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

No. 38903-7-II

In re the Detention of:

RICHARD BROTEN,

Petitioner.

UNPUBLISHED OPINION

Penoyar, C.J. — Richard Broten, who was committed to the Special Commitment Center (SCC) in 2004 as a sexually violent predator (SVP), appeals a jury's verdict that he remains an SVP. Broten argues that the trial court erred by (1) admitting testimony that he called another SCC resident by a racial epithet, (2) instructing the jury on the elements of numerous sexual crimes, (3) failing to instruct the jury on the meaning of "personality disorder," (4) failing to instruct the jury that Broten could not be committed unless the jury determined that he was "currently dangerous," and (5) violating his statutory right to a speedy trial. Broten also raises an ineffective assistance of counsel claim. We affirm.

FACTS

Broten is currently committed to the SCC.[1] As part of Broten's 2007 annual review, the State and Broten submitted expert evaluations that reached opposite conclusions about whether Broten continued to meet the definition of an SVP. The trial court ordered a "full evidentiary hearing . . . to determine whether [Broten] remains an SVP and whether he should be

[1] A jury determined that Broten was an SVP. *In re Det. of Broten*, 115 Wn. App. 252, 254, 62 P.3d 514 (2003) (*Broten* I). We reversed, holding that the State had to prove a "recent overt act" before the State could commit Broten. *Broten* I, 115 Wn. App. at 257. On remand, the State proved a "recent overt act," and the jury determined that Broten was an SVP. *In re Det. of Broten*, 130 Wn. App. 326, 334, 122 P.3d 942 (2005) (*Broten* II). We affirmed. *Broten* II, 130 Wn. App. at 329.

unconditionally released." Clerk's Papers (CP) at 18.

I. State's Case

To establish that Broten continued to meet the definition of an SVP, the State had to prove beyond a reasonable doubt that (1) Broten had been convicted of a crime of sexual violence, (2) Broten suffered from a mental abnormality or personality disorder that caused him serious difficulty in controlling his sexually violent behavior, and (3) that the mental abnormality or personality disorder made Broten likely to engage in predatory acts of sexual violence if not confined to a secure facility. *See* RCW 71.09.020(18)[2]; RCW 71.09.020(3)(c).

The State called Broten as a witness. Broten testified that he suffers from pedophilia, and he recounted the events behind his two sex offense convictions. At age fifteen or sixteen, he sexually assaulted a 5- or 6-year-old female victim. Broten informed police that he had offended against that victim many times before. In 1986, a jury convicted Broten of indecent liberties based on these assaults. In 1990, Broten pleaded guilty to first degree child rape involving a 10-month-old victim.

Broten also testified about several other occasions when he victimized children and adults but was not criminally charged.[3] Specifically, he testified that his victims included a 10-month-old girl, an 8-year-old boy, an 11-year-old boy, a 12-year-old girl, and his girl friend's sister. On several occasions, Broten used alcohol and drugs to groom young girls and women for nonconsensual sex. While working at a convalescent center, Broten victimized two or three older

[2] For ease of reference, we cite to the current version of statutes throughout this opinion.

[3] At trial, Broten testified that he had victimized at least 17 children and adults. Broten had previously acknowledged having up to 60 victims.

women. Broten raped a female relative on at least one occasion.

The State's expert, Dr. Brian Judd, a licensed psychologist, diagnosed Broten with "multiple mental disorders" from the Diagnostic and Statistical Manual of Mental Disorders, fourth edition, text revision (DSM-IV-TR) including "pedophilia, sexually attracted to both [sexes], non-exclusive," and "paraphilia not otherwise specified non consent." Report of Proceedings (RP) (Jan. 29, 2009) at 359-60. Dr. Judd based his pedophilia diagnosis on Broten's self-reported activities and several penile plethysmograph (PPG) examinations showing that Broten had stronger sexual urges for children.[4] Dr. Judd also testified that Broten's pedophilia constituted a "mental abnormality"[5] because it was an acquired condition that affected Broten's volitional capacity. With regard to Broten's volitional capacity, Dr. Judd testified that Broten admitted (1) in a 1986 interview that he "could not help [himself];" (2) in a 1990 interview that "he has the potential to commit further sex offenses"; (3) in a 1997 interview that he felt "powerless" to control his "deviant fantasies"; and (4) in a 2003 interview that "he often feel[s] helpless" to control his "struggle with deviant fantasy." RP (Jan. 29, 2009) at 374-75, 387-88. Dr. Judd also testified that Broten suffered from "antisocial personality disorder."

Dr. Judd concluded that Broten was "likely to re-offend if he is released." RP (Jan. 29, 2009) at 420. Dr. Judd noted that Broten's score on the Static-99 evaluation, which assesses the probability of an offender's reconviction for a sexual offense, represented a "high risk" of re-

[4] Broten's most recent PPG, on January 11, 2009, showed no "real arousal to anything." RP (Jan. 29, 2009) at 369. Broten tried to inhibit arousal by concentrating on thoughts apart from the displayed images even though he was told not to interfere with his response.

[5] A "mental abnormality" is "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).

offense relative to other offenders. RP (Jan. 29, 2009) at 410. Additionally, Broten's score on the Sex Offender Risk Appraisal Guide (SORAG), an actuarial evaluation that assesses the probability that the State will charge the offender with a violent offense in the future, translated to a "very high risk of re-offense." RP (Jan. 29, 2009) at 411.

Apart from these evaluations, Dr. Judd explained that Broten's past pattern of "placing himself in locations . . . at malls, at parks . . . in which he was not accompanied by . . . a chaperone who was aware of his offense history" suggested a pattern of grooming victims for predatory acts. RP (Jan. 29, 2009) at 399. Broten made these unchaperoned visits while on community placement for his child rape conviction in the mid- to late-1990s. Also, while on community placement for his sex offense convictions, Broten did not comply with alcohol treatment,[6] did not obtain permits to change his residence, and admitted to engaging in "deviant arousal." RP (Jan. 29, 2009) at 422. As a result, the Department of Corrections returned Broten to custody for violating community placement for both sex offense convictions. Although Dr. Judd acknowledged that Broten's convictions for indecent liberties and child rape did not constitute "predatory"[7] sexual acts, he testified that Broten's provision of alcohol and drugs to teenage girls "for purposes of sexual contact" constituted past predatory acts. RP (Jan. 29, 2009) at 400.

Deborah LaRowe-Prado, an SCC psychological associate and a treatment provider for

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[6] Both the State's expert and the defense's expert testified that Broten suffered from alcohol dependence.

[7] "Predatory" means "acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists." RCW 71.09.020(10).

Broten, also testified as a State's witness. LaRowe-Prado testified that, on July 16, 2008, SCC clinical staff held an annual team meeting. At the meeting, Broten informed staff that, if released, he would temporarily reside at a hotel near an area of drug and prostitution activity until he found a suitable apartment. Broten "did not take personal responsibility" for his community placement violations but, instead, adopted a "victim stance," blaming his girl friend and the community for his violations. RP (Jan. 28, 2009) at 191-92.

LaRowe-Prado observed that Broten became upset after the meeting:

> [Broten] went back to the unit and I also went back to the unit to visit another resident. . . . I do not know if he saw me, but all of a sudden I hear a verbal altercation going between himself and an African-American male.
>
> I immediately was called by the staff to take a look and see what was going on. He had called the other man, quote, a nigger.

RP (Jan. 28, 2009) at 192-93. Broten objected to this statement, and asked for a sidebar. The trial court subsequently put the sidebar on the record:

> Now, we had a side bar at 3:56 regarding the testimony of our last witness involving an incident where the derogatory remark that we euphemistically refer to as the "N word" was brought up. [Broten] was concerned that it was basically prejudicing and biasing the jury. I responded that this was an issue that was to be brought before the jury for quite simply, a demonstrated issue is quite obviously of the ability of Mr. Broten to handle stress that the situation had to be taken into context and that it was appropriate examination.

RP (Jan. 28, 2009) at 211.

II. Broten's case

Broten's expert, Dr. Luis Rosell, a licensed psychologist with a specialty in forensic psychology, diagnosed Broten with pedophilia and antisocial personality disorder. Dr. Rosell, however, testified that Broten no longer met the definition of an SVP because he had "been very invested" in his treatment, understood his offending pattern, acknowledged his sexual deviance,

and had "reached that point of change." RP (Jan. 29, 2009) at 279. Dr. Rosell criticized the State's reliance on the Static-99 and SORAG actuarial evaluations because, among other things, the evaluations did not consider an offender's treatment in determining the probability of re-offense.

In closing argument, Broten's counsel told the jury that Broten did not dispute the existence of his past convictions. Nor did Broten dispute Dr. Rosell's diagnoses: "Mr. Broten . . . told you right there on the stand he suffers from pedophilia. There's no doubt about that. And then you've got the personality disorder, which is . . . antisocial personality disorder. That's not disputed. Our expert, Mr. Rosell, has said that." RP (Jan. 30, 2009) at 482. Broten's counsel argued, however, that Broten had learned to control his sexually violent behavior through treatment and that he was not likely to engage in predatory acts of sexual violence if not confined to a secure facility.

III. Jury Instructions

Before deliberations, the trial court instructed the jury of the meaning of "sexual violence":

> "Sexual violence" means: rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under the age of fourteen, incest against a child under age fourteen, and child molestation in the first or second degree.

CP at 30-31; Instr. 8. The trial court also instructed the jury on the elements of some of the crimes listed in this instruction. Specifically, the trial court instructed the jury on the elements of first and second degree rape[8] (Instruction 9), first and second degree child rape

[8] RCW 9A.44.040, .050.

[9] (Instruction 10), first and second degree child molestation[10] (Instruction 11), indecent liberties[11] (Instruction 12), and first and second degree incest[12] (Instruction 13).

At the instruction conference, Broten took exception to Instruction 9, which defined the elements of first and second degree rape:

> I . . . understand the pattern [jury] instruction that talks about putting in crimes that the person might be more . . . likely than not to commit. I just don't think that in this case we've had the evidence that would allow the jury to make a determination whether or not the rape first, second degree would even apply. Those are rape first and second degree, that's generally adult crimes. And this case is really focused on Mr. Broten's pedophilia, which is undisputed. I don't think those should be put in and that's really the exception that I have.

RP (Jan. 30, 2009) at 467-68.

The pattern jury instruction that Broten's counsel referred to in his exception states, "'Sexual violence' [or] ['harm of a sexually violent nature'] means: (identify the applicable crime*s*)." 6A Washington Practice: Washington Pattern Jury Instructions: Civil 365.16, at 519 (5th ed. 2005) (WPI). The "Note on Use" that accompanies the pattern jury instruction states in relevant part:

> Based on the evidence in the case, fill in the blank with the following crimes of sexual violence: (1) those with which the respondent has allegedly been charged or convicted; (2) *those that the respondent is likely to commit in the future*; (3) those that constituted "recent overt acts" (when proof of such an act is necessary). *For predicted future offenses and "recent overt acts," the court should also give instructions defining the elements of those crimes*, as well as any instructions necessary to define terms used in those instructions.

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[9] RCW 9A.44.073, .076.

[10] RCW 9A.44.083, .086.

[11] RCW 9A.44.100.

[12] RCW 9A.64.020(1), (2).

WPI 365.16, at 519 (emphasis added).

The trial court denied Broten's exception to Instruction 9:

> The purpose of the instructions is to inform the jury of possible actions that the individual may partake in. The evidence in this case I believe has been quite explicit and the gentleman has basically on the stand and in his therapy has admitted to having possibly 60 or more victims and there's been a variety of just every type of sexual behavior he's been involved in that would qualify for many of these, if not all of them. And, again, it's to predict his future behavior.

RP (Jan. 30, 2009) at 468.

After deliberations, the jury entered a verdict that Broten met the definition of an SVP. The trial court entered a commitment order, and Broten now appeals.

ANALYSIS

I. Prejudicial Testimony

Broten argues that the trial court should not have admitted LaRowe-Prado's testimony that Broten used a racial epithet in an argument with an SCC resident. Broten assigns error to the testimony on the basis that it was irrelevant and unfairly prejudicial.[13] We conclude that the trial court did not err by admitting the testimony.

A. Standard of Review

We review a trial court's evidentiary rulings for abuse of discretion. *In re Det. of Post*, 145 Wn. App. 728, 741 n.8, 187 P.3d 803 (2008). A trial court abuses its discretion when it adopts a view that no reasonable person would take, applies the wrong legal standard, or relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

[13] Because Broten specifically assigns error based on relevancy, we reject the State's argument that Broten abandons his relevancy objection on appeal by primarily focusing on the prejudicial nature of LaRowe-Prado's testimony in his opening brief. We also note that Broten's objection to the testimony as "prejudicing and biasing the jury" preserved his ER 403 objection. RP (Jan. 28, 2009) at 211.

B. Relevance

The trial court did not abuse its discretion by determining that the testimony was relevant. Evidence is relevant if it has "any tendency" to make the existence of any fact that is of consequence to the determination more or less probable. ER 401. Here, Broten's verbal altercation following a meeting at which he became upset tended to suggest that Broten has difficulty controlling stress and anger. This, in turn, had some tendency to make it more probable that Broten would have difficulty controlling his sexually violent behavior, an element that the State had to prove at trial. Accordingly, the testimony was relevant.

C. Unfair Prejudice

Relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. ER 403. The trial court properly overruled Broten's ER 403 objection.[14] Unquestionably, the jury's knowledge that Broten used a hateful racial epithet in an argument with an African-American resident increased the likelihood of unfair prejudice. Broten's decision to use the epithet in these circumstances, however, also revealed the degree to which he was unable to control his behavior. We also note that the jury heard extensive testimony of abusive behavior by Broten, making any prejudicial effect of this epithet relatively minor. Therefore, we agree with the trial court's obvious conclusion that the danger of unfair prejudice did not substantially outweigh the probative value of Broten's outburst.

[14] Although the trial court did not perform an ER 403 balancing on the record, that fact alone does not constitute an abuse of discretion. *See Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). "Such a rule would unnecessarily and unreasonably intrude upon the trial court's management of the trial process." *Carson,* 123 Wn.2d at 226 (quoting *State v. Gould,* 58 Wn. App. 175, 184, 791 P.2d 569 (1990)).

II. Jury Instructions

Broten contends that the trial court erred by (1) instructing the jury on the elements of numerous sexual offenses, (2) failing to instruct the jury on the meaning of "personality disorder," and (3) failing to instruct the jury that Broten could not be committed unless the jury determined that he was "currently dangerous." These arguments fail.

A. Standard of Review

Instructions are adequate if they allow a party to argue its theory of the case and do not mislead the jury or misstate the law. *State v. Stevens*, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). Whether the jury instructions state the applicable law is a question of law that we review de novo. *Stevens*, 158 Wn.2d at 308. The failure to instruct on a term's definition may be harmless error. *In re Det. of Pouncy*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010).

B. Instructions on Elements of First and Second Degree Rape

Broten assigns error to Instructions 9 through 13, which listed the elements of several crimes of sexual violence. He argues that these instructions placed undue emphasis on predatory acts and "overwhelmed the other instructions." Appellant's Reply Br. at 6. We conclude that Broten only preserved error with regard to Instruction 9[15] and that the trial court did not err by giving Instruction 9.

[15] At trial, Broten only clearly took exception to Instruction 9, which lists the elements of first and second degree rape. Broten based his exception on the fact that rape is an "adult crime[]" whereas "this case is really focused on Mr. Broten's pedophilia." RP (Jan. 30, 2009) at 468. Accordingly, Broten failed to preserve any error with regard to Instructions 10 through 13. *See* RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.").

Instruction 9, which defined the elements of first and second degree rape, did not mislead the jury or misstate the law. At trial, the State had the burden to prove that Broten was likely to engage in predatory acts of sexual violence if not confined to a secure facility. RCW 71.09.020(18). Broten acknowledged that the case "focused on [his] pedophilia" and, therefore, he did not contest the instructions defining the elements of sexual crimes that involved children. RP (Jan. 30, 2009) at 468. But Broten also openly admitted at trial that he had raped an adult relative and had repeatedly committed sexual offenses against vulnerable adults. Broten's admissions of unadjudicated crimes entitled the State to argue that he was likely to commit predatory acts of sexual violence—including rape—against adults in the future. Because Instruction 9 enabled the State to make this argument to the jury, it was a proper instruction.

Broten analogizes *State v. Todd*, 78 Wn.2d 362, 474 P.2d 542 (1970), to support his position. In *Todd*, our Supreme Court held that the trial court erred by instructing the jury that "it is possible for a person serving a life sentence for murder in the first degree to be eligible for parole in thirteen and two-thirds years." 78 Wn.2d at 373, 377. The court noted that, in capital cases, the relevant statute at the time "[did] not provide that the jury shall choose *between* penalties, but only that it shall decide whether to take the defendant's life or spare it." *Todd*, 78 Wn.2d at 374 (citing former RCW 9.48.030 (1919)). The *Todd* court expressed concern that the instruction placed "undue emphasis" on the jury's consideration of the possibility of early parole, and the court suggested that the jury gave "considerable weight" to the possibility of early parole in Todd's case because the jury gave the judge a note that recommended long sentences for Todd's co-defendants. 78 Wn.2d at 376-77.

Todd bears little resemblance to the present case. Here, the trial court limited its instructions to the elements of Broten's past crimes and unadjudicated sexual offenses, which in turn provided the jury with a context for crimes that Broten might commit in the future. The instructions did not place "undue emphasis" on crimes of sexual violence.

C. Failure to Instruct on Personality Disorder

In a supplemental brief, Broten relies on our Supreme Court's recent *Pouncy*[16] decision to argue that the trial court erred by failing to define the phrase "personality disorder" in a jury instruction. The Supreme Court characterized "personality disorder" as a "term of art under the [DSM][17] that requires definition to ensure jurors are not forced to find a common denominator among each member's individual understanding of the term." *In re Pouncy*, 168 Wn.2d at 391 (internal quotation marks omitted) (quoting *State v. Allen,* 101 Wn.2d 355, 362, 678 P.2d 798 (1984)). The *Pouncy* court rejected the view that the trial court's failure to instruct the jury on the meaning of "personality disorder" was harmless:

> Here, the term in question implicated an element of the State's case. In order to prove Pouncy was an SVP, the State had to show he suffered from either a mental abnormality *or* a personality disorder. We have no way of knowing from the verdict whether the jury found that Pouncy was an SVP because he suffered from a mental abnormality or a personality disorder. And, if the jury agreed Pouncy suffered from a personality disorder, we have no way of knowing what definition the jury used in reaching this conclusion. It is not sufficient that counsel were able to argue to the jury their respective understandings of the term based on expert testimony; lawyers have a hard enough time convincing jurors of facts without also

[16] 168 Wn.2d 382, 229 P.3d 678 (2010).

[17] After Broten's trial, the legislature enacted a statute that defines "personality disorder" as "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment." RCW 71.09.020(9); Laws of 2009, ch. 409, § 1. Purported evidence of a personality disorder must be supported by the testimony of a licensed forensic psychologist or psychiatrist. RCW 71.09.020(9)

> having to convince them what the applicable law is. We cannot say the failure to instruct on the definition of "personality disorder" in no way affected the final outcome of the case; accordingly, it was not harmless. A new trial is required.

168 Wn.2d at 391-92 (internal quotation marks omitted).

Here, unlike in *Pouncy*, the trial court's failure to define "personality disorder" was harmless error. In *Pouncy*, the State's expert concluded that Pouncy suffered from an antisocial personality disorder and a mental abnormality but Pouncy's expert disputed each of these conclusions. 168 Wn.2d at 386. The parties' dispute about this central element of the State's case created a situation in which it was impossible to know "whether the jury found that Pouncy was an SVP because he suffered from a mental abnormality or a personality disorder." 168 Wn.2d at 392. This, in turn, cast doubt on the final outcome of the case and required a new trial. 168 Wn.2d at 392.

Here, in contrast, the parties agreed that Broten suffered from *both* a personality disorder (antisocial personality disorder) and a mental abnormality (pedophilia). At trial, both the State's expert and Broten's expert testified that they had diagnosed Broten with antisocial personality disorder and pedophilia. Additionally, in closing argument, Broten's counsel told the jury: "Mr. Broten . . . told you right there on the stand he suffers from pedophilia. There's no doubt about that. And then you've got the personality disorder, which is . . . antisocial personality disorder. That's not disputed. Our expert, Mr. Rosell, has said that." RP (Jan. 30, 2009) at 482). Thus, although the trial court erred by failing to instruct the jury on the meaning of "personality disorder," the error was harmless because Broten acknowledged proof of this element of the State's case.

D. Failure to Instruct on Current Dangerousness[18]

Broten argues that the trial court erred by failing to instruct the jury that it could not commit Broten unless he was "currently dangerous." Appellant's Br. at 17. Although Broten raises this argument for the first time on appeal, we exercise our discretion under RAP 2.5(a)(3) to consider the argument because civil commitment only satisfies due process if an individual is "mentally ill and currently dangerous." *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009).

Broten's argument fails because, as our Supreme Court recently noted, "by properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact finder impliedly finds that the SVP is currently dangerous." *Moore,* 167 Wn.2d at 124. The *Moore* court also rejected the offender's contention that the State had the burden to prove that an SVP will offend in the foreseeable future. 167 Wn.2d at 125. The court noted that the statutory definition of the element "likely to engage in predatory acts of sexual violence if not confined in a secure facility," which appears in RCW 71.09.020(7), includes a temporal limitation on future offenses because that subsection requires that "the person more probably than not will engage in [predatory] acts" if released. 167 Wn.2d at 124 (quoting RCW 71.09.020(7)).

[18] Although Broten challenges the constitutionality of chapter 71.09 RCW in his assignments of error because that chapter "is not narrowly tailored to achieve a compelling governmental interest" and it "fails to provide any timeframe within which the likelihood of reoffending is to be assessed," Broten's arguments about current dangerousness are limited to his contention that the jury instructions were not "manifestly clear." Appellant's Br. at 1, 17. Thus, we limit our review to the propriety of the instructions and do not analyze whether chapter 71.09 RCW violates due process.

Here, the jury answered in the affirmative when asked whether the State had proved beyond a reasonable doubt that Broten was an SVP. Also, the trial court instructed the jury on the "more probably than not" standard in RCW 71.09.020(7). CP at 30; Instr. 7. Thus, under *Moore*, the jury impliedly determined that Broten was currently dangerous. 167 Wn.2d at 124.

Broten's attempt to distinguish *Moore* as a case involving a bench trial is unpersuasive. Our Supreme Court's characterization of current dangerousness as an *implicit* finding makes the identity of the fact finder immaterial. Rather, a finding of current dangerousness follows from a finding that the State has proven the elements of RCW 71.09.020(18) beyond a reasonable doubt. *See Moore,* 167 Wn.2d at 124.

III. Speedy Trial

Broten contends, for the first time on appeal, that RCW 71.09.090(1) gives him the right to a trial within 45 days of the trial court's order granting him a full evidentiary hearing. Broten argues that the State violated RCW 71.09.090(1) by bringing him to trial over seven months after the trial court's order. We do not consider Broten's argument because he did not raise it in the trial court, and it is a statutory claim rather than a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *see In re Det. of Strand*, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009) ("a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal") (internal quotation marks omitted) (quoting *State v. Guloy,* 104 Wn.2d 412, 421, 705 P.2d 1182 (1985)).

IV. Ineffective Assistance of Counsel

Lastly, Broten argues that his counsel provided ineffective assistance by failing to propose an instruction defining "personality disorder." To establish ineffective assistance, Broten must

show that (1) his counsel's performance was deficient by an objective standard of reasonableness, and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because Broten did not dispute that he suffered from a "personality disorder," proposing a definitional instruction for that term would have had no effect on the trial. Consequently, Broten suffered no prejudice from his counsel's failure to propose the instruction.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Worswick, J.