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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Detention of: R.M. Appellant.	No. 54293-5-II UNPUBLISHED OPINION

LEE, C.J. — R.M. appeals his involuntary commitment for 180 days. R.M. argues that the trial court erred in admitting hearsay evidence during an expert witness's testimony; the State committed misconduct during closing argument by misstating the applicable law; and even if the errors individually were harmless, the cumulative effect denied him a fair commitment hearing.

We hold that the trial court did not err in allowing the expert witness's testimony. We agree that the State's conduct was improper, but hold that the conduct was not prejudicial. And we disagree that cumulative errors denied R.M. a fair commitment hearing. Accordingly, we affirm R.M.'s involuntary commitment for 180 days.

FACTS

The State charged R.M. with third degree assault after he allegedly assaulted his brother, Robert,[1] with a wine glass. In November 2019, the trial court found R.M. incompetent to stand trial and committed him to Western State Hospital for an evaluation.

[1] Because Robert shares the same last name with R.M., we will refer to Robert by his first name in order to protect R.M.'s privacy. We mean no disrespect.

Mallory McBride, PhD, R.M.'s clinical psychologist and forensic evaluator, and Sandra Karlsvik, M.D., R.M.'s treating psychiatrist, filed a petition for R.M. to be involuntarily committed for 180 days of treatment. They claimed that, as a result of a mental disorder, R.M. was gravely disabled. They also claimed that R.M. was found incompetent, had criminal charges of third degree assault dismissed, had committed acts constituting a felony, and presented a substantial likelihood of repeating similar acts as a result of a mental disorder.

The petition was tried before a jury on January 2020. Robert, Dr. McBride, and Mary Cason, M.D., testified.

At the hearing, Robert testified regarding the incident that led to the third degree assault charge. Robert described R.M.'s general wellness before the incident. According to Robert, R.M. would disassemble his house, keep urine in light fixtures, dig through the trash, tear up photos, and eat road kill. R.M. would often ride his bicycle around the neighborhood with no regard for other vehicles on the road. In one instance, R.M. got hit by a car while "wondering [sic] down the highway." 2 Verbatim Report of Proceedings (VRP) at 227. R.M. also mistreated his mother and brother, whom R.M. lived with.

Dr. McBride evaluated R.M. for civil commitment. During the evaluation, R.M. did not answer her questions, talked about winning a hundred million dollars in Las Vegas, claimed to have broken his back and neck though she had seen him walking, and said he heard voices.

Dr. McBride described R.M.'s behavior while he was committed for evaluation. She stated that R.M. cussed at staff, had some behavioral challenges, required quite a bit of prompting to engage in activities of daily living, and still had trouble orienting himself to his surroundings.

Dr. McBride diagnosed R.M. with "unspecified schizophrenia spectrum or other psychiatric disorder." 2 VRP at 312. She stated that, at that point, she did not believe R.M. was ready to be released to the community. Based on her evaluation of R.M., review of chart notes, and communication with the treatment team, Dr. McBride believed R.M should be civilly committed. Dr. McBride stated that Sandra Karlsvik, M.D. was her co-petitioner in this case.

Later, during redirect examination, the State asked Dr. McBride if she made the decision to file the petition alone. Dr. McBride again stated that she had a co-petitioner, Dr. Karslvik. The State then asked, "So when decisions are made regarding a patient's treatment and the decision to move to have someone civilly committed, is it then a joint decision?" 2 VRP at 365-66. R.M. objected, arguing that Dr. McBride was "testifying to another witness's basic testimony, what they would be here to testify to." 2 VRP at 366. The trial court overruled the objection, stating, "On that basis I'll overrule the objection." 2 VRP at 366. McBride then responded to the question, stating it was a joint decision.

The State also asked Dr. McBride whether her opinions regarding R.M. were shared by Dr. Karslvik. Dr. McBride responded that she consults with the entire treatment team before filing a petition. R.M. did not object to this testimony.

Dr. Cason wrote R.M.'s admission psychiatric evaluation report. Dr. Cason testified that she viewed R.M. as at least gravely disabled, though not intentionally nor advertently dangerous. She further stated that R.M.'s presentation made her very concerned about his safety if he were to leave the hospital.

During closing arguments, the State reviewed the verdict form with the jury. The State began with the first question on the verdict form: whether R.M. had a mental disorder. The State argued:

> And before we talk about this, we are talking about a mental disorder. We're not talking about punishing somebody for a crime. We're not talking about punishing somebody because a person suffers from a mental disorder. It's not that kind of proceeding. Even though we'll talk about acts constituting a felony, the ultimate direction of this trial is what is in the best interest of this individual and the treatment that —

3 VRP at 455. R.M. objected to the State's statements, claiming they were a misstatement of the law. The trial court overruled the objection, stating that "the jury's been directed that counsel's statements are not the law." 3 VRP at 455.

The jury found that R.M. had a mental disorder and was gravely disabled as a result of the mental disorder. The jury also found that R.M. had criminal charges dismissed due to a finding of incompetence, committed acts constituting the felony of third degree assault, and presented a substantial likelihood of repeating similar acts as a result of the mental disorder. Finally, the jury found that the best interest of R.M. would not be served by less restrictive treatment as an alternative to detention. Based on the jury's verdicts, R.M. was involuntarily committed for 180 days.

R.M. appeals.[2]

[2] R.M.'s 180-day involuntary commitment expired in June 2020. However, each prior commitment is evidence against an individual seeking denial of a petition for civil commitment. *In re Det. of M.K.*, 168 Wn. App. 621, 626, 279 P.3d 897 (2012). Because "each commitment order has a collateral consequence in subsequent petitions and hearings," this appeal is not moot. *Id*.

ANALYSIS

A. HEARSAY TESTIMONY

R.M. argues that the trial court erred in allowing hearsay testimony by Dr. McBride and that this error was not harmless. Specifically, R.M. argues that Dr. McBride's testimony stating the decision to petition for involuntary commitment was a joint decision with Dr. Karslvik was hearsay and inadmissible. We disagree.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted." ER 801(c). A statement can be oral, written, or nonverbal conduct that is intended by a person to be an assertion. ER 801(a). A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Winborne*, 4 Wn. App. 2d 147, 177, 420 P.3d 707 (2018).

Dr. McBride testified that Dr. Karlsvik was her co-petitioner. The State then asked Dr. McBride, "So when decisions are made regarding a patient's treatment and the decision to move to have someone civilly committed, is it then a joint decision?" 2 VRP at 365-66. Dr. McBride responded that it was a joint decision. Dr. McBride's responses are not hearsay because they do not include any statement made by Dr. Karlsvik. Instead, Dr. McBride testified regarding her own knowledge that Dr. Karslvik was her co-petitioner, as well as her own understanding of how decisions are made when an individual's treating physicians file a petition for involuntary commitment. Therefore, the trial court did not abuse its discretion in admitting Dr. McBride's testimony.

B. PROSECUTORIAL MISCONDUCT

R.M. argues that the State committed misconduct by misstating the law during closing arguments and that this misconduct was prejudicial. We agree that the State misstated the law but disagree that the misconduct was prejudicial.

1. Legal Principles

The prosecutorial misconduct standard applies to civil involuntary commitment hearings. *See In re H.N.*, 188 Wn. App. 744, 765, 355 P.3d 294 (2015), *review denied*, 185 Wn.2d 1005 (2016). Prosecutorial misconduct occurs when the prosecutor's conduct is both improper and prejudicial. *Id.*

The respondent "bears the burden of showing that the comments were improper and prejudicial." *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). Misstatement of the law is improper conduct. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

2. Misconduct

R.M. argues that the State misstated the law during closing arguments. The State argued:

> And before we talk about this, we are talking about a mental disorder. We're not talking about punishing somebody for a crime. We're not talking about punishing somebody because a person suffers from a mental disorder. It's not that kind of proceeding. Even though we'll talk about acts constituting a felony, the ultimate direction of this trial is what is in the best interest of this individual and the treatment that —

3 VRP at 455. R.M. contends that the State's statement that "'the ultimate direction of this trial is what is in the best interest of this individual'" was a misstatement of the law. Br. of Appellant at 27 (quoting 3 VRP at 455).

Here, the State petitioned for involuntary commitment on the grounds that R.M. was gravely disabled and that R.M. was likely to repeat similar acts that constituted a felony. The State argued to the jury that the "ultimate direction" was what was in the best interest of R.M., but what was in the best interest of R.M. was only one element that needed to be decided by the jury on the issue of less restrictive treatment. The jury was also required to decide whether R.M. had a mental disorder, whether R.M. was gravely disabled, and whether R.M. had committed acts that constituted a felony.

When proceeding under the gravely disabled standard, it is not enough to show that care and treatment would be "preferred or beneficial or even in his best interest." *In re LaBelle*, 107 Wn.2d 196, 208, 728 P.2d 138 (1986). Further, when proceeding under the acts constituting a felony standard, the question is not what is in the best interest of the individual, but whether R.M. had criminal charges against him dropped because he was incompetent to stand trial, had committed acts that constituted a felony, and had a substantial likelihood of committing similar acts if released. Therefore, when the State argued that "the ultimate direction of this trial is what is in the best interest of this individual," the State misstated the law. 3 VRP at 455. The State's conduct was improper.[3]

3. Prejudice

Prejudice occurs when there is a substantial likelihood that the jury's verdict is affected by the prosecutor's misconduct. *Allen*, 182 Wn.2d at 375. In finding prejudice, we look at the effect

[3] The State contends that its argument relating to R.M.'s best interests was proper because it was made in the context of the less restrictive alternative. However, the record shows that the State did not make its best interest argument in the context of the less restrictive alternative.

of a prosecutor's improper conduct by "examining that conduct in the full trial context, including . . . the evidence addressed in the argument." *H.N.*, 188 Wn. App. at 765.

R.M. argues that he was prejudiced because it "muddied" the message. Br. of Appellant at 28. But the record does not support this argument. Immediately after R.M.'s objection, the trial court clarified that "the jury's been directed that counsel's statements are not the law." 3 VRP at 455. The jury instructions also explicitly stated that

> As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

Clerk's Papers at 92. Therefore, the message was not "muddied" because the jury was given clear instruction at the time of the objection, as well as before deliberations, that what the lawyers say is not evidence and that the jury must disregard anything the lawyers say that is not supported by the evidence or the law provided by the trial court. The jury is presumed to follow the trial court's instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Finally, there is not a substantial likelihood that the jury's verdict was affected by the State's improper argument because the other evidence presented by the State showed that R.M. had a mental disorder, was gravely disabled, had a substantial likelihood of committing similar acts, and would not benefit from less restrictive treatment.

Dr. McBride testified that she diagnosed R.M. with a mental disorder. Specifically, Dr. McBride stated that R.M. had an "unspecified schizophrenia spectrum or other psychiatric disorder." 2 VRP at 312.

In order to show that an individual is gravely disabled, the State must present "tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment which presents a high probability of serious physical harm within the near future unless adequate treatment is afforded." *LaBelle*, 107 Wn.2d at 204-05.

Here, the State presented testimony from Robert, Dr. McBride, and Dr. Cason to show that R.M. was gravely disabled. Robert testified that R.M. would disassemble his house, keep urine in light fixtures, and eat road kill. Robert also testified that R.M. would often ride his bicycle around the neighborhood with no regard for other vehicles on the road and described one instance where he saw R.M. get hit by a car while he was "wondering [sic] down the highway." 2 VRP at 227. Dr. McBride testified that she diagnosed R.M. with an "unspecified schizophrenia spectrum or other psychiatric disorder." 2 VRP at 312. Dr. McBride also described her observations of R.M. while he was committed for observation, which included behavioral challenges, requiring quite a bit of prompting to engage in activities of daily living, and trouble orienting himself to his surroundings. Dr. McBride stated that she did not believe R.M. was ready to be released into the community. She further stated that she did not believe R.M. recognized his need for treatment. Dr. Cason testified that R.M. was gravely disabled and that she was very concerned for R.M.'s safety were he to leave the hospital. The testimony from these witnesses show that R.M. was unable to provide for his essential needs, such as food, shelter, and medical treatment, and that there is a high probability of serious physical harm in the near future unless adequate treatment is afforded.

The State also presented testimony from Robert and Dr. McBride that R.M. was likely to repeat similar acts. Robert testified that R.M. mistreated his mother and brother, whom R.M. lived with. Dr. McBride testified that she believed R.M. could be a danger to others if he were released.

Finally, the State presented testimony from Dr. McBride that R.M. would not benefit from less restrictive treatment. Dr. McBride testified that, at that point, she did not believe R.M. was ready to be released to the community. R.M. was still experiencing acute symptoms of psychosis. R.M. had only been in treatment for one month, which is not enough time to stabilize his condition.

Given the evidence presented, there was not a substantial likelihood that the jury's verdict was affected by the State's improper argument. Because R.M. cannot show prejudice, his prosecutorial misconduct claim fails.

C. CUMULATIVE EFFECT

R.M. argues that, even if the two errors he alleges do not individually require reversal, the cumulative effect denied him a fair hearing. We disagree.

"The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal." *In re Coe*, 175 Wn.2d 482, 515, 286 P.3d 29 (2012); *see also State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012) (finding the cumulative error doctrine did not apply where the defendant was only affected by one error and failed to demonstrate prejudice).

Here, the cumulative error doctrine does not apply because the only error was a misstatement of the law by the State during closing argument. However, as discussed above, R.M. cannot show resulting prejudice. Therefore, the cumulative error doctrine does not apply.

We affirm R.M.'s involuntary commitment for 180 days.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, C.J.

We concur:

Maxa, J.

Sutton, J.