NO. 73223-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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In re Detention of

ROBERT LOUGH,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

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# BRIEF OF RESPONDENT

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## A. ISSUES PRESENTED

1. Whether the trial court exercised sound discretion in denying Lough's motion to dismiss because it was appropriate to postpone the civil commitment proceedings while Lough was prosecuted for felony assault in Pierce County and while he served a prison sentence for that assault.

2. Whether ample evidence proved that Lough has a mental abnormality as defined in the sexually violent predator statute.

3. Whether ample evidence proved that Lough is likely to commit a predatory act of sexual violence if not confined in a secure facility.

4. Whether ample evidence proved a causal connection between Lough's mental abnormality and the likelihood that he will commit a predatory act of sexual violence.

4. Whether the trial court exercised sound discretion in admitting actuarial evidence.

5. Whether the trial court acted within its broad discretion in excluding witnesses under ER 615.

## B. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

In August 2009, when Robert Lough was nearly finished serving a 30-year sentence for attempted murder in the first degree and rape in the first degree for his near-fatal attack on J.I. in April 1986, the State filed a petition to civilly commit Lough as a sexually violent predator under chapter 71.09 RCW. CP 1-46. On May 22, 2010, while Lough was detained at the Special Commitment Center (SCC) pending a July 8, 2010 trial date, Lough assaulted and severely injured Bennett Titus, another SCC resident. CP 299, 315. As a result of that assault, Lough was charged with assault in the second degree by the Pierce County Prosecutor's Office on June 18, 2010, and he was transferred from the SCC to the Pierce County Jail. CP 1735, 1736-39.

The State moved to stay the SVP proceedings pending the outcome of the criminal case. CP 1736-39. Lough argued that a stay would violate his right to due process, and asked the trial court to dismiss the SVP petition; however, other than a bare assertion that the information underlying the SVP petition would become "stale," Lough identified no prejudice that would result from a stay

of proceedings. CP 1740-43. The trial court granted the State's motion for a stay. CP 323-24.

Lough pleaded guilty to a reduced charge of assault in the third degree in Pierce County with an agreed exceptional sentence of 60 months in prison. CP 326, 854. The trial court extended the stay of the SVP proceedings "until such time Lough is released from the Department of Corrections and appears before this court." CP 326-27. The trial court also continued the SVP trial date to "October 22, 2013 or until further order of the court." CP 329. Lough did not ask for reconsideration or discretionary review of the trial court's order imposing the stay or the order extending the stay.

Prior to October 22, 2013, Lough's attorney withdrew from the case, and the public defense agency that was subsequently assigned also withdrew from the case. CP 301. After new counsel was assigned, Lough appeared in the trial court in February 2014 at a hearing that was set at the State's request, and the trial was scheduled for March 24, 2014. CP 201. Lough then moved to dismiss the SVP petition on grounds that the delay in the proceedings had violated Lough's statutory and constitutional right to a speedy trial. CP 279-97. Both parties provided briefing and oral argument. CP 298-347; RP (3/24/14). The trial court denied

Lough's motion to dismiss, and then asked whether the parties were prepared to proceed with the trial. CP 348; RP (3/24/14) 30-32. Lough asked for a continuance, which was granted. RP (3/24/14) 32-35. In the meantime, Lough sought discretionary review of the trial court's ruling denying his motion to dismiss, and review was denied. CP 1746-51.

Pretrial motions were held on December 19 and 22, 2014. RP (12/19/14); RP (12/22/14). Jury selection began on January 5, 2015. RP (1/5/15). After a trial that lasted nearly six weeks and involved the testimony of two dozen witnesses, and after several days of deliberation, the jury unanimously found that Lough is a sexually violent predator. CP 1729. Lough was civilly committed to the care and custody of the Department of Social and Health Services (DSHS). CP 1730-31. Lough now appeals. CP 1732-34.

## 2. SUBSTANTIVE FACTS

Robert Lough met J.I. at the Spot Tavern in south King County on April 11, 1986. They talked and played pool for a couple of hours, and then they decided to go to another bar together. RP (1/8/15) 28-32. They got into Lough's van and mixed some drinks. RP (1/8/15) 33. After Lough had driven a short distance away from

the tavern, he pulled over on Highway 167 and started kissing and groping J.I. RP (1/8/15) 34-35. She told him she did not want him to do that and tried to push him away, but he persisted. RP (1/8/15) 36. J.I. jumped out of the van and ran across the highway to get away from Lough, but he chased her down, grabbed her, and took her back to the van. RP (1/8/15) 37-38. Lough threw her in the back of the van and began strangling her. RP (1/8/15) 38. J.I. thought she was going to die. The last thing she remembered was that Lough punched her in the face and knocked her out. RP (1/8/15) 39. Lough began vaginally raping J.I. with his penis as she lost consciousness. RP (1/15/15) 147.

When J.I. regained consciousness, she was lying in a ditch, wearing only a shirt and in severe pain. She managed to crawl out of the ditch and up to the highway, where she flagged down a passing motorist who then called for help. RP (1/8/15) 39-41. J.I. had emergency surgery as soon as she arrived at the hospital; the surgeon discovered that she had massive internal injuries from being stabbed repeatedly through her vagina and into her abdominal cavity with a long, sharp object such as a tire iron. RP (1/8/15) 43-44. J.I. was stabbed with the object through her vagina between 12 and 15 times. RP (1/15/15) 147. If J.I. had not made it

to the hospital, she would have died. RP (1/8/15) 44; RP (1/15/15) 147. Even though it had been nearly 30 years since she had last seen him, J.I. identified Lough as her attacker without hesitation during her testimony at the SVP trial. RP (1/8/15) 45-46.

Lough's brutal attack on J.I. was not the first indication that Lough had both sexually deviant and violent tendencies. R.B., a younger male cousin of Lough's, testified that when he was about eight years old and Lough was a teenager, Lough came into his room and asked him if he wanted to play a "game." The "game" involved R.B. allowing Lough to put his penis in R.B.'s mouth and urinate. RP (1/8/15) 66. Lough told R.B. he could urinate in Lough's mouth as well, but R.B. did not think Lough went through with it because he remembered that there was a large wet stain on his mattress after the incident. RP (1/8/15) 67. R.B. was "horrified" and "horribly embarrassed" about the incident, and he did not tell anyone about it until many years later. RP (1/8/15) 67.

B.R. was a female neighbor of Lough's. She was about five years younger than he was. B.R. testified that when she was six or seven years old, Lough trapped her in a storage area in his garage, pulled her underpants down, tried to fondle and lick her genitals, and demanded that she urinate in his mouth. RP (1/12/15) 27-31.

When B.R. was finally able to get away from Lough, she ran home crying and told her older brother, who then confronted Lough. RP (1/12/15) 31.

Lough joined the army when he was 17 years old, after he was arrested for threatening to kill his older brother, Lynn Lough.[1] RP (1/15/15) 79. On August 3, 1977, Lough was in an altercation with another soldier in the barracks, and he stabbed the other soldier multiple times with a case knife, including in the back and in the buttocks. RP (1/15/15) 82-83, 85. Lough was convicted in a court martial proceeding of an assault with intent to inflict serious bodily harm. RP (1/15/15) 84. Lough was sentenced to 18 months in Fort Leavenworth for that assault. RP (2/10/15) 124-26. Lough also received a bad conduct discharge from the army. RP (1/15/15) 86.

After he was released from Leavenworth, Lough met and married D.W. and they had two daughters together. Their relationship was fraught with violence. RP (1/15/15) 90-91, 122. D.W. described numerous violent assaults, including an incident where Lough threatened her with a gun and raped her. RP

[1] Lynn Lough is also a convicted sex offender. *See* State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

(1/15/15) 122-23. Lough blamed D.W. for the problems in their relationship. RP (2/10/15) 160.

After Lough and D.W. separated, Lough met and began living with K.O. after meeting her in a park. RP (1/15/15) 141. Lough was heavily abusing drugs and alcohol during the year that he lived with K.O. RP (1/15/15) 142. Lough was also selling drugs out of K.O.'s house. RP (1/15/15) 143. Lough was living with K.O. when he committed the rape and attempted murder of J.I. RP (1/15/15) 144. Lough admitted he was using her. Ex. 2A, pg. 124.

Lough also admitted that he was very violent when he was in prison for the crimes he committed against J.I., and that he was in many fights over the years. RP (2/9/15) 69-76. Lough testified that he had 13 feathers that had been tattooed on his arm by other Native American inmates, and that each feather signified a knife fight that Lough had been in while in prison.[2] RP (2/9/15) 76-77. Lough had hundreds of prison infractions for a variety of antisocial behaviors.[3] RP (2/10/15) 87-88.

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[2] Lough said he had actually been in more than 13 knife fights. RP (2/9/15) 76.

[3] For example, Lough spit in the face of a prison psychologist and told him that he had AIDS; Lough described this as "the best laugh [he had] had in a long time[.]" RP (2/10/15) 91-92. Lough testified that he did this because he was angry that the psychologist wanted to put him on medication. RP (2/10/15) 92.

One of Lough's major prison infractions was particularly notable in the context of the SVP proceedings. On February 18, 1996, Officer Patricia Flores was working in the intensive management unit (IMU) at the prison in Shelton when Lough pressed the emergency call button in his cell. RP (1/12/15) 76, 94-96. Officer Flores went to Lough's cell and asked him what was wrong. RP (1/12/15) 97. Lough was exposing himself and masturbating; he called Officer Flores a "fucking whore," told her that he would "come" for her, and that "[i]t's the biggest [she'd] ever had." RP (1/12/15) 99.

Lough's behavioral issues continued when he was transferred from prison to the SCC after the SVP petition was filed. Most notably, on May 22, 2010, SCC resident Bennett Titus was upset and approached a staff member. Titus is deaf, and it is difficult to communicate with him, but he conveyed to staff that Lough had shoved a burrito under his door. RP (1/14/15) 65-66. Lough was watching as Titus cleaned up the mess. RP (2/10/15) 138-39. Lough then walked up to Titus and punched him; Titus fell to the floor. RP (1/12/15) 66-67. Lough continued to beat Titus while he was on the floor. RP (1/14/15) 68. Lough beat Titus with his fists, kicked him while wearing boots, and then stomped on his

eyeglasses. RP (2/10/15) 143. Lough hit Titus so hard and so many times that he broke bones in his hand. RP (2/9/15) 142. When the staff members were able to gain control of the situation, Lough was placed in handcuffs and Titus was transported off McNeil Island to the hospital. RP (1/14/15) 69. After the incident, Lough claimed that Titus had assaulted him; however, there was no evidence that that had actually occurred. RP (1/14/15) 72. Lough also stated that Titus had put feces in the burrito, which is why he shoved it under Titus's door. RP (1/26/15) 51.

After Lough returned to the SCC after serving his prison sentence for assaulting Bennett Titus, Lough was evaluated by psychologist Dr. Richard Packard, Ph.D., to determine whether he meets the definition of a sexually violent predator under chapter 71.09 RCW. RP (1/15/15) 11, 57. In addition to reviewing all of the available records and interviewing witnesses, Dr. Packard spent four days conducting clinical interviews and psychological testing with Lough. RP (1/15/15) 57-68. For the first two days, Lough was belligerent and refused to follow directions for the psychological tests. RP (1/26/15) 79; RP (2/10/15) 160-61. At one point, Lough stormed out of the room and said the tests were "retarded." RP (2/10/15) 161.

Dr. Packard testified that Lough's childhood was highly significant to his psychological profile. RP (1/15/15) 93. Lough's father was an abusive alcoholic who was absent from Lough's life. RP (1/15/15) 97. Lough's mother was emotionally distant and physically abusive. RP (1/15/15) 99. For example, as punishment for catching Lough smoking cigarettes, she held his hand on a hot electric burner on the stove. RP (1/15/15) 98. She also threw him down the stairs. RP (1/15/15) 99. Lough started abusing alcohol and drugs from approximately the age of nine or ten, and he did poorly in school despite being of high-average intelligence. RP (1/15/15) 98, 101-02. Lough was also exposed to sexual abuse as he was growing up; although Lough could not remember whether he was sexually abused himself, Lough knew his older brother Lynn had sexually abused both of his sisters. RP (1/15/15) 102.

Dr. Packard characterized Lough's rape and sexual mutilation of J.I. as "exceedingly rare" behavior. RP (1/29/15) 31. Dr. Packard considered the crime to be a sexual homicide, because although Lough's crime "was not a completed homicide, it was very, very close to it." RP (1/26/15) 28. Dr. Packard described Lough's attack on J.I. as a "catathymic reaction," which is an extreme form of "rage-filled violence" that is triggered by an emotional event. RP

(1/15/15) 152. Dr. Packard explained that being rejected by J.I. triggered Lough's rage, and that the violence directed at J.I.'s vagina was psychologically linked with the severe abuse Lough received from his mother. RP (1/15/15) 152, 156. Dr. Packard explained that Lough's assault of Bennett Titus was a similar outpouring of rage and loss of control. RP (1/26/15) 52. Lough himself admitted that he had lost control when he attacked J.I., and that he had lost control when he attacked Titus. RP (2/10/15) 128.

Lough was arrested for raping and attempting to kill J.I. on April 12, 1986. He finally admitted that he was the one who committed the crime on July 24, 2014, during the fourth day of forensic interviews with Dr. Packard.[4] RP (2/9/15) 154. In the 28 years between the arrest and the admission of guilt, Lough repeatedly and vehemently denied any responsibility for the crime. Lough's claims of innocence included: 1) that his brother had committed the crime; 2) that there was no evidence at all to support his conviction; 3) that the prosecutor had argued in closing that the jury should convict Lough in the absence of any evidence because he was an army veteran and "trained in the art of violence"; 4) that

[4] Lough adamantly denied committing the crime prior to the fourth day. RP (1/26/15) 80-83.

after he was wrongly convicted, his appellate attorney never filed a brief on his behalf and then lied about it; 5) that there was DNA evidence conclusively proving his innocence; and 6) that his ex-wife testified for four hours at his trial about what a terrible, violent person he was. RP (2/10/15) 54-59, 74, 98-99. None of these claims were true.

After finally admitting that he had raped and stabbed J.I., Lough claimed that the reason he did not call 911 anonymously after leaving J.I. in a ditch was because he was "in the middle of nowhere and that there was no phone." RP (2/10/15) 131. Lough admitted that he went home and took drugs and drank alcohol with friends after leaving J.I. in a ditch, but claimed that he did so because he was trying to "numb" himself. RP (2/10/15) 131. As to the assault itself, Lough told Dr. Packard that he remembered only "flashes" of what had happened. RP (1/26/15) 126. On the other hand, Lough was adamant that whatever he had used to stab and mutilate J.I., "it sure wasn't a frickin' tire iron." RP (1/26/15) 126.

Additional facts will be discussed below as necessary for argument.

## C. ARGUMENT

### 1. LOUGH'S MOTION TO DISMISS WAS PROPERLY DENIED BECAUSE THE TRIAL COURT HAD THE DISCRETION TO STAY THE SVP PROCEEDINGS WHILE LOUGH WAS PROSECUTED AND SERVED A SENTENCE FOR A FELONY ASSAULT.

Lough first contends that the trial court should have dismissed the SVP petition because his right to a speedy trial was violated by staying the proceedings while he was being prosecuted in Pierce County and while he was serving a prison sentence for assaulting Bennett Titus. Appellant's Opening Brief at 14-18. This claim should be rejected. Whether framed as a stay of the proceedings or a continuance for good cause, the trial court acted within its discretion by postponing the SVP trial until after the criminal proceedings were completed and Lough had finished serving his sentence in the custody of DOC. Thus, the trial court also exercised sound discretion in denying his motion to dismiss.

Article I, § 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." CONST. art. I, § 10. The SVP statute provides that an initial commitment trial should be held within 45 days after the probable cause hearing. RCW 71.09.050(1). However, this statutory provision is not of constitutional magnitude.

*See* State v. Iniguez, 167 Wn.2d 273, 287, 217 P.3d 768 (2009) (statutes and court rules do not establish constitutional speedy trial standards); *see also* State v. Carson, 128 Wn.2d 805, 821, 912 P.2d 1016 (1996) (constitutional speedy trial rights cannot be quantified into a specific number of days or months).

There is a paucity of case law analyzing the state constitutional right to a trial "without unnecessary delay" in civil cases. But even in criminal cases, where the constitutional right to a speedy trial is more clearly established,[5] courts must consider not only the fact of delay, but also the reasons for the delay and whether prejudice occurred when determining whether the right to a speedy trial has been violated. Iniguez, 167 Wn.2d at 284-85.

As a preliminary matter, as noted by the Commissioner of this Court, Lough did not seek review of the trial court's order staying the proceedings in 2010, nor did he seek review of the order extending the stay in 2011. CP 323, 326-27, 1746-51. Although Lough initially objected to granting a stay in 2010 while

[5] SVP cases are civil, not criminal. In re Detention of Stout, 159 Wn.2d 357, 368-69, 150 P.3d 86 (2007). Therefore, the constitutional rights expressly conferred upon criminal defendants by the Fifth and Sixth Amendments to the federal constitution and by Article I, section 22 of the state constitution do not apply in SVP cases. In re Detention of Reyes, 184 Wn.2d 340, 347-48, 358 P.3d 394 (2015) (Fifth and Sixth Amendments do not apply); In re Detention of Ticeson, 159 Wn. App. 374, 380-81, 246 P.3d 550 (2011) (Article I, section 22 does not apply).

the Pierce County assault charge was pending, he made no further efforts to object, to seek review, or to request an appearance before the trial court. Rather, Lough next appeared before the trial court in early February 2014 at the *State's* request (after Lough's attorneys of record had changed three times), and he did not file the motion to dismiss for another 10 days after that appearance. CP 279, 301.

A criminal defendant's "failure to assert the right [to a speedy trial] will make it difficult for a defendant to prove that he was denied a speedy trial." Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Although the trial court "is ultimately responsible for ensuring a speedy trial" in criminal cases, "counsel for the defendant bears some responsibility" to assert the defendant's rights under CrR 3.3. Carson, 128 Wn.2d at 815. In a civil case, a litigant's inaction is construed as a waiver even when constitutional rights are at issue. *See, e.g.*, Ford Motor Co. v. Barrett, 115 Wn.2d 556, 563, 800 P.2d 367 (1990) (although the state constitution guarantees the right to a jury trial in civil cases, the right is waived by inaction when a party fails to file a jury demand under CR 38(b)). Lough's speedy trial claim should be rejected accordingly as a waiver by inaction.

Lough's claim fails on the merits as well. A trial court has the inherent authority to stay the proceedings in civil cases "where the interest of justice so requires." King v. Olympic Pipeline Co., 104 Wn. App. 338, 350, 16 P.3d 45 (2000), review denied, 143 Wn.2d 1012 (2001). A trial court's decision to stay the proceedings "is discretionary, and is reviewed only for abuse of discretion." Id. at 348. Discretion is abused only if the trial court's decision "is manifestly unreasonable or is based upon untenable grounds or reasons." Id. Put another way, a trial court abuses its discretion only if no reasonable judge would have ruled as the trial court did. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Thus, Lough must demonstrate that the trial court's denial of his motion to dismiss the SVP petition was so unreasonable that it constitutes a manifest abuse of discretion.

In King v. Olympic Pipeline, this Court recognized that a trial court "faces a dilemma" when a civil case is proceeding at the same time as a related criminal case:

> On the one hand, a parallel civil proceeding can vitiate the protections afforded the accused in the criminal proceeding if the prosecutor can use information obtained from him through civil discovery or testimony elicited in the civil litigation . . . . On the other hand, the pendency of a parallel criminal proceeding can impede the search for truth in the civil

> proceeding if the accused resists disclosure and asserts his privilege against self-incrimination and thereby conceals important evidence.

King, 104 Wn. App. at 352 (quoting J. Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 202 (1990)) (alteration in King). Accordingly, this Court held that a stay of proceedings may be granted on a case-by-case basis upon consideration of all relevant circumstances, including: 1) the similarities between the civil and criminal cases; 2) the status of the criminal case; 3) the interest of the plaintiffs in proceeding expeditiously, and the potential prejudice to the plaintiffs resulting from delay; 4) the burden that the proceedings may impose on the defendant; 5) the convenience of the court and the efficient use of judicial resources; 6) the interests of persons not parties to the civil litigation; and 7) the interest of the public in the civil and criminal cases. King, 104 Wn. App. at 353. Although these factors serve as guidelines, each case must be considered on its own facts and in its own context. Id. at 349. Based on these and other factors, the stay of proceedings was entirely proper in this case.

Although the SVP case and the assault case did not arise from the same act or transaction, Lough's violent attack on another resident at the SCC was highly relevant evidence in the SVP proceedings. However, Lough would have had a Fifth Amendment privilege not to answer any questions about the assault during Dr. Packard's forensic interviews and during the State's deposition while the assault case was pending. If the civil trial had proceeded and Lough had invoked his privilege not to answer questions about the assault, the jurors could have been instructed that they were entitled to draw an adverse inference from his refusal to answer. King, 104 Wn. App. at 355-56. Also, if Lough had been convicted of assault in the second degree in Pierce County as charged, he was facing a life without parole sentence for a third "strike" offense.[6] If this had occurred, the civil commitment proceedings would have been moot,[7] and thus, the interests of judicial economy weighed in

[6] In addition to Lough's prior convictions for rape and attempted murder, Lough's court martial for stabbing another soldier when he was in the army is almost certainly comparable to a Washington "strike" offense. Therefore, the assault against Titus would have been "strike three" if Lough had been convicted of second-degree assault as charged. *See* RCW 9.94A.030(33)(b) and (u).

[7] *See* RCW 71.09.112 (an SVP detainee who has been sentenced to life without the possibility of release is not to be returned to the custody of DSHS).

favor of granting a stay. For all of these reasons, granting a stay while the assault charge was pending was a proper exercise of the trial court's discretion.

Extending the stay until after Lough had finished serving his sentence was a proper exercise of discretion as well. A criminal defendant sentenced to over one year in custody must serve that sentence in a state prison facility. RCW 9.94A.190(1). On the other hand, a person facing civil commitment as a sexually violent predator must be held at the SCC in the custody of DSHS pending trial. RCW 71.09.040(4). Civil commitment is not punishment, and the SCC is not a prison. *See* In re Detention of Turay, 139 Wn.2d 379, 415-22, 986 P.2d 790 (1999). As required by statute, Lough was remanded to the custody of DOC after he was convicted, and he was not returned to the custody of DSHS until after he had finished serving his sentence. Detaining Lough at the SCC and proceeding with the SVP trial when he should be serving a prison sentence for an assault conviction would be contrary to the relevant statutes, it would undermine the purpose of the SCC as a treatment facility, and it would result in Lough receiving no punishment for his

crime. This would contravene legislative intent[8] and would not serve the interests of the State or the public.

Moreover, as the trial court observed, Lough has not identified any prejudice resulting from the stay. RP (3/24/14) 29. In fact, immediately after the trial court denied Lough's motion to dismiss, Lough's trial counsel stated that he was not ready to proceed with the trial and asked for a continuance. RP (3/24/14) 32. Pretrial motions did not begin for another nine months after the trial court's ruling. RP (12/19/14). There is no prejudice evident in the trial record; to the contrary, the trial record shows that Lough mounted a vigorous defense, and there is no indication that Lough's defense was hampered in any way as a result of delay. Lough has identified no witnesses who could not be found, no testimony or evidence that could not be presented, nor any other aspect in which the stay of proceedings affected his right to a fair

[8] The purposes of the Sentencing Reform Act include ensuring "that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history," providing "punishment which is just," and ensuring that sentences for offenders committing similar crimes are "commensurate." RCW 9.94A.010. The purpose of the SVP statute includes recognition of the "very long term" treatment needs of sexually violent offenders. RCW 71.09.010. Also, a sexually violent predator subject to a conditional release order who is convicted of a crime should be returned to the custody of DSHS *after* serving the criminal sentence. RCW 71.09.112. Although not directly applicable to this situation, this statutory provision evidences the legislature's intent that sexually violent predators who commit crimes should serve the full sentence for those crimes before returning to the SCC.

trial. Rather, Lough asserts that the case should have been dismissed based on the mere fact of delay. Appellant's Opening Brief at 14-18. Lough's claim may be rejected on this basis alone.

Lastly, the delay was caused by Lough's own actions in attacking and severely injuring another SCC resident less than two months before his civil commitment trial was scheduled to begin. RP (3/24/14) 24. If Lough had not beaten Bennett Titus until his head was bleeding and his ribs were broken, the delay would not have occurred. The trial court did not abuse its discretion in ruling that Lough should not be given the windfall of dismissal for his criminal behavior, particularly in the absence of prejudice.

In summary, ordering a stay of proceedings is an act within the inherent authority of the trial court, and ordering a stay was a proper exercise of discretion under the circumstances presented here. Therefore, the trial court's ruling denying the motion to dismiss was proper as well. But furthermore, the trial court's actions are also proper when framed as a continuance for good cause rather than a stay of proceedings. Lough's motion may also be denied on this basis.

An appellate court may affirm the trial court on any basis supported by the record and the law. Building Industry Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 744, 218 P.3d 196 (2009) (citing State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992)). An SVP trial "may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced." RCW 71.09.050(1). Like a decision to stay the proceedings, a trial court's decision to grant a continuance is reviewed only for manifest abuse of discretion. In re Detention of Marshall, 122 Wn. App. 132, 140, 90 P.3d 1081 (2001), *review granted on other grounds and aff'd*, 156 Wn.2d 150, 125 P.3d 111 (2005).

For all of the reasons set forth above, there was good cause to continue Lough's SVP trial under RCW 71.09.050(1) until after the Pierce County criminal case and resulting prison term were concluded, and Lough was not prejudiced by the delay. Thus, it was a proper exercise of the trial court's discretion to continue the trial, and Lough cannot demonstrate otherwise. Lough's claim fails.

## 2. AMPLE EVIDENCE PRESENTED AT TRIAL PROVES THAT LOUGH HAS A MENTAL ABNORMALITY.

Lough next claims that the State did not prove that he "suffered from a medically recognized disorder which justifies commitment." Appellant's Opening Brief at 18. This claim of evidentiary insufficiency should be rejected. Ample evidence proves that Lough suffers from a combination of mental disorders that meet the statutory definition of a mental abnormality, and thus, the jury's verdict should be affirmed.

Evidence is sufficient to support a finding that a person is a sexually violent predator if a rational factfinder could have found that the statutory elements were proved beyond a reasonable doubt. In re Detention of Audett, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006). An appellant who challenges the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The reviewing court must draw all reasonable inferences from the evidence in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 929 P.2d 1068 (1992). The reviewing court must also defer to the jurors' determination as to the weight and credibility of the evidence, and their resolution of

any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. Circumstantial evidence is to be considered as reliable and probative as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Under these standards, any question as to the weight or the meaning of the evidence should be resolved in favor of the verdict whenever such an interpretation is reasonable.

A person meets the definition of a "sexually violent predator" if the State proves beyond a reasonable doubt that the person "has been convicted of or charged with a crime of sexual violence," and that he or she "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). A "mental abnormality" is "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). "Volitional capacity" means "the power or capability to choose or decide." WPI 365.12. A mental abnormality, when coupled with a history of sexually violent acts, supports the conclusion that the person has serious difficulty

controlling his or her sexually violent behavior. In re Detention of Thorell, 149 Wn.2d 724, 742, 72 P.3d 708 (2003).

The definition of "mental abnormality" is not the same as a DSM[9] diagnosis; rather, it is "a more generalized terminology that can cover a much larger variety of disorders." In re Detention of Young, 122 Wn.2d 1, 28, 857 P.2d 989 (1993) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709, 733 (1991-1992)). As the Washington Supreme Court has stated, the DSM is "an evolving and imperfect document," and it is not "sacrosanct." Id. Particularly in light of these considerations, Dr. Packard's trial testimony is more than sufficient to establish that Lough suffers from a mental abnormality as defined by the statute.

As Dr. Packard explained, a diagnostic classification system like the DSM has serious weaknesses when a person's condition is "very rare and unusual. If there are very few people, or even if the condition is unique, then a classification system . . . starts falling apart." RP (1/27/15 a.m.) 36. As Dr. Packard further explained, the DSM-5 contains a cautionary statement about its use in forensic

[9] "DSM" and "DSM-5" refer to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (2013).

settings due to "the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." RP (1/27/15 a.m.) 29. Nonetheless, Dr. Packard utilized the DSM-5 to the extent it was possible in this case because it is a well-known classification system that provides "an efficient means of communication" about mental disorders. RP (1/27/15 a.m.) 39-40.

Dr. Packard diagnosed Lough with antisocial personality disorder with paranoid traits as described in the DSM-5. RP (1/27/15 a.m.) 41, 47. Antisocial personality disorder manifests in a failure to conform to social norms, deceitfulness, impulsivity, irritability, aggression, reckless disregard for the safety of others, and lack of remorse. RP (1/27/15 a.m.) 44-46. These traits begin in childhood as evidence of conduct disorder. RP (1/27/15 a.m.) 46-47. Dr. Packard found that Lough exhibits all of these features. RP (1/27/15 a.m.) 48-61. Dr. Packard explained that antisocial personality disorder plays a role in violent sexual offending by creating "an attitude that they can violate the boundaries and spaces of others" despite the fact that the offending behavior is harmful and illegal. RP (1/27/15 a.m.) 61.

Dr. Packard also diagnosed Lough with post-traumatic stress disorder as described in the DSM-5, which further supported his conclusion that Lough has a mental abnormality. RP (1/27/15 a.m.) 65, 77-86. Dr. Packard explained that PTSD can lead to violent sexual offending because men like Lough who are subjected to extensive trauma and abuse as children may externalize their negative emotional energy and, when triggered, may "express their outrage and violence towards a woman" in the form of a sexual assault. RP (1/27/15 a.m.) 70-73. In addition, PTSD can cause a dissociative state that leads to sexual offending, as was the case with Lough during the rape and attempted murder of J.I.:

> If someone is stimulated, if they have associated a particular trigger or a set of triggers. Perhaps a person rejects them – and this is how Mr. Lough has talked about it – so maybe the trigger was when [J.I.] rejected him and then that resulted in the anger and outpouring of the emotion and the rage, and then that became expressed in the violent rape and assault of [J.I.] and then the subsequent mutilation of [J.I.] taking place in a way that was automatic as a result of the trigger.
>
> He describes himself at one point, in one of the instances with the person at SCC, that, "I was like on auto-pilot." That's a very common expression of people with post-traumatic stress disorder when they're engaging in behavior that they feel they have

> little control over. It's, "I was on auto-pilot. I can't explain why I did that."

RP (1/27/15 a.m.) 74-75.

Dr. Packard also diagnosed Lough with several substance abuse disorders in a controlled environment as described in the DSM-5. RP (1/27/15 a.m.) 86-89. These disorders have contributed to Lough's sexually violent behavior by causing disinhibition and heightened libido, thus increasing "the likelihood of an offense taking place." RP (1/27/15 a.m.) 90. Dr. Packard noted that Lough had been abusing alcohol and drugs from a very young age, and that alcohol and drugs played a role in the attack of J.I. and in violent incidents described by Lough's ex-wife. RP (1/27/15 a.m.) 90.

In addition to these DSM-5 diagnoses, Dr. Packard also evaluated Lough's level of psychopathy using the Hare Psychopathy Checklist (PCL-R), which is often used in evaluating sexually violent predators. RP (1/27/15 a.m.) 27-29. As Dr. Packard explained, psychopathy is a psychological construct that describes a cluster of symptoms and characteristics. RP (1/27/15 a.m.) 26. Dr. Packard gave Lough a score of 28.4 out of 40 on the PCL-R, which is a high score. RP (1/27/15 a.m.) 30-31.

People who are high in psychopathy are "grandiose, egocentric, manipulative, dominant, forceful, exploitative and cold-hearted." RP (1/27/15 a.m.) 31. They are impulsive, they lack empathy and remorse, and they "readily violate social norms[.]" RP (1/27/15 a.m.) 31. As Dr. Packard explained, studies have found a correlation between high PCL-R scores and sexual recidivism; thus, Lough's high level of psychopathy is relevant in evaluating whether he is a sexually violent predator. RP (1/27/15 a.m.) 32-33. Also, people like Lough who are high in psychopathy tend not to learn to modify their behavior in response to negative consequences, which also contributes to their likelihood of re-offense. RP (2/2/15) 14-15.

Additionally, when initially prompted by questions from Lough's trial attorney on cross-examination,[10] Dr. Packard explained that emerging research shows that exposure to severe trauma and abuse during childhood, such as Lough experienced, causes neurological changes in the parts of the brain that control executive functioning, aggression, sexual arousal, and the "fight or flight" response as the child grows and develops.[11] RP (2/2/15)

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[10] *See* RP (1/29/15) 36-53.

[11] Lough agreed that he has a heightened "fight or flight" response when he is "triggered" by what he perceives to be a threatening situation. RP (2/9/15) 62-65.

11-14. Dr. Packard agreed that these neurological effects constitute "an acquired condition that affect[s] Mr. Lough's emotional and volitional control," and therefore, this neurological research also supports his opinion that Lough has a mental abnormality. RP (2/2/15) 14-15.

Based on the information summarized above, Dr. Packard's testimony coupled with the supporting evidence in the record is more than sufficient to support the jury's finding that Lough has a mental abnormality. Nonetheless, Lough argues that the State did not prove that he has a mental abnormality for the following reasons: 1) Dr. Packard's "primary diagnosis" was antisocial personality disorder, which is not sufficient to support civil commitment under the SVP statute; 2) psychopathy is essentially the same thing as antisocial personality disorder; 3) PTSD does not cause sexual violence; and 4) substance abuse disorders do not cause sexual violence. Appellant's Opening Brief at 21-33. These arguments should be rejected.

First, the record does not support the notion that Dr. Packard had a "primary diagnosis" of antisocial personality disorder. Rather, Dr. Packard testified that it was the combination of disorders and other psychological and neurological features that comprise

Lough's mental abnormality. Second, Lough's own expert, Dr. Michael First, agreed with Dr. Packard that antisocial personality disorder and psychopathy are not the same thing, and that psychopathy is a real and recognized phenomenon that is not included in the DSM. RP (1/28/15) 94-95. Third, although Dr. First opined that PTSD does not lead to violent sexual behavior,[12] Dr. Packard disagreed. This conflict in the testimony was for the jury to resolve; it cannot be second-guessed on appeal. The same is true for the conflicting testimony regarding substance abuse disorders.

In summary, the jury's verdict finding that Lough has a mental abnormality as defined by the SVP statute is supported by ample evidence, and that verdict should be affirmed.

### 3. AMPLE EVIDENCE PRESENTED AT TRIAL PROVES THAT LOUGH IS LIKELY TO COMMIT A FUTURE ACT OF SEXUAL VIOLENCE IF NOT CONFINED IN A SECURE FACILITY.

Lough also argues that the State did not prove that he is more likely than not to commit an act of sexual violence if not

[12] Notably, however, Dr. First opined that Lough was in an "uncontrollable rage" when he raped and attempted to kill J.I., and he agreed that "[w]hen people are in a rage, they may have reduced volitional control." RP (1/28/15) 126. This testimony supports rather than undermines the jury's verdict.

confined to a secure facility. Appellant's Opening Brief at 33-39. This claim also fails, as the evidence amply supports the jury's conclusion that Lough is more likely than not to commit a sexually violent act in the future if not confined.

As discussed above, a sexually violent predator is a person with a qualifying prior offense who has a mental abnormality or personality disorder that makes him or her likely to commit predatory, sexually violent acts if not confined in a secure facility. RCW 71.09.020(18). "Likely" means that the person is more likely than not to commit a sexually violent act if not confined. In re Detention of Brooks, 145 Wn.2d 275, 295, 36 P.3d 1034 (2001), *overruled on other grounds*, In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003). There is no requirement for the State to prove that the person "will reoffend in the foreseeable future" or within a specific number of years. In re Detention of Moore, 167 Wn.2d 113, 125, 216 P.3d 1015 (2009). Actuarial instruments are admissible as evidence of future risk, and a qualified expert may also rely on "static and dynamic risk factors and his [or her] own clinical judgment" in rendering an opinion regarding a person's likelihood of re-offense. In re Detention of Meirhofer, 182 Wn.2d 632, 645-46, 343 P.3d 731 (2015). Under these standards and the

well-established test for evidentiary sufficiency set forth in the previous argument section, the evidence produced at trial amply supports the jury's verdict that Lough is likely to reoffend if not confined in a secure facility.

In reaching the conclusion that Lough is more likely than not to engage in future predatory acts of sexual violence if not confined, Dr. Packard "did some structured risk assessment procedures," he "reviewed the literature regarding risk assessment," he "looked at his dynamic risk factors," and "did a clinical assessment of Mr. Lough[.]" RP (1/27/15 p.m.) 12. As Dr. Packard explained, no actuarial instrument is specifically designed to predict whether a person is likely to commit future predatory acts of sexual violence over the course of a lifetime. RP (1/27/15 p.m.) 14-16. Thus, Dr. Packard stated that he cannot rely solely on actuarial instruments to assess risk. RP (1/27/15 p.m.) 16.

With these limitations in mind, Dr. Packard used two actuarial instruments in conducting his risk assessment: the Static-99R and the VRAG-R.[13] RP (1/27/15 p.m.) 16. The Static-99R "provides a statistical estimate of the likelihood of a

[13] "VRAG-R" stands for "Violence Risk Appraisal Guide – Revised." RP (1/27/15 p.m.) 22. The VRAG-R will be discussed in more detail in the fifth argument section below.

person being reconvicted or charged again for a new rap sheet sexual crime," meaning a crime "that would be identified . . . on the criminal history as a sexual offense, such as child molestation or rape." RP (1/27/15 p.m.) 18. Based on Lough's score of 6 and his status as a high-risk/high-needs offender, the Static-99R group risk estimate is between 18.4 and 22.8 percent after five years, and between 30.5 and 44.7 percent after ten years. RP (1/27/15 p.m.) 21. As Dr. Packard noted, this group estimate would not include offenses that were unreported or undetected, as only charged crimes and convictions are included in the estimate. RP (1/27/15 p.m.) 22.

The VRAG-R is used to estimate risk "of returning to a secure facility for . . . a new violent act, including sexual acts." RP (1/27/15 p.m.) 24. The VRAG-R requires placing subjects in "bins" based on their scores; Lough's score places him in bin nine, which is the highest bin. RP (1/27/15 p.m.) 24. Among the offenders in bin nine sample, 76 percent were taken into custody for a new violent offense within five years, and 90 percent of them were taken into custody for a new violent offense within 15 years. RP (1/27/15 p.m.) 25.

Dr. Packard also used an instrument called the SVR-20.[14] This is not an actuarial tool, but "a thinking guide" that contains a list of 20 items that have been found to be linked with sexual recidivism. RP (1/27/15 p.m.) 25. Of the 20 items, Dr. Packard found that only two of them did not apply to Lough, which is indicative of high risk for sexual reoffending. RP (1/27/15 p.m.) 26.

Dr. Packard also considered Lough's dynamic risk factors, which are risk factors that can change over time and are not included in actuarial instruments, but have been found to correlate with sexual reoffending. RP (1/27/15 p.m.) 27. Lough's dynamic risk factors include an interest in sexualized violence, a lack of emotionally intimate relationships, impulsiveness and lack of self-control, antisocial behavior, poor problem-solving skills, resistance to rules and supervision, attitudes of grievance and hostility, and negative social influences. RP (1/27/15 p.m.) 28-30. Dr. Packard also considered research showing that offenders who are on some form of supervision following release are less likely to reoffend than offenders who are not on supervision. RP (1/27/15 p.m.) 32-33. Dr. Packard further noted a lack of "protective factors" that would mitigate Lough's risk of re-offense. RP (1/27/15 p.m.) 34.

[14] "SVR" stands for "Sexual Violence Risk." RP (1/27/15 p.m.) 25.

In summary, Dr. Packard looked at all of the available information "globally and all together,"[15] and concluded that Lough is more likely than not to commit a predatory act of sexual violence if not confined in a secure facility. RP (1/27/15 p.m.) 53. This evidence, particularly when viewed in the light most favorable to the State, is more than sufficient to sustain the jury's verdict.

Nonetheless, Lough argues that the evidence of future risk is insufficient because: 1) the VRAG-R concerns all future violent crimes, not just sexually violent crimes; 2) Dr. Packard's clinical judgment is "highly inaccurate";[16] and 3) proof of Lough's "mere dangerousness"[17] is not sufficient to prove that he is likely to commit sexually violent acts. These arguments should be rejected.

First, Dr. Packard explained that he finds the VRAG-R helpful in SVP cases because "the developers of the [VRAG-R] did a much better job at looking at the actual circumstances of the offenses, not just at the title of the offense," and thus, the VRAG-R captures more sexually violent behavior than the Static-99R does. RP (1/27/15 p.m.) 52. Therefore, in Dr. Packard's opinion, the

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[15] RP (1/27/15 p.m.) 49.

[16] Appellant's Opening Brief at 36.

[17] Appellant's Opening Brief at 38.

VRAG-R comes closer to answering the question posed in SVP cases than other actuarial instruments. RP (1/27/15 p.m.) 52. Second, Lough's argument regarding clinical judgment is an argument regarding the weight of the evidence, which cannot be reviewed on appeal. Moreover, the Washington Supreme Court has recently held that clinical judgment is a valid consideration in assessing risk. In re Meirhofer, 182 Wn.2d at 645-46.

Lastly, as Dr. Packard explained, the question of whether Lough will commit a sexually violent act in the future as opposed to a non-sexual violent act would depend on the gender of the person who triggers his rage:

> Q: So how do we know that he's likely to commit an act of sexual violence rather than just violence?
>
> A: I don't see those as a mutually exclusive circumstance. I would – so his possibility of violence is certainly there. The possibility of sexual violence is also very likely there. It depends on the matter of what kind of stimuli, what kind of triggers may be present, and who would be around him at the time.
>
> If a male is doing that and is there, it will probably be violence. If it's a female, it would more likely be manifested as sexual violence.

RP (1/27/15 p.m.) 8. Lough's claim fails.

## 4. AMPLE EVIDENCE PRESENTED AT TRIAL PROVES THAT LOUGH IS A SEXUALLY VIOLENT PREDATOR.

In what amounts to a combination of the two previous arguments, Lough argues that the State did not prove a "causal link" between a "medically recognized disorder" and Lough's "risk of committing a sexually violent offense" in the future. Appellant's Opening Brief at 39-42. This claim should also be rejected for the reasons already stated above. Dr. Packard testified at length and in detail about the relationship between Lough's mental abnormality and his likelihood of committing predatory acts of sexual violence if not confined in a secure facility, and the jury relied on this testimony in reaching its verdict.

Nonetheless, Lough argues that he has not committed any sexual misconduct since 1996, when he made sexual threats to Officer Lopez while masturbating in his jail cell, and that the evidence is insufficient on this basis. Appellant's Opening Brief at 41-42. Again, however, this is an argument regarding the weight and significance of the evidence presented by the State. The weight and significance of the evidence was for the jury to decide, and this Court should affirm.

## 5. LOUGH'S CHALLENGE TO THE VRAG-R IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.

Lough argues that the trial court should have excluded evidence of the VRAG-R actuarial instrument because it "fails to meet scientific standards for reliability" under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and because it does not meet general evidentiary standards for relevance and admissibility under ER 402 and ER 403. Appellant's Opening Brief at 42-47. This claim should be rejected. Washington appellate courts have held repeatedly that actuarial instruments are scientifically accepted and admissible in sexually violent predator cases, and the trial court properly admitted actuarial evidence in this case.

As a preliminary matter, Lough did not challenge the admissibility of the VRAG-R at trial on grounds that it did not meet the Frye standard. Rather, Lough devoted less than one page of his trial brief to the argument that the VRAG-R was inadmissible, and the evidence rules were the only authority he cited. *See* CP 907 (citing ER 702, ER 402, and ER 403). The trial court did not consider conducting a Frye hearing because none was requested, and admitted the actuarial evidence on the grounds that such evidence is generally admissible in SVP cases. RP (12/22/14) 13.

When Lough asked the court to reconsider its ruling in the midst of trial, he still did not cite Frye. CP 1320-24. The trial court denied the motion to reconsider, and ruled that the value of the actuarial evidence should be evaluated by the jury. RP (1/26/15) 57-58.

The failure to request a Frye hearing in the trial court precludes review on the basis of Frye on appeal. In re Detention of Post, 145 Wn. App. 728, 755-56, 187 P.3d 803 (2008), aff'd, 170 Wn.2d 302, 241 P.3d 1234 (2010); In re Detention of Taylor, 132 Wn. App. 827, 134 P.3d 254 (2006), review denied, 159 Wn.2d 1006 (2007). Accordingly, this issue may be reviewed on appeal only in accordance with general principles of admissibility under the evidence rules, and not under the Frye standard.

Evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did.

Atsbeha, 142 Wn.2d at 914. In this case, the trial court exercised sound discretion in admitting evidence regarding the VRAG-R.

Although Lough failed to preserve any claim under the Frye standard, the fact that actuarial evidence has been widely admitted under the Frye standard demonstrates that the trial court exercised its discretion properly. Indeed, as the Washington Supreme Court has held, actuarial instruments are widely used, generally accepted, and admissible as evidence regarding future risk in sexually violent predator cases. In re Thorell, 149 Wn.2d at 752-58. Furthermore, this Court has held that the VRAG-R's predecessor, the VRAG, is generally accepted for use in conducting risk assessments of sex offenders. *See* In re Detention of Strauss, 106 Wn. App. 1, 8-9, 20 P.3d 1022 (2001), aff'd, In re Thorell, *supra* (holding that the VRAG is generally accepted for use in psychological risk assessments).

Furthermore, as Dr. Packard explained, although no actuarial instrument is specifically designed to answer the precise question posed in an SVP case, he believes that the VRAG-R is based on a "much richer data set" than the Static 99-R because the VRAG-R identifies violent crimes that have a sexual component or a sexual motivation, but are not strictly "rap sheet" sex offenses.

RP (1/27/15 p.m.) 16-17, 24. Also, contrary to Lough's argument, the VRAG-R is not a "new" instrument; rather, "it is a validation of and revision to the VRAG and SORAG," which have long been in use. CP 959-60; RP (1/27/15 p.m.) 23.

In summary, given the broad acceptance and admissibility of actuarial instruments in SVP cases, Lough has not demonstrated that the trial court abused its discretion in allowing Dr. Packard to testify about the VRAG-R.

Nonetheless, Lough argues that the VRAG-R is not relevant and that this evidence was more prejudicial than probative under ER 402 and ER 403. Appellant's Opening Brief at 45-47. These arguments are without merit. As discussed above, Dr. Packard explained why the VRAG-R is relevant in conducting a risk assessment in an SVP case. Moreover, Lough's trial counsel cross-examined Dr. Packard at length regarding the VRAG-R, including the fact that it includes violent offenses that are not sex offenses. RP (1/28/15) 189-91. This was a consideration for the jury in deciding what weight the evidence should be given; it does not render the evidence so unfairly prejudicial as to be inadmissible under ER 403. The trial court did not abuse its discretion, and this Court should affirm.

## 6. THE TRIAL COURT EXERCISED SOUND DISCRETION IN EXCLUDING WITNESSES UNDER ER 615, INCLUDING THE EXPERTS.

Lastly, Lough argues he was denied his right to present a defense because in granting the parties' motion to exclude witnesses, the trial court refused to allow any witnesses, including the experts, to discuss the testimony of other witnesses with the attorneys during the trial. Appellant's Opening Brief at 47-49. But the trial court's ruling was within its discretion, and Lough cannot demonstrate otherwise.

The exclusion of witnesses is codified in ER 615, which provides:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

ER 615.

Excluding witnesses is a matter within the trial court's discretion, and the trial court's decisions regarding witness exclusion will not be disturbed absent a manifest abuse of that discretion. State v. Bergen, 13 Wn. App. 974, 978, 538 P.2d 533 (1975), review denied, 86 Wn.2d 1009 (1976). The scope of the trial court's discretion includes, for example, the ability to exempt particular witnesses from the exclusion or to decide if witnesses who have violated the exclusion order will be allowed to testify or not. Id. Expert witnesses are not exempt from ER 615; to the contrary, providing an expert witness with information about other witnesses' testimony violates a trial court's exclusion order in the absence of a specific exemption. *See* Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372-74 (5th Cir. 1981) (providing transcripts of trial testimony to a testifying expert violated the trial court's order excluding witnesses under Fed. R. Evid. 615).

Lough makes a bare assertion that "[t]o prevent Mr. Lough from consulting with his expert regarding the testimony provided by Dr. Packard is an infringement of Mr. Lough's right to present a

defense";[18] however, Lough identifies no prejudice resulting from the trial court's ruling. To the contrary, the record shows that Lough's trial attorney conducted a lengthy and exhaustive cross examination (and multiple re-cross examinations) of Dr. Packard. RP (1/27/15 p.m.) 56-73; RP (1/28/15) 160-91; RP (1/29/15) 3-107, 110-72; RP (2/2/15) 22-34, 35-36, 59-64. Lough's trial attorney also conducted an exhaustive two-day discovery deposition of Dr. Packard well in advance of trial. CP 716-842. Lough's trial counsel was not prohibited from sharing the transcript of Dr. Packard's pretrial deposition with the defense experts and consulting with them about Dr. Packard's testimony. Indeed, it would be surprising if defense counsel had not done so.

In summary, Lough has not demonstrated that the trial court abused its discretion in ordering that all witnesses were excluded, and in the absence of prejudice there is no basis to reverse in any event. Lough's claim is without merit.

[18] Appellant's Opening Brief at 49.

## D. CONCLUSION

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

DATED this 27th day of June, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Travis Stearns, the attorney for the appellant, at travis@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in In re Dentention of Robert Eugene Lough, Cause No. 73223-4, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 27th day of June, 2016.

Name:
Done in Seattle, Washington