

NO. 47414-0-II

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

IN RE THE DETENTION OF RICK MONROE

STATE OF WASHINGTON,

Respondent,

v.

RICK MONROE,

Appellant.

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

The Honorable Sally Olsen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The “to commit” instruction violated Mr. Monroe’s due process right to a fair trial.

2. Mr. Monroe received ineffective assistance of counsel in violation of due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the “to commit” instruction violated Mr. Monroe’s right to due process because it allowed the jury to reach its verdict on speculation, lessened the state’s burden of proof, and was unwarranted by substantial evidence?

2. Whether trial counsel rendered ineffective assistance in not objecting to the flawed “to commit” instruction?

C. STATEMENT OF THE CASE

1. Procedural History

In October 2009, the state filed a petition seeking to have Rick Monroe committed under chapter 71.09 RCW. CP 1-2. Kitsap County Superior Court Judge Sally Olsen found probable cause to believe Mr. Monroe was a sexually violent predator. CP 3-4.

In March 2015, a jury, after hearing the better part of 10 days of testimony, found the state proved beyond a reasonable doubt that Mr.

Monroe is a sexually violent predator (“SVP”). RP I-XI; CP 790. The court signed an Order of Commitment on March 25, 2015. RP 791.

This appeal follows. CP 792-94.

2. Trial Evidence

Dr. Harry Hoberman, the state’s expert witness, relied on past events in forming his opinion that Mr. Monroe met the SVP definition. RP IV 538-66.

Washington juvenile record reflected that Mr. Monroe, at age 16, pleaded guilty to one count of Indecent Liberties with a Child Under Fourteen. Supplemental Clerk’s Papers Exhibits 1-3. As a teen, Mr. Monroe put his hand under the clothing of two 8 year-old girls and touched their bare vaginas. RP Vol III 434-39, 453-56. It was a chance encounter at a Lake Washington park on a warm August day. RP III 420-32. The girls were there with a young chaperone. Everyone was playing in the cool lake waters. RP III 420-32.

Mr. Monroe moved to southern Oregon where he met Michelle Trontvet. RP VII 1,031. They started dating. She worked as a dorm assistant and the job provided her with housing. She lost her job – and her housing – when she was caught with Mr. Monroe in the dorm. RP VII 1,033-1,036. She and Mr. Monroe lived in her car for a time. RP VII 1,036. On impulse, they moved to Hawaii where they lived in a tent on the beach. RP VII

1,038-39. They both got jobs washing dishes. RP VII 1,040. Mr. Monroe lost his job and Ms. Trontvet discovered she was pregnant. RP VII 1,040. The couple moved back to Oregon. RP VII 1,040.

The couple settled back in. Ms. Trontvet lost the baby. RP VII 1,041. She returned to work as a sports writer for a couple local papers. RP VII 1,042. Mr. Monroe held various jobs in restaurants and a tire store. RP VII 1,045-46. He did not hold any job for long. As the couple had scant resources, finding affordable housing was difficult. They moved from one small place to another. Mr. Monroe's contribution to their resources was inconsistent. RP VII 1,049.

Over the next few years, they had two daughters. RP VII 1,043-45. The money situation never got any easier. They sometimes lived apart. Mr. Monroe found somewhat stable employment as a painter. They found the resources to buy a repossessed motor home and moved it to a trailer park. RP VII 1,05-56. One day, Ms. Trontvet saw her three year-old daughter, Crystal, playing with Barbie dolls in such a way as to simulate sex. Fearful that Mr. Monroe did something inappropriate with Crystal, they had one last blow up and ended their relationship. RP VII 1,065-66.

Mr. Monroe quickly departed for Florida. RP IV 554. He was not there for long. He returned to Washington and started a relationship with Lucy Tuggels. RP II 246-47. That relationship brought him into contact

with Kelli Simon. RP II 284-85. Ms. Simon had four children under the age of eight. RP II 279. Two of the children were special needs. RP II 280. In a matter of weeks, Mr. Monroe stopped living with Ms. Tuggels and moved into Ms. Simon's home. RP II 287. She needed assistance caring for her four children. The family was in the process of remodeling an older house. Mr. Monroe had carpentry skills and offered to help with the remodel. RP II 288.

Over an approximate two month window in the summer of 1999, Mr. Monroe engaged in frequent oral and penile-vaginal sex with Ms. Simon's eight year-old daughter Theresa. RP II 280. He also engaged Theresa's neighborhood friend, Allison, in the same activities although with less frequency. RP II 269-71. He also "taught" Theresa's cousin Michael how to have sex with her. RP II 272. After Allison disclosed the abuse to her mother, Mr. Monroe was prosecuted for and, in early 2000, pleaded guilty to rape of a child in the first degree and was sentenced to 120 months in prison. RP II 298; Supp. DCP Exhibits 10, 11, 12.

Once in DOC custody, he was sent to the Twin Rivers Sex Offender Commitment Center at Monroe Corrections Center. Mr. Monroe was placed in an intensive special sex offender treatment program but he did not progress and dropped out without completing the program. RP III 314-17. While in the program, he fantasized about stabbing one of his counsellor's

in the neck with a pencil. RP III 334. While at Monroe, Mr. Monroe said that he sexually violated his daughter Crystal. RP III 325.

Mr. Monroe was transferred from DOC to the Special Commitment Center in 2009. Mr. Monroe, although represented by counsel, did not initially engage with court ordered interviews and testing. RP IV 611. He engaged starting in 2014. RP IV 611. Dr. Hoberman, a psychologist and expert in forensic psychology, concluded Mr. Monroe met Washington's statutory definition of a sexually violent predator. RP IV 4 566, 579, 600, 619, 64-46, 662.

Dr. Donaldson, a clinical psychologist with a specialty in forensic psychology testified as a defense expert. RP IX 1,605. She disagreed with Dr. Hoberman and concluded Mr. Monroe did not meet the definition of a sexually violent predator. RP IX, X 1,605-1,815.

D. ARGUMENT

THE DISJUNCTIVE "TO COMMIT" INSTRUCTION IS FLAWED BECAUSE IT ALLOWED THE JURY TO BASE ITS VERDICT ON SPECULATION, LESSEned THE STATE'S BURDEN OF PROOF, AND WAS UNWARRANTED BY THE EVIDENCE.

Even if the evidence is sufficient to sustain the verdict, the "to commit" instruction is flawed because substantial evidence did not support use of the disjunctive "or" on the issue of whether the mental abnormality or the personality disorder made Mr. Monroe likely to reoffend. The

instruction improperly allowed the jury to base its verdict on a finding that either the mental abnormality or the personality disorder made Mr. Monroe likely to reoffend, rather than requiring the jury to find both conditions made him likely to reoffend. In this manner, the instruction permitted the jury to render a verdict based on speculation and lessened the State's burden of proving both conditions, rather than one or the other, that Mr. Monroe would likely reoffend. It is prejudicial error to submit an issue to the jury when substantial evidence does not support it. In the alternative, Mr. Monroe's counsel provided ineffective assistance in failing to object to the "to commit" instruction.

- a. **The disjunctive language in the "to commit" instruction permitted the jury to choose between the mental abnormality and the personality disorder as the sole condition that made Mr. Monroe was likely to reoffend, but the evidence did not support such a finding.**

The adequacy of jury instructions is reviewed de novo. *State v. Clausing*, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002). "[T]he chief objectives contemplated in the charge of the judge are to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved." *State v. Allen*, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). "The instructions to be given in a particular case are governed by the facts proven in the case and instructions which are overly broad or

which allow the jury to speculate as to the facts are improper." *Harris v. Robert C. Groth, MD, Inc.*, 99 Wn.2d 438, 447, 663 P.2d 113 (1983) (internal citation omitted).

The problem is that the "to commit" instruction, through use of the disjunctive, allowed the jury to find Mr. Monroe was an SVP if either the mental abnormality made him likely to reoffend or the personality disorder made him likely to reoffend. *See Viking Automatic Sprinkler Co. v. Pac. Indem. Co.*, 19 Wn.2d 294, 298, 142 P.2d 394 (1943) ("Framed in the disjunctive, as it is, the instruction permitted the jury to return a verdict for respondent without regard to [one of the causes of the harm]."); *State v. Bower*, 28 Wn. App. 704, 708, 626 P.2d 39 (1981) ("Here 'threat' was defined to include the requisite mental state, but the disjunctive instruction was inadequate to inform the jury that the alternatives of force or violence had to be accompanied by the knowledge or intent that the conduct would prevent the performance of the guard's duties."), *disapproved on other grounds by State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

Substantial evidence did not support use of the disjunctive "or" in the "to commit" instruction: "That this mental abnormality or personality disorder makes Rick Monroe likely to engage in predatory acts of sexual violence if not confined to a secure facility." Supp. DCP, Instruction 6. Dr. Hoberman did not testify that the mental abnormality or the personality

disorder made Mr. Monroe likely to reoffend. He testified the combination of the mental abnormality and the personality disorder made Mr. Monroe likely to reoffend. RP IV 646.

Substantial evidence does not support a finding that one or the other made him likely to reoffend. "[I]t is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it." *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). "[T]he giving of the instruction indicates to the jury that the court must have thought there was some evidence on the issue." *Albin v. National Bank of Commerce of Seattle*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962).

Mr. Monroe had the right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." *State v. Miller*, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). The jury should therefore have been instructed that it had to find, "The mental abnormality and personality disorder continues to make Rick Monroe likely to commit predatory acts of sexual violence unless confined to a secure facility." Such an instruction would have complied with the mandate to give an instruction "governed by the facts proven in the case" and "to bring into view the relation of the particular evidence adduced to the particular issues involved." *Harris*, 99 Wn.2d at 447; *Allen*, 89 Wn.2d at 654.

Use of the disjunctive in this instruction was unwarranted by the evidence presented to the jury. By giving the instruction worded in the disjunctive, the court sent a message to the jury that evidence could support a finding that one or the other made Mr. Monroe likely to reoffend. *Albin*, 60 Wn.2d at 754. The instruction may have misled the jury into believing it could find Mr. Monroe was an SVP based on the mental abnormality or personality disorder alone as the cause of risk of reoffense.

"[W]hen the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, as it does here, the error is presumed to be prejudicial and requires a new trial unless it affirmatively appears that the error was harmless." *Zwink v. Burlington N., Inc.*, 13 Wn. App. 560, 569, 536 P.2d 13 (1975). The State cannot show the error was harmless because it cannot affirmatively show jurors found both the mental abnormality and the personality disorder, acting in combination, made Mr. Monroe likely to reoffend.

Jurors may have rejected Dr. Hoberman's pedophilic diagnosis (the mental abnormality), RP IV 566, and accepted the personality disorder diagnosis, in which case it found Mr. Monroe to be an SVP on a basis for which there is no substantial evidence in support because the personality

disorder alone did not make Mr. Monroe likely to reoffend.¹ Dr. Donaldson opined Mr. Monroe did not suffer from the mental abnormality of pedophilia. RP X 1652-53. According to Dr. Donaldson, the pedophilia diagnosis is unreliable and should never be used in the forensic arena for decision-making. Id. RP X 1683-86. From such testimony, jurors could have rejected Dr. Hoberman's mental abnormality diagnosis.

Conversely, jurors may have rejected Dr. Hoberman's personality disorder diagnosis and accepted the mental abnormality diagnosis, in which case it found Mr. Monroe to be an SVP on a basis for which there is no substantial evidence in support because the mental abnormality alone did not make Mr. Monroe likely to reoffend. Dr. Donaldson opined Mr. Monroe did not suffer from a personality disorder. RP X 1,694, 1,774-75. Dr. Donaldson also opined the antisocial personality disorder diagnosis was not a reliable diagnosis because of the low rate of agreement among evaluators about which signs verify the presence of the disorder. RP X at 1,652. From such testimony, jurors could have rejected Dr. Hoberman's personality disorder diagnosis.

The existence of a fact cannot rest in guess, speculation, or conjecture. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564

¹ The jury was instructed that it was not required to accept an expert witness's opinion. Supp. DCP, Court's Instructions to the Jury (Instruction 3).

(1947); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Nor can a verdict. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940). The issue of whether Mr. Monroe's mental abnormality continues to make him likely to commit predatory acts of sexual violence unless confined to a secure facility or that Mr. Monroe's personality disorder continues to make Mr. Monroe likely to commit predatory acts of sexual violence unless confined to a secure facility should not have been presented to the jury via the "to commit" instruction. Use of the disjunctive "or" in the instruction, instead of the conjunctive "and," allowed the jury to base its verdict on speculation rather than substantial evidence.

And it lessened the state's burden of proof. Instead of requiring the state to prove both the mental abnormality and the personality disorder made Mr. Monroe likely to reoffend, the instruction permitted the jury to render a verdict against Mr. Monroe if it found either one of those conditions made him likely to reoffend. Substantial evidence did not support such a finding. "It is prejudicial error to submit an issue to the jury that is not warranted by the evidence." *Clausing*, 147 Wn.2d at 627.

b. The instructional error may be raised for the first time on appeal as a manifest constitutional error.

Defense counsel did not object to the "to commit" instruction on this basis. The error may be raised for the first time on appeal as a manifest error of constitutional magnitude. RAP 2.5(a)(3).

Mr. Monroe has the due process right not to be committed unless he is found to be dangerous — likely to reoffend — due to mental illness. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 31-32, 857 P.2d 989 (1993); U.S. Const. amends. V, XIV; Const. art. 1, § 3. The instruction at issue implicates Mr. Monroe's due process right to a fair trial because it allowed the jury to render a verdict based on insufficient evidence that he was likely to reoffend. To commit Mr. Monroe, the jury was required to find both the mental abnormality and the personality disorder made him likely to reoffend. The disjunctive "to commit" instruction, however, permitted the jury to find Mr. Monroe met the SVP definition if either one of those conditions made him likely to reoffend. *See State v. Byrd*, 72 Wn. App. 774, 782, 868 P.2d 158 (1994) ("Any time a requirement for conviction is not clearly stated in the instructions, a question of constitutional due process is presented."), *aff'd*, 125 Wn.2d 707, 887 P.2d 396 (1995). Violation of the due process right to a fair trial by a misleading and legally

inapplicable instruction is an error of constitutional magnitude under RAP 2.5(a)(3). *State v. O'Hara*, 167 Wn.2d 91, 98-99, 105, 217 P.3d 756 (2009).

A constitutional error is manifest "if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record." *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). In determining whether actual prejudice is present under the manifest error analysis, the focus is on "whether the error is so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d 91 at 99-100. An error is manifest if the trial court could have foreseen the potential error. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

The trial judge in Mr. Monroe's case listened to Dr. Hoberman's expert testimony along with everyone else. The court was aware that he testified that both the mental abnormality and the personality disorder combined to make Mr. Monroe likely to reoffend, not one or the other made him likely to reoffend. From this, the disjunctive error in the "to commit" instruction was foreseeable and obvious and therefore manifest. But the court gave the instruction anyway. The flawed instruction had practical and identifiable consequences in Mr. Monroe's trial because, if followed, its effect was to permit commitment based on less proof than required and speculation rather than substantial evidence.

c. Mr. Monroe's counsel provided ineffective assistance in failing to object to the "to commit" instruction.

In the event the Court declines to review the claimed error on appeal in the absence of objection below, then it will be necessary to address whether Mr. Monroe's counsel provided ineffective assistance.

Criminal defendants are constitutionally guaranteed the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Those facing involuntary commitment have a statutory and due process right to counsel and courts apply the Strickland standard to determine whether counsel was ineffective. *In re Detention of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009); *Jenkins v. Dir. of Virginia Ctr for Behavioral Rehab.*, 271 Va. 4, 16, 624 S.E.2d 453 (Va. 2006) (recognizing due process right under federal constitution); U.S. Const. amend. V and XIV; RCW 71.09.050(1); RCW 10.101.005. "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

To establish ineffective assistance of counsel, Mr. Monroe must show deficient performance and resulting prejudice. *Moore*, 167 Wn.2d at 122. Deficient performance is that which falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. The strong presumption

that defense counsel's conduct is not deficient is overcome where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

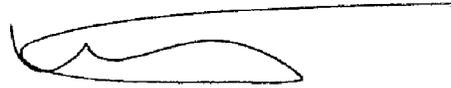
There is no legitimate reason why defense counsel failed to object to the "to commit" instruction on the basis that the use of the disjunctive "or" lessened the state's burden of proof, allowed the jury to base its verdict on speculation, and was not supported by substantial evidence. The flawed "to commit" instruction made it easier for the state to prove and the jury to find Mr. Monroe met the SVP definition. No competent attorney makes it easier for their client to be civilly committed.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Mr. Monroe shows prejudice because, as argued above, there was a basis for a reasonable jury to reject either the mental abnormality or the personality disorder as the condition that made Mr. Monroe likely to reoffend. There is a reasonable probability sufficient to undermine confidence in the outcome to conclude the jury, following the "to commit" instruction, found Mr. Monroe to be an SVP based on one or the other but not both conditions.

E. CONCLUSION

The commitment order must be reversed.

Respectfully submitted this 4th day of January 2016

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LISA E. TABBUT/WSBA 21344
Attorney for Rick Monroe

CERTIFICATE OF SERVICE

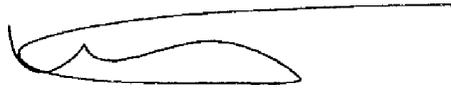
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Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Assistant Attorney General Kristie Barham, kristieb@atg.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it Rick Monroe, McNeil Island Special Commitment Ctr, P.O. Box 88600, Steilacoom, WA 98388.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 4, 2016, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Rick Monroe, Appellant

LISA E TABBUT LAW OFFICE

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