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NO. 71292-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of

MARK BLACK.

ON APPEAL FROM THE SUPERIOR COURT OF KING COUNTY

THE HONORABLE CAROL SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether Black has shown a due process violation or a manifest error affecting a constitutional right based on his absence from a limited portion of the jury selection process, which proceeded without objection.

2. Whether the trial court erred in admitting evidence regarding diagnosis that is proper under both the DSM classification system and the classification system promulgated by the World Health Organization.

3. Whether Black's right to a unanimous jury was violated when ample evidence produced at trial proves that Black has both a mental abnormality and a personality disorder.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State filed a petition to civilly commit Mark Black as a sexually violent predator in October 2011 at the end of Black's prison sentence for, among other crimes, child molestation in the second degree and attempted child molestation in the second degree. CP 1-87. Pretrial motions and trial proceedings took place

in September, October, and November 2013 before the Honorable Carol Schapira at the Maleng Regional Justice Center (MRJC).

The State's expert, psychologist Dr. Dale Arnold, conducted a mental examination of Black and diagnosed him with three disorders as described by the DSM-IV-TR[1]: 1) sexual sadism; 2) paraphilia not otherwise specified (NOS), "persistent sexual interest in pubescent aged females, non-exclusive"; and 3) personality disorder NOS with antisocial and narcissistic traits. CP 49. With respect to the paraphilia NOS diagnosis, Dr. Arnold explained in his report that this condition has been referred to by researchers as "hebephilia." CP 143. Dr. Arnold further explained that Black's sexual interest in pubescent girls was due to his specific attraction to "early breast development more associated with a pubescent aged female than a prepubescent female." CP 143.

Black filed a motion to suppress Dr. Arnold's paraphilia NOS diagnosis under Frye v. United States, 293 F. 1013 (D.C. Cir.

[1] "DSM-IV-TR" is the acronym for the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition – Text Revision. Dr. Arnold used the DSM-IV-TR in this case; therefore, much of the discussion in this brief refers to that edition of the DSM. However, by the time of trial, the American Psychiatric Association had published the fifth edition of the DSM, called the "DSM-5," which will also be discussed in this brief. Undersigned counsel has endeavored to make clear where the two editions of the DSM differ.

1923). As will be discussed in detail in the second argument section below, Black's motion was premised on the argument that Dr. Arnold had diagnosed Black with "hebephilia," and that "hebephilia" is not a generally accepted diagnosis in the psychiatric community because sexual attraction to adolescents is not abnormal. CP 1658-2113. The State filed substantial briefing and supporting materials in opposition. CP 94-166, 365-571. During the hearing on the motion, the defense offered testimony from psychologist Dr. Karen Franklin that there is conflict in the scientific community regarding "hebephilia," which Dr. Franklin described as "something to do with sexual attraction or sexual activity or both with either adolescents, or in some cases defined only as female adolescents." RP (9/13/13) 35.[2] By contrast, Dr. Arnold described Black's paraphilia as a far more specific sexual preference for girls at the earliest stage of pubescence, whose "breasts were just starting to bud." CP 470-71.

After considering the issue, the trial court granted the defense's motion to suppress evidence regarding "hebephilia," but ruled that Dr. Arnold's more specific diagnosis of paraphilia NOS

[2] Some volumes of the verbatim report of proceedings are identified only by date, others are identified by date and a Roman numeral, and others are identified by date and the type of proceedings that occurred (*e.g.* "jury voir dire"). This brief references the transcripts accordingly.

was admissible because it was a proper diagnosis under both the DSM and the ICD-10.[3] RP (9/13/13) 149-59; CP 1412-14.

During pretrial motions, Black's trial counsel explained that Black would not be present for the first day of jury selection because prospective jurors were likely to be "more open and honest" during individual questioning if Black was not present. RP (9/26/13) 42-43. The trial court agreed that this was a sensible strategy. RP (9/26/13) 43. On the last court day before jury selection was to begin, defense counsel informed the court that there were still logistical issues that needed to be worked out in order to ensure that Black was transported to the MRJC in a timely manner for the second day of jury selection. RP (10/17/13) 113-15.

The first day of jury selection proceeded in Black's absence as planned. The trial court began the jury selection process by addressing hardship excusals, distributing a written questionnaire, and asking a few general questions of the entire venire. RP (10/21/13) 13-29, 36-40. Each party then conducted a round of questioning focused primarily on identifying prospective jurors who should be questioned individually or who should be immediately

[3] "ICD-10" stands for the International Statistical Classification of Diseases and Related Health Problems, 10th Revision, which is the classification system promulgated by the World Health Organization (WHO).

excused for cause. RP (10/21/13) 44-80. The court and the parties spent the remainder of the day conducting individual questioning of prospective jurors who wanted to be questioned more privately about sensitive matters. RP (10/21/13) 85-135. Throughout the day, a number of prospective jurors were excused for hardship and for cause without objection.

The next day, defense counsel notified the court off the record that Black was not present in court due to an issue with the jail. CP 1430. Individual questioning of prospective jurors who wanted to speak more privately about sensitive matters then continued without objection from the defense. RP (10/22/13, *voir dire*) 3-45. As a result of further individual questioning, one prospective juror was excused for cause at the defense's request, and another was excused for cause *sua sponte* by the trial court. RP (10/22/13, *voir dire*) 32-33, 43-45.

At some point during this process,[4] a representative of the jail informed the court and the parties that the problem with transporting Black to court stemmed from the timing of the transport order, the jail booking process, and inadequate staffing at the

[4] Although the court clerk's minutes indicate that this discussion took place in the midst of the individual questioning, this is not at all clear from the transcripts. CP 1430.

MRJC. RP-II (10/22/13) 11-17. Defense counsel asked the trial court to excuse the venire for the day. RP (10/22/13, *voir dire*) 51-52. The trial court then inquired whether Black would be willing to waive his presence for another day so that general *voir dire* could proceed. Defense counsel responded that although she could speak with Black about it, "it would be better for the jury to see him at some point before it's actually picked. You know, someone may recognize him." RP (10/22/13, *voir dire*) 51. The trial court noted that further delay would cause substantial inconvenience to a large group of citizens for another day, even though the vast majority of them would be sent home in any event. RP (10/22/13, *voir dire*) 51-52. Defense counsel stated that she thought it was important to have Black's input on selecting the jury. The court agreed with defense counsel on that point, and then took a recess. RP (10/22/13, *voir dire*) 52-53.

Upon returning from the recess, the court and the parties briefly discussed additional potential hardship excusals. RP (10/22/13, *voir dire*) 53-58. The venire was then brought into the courtroom, and the trial court announced that jury selection could not continue because "some parts of our system which have not responded in the way that [the court] had expected." RP (10/22/13,

voir dire) 60. The court permanently excused a few additional prospective jurors for hardship, asked a couple of prospective jurors to remain for individual questioning, and, with apologies, instructed the remaining prospective jurors to return the following day. RP (10/22/13, *voir dire*) 61-67. Following a brief recess, one additional prospective juror was excused for hardship, one was excused for cause at the defense's request, two were excused due to language difficulties, and one was asked to return the next day. RP (10/22/13, *voir dire*) 68-89. The defense did not object to these procedures, and did not object to excusing any of these additional prospective jurors. The remainder of the day was then devoted to addressing other matters.[5] RP-II (10/22/13) 18-103.

Black was present in court the following day for the remainder of jury selection, which consisted of general questioning of the venire by the attorneys for both parties, the exercise of peremptory challenges by both parties, and empanelling and swearing in the jury. RP (10/23/13, *voir dire,* opening stmts.) 3, 8-131.

[5] Black does not challenge the propriety of addressing other matters in his absence for the remainder of the day.

At the conclusion of the trial, the jury found beyond a reasonable doubt that Black is a sexually violent predator. CP 1411. Black now appeals.

2. SUBSTANTIVE FACTS

Michelle B. and her 13-year-old daughter H.P. met Black in October 1995 at a social event for people who used an online chat room. RP-IV (10/24/13) 124-25, 127. Black came to Michelle's apartment two days later and they had sexual intercourse. Michelle found Black to be very charming. RP-IV (10/24/13) 128-29. After they had sex, Black asked Michelle to marry him, and they were married 11 days later. RP-IV (10/24/13) 130.

Immediately after they got married, Black lost interest in having sex with Michelle. RP-IV (10/24/13) 133-34. On the rare occasions that they had sex during their brief marriage, Black was "very rough." RP-IV (10/24/13) 135. On one occasion, Black held her down and forced his penis down her throat; when she told him that she was going to pass out, he said "go ahead and pass out." RP-IV (10/24/13) 135-36. On another occasion, Black tied her hands over her head and put a bandanna over her face. Michelle

told him she did not want to do that, and Black "did not care about that at all." RP-IV (10/24/13) 138.

At the same time that Black lost interest in Michelle, he focused his attention on H.P. RP-IV (10/24/13) 150. Black molested H.P. after taking her and a friend to a haunted house on Halloween. RP-IV (10/24/13) 210-13. About two months later, during H.P.'s visit on Christmas break, Black climbed into bed with her, took her pants off, and had sexual intercourse with her. H.P. said "no," but Black persisted. RP-IV (10/24/13) 219-20. It was painful; when H.P. went to the bathroom afterwards, her underwear was "soaked in blood." RP-IV (10/24/13) 221. Black was convicted of child molestation in the second degree for his conduct with H.P. CP 82-83.

While Black was married to Michelle and sexually abusing H.P., he also developed an online relationship with 14-year-old V.F. RP-IV (10/24/13) 232, 235-41. V.F. was underdeveloped for her age. RP-IV (10/24/13) 233. Black convinced V.F. to meet him at a 7/Eleven, and then they decided to go to Snoqualmie Falls. RP-IV (10/24/13) 241-43. On the way up the pass, Black pulled over and kissed V.F. RP-IV (10/24/13) 247. On the way back down the pass, Black pulled over again. This time, he got on top of V.F., took

off her pants and underwear, and touched her chest and crotch. V.F. told him she wanted to go home. RP-IV (10/24/13) 251-52.

Black talked V.F. into meeting him again about a week later. After driving around for a while, Black pulled over in an industrial area. RP-IV (10/24/13) 254-57. Black kissed her and showed her how to perform oral sex. V.F. was uncomfortable performing oral sex, so Black pulled her pants down and masturbated until he ejaculated on her. RP-IV (10/24/13) 257-58. Black was convicted of rape of a child in the third degree based on his conduct with V.F. CP 82-83.

After Black was released from prison, Black had a sexual relationship with 17-year-old F.M., and they had a child together. This was a clear violation of the terms of Black's community supervision, as he was prohibited from having unsupervised contact with minors. CP 243-44.

Black also began dating an adult woman named Brenna D. Black was abusive towards Brenna; during one incident, Black hit Brenna in the face while having sexual intercourse with her. He told her "[t]hat he was doing what he was doing because it was [her] fault." RP-V (10/28/13) 325. Afterwards, Brenna's face was bruised and swollen. RP-V (10/28/13) 326. On another occasion,

Brenna had fallen asleep on the couch. Black dragged her off the couch by her hair and forced her to have sex with him. RP-V (10/28/13) 332. Another time, Black strangled Brenna with a necktie during sex. She asked him to stop, but he refused. Afterwards, Brenna's eyes were swollen and covered with petechiae. RP-V (10/28/13) 333-34. Black threatened to rape her, and he threatened to kill her and her daughter. RP-V (10/28/13) 337-38.

Black's relationship with Brenna ended when Black was arrested for violating the terms of his community supervision. RP-V (10/28/13) 338-39. In addition to having contact with minors, Black's violations included possessing pornography and failure to complete sexual deviancy treatment. CP 242-47. Black received 320 days in jail for his violations. CP 85.

Dawn T. met Black on the internet in 2003. RP-IV (10/24/13) 264-66. Dawn had a 13-year-old daughter, R.W. R.W. was "skinny as a rail" and had not begun to develop breasts. RP-IV (10/24/13) 265-66. Dawn invited Black to her home and they had dinner together. R.W. met Black that evening as well. RP-IV (10/24/13) 269-70. After about a month of dating, Black asked Dawn to marry

him and she agreed. RP-IV (10/24/13) 272. Black did not tell Dawn that he was a convicted sex offender. RP-IV (10/24/13) 275.

After the marriage proposal, Black became demanding and abusive. RP-IV (10/24/13) 276-78. One night, Black tied Dawn's hands behind her back with the belt from her bathrobe, "forced [her] face into the pillow so [she] couldn't breathe," and anally raped her. RP-IV (10/24/13) 279. When Black was finished, Dawn "collapsed on the bed and just cried." Dawn did not call the police because she was terrified. RP-IV (10/24/13) 294.

During Black's relationship with Dawn, he began grooming her daughter R.W. as well. One morning, when Black and R.W. were lying in bed watching television, he put his hand under her shirt and felt her chest. RP-VII (10/30/13) 799-800. R.W. was very uncomfortable, and told Black that she needed to get up and get ready for school. RP-VII (10/30/13) 801-02.

Dawn also had a close friend, Teresa D., who had two daughters, 13-year-old R.R. and 12-year-old A.R. RP (10/24/13) 265-66, 280. R.R. was "[j]ust starting to develop breasts," and A.R. had not begun to develop at all. RP (10/24/13) 281. One night, R.R., A.R., and their cousin spent the night with R.W. at Dawn's home. Black stayed up watching television with the girls in the

living room. RP-VI (10/29/13) 664-66. Later, when everyone was asleep, Black went over to where R.R. was sleeping on the couch, climbed on top of her, and kissed her. RP-VI (10/29/13) 676-81. Black put his hand under R.R.'s shirt and fondled her breast, and he rubbed his crotch against hers. RP-VI (10/29/13) 682-83. After Black's conduct with R.R. was reported to the authorities, it came to light that Black had molested A.R. as well. CP 396. Black admitted to Dr. Arnold that if he had had more time with these girls, he "probably would have had sex with one of them." CP 407. Black was convicted of child molestation in the second degree and attempted child molestation in the second degree as a result of his conduct with R.R. and A.R. CP 4-14.

Black testified at trial that he had taken responsibility for his actions and had benefitted from sex offender treatment during his most recent prison term. RP-XI (11/6/13) 1301-03.

Additional procedural and substantive facts will be addressed below as necessary for argument.

C. ARGUMENT

1. BLACK HAS NOT SHOWN A DUE PROCESS VIOLATION OR A MANIFEST CONSTITUTIONAL ERROR STEMMING FROM HIS ABSENCE FROM A LIMITED PORTION OF JURY SELECTION.

Black first claims that his constitutional right to be present at a "critical stage" of the trial was violated when the trial court proceeded with the jury selection process for part of a day in his absence without a specific waiver of presence for that day. Appellant's Opening Brief, at 9-18. This claim should be rejected. Although Black has the right to due process, as a civil litigant he does not have the specific right to be present for every "critical stage" of the trial as guaranteed to criminal defendants. Black's due process rights were not violated when he was absent for a portion of individual questioning, and he cannot demonstrate prejudice stemming from a manifest constitutional error. To the contrary, Black was ably represented by counsel, and Black *was* present for the general questioning of the venire and for the exercise of peremptory challenges as his counsel had requested. Accordingly, this Court should affirm.

Black contends that he had a constitutional right to be present for every "critical stage" of trial, including jury selection. However, every case that Black cites for this proposition is a

criminal case. Appellant's Opening Brief, at 9-18 (citing, *inter alia*, Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); Lewis v. United States, 146 U.S. 370, 373, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934); United States v. Gordon, 829 F.3d 119, 124 (D.C. Cir. 1987); and State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011)). This is unsurprising, given that the right to be present for every "critical stage" of trial under both the federal and state constitutions is expressly guaranteed to criminal defendants, not civil litigants. U.S. CONST. amend. IV (guaranteeing rights to "the accused"); WASH. CONST. art. I, § 22 (also guaranteeing rights to "the accused").

It is well-settled that sexually violent predator cases are civil, not criminal. In re Detention of Young, 122 Wn.2d 1, 23, 857 P.2d 989 (1993); In re Detention of Strand, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009). Accordingly, "the rights afforded under the Fifth and Sixth Amendments do not attach to SVP petitioners." In re Strand, 167 Wn.2d at 191. Therefore, for example, an SVP detainee has no constitutional right to confront witnesses and no constitutional right against self-incrimination. *See* In re Detention of Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007) (no right to

confrontation); In re Young, 122 Wn.2d at 50-51 (no right against self-incrimination). Also, although a criminal accused has the right to counsel from the moment of arrest, SVP detainees do not have a right to counsel until the initiation of court proceedings (*i.e.*, the filing of an SVP petition). In re Strand, 167 Wn.2d at 190-92.

There are other constitutional rights conferred upon criminal defendants that do not extend to SVP cases. For example, unlike a criminal trial, an SVP civil commitment trial may be held while the SVP detainee is incompetent. In re Detention of Morgan, 180 Wn.2d 312, 320-24, 330 P.3d 774 (2014). Moreover, an SVP detainee has no right to refuse to participate in a mental health evaluation by the State's expert, and the fact that he has refused to participate may be used against him at trial. In re Detention of Duncan, 142 Wn. App. 97, 103-05, 174 P.3d 136 (2007), *aff'd*, 167 Wn.2d 398, 219 P.3d 666 (2009). And, although SVP proceedings are presumptively open to the public under Article I, section 10 of the Washington Constitution, SVP detainees are not entitled to a presumption of prejudice on appeal as criminal defendants are under Article I, section 22 in cases where there has been an improper courtroom closure. In re Detention of Ticeson, 159 Wn. App. 374, 382-83, 246 P.3d 550 (2011), *overruled on other*

grounds, State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). In sum, as this Court unequivocally stated in holding that Article I, section 22 does not apply in SVP cases, "[t]he SVP statute is resolutely civil." In re Ticeson, 159 Wn. App. at 381.

As the cases cited above demonstrate, SVP detainees do not have the full panoply of constitutional trial rights that are expressly conferred upon criminal defendants by the Fifth and Sixth Amendments to the United States Constitution and by Article I, Section 22 of the Washington Constitution. Therefore, although it appears that no Washington case has yet squarely addressed the issue, it logically follows from the cases cited above that an SVP detainee does not have an explicit right to be present for every "critical stage" of the proceedings, as this is another constitutional right that is expressly conferred upon criminal defendants and not upon civil litigants.

Nonetheless, Black cites two out-of-state cases for the proposition that civil litigants have a constitutional right to be present for jury selection. Appellant's Opening Brief, at 11 (citing Harrington v. Decker, 134 Vt. 259, 356 A.2d 511 (1976), and Rozbicki v. Huybrechts, 22 Conn. App. 131, 567 A.2d 178 (1990),

aff'd, 218 Conn. 386, 589 A.2d 363 (1991)). Neither of these cases is on point.

First, in Harrington, the plaintiff did not appear in court until after the jury had been empanelled. Harrington, 134 Vt. at 260. In this case, by contrast, Black was present for general *voir dire* questioning, exercising peremptory challenges, and empanelling and swearing in the jury. Thus, Black was present to provide input on selecting the jury, whereas the plaintiff in Harrington was not. Moreover, although the Vermont court's decision is quite spare and contains little analysis, the court nonetheless referred to the plaintiff's ability to be present for jury selection as a "privilege" (in contrast to a "right"), and found that it was the plaintiff's burden on appeal to demonstrate prejudice stemming from her absence. Id. at 261. In sum, this case provides little if any support for Black's position.

In Rozbicki, as in Harrington, the entirety of jury selection took place in the plaintiff's absence. Rozbicki, 22 Conn. App. at 132-33. Again, that is not what occurred in this case. Furthermore, in affirming the Court of Appeals' decision upon further review, the Connecticut Supreme Court specifically found that the Connecticut constitution confers an enumerated right upon civil litigants to be

present for jury selection. Rozbicki v. Huybrechts, 218 Conn. 386, 391-93, 589 A.2d 363 (1991). The higher court reached this conclusion based on the Connecticut constitution's plain language, which differs markedly from Washington's. *See* id. (explaining that the Connecticut constitution expressly gives civil litigants the right to question and peremptorily challenge jurors); *see also* WASH. CONST. Art. I, § 19 (containing no such language regarding questioning or challenging jurors). Accordingly, Black's reliance on this case is misplaced as well.

To sum up, there is no expressly-stated constitutional right for civil litigants to be present for every "critical stage" of the trial. Therefore, Black "must rely solely on the guaranty of 'fundamental fairness' provided by the due process clause" if he is to prevail on appeal. In re Strand, 167 Wn.2d at 191. Article I, section 3 of the Washington Constitution does not provide any greater due process rights than the Fourteenth Amendment to the United States Constitution. In re Welfare of A.W. and M.W., ___ Wn.2d ___ (No. 90393-0, filed 2/19/15), 2015 WL 710549, at *4. Thus, Black must demonstrate that his absence for a portion of the jury selection process deprived him of "fundamental fairness" as ensured by the state and federal due process clauses.

In determining whether a civil litigant has been deprived of fundamental fairness as guaranteed by due process, Washington courts utilize the three-part balancing test enunciated in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The three factors to be balanced are as follows:

> 1) the private interest affected; 2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and 3) the governmental interest, including costs and administrative burdens of additional procedures.

In re Stout, 159 Wn.2d at 370 (citing Mathews, 424 U.S. at 335, and In re Young, 122 Wn.2d at 43-44).

As a threshold matter, although the record shows that Black was not present for the second day of jury selection, the record does not show that Black's counsel specifically objected to the trial court proceeding in the limited manner that it did in his absence. Rather, when the trial court directed that individual questioning continue, Black's counsel said nothing.[6] RP-II (10/22/13) 17. This is likely because Black was absent from individual questioning as a

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[6] Black states in his brief that "his lawyers objected" to proceeding in Black's absence. Appellant's Opening Brief, at 6. Black cites no specific page of the verbatim report of proceedings where an objection was made, and undersigned counsel for the State has found none. Although the clerk's minutes reflect that Black's counsel stated "off the record" an observation "that the Defendant (sic) has not been brought up from the jail even though he did not waive his presence from this point forward," (CP 1430), this is not an objection on the record.

matter of strategy in the first instance. There was also no objection to any of the hardship excusals that took place on the second day of jury selection. Moreover, when defense counsel asked that the venire be excused for the day and stated that Black's input was needed in selecting the jury, the trial court agreed and honored that request. RP (10/22/13, *voir dire*) 52-53, 60-67. Thus, the record reflects that the only jury selection procedures that took place in Black's absence were hardship excusals, individual questioning, and challenges for cause based on that individual questioning. The record further reflects that those limited procedures took place without objection from the defense. Accordingly, unless Black can show a manifest error affecting a constitutional right, this issue cannot be raised for the first time on appeal. RAP 2.5(a)(3); *see also* In re Detention of Law, 146 Wn. App. 28, 44, 204 P.3d 230 (2008), *rev. denied*, 165 Wn.2d 1028 (2009) (SVP detainee's failure to object to admission of purportedly coerced confession on constitutional grounds is not "manifest constitutional error").

In order to make this showing, an error must be "truly of constitutional dimension" and must have "actually affected the [party's] rights at trial. It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." State v.

Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Therefore, in this context, Black must show both that his absence for a limited portion of the jury selection process truly violated the constitutional right to due process under the Mathews balancing test *and* that it resulted in actual prejudice. Black cannot make this showing.

Under the first Mathews factor, courts have found that the loss of liberty at stake in an SVP case tips the balance in the SVP detainee's favor. *See* In re Detention of Coe, 175 Wn.2d 482, 510, 286 P.3d 29 (2012); In re Stout, 159 Wn.2d at 370. But as to the second factor, the risk that Black was erroneously deprived of his liberty due to his absence for a limited portion of jury selection is nonexistent, given that Black's experienced trial attorneys were present and ably represented his interests. Indeed, Black's attorneys had already stated that Black's absence during individual questioning was an intentional strategy, because the prospective jurors were more likely to be forthcoming with sensitive information if Black was not present. Further, regarding the third Mathews factor, if Black's absence had prevented the trial court from excusing prospective jurors who obviously should have been excused, particularly when the parties agreed they should be excused, this would have been an undue burden on the prospective

jurors themselves and would undermine judicial economy. In this case, prospective jurors were excused for hardship and for cause without objection. Accordingly, Black cannot show a due process violation under the Mathews balancing test.

Furthermore, Black cannot show actual prejudice resulting from his absence as required under RAP 2.5. Indeed, he has not attempted to do so. Instead, he cites Irby for the proposition that the State bears the burden of showing that the trial court's purported error in proceeding in his absence was harmless beyond a reasonable doubt. Appellant's Opening Brief, at 14-15 (citing Irby, 170 Wn.2d at 886). As discussed above, this is a civil case rather than a criminal case, and thus, the Irby analysis does not apply here. This Court should decline Black's invitation to apply the incorrect legal standard on review.

In sum, Black's claim fails for the following reasons: 1) there is no express constitutional right to be present for every "critical stage" of a trial in civil proceedings; 2) there has been no due process violation under the Mathews balancing test; and 3) the issue was not preserved and does not meet the standard for manifest constitutional error under RAP 2.5. Black's claim is without merit and should be rejected.

2. THE TRIAL COURT RULED CORRECTLY WHEN ADMITTING EVIDENCE OF A DIAGNOSIS THAT IS PROPER ACCORDING TO THE DSM, AND THAT WOULD BE CALLED "PAEDOPHELIA" UNDER THE TERMS OF THE ICD-10.

Black next claims that the trial court erred when it admitted evidence of Dr. Arnold's diagnosis of "paraphilia not otherwise specified, persistent sexual interest in pubescent-aged females, nonexclusive type." He argues that this evidence was "hebephilia" under another name, and that it should have been excluded under the Frye test along with evidence regarding hebephilia. Appellant's Opening Brief, at 19-35. This claim should also be rejected.

As the trial court found, unlike the more general concept of "hebephilia," Dr. Arnold's diagnosis was far more specific and was proper under the terms of the DSM. Unlike the general concept of "hebephilia," Dr. Arnold's diagnosis was not based on the notion of sexual attraction to adolescents or teenagers in general; rather, Dr. Arnold focused on Black's persistent sexual preference for girls in the very earliest stage of pubescence, and his repeated pursuit of sexual contact with these particular children despite myriad negative consequences. In other words, Dr. Arnold's diagnosis is a legitimate paraphilic disorder as defined by the DSM, and the trial court did not err in denying Black's motion to exclude Dr. Arnold's

testimony. Furthermore, under the ICD-10 – the classification system promulgated by the World Health Organization, which is generally accepted and utilized worldwide – Black would simply be diagnosed as a pedophile. Black's appellate claim is without merit.

Courts use a two-part inquiry to determine whether scientific evidence is admissible. First, the evidence must meet the standard for general acceptance in the relevant scientific community under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Second, the evidence must be helpful to the trier of fact under ER 702. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). A trial court's ruling under Frye is reviewed *de novo*, whereas a ruling under ER 702 is reviewed for abuse of discretion. Id. A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

In this case, the trial court granted Black's motion to exclude evidence regarding "hebephilia" under Frye, but allowed Dr. Arnold to testify regarding his diagnosis of paraphilia NOS, persistent sexual interest in pubescent-aged females. Contrary to what Black

now claims, Dr. Arnold's diagnosis of paraphilia NOS is not the same as "hebephilia," and the trial court's ruling was proper.

As a preliminary matter, the State does *not* concede that evidence regarding hebephilia should be excluded under the Frye standard. Indeed, the question of whether hebephilia is a generally-accepted psychiatric diagnosis remains an open question in Washington. *See* In re Detention of Meirhofer, ___ Wn.2d ___, 343 P.3d 731, 736-37 (2015). In this case, the State presented substantial evidence and case law in opposition to Black's motion to suppress under Frye, most of which flatly contradicts the claims of the defense's expert, Dr. Karen Franklin, that hebephilia is a novel psychological construct that has not been scientifically validated and that is not generally accepted. *See* CP 365-571 ("State's Response to Black's Motion for a Frye Hearing," with appendices). However, given that Dr. Arnold's diagnosis of paraphilia NOS is both more specific than hebephilia and plainly valid, it is not necessary for this Court to address the issue of whether hebephilia is a valid diagnosis or not.

What is critical to deciding the issue presented in this case is the distinction between what is described in the trial court record as "hebephilia," and what Dr. Arnold specifically meant by his

diagnosis of "paraphilia not otherwise specified, persistent interest in pubescent-aged females, nonexclusive type." Although Black claims now, as he did in the trial court, that the two are exactly the same, the record demonstrates otherwise. Specifically, while "hebephilia" was described as sexual attraction to adolescents in general, Dr. Arnold's diagnosis is focused on Black's sexual preference for girls in the earliest stage of pubescence in particular.

The defense's proffered expert on "hebephilia," Dr. Karen Franklin, highlighted this distinction during her testimony. Specifically, Dr. Franklin testified that although she did not believe that there was a consistent definition of "hebephilia" in the research or the literature, she believed that "it has something to do with sexual attraction or sexual activity or both with either adolescents, or in some cases defined only as female adolescents." RP (9/13/13) 35. Based on that definition, Dr. Franklin opined that "hebephilia" was not a mental disorder at all because "it was considered normal for men to be attracted to adolescent females," and because in the past, "it was the norm for adult men, young adult men to marry younger – younger girls in the age range it's [sic] now being called a mental disorder – you know, 13, 15." RP (9/13/13) 39-40.

Notably, Dr. Franklin readily acknowledged that the words "adolescent" and "pubescent" mean different things:

> Q: Doctor, you use the word adolescent here as well as the word pubescent. Is that the same thing, or are those different?
>
> A: Those are different. Adolescents [sic] is an age range that starts with puberty but goes up until, generally you would say, early 20s. It's not just a sexual developmental period; it's a time of maturation more generally in terms of, you know, goals in the world and mental functioning, thinking.
>
> Q: And pubescent is, what, part of that?
>
> A: Pubescent is a process of puberty. So it starts with, as we discussed, the Tanner Stage 2[7] and goes on until puberty is complete.

RP (9/13/13) 75-76. And again, Dr. Franklin reiterated her opinion that men in general are attracted to adolescents:

> The idea that men are sexually attracted to adolescents and young adolescents is well established – adult men in general. There's nothing abnormal or pathological about a certain level of attraction.[8]

RP (9/13/13) 93.

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[7] The "Tanner stage" system is widely used to describe the external physical changes that occur at different stages in the sexual development of humans from childhood to adulthood. *See* CP 1887-88.

[8] In contrast to this testimony from Dr. Franklin, Dr. Arnold testified during his deposition that he had "diagnosed paraphilia NOS, sexually attracted to pubescent children . . . about four or five times out of the 560-plus cases" that he had worked on in a forensic capacity. CP 499. This contradicts Black's argument that so many men are attracted to girls in this stage of development that such attraction cannot be deemed a mental disorder.

Rather than a general sexual attraction to adolescents, however, Dr. Arnold described Black's admitted sexual preference for girls in the earliest stage of pubescence. More specifically, Dr. Arnold reported that "Mr. Black said he was more interested in early breast development more associated with a pubescent aged female than a prepubescent female." CP 425. Put another way, as Dr. Arnold explained in his deposition, "Mr. Black was quite open of [sic] telling me the thing he found attractive about these girls, was that they were just starting to bud. Their breasts were just starting to bud." CP 470-71. Dr. Arnold also reported Black's admission that "he enjoyed 'grooming' young girls because he found the attention from them exciting" and because they were "much easier to manipulate" than adult women. CP 407.

Dr. Arnold also explained in his deposition that there is a significant difference between a man who prefers adult women but who has some attraction to pubescent girls, and a man like Black who has a strong sexual preference for pubescent girls. CP 468. As he further explained, "it's an issue of the intensity of the attraction and what one does with the attraction that separates normative from pathological behavior." CP 468. This is borne out by Black's convictions and consequent prison sentences for sex

offenses committed against his 13-year-old stepdaughter in 1995-96, his fiancée's daughter's 13-year-old friend and 12-year-old friend in 2003, and the speed with which Black reoffended after being released from custody and having received sex offender treatment. CP 393-97. These factors and others that led Dr. Arnold to diagnose Black with paraphilia NOS are entirely consistent with the DSM criteria for a paraphilic disorder.

The current edition of the DSM, DSM-5, defines a paraphilia as "any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature,[9] consenting human partners." DSM-5, pg. 685. In turn, the DSM-5 defines a paraphilic disorder as "a paraphilia that is currently causing distress or impairment to the individual or a paraphilia whose satisfaction has entailed personal harm, or risk of harm, to others." Id. at pg. 685-86. The DSM-5 further distinguishes between a paraphilia and a paraphilic disorder by explaining that "[a] paraphilia is a necessary but not a sufficient condition for having a paraphilic disorder, and a

[9] The DSM does not further define what is meant by "physically mature." However, girls who are just beginning to develop breasts, such as those Black prefers, plainly do not qualify as "physically mature."

paraphilia by itself does not necessarily justify or require clinical intervention." Id. at pg. 686.[10]

Unlike the more general term "hebephilia" – which, based on the record in this case, refers to general sexual attraction to adolescents – Black's specific preference for girls at the earliest stage of pubescence meets the DSM definitions of both a paraphilia and a paraphilic disorder. Black's preference meets the definition of a paraphilia because his sexual interest is directed towards girls whose breasts are beginning to bud – *i.e.*, girls in Tanner Stage 2 (*see* CP 1888) – as opposed to "physically mature" females. Black's attraction is emotional as well as physical, because he finds these girls easier to manipulate than adult women and he enjoys grooming them for sexual contact. Furthermore, Black's preference meets the definition of a paraphilic disorder because his intense sexual interest in these girls causes distress and impairment in his relationships and in other aspects of his life, including the fact that it has resulted in his incarceration on multiple occasions, and his

[10] The DSM-5 also recognizes that "comorbid diagnoses of separate paraphilic disorders may be warranted if more than one paraphilia is causing suffering to the individual or harm to others." Id. at pg. 686. Such is the case here, as Dr. Arnold diagnosed Black with sexual sadism (which is called "sexual sadism disorder" in the DSM-5) in addition to paraphilia NOS, persistent interest in pubescent females (which would be called "other specified paraphilic disorder, persistent interest in pubescent females" under the terms of the DSM-5).

behavior is harmful to his victims and their families. In sum, as the trial court found, Dr. Arnold's diagnosis is proper under the terms of the DSM.

Moreover, as the trial court also found in making its ruling, the DSM is not the only generally-accepted classification system that supports Dr. Arnold's diagnosis of Black's paraphilic disorder NOS. As the Washington Supreme Court has recognized, the DSM is "an evolving and imperfect document" and is not "sacrosanct." In re Detention of Young, 122 Wn.2d 1, 28, 857 P.2d 989 (1993) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709, 733 (1991-1992)). With that in mind, under the ICD-10, Black's paraphilic disorder fits squarely within the definition of "paedophilia," to wit: "A sexual preference for children, boys or girls or both, usually of prepubertal *or early pubertal* age." ICD-10, § F65.3.[11] In other words, in countries other than the United

[11] The ICD-10 is available online, and the definition of "paedophilia" may be found at: http://apps.who.int/classifications/icd10/browse/2015/en#/F60-F69 (last accessed 3/16/15).

States,[12] Black's paraphilic disorder is simply called "paedophilia," *i.e.,* a sexual preference for children – a disorder whose existence and validity cannot seriously be questioned. Indeed, Dr. Franklin acknowledged during her testimony that the ICD-10 is generally accepted in the field of clinical psychology, and that the ICD-10 definition of a pedophile includes those who, like Black, prefer "early pubescent" children. RP (9/13/13) 124-25. This is sufficient in itself to demonstrate that Dr. Arnold's diagnosis of a paraphilic disorder based on Black's sexual preference for and pursuit of girls in the earliest stage of pubescence is generally accepted in the relevant scientific community. Indeed, it is sufficiently accepted worldwide that it is expressly included in the ICD-10.

In sum, the trial court correctly ruled that Dr. Arnold's diagnosis of paraphilia NOS, persistent sexual interest in pubescent-aged females, nonexclusive type was sufficiently accepted in the scientific community to be admissible under the

[12] According to the American Psychological Association, the ICD may supersede the DSM eventually: "There is little justification for maintaining the DSM as a separate diagnostic system from the ICD in the long run, particularly given the U.S. government's substantial engagement with WHO in the area of classification systems." *ICD vs. DSM*, Monitor on Psychology, Vol. 40, No. 9 (Oct. 2009), available at: http://www.apa.org/monitor/2009/10/icd-dsm.aspx (last accessed 3/16/15).

Frye standard, and that Dr. Arnold's testimony would be helpful to the trier of fact under ER 702. Accordingly, this Court should affirm.

Nonetheless, Black argues that the trial court further compounded its evidentiary error by excluding evidence from the defense regarding hebephilia, thus hampering Black's ability to challenge Dr. Arnold's paraphilia NOS diagnosis. This argument is also without merit, because the record shows that ample evidence was presented challenging Dr. Arnold's diagnosis, even if the word "hebephilia" was not used.

As a preliminary matter, when the State moved to exclude Dr. Franklin as a trial witness during motions *in limine* (on grounds that her testimony would be cumulative of Dr. Joseph Plaud's testimony and because she had not previously been disclosed as a potential trial witness), the defense indicated that they would call Dr. Franklin to testify in "rebuttal" only if Dr. Arnold testified about research and literature regarding hebephilia. The trial court noted that in light of that limitation, it was unlikely that Dr. Franklin would be needed as a witness. RP (9/26/13) 4, 38, 107-26. Dr. Arnold did not testify regarding research and literature regarding hebephilia. RP-V (10/28/13) 366-480; RP-VI (10/29/13) 488-637. Accordingly, as the defense stated on the record during pretrial

motions, there was no reason for the defense to call Dr. Franklin as a trial witness.

Furthermore, Dr. Arnold was cross-examined thoroughly about his paraphilia NOS diagnosis, and defense expert Dr. Joseph Plaud offered testimony criticizing the validity of that diagnosis. For example, Dr. Arnold conceded on cross examination that "it's not unusual for a man to find some level of attraction to a teen-aged person, even though they might prefer an older person." RP-VI (10/29/13) 513-14. Dr. Arnold also conceded that there was a "professional debate about whether attraction to pubescent-aged females is a 'clinical disorder.'" RP-VI (10/29/13) 520.[13] He also agreed there was not a specific "research study" for his diagnosis of paraphilia NOS. RP-VI (10/29/13) 521. During the defense case, Dr. Plaud testified that Black's sexual attraction to pubescent females was not a paraphilia because "[m]en are attracted to pubescence." RP-IX (11/4/13) 946. Dr. Plaud also testified that although sexual contact with adolescents is illegal, it is not sexually

[13] In support of his argument, Black notes that the State objected to this testimony as a violation of a "pretrial order." Appellant's Opening Brief, at 33. However, the objection was overruled. RP-VI (10/29/13) 520. Accordingly, the record does not reflect that Black was prevented from cross-examining Dr. Arnold about his diagnosis.

deviant. RP-IX (11/4/13) 947. In sum, Black's ability to challenge Dr. Arnold's diagnosis was not curtailed by the trial court's rulings.

Lastly, even if this Court were to conclude that the trial court erred in making its rulings regarding hebephilia, any such error is harmless. Evidentiary error is harmless if there is no reasonable probability that the outcome of the trial would have been different had the error not occurred. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). When an expert in an SVP case would have reached the same conclusions without considering the evidence that is challenged on appeal, any error in admitting that evidence is harmless. *See* In re Detention of Coe, 160 Wn. App. 809, 836-37, 250 P.3d 1056 (2011), *aff'd*, 175 Wn.2d 482, 286 P.3d 29 (2012). Such is the case here.

In addition to paraphilia NOS, Dr. Arnold diagnosed Black with sexual sadism and personality disorder NOS with narcissistic and antisocial traits. CP 424. Black does not challenge either of these additional diagnoses on appeal. As will be discussed in more detail in the next argument section, Dr. Arnold testified that any one of these three diagnoses was sufficient in itself to cause Black serious difficulty in controlling his sexually violent behavior. RP-V (10/28/13) 445-46. Accordingly, even if the trial court erred in its

rulings regarding hebephilia, any such error is harmless and this Court should affirm.

3. SUFFICIENT EVIDENCE PROVED THAT BLACK HAS BOTH A MENTAL ABNORMALITY AND A PERSONALITY DISORDER; THEREFORE, JURY UNANIMITY WAS NOT REQUIRED.

Black's final claim is that he is entitled to a new trial because the jury was not unanimous as to whether he has a "mental abnormality" or a "personality disorder" and because there is insufficient evidence to support both of these alternative means. Appellant's Opening Brief, at 35-46. This claim is without merit. Ample evidence was presented that Black suffers from both a mental abnormality and a personality disorder, all of which causes him serious difficulty in controlling his sexually violent behavior. Therefore, the jury was not required to be unanimous as to either alternative means.

The alternative means analysis that applies in SVP cases stems from the constitutional requirement of jury unanimity as to a criminal defendant's guilt for a single crime. This well-settled principle dictates that, in any case where a single crime may be committed by more than one alternative means, the jury must be

unanimous as to the defendant's guilt for the *crime*, but need not be unanimous "as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means" submitted to the jury. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988) (citing State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987), State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982), and State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976)) (emphasis in original). If the alternatives submitted to the jury truly describe alternative means of committing a single crime, rather than separate crimes, jury unanimity as to each alternative means is not required under either the state or federal constitution. State v. Fortune, 128 Wn.2d 464, 909 P.2d 930 (1996); *see also* State v. Williams, 136 Wn. App. 486, 150 P.3d 111 (2007) (analyzing the distinction between alternative means, which do not require jury unanimity, and separate crimes, which do).

In accordance with this well-settled principle, when a guilty verdict has been rendered as to a single crime, but one of the alternative means for committing that crime is later held to be invalid on appeal and the record does not establish that the jury was unanimous as to the valid alternative in rendering its verdict, the proper remedy is to remand for retrial on the remaining, valid

alternative means. State v. Joy, 121 Wn.2d 333, 345-46, 851 P.2d 654 (1993); State v. Bland, 71 Wn. App. 345, 358, 860 P.2d 1046 (1993); State v. Gillespie, 41 Wn. App. 640, 645-46, 705 P.2d 808 (1985), *rev. denied*, 108 Wn.2d 1009 (1986). This is true even though one alternative means has been reversed on appeal due to a finding of evidentiary insufficiency – a finding that has the same double jeopardy implications as an outright acquittal in other circumstances. *See* Burks v. United States, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). Put another way, jury unanimity is required to *affirm* a conviction on appeal in an alternative means case if one alternative fails, but in the absence of such unanimity, the remedy is to remand for retrial on the valid alternative. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1990).

In SVP cases, "mental abnormality" and "personality disorder" are alternative means of proving that a person is an SVP under chapter 71.09 RCW. In re Detention of Halgren, 156 P.2d 795, 809-12, 132 P.3d 714 (2006). Accordingly, the primary issue in this case is not whether the jury was unanimous regarding either a mental abnormality or a personality disorder; rather, the issue is whether the jury was presented with sufficient evidence to prove

that Black has both a mental abnormality *and* a personality disorder.

Evidence is sufficient to support a conviction in a criminal case when "a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt." Kitchen, 110 Wn.2d at 410-11 (emphasis in original). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 929 P.2d 1068 (1992). Furthermore, an appellate court considering a sufficiency challenge must defer to the jury's determination as to the weight and credibility of the evidence and the jury's resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. In addition, circumstantial evidence is not to be considered any less reliable or probative than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). These same deferential standards apply in SVP cases with respect to the "mental abnormality" and "personality disorder" alternative means. In re Halgren, 156 Wn.2d at 811.

In this case, Dr. Arnold testified that he had "found there were [three] diagnoses that explained Mr. Black's behavior." RP-V (10/28/13) 382. Those three diagnoses were: 1) personality disorder NOS[14] with antisocial and narcissistic traits; 2) paraphilia NOS, sexually attracted to pubescent-aged females; and 3) sexual sadism. RP-V (10/28/13) 382. Dr. Arnold testified that each of these diagnosed disorders was present, and that each of them had a causal connection to Black's propensity to commit predatory acts of sexual violence.

First, Dr. Arnold explained that the features of Black's personality disorder NOS with antisocial and narcissistic traits include a sense of entitlement, manipulation of others for personal gain, a lack of empathy, failure to conform his behavior to criminal laws, deceitfulness, and irresponsibility. RP-V (10/28/13) 405-06. Dr. Arnold further explained that Black's high score on the Hare Psychopathy Checklist – Revised (PCL-R)[15] indicates that his personality disorder is severe, and thus, that Black is "the type of person who is more likely to get into trouble than the typical inmate

[14] Again, Dr. Arnold used the DSM-IV-TR when he evaluated Black. RP-V (10/28/13) 382-83. The terminology would be "other specified" rather than "not otherwise specified" if he were using the DSM-5.

[15] Black scored 34 out of a possible 40 points. RP-V (10/28/13) 427.

who gets out of prison." RP-V (10/28/13) 426-27. Dr. Arnold stated unequivocally that Black's personality disorder "has a direct link to sexual offending" because Black enjoys "the adventure" of finding women on the internet, "inserting himself" into their lives, manipulating them, and grooming their daughters and their daughters' friends for sexual victimization and exploitation. RP-V (10/28/13) 427-28. Dr. Arnold stated his opinion to a reasonable degree of psychological certainty that Black's personality disorder NOS, by itself, causes Black serious difficulty controlling his sexually violent behavior. RP-V (10/28/13) 445. This testimony from Dr. Arnold is sufficient in itself to support the "personality disorder" alternative means, and Black's claim to the contrary is without merit.

Second, as discussed at length above, Dr. Arnold diagnosed Black with paraphilia NOS, persistent attraction to pubescent females. Black told Dr. Arnold that he was "specifically aroused to that age group because of the budding breasts and the emotional connection he gets from them." RP-V (10/28/13) 433. Dr. Arnold further explained that although Black's sexual preference for girls in this particular stage of development was causing significant distress and dysfunction in his life, including criminal sanctions, his

urges remained intense in spite of the consequences. RP-V (10/28/13) 433-35. Dr. Arnold opined that Black's paraphilia NOS is a mental abnormality that impairs his volitional control, citing evidence that Black went to prison for molesting a girl, participated in two years of sex offender treatment, and upon his release "he does almost exactly the very same thing. It's like he just didn't learn at all." RP-V (10/28/13) 442-43. Dr. Arnold concluded that Black's paraphilia NOS, by itself, causes Black serious difficulty controlling his sexually violent behavior. RP-V (10/28/13) 445. This testimony is sufficient to support the "mental abnormality" alternative means, and Black's claim to the contrary should be rejected.

Third, Dr. Arnold diagnosed Black with sexual sadism because Black enjoyed choking and striking his adult female sexual partners and he was sexually aroused by the physical abuse he inflicted upon them. RP-V (10/28/13) 436-39. Dr. Arnold explained that Black's sexual arousal to sadistic behaviors persisted even when his partners were crying or injured, and that Black's sexual sadism caused distress and dysfunction in his relationships. RP-V (10/28/13) 438-39. Dr. Arnold testified that in his opinion, Black's sexual sadism constitutes a mental abnormality that predisposes

him to commit criminal sexual acts. RP-V (10/28/13) 441-42. Dr. Arnold also concluded to a reasonable degree of psychological certainty that sexual sadism causes Black serious difficulty controlling his sexually violent behavior. RP-V (10/28/13) 445-46. Again, this testimony is sufficient to support the "mental abnormality" alternative means, and again, Black's claim fails.

Nonetheless, Black argues that Dr. Arnold's testimony was not sufficient to support the alternative means of "mental abnormality" and "personality disorder." In support of this argument, Black points to what he perceives to be conflicts or weaknesses in the evidence. Appellant's Opening Brief, at 38-46. But these are arguments regarding the weight and credibility of the evidence, which cannot be reviewed on appeal.

In sum, viewing the evidence in the light most favorable to the State, the evidence produced at trial is sufficient to support the conclusion that Black has both a mental abnormality and a personality disorder as defined in chapter 71.09 RCW, and thus, jury unanimity was not required. This Court should reject Black's arguments to the contrary.

D. CONCLUSION

For the reasons set forth above, this Court should affirm the jury's verdict finding that Black is a sexually violent predator and the trial court's order of civil commitment.

DATED this 30th day of March, 2015.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in IN RE DETENTION OF MARK BLACK, Cause No. 71292-6-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name

3/30/15
Date

Done in Seattle, Washington