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

In re the Detention of:
MICHAEL SEASE.
Appellant.

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DIVISION II
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Michael Sease appeals his commitment as a sexually violent (SVP) contending he was denied his right to a unanimous jury verdict. In addition, Mr. Sease contends the State failed to meet its burden of proving his likelihood to reoffend stemmed from a mental condition. Finally, he argues the assistant attorney general committed misconduct in closing argument in telling the jury they need not find Mr. Sease's likelihood to reoffend stemmed from a mental condition.

B. ASSIGNMENT'S OF ERROR

1. The trial court deprived Mr. Sease of his right to a unanimous jury.
2. The State did not offer sufficient proof that Mr. Sease is a SVP.
3. Misconduct by the assistant attorney general deprived Mr. Sease of a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The jury may not commit a person as a SVP unless it finds the person is suffering from a mental 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. Where there expert witnesses offered diagnoses that Mr. Sease had several personality disorders, and there was disagreement among the experts as to which disorders could be diagnosed in Mr. Sease, was the jury required to be unanimous as to what disorders made Mr. Sease eligible to be declared a SVP?

2. Due process requires the State prove each element necessary to commit a person as an SVP beyond a reasonable doubt. Due process also requires that commitment of a person as an SVP be predicated upon proof that, unlike other dangerous potential recidivists, the person suffers a mental abnormality or disorder which makes them likely to engage in acts of sexual violence. Where the State did not prove Mr. Sease's risk of reoffense stemmed from a mental disorder was there sufficient proof to commit him as an SVP?

3. A defendant has the right to a fair trial protected by due process, free from prosecutorial misconduct. A prosecutor may not misstate the relevant law during in closing argument. Here, the assistant attorney general told the jury it need only determine

whether Mr. Sease was likely to reoffend regardless of whether that risk of reoffense stemmed from a mental disorder. Were the state's comments improper?

D. STATEMENT OF THE CASE

Michael Sease was convicted in 1988 of first degree kidnapping with sexual motivation and first degree rape, arising from separate incidents, for which he received consecutive sentences of 78 and 240 months respectively. CP 3-5. Prior to his release from confinement at the end of his sentence the State filed a petition seeking Mr. Sease's indefinite confinement pursuant to RCW 71.09. CP 1-2.

At trial the State presented the testimony of Dr. Dennis Doren, a psychologist employed at Wisconsin's equivalent of the Special Commitment Center. Dr. Doren opined Mr. Sease suffered from three personality disorders: antisocial personality disorder, borderline personality disorder and narcissistic personality disorder. RP 123-24. Dr. Doren opined the borderline and antisocial diagnosis predisposed Mr. Sease to commit sexually violent crimes in the future. RP 173. Dr. Doren stated each of these diagnoses rested in large measure upon Mr. Sease's past criminal acts. RP 174-75.

Dr. Doren testified that reliance upon a personality disorder[s] alone to commit an individual was relatively new and still-evolving position within the treatment community. RP 299-307. Dr. Doren testified he had never before advanced such a position in Washington but had done so in other states. RP 302, 305, Dr. Doren testified that other states avoided the question by requiring a diagnosis of a major mental illness or paraphilia. RP 305-07

Dr. Theodore Donaldson testified he diagnosed Mr. Sease with borderline personality disorder but did not agree with the antisocial or narcissistic disorders. RP 428, 464, 466. Dr. Donaldson testified Mr. Sease did not meet the criteria of a SVP because he did not suffer any mental condition which predisposed him to committing sexually violent acts. Dr. Donaldson testified that because a personality disorder is merely a description of ones behavior it does not predispose the person to any particular act. RP 434.

A jury found Mr. Sease was an SVP.

E. ARGUMENT

1. THE LACK OF A UNANIMITY INSTRUCTION
DEPRIVED MR. SEASE OF HIS
CONSTITUTIONAL RIGHT TO A
UNANIMOUS VERDICT

a. The requirements of *Petrich* apply to SVP 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 as an SVP is governed by the due process protections that apply in a criminal proceeding. See In re Detention of Young, 122 Wn.2d 1, 48, 857 P.2d 396 (1995) (where SVP statute indicates due process protections similar to criminal proceeding, criminal law standards apply); RCW 71.09.050 (granting accused SVP rights to attorney, expert witnesses, and 12 person jury); RCW 71.09.060 (requiring State prove SVP allegations beyond a reasonable doubt and jury verdict be unanimous). A unanimous jury must conclude that each

element of the sexual predator commitment law is proven beyond a reasonable doubt. Id.; RCW 71.09.060(1).

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 SVP proceedings. The Court said "Given 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 rely 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. Mr. Sease was denied a unanimous jury verdict.

In Halgren, the State offered evidence that Halgren suffered from one mental abnormality and one personality disorder. 156 Wn.2d at 716. Halgren contended jury unanimity was required on the question of “whether [he] had a mental a mental abnormality or a personality disorder.” Id. at 719-20. The Court agreed that “unanimity rules are applicable to SVP cases.” Id. at 720. However, Court concluded the terms “mental abnormality” and “personality disorder” in RCW 71.09.020(16) establish alternative means by which a person may be found a SVP. Halgren, 156 Wn.2d at 721. Thus, the Court concluded Petrich would not require reversal of Halgren’s commitment so long as both alternative means were supported by sufficient evidence. Id. The Court found they were.

Unlike the petitioner in Halgren, Mr. Sease 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 purposefully omitted the term “mental abnormality” from the instructions setting forth the elements in this case. CP 105-06 (Instruction 4 and 5). Instead, Mr. Sease contends that where the state offers multiple diagnosis to support

its claim that a person suffers a personality disorder the unanimity requirement of Petrich, adopted in Halgren, required the jury unanimously agree as to which diagnosis made him an SVP.

Continuing the criminal-law analogy employed by Halgren, if the terms “mental abnormality” and “personality disorder” are the equivalent of alternative means in a criminal case, then multiple diagnoses offered to prove one of these alternative means must be the equivalent of alternative acts in the criminal setting. As the “unanimity requirements” of Petrich apply in SVP cases, Halgren, 156 Wn.2d at 720, the State must either elect a diagnosis or the trial court must provide a unanimity instruction. In this case, neither course was followed, and Mr. Sease’s right to a unanimous jury was violated.

c. In the absence of either an election or a unanimity instruction Mr. Sease’s commitment must be reversed. In limited situations, the right to a unanimous verdict is not violated despite the lack of unanimity instruction in a case where the State validly proved different factual grounds for a conviction. 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). But

the failure to give a unanimity instruction is not harmless 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; State v. King, 75 Wn.App. 899, 903, 878 P.2d 466 (1994). In the context of an SVP trial, the inquiry must be whether a reasonable juror could disagree with one or more of the alternative diagnoses offered by the State.

In the present case, Dr. Doren testified Mr. Sease suffered from three personality disorders antisocial personality disorder, borderline personality disorder and narcissistic personality disorder. RP 123-24. Dr. Doren opined the borderline and antisocial diagnosis predisposed Mr. Sease to commit sexually violent crimes in the future. RP 173. Dr. Leslie Sziebert, Mr. Sease's treating psychiatrist at the Special Commitment Center, testified he agreed with the borderline and narcissistic diagnoses but did not agree with the diagnosis of antisocial personality disorder. RP 581. Dr. Donaldson testified he diagnosed Mr. Sease with borderline personality disorder but did not agree with the antisocial or narcissistic disorders. RP 428, 464, 466.

Based on the contradictory diagnoses offered by each of the three witnesses a reasonable juror could have a doubt as to

whether the antisocial personality disorder diagnosis established Mr. Sease was an SVP. Thus, 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. Sease's commitment.

2. THE STATE DID NOT OFFER SUFFICIENT PROOF THAT MR. SEASE IS A SVP.

a. Due process requires proof that a person's risk of reoffending stems from a mental disorder. Before the State may commit an individual as an SVP, a unanimous jury must conclude that each element of the sexual predator commitment law is proven beyond a reasonable doubt. Young, 122 Wn.2d at 48; RCW 71.09.050; RCW 71.09.060. Thus, the State must prove a person

has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

71.09.020(16). The Supreme Court has concluded such a commitment comports with the requirements of due process only where the state can establish the person has a mental abnormality that makes it "difficult, if not impossible, for the person to control his dangerous behavior." Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

The Court subsequently clarified this constitutional requirement saying

Hendricks underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment “from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.” That distinction is necessary lest “civil commitment” become a “mechanism for retribution or general deterrence”—functions properly those of criminal law, not civil commitment. cf. also Moran, The Epidemiology of Antisocial Personality Disorder, 34 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999) (noting that 40%–60% of the male prison population is diagnosable with Antisocial Personality Disorder).

Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d

856 (2002). This narrowing requirement is consistent with the

plurality decision in Foucha v. Louisiana:

[T]he state asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct..., he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term.

504 U.S. 71, 86-87, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

Thus, to narrow the class of individuals subject to indefinite incarceration, Due Process requires more than mere proof of a risk to reoffend but rather proof of a risk to reoffend which stems from a

mental disorder. See e.g. In re the Detention of Thorell, 149 Wn.2d 724, 715-16, 72 P.3d 708 (2003). Crane requires the State's proof distinguish the person who is likely to reoffend because of their mental condition from the normal recidivist who may not be constitutionally committed no matter how great the likelihood of reoffending. Thorell concluded the Washington statute is consistent with these constitutional requirements. Thus, RCW 71.09.060 must require the State to prove Mr. Sease falls within the former category. The State did not meet this burden.

b. The State did not prove Mr. Sease is an SVP. Dr. Doren stated a personality disorder is "by definition . . . somebody's pattern of interacting with the world." RP 173. With respect to the antisocial personality disorder Dr. Doren described "Mr. Sease's pattern is a repetitive process of various kind of offending including multiple sexual offending." RP 174. Dr. Doren then opined this disorder, predicated as it was upon Mr. Sease's offense history, "predisposes" Mr. Sease to reoffend.

Dr. Doren continued:

The same process with borderline is that his process of being unstable in his interactions with others. It is the interpersonal process and the impulsivity. His pattern includes sexual offending [that] was part and parcel of why he offended initially."

RP 175.

Thus, Dr. Doren relied upon Mr. Sease's criminal history to conclude Mr. Sease suffered a personality disorder and then concluded that diagnosis predisposed Mr. Sease to engage in similar criminal acts in the future. Dr. Doren's opinion is little more than a conclusion that Mr. Sease's past crimes make him more likely to commit similar crimes in the future. This sort of propensity opinion is not cleansed merely by filtering it through the a diagnosis of a personality disorder, where that diagnosis is based in large measure upon the criminal acts.

Because a personality disorder is merely a description of a person's pattern of behaviors the disorder does not predispose a person to any behavior; the order does not drive behavior it merely describes it. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p. xxiii, 4th ed (1994) (Hereafter DSM-IV). The DSM-IV cautions against the misuse of a diagnosis in a forensic setting:

. . . the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the

disorder, having the diagnosis in itself; does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

Id. Thus, not only would it be improper to conclude a diagnosis based upon past acts makes Mr. Sease more likely to commit similar acts in the future, it is improper to conclude that Mr. Sease's prior offenses were the result of his disorder as opposed to simply criminal acts. This is precisely the point Dr. Donaldson repeatedly made. See e.g., RP 434.

In its best light the State did not prove Mr. Sease has a present mental condition that makes him more likely to reoffend but rather it established a pattern of past sexual crimes from which Dr. Doren opined Mr. Sease was likely to commit again. In fact that is precisely what the assistant attorney general argued to the jury telling them Mr. Sease's personality disorder manifests itself through sexual assaults. RP 650. Simply attaching a diagnosis to criminal history does nothing more than allow continued indefinite confinement for past crimes. This is precisely what Crane rejected because it fails to differentiate the run-of-the-mill recidivist from the person whose recidivism is a product of a disorder. That

requirement of due process cannot be circumvented simply by making recidivism itself the disorder.

Moreover, the reliance upon the diagnosis to opine a predisposition to again commit the very acts which give rise to the diagnosis is contrary to the DSM-IV itself. It would be illogical to dismiss that cautionary statement and still credibly rely upon the DSM-IV as the basis for the diagnosis.

It might be true that people who have committed a crime before are more likely to commit crimes in the future as compared to people who have never committed a crime. But the truth of that fact does not permit the indefinite incarceration of those people absent a showing that their risk of reoffense stems from a mental condition. Crane, 534 U.S. at 413; Thorell, 149 Wn.2d at 715-16. The State failed to offer such proof and Mr. Sease's commitment must be reversed.

3. THE STATE'S IMPROPER CLOSING ARGUMENT REQUIRES REVERSAL

a. A prosecutor seeking a verdict based upon passion and prejudice commits misconduct. Misconduct by a prosecutor, a quasi-judicial officer who must act impartially in the interests of justice, may violate a defendant's due process right to a

fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978) (“[O]nly a fair trial is a constitutional trial.”). The prosecutor has a duty to see that the defendant receives a fair trial, seeking a verdict free of prejudice and based upon reason. Id. Generally, a defendant asserting prosecutorial misconduct must establish inappropriate conduct by the prosecutor and resulting prejudice. In re the Personal Restraint of Pirtle, 136 Wn.2d 467, 481, 965 P.2d 593 (1998); State v. Furman, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). If the prosecutor'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).

b. The assistant attorney general's closing argument misstated the law and relieved the State of its burden of proof.

During rebuttal argument the assistant attorney general told the jury it need not determine anything more than that Mr. Sease was likely to reoffend in the future. RP 751. The assistant attorney general stated:

Does he rape people because he chooses to or because he can't help himself? Is it the chicken or the egg? . . . Does that make one rape better than the other because the person wants to do it or because they feel like they can't help themselves?

No. Obviously, that is not why we are here. We're not here to figure those kinds of things out.

RP 751-52.

In relevant part, Dr. Donaldson testified the mere likelihood that someone will reoffend is not enough to find they are a SVP. Instead, Dr. Donaldson insisted the person's likelihood to reoffend must stem from a mental condition which predisposes the person to do so. RP 492. As discussed above, that is precisely what the jury was required to find. See Crane, 534 U.S. at 413; Thorell, 149 Wn.2d at 715-16. Thus, contrary to the assistant attorney general's comments it is not a question of whether "one rape is better than the other," but rather whether the risk of reoffense flows from a mental disorder. A person cannot be indefinitely confined merely because he is dangerous and likely to commit a sexually violent offense. Crane, 534 U.S. at 413. Instead Due Process demands proof that the person is dangerous and likely to commit a future sexually violent offense **because** of a mental condition. Thorell, 149 Wn.2d at 715-16. Thus, it was the task of the jury to determine why Mr. Sease was likely to rape again, and the assistant attorney general's comments misstated the law and relieved the State of its burden of proof.

c. This court must reverse Mr. Sease'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. Borg, 145 Wn.2d at 335.

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. This issue was a matter on which the experts in this case disagreed and upon which disagreement exists in the scientific community. The resolution of this issue in Mr. Sease is a prerequisite to the constitutionality of his confinement. The State's misstatement urged the jury to resolve this fundamental determination by simply ignoring it. The State's misstatement must be viewed as intentional effort to mislead the jury. In light of the dispute as to Mr. Sease's diagnosis[es] and the dispute among the experts regarding reliance upon a personality disorder alone, the State's improper comments warrant reversal.

F. CONCLUSION

For the reasons above, the Court should reverse Mr. Sease's commitment.

Respectfully submitted this 14th day of February, 2008.



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

IN RE THE DETENTION OF)	
)	NO. 36600-2-II
)	
M.R.S.,)	
)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 14TH DAY OF FEBRUARY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **OPRNING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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