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NO. 69061-2-I

**COURT OF APPEALS, DIVISION I**
**OF THE STATE OF WASHINGTON**

In re the Detention of:

RICHARD ALLEN RUDE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

# RESPONDENT'S OPENING BRIEF

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## II. FACTS

### A. Procedural and Factual Background

On August 13, 2010, the State filed a petition alleging that Respondent, Richard Rude, is a sexually violent predator as defined in RCW 71.09.020(18). CP at 1-2. The Court found probable cause to support the petition and Respondent was detained at the Special Commitment Center (SCC) pending trial. RP at 65 (2-16-2012). Jury trial commenced on June 11, 2012 in Skagit County Superior Court, the Honorable John Meyer presiding. RP at 1 (06-11-2012).[1]

Rude has three convictions for Sexually Violent Offenses. On September 25, 1981, Rude plead guilty to Rape in the Second Degree by

[1] Each day of trial is a separate volume beginning at page 1.

Forcible Compulsion. Ex. 6. His ten-year prison sentence was suspended in lieu of care and treatment as a sexual psychopath at Western State Hospital (WSH). Ex. 9A.

While out of custody and waiting to be admitted to WSH, Rude was involved in another sexual assault against a woman he had driven home in a taxi cab. Ex. 52 pg. 42.[2] On January 15, 1982, Rude plead guilty to Attempted Rape in the Second Degree by Forcible Compulsion. Ex. 12. The court sentenced Rude to five years in prison, concurrent with his prior ten-year sentence, and both sentences were suspended on condition he participate in the sexual psychopath program at WSH. Ex 9A; Ex. 13.

After about one year at WSH, Rude was involved in an altercation with another male patient. Ex 52, pg. 50. The patient accused Rude of having forced sexual contact on him and Rude admitted that he had punched the man. Ex. 52, pg. 50. Rude's suspended sentence was subsequently revoked and he was sent to the Department of Corrections (DOC) to serve his ten year prison sentence. Ex. 52, pg. 51.

After his release from prison, Rude raped 19-year-old Marlisa Otis. RP at 68-84 (06-12-2012). Ms. Otis was in the Skagit

[2] Exhibit 52 is the transcript of the portion of Rude's videotaped deposition that was played for the jury. RP at 11 (06-18-2012)

Speedway parking lot and had lost track of her friend, Trisha. RP at 69; 73 (06-12-2012). Rude offered to drive her around to the parking lot to locate her friend. *Id.* at 74. Ms. Otis had never met Rude, but she accepted his offer of a ride. *Id.* at 75. Instead of driving around the parking lot, Rude got on the highway and drove to a remote gravel pit off Kelleher Road where he stopped the car. *Id.* at 75-6. Rude made her take off her shirt, exposed his penis and told her to "suck it." *Id.* at 77. Ms. Otis did not comply at first, and Rude struck her in the face with his fist. *Id.* at 77-8. She then complied and he put his penis into her mouth. *Id.* at 78. Rude then forced his penis into her vagina and then her anus. *Id.* at 79. She reported the events to the police and identified Rude as the man who had raped her. *Id.* at 82, 84.

Rude plead guilty to Rape in the First Degree.[3] Ex. 20. On March 23, 1995, the court sentenced him to 194 months in prison followed by two years of community placement. Ex. 21.

Rude's most recent sexual assault occurred on August 9, 2008. While serving his prison sentence for Rape in the First Degree, Rude sexually assaulted his cellmate, John Frost. RP at 47 (06-13-2012). One evening, he backed Mr. Frost into a corner, punching him in the arm and

[3] Rude's Plea includes an admission that he both raped and kidnapped the victim. Ex. 20.

"shadow boxing" him. Uncomfortable, Mr. Frost tried to push him away, whereupon Rude grabbed him and pulled him down onto Rude's bed. *Id.* at 47. Rude then reached his arm around Mr. Frost, who was at this point lying on his side, and "shoved his fingers in [his] ass." *Id.* Mr. Frost struggled, kicking and "shoving," eventually knocking Rude's TV over. *Id.* at 48. When this happened, Rude got up and began yelling at Mr. Frost, saying that Mr. Frost needed to pay for Rude's TV. *Id.* at 49. Mr. Frost testified that he did not immediately report the incident for fear of being regarded as a "snitch." *Id.* at 51. Rude, however, became increasingly violent and threatening after the incident, entering the cell one afternoon, grabbing Mr. Frost by the shirt, pushing him up against the door, and telling him that Mr. Frost was "going to f---ing pay him." *Id.* at 50. Mr. Frost reported the event and Rude was charged with committing an infraction. RP at 32 (06-18-2012; RP at 124 (06-19-2012).

Dr. Kathleen Longwell, a psychologist with extensive experience in the evaluation, diagnosis, and treatment of sex offenders, conducted an evaluation of Rude to determine whether, in her opinion, he met the criteria of a sexually violent predator. RP at 77-8; 96 (06-18-2012). Dr. Longwell reviewed several thousand pages of records including police reports, legal documents, health information, previous psychological evaluations, and materials from the DOC relevant to

Rude's incarceration, as well as conducting an in-person interview of. Rude. *Id.* at 97; 99. The records she reviewed are typically relied upon by other professionals in SVP cases. *Id.* at 101-03.

Dr. Longwell testified that in her opinion, to a reasonable degree of psychological certainty, Rude suffers Paraphilia Not Otherwise Specified ("NOS"): Nonconsent, Frotteurism, Antisocial Personality Disorder ("ASPD"), Alcohol Dependence, and Cocaine Dependence. RP at 132-3 (06-18-2012). In her opinion, Rude's diagnoses constitute mental abnormalities that cause him serious difficulty controlling his sexually violent behavior. *Id* at 169. In the course of explaining the basis of her opinion, Dr. Longwell testified that records she reviewed showed that as a juvenile, Rude had been convicted of Indecent Liberties based on reports of 20-30 incidents in which Rude had approached women in a parking lot, grabbing their breasts or slapping their buttocks. RP at 105 (06-18-2012). In deposition testimony played at trial, Rude admitted he had been caught approaching girls and women in a parking lot and touching them on the posterior. Ex. 52, pg. 9-10.

Dr. Longwell also explained her opinion by referring to records showing that later that year, Rude was convicted of making sexually obscene phone calls to two or more women. RP at 108 (06-18-2012). During trial Rude admitted he had made harassing phone calls. Ex. 52,

pg. 12-13. The calls were sexually explicit and obscene. RP at 109 (06-20-2012). The records further indicated that, while still a juvenile, Rude was detained by police after he reportedly cornered a woman in a laundromat and she started screaming. *Id.* at 111. At trial, Rude conceded that he had been involved in an altercation in a laundromat, but stated that he thought the woman was afraid someone was coming after her and she started screaming. Ex. 52, pg. 30-1.

In forming her opinions, Dr. Longwell also relied upon records regarding Rude's commitment to the sexual psychopath program at WSH where he was sent for treatment in lieu of prison. RP at 120 (06-18-2012). The WSH records indicate that Rude's participation in the sexual psychopath program was terminated after he physically assaulted a fellow patient with the intent to force the individual to perform oral sex on him. *Id.* at 120-21. In his deposition testimony, Rude confirmed there was an allegation that he was trying to have sexual contact with another resident, asserting that the other resident initiated the contacted by attempting to touch Rude's crotch, and that Rude had "punched" the guy. Ex. 52, pg. 48-51.

Dr. Longwell also relied in forming her opinion upon treatment records from Rude's participation at WSH and the Sex Offender Treatment Program (SOTP) at Twin Rivers. RP at 139 (06-18-2012).

The records indicate that Rude began having fantasies involving rape when he was an adolescent and that, in his homework in SOTP, he admitted that the notion of controlling a woman and seeing fear in her eyes was sexually arousing to him. *Id.*

Dr. Longwell explained that Rude's underlying sexual deviancy, combined with his Antisocial Personality Disorder, and drug and alcohol dependence cause him serious difficulty controlling his sexually violent behavior. RP at 173 (06-18-2012). Dr. Longwell testified that both Rude's Antisocial Personality Disorder and Paraphilia Not Otherwise Specified constitute mental abnormalities under the law. RP at 3-4 (06-19-2012). Dr. Longwell evaluated Rude's risk of re-offense and opined that he was likely to commit predatory acts of sexual violence if not confined to a secure facility. RP at 7 (06-19-2012).

Dr. Christopher Fisher testified on behalf of Rude. Dr. Fisher testified that Paraphilia NOS: Nonconsent is a valid diagnosis (RP at 10-11 (06-21-2012)), and in fact a diagnosis he himself would make under certain circumstances. RP at 118-19 (06-21-2012). Dr. Fisher also diagnosed Rude with Antisocial Personality Disorder (RP at 177 (06-20-2012)) as well as alcohol and substance dependence. RP at 185-6 (06-20-2012).

The jury found Rude was a Sexually Violent Predator. RP at 75

(06-22-2013). Rude timely appeals.

## III. ARGUMENT

### A. Rude's Commitment Satisfies Due Process

Rude argues that his commitment violates due process because it is "premised upon diagnoses that are not accepted by the psychiatric profession, are overbroad, and insufficiently precise." Appellate Brief (hereinafter "App.Br.") at 18. Rude, has long since lost this argument. Washington courts have recognized since 1993 Paraphilia NOS: Nonconsent as a valid basis for commitment. The diagnosis of Antisocial Personality Disorder is likewise well accepted as a valid basis for commitment. Rude's arguments fail.

#### 1. Paraphilia Not Otherwise Specified: Nonconsent is a Widely Accepted Diagnosis and a Valid Basis for Commitment

Innumerable courts have rejected the argument that Paraphilia NOS: Nonconsent is an invalid diagnostic category and, as such, cannot form the basis for commitment. The argument was first considered—and rejected—by the Washington State Supreme Court in *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). The Court, rejecting the argument that the diagnosis of Paraphilia NOS is invalid because it is not explicitly included in the DSM, observed:

The fact that pathologically driven rape, for example, is not

> yet listed in the DSM-III-R does not invalidate such a diagnosis. The DSM is, after all, an evolving and imperfect document. Nor is it sacrosanct. ... *What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.*

122 Wn.2d at 28, 857 P.2d 989 (emphasis added) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Sexually Violent Predators,* 15 U. PUGET SOUND L. REV. 709, 733 (1991-92)). Indeed, since *Young*, Washington appellate courts have upheld numerous commitments based on diagnoses of Paraphilia NOS,[4] and the diagnosis is widely accepted across the United States. *See McGee v. Bartow*, 593 F.3d 556, 581 n.16 (7th Cir. 2010).

Rude's argument was most recently rejected by Division I in *In re Detention of Berry*, 160 Wn. App. 374, 379, 248 P.3d 592 (2011), in which the court observed that "paraphilia NOS" in fact "does appear in the DSM-IV-TR." 160 Wn. App at 381. Noting that the DSM defines paraphilia as a condition characterized by "recurrent, intense sexually

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[4] *See e.g. In re Detention of Stout*, 159 Wn.2d 357, 363, 150 P.3d 86, 90 (2007); *In re Detention of Halgren*, 156 Wn.2d 795, 800-01, 132 P.3d 714 (2006); *In re Detention of Marshall*, 156 Wn.2d 150, 155, 125 P.3d 111, 113 (2005); *In re Detention of Campbell*, 139 Wn.2d 341, 357, 986 P.2d 771, 779 (1999); *In re Detention of Paschke*, 136 Wn. App. 517, 520, 150 P.3d 586, 587 (2007); *In re Detention of Taylor*, 132 Wn. App. 827, 832, 134 P.3d 254, 257 (2006); *In re Detention of Broten*, 130 Wn. App. 326, 332, 122 P.3d 942, 945 (2005); *In re Detention of Skinner*, 122 Wn. App. 620, 633, 94 P.3d 981, 987 (2004); *In re Detention of Hoisington*, 123 Wn. App. 138, 143, 94 P.3d 318, 320 (2004); *In re Detention of Strauss*, 106 Wn. App. 1, 6, 20 P.3d 1022, 1024 (2001); *In re Detention of Mathers*, 100 Wn. App. 336, 336, 998 P.2d 336, 337 (2000); *In re Detention of Aqui*, 84 Wn. App. 88, 94, 929 P.2d 436, 441 (1996).

arousing fantasies, sexual urges, or behaviors generally involving (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner, or (3) children or other non-consenting persons that occur over a period of at least 6 months," the *Berry* Court, citing to *Young*, observed that "paraphilia not otherwise specified" is a "residual category...which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the DSM-III-R." *Id.* at 381 (citing to *Young*, 122 Wn. 2d at 29). The DSM-IV-TR, the court noted, provides a number of examples of paraphilia NOS, but clearly states that the category is "not limited to" that list.[5] The omission of the term "non-consent" from this list does not prove it is an invalid diagnosis.

Rude suggests that Dr. Longwell's diagnosis runs afoul of *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) because it is not "medically recognized" and as such does not "distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist in an ordinary criminal case" as required by

[5] DSM at 576 ("This category is included for coding Paraphilias that do not meet the criteria for any of the specific categories. Examples include, but are not limited to, telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine).").

*Kansas v. Hendricks,* 521 U.S. 346, 360, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). App. Br. at 27-28. A careful reading of both *Crane* and other cases cited in support of this proposition makes clear that Dr. Longwell's conclusion that this diagnosis constituted a mental abnormality under the law forms, along with her other testimony, a sufficient basis for commitment. Neither the United States Supreme Court nor the appellate courts of other jurisdictions share Rude's fixation on the semantics of particular diagnostic classifications. The Supreme Court has, for decades and in a variety of contexts, repeatedly acknowledged "the uncertainty of diagnosis in this field and the tentativeness of professional judgment" *Greenwood v. United States,* 350 U.S. 366, 375, 76 S. Ct. 410, 100 L. Ed. 412 (1956). Reported cases, the Court has noted, "are replete with evidence of the divergence of medical opinion in this vexing area." *O'Conner v. Donaldson,* 422 U.S. 563, 579, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) (C.J. Burger, concurring). Psychiatry "is not... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Likewise, the Washington State Supreme Court has noted that "the DSM-

IV-TR candidly acknowledges...that each category of mental disorder is not a completely discrete entity." *State v. Klein,* 156 Wn.2d 103, 120, 124 P.3d 644 (2005). For that reason, "the subjective and evolving nature of psychology may lead to different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it." *Id.* Construing the law to mandate release "based on mere semantics would lead to absurd results and risks to the patient and public beyond those intended by the legislature." *Id.,* 156 Wn.2d at 121.

The Court's decision in *Crane* reflects and is entirely consistent with this approach. There, the Court was asked to clarify the "lack of control" requirement articulated in *Hendricks*. Contrary to Rude's assertion, there is nothing in *Crane* that requires that the underlying mental abnormality must be "medically recognized." While the *Crane* Court acknowledged "[t]he presence of what the "psychiatric profession itself classifie[d] . . . as a serious mental disorder" had "helped to make" the distinction between those appropriate for civil commitment and the "typical recidivist" (*Crane,* 534 U.S. at 413) in the *Hendricks* case, nowhere did the Court state that such "classification" by the psychiatric profession was mandated, nor did it state that, in order to justify commitment, the diagnosed condition must be "medically recognized." Consistent with its remark in *Hendricks* that the term "mental illness"

was "devoid of any talismanic significance" (*Hendricks*, 521 U.S. at 358-59), the *Crane* Court steered clear of semantic mandates, noting that "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." 534 U.S. at 413. The Court went on to observe that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Id.* Noting that it had not, in *Hendricks,* given the phrase "lack of control" "a particularly narrow or technical meaning," the Court observed that, "where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision." *Id.* Rather,

> [i]t is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

*Id.* Because such a showing was made in Rude's case, his commitment comports with due process.

**2. Antisocial Personality Disorder Is a Valid Basis For Commitment**

Rude appears to argue that any commitment based entirely or in

part on Antisocial Personality Disorder (ASPD) violates due process because that diagnosis is "too imprecise" to provide a basis for his commitment. App. Br. at 27. This argument, too, must be rejected.

Rude contends that *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) "strongly implies" that civil commitment cannot be based on ASPD (App. Br. at 27), and that *Hendricks* and *Crane* suggest this as well. Rude, however, reads these cases far too broadly, and fails to point to a single case in which the appellate courts of any state have found that this diagnosis is an improper basis for civil commitment.

Moreover, this argument has repeatedly been rejected by the appellate courts, and indeed was rejected in the first case in which the constitutionality of the SVP scheme was considered. In *Young,* appellants argued that the SVP scheme ran afoul of *Foucha* because it permitted the civil commitment of someone who has an "antisocial personality." *Id.,* 122 Wn.2d at 38, n. 12. Rejecting this argument, the Court specifically stated that, unlike the "antisocial personality" with which Foucha had been diagnosed, "an 'antisocial personality disorder' is a recognized mental disorder which is defined in the DSM-III-R."[6] *Id.*

Since *Young,* numerous courts have rejected challenges to the

[6] The DSM-III-R is the Diagnostic and Statistical Manual III-Revised, a compendium of mental disorders published by the America Psychiatric Association. The current iteration of this manual is the DSM-IV-R.

diagnosis of ASPD as a basis for civil commitment. *See, e.g. Adams v. Bartow*, 330 F.3d 957, 961 (7th Cir. 2003) (*Foucha* does not preclude civil commitments based on a diagnosis of ASPD); *Hubbart v. Superior Court*, 19 Cal.4th 1138, 969 P.2d 584, 599 (Cal. 1999). Indeed, the *Hubbart* Court flatly rejected the same argument Rude raises here:

> Nothing in . . . *Foucha* as a whole, purports to limit the range of mental impairments that may lead to the "permissible" confinement of dangerous and disturbed individuals. Nor did *Foucha* state or imply that antisocial personality conditions and past criminal conduct play no proper role in the commitment determination. The high court concluded only that Foucha's due process rights were violated because the State had sought to continue his confinement as an insanity acquittee without proving that he was *either* mentally ill *or* dangerous.

*Id.*, 969 P.2d at 599 (internal citations omitted; emphasis in original). *See also In re G.R.H.*, 711 N.W.2d 587, 595 (N.D. 2006) (under both *Hendricks* and *Crane,* sufficient evidence in the record established nexus between G.R.H.'s ASPD and his difficulty controlling his sexually violent behavior); *In re Detention of Sease*, 149 Wn. App. 66, 201 P.3d 1078, 1085 (2009) (affirming civil commitment based on diagnoses of ASPD and at least one other personality disorder, where each constituted an alternative means for establishing a mental disorder); *In re Commitment of Adams*, 588 N.W.2d 336, 341 (Wis.App. 1998); *In re Shafer*, 171 S.W.3d 768, 771 (Mo.App. S.D. 2005); *Murrell v. State*, 215 S.W.3d 96, 108 (Mo.

2007); *In re Detention of Barnes*, 689 N.W.2d 455, 459-60 (Iowa 2004) (concluding that neither *Hendricks* nor *Crane* precluded commitments based on ASPD).

While numerous courts have rejected Rude's argument, the most thorough treatment of this issue is found in *Brown v. Watters*, 599 F.3d 602 (7th Cir. 2010). Brown, like Rude, had been diagnosed with both Paraphilia NOS: Nonconsent and an ASPD. 599 F.3d at 611-12. He argued, like Rude, that the diagnosis of ASPD is "constitutionally insufficient to support civil commitment." *Id.* Citing both *Foucha* and *Crane*, the court soundly rejected this argument. While acknowledging that "the diagnosis of [ASPD] is the subject of some significant professional debate," the court stated that "the existence of a professional debate about a diagnosis or its use in the civil commitment context does not signify its insufficiency for due process purposes, particularly where, as here, that debate has been evaluated by the factfinder." *Id.* at 614. The court also rejected Brown's argument, identical to that made by Rude, that, because a significant percentage of the male prison population is diagnosable with ASPD, the diagnosis "does not distinguish a subgroup of offenders for whom preventative detention is appropriate." *Id.* at 614. Commenting that this argument "misses the mark," the court went on to cite to *Crane*:

> [T]here must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish between the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

*Id.* at 614, citing *Crane,* 534 U.S. at 413. If, the court continued, "the condition of [ASPD] is serious enough to cause an inability to control sexually violent behavior, the standards set by the Supreme Court would be satisfied." *Id.,* 699 F.3d at 615.

Rude does not argue that the evidence at trial was insufficient to demonstrate this connection between his diagnos[es] and serious difficulty controlling behavior, and indeed there was significant testimony to that effect. *See* RP at 142-44; 169; 171-74 (06-18-2012). Rude's argument that ASPD is "too imprecise to distinguish the truly mentally ill from those who must be dealt with by criminal prosecution alone" (App. Br. at 19) must be rejected.

### B. The State's Expert's Testimony At Trial Was Properly Admitted

Rude argues that the trial court violated his rights to due process by admitting "unreliable hearsay" regarding Rude's alleged past conduct at trial. App. Br. at 32. Rude has not demonstrated that the trial court abused its discretion in making it evidentiary rulings, and his effort to

"constitutionalize" the trial court's evidentiary rulings fails.

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". ER 401. Even relevant evidence will be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice". ER 403. The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. *State v. Swan,* 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991). Discretion is abused when based on untenable grounds or in a manifestly unreasonable manner. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93,107, 864 P.2d 937 (1994). "An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (internal citations omitted).

In any sexually violent predator proceeding, evidence relating to the offender's history of sexual offenses is highly relevant. *Young.* 122 Wn.2d at 53. The admission of expert testimony in sexually violent

predator commitment trial is proper where the testimony is based on records reasonably relied upon by others to diagnose future dangerousness. *In re Marshall*, 156 Wn.2d 150, 162, 125 P.3d 111 (2005), citing *Young,* 122 Wn.2d. at 58. A trial court may allow an expert to reveal the underlying basis for her opinion if doing so will help the jury understand the expert's opinion. *In re Coe,* 175 Wn.2d 482, 513, 286 P.3d 29 (2011). The disclosure is permissible even if the information would be inadmissible as substantive evidence. *Id.* The trial court need only give an appropriate limiting instruction explaining that the jury is not to consider this revealed information as substantive evidence. *Id.*

Dr. Longwell submitted three separate reports relating to evaluations of Rude. RP at 98 (06-18-2012). As part of this process, she reviewed roughly 3-4000 pages of documents, and conducted an interview of Rude. *Id.* at 97-98, 100. Her review included, *inter alia*, criminal history records, treatment records, records relating to Rude's conduct in prison, and depositions of potential witnesses at Rude's SVP trial. *Id.* at 97-101. These are the types of documents typically relied upon by other professionals in SVP evaluations. *Id.* at 101. Indeed, Rude's trial expert, Dr. Christopher Fisher, relied upon the same documents and records in evaluating Rude. RP at 165 (06-20-2012); RP at 109 (06-21-2012).

Rude argues that Dr. Longwell should not have been permitted to

testify as to the content of these records, in that she failed to "tie" the information upon which she relied to any particular opinion to which she testified, and as such was merely recounting inadmissible hearsay. App. Br. at 34-37. In support of this argument, he points to four specific matters about which Dr. Longwell testified at trial: Rude's "cornering" of a woman in a Texas laundromat, his 1991 rape of a 16-year-old girl, his conviction for Attempted Rape in the Second Degree, and the reasons behind his expulsion from the WSH treatment program. App. Br. at 36-37.

Dr. Longwell's discussion of these incidents was proper under ER 703 and 705, and there was no error in admitting her testimony. Pursuant to ER 703, an expert may testify as to the "facts or data" upon which that expert bases an opinion even if those "facts or data" are not admissible in evidence, so long as the information is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Here, Dr. Longwell made clear that the information upon which she relied was "of a type reasonably relied upon" by experts who conduct SVP evaluations. RP at 101 (06-18-2012). Because it was clear that Dr. Longwell was providing such information as the basis for her expert opinion, and because the jury was given a limiting instruction as to the proper uses of her testimony, Rude's argument fails.

Nor is Rude correct when he asserts that Dr. Longwell failed to "tie" any of these incidents to her opinion. Before eliciting testimony regarding the substance of Dr. Longwell's evaluation of Rude, the State's attorney asked her about the information she considered when forming that opinion. Specifically, she asked whether Rude's history of sexual offenses would be an important part of the evaluation to assess risk of re-offense. RP at 102-103 (06-18-2012). Dr. Longwell confirmed that it would. *Id.* As soon as this was established, and at the State's suggestion, the following limiting instruction was read to the jury:

> Generally, witnesses testify only to things they observe. However, some witnesses are permitted to give their opinions in addition to their observations.
>
> In order to assist you in evaluating an opinion, a witness may be allowed to give the basis for the opinion. In some circumstances, testimony about the basis for an opinion is not appropriate for you to consider for other purposes. In that instance, I will call to your attention the limited purpose for which the evidence may properly be considered. Dr. Kathleen Longwell is about to testify regarding information she relied upon as the basis for her opinion. You may consider this testimony only in deciding what credibility and weight should be given to the opinions of Dr. Longwell. You may not consider it as evidence that the information relied upon by the witness is true or that the events described actually occurred.

*Id.* at 103-04.

This instruction made it immediately clear to the jury that Dr. Longwell would be testifying as to information she relied upon when

forming her opinions, and that they could consider that information only for the limited purpose of assessing the credibility of her opinions. Information related to Rude's history of sexual offending was thus broadly "tied" to his risk of re-offense.

In addition, this information was relevant for the purpose of determining whether Rude has fantasies or urges towards non-consenting sex, an element of her diagnosis of Paraphilia NOS: Nonconsent. RP at 142-43 (06-18-2012). In making this assessment, Dr. Longwell testified, the expert looks not simply at an isolated incident but at "a pattern of behavior." *Id.* at 142-143. Where the person does not admit to fantasies or urges, "you would look at what would be the motivation behind taking that kind of risk and committing those types of sex offenses." *Id.* at 142. Sexual behavior, she noted, "is normally propelled by sexual urges and sexual fantasy." *Id.* Rude's pattern of sexual offending, she explained, indicates that he "took tremendous risks" when committing his sex offenses, suggestive of "a strong internal drive" involving non-consenting sex, "so strong that [it] overcame his sense of self-protection." *Id.* The incident in the Texas laundromat,[7] for example, reflected this internal

[7] Dr. Longwell testified that, while on probation following his conviction for harassing phone calls and indecent liberties in 1979, Rude moved to Texas with his family. While there, she stated, "a woman said that he cornered her in a laundromat and she started screaming. She was worried that he was going to assault her." RP at 111 (06-

state, and neither "getting in trouble" for this incident-- in which he "scares this woman into thinking she's going to be assaulted by him"—or being detected for the obscene phone calls he made around the same period of time "seems to be able to help him realize that this is behavior that is going to have very serious consequences for him." *Id.* at 143.

Likewise, Dr. Longwell's testimony relating to Rude's 1981 rape of a 16-year-old girl was directly related to her assessment of both Rude's risk and his diagnosis. This rape, Dr. Longwell testified, was consistent with Rude's pattern of offending against persons who clearly did not consent to sexual contact:

> It was again very clear that this young girl had no interest in sexual activities with Mr. Rude or with his companion; that the intention was to force themselves on her. They had no reason to believe that she wanted to engage in sexual activities with him at all; that was their intention. They told her we're going to rape you. Right away Mr. Rude became coolant with her. After he slapped her, according to his companion who said this, don't hurt her.
>
> Again, this is what Mr. Rude was after. He was after forcing himself at [sic] people. He wasn't after consensual sex, oh, well, if they don't give in I guess I'll have to use some force. He was aroused by seeing the fear in their eyes, by seeing that he could take something from them, something sexual, and they couldn't do anything about it.

RP at 146 (06-18-2012). The same was true of his attempted rape of the

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18-2012). Dr. Longwell testified that the police arrived at the scene and, without arresting Rude, took him to his parents. *Id.*

woman whom he had driven home in a taxicab the same year. There was no indication, Dr. Longwell testified, that the victim showed any interest in sexual contact with Rude. *Id.* at 146. Upon entering her house, however, Rude "immediately sexually assaulted her," taking out a knife, holding it to her throat, and making little cuts on her hand "to show how sharp the knife was." *Id.* at 146. "The implication," Dr. Longwell testified, "is he did that because he wanted to see the terror in her face. That's what he found arousing. And her feeling of helplessness that she couldn't protect herself." *Id.* at 146.

Finally, Dr. Longwell made clear that the offense against the victim at Western State Hospital was relevant to her assessment both of Rude's compulsivity and to his risk of re-offense. Rude, she explained, didn't like the victim because the victim was a homosexual. *Id.* at 147. Rude "bullied" the victim on several occasions, a behavior Rude apparently found sexually arousing, on one occasion taking the victim's hand and putting it on Rude's penis "to show the man that he had an erection." *Id.* at 147. "To do something like this in the context of being in a treatment program where if he was expelled from the program he faced a significant prison sentence indicates a strong internal drive to take the risk of committing such an offense that had...a certain probability that this young man would tell the treatment program that he had done this. That is

an indication of strong intent, sexual urges and fantasies." *Id.* at 148.

Rude concedes that, pursuant to ER 703 and *Marshall*, experts are permitted to offer an opinion based on hearsay data that would otherwise be inadmissible in evidence. App. Br. at 34. He nevertheless argues, citing *State v. DeVries,* 149 Wn.2d 842, n.2, 72 P.3d 748 (2003), that ER 703 "was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence." App. Br. at 34. The facts of *Devries,* however, bear no relationship to this case. *Devries* concerns the identification and authentication of an exhibit by a witness and not, as here, an expert witness' reference to otherwise inadmissible evidence as the basis for an expert opinion. In *Devries,* the trial court admitted a lab report through the telephonic testimony of an emergency room doctor who 1) did not have a copy of the report before him to consult while testifying; and 2) would not say that the report he had seen previously while treating the victim was the same one that the prosecution sought to admit; and 3) neither testified as to the foundational requirements of ER 703 nor was asked for his expert opinion. 149 Wn.2d 842 at 847. The court determined that, "because the exhibit was not properly identified and authenticated by a witness, it was a manifest abuse of discretion for the trial court to admit it into evidence." *Id. Devries* has no bearing on this case.

Rude cites *Bruton v. United States*, 391 U.S. 123, 124-26, 88 S. Ct.

1620, 20 L. Ed. 2d 476 (1968) in support of his argument that the limiting instruction given by the trial court was insufficient to ameliorate the effects of Dr. Longwell's reliance upon "inflammatory hearsay." App. Br. at 35. This argument is not persuasive, and was properly rejected by our Supreme Court in *In re Coe,* 175 Wn.2d at 515. The *Bruton* decision is not a general criticism of limiting instructions. Rather, it is a very narrow holding that a limiting instruction is not an adequate remedy when the statements of one codefendant which inculpate a second codefendant, are introduced in a *joint* trial. In a joint trial, each codefendant has both a fifth amendment right to remain silent and a sixth amendment right to confront and cross examine evidence against them. The introduction of out-of-court statements of one codefendant inculpating the other codefendant, results in a deprivation of the very fundamental constitutional right of cross examination.

Here, Rude was never deprived of his right to cross examination regarding the evidence presented against him. Indeed, Dr. Longwell was cross examined at length regarding the bases for her opinions. RP at 41-167 (06-19-2012). Rude's trial counsel questioned her in detail about the facts she relied upon in the 1981 Rape, (RP at 41-6 (06-19-2012)), the Attempted Rape case (RP at 46-7; 93-100 (06-19-2012)), his expulsion from Western State Hospital (RP at 86-92 (06-19-2012) and other matters.

Rude not only had the *right and opportunity* to cross examine Dr. Longwell regarding both her opinions and bases for those opinions, his attorney actually did conduct extensive cross examination. Accordingly, there was no deprivation of his constitutional rights and no violation of due process.

Finally, Rude argues that Dr. Longwell's testimony regarding his history of sexual misconduct was "primarily uncorroborated by other testimony or evidence." App. Br. at 36. This is also incorrect. In Rude's deposition, which was played for the jury during the trial, he confirmed that he was involved in an altercation in a laundromat; there was a woman involved and he thought the woman was afraid someone was coming after her and she started screaming. Ex. 52, pg. 30-1. As for the expulsion from WSH, Rude confirmed that he was kicked out of WSH after about one year there and he went back to prison. Ex. 52, pg. 50. He also confirmed the reason for his expulsion involved an allegation that he was trying to have sexual contact with another resident. Ex. 52, pg. 48-9. Although Rude maintained that it was the other resident who attempted to touch his crotch, Rude admitted he "punched" the guy and was sent back to prison. Exhibit 52, pg. 51. Regarding the Attempted Rape conviction, Rude testified that he drove a woman home in a taxi cab and she did not pay him. Ex 52 at page 42-3. He said he entered her house and stole some

property items and he got into an altercation with her while he was in her house. The altercation resulted in his touching her, including "contact with breasts and stuff that he shouldn't have touched." Ex. 52, pg. 43-44. Rude also testified at length about his 1981 rape of the 16-year-old girl. Ex. 52, pg. 33-41. Rude said that he and Leroy picked up a female hitchhiker whom Rude had seen before. Ex 52, pg. 36. They took her to a gravel pit and Leroy was talking about having sex and "then it turned into a rape." Ex. 52, pg. 37. Rude elaborated that Leroy "went to the back in the car and he had grabbed her and he raped her, and then I raped her." Ex 52, pg. 38. Rude said that she was "hollering" and upset, "and she started crying and screaming." Ex. 52, pg. 38. He denied having any weapons or making any threats against her, but he confirmed that he and Leroy drove away and left her at the gravel pit. Ex. 52, pg. 39.

Rude's arguments that his right to due process was violated by the State's expert's testimony must be rejected.

### C. The State's Arguments in Closing Were Proper

Rude argues that the State's attorney's argument in closing "amounted to an exhortation to the jury to commit Mr. Rude if they simply were afraid of him and believed he might reoffend." App. Br. at 39. This argument is without merit.

During closing argument, Rude's attorney argued that the State

was required to prove beyond a reasonable doubt that Rude suffered from Paraphilia Not Otherwise Specified: Nonconsent:

> So even though the instructions say that a person can be a sexually violent predator if he suffers from a mental abnormality or personality disorder, in this case the evidence has shown that there's only one crime --one diagnosis that would really make or predispose or set anyone in motion to committing a sex act, and that's Paraphilia NOS. And that's why in this case the state needs to prove that definition -- or not that definition – that diagnosis beyond a reasonable doubt.

RP at 34 (06-22-2012). The State did not object to this misstatement of the law, but, during rebuttal argument, the State's attorney addressed Rude's argument:

> Mr. Mooney told you that what you had to find beyond a reasonable doubt was that Dr. Longwell had diagnosed Mr. Rude with Paraphilia Not Otherwise Specified, that that diagnosis had to be found beyond a reasonable doubt. That's not what the law says.

*Id.* at 60. Defense counsel objected and the court overruled, saying "[c]ounsel, this is fair comment on the evidence." *Id.* The State continued:

> What you have to find is that Mr. Rude has a condition, a condition that predisposes him. And you remember, we put the slide up with definition of mental abnormality. The DSM, the testimony of the experts, the diagnoses, they're all just a guide.

*Id.* at 60-61.

Rude again objected, at which point the jury was excused. RP at 61

(06-22-2012). After extensive argument, the court noted the objection and ordered the State to proceed with argument. *Id.* at 66. The State resumed rebuttal argument:

> But what you're asked to find in this case is, does Mr. Rude have a mental abnormality as defined by the statute? You heard a lot of debate over what are the criteria for the diagnosis that Dr. Longwell made, but what you didn't hear any debate over is that there are individuals out there, there are individuals out there who have a paraphilic interest in rape. Is there controversy over this issue? Sure. But you weigh the evidence credibility of the experts. You weigh the testimony, and you determine what decision you make in this case.

*Id.* at 70.

Rude now frames this interrupted explanation as misconduct, arguing that the State invited the jury to commit Rude if they found he suffered from any "condition" that caused him serious difficulty in controlling his sexually violent behavior. Although the prosecutor was interrupted mid-sentence by objection, the explanation was appropriate and should be viewed in the context of the attorney's entire argument.

First, the State, in its rebuttal, correctly observed that Rude's counsel had misstated the law. The law, as set forth in the jury instructions, requires the State to prove, *inter alia*, that Rude "suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior;" and "that this

mental abnormality or personality disorder makes Richard Rude likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP at 666. There is nothing in the statute that requires that the jury find that the existence of a particular diagnosis be proven beyond a reasonable doubt. Nor was Rude's counsel correct in asserting that the condition upon which commitment was based was required to be a "recognized diagnosis, in the medical certainty, and in argument, that's what happened in *Kansas vs. Hendricks,* it was yes, this has to be a medical background to finding of mental abnormality, and I don't want to state to argue anything else." RP at 62 (06-22-2012). As noted in Section A (1), above, the Supreme Court has never required any particular diagnosis as a prerequisite to commitment, nor is there any requirement that the underlying condition be "medically recognized." Rather,

> [i]t is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

*Crane*, 534 U.S. at 413.

Nor was Rude's counsel correct in asserting that "there's only ...one diagnosis that would really make or predispose or set anyone in

motion to committing a sex act, and that's Paraphilia NOS." RP at 34 (06-22-2012). Dr. Longwell testified that either Rude's Paraphilia NOS or his Antisocial Personality Disorder would independently constitute mental abnormalities. RP at 3-4 (06-19-2012).[8] Thus, by definition, each constitutes a "congenital or acquired ***condition*** affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts..." RCW 71.09.020(8); CP at 667 (emphasis added). Further, as her cross examination by Rude's counsel made clear, it is Rude's sexual ***deviancy***--as opposed to the specific diagnosis of Paraphilia NOS: Nonconsent—that transforms a straightforward diagnosis of Antisocial Personality Disorder into a mental abnormality under the law. RP at 132-34 (06-19-2012). As such, Rude's counsel's assertion regarding the necessity of a Paraphilia diagnosis was not consistent with the evidence.

Rude argues that the State's attorney's use of the term "condition" rather than "diagnosis," and reference to the DSM as a "guide," invited the

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[8] Q: (by State): If you had diagnosed Mr. Rude solely with Antisocial Personality Disorder based on the records that you have, could that still constitute a mental abnormality under the statute?

A: (Longwell): Yes.

Q: If Mr. Rude had been only [sic] with Paraphilia Not Otherwise Specified without the Antisocial Personality Disorder diagnosis would that also constitute a mental abnormality required by statute?

A: It would.

jury "to disregard the medical evidence," "exhort[ing]" them "to commit Mr. Rude if they simply were afraid of him and believed he might reoffend." App. Br. at 39. This argument fails. First, the statute defines "mental abnormality" as "***a condition***..." and not, as Rude appears to suggest, "a specific psychiatric diagnosis set forth in the DSM." Moreover, the State's reference to the DSM as a "guide" was completely consistent with Dr. Longwell's testimony: Dr. Longwell, asked about how the criteria for a diagnosis of Paraphilia were to be applied, testified that, according to the American Psychiatric Association, the listed criteria are "suggested" but "not essential" for purposes of assigning the diagnosis, and then adding, "[t]hese are guidelines in making diagnoses." RP at 136 (06-18-2012).

Finally, the State's closing argument must be considered as a whole and not, as Rude attempts to do, in isolated bits and pieces, made even more confusing by the interjection of Rude's counsel's objections. The State at all times tied its argument to the statutory standards it was required to meet, as reflected by the jury instructions. The State reviewed the testimony supporting the diagnosis of Paraphilia (RP at 12-18 (06-12-2012)), the interaction of the various diagnoses (*Id.* at 18-19); the requirement of "serious difficulty" controlling behavior (*Id.* at 19-20); and the actuarial evidence regarding his likelihood to reoffend (*Id.* at 22-26).

The State emphasized that it was the job of the jury to weigh the evidence, and to determine which evidence was more credible. *Id.* at 26. The State reminded the jury of the State's burden to prove each element beyond a reasonable doubt: "That's a high burden for the state, and it should be." *Id.* at 27. At no point did the State suggest that the jury should make its decision on anything other than the evidence that had been presented to it, which did not, as Rude suggests, include basing commitment on "drug addiction, low self-esteem, lack of respect for women, or an overactive sex drive" ( App. Br. at 40), as Rude suggests. His argument should be rejected.

**D. Rude's Right to Jury Unanimity Was Not Violated**

Finally, Rude argues that the State violated Rude's right to jury unanimity. Although he concedes that each of the alternative means alleged by the State was supported by substantial evidence, he asserts that, because "the State did not prove that the ASPD or substance abuse, on their own, predisposed him to commit sexually violent acts…" his right to a unanimous jury was violated. App. Br. at 41. Because there is no such requirement, his argument fails.

In SVP cases involving an allegation that a respondent suffers from both a personality disorder and a mental abnormality, where substantial evidence supports each, these two conditions "are alternative means for

making the SVP determination." *In re Halgren,* 156 Wn.2d 795, 810, 132 P.3d 714 (2006). As Division I noted in its earlier decision in that case, "[t]o force the State to elect or the jury to rely on only one...would unnecessarily introduce a requirement that is not present in the statute. It would also compromise the value of the clinical judgments of expert witnesses in this difficult area. Neither the constitution nor the statute requires this." *In re Halgren* 124 Wn. App. 206, 215, 98 P.3d 1206 (2004). Affirming the Court of Appeals' decision on this issue, the Supreme Court noted that, "because both mental illnesses are predicates for the SVP determination, the two mental illnesses are closely connected..." and that "these two means of establishing that a person is an SVP may operate independently ***or may work in conjunction***." *Halgren,* 156 Wn.2d at 810 (emphasis added). *Accord In re Ticeson,* 159 Wn. App. 374, 246 P.2d 550 (2011).

Here, Dr. Longwell clearly testified that Rude has both a personality disorder and a Paraphilia. In fact, Dr. Longwell testified that either Rude's Antisocial Personality Disorder or his Paraphilia NOS: Nonconsent independently constituted a mental abnormality under the statutory definition. Because there was substantial evidence of both, a mental abnormality and a personality disorder, Rude's right to jury unanimity was not violated.

## IV. CONCLUSION

For the reasons set forth above, this Court should affirm Rude's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 24th day of June, 2013,

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**WASHINGTON STATE COURT OF APPEALS, DIVISION I**

DECLARATION OF SERVICE

I, Allison Cleveland, declare as follows:

On this 24 day of June, 2013, I deposited in the United States mail, and sent via email, true and correct copies of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24 day of June, 2013, at Seattle, Washington.



ALLISON CLEVELAND