No. 42573-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE: DETENTION OF JACK LECK II

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

JACK LECK II,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF ADDRESSING IN RE PERSONAL RESTRAINT OF BROCKIE

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A. SUPPLEMENTAL ARGUMENT

In re Personal Restraint of Brockie affects the harmless error standard that applies on review to the error that occurred in Mr. Leck's case, but even under the proper standard, reversal of the commitment order is required

1. Under *Brockie*, the commitment order must be reversed because the State cannot prove the jury did not rely on the uncharged alternative means in reaching its verdict.

In In re Personal Restraint of Brockie, __ Wn.2d __, 309 P.3d 498, 501-02 (2013), the Washington Supreme Court held the Kjorsvik[1] charging document test does not apply when a defendant claims on appeal or in a personal restraint petition (PRP) that the jury was instructed on an uncharged alternative means. Instead, the test set forth in State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942), and subsequent cases applies. Id. Under that test, when the challenge is brought on direct appeal, the error is presumed prejudicial and the State bears the burden to prove it was harmless. Id. at 502 (citing State v. Bray, 52 Wn. App. 30, 34-36, 756 P.2d 1332 (1988) ("An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless.").

[1] State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).

In Brockie, the court affirmed that failure to properly notify a defendant of the nature and cause of the accusation is a constitutional violation. Brockie, 309 P.3d at 501 (citing U.S. Const. amend. VI; Wash. Const. art. I, § 22; Kjorsvik,, 117 Wn.2d at 97).[2] The constitutional right to notice includes the right to be informed of the manner in which the accused allegedly committed the crime. Brockie, 309 P.3d at 501. Beginning at least in 1942 with the Severns case, the Washington Supreme Court has "long held that it is error for a trial court to instruct the jury on uncharged alternative means." Id. (citing Severns, 13 Wn.2d at 548). Such an error is a "constitutional error." Brockie, 309 P.3d at 502 & n.2.

The Severns line of cases have consistently held that when such an error is raised on direct appeal, it is the State's burden to prove the error was harmless. Brockie, 309 P.3d at 501 (citing Bray, 52 Wn. App. at 34). The harmless error test applied is based on the court's longstanding rule that "'[e]rroneous instructions given on behalf of the

[2] Although Brockie specifically cites the Sixth Amendment and article I, section 22 as the sources of the constitutional right to notice, that does not mean the right to notice is not also guaranteed by the Due Process Clauses of the state and federal constitutions. Indeed, in Kjorsvik, the court held a defendant may challenge the sufficiency of a charging document for the first time on appeal "'because it involves a question of constitutional due process.'" (quoting State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989) (citing U.S. Const. amend. XIV; Const. art. I, §3)).

party in whose favor the verdict was returned are presumed prejudicial unless it affirmatively appears they were harmless.'" Brockie, 309 P.3d at 502 (quoting State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)).

Thus, Brockie makes clear that the harmless error test developed in the courts' jury instruction case law, rather than in the Kjorsvik charging document cases, applies in evaluating the error that occurred in Mr. Leck's case. When the claim is brought on direct appeal, the error is presumed prejudicial and the State bears the burden to prove it was harmless. Brockie, 309 P.3d at 501-02; Bray, 52 Wn. App. at 34-36. The issue in an uncharged alternative means case is whether the State can show the jury did not rely on the uncharged alternative in convicting the defendant. Brockie, 309 P.3d at 503; Severns, 13 Wn.2d at 548-49, 552; Bray, 52 Wn. App. at 34; State v. Chino, 117 Wn. App. 531, 540-41, 72 P.3d 256 (2003); State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996).

The State cannot meet that burden here. The jury was instructed on an alternative means that was not set forth in the petition. The petition alleged Mr. Leck suffered from "[a] mental abnormality, . . . specifically, Pedophilia" but did not allege a "personality disorder."

CP 1-2. Yet the jury was instructed it could find Mr. Leck was a "sexually violent predator" if it found he suffered from *either* "a mental abnormality *or* personality disorder." CP 1580 (emphasis added).

The error is not harmless because it is possible—indeed likely—the jury relied on the uncharged alternative. The State presented evidence that Mr. Leck suffered from *both* a "mental abnormality" *and* a "personality disorder." Dr. Arnold testified he diagnosed Mr. Leck with both pedophilia and antisocial personality disorder. 8/08/11RP 230. He testified at length about why he thought Mr. Leck suffered from each disorder. 8/08/11RP 230-87. He also specifically opined the two disorders *together* predisposed Mr. Leck to commit criminal acts: his pedophilia created the urge to offend and his antisocial personality disorder interfered with his ability to resist the urge. 8/08/11RP 288. The assistant attorney general reiterated this theme in closing argument. 8/15/11RP 1093-1100.

Because it is possible the jury relied on Dr. Arnold's opinion that Mr. Leck had an antisocial personality disorder in order to find he was a "sexually violent predator," the error was not harmless and requires reversal of the commitment order. Brockie, 309 P.3d at 503; Severns, 13 Wn.2d at 548-49, 552; Bray, 52 Wn. App. at 34.

Thus, Brockie affirms that this Court was correct to reverse Mr. Leck's commitment order. The Court applied the harmless error test set forth in Kjorsvik rather than the test developed in the Severns line of cases. See In re Det. of Leck, __ Wn. App. __, 309 P.3d 603, 609 (2013). That is contrary to Brockie. Yet, under either test, the error in instructing the jury on the uncharged alternative was not harmless and requires reversal.

When a conviction is reversed due to instructional error, the remedy is to remand for a new trial with proper instructions. E.g., State v. Schaler, 169 Wn.2d 274, 278, 236 P.3d 858 (2010). Thus, the case should be remanded for a new commitment trial with proper instructions.

Finally, the Court was also correct to allow Mr. Leck to challenge this constitutional violation for the first time on appeal. Courts applying Severns have consistently held that instructing the jury on an uncharged alternative means is a manifest constitutional error that may be raised for the first time on appeal. State v. Laramie, 141 Wn. App. 332, 342, 169 P.3d 859 (2007); Chino, 117 Wn. App. at 538.

2. Applying the *Severns* line of cases to chapter 71.09 RCW proceedings is consistent with the State's burden to prove the "elements" of the SVP designation beyond a reasonable doubt.

Beginning with In re Personal Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993), Washington courts have consistently applied standards developed in criminal cases that are natural and logical components of the State's constitutionally-mandated burden to prove beyond a reasonable doubt the "elements" of the SVP designation in chapter 71.09 RCW proceedings.

In Young, the Washington Supreme Court addressed the constitutionality of the state's then-new civil commitment statute. The court acknowledged that, in order to satisfy the requirements of the Due Process Clause, the statute could not authorize confinement absent a determination, based on a high degree of proof, that the detainee was currently mentally ill and dangerous. Young, 122 Wn.2d at 36-38 (citing Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). Washington's statute satisfies that requirement because it requires the State to prove, beyond a reasonable doubt, that the detainee suffers from a current mental illness that renders him a present danger to the community. Young, 122 Wn.2d at 37-39. This high burden of proof helps to satisfy due process because it "'tends to

equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question.'" Id. at 38 (quoting Heller v. Doe, 509 U.S. 312, 322, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)).

The State's constitutionally-mandated burden to prove current mental illness and dangerousness beyond a reasonable doubt carries with it a number of procedural protections that chapter 71.09 RCW proceedings share with criminal trials. For instance, the Young court concluded that a necessary component of the State's burden of proof is the requirement that the jury be unanimous. Young, 122 Wn.2d at 47-48. Although the statute was silent on the issue of jury unanimity,[3] the court construed the statute to afford an individual the right to a unanimous 12-person verdict. Id. The court reasoned the Legislature's use of the "beyond a reasonable doubt" standard "suggests an acute awareness of the need for heightened procedural protections in these proceedings." Id. In addition, in Washington, the beyond a reasonable doubt standard generally requires a unanimous verdict. Thus, the requirement of jury unanimity is a necessary and logical component of the State's high burden of proof. Id.

[3] The Legislature subsequently amended the statute to explicitly provide for a unanimous jury verdict. See RCW 71.09.060(1).

In cases subsequent to Young, Washington courts have consistently treated the State's burden to prove the SVP designation beyond a reasonable doubt as akin to the State's burden in criminal cases to prove the "elements" of a crime. The Washington Supreme Court consistently labels the essential facts the State must prove in chapter 71.09 RCW proceedings as "elements." See, e.g., In re Det. of Post, 170 Wn.2d 302, 309-10, 241 P.3d 1234 (2010) (in order to find detainee is SVP, jury must find State has proved three "elements"); In re Det. of Pouncy, 168 Wn.2d 382, 391-92, 229 P.3d 678 (2010) (term "personality disorder" must be defined for jury because it implicates an "element" of the State's case); In re Det. of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006) (terms "mental abnormality" and "personality disorder" are two distinct means of establishing the mental illness "element" in SVP cases).

The three "elements" the State must prove beyond a reasonable doubt are: (1) that the respondent "has been convicted of or charged with a crime of sexual violence," (2) that the respondent "suffers from a mental abnormality or personality disorder," and (3) that such abnormality or disorder "makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." Post, 170 Wn.2d at 309-10; RCW 71.09.020(18).

As in criminal cases, the "elements" the State must prove in chapter 71.09 RCW proceedings may encompass alternative statutory means. In Halgren, the Washington Supreme Court applied the same test used to determine the existence of alternative means in criminal cases to determine whether the "mental illness" element can be divided into alternative means. Halgren, 156 Wn.2d at 809-10. Applying that test, Halgren concluded the mental illness element encompasses the two alternative means of "personality disorder" and "mental abnormality." Id.

Halgren also concluded that the same unanimity rules that apply in criminal cases, which derive from the alternative means doctrine, apply equally in chapter 71.09 RCW proceedings. Id. at 809. Thus, as in criminal cases, the jury need not be unanimous as to the particular means alleged, as long as there is substantial evidence to support a finding of each alternative. Id. at 812.

In In re Detention of Sease, 149 Wn. App. 66, 77-78, 201 P.3d 1078, review denied, 166 Wn.2d 1029, 217 P.3d 337 (2009), the Court of Appeals extended Halgren to hold that, as in criminal cases, each alternative means cannot itself be divided into "means within a means." In Sease, the State alleged Sease suffered from two different

personality disorders and did not allege he suffered from a "mental abnormality." The Court applied several criminal cases to conclude the jury need only have unanimously found Sease suffered from a "personality disorder"; they did not need to agree unanimously as to which personality disorder he suffered from. Id. at 78-79.

Washington courts also consistently look to the criminal law in determining how the jury must be instructed regarding the statutory "elements" in chapter 71.09 RCW cases. In Halgren, the court concluded the jury need not be instructed it must be unanimous as to which alternative means it found, as long as substantial evidence supported each alternative alleged. Halgren, 156 Wn.2d at 812. That is the same standard that applies in criminal cases. Id.

Similarly, in Pouncy, the Supreme Court concluded the jury must be instructed on the definition of "personality disorder" because it is not a term of common usage and is beyond the experience of the average juror, and because the term "implicate[s] an element of the State's case." Pouncy, 168 Wn.2d at 391. Because the jury was not instructed as to the definition of the term, and there was no way to know what definition the jury used, the failure to instruct the jury was not harmless. Id.

Thus, Washington courts have uniformly adopted standards derived from the alternative means doctrine developed in the criminal law in chapter 71.09 RCW proceedings. As in criminal cases, the "elements" the State must prove can be divided into alternative means. Halgren, 156 Wn.2d at 809-10. But those means cannot themselves be divided into "means within means." Sease, 149 Wn. App. at 78-79. Also as in criminal cases, the jury need not be instructed that it must be unanimous as to the alternative means alleged as long as substantial evidence supports each alternative. Halgren, 156 Wn.2d at 812. Finally, the jury must be instructed as to the definition of the "personality disorder" alternative means because it implicates an "element" of the State's case. Pouncy, 168 Wn.2d at 391.

The courts' determination that the standards derived from the alternative means doctrine apply in these contexts stems from the State's constitutionally-mandated burden to prove the "elements" of the SVP designation beyond a reasonable doubt, which is the same standard of proof that applies in criminal cases. See Young, 122 Wn.2d at 47-48; Halgren, 156 Wn.2d at 809. Just as courts have adopted portions of the alternative means doctrine in these contexts, courts should also apply the standards developed in the Severns line of cases

to chapter 71.09 RCW proceedings. Those standards similarly derive from the alternative means doctrine. See Severns, 13 Wn.2d at 548; Bray, 552 Wn. App. at 34. The rule that the jury may not be instructed on an uncharged alternative means rests on the fundamental principle that "[t]he manner of committing a crime is an element" that must be properly charged, and "[o]ne cannot be tried for an uncharged offense." Bray, 552 Wn. App. at 34. That fundamental principle applies equally to chapter 71.09 RCW proceedings.

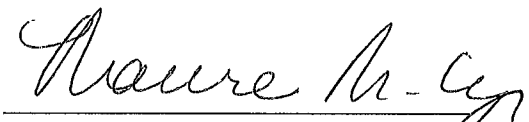
B. CONCLUSION

The harmless error standard applied by this Court in its opinion in Mr. Leck's case is contrary to Brockie. Instead of asking whether the charging document contained all of the essential elements, Brockie requires the Court ask whether it is possible the jury relied on the uncharged alternative means in reaching its verdict. But even under that standard, the error that occurred when the jury was instructed on an uncharged alternative is not harmless.

In addition, the rule developed in the Severns line of cases derives from the alternative means doctrine, which the courts have wholeheartedly adopted in other contexts in chapter 71.09 RCW proceedings. Therefore, this Court was correct to conclude that it was

error to instruct the jury on an uncharged alternative means, and that the error requires reversal.

Respectfully submitted this 18th day of October, 2013.



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APPELLANT.	)	

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