NO. 90725-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Kevin Magera:

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MAGERA,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

For a claim of prosecutorial misconduct to stand, well-settled law establishes that both improper conduct and prejudicial effect must be demonstrated. Kevin Magera claims that such conduct occurred during the closing argument of his 2013 sexually violent predator trial, despite failing to object to any of the alleged improper arguments. The Court of Appeals rejected his claims using the established standard for assessing prosecutorial misconduct. The Court found that the State's closing arguments were not improper and were amply supported by the record.[1]

Mr. Magera seeks review of this decision. Because his case does not meet any of the criteria for review set forth in RAP 13.4(b), this Court should deny review. Even if his Motion merited review by this Court, Magera cannot establish any impropriety from the closing arguments made at his trial.

II. ISSUE PRESENTED FOR REVIEW

This Court should deny review because the decision below does not meet any of the RAP 13.4(b) criteria. The State does not seek review of any issue; however, if the Court were to accept review, the following issues would be presented:

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[1] A copy of the "Unpublished Decision" filed by the Court of Appeals on July 28, 2014, is attached as Exhibit A.

Whether the State engaged in prosecutorial misconduct during closing argument, where: (1) Magera failed to object to the comments he claims were flagrant and ill-intentioned; (2) the arguments were based on evidence presented to the jury; and (3) even if the comments were improper, no prejudice has been demonstrated.

III. STATEMENT OF THE CASE

A. Procedural Facts

In January 2011, the State filed a sexually violent predator (SVP) petition seeking the civil commitment of Magera pursuant to RCW 71.09. CP 826. When the petition was filed, Magera was in the custody of the Department of Corrections (DOC), and was scheduled to be released into the community. CP 828. A few months later, the trial court entered an order determining that probable cause existed to believe Magera was an SVP. CP 873. Pursuant to this order, Magera was transported to the Special Commitment Center (SCC) on McNeil Island. *Id.*

A jury trial on the petition began on February 25, 2013. Ten days later, the jury returned a verdict finding that Magera was an SVP. CP 6. On the same day, the trial court entered an Order of Commitment. CP 4. On March 29, 2013, Magera filed a Notice of Appeal. CP 2. On July 28, 2014, the Court of Appeals affirmed Magera's civil commitment. Ex. A.

B. Sexually Violent Predator Trial

1. Magera's Offense History

Magera has stated that if it were not against the law, he would have sex with children often and exclusively. CP 372-373.[2] He was born on January 13, 1977, and since a young age has sexually victimized at least ten children. CP 41, 371.[3] While he has had many sex offender treatment attempts, he has been discouraged by his inability to control his sexual thoughts and feelings towards children. CP 375.

From ages five to eight, Magera himself was the victim of sexual abuse by his biological father, a stepfather, and one of his stepfather's friends. 2RP 132. At age seven, Child Protective Services removed him from his home. CP 65. He continued as a ward of the State until age 19. CP 66. As a ward of the State, he was moved from placement to placement frequently due to his temper and sexual acting-out with other residents at each placement. CP 71.

Magera's first sexual assault victim was his sister, M.M. CP 75. The sexual abuse began when M.M. was four years old and Magera was eight. 2RP 130. The sexual assaults of his sister included pulling her

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[2] Portions of the February 11, 2013, deposition of Paul Martin were published to the jury. 2RP 149, Ex 61, CP 362-394.

[3] Portions of the January 31, 2013, and February 14, 2013, depositions of Magera were published to the jury. 2RP 162, 165, 173; 3RP 5-7; Ex. 62; CP 33-154, 286-322.

pants down and looking at her nude, rubbing his penis between her buttocks, and fondling her vagina. CP 76-77.

At around age ten or eleven, Magera victimized a girl in his special education class. CP 70-71, 2RP 130. In secluded area, he would coerce her into playing sexual games. 2RP 130-131. These games included fondling of the girl's genitals and anal intercourse. 2RP 131.

In July 1990, Magera was convicted of Assault 4. CP 81, Ex. 1-3. He assaulted a nine-year-old boy, named L.W. 2RP 144. About two weeks after L.W. arrived at the facility, Magera rubbed his penis against L.W.'s buttocks and stroked the young boy's penis. 2RP 129-130.

After his conviction, Magera was moved to another placement, where he engaged in mutual genital fondling with another 13-year-old resident. CP 87-88. He also massaged the buttocks of another 12-year-old resident. *Id.* After being sent to another group home, Magera was convicted of Assault 4 with sexual motivation for assaulting a staff member. CP 89-90, Ex. 4-5. He was sent to Echo Glen, a Juvenile Rehabilitation Agency facility, in 1991 pursuant to this conviction, where he continued acting out sexually. CP 89-90, 93.

Magera was released from Echo Glen to a group home on the Spokane area. CP 98-99. At this facility, he continued his inappropriate sexual behaviors. CP 100-101. For example, he performed oral sex on

anther male resident. *Id.* He was removed from this group home for his sexual conduct. CP 102.

Now 16 years-old, Magera was placed into yet another group home. CP 103. At this placement, he was charged with Assault 4 and Indecent Exposure for sexual misconduct with a male resident at the home. CP 108, Ex. 10-12. He was sent to Green Hill School, another Juvenile Rehabilitation Agency facility after this conviction. CP 108. There, Magera participated in further sex offender treatment. CP 110. When he was released in 1994, he did not believe he would commit any further sex offenses. CP 108, 112. His parole ended in late 1994, but Magera continued sex offender treatment until age 19. CP 115-116.

In 1999, Magera crossed paths with an ex-girlfriend while he was working as a children's ride operator at an amusement park in Seattle. CP 122-123. He eventually became the live-in babysitter for his ex-girlfriend's young children. CP 126. E.M. was the older of the two children as a five-year-old kindergartener. 2RP 116. Magera began sexually abusing E.M. after about a week of moving in to babysit her. CP 127. Magera had previously been babysitting for someone else in a similar situation, but had been told to leave by the mother of the children. 3RP 103.

Magera's offenses against E.M. were extensive. He would use the term "fun fun" with E.M. as a way of communicating to her that he wanted to have sex with her. CP 127. He had names for each of the sexual acts he performed on E.M. He called vaginal oral sex "lick lick." CP 128. "Front front" involved E.M. lying naked on top of Magera while he was nude from the waist down. CP 128-130. He would then place his penis between her vaginal lips and rub her back and forth on top of him until he ejaculated. *Id.* When Magera ejaculated onto E.M., it was called "wet wet." 2RP 118. "Butt butt" was similar to "front front," but Magera would place his penis between E.M.'s buttocks. CP 130.

The sexual assaults of E.M. occurred approximately three to four times per day over a six-month period. CM 130-132, 2RP 119. Magera convinced E.M. that they were in love, that people who were in love did these kinds of things together, and that one day they would run away and get married. 2RP 120. He told her that if she ever told anyone about "fun fun" that he would go away and they could never get married. 2RP 121.

Magera also sexually assaulted a male playmate from E.M.'s kindergarten class named J.B. 2RP 122. Magera exposed himself to J.B. during the child's bath time and fondled the boy's penis while he was sleeping over. CP 140. Magera also made attempts to have J.B. and E.M engage in sexual activity together while he observed them. 2RP 123.

In 2000, Magera was convicted of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree for his offenses against E.M. and J.B. CP 138, Ex. 13-16.

2. Dr. Hupka's Trial Testimony

The State presented expert testimony from licensed psychologist Dr. John Hupka at the commitment trial. 3RP 68 - 5RP 51. Dr. Hupka has over 15 years of experience evaluating sex offenders and has conducted SVP evaluations since 1996. 3RP 72-73.

Dr. Hupka conducted an SVP evaluation of Magera in 2009 for the Department of Corrections. 3RP 76. He updated that evaluation in 2013. 3RP 77. For his evaluations Dr. Hupka interviewed Magera and reviewed multiple documents related to Magera, including police reports, psychological evaluations, and confinement records. 3RP 77-78, 81.

Dr. Hupka found that Magera had an established pattern of sexual attraction to children aged six to twelve, and a pattern of no control or no willingness to control his sexually violent behavior. 3RP 110. He assigned Magera a primary diagnosis of a sexual disorder: pedophilia. 3RP 116. Dr. Hupka also diagnosed Magera with a personality disorder that complicated his pedophilia. *Id.* Pedophilia involves a chronic sexual attraction to children. 3RP 115-117. The personality disorder includes antisocial and narcissistic characteristics. 3RP 136.

Magera's pedophilia and personality disorder each impair his emotional and volitional capacity. 3RP 137-140. Dr. Hupka opined that Magera's condition predisposes him to the commission of criminal sexual acts due to his inability to contain his sexual attraction to children to fantasy. 3RP 140. This condition constituted a mental abnormality for Magera, an opinion Dr. Hupka held to a reasonable degree of psychological certainty. 3RP 141.

Dr. Hupka also testified that Magera's mental abnormality made him likely to engage in acts of future sexual violence. 3RP 144. Using a generally accepted risk assessment method, Dr. Hupka determined this likelihood by examining actuarial data, dynamic risk factors, Magera's clinical issues, and protective factors. 3RP 147-148.

Actuarial data provided Dr. Hupka with a starting point in his risk assessment by indicating Magera was at higher risk for re-offense than other sex offenders. 3RP 165-166. Dynamic risk factors are individual and changeable risk factors that are addressed in sex offender treatment. 3RP 166. Assessment of Magera's dynamic risk revealed deficiencies, including intimacy issues, poor social support, and poor sexual regulation. 3RP 171. Clinical factors, such as Magera's mental disorders are an additional risk factor indicative of high risk for re-offense. 3RP 172-173. Protective factors, such as sex offender treatment completion and a

supportive release environment can mitigate an offender's risk. 3RP 174, 178. Dr. Hupka opined that Magera's treatment acumen was worsening over time and that his proposed release environment was inadequate. 3RP 177-180. He concluded that Magera could not be safely released into the community. 3RP 182.

3. Closing Argument

During closing argument, the State highlighted the risk for re-offense Mr. Magera poses as a result of his mental abnormality and lack of treatment. For example, the State argued that Mr. Magera's inability to acknowledge his sexual attraction to children amounted to a profound lack of insight into why he offended:

> We need to see Mr. Magera taking accountability for his actions. Pleading guilty and avoiding trial is not taking accountability. Not all those who suffer the terrible abuse that Mr. Magera suffered end up being pedophiles or else it would be a risk factor that Dr. Hupka and other practitioners in this field consider. There's something else here that needs to be acknowledged by Mr. Magera that he was partially able to acknowledge in 2009 and is not able to acknowledge right now.

6RP 17-18. By attributing his offending behavior to his own victimization, Magara failed to take accountability for his own role in his offending. *Id.*

Magera denied suffering from pedophilia or a mental abnormality in his closing argument. 6RP 30, 38, 39, 41. The State rebutted this

argument with a clear example of how Magera's sexual response to children affected his emotional and volitional controls:

> So, we have this likelihood [of risk to reoffend] because of a mental disorder. And we know that it's a mental disorder that gives him serious difficulty controlling himself. You imagine a kindergartner, a five or six year-old. You see a little person who's innocent, bushy tailed, wide eyed, dwarfed by the fifth and sixth graders that go to the same elementary school. You feel the need, the desire, to protect this little child, to nurture them, to shield them from bad things. You talk to a kindergartner about their favorite Disney princess or their latest Lego creation. That's what you do. Mr. Magera sees a kindergartner and sees a potential sexual partner. Mr. Magera sees a kindergartner and feels sexual urges. He gets aroused. He gets and maintains an erection. Mr. Magera talks to a kindergartner about fun-fun and it being our little secret, because if people found out, they wouldn't understand. Five and six year-olds gave him an erection. Ladies and gentlemen, that is not a normal response. That is mentally abnormal.

6RP 55-56. Magera filed to object to any arguments the State made in closing or rebuttal.

IV. ARGUMENT

Magera argues that the State engaged in "flagrant and ill-intentioned" misconduct during closing arguments at trial. Petition at 4. He is incorrect. As a preliminary matter, Magera failed to object to any of the alleged misconduct and must demonstrate on appeal that no curative instruction from the trial court could have remedied any impropriety. Further, his argument that the State urged the jury to punish

Magera and sought to appeal to the jury's passions and prejudices are without merit.

The State's arguments were based on the record presented to the jury and were not misconduct. Even if any of the State's comments were improper, Magera does not demonstrate prejudice. Magera's Petition fails to demonstrate that the Court of Appeals decision below conflicts with a decision of this Court, or any other rationale that merits review under RAP 13.4(b). As such, his arguments must be rejected and the ruling of the Court of Appeals should be affirmed.

A. The Court Of Appeals Used Well-Settled Law In Requiring Magera To Demonstrate Both Improper Conduct And Prejudicial Effect On Review.

At trial, Magera did not object to any of the conduct now identified as flagrant, ill-intentioned, and prejudicial. Petition at 4, 7. To prevail on a claim of prosecutorial misconduct, one "must show both improper conduct and prejudicial effect." *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 717 (2000). "A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Failure to request a curative instruction or move 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." *In re Law*, 146 Wn. App. 28, 51, 204 P.3d 230 (2008) (*citing State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). In those circumstances "where the defense attorney does not object, move for a mistrial, or request a curative instruction, appellate review is only appropriate if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice they engendered by the misconduct." *State v. Kendrick*, 47 Wn. App. 620, 638, 736 P.2d 1079 (1987). Magera fails to meet this standard.

In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). When reviewing a prosecutor's closing remarks, the court must look at "the context of the total argument, the issues in the case, the evidence, and the instructions provided by the trial court." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Because all of the State's arguments were based on the evidence and law presented to the jury, Magera's claim of misconduct was properly rejected by the Court of Appeals.

B. Magera's Lack Of Accountability Is Evidence Of Poor Treatment Progress And High Risk For Future Offense.

Assuming for the sake of argument that Magera could meet the standard for reviewing his claim of error issue despite not objecting at trial, he cannot establish prosecutorial error. Magera argues that in closing argument, the State "plainly urged the jury to view commitment as the means to hold Magera accountable for based [sic] acts and crimes." Petition at 6. That is incorrect. In the context of the total argument, the issues in the case, and the evidence, it is clear that the comments made by the State related to Magera's risk for re-offense.[4]

One component of Dr. Hupka's risk assessment of Magera examined protective factors, or factors that might reduce an individual's risk for re-offense. 3RP at 147. Completion of sex offender treatment was one of the protective factors he considered. 3RP 174. Dr. Hupka testified that Magera had not participated in any sex offender treatment for three years at the time of trial. 3RP 176. From the time Dr. Hupka interviewed Magera in 2009 until his most recent interview in 2013, any treatment benefits had "largely gone by the wayside." *Id.*

[4] *See* Ex. A at 4 ("Taken in context, the prosecutor's argument suggests that Magera lacks insight into his offending behavior and that, as a result, there is a strong likelihood that he will reoffend if released.")

Since 2009, when Magera had finished the sex offender treatment program at the Twin Rivers Correctional Center, Dr. Hupka opined that he had "essentially backpedaled" in terms of his treatment. *Id.* In his 2013 interview with Dr. Hupka, Magera was unaware how his sex offenses affected his child victims, was less willing to discuss his sexually deviant attraction to children, and could not recall risk factors he had previously identified for himself to avoid re-offending. 3RP 177-178.

During closing argument, the State highlighted for the jury other evidence that supported Dr. Hupka's opinion. 6RP 16. This evidence demonstrated several areas where Magera's treatment knowledge was particularly lacking. For example, Magera was unwilling or unable to see that his sexual attraction to children accounted for his offending behavior:

> We need to see Magera taking accountability for his actions. Pleading guilty and avoiding trial is not taking accountability. Not all those who suffer the terrible abuse that Magera suffered end up being pedophiles or else it would be a risk factor that Dr. Hupka and other practitioners in this field consider. There's something else here that needs to be acknowledged by Magera that he was partially able to acknowledge in 2009 and is not able to acknowledge right now.

6RP 17-18.

This argument was amply supported by the record. Magera testified that after his 2009 treatment, he discovered that his offending was related to his desire for a relationship with someone who would accept

him. CP 146-147. His "discovery" failed to account for why he chose child victims when peer sexual partners were available. Magera also testified that he was "no longer attracted to children," but in the next breath stated that "it would be so easy, you know to slip back" into offending. CP 296.

When asked if he was open to having a relationship with a person who has children, Magera responded it would make him "nervous" and he would want to disclose his offending history to the person and ensure that the person "still thinks that it's okay." CP 296. Yet, when reciting the risk factors related to re-offense he can recall, Magera includes "I'm not to be in a relationship with somebody who has kids." CP 277. The evidence clearly indicated Magera failed to take accountability for his chronic and pervasive sexual attraction to children and the role it plays in his offending.

Magera likens the State's argument to *Gaff*, where the prosecutor made an improper closing argument. *In re Gaff*, 90 Wn. App. 834, 954 P.2d 943 (1998). While this case is distinguishable, it also fails to support Magera's claim of prosecutorial misconduct. In *Gaff*, the prosecutor argued that the civil commitment process could be a "tool" the jury could use to correct lenient sentences imposed on the respondent in the past. *Id.* at 840. The Court ruled that prosecutors in SVP matters must

take care to ensure their arguments do not suggest that the jury "send a message" about lenient past sentences or confuse juries about their function. *Id.* at 844.

The State made no such arguments in Magera's case. There was no argument or suggestion that any of Magera's criminal sentences had been lenient. In fact, the State explicitly stated to the jury that "we're not here to punish the worst of the worst. . . . That's not what this trial is about. This trial is about mental health." 6RP 55.[5]

Even if the State's argument was improper, there was no improper purpose behind the argument. In *Gaff*, the Court found the prosecutor's improper arguments did not result in a jury verdict that "reflects a desire to punish Gaff rather than protect the public." *Gaff* at 844. Likewise, there is no indication in this record that the jury mistook the State's arguments regarding Magera's lacking treatment skills for an invitation to ignore the evidence and punish him. His argument is without merit.

[5] Magera claims that the State's argument and Court of Appeals decision run counter to the holdings in *Young*. Petition at 4; *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). He is incorrect. First, Magera cites to a holding in *Young* that the SVP law does not violate ex post facto law and double jeopardy concerns. *See* Petition at 4; *Young* at 21. No such issues are raised in this appeal. Further, even if the cited portion from *Young* (that the SVP "statute is not concerned with the criminal culpability of petitioner's past actions") was applicable to this case, the State's argument was aligned with this Court's finding that the statute's focus on "treating petitioners" and "protecting society." *Young* at 21.

C. The State's Rebuttal Arguments Were Based On The Evidence Presented At Trial.

Magera argues that the State made a closing argument that "was a purposeful effort to stoke the jurors' basest fears and prejudices" and "relied upon matters not in evidence." Petition at 7. He is incorrect. The argument Magera claims constituted prosecutorial misconduct was rebuttal to his closing arguments and based on evidence presented at trial.[6]

In his closing argument, Magera claimed that he did not suffer from pedophilia and, if he was a pedophile, it did not constitute a mental abnormality. 6RP 30, 38, 39, 41. The State rebutted this argument:

> So, we have this likelihood [of risk to reoffend] because of a mental disorder. And we know that it's a mental disorder that gives him serious difficulty controlling himself. You imagine a kindergartner, a five or six-year-old. You see a little person who's innocent, bushy tailed, wide eyed, dwarfed by the fifth and sixth graders that go to the same elementary school. You feel the need, the desire, to protect this little child, to nurture them, to shield them from bad things. You talk to a kindergartner about their favorite Disney princess or their latest Lego creation. That's what you do. Magera sees a kindergartner and sees a potential sexual partner. Magera sees a kindergartner and feels sexual urges. He gets aroused. He gets and maintains an erection. Magera talks to a kindergartner about fun-fun and it being our little secret, because if people found out, they wouldn't understand. Five and six-year-olds gave him an erection. Ladies and gentlemen, that is not a normal response. That is mentally abnormal.

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[6] *See* Ex. A at 4 ("The comments by the prosecutor were either based on evidence in the record and before the jury or they were fair inferences from that evidence.")

6RP 55-56.

The State's rebuttal argument addressed arguments Magera made about his mental condition based on the record. Dr. Hupka testified that Magera's pedophilia was the driving force behind his mental abnormality. 3RP 139, 172. His pedophilia impairs his emotional capacity. 3RP 137. Dr. Hupka explained, "The normal response to children is one of caretaking, being concerned about children," and that, "sexual arousal and sexual desire and wanting to rape children is not a normal part of emotional experience." 3RP 137-138.

An example of this abnormal emotional response is Magera's offenses against E.M. and J.B. Both children were in kindergarten when Magera sexually assaulted them. 2RP 116, 122. Magera's offenses against E.M. included simulated sexual intercourse with ejaculation, oral sex, and fondling that he referred to as "fun fun." 2RP 117-118. Instead of babysitting E.M., Magera assaulted her three to four times a day and convinced her that they were in love and "would run away and get married." 2RP 119-120. The State's rebuttal argument clearly contradicts Magera's arguments with this evidence.

Comparing Magera's trial to the cases he cites reveals that the State's arguments do not constitute misconduct. In *Belgarde,* the

prosecutor, based in part on his own recollection of Wounded Knee, argued to the jury that the defendant was "strong in" a group which the prosecutor describes as "a deadly group of madmen" that "kill indiscriminately," and likening the American Indian Movement members to "Kaddafi" and "Sean Finn" of the IRA. *State v. Belgarde*, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). While it is not difficult to see how the language at issue in *Belgarde* constitutes an improper emotional appeal to the jury, the State's argument in this case was based on the evidence and rebutted arguments made by Magera.

In *Gaff*, the prosecutor equated uneasy sleep and noises in the night to the fear of "someone like" Mr. Gaff. *Gaff*, 90 Wn. App. at 839. While the Court held that this argument improperly invited the jury to decide the case based on emotional appeals, it concluded that it was not so flagrant and ill-intentioned that it could not have been neutralized via a curative instruction. *Id* at 841-842. Unlike the fear inspiring arguments at issue in *Gaff*, the State's arguments in Magera's case described his mental condition.

The jury members in this case were selected, in part, because they demonstrated impartiality and indicated they would not be swayed by emotional appeals. Each potential juror was required to fill out a questionnaire addressing sensitive issues such as a juror's experience with

sexual victimization. 2RP 2. Some jurors were questioned individually, in open court, concerning answers to questionnaire items they preferred to discuss outside the presence of other jurors. 2RP 16. The questionnaire and individual questioning occurred in addition to the voir dire process. In his closing, Magera reminded the jurors that they were selected because they indicated they would follow the law in the case despite strong emotions people have about sex offenders. 6RP 52. Even if the State's rebuttal argument inadvertently made an emotional appeal to the jury, it could not have had any impact on the verdict.

V. CONCLUSION

For the foregoing reasons, the State requests that this Court deny review of the Court of Appeals decision, because Magera fails to present a reviewable issue and the State's arguments at trial were proper.

RESPECTFULLY SUBMITTED this 24th day of September, 2014.

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Assistant Attorney General

EXHIBIT A

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

In the Matter of the Detention of	)	No. 70129-1-I
	)	
	)	
	)	UNPUBLISHED OPINION
	)	
KEVIN MAGERA	)	FILED: July 28, 2014
	)	

VERELLEN, A.C.J. — Kevin Magera appeals from the trial court's order authorizing his commitment as a sexually violent predator (SVP) pursuant to chapter 71.09 RCW. He first contends that the State committed misconduct in its closing argument. His arguments are unavailing because the State's closing arguments were not improper and were supported by the record. Magera next contends that his right to a unanimous jury verdict was violated. This argument is meritless because the jury was not required to unanimously agree as to the specific diagnoses that satisfied the statutory elements. Accordingly, we affirm.

FACTS

In 2000, Magera was convicted of one count of rape of a child in the first degree and two counts of child molestation in the first degree. The State filed an SVP petition shortly before Magera's scheduled release. To establish that Magera was an SVP, the State had to prove the following elements beyond a reasonable doubt: (1) Magera had been convicted of or charged with a crime of sexual violence;

(2) Magera suffered from a mental abnormality or personality disorder; and (3) the mental abnormality or personality disorder made Magera likely to engage in predatory acts of sexual violence if not confined in a secure facility.[1]

At the commitment trial, Dr. John Hupka, a licensed psychologist, testified on behalf of the State. He had reviewed Magera's treatment records, psychological and psychiatric evaluations, police reports, victim statements, and numerous other records. Hupka also interviewed Magera twice. Based on his evaluations, Dr. Hupka diagnosed Magera with pedophilia, a mental abnormality characterized by intense recurrent sexual fantasies and urges or sexual behaviors involving prepubescent children. Hupka also diagnosed Magera with a personality disorder of a mixed type, having both antisocial and narcissistic characteristics, that complicates his pedophilia. But Hupka testified that Magera's personality disorder alone did not predispose him to commit criminal sexual acts. Instead, Hupka concluded that Magera's pedophilia, individually and together with his personality disorder, undermined his ability to control his behavior. Based on actuarial risk assessment measures and static and dynamic risk factors, Hupka concluded that Magera was likely to commit new predatory sexual offenses.

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[1] RCW 71.09.020(18); In re Det. of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006) (quoting In re Det. of Thorell, 149 Wn.2d 724, 758-59, 72 P.3d 708 (2003)). A "mental abnormality" is defined as "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).

A jury found that Magera was an SVP. As a result, the trial court committed Magera to a secure facility until such time as his mental abnormality has been modified to the point where he would be safe at large. Magera appeals.

DISCUSSION

Magera first argues that the prosecutor committed two instances of misconduct during closing argument that require reversal of his commitment order. We disagree.

To prevail on this claim, Magera must show that the prosecutor's conduct was both improper and prejudicial.[2] We consider the prosecutor's alleged improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.[3] To establish prejudice, Magera must show a substantial likelihood that the misconduct affected the jury verdict.[4] Because Magera failed to object, we will not review the alleged error unless the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.[5]

Magera argues that the prosecutor improperly urged the jury to civilly commit him in order to hold him accountable for his earlier crimes by stating, "We need to see Mr. Magera taking accountability for his actions. Pleading guilty and avoiding trial is not taking accountability."[6] Magera is correct that a prosecutor commits

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[2] In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 717, 286 P.3d 673 (2012).

[3] State v. Anderson, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009).

[4] Glassman, 175 Wn.2d at 717.

[5] Id.

[6] Report of Proceedings (RP) (March 6 & 7, 2013) at 17.

misconduct by arguing that civil commitment "should be invoked to impose further punishment."[7] But here, the prosecutor did not make such an argument. Instead, the prosecutor made this statement in the context of arguing that Magera failed to accept responsibility for his offenses, acknowledge his risk factors, and truly incorporate the information learned in treatment to reduce his risk of recidivism. Taken in context, the prosecutor's argument suggests that Magera lacks insight into his offending behavior and that, as a result, there is a strong likelihood that he will reoffend if released. Such an argument is supported by the evidence presented at trial. "[I]n a sexual predator commitment proceeding, the prosecutor is entitled to argue that a respondent's future dangerousness prevents placement in a less restrictive setting than secure confinement."[8] The prosecutor's argument was not improper.

Magera also argues that the prosecutor's rebuttal argument caused the jury to improperly base its decision on passion and prejudice. In an effort to explain Magera's mental abnormality, the prosecutor juxtaposed a normal reaction to a young child—caring and kindness—with Magera's reaction to a young child—arousal.[9] The comments by the prosecutor were either based on evidence in the

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[7] In re Det. of Gaff, 90 Wn. App. 834, 842, 954 P.2d 943 (1998).

[8] Id.

[9] The prosecutor argued, "You imagine a [k]indergartner, a five or six-year-old. You see a little person who's innocent, bushy tailed, wide eyed, dwarfed by the fifth and sixth graders that go to the same elementary school. You feel the need, the desire, to protect this little child, to nurture them, to shield them from bad things. You talk to a [k]indergartner about their favorite Disney princess or their latest Lego creation. That's what you do. Mr. Magera sees a [k]indergartner and sees a potential sexual partner. Mr. Magera sees a [k]indergartner and feels sexual urges. He gets aroused. He gets and maintains an erection. Mr. Magera talks to a [k]indergartner about fun-fun and it being our little secret, because if other people found out, they

record and before the jury or they were fair inferences from that evidence.[10] In closing argument, the prosecutor has wide latitude in making arguments and drawing reasonable inferences from the evidence.[11] The prosecutor's argument was not improper. Furthermore, the type of rhetoric used in the prosecutor's closing argument here did not approach the egregious conduct of the prosecution in the cases relied upon by Magera.[12] Any arguably improper comments were not so egregious as to engender incurable prejudice. Magera's claims of prosecutorial misconduct fail.

Magera next contends he was denied the right to a unanimous jury verdict. Specifically, Magera argues that where the State presents evidence of multiple diagnoses to support its claim that the respondent suffers from a mental abnormality, the jury is required to unanimously agree as to which specific mental abnormality makes the respondent an SVP. We disagree.

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wouldn't understand. Five and six-year-olds gave him an erection. Ladies and gentlemen, that is not a normal response." RP (Mar. 6 & 7, 2013) at 55-56.

[10] For example, Dr. Hupka testified that Magera's pedophilia "impairs his emotional capacity. . . . The normal response to children is one of caretaking . . . . Sexual arousal and sexual desire and wanting to rape children is not a normal part of emotional experience." RP (Mar. 1 & 4, 2013) at 137-38.

[11] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

[12] See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (reversing convictions where the prosecutor argued extensively that the defendant was affiliated with a terrorist organization whose members were militant "butchers, that killed indiscriminately"); State v. Pierce, 169 Wn. App. 533, 556, 280 P.3d 1158 (2012) (reversing convictions where the prosecutor "argued outside the evidence about what [the defendant's] thoughts were before the crime, invited the jury to relive the horror of the murders by fabricating a heart-wrenching story about how the murders occurred, and invited the jury to imagine the crimes happening to themselves").

The right to a unanimous jury verdict applies in SVP civil commitment hearings.[13] Moreover, the principles regarding the right to unanimous jury verdicts in criminal proceedings apply equally in SVP civil commitment hearings.[14] One such principle is the rule that where there is more than one statutory alternative means of committing an offense, the alternative means test generally requires that the jury unanimously agree on one of the alternative means.[15] Proof that a respondent suffers from a "mental abnormality" or proof that a respondent suffers from a "personality disorder" constitute the two distinct means of establishing the mental illness element of the SVP determination.[16] But "the alternative means analysis does not apply to circumstances involving 'means within a means.'"[17] "[T]he actual diagnosed mental abnormalities or personality disorders are not the alternative means which the State must prove beyond a reasonable doubt; it is whether the person suffers from a mental abnormality or a personality disorder."[18]

Here, the State presented evidence that Magera suffered from both pedophilia and a personality disorder not otherwise specified, which complicated his pedophilia. But the State clarified that Magera's personality disorder alone did not satisfy the

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[13] RCW 71.09.060(1); In re Det. of Keeney, 141 Wn. App. 318, 327, 169 P.3d 852 (2007).

[14] In re Det. of Halgren, 156 Wn.2d 795, 809-11, 132 P.3d 714 (2006).

[15] Id. at 809 (citing State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976)).

[16] Id. at 811; see RCW 71.09.020(16).

[17] In re Det. of Pouncy, 144 Wn. App. 609, 618, 184 P.3d 651 (2008) (quoting State v. Al-Hamdani, 109 Wn. App. 599, 604, 36 P.3d 1103 (2001)), aff'd, 168 Wn.2d 382 (2010); see In re the Pers. Restraint of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988).

[18] In re Det. of Sease, 149 Wn. App. 66, 76-77, 201 P.3d 1078 (2009).

statutory requirements for finding that Magera was an SVP. Indeed, because Magera was not alleged to have a qualifying personality disorder, the jury instructions eliminated this option. Instead, the jury was instructed only that the State must prove that Magera "suffers from a mental abnormality which causes serious difficulty in controlling his sexually violent behavior."[19] The jury was not required to unanimously decide whether Magera had a mental abnormality as a result of his pedophilia alone or in combination with his personality disorder not otherwise specified, which complicated his pedophilia.[20] Instead, the jury need only have unanimously found that the State proved that Magera suffered from a mental abnormality that made it more likely that he would engage in acts of sexual violence if not confined to a secure facility. It did so. Accordingly, no unanimity instruction was required and Magera's claim is unavailing.

As part of the same argument, Magera contends that the trial court erroneously rejected his proposed jury instructions. We review the adequacy of the jury instructions de novo "in the context of the instructions as a whole."[21] Magera's proposed instructions would have required the jury to reach unanimous agreement as to whether Magera suffered from "a mental abnormality, to wit: pedophilia."[22] In

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[19] Clerk's Papers at 14.

[20] "[T]hese two means of establishing that a person is an SVP [—mental abnormality or personality disorder—] may operate independently or may work in conjunction. Thus, because an SVP may suffer from both defects simultaneously, the mental illnesses are not repugnant to each other and may inhere in the same transaction." Halgren, 156 Wn.2d at 810.

[21] State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 425 (1995).

[22] Clerk's Papers at 568.

declining to give the proposed instructions, the trial court concluded that it would likely be a comment on the evidence to limit the alleged mental abnormality to pedophilia alone and that such instructions were unnecessary because there were not multiple diagnoses that would make the pattern jury instructions confusing. For these and the reasons discussed above, Magera's proposed jury instructions were properly refused.

We affirm the trial court's order authorizing Magera's commitment as an SVP.

WE CONCUR:

NO. 90725-1

WASHINGTON STATE SUPREME COURT

In re the Detention of: KEVIN MAGERA, Petitioner.	DECLARATION OF SERVICE

I, Joslyn Wallenborn, declare as follows:

On September 24, 2014, I sent via electronic mail and regular USPS mail a true and correct copy of Answer To Petition For Review and Declaration of Service, postage affixed, addressed as follows:

Gregory Link
Washington Appellate Project
1511 Third Ave, Suite 701
Seattle, WA 98101

greg@washapp.org
wapofficemail@washapp.org

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

DATED this 24th day of September, 2014, at Seattle, Washington.

JOSLYN WALLENBORN

OFFICE RECEPTIONIST, CLERK

To: Wallenborn, Joslyn (ATG); 'greg@washapp.org'; Washington Appellate Project (wapofficemail@washapp.org)
Cc: Buder, James (ATG)
Subject: RE: In re the Detention of Kevin Magera, no. 90725-1

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Good Afternoon,

Attached for filing is the Answer To Petition for Review in the above-entitled case. A hard copy has also been mailed to the Washington Appellate Project.

Filed on behalf of:

JAMES BUDER

WSBA #36659, OID #91094

Thank you,
Joslyn Wallenborn
Legal Assistant to Malcolm Ross, Senior Counsel, James Buder, AAG, and Fred Wist, AAG
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