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COA NO. 32762-1-III

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

IN RE DETENTION OF SCOTT HALVORSON:

STATE OF WASHINGTON,

Respondent,

v.

SCOTT HALVORSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Harold D. Clarke, III, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining To Assignments Of Error 2

B. STATEMENT OF THE CASE 3

1. Procedural Facts. 3

2. Trial Evidence. 3

C. ARGUMENT 8

1. EXPERT TESTIMONY THAT HALVORSON SUFFERED FROM A PERSONALITY DISORDER, ALCOHOL DEPENDENCE AND CANNABIS ABUSE WAS IRRELEVANT UNDER ER 401 AND INADMISSIBLE UNDER ER 403 8

a. Over defense objection, the court permitted the jury to hear expert testimony that Halvorson suffers from antisocial personality disorder, alcohol dependence and cannabis abuse 8

b. Where the State's expert opines that Halvorson suffers from a mental abnormality that makes him likely to commit acts of predatory sexual violence and the jury is accordingly instructed on mental abnormality as a means to find Halvorson meets the SVP definition, expert testimony that he suffers from other mental conditions is irrelevant and inadmissible under ER 403. 11

2. THE COURT VIOLATED HALVORSON'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE IN EXCLUDING EVIDENCE THAT AN IDENTIFIED VICTIM CONSENTED TO SEXUAL ASPHYXIATION ON A PREVIOUS OCCASION 16

TABLE OF CONTENTS

Page

a. The court denied Halvorson's motion to admit testimony that D.S. consented to sexual asphyxiation on another occasion 17

b. Due process and the standard of review 20

c. The evidence was admissible under ER 412, and the trial court violated Halvorson's right to present a complete defense in ruling otherwise 21

d. The State cannot prove the error was harmless beyond a reasonable doubt 28

3. THE COURT WRONGLY ADMITTED EXPERT TESTIMONY ON RISK ASSESSMENT UNDER THE FRYE STANDARD 30

a. Summary of the novel dynamic risk assessment known as the SRA-FV 31

b. The scientific evidence was inadmissible under Frye because the method employed by the State's expert to conduct the risk assessment has not achieved consensus in the relevant scientific community 33

c. The error is prejudicial because it impacted a material and disputed issue in the case. 48

4. CUMULATIVE ERROR VIOLATED HALVORSON'S DUE PROCESS RIGHT TO A FAIR TRIAL 49

D. CONCLUSION 50

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Anderson v. Akzo Nobel Coatings, Inc.,
172 Wn.2d 593, 260 P.3d 857 (2011) 33

In re Detention of Halgren,
156 Wn.2d 795, 132 P.3d 714 (2006) 12

In re Detention of Pettis,
__Wn. App.__ __P.3d__, 2015 WL 3533220
(slip op. filed June 4, 2015) 46, 47

In re Detention of Ritter,
177 Wn. App. 519, 312 P.3d 723 (2013),
review denied, 180 Wn.2d 1028 (2014) 31, 32, 44

In re Detention of Thorell,
149 Wn.2d 724, 72 P.3d 708, 720 (2003),
cert. denied,
541 U.S. 990, 124 S. Ct. 2015, 158 L. Ed. 2d 496 (2004) 20, 31, 49

In re Detention of Twining,
77 Wn. App. 882, 894 P.2d 1331 (1995),
overruled on other grounds,
In re Detention of Pouncy,
168 Wn.2d 382, 229 P.3d 678 (2010) 28

In re Welfare of Hansen,
24 Wn. App. 27, 599 P.2d 1304 (1979) 20

Lamborn v. Phillips Pac. Chem. Co.,
89 Wn.2d 701, 575 P.2d 215 (1978) 22

Ma'ele v. Arrington,
111 Wn. App. 557, 45 P.3d 557 (2002) 33

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

McClarty v. Totem Elec.,
119 Wn. App. 453, 81 P.3d 901 (2003),
rev'd on other grounds,
157 Wn.2d 214, 137 P.3d 844 (2006) 46, 47

State v. Britton,
27 Wn.2d 336, 178 P.2d 341 (1947) 15

State v. Coe,
101 Wn.2d 772, 684 P.2d 668 (1984) 50

State v. Copeland,
130 Wn.2d 244, 922 P.2d 1304 (1996) 34

State v. Darden,
145 Wn.2d 612, 41 P.3d 1189 (2002) 21, 27

State v. Davenport,
100 Wn.2d 757, 675 P.2d 1213 (1984) 49

State v. Gore,
143 Wn.2d 288, 21 P.3d 262 (2001) 34

State v. Gregory,
158 Wn.2d 759, 147 P.3d 1201 (2006),
overruled on other grounds,
State v. W.R.,
181 Wn.2d 757, 336 P.3d 1134 (2014) 23-25

State v. Guloy,
104 Wn.2d 412, 705 P.2d 1182 (1985),
cert. denied,
475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986) 28

State v. Hudlow,
99 Wn.2d 1, 659 P.2d 514 (1983) 21, 23, 27

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Iniguez,
167 Wn.2d 273, 217 P.3d 768 (2009) 21

State v. Jones,
168 Wn.2d 713, 230 P.3d 576 (2010) 21, 23, 28

State v. Larry,
108 Wn. App. 894, 34 P.3d 241 (2001) 11

State v. Morley,
46 Wn. App. 156, 730 P.2d 687 (1986) 23, 27

State v. Neal,
144 Wn.2d 600, 30 P.3d 1255 (2001) 16, 48

State v. Oswalt,
62 Wn.2d 118, 381 P.2d 617 (1963) 15

State v. Reed,
101 Wn. App. 704, 6 P.3d 43 (2000) 22

State v. Riker,
123 Wn.2d 351, 869 P.2d 43 (1994) 34

State v. Russell,
125 Wn.2d 24, 882 P.2d 747 (1994) 43

State v. Schmitt,
124 Wn. App. 662, 102 P.3d 856 (2004). 46

State v. Simmons,
117 Wn. App. 682, 73 P.3d 380 (2003),
aff'd, 152 Wn.2d 450, 98 P.3d 789 (2004) 47

State v. Sipin,
130 Wn. App. 403, 123 P.3d 862 (2005) 46, 48

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997) 21

State v. Williams,
104 Wn. App. 516, 17 P.3d 648 (2001) 11

State v. Wittenbarger,
124 Wn.2d 467, 880 P.2d 517 (1994) 20

FEDERAL CASES

Crane v. Kentucky,
476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) 28

Foucha v. Louisiana,
504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) 20

Frye v. United States,
54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923) ....
.... 1, 3, 30, 31, 33, 34, 43, 46-48, 50

In re Murchison,
349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955) 20

Parle v. Runnels,
505 F.3d 922 (9th Cir. 2007) 50

Washington v. Texas,
388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) 21

OTHER STATE CASES

Welch v. State,
2 P.3d 356 (Okla.),
cert. denied,
531 U.S. 1056, 121 S. Ct. 665, 148 L. Ed. 2d 567 (2000) .... .30

TABLE OF AUTHORITIES

Page

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ER 401 .... 2, 9, 12, 22, 23

ER 402 .... 9, 12

ER 403 .... 2, 8, 9, 13, 15

ER 412 .... 1, 2, 16, 17, 22

ER 412(c) 22

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Page

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RCW 9A.44.020 22

RCW 71.09.020(8)........ 12

RCW 71.09.020(9)........ 12

RCW 71.09.020(18)........ 12

RCW 71.09.060(1)........ 1

U.S. Const. amend. XIV 1, 20, 21, 27, 49

Wash. Const. art. 1, § 3........ 49

A. ASSIGNMENTS OF ERROR

1. The court erred in permitting the State's expert witness to testify about appellant's diagnoses for antisocial personality disorder, alcohol dependence and cannabis abuse.

2. The court erred in excluding testimony about an identified victim's prior sexual behavior under ER 412, in violation of appellant's due process right to present a complete defense under the Fourteenth Amendment to the United States Constitution.

3. The court erred in admitting evidence of the Structured Risk Assessment - Forensic Version (SRA-FV) under the Frye[1] standard.

4. The court erred in entering the following findings of fact and conclusions of law pertaining to the Frye hearing:

a. "The SRA-FV is generally accepted within the community of experts who evaluate sex offenders and assess their recidvsim risk." CP 1434 (FF 15).

b. "The use of a split sample for validation of a risk assessment instrument is supported by a scientific theory that is generally accepted in the relevant scientific community." CP 1435 (CL 5).

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[1] Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

c. "The SRA-FV is an instrument that is capable of producing reliable results and is generally accepted in the scientific community." CP 1435 (CL 6).

d. "The SRA-FV satisfies the Frye evidentiary standard." CP 1435 (CL 8).

5. Cumulative error deprived appellant of his due process right to a fair trial.

Issues Pertaining to Assignments Of Error

1. Where the State's expert did not rely on the personality disorder, alcohol dependence or cannabis abuse diagnoses as the mental abnormality that made appellant likely to reoffend and the trial court instructed the jury solely on mental abnormality as the basis to commit, whether the trial court erred in permitting the jury to consider evidence of these diagnoses because they were irrelevant under ER 401 and unduly prejudicial under ER 403?

2. Where the question of whether appellant currently suffered from a nonconsent paraphilia was a central issue at trial, did the court violate ER 412 and appellant's constitutional right to present a complete defense in excluding evidence that an identified victim had previously consented to sexual asphyxiation with another man?

3. Whether the court committed reversible error in failing to exclude expert testimony on the SRA-FV because the State did not show the evidence being offered was based on an established methodology generally accepted in the scientific community under the Frye standard?

B. STATEMENT OF THE CASE

1. Procedural Facts

In 2012, the State filed a petition seeking Scott Halvorson's civil commitment under chapter 71.09 RCW. CP 1-50. The jury found Halvorson met the definition of a sexually violent predator (SVP). CP 1418. The court ordered his indefinite commitment. CP 1428. Halvorson appeals. CP 1429-31.

2. Trial Evidence

Dr. Judd, testifying for the State, diagnosed Halvorson[2] with paraphilia, NOS - nonconsent (other specified paraphilic disorder - rape), pedophilia, antisocial personality disorder, alcohol dependence and cannabis abuse. RP[3] 653-55, 669-70, 673-74, 715-16, 729. Judd opined Halvorson has mental abnormalities in the form of paraphilia and pedophilia that make him more likely than not to commit predatory acts of

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[2] Halvorson currently goes by the name of Raymond Scott Reynolds and was referred to by that name during trial testimony. RP 355-56.

[3] The verbatim report of proceedings is referenced as follows: RP - seven consecutively paginated volumes consisting of 7/24/14, 8/18/14, 8/19/14, 8/20/14, 8/21/14, 8/25/14, 8/26/14, 8/27/14.

sexual violence. RP 711, 747. As set forth below, Judd relied on a number of past events in reaching his opinion. RP 651, 655, 657-58, 660-61, 671-72, 714-16.

Halvorson had sexual contact with his two younger sisters as a juvenile. RP 576, 579-82, 611-18.[4] In 1980, Halvorson pled guilty to first degree criminal trespass based on an event in which he went into the house of 16-year-old C.O. and started cutting off her underpants while she slept in the middle of the night. RP 451-53, 455-59, 470.[5] 26 years before the commitment trial, Halvorson pled guilty to indecent liberties against four-year-old E.M. based on an event that occurred in 1987. Ex. 2, 3.[6] Halvorson also pled guilty to first degree rape against 10-year-old D.H., based on an event that occurred pending sentencing on the indecent liberties conviction. Ex. 6, 29; RP 361, 366-67, 731-35, 781-82.[7] Twenty

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[4] Halvorson admitted sexual contact occurred. RP 384, 441-48.

[5] Halvorson testified he was drunk at the time. RP 456-57, 471. C.O. was his former girlfriend. RP 451, 453-54. He decided to take her underpants to show guys that had been teasing him that he had a girlfriend and was having sex. RP 457-58, 463. He ran off when C.O. woke up. RP 459. He maintained there was no sexual intent involved. RP 542.

[6] At the commitment trial, Halvorson denied committing any offense against E.M. RP 367, 370-74, 383, 417, 541-42. He explained he followed his attorney's advice in entering the plea and that he pled guilty because he was afraid of a long prison term in Walla Walla where he could be attacked. RP 376-77, 381-82.

[7] Halvorson testified that he did not remember anything involving the event involving D.H. due to an alcoholic blackout. RP 389, 392-94, 411. He pled guilty because he believed he was responsible for the crime, he

years later, in 2008, a jury convicted Halvorson of third degree rape and second degree assault against D.S. based on an event that occurred in 2007.[8] Ex. 11; RP 661, 734.[9]

Dr. Judd reviewed records that he interpreted as Halvorson's admissions that he had a sexual deviancy. RP 661-65. Halvorson denied having a sexual deviancy when interviewed by Judd. RP 665-66.

While Dr. Judd opined Halvorson has mental abnormalities in the form of paraphilia and pedophilia that make him more likely than not to commit predatory acts of sexual violence (RP 711, 747), Judd did not believe an antisocial personality disorder predisposes someone to engage in a sexually violent offense. RP 680, 746-47, 752-53. But the interaction between mental abnormality and the personality disorder increased the probability that someone is likely to reoffend insofar as the personality disorder implicates lack of remorse, empathy and concern about the impact on one's behavior on others. RP 680-81, 746-47.

Dr. Judd evaluated Halvorson's risk of reoffense using several risk assessment instruments: the Structured Risk Assessment - Forensic

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had a serious problem that needed to be addressed, and he did not want the girl to be victimized further by dragging her into court. RP 395-97.

[8] The Court of Appeals reversed the jury's special verdict finding that the assault occurred with sexual motivation due to an instructional error. See State v. Halvorson, 152 Wn. App. 1048, 2009 WL 3380973 (2009).

[9] Halvorson maintained the sex was consensual and that D.S. asked to be choked during intercourse. RP 499-502.

Version (SRA-FV), the Static-99R, the VRAG-R, and its predecessor the SORAG. RP 681-82. Using a Static-99R score of 6, 31 percent group of offenders in the reference sample that scored similar to Halvorson reoffended in five years and a 42 percent reoffended in 10 years. RP 700. Those with a score of 6 recidivate at 2.9 times the rate as the average score of 2. RP 701. On the SORAG, 75 percent of those with a score similar to Halvorson reoffended within seven years and 99 percent reoffended within 10 years. RP 708. On the VRAG-R, 60 percent reoffended within five years and 82 percent reoffended within 15 years.[10] RP 708.

Halvorson's score on the SRA-FV placed him in the high-risk group in the Satic-99R. RP 696-99. Dr. Judd "used the SRA-FV to look at the density or needs that he has, which are relatively high, and I felt that this was indicative of a higher level risk for violent recidivism, sexually violent recidivism, than what was indicated by the Static-99R." RP 709. Given that the risk assessment instruments had comparatively "discordant findings," Judd used his clinical judgment to arrive at his opinion that Halvorson was at high risk to reoffend. RP 766-67, 822-23.

Dr. Donaldson, a clinical psychologist specializing in forensic psychology, testified on behalf of Halvorson. RP 835. Donaldson opined

[10] The VRAG-R and its predecessor, the SORAG, broadly measure risk of violent reoffense, not limited to violent sex offenses. RP 706-07.

there was insufficient evidence to conclude Halvorson currently suffered from a mental abnormality. RP 842-43, 861. According to Donaldson, there is almost no science to support such a finding. RP 870. Paraphilia diagnoses have poor reliability. RP 845, 854-55. The paraphilia - non-consent diagnosis is not scientifically credible and was "basically contrived in order to somehow shoehorn rapists into a mental illness." RP 848-49. The pedophilia diagnosis, meanwhile, lacks empirical evidence to back it up because those diagnosed with pedophilia recidivate at the same rate as simple child molesters. RP 846, 898. Halvorson had not shown symptoms of pedophilia for many years. RP 893. Antisocial personality disorder diagnoses have poor reliability. RP 862.

Donaldson further testified there was insufficient evidence to show Halvorson had serious difficulty controlling sexually violent behavior. RP 853. There is no way to accurately predict an individual's risk of sexual reoffense. RP 856, 859. The prediction instruments that do exist say nothing about the risk of an individual. RP 859. This is a structural problem with the science. RP 869-70, 874.[11]

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[11] Halvorson presented other evidence in his defense. Halvorson had a current girlfriend and the two were planning to live together. RP 971-73, 992-93. A pastor in the community had a relationship with Halvorson and was willing to provide spiritual guidance to him. RP 961-64. Halvorson would be on community custody for up to three years if released. RP 994-96.

C. ARGUMENT

1. EXPERT TESTIMONY THAT HALVORSON SUFFERED FROM A PERSONALITY DISORDER, ALCOHOL DEPENDENCE AND CANNABIS ABUSE WAS IRRELEVANT UNDER ER 401 AND INADMISSIBLE UNDER ER 403.

The "to commit" instruction required the State to prove Halvorson suffers from a mental abnormality and that this mental abnormality makes him more likely than not to commit predatory acts of sexual violence. Testimony about Halvorson's personality disorder, alcohol dependence and cannabis abuse diagnoses were not relevant because the jury was not instructed on personality disorder as means to commit Halvorson, and the other two diagnoses were not relied on by the State's expert as mental abnormalities. In light of the "to commit" instruction, such testimony was misleading and confusing under ER 403. The trial court thus erred in allowing the jury to consider expert testimony that Halvorson suffered from antisocial personality disorder, alcohol dependence and cannabis abuse.

a. Over defense objection, the court permitted the jury to hear expert testimony that Halvorson suffers from antisocial personality disorder, alcohol dependence and cannabis abuse.

Before trial, Halvorson's counsel moved to exclude reference to Dr. Judd's diagnoses of antisocial personality disorder, alcohol dependence and cannabis abuse. CP 1216-20; RP 231-32. Counsel argued that Dr. Judd

relied only on the paraphilia and pedophilia diagnoses in opining that Halvorson had a mental abnormality that made him likely to reoffend. CP 1219-20. Dr. Judd did not rely on the antisocial personality disorder, alcohol dependence and cannabis abuse diagnoses as the basis for his opinion that Halvorson met the commitment criteria. CP 1220. Dr. Judd did not identify the antisocial personality disorder, alcohol dependence and cannabis abuse conditions predisposed Halvorson to commit acts of sexual violence. CP 1220. Counsel thus argued evidence of such diagnoses was irrelevant under ER 401/402 and would likely confuse and mislead the jury under ER 403. CP 1220.

With regard to the antisocial personality disorder diagnosis, the State argued such evidence was proper because the jury would be instructed on whether Halvorson's mental abnormality or personality disorder made him likely to reoffend. RP 234. According to the State, the personality disorder evidence should be admitted because Dr. Judd's testimony would be that the personality disorder interacts with Halvorson's "pedophilic issues in a way that dramatically heightens his risk." RP 234. With regard to the alcohol dependence and cannabis abuse diagnoses, the State argued such evidence was admissible because history showed alcohol was involved in prior offenses and his drinking impacted his risk of reoffense. RP 232-33.

The trial court ruled the personality disorder, alcohol dependence and cannabis abuse diagnoses were "appropriate" and that the prejudice from the latter two diagnoses did not outweigh their relevance. RP 312-13.

During trial, Dr. Judd focused on the paraphilia and pedophilia as the mental abnormalities that make Halvorson more likely than not to commit predatory acts of sexual violence. RP 747. Judd did not include the antisocial personality disorder, alcohol dependence or cannabis abuse as part of the mental abnormality. RP 653-54, 716-17, 746-47. Judd opined the antisocial personality disorder did not have the "kind of specificity to crimes of predatory acts of sexual violence." RP 752-53. Judd considered the antisocial personality disorder to be a factor increasing the risk of reoffense, but did not believe it predisposed someone to engage in a sexually violent offense. RP 680, 746-47, 752-53. The alcohol dependence and cannabis abuse diagnoses did not factor into Judd's risk assessment. RP 716-17.

Based on Dr. Judd's testimony, Halvorson's counsel later objected to inclusion of "personality disorder" in the State's proposed "to commit" instruction. RP 937-38. The State initially disagreed, contending the jury could disregard Dr. Judd's testimony and rely on the presence of a personality disorder as the basis to commit. RP 938-40. The court wondered whether the evidence supported inclusion of personality disorder in the instruction. RP 940-41. The State agreed to remove reference to

personality disorder in the "to commit" instruction as "a more conservative approach." RP 944. The "to commit" instruction given to the jury therefore only referenced mental abnormality, not personality disorder. CP 1397. The terms "mental abnormality" and "personality disorder" were defined for the jury in separate instructions. CP 1398, 1399.

b. Where the State's expert opines that Halvorson suffers from a mental abnormality that makes him likely to commit acts of predatory sexual violence and the jury is accordingly instructed on mental abnormality as a means to find Halvorson meets the SVP definition, expert testimony that he suffers from other mental conditions is irrelevant and inadmissible under ER 403.

Trial court decisions regarding admission of evidence are reviewed for abuse of discretion. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). A trial court abuses its discretion if its decision is based on untenable grounds or made for untenable reasons. State v. Williams, 104 Wn. App. 516, 521, 17 P.3d 648 (2001).

To understand why the trial court abused its discretion in admitting expert testimony on the diagnoses at issue, an overview of the relevant law is helpful. Chapter 71.09 RCW authorizes the commitment of those found to meet the SVP definition. RCW 71.09.060(1). An SVP is "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which

makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

"Mental abnormality" and "personality disorder" are alternative means for making the SVP determination. In re Detention of Halgren, 156 Wn.2d 795, 810, 132 P.3d 714 (2006). Each has its own particular statutory definition.[12] The jury, however, was not instructed that it could commit Halvorson on the basis of a personality disorder. Instead, the "to commit" instruction was limited to the mental abnormality means. CP 1397.

The "to commit" instruction impacts what evidence is relevant and what is irrelevant. Relevant evidence is "evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Irrelevant evidence is inadmissible. ER 402. Further, relevant evidence "may be excluded if its probative value is substantially

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[12] "Mental abnormality" means "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). "Personality disorder" means "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment." RCW 71.09.020(9).

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" ER 403.

The jury was not instructed on the personality disorder means for proving Halvorson met the SVP definition because the State's expert, Dr. Judd, did not opine that Halvorson's personality disorder makes him likely to commit predatory acts of sexual violence. Based on the way the jury was instructed, it could not consider the personality disorder as contributing to risk of reoffense. Evidence of Halvorson's personality disorder was irrelevant to the mental abnormality-focused question the jury had to answer in order to find Halvorson met the statutory criteria for commitment. It was therefore improper to allow Dr. Judd to testify that Halvorson suffered from a personality disorder and that this disorder contributed to his risk of reoffense. Dr. Judd testified the personality disorder interacted with the mental abnormality and thereby contributed to the risk of reoffense. RP 680-81, 746-47. But that testimony was irrelevant because the jury was only authorized to consider whether a mental abnormality made Halvorson more likely than not to commit predatory acts of sexual violence, not whether the personality disorder did, even as a contributing factor.

Expert testimony on the personality disorder was also misleading, confusing and unfairly prejudicial under ER 403 because its presence invited the jury to rely on the personality disorder as a basis to commit Halvorson.

The "to commit" instruction limited the State to the mental abnormality means of proving Halvorson met the commitment criteria, but Dr. Judd relied on the personality disorder to boost his risk assessment. RP 680-81, 746-47. Consistent with Dr. Judd's testimony, the State argued to the jury that the personality disorder folded into the risk of reoffense. RP 1068-69.

Testimony on the personality disorder was inadmissible under ER 403 because it was presented to the jury as something to consider in reaching its verdict while the "to commit" instruction did not authorize the jury to consider evidence of a personality disorder in deciding whether the State had proven its case. The prejudicial effect of the personality disorder evidence outweighed its probative value because, under the "to commit" instruction, such evidence was irrelevant and had no probative value. But the State used this evidence to Halvorson's disadvantage in pointing to the personality disorder as contributing to the risk of reoffense. The trial court therefore erred in permitting the State to rely on personality disorder evidence to meet its burden that Halvorson suffered from a mental abnormality that made him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

Based on Judd's pre-trial evaluation, it was known at the time of the court's ruling that Judd would be relying on the mental abnormality, not personality disorder, as the condition that made Halvorson more likely than

not to commit predatory acts of sexual violence. CP 1265, 1267. Defense counsel pointed this out. CP 1219-20. The court admitted the personality disorder evidence anyway. There was no tenable basis to admit the evidence based on Dr. Judd's opinion in relation to application of the law to the facts of the case.

The alcohol dependence and cannabis abuse diagnoses were also irrelevant. Dr. Judd did not treat either condition as a mental abnormality. Furthermore, the alcohol dependence and cannabis abuse diagnoses did not factor into Judd's risk assessment. RP 716-17. The diagnoses were irrelevant under the "to commit" instruction, which only posited a mental abnormality as a basis to find Halvorson met the SVP definition. The trial court recognized these diagnoses carried some prejudicial effect. RP 312-13. These diagnoses were necessarily unfairly prejudicial under ER 403 because they possessed no relevance.

This error was not harmless. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). An evidentiary error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected

had the error not occurred. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

Because the trial court allowed the jury to consider both relevant and irrelevant evidence to determine whether the State proved Halvorson met the commitment criteria, it is impossible to say whether the jury relied only on relevant evidence in reaching its verdict. The court instructed the jury on the definition of personality disorder, thus signaling to the jury that consideration of such evidence was appropriate. And the jury was instructed to consider all the evidence before it, including Dr. Judd's testimony regarding the personality disorder, in reaching a verdict. CP 1392 (Instruction 1) ("In deciding this case, you must consider all of the evidence that I have admitted"). There is a reasonable probability that the jury took the improper expert testimony on the personality disorder and other diagnoses into account in reaching its verdict. Reversal is therefore required.

2. THE COURT VIOLATED HALVORSON'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE IN EXCLUDING EVIDENCE THAT AN IDENTIFIED VICTIM CONSENTED TO SEXUAL ASPHYXIATION ON A PREVIOUS OCCASION.

The trial court did not allow evidence that D.S. consented to being choked while having sex on a previous occasion. In so doing, the court violated ER 412 and Halvorson's due process right to present a complete defense. This evidence was relevant because the defense theory was that

D.S. consented to being choked. The proffered testimony bolstered Halvorson's account of the event, the credibility of which was otherwise shaky standing alone. The court's ruling prejudiced Halvorson's right to have the jury consider all relevant evidence in determining whether he met the commitment criteria. It circumscribed his ability to argue Dr. Judd's opinion was based on an inaccurate understanding of Halvorson's interaction with D.S. Reversal is required because the State cannot show this error was harmless beyond a reasonable doubt.

a. The court denied Halvorson's motion to admit testimony that D.S. consented to sexual asphyxiation on another occasion.

Before trial, Halvorson's counsel moved under ER 412 to admit evidence that D.S. (1) had a nickname connoting promiscuity; (2) she was observed exchanging sex for money with another man at a bar called The Flame; and (3) she was observed requesting another man to cut off her air supply during sexual intercourse in 2006. RP 268-79, 294-97; CP 1622-49.

The offer of proof for the third piece of evidence came from deposition testimony provided by Ms. Anstine, who knew D.S. for many years. CP 1627-32. Anstine knew D.S. engaged in prostitution activities, including at The Flame. CP 1628-29. She observed D.S. engage in a particular act of prostitution at a hotel in which D.S. asked the customer to choke her. CP 1629-32. Anstine could not specify the year this incident

occurred, but said it was shortly before the hotel they were in on Sprague Avenue closed and was replaced by a woman's shelter. CP 1630. Based on Anstine's description, counsel was able to ascertain that she was referring to the Budget Saver Motel and Maple Tree Motel, which closed as a corporation on October 31, 2006 according to the Washington State Department of Revenue. CP 1630-31. The Union Gospel Mission opened its crisis shelter for women at the same location in 2007. CP 1631. From this, it could be determined that the specific activity described by Anstine took place mid to late 2006 — less than a year before D.S.'s April 2007 incident with Halvorson. CP 1631.

Counsel argued D.S.'s prior act of consent to sexual asphyxiation was important to the defense because Dr. Judd relied on the assault/rape conviction involving D.S. as a basis to opine Halvorson current suffered from paraphilia - nonconsent. CP 1644. The proffered evidence supported Halvorson's expected testimony that the sex between Halvorson and D.S. was consensual, which provided a basis to argue Halvorson had actually lived in the community for a decade without exhibiting signs or symptoms of the alleged mental abnormality. CP 1644-45. Conversely, independent evidence that D.S. had previously consented to sexual asphyxiation could be used to undermine Dr. Judd's opinion that Halvorson currently suffered from a dangerous mental abnormality. CP 1647-48.

The State argued each piece of evidence was irrelevant or otherwise inadmissible under the rules of evidence. CP 1618-1621; RP 279-93.

The court excluded evidence of the prior consensual asphyxiation incident. RP 314-15. It described the event as "somewhat remote" and "kind of speculative." RP 314-15. The court was not impressed with the testimony as being "specifically relevant to the question of the underlying motivation for the sex, which was a trade for drugs, allegedly." RP 315. Evidence that D.S. traded sex for money on a specific occasion was admitted; the nickname was not. RP 313-15.

Halvorson gave his version of the event at the commitment trial. He testified that he knew D.S. from previous encounters, including one at The Flame. RP 471-80, 484-86. On the night in question, D.S. agreed to have sex with Halvorson in exchange for $40 to buy cocaine.[13] RP 497. They had consensual sex. RP 499-500. During the course of that sexual encounter, D.S. asked him to softly choke her so that she could "get off." RP 500. Halvorson agreed. RP 500-01. He "softly" cut off her air supply while having sex with her. RP 501. At some point, her head bobbed up and down and she started making odd gurgling noises. RP 501. He asked if she was okay and she told him she was. RP 501. But Halvorson felt

[13] A friend of Halvorson's mother testified that she knew D.S. for over 30 years and that, on the night of April 20, 2007, she observed D.S. at The Flame exchange sex for $20. RP 977-79.

uncomfortable with continuing the asphyxiation and stopped. RP 501-02. After taking a break, they finished intercourse. RP 502. Halvorson denied raping D.S. but acknowledged he caused the petechial hemorrhages as a result of the choking. RP 470, 541.

b. Due process and the standard of review.

Involuntary commitment under chapter 71.09 RCW is a significant deprivation of liberty triggering due process protection under the Fourteenth Amendment of the United States Constitution. In re Detention of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003) (citing Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)), cert. denied, 541 U.S. 990, 124 S. Ct. 2015, 158 L. Ed. 2d 496 (2004). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

Notions of fundamental fairness require the accused be given "a meaningful opportunity to present a complete defense." State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); see also In re Welfare of Hansen, 24 Wn. App. 27, 36, 599 P.2d 1304 (1979) (due process principles require party be given a full and meaningful opportunity to present evidence). "[T]he right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies" is a fundamental element of due process as protected by the

Fourteenth Amendment. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Evidentiary decisions are generally reviewed for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). For example, the admissibility of evidence under the rape shield statute "is within the sound discretion of the trial court." State v. Hudlow, 99 Wn.2d 1, 17, 659 P.2d 514 (1983). But whether a constitutional right has been violated is a question of law reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). Whether a trial court's ruling excluding evidence of past sexual behavior violates the constitutional right to present a defense is therefore subject to de novo review. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

c. The evidence was admissible under ER 412, and the trial court violated Halvorson's right to present a complete defense in ruling otherwise.

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If relevant, the burden is on the State to show a compelling interest to exclude it, which requires that the evidence be so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Darden, 145 Wn.2d at 621; Hudlow, 99 Wn.2d at 15-16. Even so, "[e]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a

compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, are relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978).

Under ER 412(c), "evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."

No published case addresses the admissibility of evidence under ER 412. RCW 9A.44.020, the rape shield statute applicable in criminal cases, covers the same subject matter. Cases applying the rape shield statute provide guidance because consent is at issue in Halvorson's case, while both ER 412 and the statute are concerned with balancing the probative value of the evidence against undue prejudice.

The rape shield relevancy inquiry is whether, under ER 401, "the [victim's] consent to sexual activity in the past, without more, makes it more probable or less probable that [he or] she consented to sexual activity

on this occasion." Hudlow, 99 Wn.2d at 10. "Factual similarities between prior consensual sex acts and the questioned sex acts claimed by the defendant to be consensual would cause the evidence to meet the minimal relevancy test of ER 401." Id. at 11. Factual similarities must be particularized. State v. Gregory, 158 Wn.2d 759, 785, 147 P.3d 1201 (2006), overruled on other grounds, State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014). "Evidence of past sexual conduct, such as meeting men in bars before consenting to sex or other distinctive sexual patterns, could be relevant if it demonstrates 'enough similarity between the past consensual sexual activity and defendant's claim of consent.'" Jones, 168 Wn.2d at 723 (quoting Hudlow, 99 Wn.2d at 11). Other factual situations in which past sexual conduct may be relevant include "distinctive sexual patterns so closely resembling defendant's version of the alleged encounter as to tend to prove consent on the questioned occasion." Hudlow, 99 Wn.2d at 11.[14]

Halvorson should have been allowed to present evidence of D.S.'s previous consent to erotic asphyxiation to support his argument that D.S. consented to sex with him. There is a particularized factual similarity

[14] See also Gregory, 158 Wn.2d at 785 (citing the following from State v. Morley, 46 Wn. App. 156, 159, 730 P.2d 687 (1986) as an example of a prior incident with sufficient similarity: shortly before the incident with the defendant, the victim offered the witness sex in exchange for $40 in circumstances very similar to the defendant's version of events).

between Halvorson's interaction with D.S. and her interaction with the other man: sexual asphyxiation. Being choked to derive sexual pleasure is an unusual phenomenon. Its distinctiveness provides enough similarity between D.S.'s past consensual sexual activity and Halvorson's claim of consent to make it relevant. Evidence that D.S. engaged in erotic asphyxiation on another occasion with another man made it more likely that she consented to sex and being choked by Halvorson.

Halvorson's case stands in contrast to Gregory. In a prosecution for a 1998 rape, Gregory's defense was that the alleged victim. R.S. consented to sexual intercourse in exchange for money. Gregory, 158 Wn.2d at 780-81. Gregory sought to present evidence of R.S.'s prior prostitution activities to support the defense theory of consent. Id. The trial court concluded R.S.'s prior convictions for prostitution and sexual misconduct were too remote in time and too different in character to be relevant and nothing suggested that R.S. was prostituting herself in 1998. Id. at 785-86. R.S. worked for an escort service in 1996 and early 1997, but such activity was not factually similar to Gregory's account of the incident in question. Id. at 786. R.S. denied streetwalking after 1995. Id. The Supreme Court concluded the trial court did not abuse its discretion in excluding R.S.'s prior prostitution/sexual misconduct convictions where at

least two years separate the prior streetwalking conduct and the incident in question. Id.

Unlike the conduct at issue in Gregory, the sexual asphyxiation conduct is singular evidence of a distinctive sexual pattern. Evidence that D.S. exchanged sex for money with Halvorson and Anstine's observation that D.S. exchanged sex for money with another man and asked to be choked as part of that encounter increase the distinctive similarity between the two events.

The trial court nonetheless did not view the event as "specifically relevant to the question of the underlying motivation for the sex, which was a trade for drugs, allegedly." RP 315. The court took an unduly constricted view of relevancy. As argued by defense counsel, the relevancy was that it supported Halvorson's position that D.S. consented to the sex, even the choking. CP 1643-44. That is the crucial point.

The trial court described the prior asphyxiation as "somewhat remote" and "kind of speculative." RP 314-15. The court did not say why it was speculative. The proffered evidence was based on deposition testimony. A witness's personal knowledge is not speculative. Further, the prior occasion was not so remote as to render it irrelevant. The prior occasion occurred less than a year before her encounter with Halvorson — a lesser span of time than the two or three years at issue in Gregory. Although

Anstine could not specify the year herself, the time period at issue could be fairly pinpointed based on her description of the closing of the hotel and its replacement by the women's shelter on Sprague, in conjunction with state records of when that occurred. CP 1630-31.

Dr. Judd's understanding of the event was that Halvorson violently choked D.S. while raping her. RP 734. Judd relied on this incident in support of his opinion that Halvorson suffered from a mental abnormality (paraphilia - nonconsent) that made him likely to reoffend. Id. This incident, which occurred in 2007, was the last and by far the most recent sexual offense relied on by Judd in forming his opinion. The others were much more remote, having occurred many years earlier.

To rebut Judd's opinion, the defense needed every weapon at its disposal. Evidence that D.S. consented to sexual asphyxiation on a prior occasion was an important part of the defense theory. The excluded evidence was probative of the defense theory that D.S. actually consented to the sex and the choking and therefore Halvorson did not commit an act of sexual violence against her. In turn, such evidence subverted a key factual basis for Dr. Judd's opinion that Halvorson suffered from the paraphilia. Such evidence supported Halvorson's theory of the case and, if believed, provided an evidentiary basis to undermine the State's theory.

Finding no relevancy at all, the trial court did not find the prejudice outweighed probative value. But even if it had, such a ruling would have been error. The burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Darden, 145 Wn.2d at 612; Hudlow, 99 Wn.2d at 15-16. "The prejudice focused on is to the factfinding process itself, *i.e.,* whether the introduction of evidence of the victim's past sexual history may confuse the issues, mislead the jury, or cause the case to be decided on an improper or emotional basis." Morley, 46 Wn. App. at 159.

Here, the trial court admitted evidence that D.S. had exchanged sex for money on another occasion, thus implicitly determining that such evidence was not unduly prejudicial to the fact-finding process. RP 314. Adding evidence that D.S. consented to sexual asphyxiation on another occasion does not add any appreciable prejudice to the balance. The jury was already going to hear evidence of past sexual behavior that would place D.S. in an unflattering light.

Neither the State nor the trial court identified a compelling interest to exclude the evidence. The court violated Halvorson's due process right to present a complete defense in excluding this evidence. U.S. Const. amend. XIV.

d. The State cannot prove the error was harmless beyond a reasonable doubt.

The denial of the right to present a complete defense is constitutional error. Jones, 168 Wn.2d at 724; Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

The State cannot overcome the presumption of prejudice here. Expert psychiatric or psychological testimony is central to the ultimate question of whether Halvorson suffers from a mental abnormality that makes him likely to engage in predatory acts of sexual violence. In re Detention of Twining, 77 Wn. App. 882, 890, 894 P.2d 1331 (1995), overruled on other grounds, In re Detention of Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010). This was a case involving dueling experts. Both sides presented expert testimony on whether Halvorson possesses a mental abnormality that makes him likely to reoffend and reached diametrically opposed conclusions.

Dr. Judd relied on the D.S. offense, in particular the use of force through choking, as an evidentiary basis for his paraphilia diagnosis. RP

661, 734, 749. Dr. Judd agreed a mental abnormality must be current. RP 747. The most recent sexual offense evidence relied on by Judd to support the current paraphilia diagnosis involved D.S. With reference to Halvorson's interaction with D.S., Dr. Judd testified "the recent trajectory or the recent history of offending would appear to meet the criteria . . . for predatory." RP 712. Halvorson testified that D.S. consented to the sex and the choking and in that way presented his version of events to the jury. RP 497-502. But the State vigorously attacked his credibility, especially in relation to this event. RP 783-84, 1070-72. The claim that D.S. wanted to be choked sounds fantastic in the absence of corroborating evidence that she had exhibited the same behavior before.

Dr. Judd, meanwhile, acknowledged the existence of the phenomena of erotic asphyxiation, in which people get sexual pleasure from oxygen deprivation. RP 735-36. Assuming the premise that the choking started out as consensual, Judd opined the level of injury indicates a behavior that got out of control, and shows Halvorson was aroused to the nonconsensual, violent aspect of the sex act. RP 784-86. Judd, however, professed no expertise on the subject of what injuries could be consistent with consensual sexual asphyxiation, such as the petechial hemorrhaging exhibited by D.S. RP 734. The evidence does not show Judd had any training, conducted any research, or otherwise had specialized knowledge

that would enable him to accurately judge whether D.S.'s injury was consistent with consensual sexual asphyxiation. It was simply his off the cuff observation made without any foundation to back it up. Cf. Welch v. State, 2 P.3d 356, 368-369 (Okla.), cert. denied, 531 U.S. 1056, 121 S. Ct. 665, 148 L. Ed. 2d 567 (2000) (detective's testimony that victim's death was not the result of auto-erotic behavior, that her death was not accidental but intentionally inflicted, and her wounds were not consistent with sexual asphyxiation was properly admitted and based upon his specialized knowledge of homicide investigations). The jury was aware of this and could discount his opinion on the subject accordingly.

The trial court deprived the jury of fairly judging whether the State had proven its case based on all relevant evidence, including evidence that supported the defense theory Halvorson did not currently suffer from a mental abnormality that made him likely to reoffend. The denial of Halvorson's constitutional right to present a complete defense distorted the fact-finding process. Reversal is required because the State cannot show the error was harmless beyond a reasonable doubt.

3. THE COURT WRONGLY ADMITTED EXPERT TESTIMONY ON RISK ASSESSMENT UNDER THE FRYE STANDARD.

Evidence on the SRA-FV was inadmissible under the Frye standard because the State failed to prove the method used to assess risk

based on the presence of dynamic risk factors was accepted in the scientific community. Reversal is required because there is a reasonable probability the outcome would have been different absent the error.

a. Summary of the novel dynamic risk assessment known as the SRA-FV.

The SRA-FV is a "novel dynamic risk assessment instrument." In re Detention of Ritter, 177 Wn. App. 519, 525, 312 P.3d 723 (2013), review denied, 180 Wn.2d 1028 (2014). "[W]here an expert witness derives a prediction of future dangerousness in whole or part from a novel dynamic risk assessment instrument like the SRA-FV, the trial court must hold a Frye hearing on the instrument before the expert may use it at trial." Ritter, 177 Wn. App. at 525.

The defense objected to the admission of SRA-FV evidence under Frye. CP 55-74. At the Frye hearing, Dr. Judd testified for the State. RP 11-80. Dr. Abbott testified for the defense. RP 83-162. The court found both experts to be credible. CP 1433 (FF 1, 2). At the conclusion of the hearing, the court ruled the Frye standard was satisfied. RP 170-73; CP 1432-35.

To address that ruling, a summary of risk assessment is in order. "In greatly simplified terms, there are two broad approaches to conducting risk assessments: clinical judgment or actuarial assessment." Thorell, 149

Wn.2d at 753. Risk factors are either static, which are unchangeable, or dynamic, which are changeable; dynamic risk factors are either stable, which can change slowly, or acute, which can change quickly. Ritter, 177 Wn. App. at 523 n.4. An actuarial instrument like the Static-99R measures the presence of static risk factors (with the exception of age, which is dynamic). RP 21-24, 88. The SRA-FV, on the other hand, is a structured clinical judgment tool for evaluating "stable dynamic risk factors" and integrating them with "static risk factors" considered by actuarial instruments. Ritter, 177 Wn. App. at 523. "Thus, a prediction of future dangerousness based on the SRA-FV is neither purely actuarial nor purely clinical." Id.

The SRA-FV considers three domains of stable dynamic risk factors: "Sexual Interests," "Relational Style," and "Self-Management." The sexual interests domain includes "Sexual preferences for children," "Sexualized violence," and "Sexual preoccupation." The relational style domain includes "Emotional congruence with children," "Lack of emotionally intimate relationships [with adults]," "Callousness," and "Grievance thinking." The self-management domain includes "Lifestyle impulsivity," "Resistance to rules [and] supervision," and "Dysfunctional coping." Id. at 523 n.4.

The evaluator arrives at a SRA-FV score based on assessment of the dynamic risk factors present. RP 41, 49-50. The score on the SRA-FV is used to select a Static-99R "reference group" among three available options: routine, preselected for treatment, and high risk. RP 38-39, 41, 56, 87-88. In that manner, the recidivism rate is quantified. RP 56.

b. The scientific evidence was inadmissible under Frye because the method employed by the State's expert to conduct the risk assessment has not achieved consensus in the relevant scientific community.

The trial court determined (1) "The SRA-FV is generally accepted within the community of experts who evaluate sex offenders and assess their recidivism risk." (CP 1434 (FF 15)); (2) "The use of a split sample for validation of a risk assessment instrument is supported by a scientific theory that is generally accepted in the relevant scientific community." (CP 1435 (CL 5)); (3) "The SRA-FV is an instrument that is capable of producing reliable results and is generally accepted in the scientific community." (CP 1435 (CL 6)); and (4) "The SRA-FV satisfies the Frye evidentiary standard." CP 1435 (CL 8). As set forth below, Halvorson challenges these determinations.

Frye rulings are reviewed de novo. Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011); Ma'ele v. Arrington, 111 Wn. App. 557, 562-63, 45 P.3d 557 (2002). A reviewing

court will undertake a searching review that is not confined to the trial record. State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996).

Under Frye, novel scientific evidence is admissible only where (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under Frye. State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). While unanimity is not required, scientific evidence is inadmissible "[i]f there is a significant dispute among qualified scientists in the relevant scientific community." Gore, 143 Wn.2d at 302.

The SRA-FV was published in a peer reviewed professional journal on December 30, 2013. David Thornton & Raymond A. Knight, Construction and Validation of the SRA-FV Need Assessment, Sexual Abuse: A Journal of Research and Treatment (December 30, 2013); see CP 131-46 (article in clerk's papers). The developers of the SRA-FV authored this publication. They claimed the SRA-FV scores are statistically correlated with sexual recidivism, and that the SRA-FV has

shown significant incremental validity in improving risk assessment relative to the Static-99R. Thornton & Knight (2013) at 1, 9-12.

Dr. Judd, testifying for the State, acknowledged the 2013 Thornton article does not address the use of the SRA-FV to determine which reference group from the Static-99R to use. RP 57. There is nothing published or peer reviewed on using the SRA-FV score to choose a Static-99R norm as a means to measure risk of reoffense. RP 57, 115. There is no peer-reviewed research that addresses how often the wrong reference group is chosen. RP 57. The user manual for the SRA-FV provides scoring rules but nothing about its design and development. RP 104.

There is a peer-reviewed publication, authored by someone who did not develop the SRA-FV, which addresses the validity of using the SRA-FV to choose Static-99R recidivism estimates: Brian Abbott, The Utility of Assessing "External Risk Factors" When Selecting Static 99R Reference Groups, Open Access Journal of Forensic Psychology 5, 58-118 (2013); CP 148-77 (article in clerk's papers). Dr. Abbott concluded such a use is scientifically unjustified and leads to erroneous results. Abbott (2013) at 103-04. Abbott discovered "clinicians cannot rely upon the evaluee's total dynamic risk score to select a single Static-99R reference group." Id. at 99.

According to Dr. Abbott, those who use cut-off scores on the SRA-FV to choose which recidivism estimates to use for the Static-99R assume that the members of the different Static-99R recidivism groups (high risk group, pre-selected treatment group, routine group) have a distinct and exclusive range of scores on the SRA-FV. Id. at 97, 102. For example, Thornton, in unpublished material, teaches evaluators to do the following: if the evaluee scores a 3.3 or higher on the SRA-FV, then use the high risk recidivism rates for the Static 99R; if the evaluee scores between 2.4 and 3.2 on the SRA-FV, then use the preselected for treatment group recidivism rates on the Static-99R; and if the evaluee scores a 2.3 or below on the SRA-FV, then use the routine recidivism rates on the Static-99R. Id. at 93-94 (Table 2) and 99-100 (Table 4).

The validity of this procedure assumes all of the sex offenders in the Static-99R high risk reference group would have scored a 3.3 or higher on the SRA-FV; that all members of the preselected for treatment group would have scored between a 2.4 and a 3.2, and that all members of the routine sample would have scored a 2.3 or lower on the SRA-FV. Id. But Thornton recommended using cut-off scores on the SRA-FV to choose the Static-99R reference group without ever actually scoring the SRA-FV on each member of the respective Static-99R recidivism groups. Id. at 95. Instead, Thornton only scored a single sample of the preselected high risk

need group. He then used that date to "statistically contrive" a Static-99R reference group selection model. Id.

According to Abbott, Thornton's research suffers from a fatal flaw. If evaluators are to use a risk assessment instrument to select Static-99R reference groups, there must be three ranges of scores that are mutually exclusive, one for each Static-99R reference group. Id. at 93-94. This is not the case when evaluators use the SRA-FV to choose Static-99R reference groups. Abbott analyzed the raw data from the Static-99R developers and found that the members of the different Static-99R recidivism groups — high risk, preselected, and routine — had a variation of SRA-FV scores and those SRA-FV scores overlapped all three of Thornton's proposed cut scores. Id. at 97-100 (Tables 3 and 4). Abbott explained that his study showed a single score would actually predict all reference groups, not just one. RP 100. A single reference group cannot be selected. RP 117. Dr. Judd did not address the overlap problem identified by Abbott.

Dr. Abbott pointed out that Thornton's results (the SRA-FV validation study) have not been replicated. RP 117, 121-23, 125. Replication is essential to discovering false results and to maintaining scientific credibility. RP 122. The SRA-FV items have never been proven by an acceptable statistic means to actually measure long-term

vulnerabilities. RP 95. The SRA-FV does not accurately predict sexual recidivism in terms of probability of risk. RP 98-99. The SRA-FV has a 24 percent error rate in terms of misidentifying a nonrecidivist as a likely reoffender. RP 99.

According to Dr. Abbott, construct validity — whether the instrument actually measures what it says it measures — has not been established for the SRA-FV. RP 105. The SRA-FV is an "incomplete validation study." RP 105. The Thornton article provides no data regarding the construct validity for individual scores. RP 111-15. There are methods to establish construct validity, but they have not been followed. RP 114-15.

A recent article by the Static-99R authors, which includes Thornton, recognized "empirically combining static scores with other measures has the effect of creating a new actuarial measure, which needs to be evaluated on its own merits. There has been much less research on these new combined measures than there has been for Static-99/R." Karl Hanson, et al., What Sexual Recidivism Rates Are Associated With Static-99R And Static-2002R Scores? 15 Sexual Abuse: J. Res. & Treatment 1, 25 (2015).[15] While "[p]revious research indicates that there are a number of factors that add incrementally over STATIC scores . . . and that these

[15] An "in press" version of the article is available here: http://www.static99.org/pdfdocs/ResearchHanson_Thornton_Helmus_Babchishin-2015.pdf. (accessed July 14, 2015).

factors should be considered in comprehensive risk assessments," "the ability of evaluators to improve accuracy by choosing reference groups has yet to be empirically tested." Id. at 29.

Thornton describes the SRA-FV as a "newly designed instrument." Thornton & Knight (2013) at 1. Thornton could only hypothesize that their results would generalize to other sex offenders: "it seems reasonable to hypothesize that the present results will generalize to a similar range of settings. Definitive evidence about this will, however, depend on new studies carried out with other samples." Id. at 12.

The SRA-FV was validated on a split sample of offenders (a sample taken from the same original Bridgewater population on which the SRA-FV was originally developed). RP 44, 90-91. According to Dr. Judd, the only limitation with the split sample is that it was old, something more contemporaneous would be desirable. RP 58-59. Dr. Abbott believed the sample was outdated and testified there was no good data to support using the Bridgewater sample to predict sexual recidivism on a more current population. RP 101-02, 125-26.[16]

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[16] The Static-99R authors excluded the Bridgewater sample from any Static-99R reference group because it is dated "and it was an outlier in certain analyses." Hanson, et al., What Sexual Recidivism Rates Are Associated With Static-99R And Static-2002R Scores? at 8.

The SRA-FV has not been cross-validated on an independent sample (a sample of offenders taken from a different population). RP 123-24. This is significant. Thornton, the developer of the SRA-FV, recognized "the present study has a number of limitations that must be addressed in future research. First, as we have noted, because the present results are limited to a particular population, cross validation of the scale on other populations is essential." Thornton & Knight (2013) at 14.

If the split sample is sufficient to show the reliability of the method, as the State contends, then why do the developers of the SRA-FV concede that cross validation on new samples is essential? Thornton does not explain. But "[i]t is well known that predictive validity tends to be stronger in initial validation studies than in cross validation studies, a pattern often referred to as shrinkage. Shrinkage occurs because prediction equations capitalize on chance characteristics of the validation sample to achieve optimal prediction, and these same characteristics are not likely to be present to the same degree in a new sample." Blair, Marcus & Boccaccini, Is There Allegiance Effect for Assessment Instruments? Actuarial Risk Assessment as an Exemplar, Clinical Psychology: Science and Practice, Vol. 15 Issue 4 at 349 (Dec. 2008). Blair studied three actuarial tools used in SVP proceedings (SORAG, VRAG, and Static 99) and found the predictive value for each instrument

was highest in the initial validation studies (conducted by the developer of the instrument). Id. The value decreased in cross validations studies by the developers of the instruments, and further decreased in cross validation studies by independent researchers. Id.

One reason for this bias is that instrument authors may be unwilling to publish studies showing poor performance of their instruments. Id. Other researchers have discovered similar results. Singh, Grann and Fazel found evidence of a significant authorship bias specifically to risk assessment studies published in peer-reviewed journals. Singh, Grann & Fazel, Authorship Bias in Violence Risk Assessment? A Systematic Review and Meta Analysis, PLOS ONE, Vol. 8 Issue 9 (Sept. 2013). Such concerns illustrate the problem of treating the SRA-FV assessment as a reliable method accepted in the scientific community when it is still so new.

The court concluded, "The use of a split sample for validation of a risk assessment instrument is supported by a scientific theory that is generally accepted in the relevant scientific community." CP 1435 (CL 5). But Dr. Judd, the State's expert, did not testify to that effect. The State otherwise did not meet its burden of showing a lack of significant dispute among experts that use of a single split sample is sufficient to validate a risk assessment instrument. The trial court erred in concluding otherwise.

The inter-rater reliability of the SRA-FV is another concern in the scientific community. Inter-rater reliability is the probability that experts will independently arrive at the same score when they apply the same instrument to the same offender based on the same available information. RP 47-48, 106-07. When an instrument lacks inter-rater reliability, it is an unreliable measure of risk because one cannot be sure of the subject's actual score on the instrument. "[T]he lower the reliability of a given test, the lower the limit on the validity of the construct being measured. It should thus be no surprise that tests with reliability coefficients below .80 have been criticized for containing excessive error variance and, hence, poorer validity." Kirk Heilbrun, The Role of Psychological Testing in Forensic Assessment, Law and Human Behavior, vol. 16 No. 3 at 265 (1992).

The accepted minimum level of reliability in the field of psychology in a forensic setting is .80 to .90. RP 107-08. It has been recommended that an instrument achieve a .8 or greater inter-rater reliability for forensic purposes when an individual's liberty is at stake. RP 61.

One of the authors of the 2013 Thornton & Knight article trained, supervised and consulted with individuals who scored the SRA-FV. Thornton & Knight (2013) at 8. Even with these added safeguards to ensure reliability, the SRA-FV had low reliability: a .64 rating for a single rater working alone and .78 for two raters working together. Thornton &

Knight (2013) at 9. .80 is the standard for use in forensic evaluations. Abbott (2013) at 96 (citing Heilbrun (1992)). Thornton acknowledged "The results of the study do raise a particular concern about the SRA-FV. The observed inter rater reliability was lower than desirable." Thornton & Knight (2013) at 13. In unpublished research, the SRA-FV could only muster a .55 rating. Abbott (2013) at 96; RP 108-09.

Dr. Judd testified the inter-rater reliability of the SRA-FV was a concern; it had only fair reliability, not good reliability.[17] RP 48-49, 59-60. Judd justified his personal use of the SRA-FV, despite the inter-rater reliability problem, on the ground that he bent over backward to articulate the basis for his scoring. RP 49. Dr. Abbott believed the instrument is flawed because the rating criteria are inherently subjective. Abbott (2013) at 95. The low inter-rater reliability showed the SRA-FV was not doing a good job of measuring what it purported to measure. RP 110.

"The core concern of Frye is whether the evidence being offered is based on an established scientific methodology." State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). For the reasons stated, the State failed to show the SRA-FV method of risk assessment meets that standard.

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[17] The categories for inter rater reliability are poor, fair, good and excellent. RP 60-61.

The trial court nonetheless determined "The SRA-FV is generally accepted within the community of experts who evaluate sex offenders and assess their recidivism risk." CP 1434 (FF 15) and "The SRA-FV is an instrument that is capable of producing reliable results and is generally accepted in the scientific community." CP 1435 (CL 6). Halvorson challenges these determinations.

Dr. Judd believed the SRA-FV is routinely used for those referred under chapter 71.09 for evaluation, but had no specific information. RP 12, 66. He believed most of the "panel members" (those conducting SVP evaluations on behalf of the State) in Washington used it. RP 66-67.

In February 2011, California adopted the SRA-FV as its official dynamic risk assessment instrument for evaluating sex offenders' future dangerousness. Ritter, 177 Wn. App. at 524. But in September 2013, California switched to the Stable-2007/Acute-2007 instrument. Id.[18]

The SRA-FV is used at the federal level under the Adam Walsh Act. RP 66.[19] But to what degree remains unspecified.

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[18] Judd claimed the Stable-2007 instrument replaced the SRA-FV because it was targeted to the California population at issue (parolees/probationers). RP 68-69.

[19] Under the Adam Walsh Child Safety and Protection Act, the federal government may seek the civil commitment of certain individuals determined to be a "sexually dangerous person." 18 U.S.C. § 4248.

The trial court noted Association for the Treatment of Sexual Abusers (ATSA) guidelines provides that its members use empirically supported instruments and methods over unstructured clinical judgment, such as a "structured, empirically guided risk protocol." CP 1434 (FF 13). Dr. Judd, however, acknowledged the ATSA guidelines do not specifically endorse the SRA-FV or any other specific actuarial or dynamic risk assessment. RP 54. Dr. Abbott testified the ATSA guidelines regarding risk assessment were for the purpose of treatment, which is different from making a risk assessment in the SVP forensic setting. RP 143-44. That the existence of long-term vulnerabilities is generally accepted does not mean the SRA-FV reliably measures those vulnerabilities. RP 159. The ATSA guidelines endorse the conceptual model of an empirically guided risk assessment, but that does not mean the SRA-FV itself is generally accepted in the scientific community. RP 161.

Dr. Abbott reviewed 65-70 SVP-type evaluations from California, Washington and Missouri in the past 12 months. RP 126. About 20-25 evaluators were involved. RP 126-27. A little less than half of those evaluators used the SRA-FV. RP 127. Of the 20 or so defense experts that Abbott had communicated with, none used the SRA-FV. RP 127-28. Dr. Judd had not seen the SRA-FV used by any of the experts retained by those facing commitment. RP 67.

The State did not meet its burden of showing a lack of significant dispute among experts that the SRA-FV was a reliable method of doing what it claims to do. The court's task is not to determine whether a scientific method is correct because such determination is beyond the expertise of judges. State v. Sipin, 130 Wn. App. 403, 419, 123 P.3d 862 (2005). Instead, its task is to determine whether the appropriate scientific community has generally reached consensus that the method is reliable. Sipin, 130 Wn. App. at 419-20.

As argued, there is still a significant debate that this new instrument employs a reliable methodology to predict risk of reoffense. Scientific evidence is inadmissible "[i]f there is a significant dispute among qualified scientists in the relevant scientific community." Gore, 143 Wn.2d at 302.

Division Two of the Court of Appeals recently held the SRA-FV passes the Frye test. In re Detention of Pettis, __Wn. App.__, __P.3d__, 2015 WL 3533220 (slip op. filed June 4, 2015), petition for review pending (No. 91876-7). Division Three is not bound by Division Two's decision. McClarty v. Totem Elec., 119 Wn. App. 453, 469, 81 P.3d 901 (2003), rev'd on other grounds, 157 Wn.2d 214, 137 P.3d 844 (2006) (the decision of a division is not binding on another division); State v. Schmitt, 124 Wn. App. 662, 669 n.11, 102 P.3d 856 (2004) ("We need not follow

the decisions of other divisions of this court."). The decisions of other divisions are rejected if unpersuasive. McClarty, 119 Wn. App. at 469; State v. Simmons, 117 Wn. App. 682, 687, 73 P.3d 380 (2003), aff'd, 152 Wn.2d 450, 98 P.3d 789 (2004).

Division Two's decision in Pettis should be rejected. Its conclusion that SRA-FV is generally accepted in the scientific community is flawed. This is the basis for its conclusion: "Dr. Phenix testified unequivocally that the tool was widely accepted in her field due to its good predictive accuracy. And there does not appear to be a *significant* dispute about the acceptance of the SRA–FV. There is some criticism from Dr. Abbott and Dr. Fisher, but the Frye standard does not require unanimity." Pettis, 2015 WL 3533220 at *6. Division Two reduced the number of scientists in the filed that criticized the SRA-FV to two people. There was nothing in the record to rebut Phenix's testimony that the SRA-FV was widely accepted. And from that, Division Two concluded the instrument was generally accepted.

The record in Halvorson's case is different. Of the 20 or so defense experts that Abbott had communicated with, none used the SRA-FV. RP 127-28. Judd believed most conducting SVP evaluations on behalf of the State in Washington used it. RP 66-67. According to Abbott, less than half of the state evaluators he had reviewed during he

part year from California, Washington and Missouri used the SRA-FV. RP 126-27. A general consensus has not been reached. And, as argued, there is a significant dispute about the SRA-FV's validity as an accurate predictor of reoffense.

c. The error is prejudicial because it impacted a material and disputed issue in the case.

Reversal is required when there is a reasonable probability that, but for the Frye error, the outcome of his trial would have been different. Sipin, 130 Wn. App. at 421. Improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a whole. Neal, 144 Wn.2d at 611. Expert testimony on the SRA-FV cannot be considered of minor significance in this case.

The two sides presented dueling expert opinion on whether Halvorson was likely to reoffend. Dr. Judd relied on the SRA-FV as an integral part of his risk assessment involving dynamic risk factors for the jury. RP 696-99, 709, 805. Instead of a pure clinical evaluation of dynamic risk factors, for which Judd acknowledged reasonable minds could differ (RP 823), the State was able to impress the jury with a structured calculation of risk involving those factors. Dr. Judd told the jury that he "used the SRA-FV to look at the density or needs that [Halvorson] has, which are relatively high, and I felt that this was

indicative of a higher level risk for violent recidivism, sexually violent recidivism, than what was indicated by the Static-99 R. So I utilized that additional information for the SRA-FV as a foundation, particularly in my 2013 report when I had access to them, to continue to justify using the high risk instruments." RP 709. In other words, the SRA-FV justified Judd's use of the SORAG/VRAG-R instrument, which designated Halvorson with a very high risk of reoffense. RP 708. Further, the SRA-FV allowed Judd to opine Halvorson was more likely than not to reoffend, despite the fact that the Static-99R score, standing alone, did not place him in a reference group that was more likely than not to reoffend. RP 700. The jury may have placed particular weight on this risk assessment tool when the jury should not have been allowed to consider it as evidence at all. Reversal is required because the outcome of the trial might reasonably have been different if the trial court had excluded the challenged evidence. Sipin, 130 Wn. App. at 421.

8. CUMULATIVE ERROR VIOLATED HALVORSON'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The state and federal constitutions guarantee the right to due process of law. U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Those subject to involuntary commitment are entitled to due process protection. Thorell, 149 Wn.2d at 731-32. Due process requires a fair trial. State v.

Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

As set forth above, an accumulation of errors affected the outcome of Halvorson's trial: (1) admission of expert testimony on personality disorder, alcohol dependence and cannabis abuse (section C.1., supra); (2) erroneous exclusion of evidence under ER 412 and denial of right to present a complete defense (section C.2., supra); and (3) the Frye error (section C.3., supra).

D. CONCLUSION

For the reasons stated, Halvorson requests that this Court vacate the jury's verdict and reverse the court's commitment order.

DATED this 29th day of July 2015.

Respectfully submitted

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State v. Scott Halvorson

No. 32762-1-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 29th day of July, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 29th day of July, 2015.

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