NO. 47336-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

GEORGE HANCOCK,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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II. STATEMENT OF THE CASE

A. Relevant History

George Edward Hancock Jr. has a long history of sexually assaulting young children dating from the 1970s until his most recent conviction in 1999. He has been convicted of several sexual offenses, and

at least two sexually violent offenses in Washington State. He was convicted of Rape of a Child in the First Degree in Kitsap County in 1999 and Indecent Liberties Against a Child Under Age 14 in Thurston County in 1983. CP at 1-4. Both of those offenses are sexually violent offenses as defined by RCW 71.09.020(17). He was also convicted in California in 1988 for Lewd and Lascivious Acts on a Child Under the Age of 14, (CP at 3) and Communication with a Minor for Immoral Purposes in Spokane County in 1978. CP at 7. In July, 2014 the State filed a Sexually Violent Predator petition against him when he was about to be released from prison after serving his sentence for the 1999 offense.

Hancock has admitted that he has always been sexually attracted to children. RP at 678. His attraction is specifically to young girls between the ages of 4 and 10. RP at 759. He has digitally and orally raped girls as young as 5 and 6, forced them to suck his penis, touched them on their breasts, licked their buttocks and was convicted of inserting a vibrator in the vagina of a 6 year-old. RP at 679; 772-774; 787-90; 792-94; 833. After each arrest, Hancock's pattern was the same: when first contacted, Hancock initially lied about his offenses, and then later admitted he had done what the victim accused him of doing. RP at 767 (1978 Communication); RP at 774 (1980 indecent Liberties); (1999 Rape of a Child RP at 826.)

In 1979, in Spokane, Washington, Hancock put a six-year-old boy's penis in his mouth and sucked it. CP at 7. This incident was witnessed by a

sixteen-year-old girl who reported it to her parents. CP at 7. When the boy was interviewed by law enforcement, he said that Hancock had also wanted the boy to put Hancock's penis in his mouth. CP at 8. The boy said that it had happened several times, and that Hancock told him not to tell. CP at 8. Hancock initially denied the act, but eventually admitted that it happened one time. CP at 8. Hancock was charged with Indecent Liberties Against a Child Under the Age of Fourteen. He ultimately pleaded guilty to one count of Communication with a Minor for Immoral Purposes and was sentenced to three months of supervision. CP at 8.

In 1980 in Tumwater, Washington, several witness reported to law enforcement that Hancock was behaving inappropriately with two young girls, aged five and six. CP at 3-4. The witnesses indicated that he was "humping" the girls, having them suck his penis and rub his crotch. CP at 3. When law enforcement contacted the girls, only one would say that Hancock had touched her crotch. CP at 3. After being contacted by law enforcement, Hancock ran away from home. Two years later, when he was under investigation for an arson, he admitted that he had molested one of the girls. CP at 4. He told the officer that he had undressed her and played with her vagina with his fingers and put his mouth on her vagina. CP at 4. He said he had engaged in this contact for about four or five months. CP at 4. During this interview, he admitted that he had done the same thing to another girl who was five while he was staying with her family, but this girl

was never located. CP at 4. In December 1982, Hancock pleaded guilty to one count of Indecent Liberties Against a Child Under the Age of 14. CP at 4. He was ultimately sentenced to a term of 124-157 weeks, consecutive with an arson conviction. CP at 4.

By 1988 Hancock had relocated to California. In June of that year three young girls, one seven-year-old, and five year-old twins, were diagnosed with the sexually transmitted disease of gonorrhea[1]. CP at 4. The seven-year-old reported to law enforcement that "Eddie" had touched and licked her "peepee" and everywhere on her body. One of the twin five-year-olds reported that "Eddie" had kissed her vagina with his tongue. She also said that he had taken his pants off. CP at 4-5. The other five-year-old said that he had touched her between the legs. Eddie was determined to be Hancock, whose full name is George Edward Hancock. CP at 6. At the time Hancock was living with a woman and her 11-year-old daughter. Hancock told the investigating officer that he had lived with the mother of the three girls, but he denied that he had touched them. CP at 6. Shortly after his initial denial, he admitted that he had been aroused to young girls for a long time. CP at 6. He admitted molesting the girls, with the exception of one of the twins. He acknowledged that he had such strong sexual feelings for girls, that sometimes he cannot remember what he had done. CP at 6. He

[1] The trial court excluded any mention of the fact that Hancock had transmitted gonorrhea to the girls, ruling that the probative value was substantially outweighed by the prejudicial effect. CP at 736.

admitted putting his fingers and tongue inside the girls' vaginas and rectum, but denied using his penis. CP at 6-7. Hancock was initially charged with fifteen counts of Lewd and Lascivious Conduct with a Minor Under the Ager of 14 and pleaded guilty to one count. CP at 7. He was sentenced to eight years in the California Department of Corrections. CP at 7; RP at 785.

He initially served his sentenced from 1988 until he was released in January 1993. RP at 802; 813. When he was released from this sentence, his adjustment to community supervision was abysmal. He subsequently was returned to custody repeatedly for violating the conditions of his release. His parole was revoked the first time in March 1993 for having contact with a minor. RP at 815-16. He was sanctioned and returned to custody until he was released again in February 1994. RP at 816. His parole was revoked again in November 1994. RP at 816-17. He was released this time in July 1995. RP at 817. Five months later, in December 1995, his parole was revoked again. RP at 817. After serving a nine-month sanction, he was released September 1996 (RP at 818) only to be revoked again in April 1997. RP at 819. He received a 10-month sanction for this violation, and was released in February of 1998. RP at 820. He was finally discharged in June 1998. RP at 820. All told, he was given an eight-year sentence, he served four years before he was released on parole, and then served four additional years for various parole violations. RP at 821. In all of his parole

violations he was found having prohibited contact with minor-aged females. RP at 1231-33. During this period of time between 1988 and 1999 he acknowledged that he was not in the community for very long, and he spent most of the time incarcerated. RP at 1234.

Hancock's final sexual offense took place in 1999, shortly after he was released on the 1988 offense. In Bremerton, Washington where Hancock had relocated, a girl whom Hancock had been baby-sitting disclosed that he had touched her "peepee", kissed her on the lips, "peepee", butt and breasts. CP at 2. She also reported that he had inserted a "buzzing thing" in her vagina that she described as red and rounded like a marker. CP at 2. She said Hancock had asked her to touch and lick his "peepee" but she had refused. CP at 2. This girl was examined by medical professional who determined that she had contracted gonorrhea[2], and had "penetrating trauma based on decreased hymenal tissue." CP at 2. Hancock denied that he had ever touched the child and claimed he had never been alone with her. He was charged with three counts of Rape of a Child in the First Degree. CP at 3. He was found guilty of one count and sentenced to 171 months in prison. CP at 3. Hancock steadfastly denied committing this offense until part-way through the SVP trial, when for the first time he

[2] As previously noted, all references to Hancock giving the children gonorrhea was excluded from the trial. CP at 736.

admitted sexually assaulting her. RP at 676-85. He was scheduled to be released on July 27, 2014 when the State filed this SVP petition.

B. The SVP Proceedings

When the State filed a petition against Hancock pursuant to RCW 71.09 it retained Richard Packard, Ph.D. to conduct an evaluation. CP at 9. Dr. Packard is a licensed psychologist who specializes in the assessment and treatment of sexual offenders. CP at 9. He has qualified as an expert in SVP proceedings in Washington many times. CP at 9. Dr. Packard conducted an initial assessment of Hancock in May, 2012 and filed a supplemental report in July, 2014. CP at 9. Dr. Packard reviewed over 2200 pages of records pertaining to Hancock, including criminal history records, police reports, parole violation reports, victim statements and records from the Department of Corrections. CP at 9. He also interviewed Hancock twice, first in 2012 and then again in 2014.

During his interview, Hancock told Dr. Packard that he had a life-long arousal to kids. "As long as I can remember I've had problems with sexually abusing them." RP at 750. Hancock acknowledged to Dr. Packard that he currently found children sexually arousing and that he had sexual fantasies about children, and that he was trying not to masturbate to those fantasies. RP at 797-98. Hancock relayed how he would enter into a relationship with a child and become friends, and then would convince himself that "they wanted to do it as much as I did." RP at 799. In his

deposition conducted a month before the commitment trial began, Hancock denied committing the 1999 offense. RP at 676-77; 683; 826. Mid-way through trial, he admitted for the first time that he had sexually assaulted the girl. RP at 676-85. Hancock's version of the extent of his sexual criminal history varied also. During the 1999 investigation, when asked how many girls he had touched, Hancock said he did not know because he had lost count. He told Dr. Packard that he thought he had molested "ten or perhaps more" children. RP at 797. Dr. Packard testified that he had read Hancock's prior statements where he had admitted molesting as many as 35 victims. RP at 799.

After considering all of the voluminous information, Dr. Packard determined that Hancock met the criteria as a sexually violent predator, meaning that he suffers from a mental abnormality and or personality disorder that renders him likely to commit acts of sexual violence. CP at 9-12. Specifically, Dr. Packard found that Hancock suffered from pedophilia, sexually attracted to males and females, non-exclusive type, and Anti-social personality disorder. CP at 9.

The case proceeded to trial in early February 2015. The State called Dr. Packard as its main witness. Dr. Packard testified that Hancock had a long history of offending with children. Dr. Packard found it significant that after being detected and incarcerated, Hancock continued to involve himself in situations and interpersonal relationships where

young, vulnerable children were present, and Hancock used these opportunities to gratify his sexual deviancy. RP at 902-03. Packard testified that Hancock had relatively little pro-social experience given that his adult relationships have been with older women who have younger daughters who became his victims. RP at 907. Hancock was involved in relationships with adults simultaneous to his molestation of children, which indicated that adult relationships failed to satisfy his emotional and/or sexual needs. RP at 910. It was especially troubling that Hancock was caught sexually assaulting several girls in 1988 and despite his previous conviction, he still believed no one had been harmed. RP at 918. He stated he thought that the children were coming on to him. RP at 918. Packard testified he had problems with maintaining employment and with following rules the entire time he was in the community, when he was incarcerated and continuing up to while he has been confined at the SCC. RP at 914-15. Hancock did not participate in the Sex Offender Treatment Program in prison. RP at 832.

At trial, Dr. Packard testified that Hancock meets the criteria for several disorders, listed in the *Diagnostic and Statistical Manual of Mental Disorders*, ("DSM-V"). Dr. Packard diagnosed Hancock as suffering from Pedophilic Disorder, and Anti-social Personality Disorder. RP at 754; 813. Packard also determined that he has characteristics related to obsessive-compulsive disorder. RP at 754. Dr. Packard described Hancock's

pedophilic disorder as "a fundamental orientation" that will be a "lifelong chronic problem" that is not likely to go away. RP at 803-804. Dr. Packard assessed Hancock's risk for re-offense using, among other tools and psychological testing, the Static-99R. RP at 836. Dr. Packard determined that Hancock suffers from both a mental abnormality and a personality disorder that makes him likely to commit predatory acts of sexual violence if not confined to a secure facility. RP at 826-30; 834; 941.

Dr. Packard testified that he scored Hancock on several risk assessment tools and that he scored in the high risk group. RP at 860. He further testified that based on his dynamic risk factors, Hancock was appropriately compared to individuals in the "high risk/high needs" normative group. RP at 861-62. Of the individuals who scored similarly to Hancock in the high risk/high needs group, 42.8 % were either charged or convicted of a new offense within 10 years. RP at 863. Hancock scored higher than 97.2% percent of all the sex offenders in the development sample. RP at 864. On the Violence Appraisal Guide (VRAG), another actuarial instrument used by Dr. Packard, Hancock scored in the highest group, and 90% of offenders in the development sample who scored the same were returned to a secure facility for a new offense within 15 years. RP at 880-81. Dr. Packard testified that the developers of the actuarials acknowledge that the results represent an underestimate of risk for re-offense. RP at 884.

At trial, the State used an illustrative exhibit to assist Dr. Packard in explaining how the actuarials were underestimates of risk. See RP at 882-84. Prior to allowing the jury to see the exhibit, the state submitted an offer of proof by having Dr. Packard testify about the exhibit and his testimony concerning the actuarial instruments. RP at 782-791. The exhibit helped Dr. Packard explain to the jury the concept that the acturarial instruments were unable to measure true risk because not all sexual offenses are reported, and of those that are reported, not all result in charges or convictions. *Id.* Dr. Packard explained at length the concept that comparing Hancock to group data about offenders who had been convicted did not tell an accurate picture of risk because there are an unknown number of undetected offenses.

In late February 2015, a unanimous jury determined that Hancock was a sexually violent predator. He was committed to the care and custody of the Department of Social and Health Services. He now appeals.

III. ARGUMENT

On appeal, Hancock raises six issues, most of which have been previously resolved against him by the Appellate Courts and many of which he failed to raise below. First, the court properly instructed the jurors using the statutory definition of sexually violent predator rather than Hancock's suggested mathematical formulation. Second, without any

objection from Hancock, the trial court properly followed the *Coppin*[3] decision in determining that "sexually violent offenses" are the same as a "crimes of sexual violence." Next, adhering to well-settled law, the State proved all of the statutory elements of a sexually violent predator proceeding, notwithstanding Hancock's argument for the first time on appeal that it was error for the state to rely on Hancock's "lifetime risk" in showing that he met the definition of an SVP. The trial court did not abuse its discretion in permitting the State's expert to rely on an illustrative exhibit that Hancock disliked. The court correctly denied Hancock's untimely request for a mistrial just before closing arguments began. And finally, the prosecutor did not commit misconduct in closing argument. None of Hancock's arguments are persuasive and this Court should affirm his commitment as a sexually violent predator.

A. The Trial Court Properly Instructed The Jury Using The Statutory Definition Of A Sexually Violent Predator

Hancock argues that the jury should have been instructed that it was the State's burden to prove that Mr. Hancock's risk exceeds 50%. (Assignment of Error #1, Brf. of App. at 1.) This misconstrues both the statutory elements and the case law analyzing the statute. His argument should be rejected.

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[3] *In re the Detention of John Coppin*, 157 Wn. App. 537 (2010).

Jury instructions are sufficient when they allow parties to argue their case theories, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). The State's burden in civil commitment cases pursuant to RCW 71.09 is to prove beyond a reasonable doubt that the individual is "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). The jury was not, as Hancock suggests, left to guess what this term meant, because the court properly instructed the jury according to the statute, which specifically defines the term "likely to engage in predatory acts of sexual violence if not confined to a secure facility" as meaning "the person more probably than not will engage in such acts if released unconditionally from detention." RCW 71.09.020(7). This is precisely how the WPI committee recommends instructing juries on this issue (see WPI 365.14), and was exactly how this jury was instructed. CP at 1074-1098. The jury thus had a very clear definition upon which to base its decision and they were not left to guess at its meaning.

Hancock offers nothing to show that this is an incorrect statement of the law, because it is not, nor how it precluded him from arguing his theory of the case. The court specifically allowed Hancock to make such argument. RP at 34-36. Indeed, his expert was able to testify about statistical percentages exactly as Hancock wished. RP at 1089; 1119;

1129; 1139. Hancock asserts that the trial court "elected to use the statutory language without further elaboration." (Brf. of App. at 15.) But the court gave clear explanations as to why he disagreed with the statistical argument. "We utilized the 'more probably true than not' standard for centuries without definition in terms of percentage. It's argued all the time." RP at 34. And "Why would you not be allowed to argue [the risk must exceed 50%] as opposed to having that be an instruction?" RP at 35. "That motion is denied. It doesn't preclude argument as to what that means, but the language of the statute and the burden will be contained in the instruction." RP at 36.

While Hancock argues that the statutory phrase is not "manifestly clear" (Brf of App at 15), his assertion is false. The court gave the attorneys freedom to explain what the "likely" requirement meant. The trial court permitted the experts to testify that the risk should be over 50% and allowed the attorneys to argue the same in closing. (RP at 36-37). The only limitation the court put on the parties was during voir dire, where the court refused to allow the parties to use specific percentages to ask the jury what the risk level should be required to be to determine if a juror would vote for commitment. ("You can certainly discuss the various burdens of proof, but I don't think it's appropriate to be asking a juror if there was a 33 percent chance of re-offending, would you commit? That's not going to happen." RP at 42.)

SVP status is determined by whether a requisite mental condition will "more probably than not" make the person engage in future acts of sexual violence. RCW 71.09.020(7). A numerical quantification of an individual's risk is not required, and Hancock's interpretation is incorrect. He cites *In re Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001) for the proposition that the "more probably than not" standard for determining risk in an SVP case *requires* a "predicted recidivism rate exceeding 50%" and thus the court was required to instruct the jury on the numerical percentage. He is wrong.

Hancock's reliance on *Brooks* is not well founded, and there is nothing in *Brooks* that requires a jury instruction containing a specific quantification of an individual's risk. Brooks, a committed SVP, argued that the "more likely than not" standard for proving dangerousness in RCW 71.09 was not narrowly tailored, and urged that, because *Addington v. Texas,* 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), requires the application of the "clear, cogent, and convincing" standard in mental illness commitment cases, it would violate equal protection to permit a lower standard in SVP cases. *Brooks*, 145 Wn.2d at 293. Rejecting that argument, the court stated that, "when an expert testifies that a person has a likelihood of reoffending, it means that of the persons who suffer from this mental abnormality or personality disorder, more than 50 percent will engage in predatory acts of sexual violence if not confined in a secure

facility." *Id.* at 296-97 (emphasis added). The Court specifically approved the statutory absence of a numerical quantification:

> RCW 71.09.060(1)'s demand that the court or jury determine beyond a reasonable doubt that a defendant is an SVP means that the trier of fact must have the subjective state of certitude in the factual conclusion that the defendant more likely than not would reoffend if not confined in a secure facility.

Id. at 297-298.

Thus, while it is correct that the court equated the term "likely" to a statistical probability exceeding 50 percent, it did so in explaining that the standard of proof satisfied equal protection. The issue of jury instructions was not before the *Brooks* Court, and the Court certainly did not hold that the jury must be instructed as to a statistical probability. The phrase "likely to engage in predatory acts of sexual violence if not confined in a secure facility" is specifically defined by statute, and "means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. . ." RCW 71.09.020(7). The jury was properly instructed as to the legal requirements of the statute.[4]

[4] Hancock includes a footnote observing that his proposed instructions were erroneous, but that it was a clerical error and should have no impact on review. Brf. of App. at 17, n. 11. This argument is entirely specious. The trial court correctly declined to use his erroneous instructions and he cannot now claim that the "error would have been corrected" if the court had ruled in his favor.

B. The Jury Was Properly Instructed That As A Matter Of Law Certain Crimes Are Sexually Violent Offenses

Hancock argues that the trial court relieved the State of its burden to prove that Hancock had been convicted of a crime of sexual violence. He further argues (for the first time) that the statute requires a showing of actual force in order to prove a sexually violent conviction. His arguments lack merit. First, Hancock failed to object to the instructions at trial, and as such this argument is waived. Second, Hancock repeatedly conceded the fact that he had been convicted of qualifying crimes at trial, thus his claim that the court relieved the State of its burden fails. Finally, his attempt to differentiate the terms "sexually violent offenses" and "crimes of sexual violence" has already been rejected by this Court in *In re Coppin*, a case he argues was "wrongly decided" and should be ignored. The *Coppin* Court, however, conducted a thorough statutory analysis and correctly rejected his argument as unpersuasive.[5] This Court should do the same. Hancock has waived objection to this instruction.

Hancock acknowledges that he did not object to the "to commit" instruction that the court gave. Brf. of App. at 12. Failure to object to jury instructions waives the issue on appeal. *Estate of Ryder v. Kelly–Springfield Tire Co.,* 91 Wn.2d 111, 114, 587 P.2d 160 (1978).

[5] Furthermore, the Washington State Supreme Court denied Coppin's petition for review. See 170 Wn.2d 1025 (2011).

"Instructions to which no exceptions are taken become the law of the case." *Hudson v. United Parcel Serv., Inc.,* 163 Wn. App. 254, 269, 258 P.3d 87, 95 (2011) (citing *Guijosa v. Wal–Mart Stores, Inc.,* 144 Wn.2d 907, 917, 32 P.3d 250 (2001)). Because he did not preserve this argument, the court should reject it outright.

Hancock's failure to object to this instruction was in all probability based on the fact that he did not deny that he had been convicted of a crime of sexual violence. This was clear long before the jury was empaneled. In pre-trial motions Hancock's attorney told the court that he would not be challenging the convictions: We are "not going to re-litigate guilt on that case, which would be sort of silly, since it would be proven beyond a reasonable doubt with a certified copy." RP at 62. In his opening statement, Hancock's attorney made sure the jury knew that he was not challenging the sexually violent offenses. He conceded that Hancock had been convicted of sexually violent offenses, and told the jury that, because there will be certified copies of the court documents, "this side won't be arguing about that, it would be kind of silly, wouldn't it? *So there will be no dispute on the first element of proof.*" RP at 545 (emphasis added). He re-emphasized that point in closing, conceding the element by pointing out the certified copies that the prosecutor had and reassuring the jury that the first element is not in dispute, and they should therefore focus their energies on the remaining two elements. RP at 1490-91.

Hancock does not now nor did he at trial contest his sexually violent convictions. The jury made a finding based upon the clear and uncontroverted evidence presented at trial, and made a proper finding under the only reasonable interpretation of the statute that he met the definition of a sexually violent predator since he had, among other things, at least one conviction for a sexually violent offense.

1. A "Sexually Violent Offense" Means A "Crime Of Sexual Violence"

Even if this Court were inclined to consider this argument, it lacks merit, and has been specifically rejected by this Court.

This Court rejected a claim identical to that made by Hancock in *In re Detention of Coppin,* 157 Wn. App. 537, 553, 238 P.3d 1192, 1200-1201 (2010), review denied, 170 Wn.2d 1025 (2011). Coppin, after his initial commitment trial, argued that his convictions for "sexually violent offenses" were not "crimes of sexual violence." This Court rejected Coppin's argument, finding that the statute uses the two terms interchangeably:

> The legislature expressly defined "sexually violent offense" to include statutory rape in the first degree. ***Given this definition, it would be absurd to conclude that first degree statutory rape, a "sexually violent offense" is not also a "crime of sexual violence."*** Accordingly, Coppin's two 1988 convictions for statutory rape necessarily were for crimes "of sexual violence," as the SVP definition requires.
>
> ...
>
> In view of this analysis, ***Coppin's argument that the State failed to prove that he had been convicted of or charged***

> ***with a "crime of sexual violence," because it did not prove that the 1988 convictions for first degree statutory rape involved "violence,"*** as defined by the dictionary, is also unpersuasive.

Id. at 553 (emphasis added).

Hancock's argument that the State should have been required to show that his offenses involved "actual violence" is likewise unpersuasive. It doesn't matter whether or not he applied "swift and intense" force nor is it a requirement to show "rough or injurious physical force." (See Brf of App. at 25.) Qualifying "sexually violent offenses" and "crimes of sexual violence" are defined by statute regardless of the amount of force applied.

2. The Trial Court Did Not Relieve The State Of Its Burden To Prove All Elements Of The Statute

The court properly instructed the jury and required the State to prove every element beyond a reasonable doubt. In the opening instructions to the jury the trial court told the jury clearly what the state had to prove:

> In this proceeding, the ***State must prove all of the following elements beyond a reasonable doubt:*** One, that George Edward Hancock, Jr., was convicted of the crime of sexual violence; namely, rape of a child in the first degree and indecent liberties with a child under the age of 14; second, that George Edward Hancock, Jr., suffers from a mental abnormality or a personality disorder which causes serious difficulty in controlling his sexually violent behavior; and third, that this mental abnormality or personality disorder causes George Edward Hancock, Jr., likely to engage in predatory acts of sexual violence if not confined to a secured facility."

RP at 90.

The final instructions reiterated both the burden on the State and each of the elements the State was required to prove. See CP at 1080; 1082.

The court also specifically instructed the jury that his comments were not evidence. "Our state constitution prohibits a trial judge from making a comment on the evidence. ... Although I will not intentionally do so, if it appears to you that I have made or indicated some personal opinion concerning the evidence, you must disregard that opinion entirely." RP at 92.

Juries are presumed to follow all instructions given. *State v. Stein*, 144 Wn. 2d 236, 247, 27 P.3d 184, 189 (2001) (citing *Degroot v. Berkley Constr., Inc.,* 83 Wn. App. 125, 131, 920 P.2d 619 (1996). The jury here was properly instructed about the elements, the State's burden, and told not to consider any unintentional comments. Hancock's argument should be rejected.

3. The Legislative Intent Is Plain

Even if this Court determines to conduct a new statutory analysis, Hancock's argument still fails. In interpreting a statute, the court should look first to the statute's plain language, and assume that the legislature means what it says. *Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007), *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)). "When interpreting a statute, we must avoid unlikely, absurd, or strained results."

Morris v. Blaker, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). Under the "plain meaning rule," the court must "examine the language of the statute, other provisions of the same act, and related statutes to determine whether we can ascertain a plain meaning." *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). "Each provision must be read in relation to the other provisions, and we construe the statute as a whole." *In re Detention of Williams*, 147 Wn.2d 476, 490, 55 P.3d 597 (2002).

Here, the legislative intent is clear. In order to prove that an individual is a sexually violent predator, the State must prove beyond a reasonable doubt that the individual "has been convicted of or charged with a crime of sexual violence...". RCW 71.09.020(18)[6].

> RCW 71.09.020(17) defines a "sexually violent offense" as:
> (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, *rape of a child in the first* or second degree, statutory rape in the first or second degree, indecent liberties against a child under age fourteen, or child molestation in the first or second degree... (emphasis added).

Under the plain language of RCW 71.09.020(17)(a), a conviction for rape of a child in the first degree meets the definition of a "crime of sexual violence" and qualifies as a predicate offense for commitment as a sexually violent predator. There can be no other reasonable interpretation of the statute, and the intent of legislature is clear: an individual must have

[6] In 2009, the legislature amended RCW 71.09.020. Laws of 2009 c 409 § 1, eff. May 7, 2009. The pertinent provisions are identical, but have been renumbered. The definitions of "sexually violent offense" and "sexually violent predator" that were formerly RCW 71.09.020(15) and (16) respectively, are now subsections (17) and (18).

been charged or convicted of a sexually violent offense to qualify as a sexually violent predator. Any other interpretation of the statute would render RCW 71.09.020(17) superfluous and meaningless.

Furthermore, throughout RCW 71.09 the legislature uses the term "sexually violent offense" in a manner requiring such a charge or conviction as a necessary predicate to the filing of an SVP petition. *See* RCW 71.09.030.[7] This indicates the clear intent of the legislature that a "sexually violent predator" be one who has been charged or convicted of a "sexually violent offense" under RCW 71.09.020(17).

Hancock failed to object to the instructions at trial, and therefore this argument is waived. He further conceded the fact that he had been convicted of qualifying crimes, thus his claim that the court relieved the State of its burden fails. He further urges this Court to disregard the *Coppin* decision that determined "sexually violent offense" and "crime of sexual violence" mean the same thing. The *Coppin* opinion conducts a thorough statutory analysis and rejects the argument as unpersuasive. This Court should do the same.

[7] The SVPA allows the State to file an SVP petition "[w]hen it appears that...[a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement." RCW 71.09.030(1). The statute outlining the procedure for filing an SVP petition does not reference "crimes of sexual violence".

C. The State Met Its Burden to Show that Hancock Is A Sexually Violent Predator

Hancock argues that the state did not prove that he was "currently dangerous" and that the trial court erred in allowing the jury to consider his "lifetime risk" in assessing whether or not he is a sexually violent predator. This argument is waived because he did not raise it below.

Rather than allowing the jury to consider the risk "within a fixed number of years,' he now argues that the court should have used "some other formulation" to express his overall risk. Brf. of App. at 30. This argument fails. The assessment of risk under 71.09 *is* lifetime risk, and to limit the jury's consideration to any particular timeline is contrary to well settled law.

Hancock, while arguing that lifetime risk violates due process, does not suggest an alternative formulation, nor does he cite to any authority for the proposition that such an alternative formulation is required or even advisable. Moreover, while citing *In re Detention of Moore*, 167 Wn.2d 113, 123, 216 P.3d 1015 (2009) (Brf. of App. at 30), he overlooks the fact that, in that case our Supreme Court squarely rejected this argument. There, the appellant argued that the State's prediction of dangerousness in an SVP case must be "refined" to the foreseeable future. *Id.* at 123. The court rejected this argument, concluding that, "[b]y properly finding a person to be an SVP, it is implied that the

person is currently dangerous. We do not deem it necessary to impose on the State the additional burden that it prove the SVP will reoffend in the foreseeable future." *Id.* Hancock does not provide any argument or authority why the *Moore* decision does not apply in his case. Additionally, the Court of Appeals held in *In re Detention of Keeney,* 141 Wn. App. 318, 326, 169 P.3d 852 (2007), that factfinders are not required to consider any particular time frame when making the determination a person is likely to commit predatory acts of sexual violence in the future. Hancock's argument is precluded by the decisions in *Moore* and *Keeney.*

D. The Trial Court Did Not Abuse Its Discretion When It Allowed The State To Use An Illustrative Exhibit During The Expert's Testimony To Explain Why The Actuarial Assessment Is An Underestimate Of An Individual's Risk

Hancock argues that the trial court admitted irrelevant and prejudicial evidence. (Brf. of App. at 31.) Because the trial court did not abuse its discretion in this matter, this argument must be rejected. The trial court's discretion with respect to evidentiary matters is broad, and a decision of the trial court is reversed only if the court abuses its discretion. Discretion is abused if it is based on untenable grounds or for untenable reasons. *Day v. Santorsola*, 117 Wn. App. 1081 (2003) (footnotes and citations omitted). Illustrative exhibits are for use only "during the initial presentation of testimony and/or in final argument by counsel." *In re Woods*, 154 Wn.2d 400, 427, 114 P.3d 607, 621 (2005). Ordinarily, only

minimal foundation is required for a purely illustrative exhibit. *Reitz v. Knight*, 62 Wn. App. 575, 585, n. 6, 814 P.2d 1212, 1218 (1991). Expert opinion may be given even where the underlying factual material would otherwise be inadmissible. ER 703; *see Group Health Coop. of Puget Sound, Inc. v. Department of Rev.,* 106 Wn.2d 391, 400, 722 P.2d 787 (1986). ER 703 provides that if "facts or data ... upon which an expert bases an opinion or inference ... [are] of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." *Det. of Marshall v. State*, 156 Wn.2d 150, 161, 125 P.3d 111, 116 (2005). Use of charts is generally permitted at the court's discretion to illustrate expert testimony. *State, Dep't of Fisheries v. Gillette*, 27 Wn. App. 815, 826, 621 P.2d 764, 770 (1980).

Here, not only was the illustrative exhibit 44 relied on by the testifying expert, it was never admitted into evidence. The trial court ruled that it could be admitted for illustrative purposes only. RP at 790. It was briefly shown to the jury during the expert's testimony and was used to help explain to the jury the limitations on the actuarial risk assessment instruments. The testimony using the illustrative was relatively brief. RP at 882-84. Furthermore, Dr. Packard explained the concept carefully to the court, and subsequently to the jury, making sure they knew that the concentric circles were a "concept" and not actual numbers. RP at 883. Dr.

Packard was cross-examined at length about his reliance on the actuarials (RP at 993-1012) and it was not an abuse of discretion to allow him to use an illustrative exhibit to explain why he determined that the actuarial risk assessment was not an accurate reflection of Hancock's true risk. Furthermore, the exhibit did not go back into the jury room and the jury was instructed about its limited purpose ("This exhibit is itself not an exhibit; rather, it's one party's illustration offered to assist you in explaining and evaluating the evidence in the case.") RP at 739-40. Thirty-four admitted exhibits went back to the jury room (RP at 1423), but Illustrative Exhibit 44 did not. Hancock's assertion ignores the offer of proof the State provided before the trial court ruled that it could be used. RP at 782-90. It further ignores the testimony explaining the exhibit. His argument should be rejected.

1. The Illustrative Exhibit Clarified The Expert's Testimony, And Did Not Go With The Jury Into The Jury Room

Dr. Packard testified that illustrative exhibit 44 was meant to "reflect the concept that there is underreporting [of sexual offenses] and where – sort of how that progresses across the different steps" involving charges and convictions of sexual offenders. RP at 783. Dr. Packard clarified that the question under RCW 71.09 is not limited to a specific time frame, but that he is looking at the risk for re-offense over the rest of Hancock's lifetime. RP at 863-864; 882. Because the jury was tasked with

determining if Hancock was likely to offend (as opposed to whether he was to be charged or convicted of an offense), it was important for the jury to be aware how the risk assessment tools were applied, and specifically what were their limitations. Actuarials measure only charges and convictions. RP at 788. They are considered to underestimate risk. RP at 788. It is widely known that sex offenses are under-reported and a larger group of sex offenses that are committed but not reported. RP at 788. Hancock's attorney agreed with the facts contained in the illustrative exhibit, that is, that sex offenses are underreported and that both experts would testify as such. RP at 674. Dr. Packard believed Illustrative Exhibit 44 would help explain this concept to the jury. RP at 789; 882. Dr. Packard did not have the numbers that each circle represented off the top of his head, but did indicate they were available from official data sources such as the National Institute of Justice. RP at 785. He stated that it was "roughly proportional" to the number of crimes, but that it was impossible to know for sure because the number of crimes that are actually committed that are unreported is unknown. RP at 790. The court did not abuse its discretion in allowing Dr. Packard to explain his opinion using illustrative exhibit 44.

Dr. Packard testified that the National Crime Victimization Survey revealed that there are more sex offenses committed that are reported. RP at 882-83. Because not all sex offenses that are committed are reported,

and not all offenses that are reported result in criminal charges being filed, and not all charges that are filed result in a conviction and the actuarial measure of risk is charges or convictions, thus a large number of offenses that are committed are not captured in the data. 788-90; 882-84. He testified that Exhibit 44 is an illustration of that relationship between committed offenses and charges or convictions. RP at 883-84.

Dr. Packard testified before the jury that the SVP statute is concerned with what is the likelihood of the offender "engaging in criminal sexual acts over the course of the rest of their life." RP at 843. He went on to explain that the actuarial instruments he used were not designed to answer that specific question, and thus the results have limitations. RP at 844. The instruments look only at detected offenses that occur within a limited time period. RP at 847. He explained that this is a significant limitation on the risk assessment, because a person can engage in the behavior, not be detected, and that person will count in the research data as a non-recidivist. RP at 847. Dr. Packard testified that nonetheless the actuarials are generally accepted and used in SVP evaluations because they provide helpful information. RP at 849.

Hancock was able to admit significant testimony through his expert countering the state's reliance on the actuarials. RP at 1127-77. Hancock's expert, Chris Fischer, acknowledged that it is hard to measure data about sexual assaults and under-reporting. RP at 1267. He

acknowledged that Dr. Karl Hanson, the developer of the Static-99, states clearly that the actuarial results are underestimates because not all offenses are detected. RP at 1268. Fischer admitted "not all offenses are reported. Everyone acknowledges that." RP at 1268.

The trial court did not abuse its discretion in allowing Illustrative Exhibit 44 to be used because it was helpful to the jury in understanding Dr. Packard's testimony regarding the reasons why Hancock's actuarial results are an underestimate of his true risk. RP at 789; 882. The prosecutor explained the exhibit in her closing argument. RP at 1451-52.

Hancock's concern that the bull's eye "prejudiced" him is unsupported by facts, and is not the proper question. The correct test is whether its "probative value was substantially outweighed by the danger of unfair prejudice." ER 403. It was not, because the exhibit assisted the expert in explaining his risk assessment, and was subject to cross-exam about all the weaknesses in the numbers. Hancock asserts that there is a reasonable probability that this exhibit materially affected the outcome of the trial. He offers nothing more than this assertion because there is simply no evidence to support this claim. Hancock's trial lasted for over two weeks, with two experts and multiple victims testifying. The jury heard in detail about Hancock's lifelong sexual deviancy, his sexual attraction to children and the numerous young children he had molested. They also heard testimony about the significantly smaller number of charges and

convictions he received. This exhibit represented the uncontested fact that more sexual offenses take place than are charged or convicted. The testimony involving the exhibit was brief – 2 pages out of a 1500 page transcript . Rather than "bolster" the State's case, the exhibit explained the expert's opinion that the actuarial instruments were not an accurate assessment of Hancock's risk. The trial court did not abuse its discretion in allowing it to be used and the commitment should be upheld.

E. The Trial Court Did Not Abuse Its Discretion In Denying An Untimely And Unsupported Request For A Mistrial

The trial court did not abuse its discretion when it denied a last-minute request by Hancock to declare a mistrial just before closing argument. His request was based on his claim that that his attorneys had "changed strategy at the last minute." RP at 1421. The trial court was correct to deny Hancock's request. First, there is no hybrid representation in proceedings pursuant to RCW 7.09, and Hancock did not represent himself. The court was not bound to consider a request that didn't come through counsel. Second, his claim was vague and based entirely on a strategic decision of counsel. When the court denied the request because it lacked specificity, Hancock acquiesced and said "OK" rather than explaining any conflict or breakdown in communication. RP at 1422. Third, although Hancock did not make it clear what precise testimony he was referring to, Hancock's attorney was somewhat limited in the way he

could present any further testimony from Hancock because Hancock changed his version of the 1999 offenses mid-way through the trial. And finally, by the time Hancock raised the issue, the entire trial had been completed and all that remained was closing argument. Any conflict between the two would have been irrelevant as the strategy of the closing argument was entirely left up to Hancock's attorney.

1. Differences Of Opinion In Strategy Does Not Amount To A Breakdown In Communication

The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and a trial court's denial of a motion for a new trial will not be reversed on appeal unless there is a clear showing of abuse of discretion. *State v. Pete,* 152 Wn.2d 546, 552, 98 P.3d 803 (2004); *State v. Balisok,* 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. *Id.* A trial court's denial of a motion for mistrial "will be overturned only when there is a 'substantial likelihood' the prejudice affected the jury's verdict." *State v. Russell,* 125 Wn.2d 24, 85, 882 P.2d 747 (1994). A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *Smith v. Lockhart,* 923 F.2d 1314, 1320 (8th Cir. 1991).

Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense. *E.g., State v. Lopez,* 79 Wn. App. 755, 766, 904 P.2d 1179 (1995) (citing *United States v. Morrison,* 946 F.2d 484, 498 (7th Cir. 1991)); *United States v. Hillsberg,* 812 F.2d 328, 333 (7th Cir. 1987). The general loss of confidence or trust alone is not sufficient to substitute new counsel. *Johnston v. State,* 497 So.2d 863 (1986).

Applying this test, it is clear the trial court did not abuse its discretion. Hancock has shown no breakdown in communication and nothing more than a slight disagreement regarding strategy.

2. Hancock's Request Was Untimely And Unsupported By Facts

A defendant may not discharge appointed counsel unless the motion is timely and rests upon proper grounds. *Restraint of Stenson,* 142 Wn.2d 710, 732–34, 16 P.3d 1 (2001). *State v. Cross*, 156 Wn. 2d 580, 606, 132 P.3d 80, 92 (2006), *as corrected* (Apr. 13, 2006). When reviewing a trial court's decision, we consider "(1) the extent of the conflict, (2) the adequacy of the [trial court's] inquiry, and (3) the timeliness of the motion." *Id.* at 607, citing *Restraint of Stenson,* 142 Wn.2d at 724, 16 P.3d 1.

a. Extent Of The Conflict

The court correctly determined that Hancock's reasons were insufficient. At the conclusion of the evidentiary portion of the trial, shortly before closing argument, Hancock told the judge he wanted a mistrial due to a disagreement as to strategy with his attorneys. RP at 1421. Hancock was apparently upset about the way his testimony came across, and he said they had spent six months going over it and "they changed it." RP at 1421.

"[T]here is a difference between a complete collapse and mere lack of accord." 156 Wn.2d at 606. *Cf. Morris v. Slappy,* 461 U.S. 1, 13–14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (constitution does not require a "meaningful relationship" between attorney and client). "[T]he choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80, 92 (2006), *as corrected* (Apr. 13, 2006) citing *State v. Piche,* 71 Wn.2d 583, 590, 430 P.2d 522 (1967). The State Supreme Court held that an attorney and a client disagreement over trial strategy was not sufficient to find a cognizable conflict even where counsel testified that he "can't stand the sight of" his client. ... [because this] is not the type of conflict with counsel that raises Sixth Amendment concerns. 156 Wn.2d at 609. Instead, this is the type of conflict that courts

generally leave to the attorney and client to work out, absent actual ineffective assistance of counsel. *Id.*

Hancock did not show anything other than the "mere lack of accord" that *Cross* says is insufficient. Hancock's attorneys did not join in the request, and there was nothing before the court to suggest that the relationship had deteriorated to the point that Hancock and his attorneys were so at odds as to prevent presentation of an adequate defense. Furthermore, Hancock's testimony had indeed changed; but it was his own admissions that had changed. Throughout the course of the proceedings, and for the prior 16 years, Hancock had denied committing the 1999 offense. RP at 676-77. He denied it in his deposition taken under oath a month before the trial. RP at 683. After the prosecutor presented Hancock's deposition testimony, Hancock was called to the stand again, and this time he admitted that he committed the offense, and that he had lied about it all these years. RP at 676-85. Given this change in Hancock's position about his guilt of the 1999 offenses, his attorneys likely had to change strategy. Hancock cannot change his sworn testimony and then try to blame his attorney for the change. The court properly denied the motion.

b. The Court's Inquiry

The court evaluated the representation provided throughout the trial and determined that Hancock's attorneys had more than adequately

represented him. RP at 1421. When the court denied Hancock's request because it lacked specificity, Hancock acquiesced and said "OK" rather than providing specific details or explaining any conflict or breakdown in communication. RP at 1422. Neither of Hancock's attorneys joined in his request or said there was a communication problem, a conflict of interest or anything close. When on the final day of trial, he told the court he was unhappy with his attorneys, the trial court observed that the only thing Hancock was unhappy about was that he was still in court.[8] RP at 1421. Given that all that remained was closing argument, even if Hancock and his attorney's communication had been damaged it would not have affected the closing argument which lies soundly in the strategic decision of the attorney. "[T]he choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." 156 Wn.2d at 606. "Again, strategy decisions are for the attorney. ... Until and unless the disagreement about strategy actually compromises the attorney's ability to provide adequate representation, strategy differences do not violate any constitutional rights held by defendants." *Id.* at 611. Here there was no compromise of Hancock's attorney's ability to present an adequate closing argument. Hancock failed to provide a basis to support his request and the court correctly denied it.

[8] The previous day in court, Hancock told the court that he did not wish to remain for the closing argument on the final day. RP at 1412; 1414. The court refused to excuse him. RP at 1413; 1414-15.

c. Timeliness Of The Request.

And lastly, Hancock's request coming at the conclusion of the trial was untimely. Even if Hancock had made an adequate record of the reasons, any breakdown in communication between attorneys and client would have essentially been meaningless at that point in the trial. The testimony was complete and there was no further need to collaborate. All that remained was closing argument, which is within the sole purview of counsel. 156 Wn.2d at 606. The trial court did not abuse its discretion in denying the request after all the evidence had been presented in a lengthy trial.

Hancock argues that *U.S. v. Blackledge*, 751 F. 3d 188 (4th Cir. 2014) holds that the court must inquire into the dissatisfaction with counsel. *Blackledge* is inapposite because it involves repeated requests to withdraw made by counsel rather than the respondent, and based on a clear conflict of interest and communication breakdown. There, during the discovery stage of the proceedings before the trial began, Blackledge's attorney moved the court for permission to withdraw, citing an internal conflict. 751 F.3d at 190. The court denied the motion, which counsel re-raised after Blackledge filed a bar complaint against her. *Id.* The motion included specific allegations *from the attorney* that "an internal conflict had arisen and that she could 'no longer continue to ethically represent' Blackledge." *Id.* at 191. She further acknowledged that as a result of her

failing to file a timely motion requesting an expert witness, he no longer trusted her. *Id.* at 191-92. Because Blackledge had filed a bar complaint against her, she felt she had a conflict of interest in further representation. *Id.* at 192. After reviewing the cases pursuant to the federal standard of review for motions to substitute counsel,[9] the Fourth Circuit Court of Appeals reversed, finding that the court failed to inquire as to the extent of the breakdown asserted on the record by the attorney. "While motions to substitute counsel often arise at the defendant's urging, ***when the attorney also seeks to withdraw***, the court must thoroughly inquire into the factual basis of any conflicts asserted by counsel." 751 F.3d at 194.

Notwithstanding the *Blackledge* court's determination that the motion was untimely when it was filed *three weeks prior* to the trial beginning, the Court of Appeals ultimately determined that, because the attorney had missed a filing deadline that created the animosity between her and her client, the attorney "labored under a conflict of interest that caused her communications with Blackledge to be so broken that a

[9] In deciding whether a district court has abused its discretion in denying a motion to withdraw or to substitute counsel, we consider three factors: (1) timeliness of the motion; (2) adequacy of the court's inquiry; and (3) "whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense." 751 F.3d at 194 (citing *United States v. Gallop,* 838 F.2d 105, 108 (4th Cir. 1988) (internal citations omitted). If the court abused its discretion, the ruling is subject to harmless error review. *See United States v. Horton,* 693 F.3d 463, 467 (4th Cir. 2012). *Id.*

'fundamental step for adequate representation'—basic trial preparation—failed to occur." 751 F.3d at 197.

Here, Hancock's last minute request -- at the conclusion of his trial and without his attorneys' agreement -- was properly denied. He failed to articulate any basis for a conflict with his attorneys other than the fact that his testimony changed, yet his attorneys were bound by the fact that Hancock had perjured himself in his deposition and finally admitted his guilt in the 1999 offense when called to the stand by the prosecutor in the middle of the trial. Although the record is unclear, in all probability the change in his testimony required a change in strategy. His attorneys did not ask to be removed nor did they state there had been a breakdown in communication or a conflict. The court had observed several weeks of trial representation of Hancock, and found that the attorneys were working very hard on his behalf. When the request was denied because it lacked specificity, Hancock did not pursue it further. The request was properly denied.

F. The Prosecutor Did Not Commit Misconduct

Hancock raises for the first time on appeal a claim that the prosecutor argued "facts not in evidence" during her closing argument. Because he did not object to these comments at trial, he cannot make the requisite showing that the comments were so ill-intentioned and flagrant *and* that a curative instruction could not have cured any arising prejudice.

Moreover, the record supports the prosecutor's argument – Hancock can point to no other place in the record where he made this assertion previously. The prosecutor was well within the bounds of proper argument to draw inferences that the facts supported. His claims should be rejected.

G. Hancock Did Not Object To The Prosecutor's Argument

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.; State v. Ish,* 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal,* 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Where the defendant does not object to the comments at trial—as is the case here-- any claim of error is waived unless the misconduct was "so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *In re Det. of McGary*, 175 Wn. App. 328, 343, 306 P.3d 1005, 1013 *review denied*, 178 Wn. 2d 1020, 312 P.3d 651 (2013) (citing *State v. Emery,* 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012).

Hancock did not object at trial, and has failed to show any misconduct, much less misconduct that was "so flagrant and ill-intentioned that an instruction could not have cured the resulting

prejudice." *McGary* 175 Wn. App. at 343. In closing argument, the prosecutor correctly recited Hancock's criminal sexual history, including his own version of events that indicated he had persistent sexual contact with young girls every time he was free in the community. RP at 1432-33; 1438-39. Hancock did not object to her argument in general (see RP at 1422-1457), nor did he ever object to the specific comments he is challenging here. RP at 1446. Hancock makes an assertion that "a prosecutor commits misconduct by arguing facts not in evidence" citing to page 696 of the *Glasmann*[10] opinion. (Brf of App at 37). This citation does not exist and the rule of law Hancock claims the opinion stands for is not found anywhere in the opinion. *Glasmann* addresses *improper* argument about the guilt of a defendant in a criminal proceeding, as well as physical exhibits that were submitted to the jury that had either been altered or had not been admitted during the trial. 175 Wn. 2d at 705. The facts of *Glasmann* and the cases cited therein have no application to this case.

Here, none of the exhibits had been altered, they had all been properly admitted, and there was no objection to the jury reviewing them. Moreover, there was a factual basis for each argument the prosecutor made. Importantly, because he didn't object at trial, Hancock must establish that any alleged misconduct was flagrant and ill-intentioned *and* that an instruction would not have cured the prejudice. *Thorgerson,* 172

[10] *In re Glasmann*, 175 Wn. 2d 696, 286 P.3d 673 (2012).

Wn.2d at 443, 258 P.3d 43; *State v. Russell,* 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Hancock has failed to prove either prong and thus his argument fails.

1. The Closing Argument Was Proper And Is Supported By The Testimony

The prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Johnson,* 40 Wn. App. 371, 381, 699 P.2d 221 (1985). Where evidence contradicts a defendant's testimony, the prosecutor may argue that the defendant is lying. *State v. McKenzie*, 157 Wn.2d 44, 59, 134 P.3d 221, 229 (2006) citing *State v. Copeland,* 130 Wn.2d 244, 291–92, 922 P.2d 1304 (1996); *see also State v. Jefferson,* 11 Wn. App. 566, 524 P.2d 248 (1974) (finding no impropriety in prosecutor's use of word "liar" where evidence showed defendant was untruthful); *State v. Luoma,* 88 Wn.2d 28, 40, 558 P.2d 756 (1977) (finding that evidence supported prosecutor's comments in closing argument that defendant was a "liar"). A prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson,* 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

The prosecutor here presented a reasonable and persuasive argument that did not amount to misconduct. She pointed out that Hancock had never before made the statements he made at trial, as is permissible. (*See State v. McKenzie*, 157 Wn. 2d at 59.) During the course

of the trial, the prosecutor had presented significant portions of Hancock's deposition testimony, during which he acknowledged long-standing sexual deviancy and persistent problems with sexual offending whenever he was released back into the community. CP at 1113-1218; Exs. 61, 62, 63, 64 and Exhibit 65[11]; CP at 344-574. Hancock has not shown anywhere in the record where he claimed to have been offense free in the community for 11 years.

Hancock argues that the record does not support the prosecutor's remark. Beyond alleging that this statement is untrue, however, he points to nothing in the record to suggest that Hancock did, in fact, previously allege to have been offense free for 11 years. Moreover, Hancock's own testimony reveals that he had spent very limited time in the community without violating the conditions of his release. Hancock testified that he was initially released on parole in 1993, but was almost immediately violated on parole for having contact with a minor-aged female. CP at 815. He absconded to Oregon and was rearrested, and returned to custody for eight months. RP at 816-17. His parole was revoked again in December 1995. RP at 817. At that time he was caught living with a woman and her 13 year old daughter, and re-incarcerated for another nine months until September 1996. CP at 818-19. Hancock was then rearrested in April 1997 and held in custody until June 1998. CP at 819-20. According to his own

[11] The Kitsap County Appeals Clerk transmitted Exhibit 65 without assigning a Clerk's Papers reference number.

testimony then, he was in the community only a matter of months between 1988 and 1999. After reviewing Hancock's extensive file and interviewing Hancock himself, Dr. Packard testified that the longest stretch Hancock had spent in the community without offending since adolescence was 8 months. RP at 926-27. Dr. Packard, testified at length about the interview he conducted with Hancock, and Hancock had never claimed to be offense free in those interviews. RP at 727; 730-31; 735-36; 742-50. Hancock's expert, Dr. Fischer, who had interviewed Hancock and testified about the interview at trial, did not make any reference to Hancock stating he had been offense free for 11 years. (See RP at 1265-1271; 1281-1343.)

The prosecutor's comments about Hancock's new version of events were entirely based on his statements under oath and to the experts in the case. Hancock has failed to show any impermissible argument, let alone flagrant and ill-intentioned misconduct.

2. Hancock Has Failed To Show How The Prosecutor's Comments Could Have Affected The Verdict

To show prejudice, Hancock must show that there is a substantial likelihood that the prosecutor's statements affected the jury's verdict. *State v. Lindsay*, 180 Wn.2d 423, 440, 326 P.3d 125, 134 (2014) citing *State v. Emery,* 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Anderson,* 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). The jury heard extensive testimony about Hancock's repeated sexual assaults of young girls each

time he was released into the community, including his most recent offense that took place in 1999, after being repeatedly in trouble for such acts. He has failed to show how the prosecutor's comments – constituting about 10 words out of a lengthy closing argument capping a trial that took over two weeks- that he was newly asserting that he didn't harm any girls between 1988 and 1999, particularly when the evidence proved he was incarcerated the vast majority of that time, affected the outcome of the trial. What was likely most persuasive to the jury was the fact that Hancock had in fact re-offended in 1999, regardless of what he had done between 1988 and 1999.

3. The Record Shows That Hancock Told His Family About His Convictions, But Not The Details Of The Offenses

Hancock argues that the prosecutor committed misconduct when she argued that his family "didn't know his offense history." Brf. of App. at 13. As Hancock acknowledges elsewhere in his brief, he shared with his family the *fact* that he had been convicted, but not all the details of the offenses. Brf of App at 9. This is exactly what the prosecutor argued. Hancock has failed to show that the prosecutor's (correct) recitation of the facts was such ill-intentioned and flagrant misconduct, that had he objected at trial, a curative instruction would not have cured any resulting prejudice.

Hancock's mother, Frances Hancock, testified that she did not know any of the details of his offenses. RP at 1037. She didn't even know the number of offenses for which he was convicted until a few months before the trial. RP at 1036. Hancock didn't discuss his offenses with her; rather his attorney gave her the police reports shortly before trial. She does not think he committed his most recent offenses. RP at 1037-38. Hancock maintained until trial that he didn't commit the 1999 offense, and his mother didn't think he did it. RP at 1038. When he admitted in these proceedings for the first time that he did do it, Ms. Hancock still didn't believe it. RP at 1038-39. Hancock had never spoken with his mother about his triggers for re-offense, because she just didn't believe he would ever do it. RP at 1039.

His sister, Darla Braniff, also testified that she didn't know the details of his offenses, just the fact that he has been convicted. RP at 1044; 1049. A week before trial Hancock's attorney gave her some police reports but she didn't read them. RP at 1049. Ms. Braniff knew that he has been in jail several times. RP at 1050. For the past several years, Hancock has told her he did not commit the 1999 offense in Kitsap County, despite his recent admission that he had done it. RP at 1050. He never talked to her about risk factors, or triggers for re-offense. RP at 1050. She testified that she thinks it is ok for children to be around him as long as there are others around. RP at 1050-52. Hancock still hadn't talked to his sister

about why he was now admitting an offense that he had denied committing for 16 years, except to tell her he had "changed his plea." RP at 1052.

Even Hancock himself admits that he didn't go into the details of his offenses with his mother and sister. RP at 856. He has admitted to significantly more instances of abuse than his criminal history reflects. He has only shared the facts of the convictions with them, but not the details. RP at 856.

Additionally, the jury heard that Dr. Packard was concerned about the lack of information Hancock's family had been given. The fact that Hancock did not share the details of his offenses was concerning to Dr. Packard for several reasons. The details of his offense cycle and offending pattern would be important for them to know in order to recognize high risk situations. In Packard's opinion, they simply wouldn't know what to look for if he were at risk for re-offense. RP at 933. Hancock told Dr. Packard that his family, didn't want to address the historical problems. RP at 911-912. In Dr. Packard's opinion, the release plan was unrealistic: he was proposing to live with family and he just won't be around children. RP at 912. Dr. Packard was concerned because there are children in the family. RP at 924. Additionally, other children live in and near the area. There is a large park nearby and school bus stop across the street. RP at 925. Packard told the jury that he was concerned that Hancock's family

view him as little to no risk and don't believe he committed the most recent offense. RP at 924.

Because the evidence supported the prosecutor's argument, Hancock failed to make the required showing that the comments were misconduct at all, much less flagrant and ill-intentioned. Because it was not improper, no curative instruction was necessary, and he has failed to meet his burden to show misconduct, prejudice and that any misconduct could have been cured by a curative instruction. His claim should be denied.

4. The Prosecutor Correctly Pointed Out That Hancock Asserted He Was Subject To Conditions Of Supervision Without Any Proof

Hancock testified that he had been in touch with his Community Corrections Officer (CCO) who informed him he would be wearing an ankle bracelet upon release. RP at 1356. Hancock presented no other evidence of this requirement, nor any testimony from his CCO to support his assertion. He did not show any other place in the record where he made this claim, and his argument that the prosecutor committed misconduct fails.

The prosecutor mentioned briefly in closing that he had never mentioned this before. This was proper argument, and Hancock did not object. RP at 1446. Thus he has failed in his burden is to show the

comment was both flagrant misconduct and ill-intentioned, and a curative instruction could not have cured any resulting prejudice.

Given the enormous amount of evidence presented at trial that Hancock had given conflicting statements about all of his sexual offending, and that he had a lifetime of sexually abusing young children, despite being convicted repeatedly, it would be an impossible task to show that the prosecutor's brief comment that he had never before stated that he would be subject to an ankle bracelet could have affected the jury's verdict. He has thus failed to meet his burden, and his commitment should be affirmed.

IV. CONCLUSION

Hancock's arguments are without merit. For the foregoing reasons, the State requests that this Court affirm Hancock's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 13th day of October, 2015.

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NO. 47336-4

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: GEORGE EDWARD HANCOCK, JR., Appellant.	DECLARATION OF SERVICE

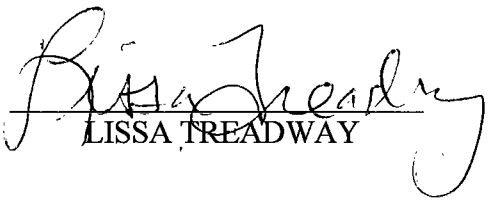
I, Lissa Treadway, declare as follows:

On October 13, 2015, pursuant to the Electronic Service Agreement between the parties, I served via electronic transmission a true and correct copy of the Respondent's Opening Brief and Declaration of Service addressed as follows:

Jodi Backlund
backlundmistry@gmail.com

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

DATED this 13th day of October, 2015, at Seattle, Washington.



LISSA TREADWAY

WASHINGTON STATE ATTORNEY GENERAL

October 13, 2015 - 11:58 AM

Transmittal Letter

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Case Name: Detention of George Hancock

Court of Appeals Case Number: 47336-4

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