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NO. 50946-6

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

In re the Detention of Timothy McMahon,

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY MCMAHON,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Following a trial, a jury found beyond a reasonable doubt that Timothy McMahon is a sexually violent predator. McMahon now seeks reversal, arguing that the State committed prosecutorial misconduct during closing argument when it argued that under the defense expert's theory, McMahon's alcohol use disorder also qualified as a "mental abnormality" as defined by statute. This Court should reject his claims.

Both the State's expert and McMahon's expert testified extensively about McMahon's alcohol use disorder at trial. The State's expert testified that the disorder affects McMahon's ability to control his behavior and is a long-term risk factor for his sexual reoffending. McMahon's expert testified that the disorder was in remission, but he acknowledged that it is a chronic, relapsing condition. He opined that the disorder impaired McMahon's psychological functioning, induced antisocial personality traits, and caused McMahon's prior sexual offending.

In light of this testimony, it was a reasonable inference from the evidence that McMahon's alcohol use disorder also qualifies as a mental abnormality. Thus, the State's argument about the defense expert's theory was proper. Further, even if this argument were improper, McMahon cannot show prejudice in light of the overwhelming evidence that he suffered from at least one mental abnormality and the fact that an instruction could have

cured any resulting prejudice. Accordingly, McMahon cannot meet his burden to show prosecutorial misconduct. He likewise cannot meet his burden to show that his trial counsel was ineffective for failing to object to the alleged misconduct. This Court should affirm.

II. RESTATEMENT OF THE ISSUES

- A. **Where the defense expert testified that McMahon's sexual offending was driven primarily by his alcohol use disorder, and McMahon's counsel did not object to the State's argument that under that theory the alcohol use disorder qualifies as a mental abnormality, does McMahon fail to show prosecutorial misconduct?**
- B. **Where expert testimony supported the State's argument, does McMahon fail to show ineffective assistance of counsel based on a failure to object to that argument?**

III. STATEMENT OF THE CASE

A. McMahon's History of Sexual Offending

Timothy McMahon has a long history of sexual offending against young girls. He has been convicted of at least six sexually violent offenses as that term is defined in RCW 71.09.020(17). CP at 17, 57.

In 1985, McMahon was arrested after his six-year-old stepdaughter and his three-year-old daughter disclosed that he had touched their genital areas. CP at 58-59; RP at 191-95, 299, 699.¹ The six-year-old revealed that

¹ The Report of Proceedings contains six separate volumes. Because these volumes are consecutively paginated, citations to the Report of Proceedings omit the volume number.

McMahon touched her genital area three separate times and had twice forced her to touch his penis with her hand until he ejaculated. RP at 299, 306, 699. The three-year-old told police that McMahon had “hurt” her genital area. RP at 699. McMahon admitted it was possible that he inserted his tongue into the six-year-old’s mouth. RP at 306, 699. He also admitted that the six-year-old had touched his penis, saying that she grabbed it “like she knew what she was doing.” RP at 306, 700. A jury convicted McMahon of one count of indecent liberties. RP at 701. McMahon now claims the six-year-old touched his genitals while he was sleeping, and she made up the rest of the story because he scolded her. RP at 198-201, 299.

In 1996, McMahon was arrested after a twelve-year-old girl reported that he had repeatedly molested her. CP at 65-66; RP at 205, 300, 704. The girl occasionally stayed overnight at McMahon’s house because she was friends with his girlfriend’s daughters. RP at 300. She described many incidents of molestation by McMahon. RP at 300, 704-05. Several times, McMahon grabbed and rubbed her breasts. RP at 300. Another time, McMahon stuck his fingers under her nightgown and lifted it up to peer underneath. RP at 300. McMahon also touched her buttocks on numerous occasions, kissed her, and made comments to her about her body. RP at 300. Some of these incidents occurred while she pretended to be asleep. RP at 705. McMahon told police that he could not remember these incidents, but

he could offer no reason as to why they would not be true. RP at 705. In 1997, a jury convicted McMahon of two counts of child molestation in the second degree. CP at 66; RP at 301. McMahon now claims that these allegations are contrived. RP at 207-08, 301.

In 2003, McMahon's three stepdaughters (RMC, CRC, and KEC) reported that he had repeatedly molested them when they were young. CP at 70; RP at 301-02. They also disclosed that he repeatedly exposed his genitals in their presence and masturbated in front of them. CP at 26, 70-72; RP at 302-04, 702.

McMahon started molesting RMC when she was about nine years old. RP at 302. He molested her approximately 30 different times. RP at 302, 702. She recalled one instance when he touched her genitals for several minutes and said, "you're making me hard." RP at 302. She also recalled frequently seeing him with his bathrobe open and genitals exposed, seeing him with erections, and seeing him masturbate. RP at 302-03, 703.

McMahon started molesting CRC when she was about nine years old. RP at 302. He rubbed her genitals over her clothing while she pretended to be asleep, and he rubbed the skin at the top of her pelvic bone. RP at 107, 303. One time, while they were playing cards, he masturbated and ejaculated. RP at 302. In yet another instance, he disrobed and asked her to

tie him up like a cow. RP at 303, 108. CRC also recalled seeing McMahon walk around the home unclothed on several occasions. RP at 106-07.

McMahon started molesting KEC when she was about six years old. CP at 71; RP at 302. One time—after she asked McMahon to read her a book—he climbed into bed with her, took her hand, and placed it on his penis. RP at 702. In other incidents, he groped her breast and touched her genital area. RP at 304, 703. Like her two sisters, KEC also reported that McMahon would walk around the house with his penis exposed and would touch his genitals. RP at 703. The sexual abuse of KEC continued until she was approximately 12 or 13 years old, which was after McMahon was released from prison for his 1997 convictions. RP at 304-05, 703.

McMahon denied sexually abusing his stepdaughters and claimed that they colluded together out of anger. RP at 220, 305. Nonetheless, he ultimately pled guilty to three counts of child molestation in the first degree. RP at 223. In 2005, the court sentenced him to 149 months for these offenses. RP at 223.

B. Sexually Violent Predator Petition

In February 2017, before McMahon's release from prison, the State filed a petition seeking to commit him as a sexually violent predator under chapter 71.09 RCW. CP at 1-2. A sexually violent predator is "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). A “mental abnormality” is “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.” RCW 71.09.020(8).

In support of its petition, the State relied on a report from Dr. C. Mark Patterson, Ph.D. CP at 14-40. Dr. Patterson initially evaluated McMahon in March 2015. CP at 15. As part of that evaluation, Dr. Patterson reviewed thousands of pages of documents related to McMahon’s background, interviewed McMahon, and conducted a comprehensive risk assessment. CP at 15, 55-57. In November 2016, Dr. Patterson reviewed additional documents and conducted another risk assessment. CP at 16-17, 29-36. In his updated evaluation report, Dr. Patterson opined that McMahon meets the sexually violent predator criteria. CP at 37.

C. Initial Commitment Trial

The case proceeded to a jury trial in August 2017. *See* RP at 1-906. At trial, the State presented expert testimony from Dr. Patterson. RP at 278-451. Dr. Patterson testified that McMahon suffers from five mental disorders: (1) pedophilic disorder, (2) antisocial personality disorder,

(3) exhibitionistic disorder, (4) alcohol use disorder, and (5) cannabis use disorder. RP at 312. He testified that the pedophilic disorder and the antisocial personality disorder affect McMahon's emotional and volitional capacity and predispose him to commit sexual acts. RP at 340-43. Accordingly, he testified that McMahon has a mental abnormality. RP at 343. Dr. Patterson also testified that McMahon's mental abnormality causes him serious difficulty controlling his behavior. RP at 340-44. He explained that both the pedophilic disorder and the antisocial personality disorder on their own create serious difficulty, and the combination of these disorders makes it even more difficult for McMahon to control his behavior. RP at 344. Dr. Patterson further testified that the alcohol use disorder is an "important contributing factor" to McMahon's inability to control his behavior and that McMahon's chronic alcohol abuse is a long-term risk factor for sexual reoffending. RP at 344-45, 371-72.

Dr. Patterson testified that McMahon is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. RP at 345, 369-70. In reaching this conclusion, he relied on several actuarial instruments, considered various risk factors, and applied his clinical judgment. RP at 350. McMahon's scores on the actuarial instruments placed him in the following risk categories: "above average,"

“well above average,” “moderately high,” and “high-risk.” RP at 356, 359, 360, 362.

McMahon’s expert, Dr. Brian Abbott, disagreed with Dr. Patterson’s diagnoses of pedophilic disorder and antisocial personality disorder. RP at 612-14, 621-29, 710-16. Dr. Abbott testified that McMahon’s sexual offending was “driven primarily” by severe alcohol use disorder, which he diagnosed using the criteria in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V). RP at 613-15, 708. Dr. Abbott explained that the alcohol use disorder “impaired [McMahon’s] psychological functioning,” and “caus[ed] him to act in antisocial ways and have antisocial attitudes,” such as aggression, impulsivity, lack of remorse, irresponsibility, and reckless disregard for the safety of others. RP at 614-15. He testified that these attitudes “lead[] him to act irresponsibly and impulsively in managing his sexual impulses.” RP at 716. In his opinion, McMahon’s “sex-offender behavior was related to those characteristics induced by the alcohol use disorder.” RP at 614-15.

Despite linking McMahon’s sexual offending directly to his severe alcohol use disorder, and acknowledging that the disorder is a congenital or acquired condition, Dr. Abbott testified that the disorder was not a mental abnormality. RP at 615. He also testified that the disorder is currently in remission, although he acknowledged that alcohol use disorder is a “chronic

relapsing condition,” and that it was “possible [McMahon] could resume drinking, if released.” RP at 616-18, 708.

During closing arguments, the State argued that McMahon suffers from a mental abnormality that causes him serious difficulty controlling his sexually violent behavior. RP at 826-33. In support of this argument, the State pointed to Dr. Patterson’s testimony that McMahon suffers from a number of disorders, including pedophilic disorder and antisocial personality disorder, which “work together to create a mental abnormality.” RP at 830-31. The State also pointed to Dr. Abbott’s testimony that McMahon has severe alcohol use disorder. RP at 833. Relying on Dr. Abbott’s testimony that McMahon’s alcohol use disorder is a congenital or acquired condition, caused him to act irresponsibly and impulsively in managing his sexual impulses, and led to his prior sexual offending, the State argued that under Dr. Abbott’s theory, this disorder also qualifies as a mental abnormality. RP at 833. McMahon’s counsel did not object to this argument. *See* RP at 833.

McMahon’s attorney focused on McMahon’s alcohol use disorder in closing argument. RP at 841-43. She emphasized that both experts testified that McMahon has alcohol use disorder and that his condition is severe. RP at 841. She also stressed how much the disorder affects McMahon’s behavior, arguing that it is “pervasive and insidious and it

governs everything that has gone on in his life,” including “defin[ing] his sexual behavior.” RP at 842.

At the conclusion of the trial, the jury found that the State proved beyond a reasonable doubt that McMahon is a sexually violent predator. CP at 229. The trial court entered an order of commitment, which McMahon now appeals. CP at 230-31.

IV. ARGUMENT

A. McMahon Fails to Meet His Burden of Proving Prosecutorial Misconduct

McMahon first claims that reversal is required because the Assistant Attorney General committed prosecutorial misconduct during closing argument when she argued that under the defense expert’s theory, McMahon’s alcohol use disorder also satisfied the statutory definition of a “mental abnormality.” *See* Br. of App. at 1, 7-18. This claim fails for two independent reasons.

First, McMahon fails to meet his initial burden of showing that the prosecutor’s argument was improper. There was ample evidence presented at trial that McMahon suffered from alcohol use disorder, and it was a reasonable inference from this evidence that this disorder amounted to a mental abnormality. Second, even assuming that this argument was improper, McMahon cannot show prejudice. This is particularly so in light

of the fact that McMahon's attorney did not object to the State's argument and a curative instruction would have cured any prejudice.

1. McMahon must show that the prosecutor's argument was both improper and that no instruction could have cured any prejudice

Courts apply the prosecutorial misconduct standard used in criminal cases to SVP cases. *See In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009); *In re Det. of Law*, 146 Wn. App. 28, 50-52, 204 P.3d 230 (2008). The defendant "has a significant burden when arguing that prosecutorial misconduct requires reversal." *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). The defense must prove that the prosecutor's conduct was both improper and prejudicial. *Id.* at 442; *Law*, 146 Wn. App. at 50.

If the defendant failed to object at trial, he is "deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* (quoting *Thorgerson*, 172 Wn.2d at 455).

To analyze prejudice, courts look to the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); *State v. Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). The absence of a request for a mistrial “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

2. There is ample expert testimony supporting McMahon’s diagnosis of alcohol use disorder

McMahon claims that the State’s argument was improper because it encouraged the jury to commit “based on a disorder that was not supported by expert testimony.” Br. of App. at 14. This argument is belied by the record. Contrary to McMahon’s assertion, there is ample evidence supporting all of his diagnoses, including the alcohol use disorder. Indeed, both experts testified extensively about this disorder at trial.

The State’s expert, Dr. Patterson, diagnosed McMahon with alcohol use disorder using the criteria outlined in the DSM-V. RP at 312, 327. He testified that McMahon’s DUI arrests, physical altercations while drinking, tolerance, blackouts, and memory problems were all evidence of this disorder. RP at 327-28. In addition, he testified that the alcohol use disorder is an “important contributing factor” to McMahon’s inability to control his

behavior and that McMahon's chronic alcohol abuse is a long-term risk factor for sexual reoffending. RP at 344-45, 371-72.

McMahon's expert, Dr. Abbott, also testified that McMahon had a history of severe alcohol use disorder. RP at 615-16. Like Dr. Patterson, he too relied on the criteria outlined in the DSM-V manual to reach this conclusion. RP at 615-16. He testified that alcohol use disorder in the DSM-V consists of 11 different symptoms and that McMahon had exhibited seven of them throughout his life. RP at 615-16. Dr. Abbott testified that McMahon's severe alcohol use disorder was currently in remission, although he acknowledged that it is a "chronic relapsing condition," and that it was "possible [McMahon] could resume drinking if released." RP at 616, 617, 618. In short, the testimony of both experts fully supports McMahon's diagnosis of alcohol use disorder.

3. It was a reasonable inference from McMahon's expert's testimony that McMahon's alcohol use disorder qualifies as a mental abnormality

McMahon also claims that the State's argument was improper because "no expert testimony supported the idea that [his] alcohol use disorder amounted to a mental abnormality under the statute." Br. of App. at 12. He asserts that expert testimony "is required in order to prove a mental abnormality under chapter 71.09 RCW." Br. of App. at 11. These arguments are unfounded.

For one, while McMahon is correct that medical facts, such as whether or not someone suffers from a particular mental disorder generally require expert testimony, a “mental abnormality” is a separate legal term defined by statute. McMahon cites no authority that expert testimony is required in order to prove that a particular disorder qualifies as a “mental abnormality.” The primary case on which McMahon relies, *In re Detention of Bedker*, held only that such testimony is proper expert opinion testimony and is helpful to the trier of fact. 134 Wn. App. 775, 779, 146 P.3d 442 (2006). McMahon’s other cited authorities reiterate that such testimony is helpful (see *In re Det. of Young*, 122 Wn.2d 1, 58, 857 P.2d 989 (1993); *In re Det. of Twining*, 77 Wn. App. 882, 889-90, 894 P.2d 1331 (1995)), indicate that such testimony can be relied on in a sufficiency challenge (see *In re Det. of Thorell*, 149 Wn.2d 724, 762, 72 P.3d 708 (2003)), or are distinguishable because they do not involve the Sexually Violent Predator Act (see *In re Det. of A.S.*, 138 Wn.2d 898, 982 P.2d 1156 (1999); *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001)).

In any event, McMahon is incorrect that no expert testimony supported the idea that his alcohol use disorder amounted to a mental abnormality under the statute. Thus, even if expert testimony is necessary, that requirement was satisfied by Dr. Abbott’s testimony, which fully

supported the State's argument that the alcohol use disorder qualified as a mental abnormality.

"In closing argument, the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence." *Thorgerson*, 172 Wn.2d at 448; *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). For example, in *In re Personal Restraint Petition of Yates*, our Supreme Court held that prosecutors did not commit misconduct when they argued in closing argument in the penalty phase of trial that Yates, who had been convicted of murder, would be dangerous in the future. 177 Wn.2d 1, 58, 296 P.3d 872 (2013). The Court held that the arguments about future dangerousness were proper because they "were based on reasonable inferences from the facts adduced in both the guilt and penalty phases of trial" including Yates's criminal history. *Id.* at 60.

Here, under the court's instructions, a "mental abnormality" was defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit criminal sexual acts to a degree that makes the person a menace to the health and safety of others." CP at 217. "Volitional capacity" was defined as "the power or capability to choose or decide." CP at 217. As the State recognized, although Dr. Abbott did not expressly identify the alcohol use disorder as a

mental abnormality, his testimony about the disorder shows that under his theory, the disorder satisfies this definition.

Dr. Abbott testified that alcohol use disorder is an acquired or congenital condition. RP at 615. In addition, he testified about how McMahon's severe alcohol use disorder affects McMahon's emotional and volitional capacity and predisposes him to commit sexual acts. *See* RP at 613-15, 708, 716. Specifically, Dr. Abbott testified that the severe alcohol use disorder "impaired [McMahon's] psychological functioning" and "caus[ed] him to act in antisocial ways and have antisocial attitudes," such as aggression, impulsivity, lack of remorse, irresponsibility, and reckless disregard for the safety of others. RP at 614-15. He testified that McMahon's sexual offending "was driven primarily based on the deterioration and the psychological functioning associated with the alcohol use disorder." RP at 615. And he testified that McMahon's "antisocial personality features induced by severe alcohol use disorder, lead[] him to act irresponsibly and impulsively in managing his sexual impulses through the sexual offending behavior towards the victims." RP at 716.

Based on this testimony, it is a reasonable inference that under Dr. Abbott's theory, McMahon's alcohol use disorder also constitutes a mental abnormality as defined by the instruction. The State simply used Dr. Abbot's testimony to draw that inference in closing argument. This was

proper. *See Dhaliwal*, 150 Wn.2d at 579. It was also consistent with the jury's duty as the factfinder to apply the definition of "mental abnormality" to the particular set of facts before it. *See Young*, 122 Wn.2d at 50 (the application of the statute to a particular set of facts "is, of course, a determination for the factfinder"); *State v. Moore*, 179 Wn. App. 464, 467-68, 318 P.3d 296 (2014) (it is the jury's duty to accept the law as given to it and to apply the law to the facts before it).

4. The jury based its verdict on the evidence presented at trial, not on speculation

McMahon contends that even if the alcohol use disorder meets the statutory definition of a mental abnormality, it would "still be insufficient to support commitment" because "[n]o evidence supports a causal link between McMahon's alcoholism and his risk of committing future sex offenses." Br. of App. at 13. He thus contends that the State's closing argument was improper because it encouraged the jury to reach a verdict based on speculation, and it relieved the State of its burden to prove the causal link beyond a reasonable doubt. Br. of App. at 14-16. This argument fails for several reasons.

First, the State never encouraged the jury to base its verdict on speculation or conjecture. The State tied its entire closing argument to the evidence presented at trial, including testimony from both Dr. Patterson and

Dr. Abbott. *See* RP at 826-37. Contrary to McMahon's suggestions that the jury cannot commit with "mix-and-match findings," it is entirely proper for the jury to credit or reject portions of both expert's testimony. *See Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975) (factfinder "has the right to reject expert testimony in whole or in part in accordance with its views as the persuasive character of that evidence"); Br. of App. at 15.

Second, there *was* evidence supporting a causal link between the alcohol use disorder and McMahon's risk of re-offense. Dr. Patterson testified that McMahon's alcohol use disorder is an "important contributing factor" to his inability to control his behavior and that his chronic alcohol abuse is a long-term risk factor for sexual reoffending. RP 344-45, 371-72. In addition, Dr. Abbott's testimony established a clear link between prior sexual offending and his alcohol use disorder, which is sufficient evidence for a jury to find that McMahon presents a serious risk of future sexual violence. *See Thorell*, 149 Wn.2d at 762 (a diagnosis of a mental abnormality "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"). Dr. Abbott also testified that it was possible McMahon could resume drinking if released. RP at 618. Further, McMahon's testimony supported this causal link, as he testified

that in the past, alcohol was a major factor in his offenses, his alcohol use continued despite participation in alcohol treatment programs, and he tried to control his drinking but “it never worked out for very long.” RP at 226-27, 231-33, 228.

Finally, the jury instructions ensured that the jury did not speculate. The jury instructions required the jury to find that McMahan “suffers from a mental abnormality and/or personality disorder *which causes him serious difficulty in controlling his sexually violent behavior*” and “that *this mental abnormality or personality disorder* makes [McMahan] likely to engage in predatory acts of sexual violence if not confined to a secure facility.” CP at 216 (emphases added). Thus, the instructions required the jury to find a causal link between the mental abnormality and the risk of reoffense. *See Thorell*, 149 Wn.2d at 743 (“the standard ‘to commit’ instruction requires the fact finder to find a link between the mental abnormality and the likelihood of future acts of sexual violence if not confined in a secure facility”). Accordingly, even if the jury relied on the alcohol use disorder, this Court can be certain that the jury found the necessary causal link between that disorder and McMahan’s risk of re-offense, because “[a] jury is presumed to follow the court’s instructions.” *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990).

5. McMahan cannot show prejudice under the heightened standard that applies in this case

McMahan's trial counsel did not object to the State's argument that under the defense expert's theory, the alcohol use disorder also qualifies as a mental abnormality. *See* RP at 833. Accordingly, McMahan must show prejudice under the heightened standard. *Emery*, 174 Wn.2d at 760-61. Specifically, he must show: (1) no curative instruction would have obviated any prejudicial effect on the jury, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *Id.* He cannot make this showing.

First, McMahan fails to show that a curative instruction would not have obviated any prejudicial effect. If McMahan had objected during closing argument, the trial court could have instructed the jury to disregard the argument that alcohol use disorder qualifies as a mental abnormality. This would have sufficiently guarded against the jury considering alcohol use disorder as a basis for commitment. McMahan makes no argument to the contrary, and this alone defeats his claim.

Second, there is not a substantial likelihood that the prosecutor's argument affected the jury's verdict. The absence of a request for a mistrial "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial."

Swan, 114 Wn.2d at 661. Moreover, when analyzing prejudice, courts look to the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *Warren*, 165 Wn.2d at 28. Here, the record supports the conclusion that this argument did not affect the jury's verdict.

There was overwhelming evidence presented at trial that McMahon suffers from pedophilic disorder, including his fifteen-year history of sexually molesting young girls. There was also overwhelming evidence that McMahon suffers from antisocial personality disorder, which Dr. Patterson said qualified as a "personality disorder" under the statute. *See* RP 329-334. Thus, there was significant evidence that McMahon suffered from other qualifying mental abnormalities and/or personality disorders. The State relied heavily on these other disorders in closing argument. *See* RP at 827-37, 864-74. Further, there is no requirement that the jury unanimously determine which mental abnormality causes McMahon difficulty in controlling his behavior. *Sease*, 149 Wn. App. at 77.

In addition, the trial court properly instructed the jury on the elements the State had to prove, as well as the definition of "mental abnormality." CP at 216-17. The court also instructed the jury that the lawyers' arguments are not evidence and that it should "disregard any remark, statement, or argument that is not supported by the evidence or the

law.” CP at 210. A jury is presumed to follow the court’s instructions. *Carnation Co*, 115 Wn.2d at 187.

McMahon asserts that the argument was prejudicial because the jury likely relied on the alcohol use disorder as the basis for commitment and “the likelihood is great that the jury relied on its own speculation rather than expert testimony.” Br. of App. at 18. He again asserts that there was no causal link between alcohol use disorder and McMahon’s likelihood of sexually reoffending. Br. of App. at 18. This argument is unpersuasive.

For reasons just discussed, McMahon has not shown that the likelihood is great that the jury relied on the alcohol use disorder. There was overwhelming evidence that McMahon suffers from pedophilic disorder and antisocial personality disorder and the State primarily urged commitment on that basis. *See* RP at 827-37, 864-74.

Nevertheless, this Court can be certain that the jury found a causal link between the mental abnormality and McMahon’s risk of re-offense, because the jury instructions required it to do so. *See* CP at 216 (requiring the jury to find that McMahon “suffers from a mental abnormality and/or personality disorder *which causes him serious difficulty in controlling his sexually violent behavior*” and “that *this mental abnormality or personality disorder* makes [McMahon] likely to engage in predatory acts of sexual violence if not confined to a secure facility”) (emphases added). Thus, the

jury did not commit McMahon on the basis of speculation. *See Warren*, 165 Wn.2d at 28 (a jury is presumed to follow the court's instructions). For these reasons, McMahon fails to show prejudice.

B. McMahon Fails to Show that His Trial Counsel was Ineffective

McMahon next claims that reversal is required because he received ineffective assistance of counsel when his attorney failed to object to the State's argument that his alcohol use disorder qualified as a mental abnormality under the statute. Br. of App. at 1, 19. This argument also fails.

Courts apply the ineffective assistance of counsel standard used in criminal cases to SVP cases. *See In re Det. of Stout*, 159 Wn.2d 357, 377-78, 150 P.3d 86 (2007). Under this test, the defendant must establish two things: (1) that the attorney's performance was deficient, and (2) that the defendant was prejudiced by that deficient performance. *In re Det. of Hatfield*, 191 Wn. App. 378, 401, 362 P.3d 997 (2015). "Deficient performance is that which falls below an objective standard of reasonableness." *Id.* (quoting *State v. Borsheim*, 140 Wn. App. 357, 376, 165 P.3d 417 (2007)). "Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different." *Id.* (quoting *State v. Weaville*, 162 Wn. App. 801, 823, 256 P.3d 426 (2011)). Failure on either prong defeats a claim of ineffective assistance

of counsel. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Courts are reluctant to find ineffective assistance of counsel. *See State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). On review, there is a presumption that counsel was effective. *Stout*, 159 Wn.2d at 377. This presumption “is not overcome if there is any ‘conceivable legitimate tactic’ that can explain counsel’s performance.” *Hatfield*, 191 Wn. App. at 402 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). “Competency of counsel is determined based on the entire record below.” *Id.* at 401 (quoting *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

“The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). If a claim rests on counsel’s failure to object, “a defendant must show that an objection would likely have been sustained.” *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010).

Here, McMahon’s claim fails on both prongs. For one, McMahon cannot show deficient performance. As discussed earlier, the State’s closing argument was not improper. Thus, McMahon’s trial counsel did not provide

deficient performance by failing to object to proper argument. *See Yates*, 177 Wn.2d at 61 (“Because the prosecution did not engage in misconduct, trial and appellate counsel did not provide deficient performance by failing to challenge the acts at issue in this claim”).

Further, trial counsel’s decision to refrain from objecting during the State’s closing argument was not deficient performance even if the State’s argument was improper. Attorneys “do not commonly object during closing argument ‘absent egregious misstatements.’” *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting *United States v. Necochea*, 986 F.2d 1273, 1281 (9th Cir. 1993)). The State’s allegedly improper argument falls far short of an egregious misstatement. Accordingly, it was a conceivable tactical decision for trial counsel not to object in order to avoid drawing attention to the argument, and this decision was within the wide range of permissible professional conduct. *See Davis*, 152 Wn.2d at 717.

Finally, even if trial counsel’s performance was deficient, McMahon cannot show that but for his counsel’s deficient assistance, a reasonable probability exists that the outcome would have been different. McMahon claims, “if trial counsel had objected and requested a curative instruction, the court would likely have clarified to the jury that it must rely on the testimony presented at trial to find causation.” Br. of App. at 20. He further claims, “without that clarification, there is a reasonable probability that the

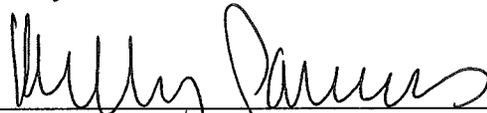
jury rendered its verdict on an improper basis.” Br. of App. at 20. But McMahon’s desired instruction was already before the jury. As already discussed, the court’s instructions told the jury to “disregard any remark, statement, or argument that is not supported by the evidence or the law.” CP at 210. Thus, McMahon fails to explain how an additional clarifying instruction would have changed the outcome at trial.

V. CONCLUSION

Based on the expert testimony elicited at trial, the State properly argued that under McMahon’s expert’s theory, McMahon’s alcohol use disorder also satisfied the statutory definition of a mental abnormality. McMahon fails to demonstrate that such argument constituted prosecutorial misconduct. He likewise fails to show that his trial counsel was ineffective for failing to object to this argument. This Court should affirm.

RESPECTFULLY SUBMITTED this 20th day of July, 2018.

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NO. 50946-6-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

TIMOTHY JOHN MCMAHON,

Respondent.

DECLARATION OF
SERVICE

I, Elizabeth Jackson, declare as follows:

On July 20, 2018, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

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

DATED this 20 day of July, 2018, at Seattle, Washington.


ELIZABETH JACKSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

July 20, 2018 - 2:40 PM

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