVP commitment proceedings are civil proceedings and therefore subject to the civil rules. *In re Detention of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002).

giving trial courts an opportunity to correct claimed errors. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

An exception to the rule is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Appellate courts do not assume the alleged error is of constitutional magnitude. *See Scott*, 110 Wn.2d at 495. The appellate court should determine whether the error “is truly of constitutional magnitude – that is what is meant by ‘manifest.’” *Scott*, 110 Wn.2d at 495. “Manifest” means that a showing of actual prejudice is made. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). If the asserted error is not a constitutional error, the court may refuse review on that ground. *Scott*, 110 Wn.2d at 495. If the claim is constitutional, then the court should examine the effect the error had on the trial under the harmless error standard. *Id.*

The constitutional error exception is not intended to afford individuals a means for obtaining new trials whenever they can identify a constitutional issue not litigated below. *Id.*; *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). “The exception actually is a narrow one, affording review only of ‘certain constitutional questions.’” *Scott*, 110 Wn.2d at 495; *see also State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (“we construe the exception narrowly by

requiring the asserted error to be (1) manifest and (2) ‘truly of constitutional magnitude.’”).

By failing to object below, Monroe did not give the trial court an opportunity to correct the alleged error. Thus, Monroe has not preserved this issue for appeal. *See State v. Bertrand*, 165 Wn. App. 393, 400, 267 P.3d 511 (2011). Monroe argues that he is entitled to raise this issue for the first time on appeal. Brief of Appellant at 16-17. Monroe may not appeal this issue because the instructional error he alleges is not a manifest constitutional error. *See In re Detention of Sease*, 149 Wn. App. 66, 74-75, 201 P.3d 1078 (2009).

Monroe must first identify a constitutional error and then show how it actually affected his rights at trial. *See McFarland*, 127 Wn.2d at 333. An error is “manifest” if it either (1) results in actual prejudice; or (2) a plausible showing is made that the error had practical and identifiable consequences at trial. *Reyes*, 176 Wn. App. at 842; *see also McFarland*, 127 Wn.2d at 333. The lack of a *required* unanimity instruction has been held to be an error of constitutional magnitude that may be raised for the first time on appeal *if* it is manifest. *Sease*, 149 Wn. App. at 75. If the trial court’s failure to give a unanimity instruction was error and, if that error affected Monroe’s rights, the error is subject to the harmless error analysis. *See id.*

This Court's ruling in *Sease* is dispositive. *See id.* at 74. Sease did not propose a unanimity instruction and did not object to the State's proposed jury instructions or the Court's instructions to the jury. *Id.* Sease argued for the first time on appeal that the trial court denied him his right to a unanimous jury by failing to give a unanimity instruction. *Id.* This Court held that "it was not error, manifest or otherwise, for the trial court to fail to give a unanimity instruction and, therefore, Sease cannot appeal this issue." *Id.* at 75; *see also Reyes*, 176 Wn. App. at 842-44 (SVP may not raise an open courtroom violation for the first time on appeal because he failed to establish that the violation was manifest).¹³ *Sease* provides clear authority that Monroe may not raise this issue for the first time on appeal. *See Sease*, 149 Wn. App. at 74-75. Because Monroe's non-preserved claim of error is neither manifest nor truly of constitutional magnitude, Monroe has not preserved this issue for appeal. *See Bertrand*, 165 Wn. App. at 402-03.

¹³ On the contrary, Division I of the Court of Appeals found that the lack of a required unanimity instruction is an issue of constitutional magnitude subject to review for the first time on appeal. *In re Detention of Ticeson*, 159 Wn. App. 374, 387-88, 246 P.3d 550 (2011), *abrogated on other grounds by State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). However, the *Ticeson* court did not engage in any analysis as to whether the alleged error was manifest and ultimately held that no unanimity instruction was required. *See id.* at 387-89.

3. The Trial Court Properly Instructed the Jury on the Elements Necessary to Commit Monroe as an SVP.

Even if this Court does reach the issue, the trial court properly instructed the jury as to the elements the State was required to prove to commit Monroe as an SVP. It was not error, manifest or otherwise, for the trial court to instruct the jury that it may commit Monroe as an SVP on the basis of his mental abnormality or personality disorder. *See Sease*, 149 Wn. App. at 74. Unanimity was not required. *See Ticeson*, 159 Wn. App. at 388-89.

The “to commit” instruction¹⁴ was consistent with Washington Pattern Instruction (WPI) 365.10,¹⁵ which directs courts to instruct in the disjunctive “or” as opposed to the conjunctive “and” between “mental abnormality” and “personality disorder.” *See* CP 805. The pattern instruction and the “to commit” instruction are also consistent with the statutory definition of “sexually violent predator,” which also includes “or” in between the two terms.¹⁶

¹⁴ The “to commit” instruction is Jury Instruction No. 6.

¹⁵ WPI 365.10 provides the following on how to instruct the jury on the SVP elements: “That (respondent’s name) suffers from a [mental abnormality] [or personality disorder] which causes serious difficulty in controlling [his] [her] sexually violent behavior[.]”

¹⁶ A “sexually violent predator” means “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality *or* personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18) (emphasis added).

The jury's verdict was not based on "guess, speculation, or conjecture" as claimed by Monroe. *See* Brief of Appellant at 14-15. Viewing the evidence in the light most favorable to the State, there was substantial evidence presented at trial to support the jury's verdict. "The verdict of a jury founded upon facts is entitled to great weight, and is almost conclusive upon this court if supported by any evidence." *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940).

a. Controlling Authority Establishes That a Unanimity Instruction is Not Necessary Where There is Substantial Evidence of Each Alternative Means.

Monroe does not dispute that there is sufficient evidence in the record to prove that he suffers from both a mental abnormality and a personality disorder. Rather, he argues that the "to commit" instruction was flawed because it used the disjunctive "or" on the issue of whether Monroe had a mental abnormality or personality disorder. He asserts that this improperly allowed the jury to base its verdict on a finding that either the mental abnormality or personality disorder made him likely to reoffend, as opposed to requiring the jury to find "both conditions" made him likely to reoffend. Brief of Appellant at 9-10. Monroe cites no SVP

authority for this proposition. In fact, Washington courts have reached the opposite conclusion.

The right to a unanimous jury verdict applies in SVP commitments. *In re Detention of Halgren (Halgren II)*, 156 Wn.2d 795, 807-09, 132 P.3d 714 (2006); *In re Detention of Pouncy*, 144 Wn. App. 609, 617, 184 P.3d 651 (2008). However, the Washington Supreme Court has held that the alternative means test applies to SVP proceedings. *Halgren II*, 156 Wn.2d at 810-12. Thus, when a “mental abnormality” and “personality disorder” are alternative means of establishing the mental illness element in an SVP commitment, unanimity as to which means supports a basis for commitment is not required. *Id.*

In *Halgren*, the State’s evidence showed that Halgren suffered from a mental abnormality and a personality disorder. *Id.* at 800. The State’s expert testified that the combination of these two disorders caused Halgren difficulty controlling his behavior. *In re Detention of Halgren (Halgren I)*, 124 Wn. App. 206, 211, 214, 98 P.3d 1206 (2004). The Court of Appeals rejected Halgren’s argument that the jury must be unanimous as to whether it was the mental abnormality *or* personality disorder that made him likely to reoffend. *Id.* at 213. The Supreme Court affirmed, holding that the right to a unanimous jury was not violated because, under the alternative means test,

there was substantial evidence that Halgren had both a mental abnormality and a personality disorder. *Halgren II*, 156 Wn.2d at 812.

Where there is substantial evidence that a person has a mental abnormality and a personality disorder, the two conditions are alternative means for making the SVP determination and the jury need not reach a unanimous verdict as to which condition makes him likely to reoffend. *Id.* at 810-12. The SVP statute “defines two means – ‘mental abnormality’ or ‘personality disorder’ – of a single mental illness status.” *Halgren I*, 124 Wn. App. at 216. When that status is coupled with the other statutory criteria, civil commitment as an SVP is required. *Id.*

An argument similar to Monroe’s was rejected by Division I in *Ticeson*, 159 Wn. App. 374. Similar to Monroe, the State’s expert in *Ticeson* diagnosed Ticeson with both a mental abnormality and personality disorder. *See id.* at 378. The State’s expert testified that Ticeson’s personality disorder caused him to have difficulty controlling his behavior. *Id.* The trial court instructed the jury that it must determine whether Ticeson suffers from “a mental abnormality and/or personality disorder” that makes him likely to reoffend. *Id.* Ticeson did not contest the sufficiency of the evidence for either diagnosis; rather, he argued on appeal that there was insufficient evidence to show that his personality disorder, standing alone, made him likely to reoffend. *Id.* at 388.

The Court of Appeals rejected Ticeson's argument that a unanimity instruction was constitutionally required. *Id.*

Citing *Halgren II*, the Court noted that the State's expert testified that Ticeson's personality disorder causes him serious difficulty controlling his sexually violent behavior and that this "is sufficient to allow a rational juror to find Ticeson's personality disorder makes him likely to reoffend." *Ticeson*, 159 Wn. App. at 388-89. The Court held that no unanimity instruction was required because there was substantial evidence to support either alternative means:

Where an element may be established by alternative means, a particularized expression of unanimity as to the means relied upon to reach the verdict is not required so long as there is substantial evidence to support a verdict on each alternative. If a rational juror could have found each means proved beyond a reasonable doubt, no unanimity instruction is necessary.

Id. at 388-89 (footnotes omitted); see *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994) ("If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means.") (emphasis in original).

Thus, it is well settled that a jury is not required to unanimously agree on whether it is the mental abnormality or the personality disorder that makes the person likely to reoffend. *See Ticeson*, 159 Wn. App. at 388-89; *see also Sease*, 149 Wn. App. at 82 (“We hold that the State need not prove beyond a reasonable doubt which mental abnormality or personality disorder causes a person to be an SVP[.]”).

Further, the alternative means analysis does not apply to circumstances involving “means within a means.” *Pouncy*, 144 Wn. App. at 618. In *Pouncy*, the court found that the jury was properly instructed that it must unanimously agree as to whether *either* of the two alternative means, mental abnormality or personality disorder, were proved beyond a reasonable doubt. *Id.* at 619-20. No further instruction as to unanimity was required. *Id.* at 620.

Unanimity is not required if the alternative means are not repugnant to each other. *Halgren II*, 156 Wn.2d at 810. In making an SVP determination, the mental abnormality and personality disorder are closely connected and may operate independently or work in conjunction with each other. *Id.* Thus, because an SVP may suffer from both mental illnesses simultaneously, they are not repugnant to each other. *Id.*; *see also State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976) (When alternative means of committing a crime are charged that are not

repugnant to each other, and there is substantial evidence to support each alternative means, jury unanimity as to the mode of commission is not required.).

b. Sufficient Evidence Supported the Alternative Means of Mental Abnormality or Personality Disorder as a Basis for Monroe's Commitment as an SVP.

Monroe does not dispute the sufficiency of the evidence showing that he has a mental abnormality and a personality disorder. In fact, there was substantial evidence presented at trial for the jury to conclude that either condition caused Monroe difficulty controlling his behavior and made him likely to reoffend. Monroe appears to ask this Court to disregard the State's evidence and rely instead on the testimony of his expert, Dr. Donaldson. *See* Brief of Appellant at 13-14. However, this is not the standard for reviewing a sufficiency challenge. All evidence must be reviewed in the light most favorable to the State. *Thorell*, 149 Wn.2d at 744.

Dr. Hoberman testified that Monroe's mental abnormality was a strong and intense form of pedophilia that involves actual sexual penetration of very young girls. *See* RP IV 566, 576-79, 633-37. He testified that Monroe's pedophilic disorder "is sufficient as a mental

abnormality to cause him serious difficulty in controlling his sexually-violent behavior” and make him likely to reoffend. RP V 791.

Dr. Hoberman also testified that Monroe suffers from a mixed personality disorder and that he has “a lot of maladaptive personality disorder traits.” RP IV 566, 579-601.¹⁷ He testified that Monroe’s personality disorder “clearly” meets the statutory definition of a personality disorder. RP IV 602-03; RP VI 978; *see also* CP 807. Moreover, Dr. Hoberman testified that a “personality disorder, *in and of itself*, is sufficient under Washington law” as a basis for commitment. RP IV 637 (emphasis added). He accurately testified that a person has to suffer from a mental abnormality *or* personality disorder, and that either one of these conditions must cause the person serious difficulty controlling his sexually violent behavior. *See* RP IV 637-38.

Monroe claims that his expert, Dr. Donaldson, “opined Mr. Monroe did not suffer from a personality disorder.” Brief of Appellant at 14. This mischaracterizes Dr. Donaldson’s testimony. Dr. Donaldson testified that he did not diagnose “*antisocial* personality disorder.” RP X 1694 (emphasis added). Dr. Donaldson testified that there is evidence that Monroe has borderline personality

¹⁷ He diagnosed Monroe with antisocial personality disorder, borderline personality disorder, and traits of narcissistic personality disorder. RP IV 579-90, 601.

disorder and that anyone with “serious disturbance” is going to have some characteristics of many personality disorders. RP X 1774. Dr. Donaldson testified that Monroe is “significantly impaired across the board” and “*fits the requirements for several personality disorders.*” RP X 1695, 1774 (emphasis added). Thus, even Monroe’s own expert, agreed that Monroe has a personality disorder.

Dr. Hoberman testified that Monroe has some “very specific personality and behavioral features that...contribute to his risk.” RP V 679-80. He testified that Monroe’s risk is increased because he fits into a subset of individuals with antisocial personality disorder who also have psychopathy. *See* RP IV 619-26; RP V 678-80. Dr. Hoberman testified that Monroe’s pedophilic disorder, combined with his personality disorder and psychopathy, have a “very significant” effect on his risk such that his risk is “greater than if either one was present by itself.” RP V 680-81. Dr. Hoberman explained that Monroe’s pedophilic disorder pulls him towards children and his personality disorder makes him unable to refrain from acting on those desires because he lacks internal inhibitions and controls. RP V 681.

Thus, as noted in *Halgren*, Monroe’s mental abnormality and personality disorder are not repugnant to each other and may operate independently or work in conjunction with each other. *See Halgren II*,

156 Wn.2d at 810. Dr. Hoberman concluded that Monroe has a mental abnormality and a personality disorder that make him likely to reoffend. RP IV 646.¹⁸

Monroe argues that the “to commit” instruction “may have misled the jury into believing it could find Mr. Monroe was an SVP based on the mental abnormality or personality disorder alone as the cause of risk of re-offense.” Brief of Appellant at 13. Monroe’s argument shows a clear misunderstanding of the law on this issue. As *Halgren* and *Ticeson* clearly establish, the jury was entitled to base its verdict on either the mental abnormality or personality disorder as alternative means as long as there was substantial evidence to support each means. *See Halgren II*, 156 Wn.2d at 810-12; *see also Ticeson*, 159 Wn. App. at 388-89. Monroe fails to cite to this legal authority in his briefing. Viewing the evidence in the light most favorable to the State, there was substantial evidence for a rational jury to find that either condition made Monroe likely to reoffend. Sufficient evidence supported the alternative means and there was no instructional error.

¹⁸ Monroe claims that Dr. Hoberman testified that “*the combination* of the mental abnormality and personality disorder” made him likely to reoffend. Brief of Appellant at 12 (emphasis added). This mischaracterizes Dr. Hoberman’s testimony. *See* RP IV 646.

B. Trial Counsel Was Not Ineffective For Not Objecting to a Jury Instruction That Accurately Reflected the Law.

Monroe argues that his trial counsel was ineffective for not objecting to the “to commit” instruction. Brief of Appellant at 18-19. To establish ineffective assistance of counsel, Monroe must show: (1) that counsel’s performance was deficient; and (2) that such deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687, (1984); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Monroe cannot show that counsel was ineffective for choosing not to object to a jury instruction that accurately reflected the law. His argument lacks merit and should be rejected.

The first prong of the *Strickland* test requires a showing that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *Brett*, 126 Wn.2d at 198. There is a strong presumption that counsel’s representation was effective. *In re Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004); *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Counsel’s competency is determined based on the entire record below. *McFarland*, 127 Wn.2d at 335; *see also State v. Piche*, 71 Wn.2d 583, 591, 430 P.2d 522 (1967) (“the competence of counsel must be judged from the whole record and

not from isolated segments of it”). The relevant question is whether counsel’s choices were reasonable. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Monroe fails to satisfy the first prong of the *Strickland* test. The “to commit” instruction was consistent with the statute, the Washington Pattern Instruction, *Halgren*, *Ticeson*, and the evidence presented at trial. It was reasonable for Monroe’s counsel, as did counsel for the State and the trial court, to rely on the statutory language, Washington Pattern Instruction, and well-established case law in giving the instruction. Monroe’s counsel was not ineffective where significant legal authority supported their decision. Because Monroe failed to satisfy the first prong of the *Strickland* test, this Court need not address the second prong. *See State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (“If either part of the test is not satisfied, the inquiry need go no further.”). Nonetheless, he cannot show any prejudice stemming from an instruction that is an accurate statement of the law.

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V. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the civil commitment of Monroe as an SVP.

RESPECTFULLY SUBMITTED this 14th day of April, 2016.

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NO. 47414-0-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

RICK ALLEN MONROE,

Appellant.

DECLARATION OF
SERVICE

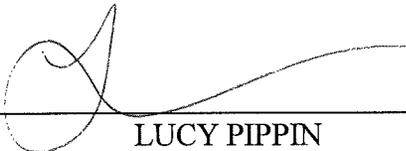
I, LUCY PIPPIN, hereby declare as follows:

On April 4, 2016, I served, via electronic mail and regular USPS mail, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

LISA TABBUT
P.O. Box 1319
Winthrop, WA 98862
LTABBUTLAW@GMAIL.COM

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

DATED this 4th day of April, 2016, at Seattle, Washington.



LUCY PIPPIN

WASHINGTON STATE ATTORNEY GENERAL

April 04, 2016 - 1:23 PM

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