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 REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

1. MR. LECK'S STATUTORY AND DUE PROCESS RIGHT TO NOTICE WAS VIOLATED WHEN THE JURY WAS INSTRUCTED ON AN ALTERNATIVE MEANS NOT ALLEGED IN THE PETITION 1

a. Mr. Leck's constitutional right to notice was violated......... 1

b. Mr. Leck may raise the issue for the first time on appeal and the error is not harmless 4

2. MR. LECK'S DUE PROCESS RIGHT TO BE PRESENT WAS VIOLATED WHEN HE WAS NOT ALLOWED TO ATTEND THE RECENT OVERT ACT HEARING 5

a. Mr. Leck had a constitutional right to attend the hearing 5

b. The State has not proved the error was harmless beyond a reasonable doubt... 10

3. MR. LECK'S DUE PROCESS RIGHT TO CROSS-EXAMINATION WAS VIOLATED WHEN HIS SISTER'S OUT-OF-COURT STATEMENT WAS ADMITTED AT TRIAL BUT MR. LECK DID NOT HAVE AN OPPORTUNITY TO CROSS-EXAMINE HER..................... 11

B. CONCLUSION.. 12

TABLE OF AUTHORITIES

Washington Cases

City of Bothell v. Kaiser, 152 Wn. App. 466, 217 P.3d 339 (2009) .. 3, 4

In re Det. of Halgren, 156 Wn.2d 795, 132 P.3d 714 (2006) 4

In re Det. of Marshall, 156 Wn.2d 150, 125 P.3d 111 (2005) 7, 8

In re Det. of Morgan, 161 Wn. App. 66, 253, P.3d 394 (2011) 5, 7

In re Pers. Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998) 9

In re Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994) 9, 10, 11

In re Pers. Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993) 3

State v. Chino, 117 Wn. App. 531, 72 P.3d 256 (2003) 4

State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) 1, 5

State v. Griffin, 173 Wn.2d 467, 268 P.3d 924 (2012) 6

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) 10

State v. Laramie, 141 Wn. App. 332, 169 P.3d 859 (2007) 1, 2, 4

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989) 2, 3, 4

State v. Taylor, 140 Wn.2d 229, 996 P.2d 571 (2000) 2

State v. Valdobinos, 122 Wn.2d 270, 858 P.2d 199 (1993) 2

United States Supreme Court Cases

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 12

Rushen v. Spain, 464, U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) 10

Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934) 5

Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967) 3

Cases from Other Jurisdictions

People v. Dokes, 79 N.Y.2d 656, 595 N.E.2d 836 (1992) 7, 8, 10, 11

Rules

RAP 9.1 11

RAP 9.2 11

A. ARGUMENT IN REPLY

1. MR. LECK'S STATUTORY AND DUE PROCESS RIGHT TO NOTICE WAS VIOLATED WHEN THE JURY WAS INSTRUCTED ON AN ALTERNATIVE MEANS NOT ALLEGED IN THE PETITION

a. Mr. Leck's constitutional right to notice was violated.

The State contends Mr. Leck waived his right to challenge the omission of the alternative means from the petition because he did not object to the jury instructions at trial. The State argues this is an instructional issue rather than a notice issue. To the contrary, in the criminal context, it is well-settled that when the jury is instructed on an uncharged alternative means, the defendant's due process right to *notice* is violated. Because detainees in chapter 71.09 RCW proceedings have the same fundamental due process rights as defendants in criminal proceedings, the same standards should apply.

It is well-settled that when the jury is instructed on an uncharged alternative means, a defendant's constitutional right to *notice* is violated. State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007); see also State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) ("It is reversible error to try a defendant under an uncharged

statutory alternative because it violates the defendant's right to *notice* of the crime charged.") (emphasis added).

This rule has its basis in the "essential elements" rule, which requires the charging document to contain all essential elements of the crime. See State v. Leach, 113 Wn.2d 679, 690, 782 P.2d 552 (1989). "The manner of committing an offense is an element, and the defendant must be informed of this element in the information." Laramie, 141 Wn. App. at 342. Thus, if the jury is instructed on an alternative means not contained in the charging document, the charging document is constitutionally deficient because it omits an essential element of the crime. Id.

The "essential elements" rule is founded upon the constitutional due process right to advance notice of the charge. State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000) ("The rule that a charging document must include all essential elements of a crime is grounded in the constitutional requirement that defendants be informed of the nature and cause of the accusation against them, in addition to due process concerns regarding notice."); State v. Valdobinos, 122 Wn.2d 270, 283, 858 P.2d 199 (1993) ("The essential elements rule is of constitutional magnitude, since the notice principle which it embodies is a component

of due process."); Leach, 113 Wn.2d at 690 (omission of element from charging document violated defendant's "due process right to be properly informed of the charge against him as required by the state and federal constitutions"); City of Bothell v. Kaiser, 152 Wn. App. 466, 471, 217 P.3d 339 (2009) ("Omitting an essential element from the charging document violates a defendant's due process right to be informed of the charges.").

As stated in the opening brief, due to the substantial deprivation of liberty at stake, detainees in chapter 71.09 RCW proceedings are entitled to the protections of the Due Process Clause before they may be civilly committed. In re Pers. Restraint of Young, 122 Wn.2d 1, 48, 857 P.2d 989 (1993); Specht v. Patterson, 386 U.S. 605, 608, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967). Such protections include "a full judicial hearing" and "the full panoply of the relevant protections which due process guarantees in state criminal proceedings," including "all those safeguards which are fundamental rights and essential to a fair trial." Specht, 386 U.S. at 609-10.

The Washington Supreme Court has held that "mental abnormality" and "personality disorder" are alternative means of establishing the mental illness "element" in chapter 71.09 RCW cases.

In re Det. of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006). The "essential elements" rule—and the statute—required the State to include all of the elements in the petition. Leach, 113 Wn.2d at 690; Laramie, 141 Wn. App. at 342; RCW 71.09.030(1). Because the petition omitted an element, Mr. Leck's constitutional due process right to notice was violated. Taylor, 140 Wn.2d at 236; Valdobinos, 122 Wn.2d at 283; Leach, 113 Wn.2d at 690; Kaiser, 152 Wn. App. at 471.

b. Mr. Leck may raise the issue for the first time on appeal and the error is not harmless.

It is well-settled that when the jury is instructed on an uncharged alternative means, a manifest error of constitutional magnitude has occurred, which the defendant may challenge for the first time on appeal. Laramie, 141 Wn. App. at 342; State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003); RAP 2.5(a)(3).

The State argues Mr. Leck suffered no prejudice because he knew prior to trial that the evidence supported the alternative means. "But this does not answer the problem that the jury was instructed on an uncharged alternative means, despite Mr. [Leck's] constitutional right to be informed of the nature of the charges against him." Laramie, 141 Wn. App. at 343. The error was necessarily prejudicial because, under the instructions given, the jury could have found Mr.

Leck was a "sexually violent predator" based on either the charged or the uncharged alternative means. Id.; Doogan, 82 Wn. App. at 189 (error of offering uncharged means as basis for conviction is prejudicial if it is possible jury might have convicted defendant under uncharged alternative). Reversal is therefore required. Laramie, 141 Wn. App. at 343; Doogan, 82 Wn. App. at 190.

2. MR. LECK'S DUE PROCESS RIGHT TO BE PRESENT WAS VIOLATED WHEN HE WAS NOT ALLOWED TO ATTEND THE RECENT OVERT ACT HEARING

a. Mr. Leck had a constitutional right to attend the hearing.

The State contends the question is not whether Mr. Leck's right to be present was violated, but whether the trial court abused its discretion in denying the motion for continuance. Yet the State does not contest that Mr. Leck had a constitutional due process right to be present at all proceedings where "his presence ha[d] a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); In re Det. of Morgan, 161 Wn. App. 66, 74, 253, P.3d 394 (2011).

Even if the question is whether the trial court abused its discretion, an abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). A decision rests on untenable grounds if it was reached by applying the wrong legal standard. Id. Therefore, if the court denied the motion for continuance based on its erroneous conclusion that Mr. Leck had no constitutional right to be present at the hearing, the court abused its discretion *and* violated Mr. Leck's constitutional right to be present.[1]

The State contends Mr. Leck had no right to be present at the hearing because the court considered only undisputed facts. First, one of the most important facts at issue—whether Mr. Leck had a mental abnormality or personality disorder—*was* disputed. CP 1605-46.

Second, and more important, Mr. Leck had a right to be present because the hearing provided an opportunity for him to assist in defending against the charge. Snyder, 291 U.S. at 105-06; Morgan, 161 Wn. App. at 74. This was not a hearing to decide purely legal or ministerial matters. Instead, it was a hearing to decide whether the

[1] The State acknowledges that counsel objected to proceeding with the hearing in Mr. Leck's absence. SRB at 10; 1/14/11RP 2-3. The issue is properly preserved for review.

evidence was sufficient to sustain the State's burden of proving current dangerousness. Young, 122 Wn.2d at 27, 41; In re Det. of Marshall, 156 Wn.2d 150, 158, 125 P.3d 111 (2005). If the court had concluded the evidence was not sufficient, the State would have been required to plead and prove to the jury a recent overt. Mr. Leck had a constitutional right to be present, just as he would at any hearing at which a court weighs evidence and decides if it is sufficient to prove an element of the charge.

The hearing in this case was akin to a pretrial hearing at which a court determines whether the State may cross-examine a testifying defendant about his prior crimes. In People v. Dokes, 79 N.Y.2d 656, 660, 595 N.E.2d 836 (1992), the New York court concluded the defendant had a constitutional right to be present at a pretrial conference between the judge and the attorneys on the defendant's motion to preclude the People from cross-examining him about his prior crimes.[2] The court explained, "[i]n determining whether a defendant has a right to be present during a pretrial proceeding, a key factor is whether the proceeding involved factual matters about which defendant might have peculiar knowledge that would be useful in

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[2] The Washington Supreme Court cited Dokes with approval in In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

advancing the defendant's or countering the People's position." Id. Even if the facts regarding the prior crimes are undisputed, the court must still weigh "the nature of the conduct, its similarity to the pending charges, the extent to which it bears on the defendant's credibility, the age of the defendant at the time, the disposition of the charges and many other factors." Id. at 661. The defendant has a constitutional right to be present at the hearing because he "is in the best position to point out errors in the [criminal history] report, to controvert assertions by the prosecutor with respect to uncharged acts and to provide counsel with details about the underlying facts of both charged and uncharged acts." Id. In short, "the defendant's presence will help to ensure that the court's determination will not be predicated on the prosecutor's unrebutted view of the facts." Id. (footnote, internal quotation marks and citation omitted).

As stated in the opening brief, the purpose of the hearing in this case was to determine whether "an objective person knowing the factual circumstances of [Mr. Leck's] history and mental condition would have a reasonable apprehension that [the act for which he was incarcerated] would cause harm of a sexually violent nature." Marshall, 156 Wn.2d at 158. As at the hearing at issue in Dokes, the

court had to weigh the nature of the conduct, its similarity to the current charge, Mr. Leck's age at the time, and many other factors, including Mr. Leck's mental condition. Mr. Leck was in the best position to controvert factual assertions by the prosecutor and provide counsel with details about the underlying facts. A detainee's presence at such a hearing "will help to ensure that the court's determination will not be predicated on the prosecutor's unrebutted view of the facts." Dokes, 79 N.Y.2d at 661. Therefore, Mr. Leck had a constitutional right to be present at the hearing.

The recent overt act hearing is markedly different from the kinds of proceedings—regarding purely legal and ministerial matters—at which a defendant does not have a constitutional right to be present. See, e.g., In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (no right to be present at hearing on motion for continuance); In re Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994) (no right to be present at hearings at which court deferred ruling on ER 609 motion, granted defense counsel's motion for funds to get defendant haircut and clothing for trial, settled on wording of jury questionnaires and pretrial instructions, set time limit on testing of certain evidence, announced its rulings on evidentiary matters that had

previously been argued, ruled that jurors could take notes, and directed State to provide defense with summaries of its witnesses' testimonies); Morgan, 161 Wn. App. at 74-75 (no right to be present at chambers meeting where purely legal questions about process of deciding forced medication motion were discussed but court made no ruling).

In contrast to the proceedings in those cases, the proceeding in this case presented an opportunity to rebut the State's view of the facts and defend against the charge. Mr. Leck therefore had a constitutional due process right to be present. Snyder, 291 U.S. at 105-06; Lord, 123 Wn.2d at 306; Dokes, 79 N.Y.2d at 661.

b. The State has not proved the error was harmless beyond a reasonable doubt.

The State contends Mr. Leck has not shown the error was prejudicial. SRB at 16. But it is the *State's* burden to prove the error was harmless, beyond a reasonable doubt. State v. Irby, 170 Wn.2d 874, 886, 246 P.3d 796 (2011); Rushen v. Spain, 464, U.S. 114, 120, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).

The State contends the error was not prejudicial because Mr. Leck did not provide an offer of proof to the court of evidence he wanted to present at the hearing. SRB at 17. The State misunderstands the nature of Mr. Leck's right to be present. Even if Mr. Leck did not

intend to present evidence at the hearing, he had a right to be present in order to assist in rebutting the State's view of the facts and defend against the charge. Snyder, 291 U.S. at 105-06; Lord, 123 Wn.2d at 306; Dokes, 79 N.Y.2d at 661. The State has not shown beyond a reasonable doubt that the court would have made the same recent overt act determination even if Mr. Leck had been present. The error is therefore not harmless and the conviction must be reversed.

3. MR. LECK'S DUE PROCESS RIGHT TO CROSS-EXAMINATION WAS VIOLATED WHEN HIS SISTER'S OUT-OF-COURT STATEMENT WAS ADMITTED AT TRIAL BUT MR. LECK DID NOT HAVE AN OPPORTUNITY TO CROSS-EXAMINE HER

The State contends Mr. Leck's constitutional right to cross-examination was not violated because Donna Leck's out-of-court statement was admissible under the evidence rules. SRB at 21-13. For the reasons given in the opening brief, due to the prejudicial nature of the evidence and questions about Ms. Leck's biases and motives,[3] Mr.

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[3] The State contends Mr. Leck's testimony from the first trial is not part of the record on appeal. SRB at 24 & n.9. This claim is perplexing. RAP 9.1(a)(1) provides the "record on review" may include a "report of proceedings." RAP 9.1(b) provides "[t]he report of any oral proceeding must be transcribed in the form of a typewritten report of proceedings. The report of proceedings may take the form of a 'verbatim report of proceedings' as provided in rule 9.2." RAP 9.2(a), in turn, provides, "[i]f the party seeking review intends to provide a verbatim report of proceedings, the party should arrange for transcription of and payment for

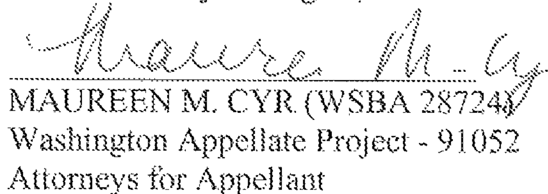
Leck had a right to cross-examine her even if the evidence was admissible under the evidence rules.

The State contends Mr. Leck has not shown the error was prejudicial. SRB at 23. But again, it is the *State's* burden to prove, beyond a reasonable doubt, that the error was harmless. See Chapman v. California, 386 U.S. 18, 21, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (when federal constitutional violation occurs, State bears burden to prove beyond a reasonable doubt that error did not contribute to verdict). The State has not met that burden.

B. CONCLUSION

Because the jury was instructed on an alternative means not charged in the petition, Mr. Leck was denied his constitutional right to be present at the recent overt act hearing, and his constitutional right to cross-examination was violated, the detention order must be reversed.

Respectfully submitted this 22nd day of August, 2012.



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an original and one copy of the verbatim report of proceedings within 30 days after the notice of appeal was filed . . . ." Those requirements were complied with in this case. Verbatim reports of the hearings from the first trial were timely ordered and set forth in the statement of arrangements. Copies of the completed transcripts were provided to the State. Those hearings are part of the "record on review."

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

IN RE THE DETENTION OF JACK LECK II, APPELLANT.	)))))))	NO. 42573-4-II

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I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 22ND DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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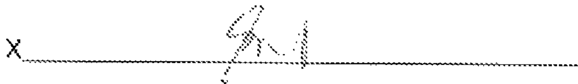
X 

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