70129-1

70129-1

No. 70129-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Detention of:

KEVIN MAGERA,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. Misconduct by the assistant attorney general deprived Kevin Magera of due process.

2. Mr. Magera was denied his right a unanimous jury.

3. The trial court erred in refusing to give Mr. Magera's proposed "to commit" instruction.[1]

B. ISSUES PRESENTED

1. A defendant has the right to a fair trial protected by due process, free from prosecutorial misconduct. In a commitment trial it is improper for the State to argue the purpose of the proceeding is to punish the respondent or otherwise to address his past crimes. Where the State urged the jury to hold Mr. Magera accountable for his past crimes were the state's comments improper?

2. It is improper for a prosecutor to make arguments which seek to appeal to jurors' passions and prejudices. Where the State made such arguments were the State's comments improper?

3. A person may not be indefinitely confined under RCW 71.09 unless a jury unanimously finds the person is suffering from a mental

[1] Because the proposed instructions were not individually numbered, Mr. Magera cannot comply with the requirement of RAP 10.3(g) that he assign error to the instruction by number. The instruction is included in the Clerk's Papers. CP 567.

abnormality or personality disorder which makes the person more likely to engage in future acts of sexual violence if not confined in a secure facility. In making the determination of whether the person suffers from a mental abnormality or personality disorder, the jury must be unanimous as to the abnormality or disorder suffered. Was the jury required to be unanimous as to what disorders made Mr. Magera eligible for commitment?

C. STATEMENT OF THE CASE

As a child, Mr. Magera was subjected to regular sexual abuse, first by his father beginning at age 4 or 5. CP 56-60. He reported the abuse to his stepfather, who in turn began sexually abusing him. CP 57-58. Additionally, a friend of his stepfather began sexually abusing him as well. *Id.*

By the age of 7 he was removed from his family home to live in a series of foster care placements. CP 66. Robbed of his own innocence and as a product of his abuse, he too acted out sexually with others around him, including siblings and other children. CP 69, 75-77. His foster placements often involved living with other youths from similar backgrounds who were also conditioned to inappropriate sexual behavior. Thus, his time in foster care was punctuated by repeated

instances of sexual activity with other children. CP 80-85. As is too often the case, ultimately his foster care led to his graduation to placement in the Juvenile Rehabilitation Administration. CP 72.

Back in the community as a young adult, Mr. Magera was convicted of three offenses for molesting 2 children who were 5 and 6 at the time of the offenses. Exhibit 14. Mr. Magera was sentenced to about 11 years in prison. *Id.* While in prison Mr. Magera was evaluated by Dr. John Hupka CP 76. Dr. Hupka diagnosed Mr. Magera with pedophilia as well as personality disorder not otherwise specified (NOS).

Immediately before Mr. Magera's completion of his sentence the State filed a petition alleging Mr. Magera should be committed under RCW 71.09.

At trial, Dr. Hupka opined Mr. Magera's pedophilia made him likely to commit new sexual offenses if not committed. 3RP 181.

A jury found Mr. Magera met the criteria for commitment. CP 95.

D. ARGUMENT

1. Flagrant misconduct by the Assistant Attorney General deprived Mr. Magera of a fair trial.

a. *Prosecutorial misconduct deprives a respondent in a commitment trial due process right to a fair trial.*

A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Even where a defendant does not object in the trial court to improper acts by the prosecutor, this Court may review them where they are flagrant and ill-intentioned. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). That is the case here.

b. *The State wrongly urged the jury to commit Mr. Magera as a way of holding him accountable for his prior crimes.*

Both the Washington and United States Supreme Court have accepted the notion that indefinite confinement under statutes such as RCW 71.09 is civil rather than criminal in nature. Each court has found such statutes focus on treatment, a civil aim, rather than punishment, retribution or other aims of criminal statutes. The Supreme Court said:

> The sexually violent predator statute is not concerned with the criminal culpability of petitioners' past actions. Instead, it is focused on treating petitioners for a current mental abnormality, and protecting society from the sexually violent acts associated with that abnormality.

In re the Detention of Young, 122 Wn.2d 1, 22, 857 P.2d 989 (1993). Yet that is precisely the argument the State presented to the jury. The State told the jury:

> We need to see Mr. Magera taking accountability for his actions. Pleading guilty and avoiding trial is not taking accountability.

5RP 17.

As an initial matter, admitting one's guilt to serious felonies seems to be the very definition of accountability. In any event, this Court has previously held that this sort of argument is improper. In *In re the Detention of Gaff* the State argued that indefinite confinement

under RCW 71.09 was a "tool" the jury could use to address previously imposed sentences which had been too lenient. 90 Wn. App. 834, 842, 954 P.2d 943 (1998). This Court said

> to the extent the prosecutor suggested that this "tool" of civil commitment should be invoked to impose further punishment, the argument would clearly constitute misconduct because the purpose of the Community Protection Act is not to impose punishment but to provide treatment and to protect the public. Any argument for further punishment raises substantive due process and ex post facto issues.

Id. at 842-43 (citing *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *Young,* 122 Wn.2d 1). The same is true here.

Mr. Magera was held accountable for his past acts by way of his guilty plea and conviction for three counts, and his resulting sentence of 11 years in prison. The jurors' task in this case was not to determine whether that was sufficient punishment for his acts. *Young*, 122 Wn.2d at 22; *Gaff*, 90 Wn. App. at 842-43. Rather, the jury's focus was determining whether to commit Mr. Magera for treatment of his current condition. *Id.* The State's argument was a flagrant misstatement of the law.

c. *The assistant attorney general improperly and flagrantly encouraged the jury to base its verdict on passion and prejudice.*

It is improper for the State to employ in its arguments to the jury inflammatory comments which are a deliberate appeal to the passions and prejudices of the jury. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Such arguments are improper for the added reason that they so often rely on matters outside the evidence. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Here, the assistant attorney general made such flagrant and prejudicial comments.

In its rebuttal argument, the State said:

> You imagine a Kindergartener, a five or six-year-old. You see a little person whose 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 princes or their latest Lego creation. That's what you do. Mr. Magera sees a Kindergartner and sees a potential victim.

6RP 55-56.

The State's inflammatory argument relied upon matters not in evidence. The argument was a purposeful effort to stoke the jurors' basest fears and prejudices. The State's argument was improper.

d. *The Court should reverse Mr. Magera's commitment.*

If the State's conduct is shown to be improper, it is prejudicial if the appellate court can determine that there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Borg*, 145 Wn.2d 329, 335, 36 P.3d 546 (2001). The State's comments were not inadvertent or comments on a collateral issue. Rather, the State's misstatement of the law went to the central issue at stake in this case. The State urged the jury to resolve the issues by resort to improper punitive aims, and to do so only after the State purposefully appealed to the jury's passion and prejudices. The State's improper comments warrant reversal.

2. Mr. Magera was denied his right to a unanimous jury.

a. *Jury unanimity is required commitment trials.*

Based on principles of due process as well as the state constitutional right to a unanimous jury trial, a defendant in a criminal case has a constitutional right to a conviction only by a jury which unanimously agrees that the crime charged has been committed beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); U.S. Const. amend. XIV; Const. art 1, § 22. Likewise, involuntary detention in RCW 71.09 proceedings is governed by the due process protections that apply in a criminal proceeding. *Young*, 122

Wn.2d at 48. Specifically, RCW 71.09.060 requires a jury unanimously conclude the State has proved each element necessary for commitment beyond a reasonable doubt.

In *In re the Detention of Halgren*, 156 Wn.2d 795, 132 P.3d 714 (2006), the Court concluded the unanimity requirements announced in *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), apply to RCW 71.09 proceedings. The Court said "[g]iven that the ultimate due process concern is in ensuring that the jury unanimously agrees on the basis for confinement, we hold that unanimity rules are applicable in SVP cases." *Halgren*, 156 Wn.2d at 720. *Petrich* requires that where the State alleges a defendant has committed multiple acts, each of which could independently establish the charge, either the prosecutor must elect which act it is relying on or the jury must be instructed they must unanimously agree on a single act in assessing the defendant's guilt. *Petrich*, 101 Wn.2d at 572. This requirement, however, does not apply to alternative means cases, that is cases in which the State alleges a single act which may satisfy alternative statutory means of committing a single offense. *See e.g. State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997) (holding second degree murder has alternative means – intentional murder and felony murder).

b. *Jury instructions must ensure unanimity instruction where the jury is presented with alternative evidence of more than one abnormality might cause the risk of reoffense.*

Unlike the petitioner in *Halgren*, Mr. Magera does not contend the jury was required to unanimously agree that he suffered a "mental abnormality" as opposed to a "personality disorder." In fact, the trial court omitted the term "personality disorder" from the instruction setting forth the elements in this case. CP 14. Instead, where the State alleges a person suffers a mental abnormality the unanimity requirement of *Petrich*, adopted in *Halgren*, requires the jury unanimously agree as to which abnormality made him committable under RCW 71.09. If the State does not elect which abnormality it wishes the jury to rely upon the trial court must provide an instruction which ensures the jury unanimously agrees on a single abnormality.

In this case, neither course was followed. In fact, the State did precisely the opposite. The State objected to the defense proposed "to commit" instruction which would have required the jury to find a causative effect of a single diagnosis on Mr. Magera's risk of reoffense. 5RP 167; CP 567. That instruction provided in pertinent part:

> To establish that Kevin Magera is a sexually violent predator, the State must prove each of following elements beyond a reasonable doubt:

> . . .
> (2) that Kevin Magera suffers from a mental abnormality, namely Pedophilia which causes him serious difficulty controlling his sexually violent behavior . . . .

CP 567. By requiring the jury to unanimously agree on a single diagnosis, which happened to be the only one the State offered, that instruction would have resolved the unanimity problem. The court refused to provide that instruction to the jury. 5RP 178.

The jury heard evidence that Dr. Hupka diagnosed Mr. Magera with personality disorder NOS. 3RP 135. That diagnosis "complicated" his pedophilia. 3RP 136. In closing, the State told the jury "Now this statue allows a personality disorder alone, as long as it makes someone likely to reoffend, to be constituted [sic] a sexually violent predator." 6RP 9. The State did acknowledge that this was not Dr. Hupka's opinion in this case. But, rather than ensure the jury would unanimously agree as to a single disorder which caused Mr. Magera's likelihood of reoffense, the State specifically invited the jury to consider other possibilities. The State's argument illustrates its objection to Mr. Magera's proposed instruction was little more than a hedge on its bet.

c. *Mr. Magera was denied a unanimous jury verdict.*

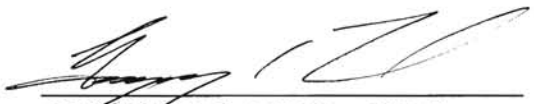
In limited situations, denial of the e right to a unanimous verdict does not require reversal. If the State can prove the violation was harmless beyond a reasonable doubt, the failure to give a "unanimity" instruction does not require reversal. *State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990). The failure to give a unanimity instruction requires reversal if any rational juror could have a doubt as to whether each alternative separately established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411. In the context of a RCW 71.09 trial, the inquiry must be whether a reasonable juror could disagree that one or more of the alternatives causes a serious lack of control.

Here, in addition to the diagnosis pedophilia, the State pointed jurors to the diagnosis of personality disorder NOS and identified it as independent and sufficient basis to commit Mr. Magera. In light of that added diagnosis, and even if Dr. Hupka did not see it as such, the State cannot prove the absence of an election or unanimity instruction was harmless. *Kitchen*, 110 Wn.2d at 411. This Court must reverse Mr. Magera's commitment.

E. CONCLUSION

The assistant attorney general's misconduct deprived Mr. Magera of a fair trial. Further, the failure to ensure the unanimity of the jury's verdict requires a new trial.

Respectfully submitted this 17th day of December, 2013.



GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Petitioner

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

IN RE THE DETENTION OF	)	
	)	
	)	
KEVIN MAGERA,	)	NO. 70129-1-I
	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, DECLARE THAT ON THE 17TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **OPENING 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:

[X] JAMES BUDER, AAG [JamesB3@atg.wa.gov] OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] KEVIN MAGERA SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2013.

x _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711