NO. 44575-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

CHARLES ROBINSON,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The trial court found that Charles Robinson (Robinson) is a sexually violent predator (SVP) and ordered him committed to the custody of the Department of Social and Health Services for placement in a secure facility. The hearing was fair, consistent with the Rules of Evidence, the Civil Rules, and the procedural protections provided in RCW 71.09, and the trial court's findings are supported by sufficient evidence. Robinson was afforded all due process to which he is entitled, as directed by numerous decisions of the Washington appellate courts. His arguments to the contrary, especially his attempt to re-characterize SVP commitment proceedings as criminal, have been rejected repeatedly by the Washington Supreme Court. This court should affirm Robinson's civil commitment as a sexually violent predator.

II. ISSUES PRESENTED

A. Whether the trial court acted within its discretion and afforded Robinson due process in allowing the State to play Robinson's video deposition at trial.

B. Whether there was sufficient evidence to support the trial court's finding that Robinson is a sexually violent predator.

III. STATEMENT OF FACTS

A. Procedural History

On December 18, 2007, the State filed a petition alleging that Charles Robinson (Robinson) is a sexually violent predator (SVP). CP 1. After a bench trial, the Honorable Leila Mills, Kitsap County Superior Court, found that Robinson was an SVP and ordered him committed to the custody of the Department of Social and Health Services for placement in a secure facility. CP 103. Robinson appeals. CP 108.

B. Robinson's Sexual Offense History

Robinson has a lengthy history of sexually assaulting children. Robinson's first adjudicated victim was a six-year-old boy, Andy M. CP 89A (Ex. 22 at 38); 2RP at 110. On October 30, 1987, Andy and his family attended a church function with Robinson in Orange Grove, California. *Id.* (Ex. 22 at 40). Andy's family had been acquainted with Robinson for three years. *Id.* (Ex. 22 at 42). In the evening, Robinson spent the night with Andy at the church. *Id.* (Ex. 22 at 44); 2RP at 110. Robinson was head of the church boy's group, and they planned to participate in a Halloween parade the following day. *Id.* (Ex. 22 at 45); 2RP at 110. Andy's father left his son in the care of Robinson for the evening. *Id.* (Ex. 22 at 44). After Andy arrived home the next day, he reported to his father that Robinson had taken off his clothes and kissed

him all over. 2RP at 110. Andy reported that he fell asleep and when he woke up, Robinson had his clothes off and had taken Andy's clothes off as well. *Id.* Robinson then sucked on Andy's penis, kissed him on the mouth, rubbed his buttocks, and threatened to tear up Andy's pants. *Id.* Andy reported that he was sexually assaulted three times that evening. *Id.*

Robinson was eventually arrested and convicted on one count of Lewd and Lascivious Acts with a Child Under Age 14. CP 89A (Ex. 1-3, 22 at 61); 2RP at 203-204. He received a six year prison sentence and was paroled to the community in 1991. *Id.* (Ex. 22 at 62).

Robinson's next offense involved a four-year-old boy named William B. 2RP at 111; CP 89A (Ex. 22 at 63). On July 26, 2000, William's mother contacted the police to report that Robinson had molested her son. Robinson worked as a maintenance man at the apartment complex where she and William resided. She was new to the area and had allowed Robinson to babysit William while she searched for a job. CP 89A (Ex. 22 at 63-64). She discontinued this practice after William said he no longer wanted Robinson to babysit him. She later discovered that Robinson was a convicted sex offender. Upon learning this, she asked William if anyone had touched him in his "private area." William reported that Robinson had touched his "private." 2RP at 111. When William was interviewed by the police, he reported that Robinson

had grabbed his penis on multiple occasions, both over and under his clothing. *Id.*

Robinson was questioned by police. He admitted touching William's penis when dressing him after a bath. 2RP at 111. Robinson admitted, "I'm constantly telling myself I cannot do this." *Id.* at 139. Robinson also mentioned that he had offended against a boy in California. *Id.* at 112. He admitted masturbating to images of children, and admitted he masturbated frequently to the point where his penis was sore. *Id.* at 139.

Robinson was convicted of Child Molestation in the First Degree by a jury. He was sentenced to life without the possibility of parole, but that sentence was later reduced to 89 months on appeal. CP 89A (Ex. 4-8).

During the investigation into William's molestation, other children in the neighborhood reported that Robinson had sexually assaulted them. 2RP at 112. Robinson had access to these children through baby-sitting or spending time with them. *Id.* at 113. A three-year-old boy reported to his mother that Robinson put ointment on his penis and had oral sex with him. *Id.* at 112. A four-year-old girl reported that Robinson had pulled her pants down. *Id.* This girl's five-year-old brother disclosed that Robinson paid him to have oral sex. *Id.* at 112-113. This boy also reported that he

had witnessed Robinson sexually assault two of his sisters who were two and four years old at that time. *Id.* at 113.

A six-year-old girl, also from the same neighborhood, reported that Robinson played a game with her called "Sex Tac Toe." *Id.* She reported that Robinson did something with his mouth. She also reported that Robinson placed his head between her legs when she was not wearing panties and she received a rash. *Id.*

C. Parole Violations

While Robinson was on parole on his Lewd and Lascivious Acts conviction, he committed several parole violations by having unauthorized contact with minors. 2RP at 137.

During a home visit in March of 1992, Robinson's parole officer John Withrow observed him sitting outside watching five young children play. CP 89A (Ex. 33 at 1). Mr. Withrow escorted Robinson into his home where he admitted to bringing a seven-year-old boy into his home and accompanying him into the bathroom. *Id.* (Ex. 33 at 2). He also admitted to wrestling with children, but denied molesting them. *Id.* Robinson was cited for parole violations, including unauthorized contact with children. *Id.* (Ex. 33 at 2). He was returned to custody and eventually released to the community in March of 1993. *Id.* (Ex. 25 at 43).

On September 28, 1993, just six months after he was released from his parole violations, Robinson was again discovered having contact with children. Parole officers conducted a search of Robinson's residence in his absence and discovered child magazines and a toy car. *Id.* (Ex. 25 at 19-23). The parole officers discovered a trunk in his garage which was padlocked, and they called his mother to request that she contact Robinson and have him report home. *Id.* (Ex. 25 at 19). Robinson arrived home as a passenger in a car with two children in the back seat. *Id.* Robinson claimed he did not have the key to the trunk so parole officers used bolt cutters to unlock the trunk. *Id.* (Ex. 25 at 21). Inside the trunk, parole officers discovered boy's underpants and children's toys. *Id.* (Ex. 25 at 21-24). He was placed in custody for violating parole and remained there until September 28, 1994. *Id.* (Ex. 25 at 33).

In December of 1994, approximately two months after his release from his parole violation, Robinson's parole officer spotted him on a road holding the hands of two small girls. *Id.* (Ex. 25 at 25-27). The officer pulled over and arrested Robinson immediately. *Id.* (Ex. 25 at 27). Both girls were under the age of eight. *Id.* (Ex. 25 at 19; Ex. 22 at 83). Robinson's parole was again revoked and he was incarcerated until his period of parole expired. He was released into the community on January 16, 1995. *Id.* (Ex. 22 at 84). Five years later, he was convicted of

child molestation in the first degree against victim William B. in Jefferson County, Washington. *Id.* (Ex. 4-8).

D. Psychological Testimony

1. Dr. Harry Goldberg

At trial, the State presented the testimony of Dr. Harry Goldberg. 2RP at 87. Dr. Goldberg is a forensic psychologist with considerable experience in the evaluation, diagnosis, and treatment of sex offenders. Dr. Goldberg has evaluated, assessed and treated over two thousand sex offenders during his twenty-seven year career. 2RP at 94.

Dr. Goldberg has extensive experience in sex offender civil commitment proceedings and has conducted approximately thirty evaluations in Washington and over 700 evaluations in California. 2RP at 94. Dr. Goldberg evaluated Robinson to determine if he met criteria as an SVP. As part of his evaluation, Dr. Goldberg reviewed extensive records relating to Robinson, including court records, police reports, probation reports, prison records, medical records, and psychological and psychiatric records. 2RP at 96-97. He testified that these records were the type that mental health professionals in the field typically rely on in evaluating sexually violent predators. 2RP at 97. Dr. Goldberg also interviewed Robinson on two different occasions. 2RP at 97-98.

Dr. Goldberg testified about the records he reviewed regarding Robinson's sex offense history that served the basis for his opinions as to Robinson's mental condition and his risk to reoffend. 2RP at 100.

Dr. Goldberg diagnosed Robinson as suffering from the mental abnormality of Pedophilia, Sexually Attracted to Males, Nonexclusive Type. *Id.* at 106. In addition, he diagnosed Robinson with the mental abnormality of Psychotic Disorder Not Otherwise Specified (NOS). *Id.* Dr. Goldberg also diagnosed Robinson with a personality disorder, specifically, Personality Disorder NOS with Antisocial Personality Features. *Id.* Dr. Goldberg explained in detail what these mental abnormalities and personality disorder mean and he further explained how he reached these diagnoses.

Dr. Goldberg opined that Robinson's mental abnormalities and personality disorder cause him serious difficulty controlling his sexually violent behavior and make him likely to engage in predatory acts of sexual violence if not confined to a secure facility. *Id.* at 140-196. In making this determination, Dr. Goldberg considered the file materials, his interviews with Robinson, as well as various risk assessment tools. In particular, Dr. Goldberg considered numerous static and dynamic risk factors associated with sexual offense recidivism, as well as Robinson's

behavior, specifically, his inability to keep himself away from children in the community when he was on parole. *Id.*

In evaluating Robinson's serious difficulty in controlling his sexually violent behavior, Dr. Goldberg testified that when he examined the persistence of Robinson's behavior, it was striking to him that even after being convicted of a sexual crime against a child and receiving a prison sentence, Robinson continued to have contact with children while on probation, knowing full well that he will be subjected to additional prison time. *Id.* at 137. The fact that additional imprisonment did not deter Robinson from having contact with children on three separate occasions illustrated his lack of volitional control. *Id.* at 138. Moreover, Dr. Goldberg noted that Robinson continued his sexual offending in 2000, and the file materials indicate that Robinson was suspected of offending against additional victims in the apartment complex where he worked and resided. *Id.*

Dr. Goldberg explained that a risk assessment involves a comprehensive evaluation of not just static factors, but dynamic factors as well. *Id.* at 142. He explained that actuarial instruments are one part of the overall risk assessment but not the only part. He explained that combining the consideration of dynamic risk factors along with the static risk factors provides for "incremental validity," meaning this method has

been shown by research to add accuracy to risk assessment over just actuarials alone. *Id.* at 188-189. Specifically, research conducted by Dr. David Thornton, one of the developers of the Static-99R[1], indicated that a risk assessment combining the Static 99R with the SRA:FV[2] provided incremental validity. *Id.* Dr. Goldberg opined that when he considered these factors, it is his opinion to a reasonable degree of psychological certainty that Robinson is likely to engage in predatory acts of sexual violence if not confined to a secure facility. *Id.* at 196.

2. Dr. James Manley

Dr. James Manley testified on behalf of Robinson. He testified that Robinson does not have either a mental abnormality or a personality disorder, and is not likely to commit predatory acts of sexual violence if not confined in a secure facility.

Dr. Manley worked as an evaluator for the Special Commitment Center (SCC) in 1999 and 2007. 3RP at 364-368. He performed annual reviews of residents committed as sexually violent predators. *Id.* Dr. Manley entered private practice in September 2011. *Id.* He has

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[1] The Static-99R is one of the most widely used actuarial instruments for measuring sex offender recidivism. The Static-99 has been shown to accurately assess recidivism through numerous cross-validation studies. 2RP at 144-149, 166-167.

[2] The SRA:FV is an instrument that measures dynamic factors related to risk of re-offense, such as the psychological vulnerabilities of an offender. Research has shown the SRA:FV to be useful in performing risk assessments. 2RP at 178-179, 249.

performed only two SVP initial commitment evaluations in state and private practice. *Id.* at 371.

Like Dr. Goldberg, Dr. Manley diagnosed Robinson as suffering from pedophilia. *Id.* at 325. However, Dr. Manley did not find that Robinson's pedophilia qualified as a mental abnormality. *Id.* He pointed to the lack of certain behavior by Robinson, such as collecting or viewing child pornography, or other sexual behaviors. However, Dr. Manley acknowledged that these types of behavior occur "infrequently" at the SCC. *Id.* at 401-402.

Like Dr. Goldberg, Dr. Manley also used the Static-99R which he described as the "gold standard" of sex offender risk assessment. 3RP at 276. Similar to Dr. Goldberg, Dr. Manley scored Robinson in the moderate to high range to reoffend. *Id.* at 287.

E. Trial Court's Findings and Conclusions

The trial court found that both experts were very close in their analysis on various issues, but they differed on their ultimate conclusions. CP 103 (Findings of Fact (FF) 45). The trial court found the testimony of Dr. Goldberg to be more reliable than Dr. Manley on the ultimate issue of whether Robinson meets the criteria of a sexually violent predator. *Id.* (FF 45).

In particular, the trial court found Dr. Goldberg to be more reliable than Dr. Manley on the issue of lack of volitional control. *Id.* (FF 49). The trial court did not find Dr. Manley's analysis on this issue to be persuasive. *Id.* The fact that Robinson could not resist being with children even while on parole demonstrated to the trial court a lack of volitional control. *Id.* (FF 48, 49).

Furthermore, the trial court was not persuaded by Dr. Manley's opinion that, because Robinson had not engaged in cutting out pictures of children from magazines or offended against younger residents at the SCC, he has shown that he is able to control himself. *Id.* (FF 50). The trial court found more persuasive Dr. Goldberg's opinion that Robinson's lack of offending behavior at the SCC offers little value in the analysis. *Id.* (FF 51). The trial court noted that Robinson has no access to children at the SCC, which is the victim pool he has offended against in the past. *Id.* Moreover, cutting out pictures of children from magazines is of very limited value as to whether someone is still acting out on urges. *Id.* The trial court was more persuaded by the fact that Robinson re-offended when in the community and that he has not received any treatment to manage those urges. *Id.*

The trial court found that the State had proven beyond a reasonable doubt that Robinson is a sexually violent predator. *Id.* (FF 53, Conclusions of Law (CL) 9).

IV. ARGUMENT

Robinson argues on appeal that the trial court committed several errors. First, he argues the trial court erred in allowing his video deposition to be played at trial because he should have been warned of his Fifth Amendment right to remain silent. This argument is embedded in an argument that the SVP statute is criminal in nature. Second, he argues that the trial court lacked sufficient evidence to commit him as a sexually violent predator.

A. The Trial Court Did Not Err in Allowing the State to Play Robinson's Video Deposition at Trial

Robinson's contention that the trial court erred in admitting his video deposition rests on two theories. First, relying on ER 804(b), Robinson argues that because he was available as a witness at trial, the trial court should not have admitted his videotaped deposition. Appellant's Brief at 13-17. Second, despite well settled case law to the contrary, Robinson argues the SVP statute is criminal in nature and he therefore should have been advised of his right to remain silent prior to the taking of his video deposition. *Id.* at 18-26. Since our courts have

soundly rejected both of these arguments, the trial court did not err in admitting his video deposition.

1. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *In re Detention of Coe*, 175 Wn.2d 482, 492, 286 P.3d 29 (2012). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Id.*

2. Robinson's Video Deposition Is Admissible at Trial Regardless of His Availability to Testify

Relying on ER 804, Robinson argues that the trial court erred in allowing the use of his video deposition without first requiring the State to show he was unavailable. Appellant's Brief at 17-18. Robinson's reliance on ER 804 is completely misplaced. The admissibility of Robinson's video deposition does not hinge on his unavailability under the ER 804 hearsay exception. Rather, his video deposition is admissible as a statement by party-opponent under ER 801(d)(1), and admissible as a deposition of a party under CR 32(a)(2).

Cases filed under RCW 71.09 are civil in nature. *In re Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002); *In re Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). In litigating civil cases, parties must comply with the civil rules of procedure. CR 1. The only exception is when specific

statutes applicable to special proceedings contradict the civil rules of procedure. CR 81. "Proceedings under RCW 71.09 are special proceedings within the meaning of CR 81; accordingly, the civil rules govern proceedings under RCW 71.09 only if they are not inconsistent with the statutory proceedings applicable to RCW 71.09." *Capello v. State*, 114 Wn. App. 739, 746, 60 P.3d 620 (2002).

There are no provisions under RCW 71.09 which speak to the use of a respondent's videotaped deposition at trial. Therefore, the civil rules of procedure are the controlling authority. Under CR 30, a party is granted the right to conduct discovery through deposition: "any party may take the testimony of any person, including a party, by deposition upon oral examination." CR 30(a).

Furthermore, CR 30(b)(8) provides that any party may videotape the deposition of any party or witness without leave of court. Apart from leading to additional evidence, the admissions gained in the deposition process provides significant insight into the central issues in a sexually violent predator case, that is, respondent's current mental condition and his ability to control sexually violent re-offense.

Moreover, CR 32(a)(2) provides that "[t]he deposition of a party ... may be used by an adverse party for any purpose." Here, the State used the video deposition of Robinson, the opposing party herein, as

substantive evidence in the State's case-in-chief. This practice is consistent with CR 32(a)(2), and has been approved by Washington courts. *Young v. Liddington*, 50 Wn.2d 78, 79-80, 309 P.2d 761 (1957).

Under CR 32(a)(2), Robinson's deposition is admissible for "any purpose." Thus, the State is permitted to use his videotaped deposition in its case in chief regardless of whether Robinson was available, or whether he intended to testify in his own case. Accordingly, the trial court did not err.

3. The Fifth Amendment Privilege Against Self Incrimination Does Not Apply in SVP Cases

Robinson argues that he should have been warned of his Fifth Amendment right to remain silent before his video deposition was taken. Because SVP proceedings are civil, Robinson does not have a Fifth Amendment right to remain silent.

In *Young*, 122 Wn.2d at 50-52, the Supreme Court addressed the contention that respondents in SVP cases have a blanket Fifth Amendment right to remain silent. At issue in *Young* was a trial court order that *Young* speak with the State's psychologist. Young claimed that such an order violated his Fifth Amendment right to remain silent. *Id.* at 50.

Our Supreme Court rejected *Young's* contentions. The court held that the Fifth Amendment protection did not apply because the SVP

statute is not criminal in nature. The court noted the "good reasons to refuse the statutory right to remain silent to sexually violent predators even though the Legislature has granted such a right to the mentally ill." *Id.* at 51. In rejecting any right to remain silent under equal protection, the court observed that:

> The problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential.

122 Wn.2d at 52.

Despite the Supreme Court's holding in *Young*, Robinson contends the SVP statute is a criminal statute because it shares similar characteristics of a criminal trial, such as the requirement of proof beyond a reasonable doubt, the right to a probable cause hearing, and the right to representation by counsel. Appellant's Brief at 20-21. Our courts have recognized that these guarantees are necessary to satisfy due process because of the serious restraint on liberty resulting from civil commitment as an SVP. However, it is well settled that an SVP case is a civil proceeding and punishment is not the purpose of confinement under the SVP statute. *Young*, 122 Wn.2d at 18-25. Indeed, Washington courts

have repeatedly refused to confer upon SVP respondents the same rights as criminal defendants. *In re Detention of Stout*, 159 Wn.2d 357, 369–71, 150 P.3d 86 (2007); *In re Detention of Turay*, 139 Wn.2d 379, 422, 986 P.2d 790 (1999); *In re Detention of Ticeson*, 159 Wn. App. 374, 381, 246 P.3d 550 (2011); *In re Aqui*, 84 Wn. App. 88, 101, 929 P.2d 436 (1996).

Robinson's Fifth Amendment argument has been extensively litigated and the law is well settled: SVP cases are civil, not criminal, thus, the Fifth Amendment privilege against self-incrimination does not apply in SVP cases.

4. Robinson Was Afforded Due Process

Robinson also claims that his Fourteenth Amendment Due Process Rights were violated by the use of this deposition at trial. However, Robinson's right to due process was fully protected in this case because the State complied with the applicable procedural and evidentiary rules in obtaining and admitting this testimony.

The right to due process of law under the Fourteenth Amendment applies at SVP proceedings. *In re Detention of Brock*, 126 Wn. App. 957, 110 P.3d 791 (2005). The ultimate goal of the Due Process Clause is to ensure that in all proceedings, the procedure comports with fundamental

principles of fairness. It does not guarantee a particular form or method of procedure. U.S. Const. amend. XIV; *See also Young*, 122 Wn.2d 1.

In determining what procedure due process requires, courts balance three factors: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the value of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

Although Robinson has a significant private interest in his liberty, he also has considerable procedural safeguards in place. He has statutory rights to counsel, to present evidence and cross-examine witnesses, the ability to gather evidence and use the civil discovery rules, and the protections of a contested civil trial in which the allegations against him are proven beyond a reasonable doubt. Our Supreme Court has recognized that "Given the extensive procedural safeguards in chapter 71.09 RCW, the risk of an erroneous deprivation of liberty under the challenged amendments is low." *State v. McCuistion*, 174 Wn.2d 369, 393, 275 P.3d 1092 (2012).

Here, the State properly noted Robinson's deposition. 1RP at 37. He was represented by counsel during the deposition. *Id.* Robinson's counsel then conducted follow-up questions of Robinson during the video deposition. CP 89A (Ex. 22 at 103-114). The entire deposition was played for the trial court. 1RP at 42, CP 85. This process does not offend fairness or due process.

Finally, the State has a substantial interest in treating as well as protecting the public from sexually violent predators, an interest which would be thwarted by the application of the Fifth Amendment privilege against self-incrimination in such proceedings. If a respondent were allowed to refuse to answer questions asked during his deposition or the psychological interview, then it would be nearly impossible for the State to determine whether or not the respondent was sexually dangerous. Since the self-incrimination privilege would be a great burden to the State while being of minimal value in assuring reliability in determining appropriate treatment and public protection needs, the third factor weighs heavily in favor of the holding that due process does not require the application of the privilege against self-incrimination.[3]

[3] *See, People v. Allen,* 107 Ill.2d 91, 481 N.E.2d 690 (1985) (holding that there is no Fifth Amendment privilege against self-incrimination in sexually dangerous person proceedings).

In sum, the procedural protections in place ensured that Robinson's right to due process was fully protected and the trial court did not err in permitting the use of his deposition at trial.

B. Substantial Evidence Supports the Trial Court's Finding That Robinson Is a Sexually Violent Predator

Robinson argues the evidence presented by the State failed to establish that he is a sexually violent predator. He argues the testimony from the State's witnesses should be discounted and contrary evidence from his defense expert should carry the day. Robinson's argument should be rejected because he ignores the narrow standard of review applicable to sufficiency of the evidence challenges under RCW 71.09.

1. Standard of Review

The criminal standard of review applies to sufficiency of the evidence challenges under the SVP statute. *In re Detention of Thorell,* 149 Wn.2d 724, 744, 72 P.3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

In reviewing the sufficiency of the evidence, the reviewing court does not determine whether *it* believes the evidence at trial was proven beyond a reasonable doubt. *State v. Hughes,* 154 Wn.2d 118, 152,

110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco,* 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The reviewing court must look at the evidence in the light most favorable to the State and the commitment must be upheld if any rationale trier of fact could have found the essential elements beyond a reasonable doubt. *In re Audett,* 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against Appellant. *Id.* at 727. An appellate court should not second guess the credibility determinations of the fact-finder. *In re Detention of Halgren,* 156 Wn.2d 795, 811, 132 P.3d 714 (2006); *see also In re Davis,* 152 Wn.2d 647, 680, 101 P.3d 1 (2004) ("A trial court's credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the evidence.") Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Detention of Broten,* 130 Wn. App. 326, 335, 122 P.3d 942 (2005). "Determinations of credibility are for the fact finder and are not reviewable on appeal." *Hughes,* 154 Wn.2d at 152.

2. The State Proved Beyond a Reasonable Doubt That Robinson Is a Sexually Violent Predator

The evidence in this case, taken in the light most favorable to the State, overwhelmingly supported the trial court's finding that Robinson met each element of a sexually violent predator.

In order to uphold Robinson's commitment, this Court must find the trial court had sufficient evidence to find the following elements:

1. That Robinson had been convicted of or charged with a crime of sexual violence; and

2. That Robinson suffers from a mental abnormality or personality disorder; and

3. That such mental abnormality or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

RCW 71.09.020(18).

Here, the trial court determined that Robinson was convicted of a sexually violent offense as defined by RCW 71.09.020(17), namely, Child Molestation in the First Degree. CP 103 (FF 3, 11; CL 3). Next, the trial court determined that Robinson suffers from a mental abnormality in the form of pedophilia. *Id.* (FF 12, 22, 24, 27, 28, 31; CL 4). The trial court also found that Robinson suffers from a personality disorder in the form of personality disorder not otherwise specified with antisocial features. *Id.* (FF 12, 26; CL 5). Finally, the trial court found that Robinson mental

condition makes him likely to engage in predatory acts of sexual violence if not confined to a secure facility. *Id.* (CL 8).

Ultimately, the trial court found that the State proved beyond a reasonable doubt that Robinson is a sexually violent predator. *Id.* (FF 44, 53; CL 9).

3. Robinson's Assignments of Error Are Unsupported by the Record

Robinson assigns error to numerous findings and conclusions made by the trial court. Appellant's Brief at 1-3. However, none of his assignments of error have merit.

a. Robinson Had Serious Difficulty Controlling His Sexually Violent Behavior

Robinson argues the trial court erred in entering findings regarding his serious difficulty in controlling his sexually violent behavior. CP 103 (FF 12, 29, 30, 31, 33, 44, 48, 49, 50, 51, and 53). In these findings, the trial court found that Robinson suffers from a mental abnormality and a personality disorder, and that his mental condition causes him serious difficulty in controlling his sexually violent behavior.

Robinson challenges the trial court's findings by asserting a lack of evidence that he molested any children while on parole or that he lost ability to control his behavior at the SCC. He suggests the absence of

such evidence defeated the court's findings. Appellant's Brief at 33. Robinson's argument is groundless.

At trial, the State presented substantial evidence of Robinson's serious difficulty in controlling his sexually violent behavior. Probation officers Sharon Guss and John Withrow described how Robinson continued to seek out children despite probation conditions that prohibited him from doing so. CP 89A (Ex. 25; Ex.33). Ms. Guss observed Robinson's repeated contacts with two little girls. *Id.* (Ex. 25). She also found boys' underpants in a locked trunk belonging to Robinson. *Id.* Robinson admitted to Mr. Withrow that he had children in his residence and had taken a boy into the restroom. *Id.* (Ex. 33). Robinson also admitted that he had "wrestled" with children. *Id.*

Dr. Goldberg testified about Robinson's mental condition and how this condition caused him serious difficulty in controlling his sexually violent behavior. 2RP at 137-140. Dr. Goldberg testified that when he examined the persistence of Robinson's behavior, it was striking that even after being convicted of a sexual crime against a child and receiving a prison sentence, Robinson continued to have contact with children while on probation, knowing full well that he would be subjected to additional prison time. 2RP at 137. The fact that additional imprisonment did not deter Robinson from having contact with children on three separate

occasions illustrated his lack of volitional control. *Id.* Moreover, Dr. Goldberg noted that Robinson continued his sexual offending in 2000, and Robinson was suspected of offending against additional victims in the apartment complex where he worked and resided. *Id.* at 138.

In addition, Robinson's statements following his sexual offending against Andy M. and William B. perfectly illustrated his difficulty with volitional control. When interviewed by a detective regarding his rape of Andy, Robinson admitted that he masturbates and thinks about sucking a boy's penis, but that he has been working on trying not to, and that his penis gets sore from all the masturbation. 2RP at 139. When interviewed by the investigative officer regarding his molestation of William, Robinson stated that "I have to constantly tell myself I cannot do this, I was going to get some help." *Id.* This evidence clearly showed that Robinson has serious difficulty with his volitional control.

With regard to Robinson's argument that he did not act out while in confinement, Dr. Goldberg explained that the lack of such behavior is not uncommon amongst sex offenders and it is not considered a significant point of data:

> In my experience, and also my experience in California, it's very rare. Even though we have a hospital with 700 SVPs in California, it's very rare for any of those sex offenders to be accused of rape, collecting child pornography, or anything like that. And does that mean that they don't have

> a problem with children or they don't have a problem with rape? No, it just means that they are in a structured environment ... it doesn't mean it's not going on. I'm just saying I don't think that's a very significant point of data. Now, if he was caught, I do think that is significant, because it's a rare occurrence. But I do – not getting caught for child porn or not getting caught for rape is common among sex offenders. And I'd say at least 80 percent of sex offenders, in my experience, never engage in that behavior.

2RP at 210.

Dr. Goldberg further explained:

> That's what I'm saying is that I don't think you can make many inferences, especially with a child molester who is generally in my experience, the most well-behaved prisoners in the population are the child molesters, that just because they behave in prison doesn't necessarily mean they're going to behave when they get out. Primarily the reason is their issues have nothing to do with other adults. It has to do with children. There are no children in prison.

2RP at 215.

The overwhelming weight of the evidence supported the trial court's findings that Robinson had serious difficulty controlling his sexually violent behavior.

b. Robinson's Grooming Behavior

Next, Robinson disputes the trial court's findings regarding his "grooming" and "predatory" behavior toward children. Appellant's Brief at 46-47. He disagrees with the trial court's findings that he placed

himself in a position of trust and engaged in grooming behavior toward his child victims. CP 103 (FF 4, 5, 15, and 43).

The record is replete with evidence of Robinson's grooming behavior. Robinson's probation officers provided evidence of this behavior. While on parole, Robinson had repeated contacts with children despite conditions prohibiting such contact. He invited children into his home and admitted to accompanying a seven-year-old boy into the restroom. CP 89A (Ex. 33). Robinson had no children of his own, yet he had toys and children's magazines in his home. *Id.* (Ex. 25). Robinson admitted that he "wrestled" with children. *Id.* (Ex. 33). He also admitted that he babysat two girls. *Id.* (Ex. 25).

Robinson testified in his deposition that he volunteered to babysit William B. *Id.* (Ex. 22 at 64). William's mother needed a babysitter and he volunteered his services. *Id.* Robinson also babysat Andy M. on numerous occasions. Andy's parents invited Robinson to church. He became the leader of the church's boys' group. He began babysitting Andy a year after he met the parents. *Id.* (Ex. 22 at 42). Robinson estimated that he babysat Andy more than 20 times. *Id.*

In describing Robinson's grooming behavior, Dr. Goldberg explained:

> ... he does groom his victims, as evidenced by his, you know, getting involved in activities which are attractive to children, getting involved in baby-sitting, the church group and things like that; develop trust with the parents of these children so that he can molest them.

2RP at 183.

Dr. Goldberg described how Robinson placed himself in a position to gain access to children:

> One of the characteristics of people with pedophilia is that they like to associate with children, because that is where they get their sexual gratification. And in this case, you have a long pattern of Mr. Robinson becoming involved in activities which are attractive to children. He was working for a carnival. He told me at one time he was working there for ten years. Lately, he said it's more than five years. That's a place you would come in frequent contact with children. He also, as I mentioned earlier, he was -- prior to the 1987 offense, he was volunteering for the church. He was leading a boys' group. And then a 2000 offense, he was somehow baby-sitting children. Most adult men do not volunteer for baby-sitting children. That's my experience. It's very unusual. And he was baby-sitting children often, during this time period. So again, you have a pattern of somebody who frequently comes in contact with children. And that is that is a quality of pedophilia. And also, you do have an incidence in the 1990's, when he was placed on parole after serving time for the first conviction, and he was constantly being violated for being in the presence of children, which also is an indication that he has a hard time staying away from children.

2RP at 115-116.

The evidence showed that Robinson placed himself near children by befriending the parents, working as a babysitter, working in a carnival,

and volunteering as a church leader. The evidence showed that he invited children into his home and continued to babysit while on parole. The reasonable inferences from this evidence support the trial court's finding that Robinson placed himself in a position of trust and engaged in grooming behavior.

c. Mental Abnormality and Personality Disorder

Robinson argues the trial court erred in finding that he suffers from a mental abnormality and a personality disorder. CP 103 (FF 26, 27, and 28). The sole basis for Robinson's argument is that his expert, Dr. Manley, offered a different opinion than Dr. Goldberg.

Dr. Goldberg diagnosed Robinson with pedophilia and opined that this condition constitutes a mental abnormality. *Id.* at 122, 134-140. Dr. Goldberg based his opinion on Robinson's long history of persistent sexual behavior toward children and his self-admitted difficulty in controlling his sexual urges toward children. 2RP 110-117, 119, 139.

Dr. Goldberg diagnosed Robinson with personality disorder not otherwise specified, with antisocial features. 2RP at 134. He reached this diagnoses by examining Robinson's lifelong pattern of behavior. He observed that Robinson's life is lined with deceitfulness, impulsivity and unlawful behaviors. 2RP 131-134.

Here, the trial court considered the testimony of both Dr. Goldberg and Dr. Manley. The trial court was persuaded by Dr. Goldberg's testimony and opinions. *Id.* (FF 28). It did not find Dr. Manley's testimony to be persuasive. *Id.* (FF 45, 49).

Because appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence, Robinson's argument fails. *Broten,* 130 Wn. App. at 335. The trial court made a credibility determination and this Court should defer to the trial court.

d. Risk Assessment

Robinson argues the trial court erred when it found he was more likely than not to commit predatory acts of sexual violence if not confined to a secure facility. CP 103 (FF 34, 35, 36, and 37). Again, Robinson rests his argument solely on the fact that Dr. Manley provided a contrary opinion. Appellant's Brief at 42-43. However, a difference of opinion does not constitute grounds to overturn the trial court's findings.

Dr. Goldberg testified in detail about how he assessed Robinson's risk to reoffend. 2RP at 141-196. Dr. Goldberg testified that in his expert opinion, to a reasonable degree of psychological certainty, Robinson is likely to commit predatory acts of sexual violence if not confined in a secure facility. 2RP at 196.

The trial court considered the testimony of both experts and concluded that Dr. Goldberg's opinions were more persuasive. Besides relying on the contrary opinions of his own witness, Robinson cites no other basis to overturn the trial court's decision. Viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in the State's favor, a rational trier of fact would have found that Robinson is likely to reoffend.

e. The SRA:FV Assessment

Robinson argues the trial court erred when it entered Finding of Fact No. 40, regarding the Structured Risk Assessment: Forensic Version (SRA:FV). Finding of Fact No. 40 states:

> Of particular interest to the Court was Dr. Goldberg's scoring on the Structured Risk Assessment – Forensic Version (SRA-FV). According to the data and the three categories regarding sexual interest, relational style and self-management, Mr. Robinson scored a 3.31, which placed him in the high risk/high need category. Dr. Goldberg testified how the Static-99R and the SRA-FV are combined as to static and dynamic factors, which show Mr. Robinson to be above the 50th percent threshold to reoffend and is thus considered more likely than not to sexually reoffend.

Robinson argues that Dr. Manley rejected the validity of the SRA:FV because the instrument has not been published or critiqued. Appellant's Brief at 43. For the first time on appeal, Robinson references

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and appears to be raising a *Frye* challenge. Appellant's Brief at 44. However, because Robinson never raised the issue below, he cannot raise the issue for the first time on appeal.

Failure to object to the admissibility of evidence at trial precludes appellate review of that issue unless the alleged error involves manifest error affecting a constitutional right. *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992); *State v. Stevens*, 58 Wn. App. 478, 485-86, 794 P.2d 38 (1990). Our courts have held that failure to preserve for review any challenge to the foundation of an expert's testimony under *Frye* does not involve manifest error affecting a constitutional right. *See In re Detention of Post*, 145 Wn. App. 728, 755, 187 P.3d 803 (2008) (failure to seek a *Frye* hearing in the trial court precluded the issue for review on appeal); *In re Detention of Taylor*, 132 Wn. App. 827, 836, 134 P.3d 254 (2006) (failure to raise *Frye* issue at commitment trial precluded review on appeal). *Accord State v. Florczak*, 76 Wn. App. 55, 72-73, 882 P.2d 199 (1994); *State v. Jones*, 71 Wn. App. 798, 820, 863 P.2d 85 (1993).

Because Robinson never raised the issue below, the State had no opportunity to respond fully to the challenge he now makes. The Court

should decline to address the *Frye* issue based on Robinson's failure to preserve this issue for appeal.

f. Robinson's Age as a Protective Factor

Robinson assigns error to the trial court's finding that his age (forty-eight) was not a protective factor as it relates to his likelihood to re-offend. CP 103 (FF 41). He argues the trial court failed to consider the clinical significance of his age. Appellant's brief at 44. On the contrary, the trial court did consider Robinson's age and concluded that age was not a mitigating factor in this case:

> ... the Court considered whether age is a mitigating factor. The Court finds, in this instance, that age is not a mitigating factor, in that the score on the Static-99R and the Static-2002R takes into account the current age of the offender.

Findings of Fact No. 41.

The trial court also considered Robinson's age in the context of dynamic risk factors:

> ... when considering the dynamic risk factors, Dr. Manley did not consider Mr. Robinson to have the current behaviors of a pedophile. He takes into account that libidinal urges tend to decrease with age. However, the Court does not accept the view of Dr. Manley, as the age differential and the libidinal difference with age is accounted for in the Static-99R.

Findings of Fact No. 47.

g. Robinson's Release Plan

Robinson argues the trial court erred in finding that he lacked a realistic release plan. CP 103 (FF 42). If released, Robinson planned to return to California to work in the construction field. 2RP at 195. Dr. Goldberg testified that considering Robinson no longer has any ties to California, and has not worked in many years, his plan to return to California was very vague and unrealistic. 2RP at 195-196.

Dr. Manley testified that he gave Robinson's release plan a "question mark" because he probably does not have the ability to become a licensed contractor. 3RP at 389. The trial court determined that Dr. Goldberg's opinion was persuasive and found that Robinson's release plans did not serve as a protective factor. 2RP at 195-196; CP 103 (FF 42).

The trial court's finding regarding Robinson's release plan is well supported by the evidence.

h. Robinson's Denial

Robinson argues the trial court erred in finding that he displayed extreme denial during his own testimony. The trial court found:

> Also of great concern and which supports the Court's conclusions is the extreme denial presented by Mr. Robinson during his own testimony in this case. He has demonstrated that he lacks a complete understanding of his actions or the fact that he has harmed anybody. In

> considering his testimony, he tended to blame the children. When describing the incident in California, he stated that the child wanted to be touched, as opposed to taking responsibility as the adult in the situation.

Findings of Fact No. 52.

Robinson argues that Dr. Manley did not consider denial to be an important factor in assessing Robinson's risk of re-offense. Appellant's Brief at 49. However, the trial court did not find Dr. Manley's testimony to be persuasive. The trial court considered Robinson's denial as a significant indication of his lack of understanding regarding his sexually violent behavior. Because credibility determinations of the fact-finder should not be second-guessed, the trial court's findings should not be disturbed. *Halgren,* 156 Wn.2d at 811.

4. The Evidence At Trial Clearly Demonstrated That Robinson Is A Sexually Violent Predator

In sum, when all of the evidence is viewed in the light most favorable to the State, any rational trier of fact could have found that Robinson meets all of the elements of a sexually violent predator beyond a reasonable doubt. The trial court's findings were well supported by evidence; therefore, Robinson's civil commitment should be affirmed.

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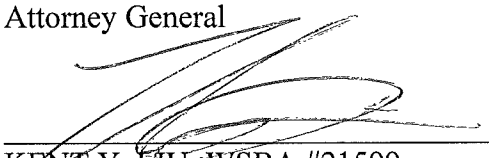
V. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Robinson's civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 16 day of December, 2013.

ROBERT W. FERGUSON
Attorney General



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NO. 44575-1

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: CHARLES H. ROBINSON, Appellant, v. STATE OF WASHINGTON, Respondent.	DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

On this 5th day of December, 2013, I deposited in the United States mail true and correct cop(ies) of Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

James L. Reese, III
612 Sidney Avenue
Port Orchard, WA 98366

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

DATED this 5th day of December, 2013, at Seattle, Washington.

KELLY HADSELL

WASHINGTON STATE ATTORNEY GENERAL

December 05, 2013 - 12:46 PM

Transmittal Letter

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Court of Appeals Case Number: 44575-1

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