Supreme Court No.: 94995-6
Court of Appeals No.: 73727-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF PATRICK MCGAFFEE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Patrick McGaffee requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *In re Detention of Patrick McGaffee*, No. 73727-9-I, filed August 14, 2017. A copy of the opinion is attached in an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Frye excludes scientific evidence shown to be either not capable of reliable results or not generally accepted in the relevant expert community. Where the evidence at the Frye hearing revealed no peer-reviewed scientific publication recommended the SRA-FV be used in the way the State's expert had, and that the instrument lacks construct validity, suffers from poor inter-rater reliability, and has yet to be cross-validated on any modern population, should this Court grant review where the trial court erred in refusing to exclude the SRA-FV, or its use to select a Static-99R reference group, under Frye? RAP 13.4(b)(4).

2. The "more likely than not" RCW 71.09 commitment standard requires the State to prove that an individual's risk of reoffending exceeds 50%.[1] This is a question of absolute, not relative, risk. Should this Court grant review where the trial court erred in allowing the State's expert to

[1] State v. Brooks, 145 Wn.2d 275, 295, 36 P.3d 1034 (2001), overruled on other grounds by In re Det. of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003).

testify he believed McGaffee's risk of reoffense is greater than that of 94% detected sex offenders, when that irrelevant information confused the issue at hand and inflamed the passions of the jury? RAP 13.4(b)(4).

3. The constitutional right to present a defense includes the right to call witnesses in one's own behalf, including expert witnesses. Should this Court grant review where the trial court violated McGaffee's right to present a defense when it prevented his expert from testifying that one of the actuarial risk instruments used by the State expert, the VRAG-Revised, lacks general acceptance in the scientific community and will likely fail future replication attempts? Should this Court also grant review where the court violated McGaffee's right to present a defense when the court refused to ask a juror's question regarding what instruments Dr. Abbott had used in assessing McGaffee's risk to reoffend?
RAP 13.4(b)(4).

4. A prosecuting attorney has the obligation to secure a fair and just verdict. This obligation includes a prohibition on making arguments that constitute burden shifting, reference facts not in evidence, or misstate the law. Should this Court grant review where the prosecutor shifted the burden to McGaffee, referenced evidence the State induced the trial court to exclude, and misstated the reasonable doubt standard? RAP 13.4(b)(4).

5. Should this Court grant review where the overall cumulative effect of these errors deprived McGaffee of a fair trial?

C. STATEMENT OF THE CASE

Patrick McGaffee is in his late forties, but looks younger. RP434, 1212. He is only 5' 5" tall and has scoliosis (curvature of the spine) that gives him an unusual posture. RP700-01; RP1211-12. He wears hearing aids in both ears. RP1211-12.

McGaffee's IQ has been measured at 78, which represents the borderline range of cognitive abilities and is consistent with cognitive deficits. RP1213-18. As a child, he was placed in special education classes. RP440, 1213. When he was just nine years old, a teenager raped him. RP478-80.

Since he was twelve or thirteen, McGaffee knew he was gay, but he hid his homosexuality until he was about twenty-two years old. RP457. McGaffee has had consenting sexual relationships with other incarcerated adult males, but not since 2005. RP461-62.

In the SCC treatment program, McGaffee disclosed his sexual history, including his sexual offending against prepubescent boys. RP477, 710-15 (Exhibit 16). He pursued treatment and made these disclosures because he thought he needed to change and wanted to change. RP690-92. When interviewed about his index offense, McGaffee told the State's

evaluator he thought the sentence he received for his crime was fair and he understood that his fifteen-year-old victim was emotionally hurt. RP1343. He expressed a commitment not to reoffend. RP1343.

McGaffee understands a pedophile to be someone who is attracted to prepubescent children and he agrees this label applied to him. RP657. As the State's expert testified, pedophilia differs from a pedophilic disorder, which requires current distress or impairment. RP1228. Pedophilia appears to be a lifelong condition. RP1232. On the other hand, a pedophilic disorder may change over time with, or even without, treatment. RP1232-33. The DSM acknowledges that the propensity to act on an attraction to prepubescent children may abate over time. RP1233. The goal of treating a pedophile is to get them to manage their arousal so they do not act on it. RP1233.

McGaffee's treatment at the SCC included a sexual arousal modification program. RP764. As a result, he no longer has thoughts of inappropriate relationships with underage children. RP628-29, 659. He has not had a sexual fantasy involving a child for many years. RP727. His current preferred age range for a sexual partner would be from thirty years of age to about his own age. RP520. He is on Prozac to treat his depression and anxiety. RP655, 788. The medication he now takes has also reduced his arousal. RP655-56.

McGaffee stipulated to his commitment in 1998. RP770. At times during the first decade of his commitment, he violated facility rules. McGaffee admitted that he was attracted to some fellow SCC residents and engaged in sex with them, up to the year 2005. RP457, 461-62, 579, 585-87, 618. He admitted that having sex with others at the SCC was against the rules. RP591.

Additionally, before 2007, McGaffee possessed at the SCC some movies and images that depicted children. RP463-64; 700; 1564. However, while child pornography was discovered at the institution in this timeframe, McGaffee had clothed pictures of children, and there was no child pornography on his computer either the first or second time it was searched. RP1285-87.

According to McGaffee, he has not had sexual contact with another person since about 2006. RP1714-15. Even the State's evaluator agreed that there is no data in the records suggesting that McGaffee has had any sexual relationship or been sexually acting out since 2011. RP1299-1300. Even from the perspective of the State evaluator, there are no observed behaviors to demonstrate a pedophilic disorder since 2011. RP1303.

McGaffee considered seeking release in 2008, but held back because he wanted more outside support in place. RP776. He participated

in treatment for four more years up to 2012 but then stopped. RP654. He felt that he had gone as far as he could go in treatment, finishing the required assignments. RP787.

At trial, forensic psychologist Dr. Abbott opined that McGaffee does not meet commitment criteria. Dr. Abbott has extensive expertise in treatment and risk assessment of sex offenders. RP1518-31, 1594, 1629, 1735-36, 1738. He does not believe McGaffee currently suffers from a pedophilic disorder, even if he suffered from it in the past. RP1533, 1553, 1565, 1642, 1693. Dr. Abbott testified that McGaffee "has made substantial progress through the treatment that he's received at SCC" causing the pedophilic disorder to remit. RP1555.

Specifically, McGaffee "has matured significantly emotionally and socially compared to when he was living out in the community and during his early years at SCC." RP1555. Dr. Abbott noted that McGaffee was finally able to "come to terms with and accept his homosexuality." RP1555. He has "gone through quite a bit of sexual arousal modification treatment at the SCC... that helped him also reorient himself towards age-appropriate sexual partners." RP1556. The remission of the pedophilic disorder is linked in part to McGaffee realizing his offending caused real harm:

> A third area that I think is important in terms of explaining the remission of his pedophilic disorder has been the empathy that he's developed for the victims. When he was committing his sexual offenses, he lacked empathy or the ability to understand that what he was doing was harming the victim.

RP1557.

Now, McGaffee knows that sexual interest in prepubescent children or adolescent males is wrong and harmful. RP1557. He has gained the ability to inhibit his arousal, which is "what we try to teach sex offenders in treatment who have the type of condition that Mr. McGaffee has." RP1560-62; 1649. Last, he has developed a comprehensive relapse prevention plan. RP1558. Dr. Abbott viewed McGaffee's decision to leave treatment in 2012 as "understandable under the circumstances" and it did not change his opinion of the influence that treatment had on McGaffee. RP1590.

Not only did Dr. Abbott opine that McGaffee lacks any qualifying mental disorder, he also opined that McGaffee's risk "falls below the [statutory] threshold of more likely than not." RP1595-97.

The trial court made a series of rulings, all adverse to McGaffee, each dealing with information related to risk of reoffense. First, the trial court denied a defense Frye motion to keep the State's evaluator from testifying about a novel psychometric measure, the SRA-FV. 10/21/14 RP4-7. Second, over objection, the trial court allowed the State's evaluator

to present relative risk ranking data comparing McGaffee to other sex offenders. RP 997-98, 1002-31. Third, the trial court barred Dr. Abbott from testifying that a newly revised actuarial risk instrument used by the State's expert was not generally accepted in the scientific community and would likely fail replication. RP1608, 1617. Fourth, over objection, the trial court refused to pose a jury question asking Dr. Abbott what instruments he – as compared to the State's expert – used in his risk assessment. RP1778-86.

Finally, in closing argument, the trial court overruled defense objections as to the State's comparison between how their expert and Dr. Abbott approached risk assessment in the case. RP1831-33; CP 492-519. Similarly, the trial court overruled defense objections to the prosecutor's use of a "vacuum" analogy to tell the jury that the absence of observed signs of a pedophilic disorder was evidence of its existence. RP1868-69.

The jury returned a verdict finding that McGaffee continues to meet RCW 71.09 commitment criteria and that is what the trial court ordered. CP 491; CP 1131. The Court of Appeals affirmed. Slip Op. at 20.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. The State's expert's use of the SRA-FV does not satisfy the Frye standard of scientific evidence admissibility.

To establish that an individual respondent meets the involuntary civil commitment criteria of RCW 71.09, the State must prove beyond a reasonable doubt that he or she is "more likely than not" to engage in a future predatory act of sexual violence unless confined to a secure facility. RCW 71.09.020(18). The "more likely than not" standard represents an absolute statistical probability exceeding 50%. State v. Brooks, 145 Wn.2d at 295.

In general, the State attempts to meet this burden by presenting actuarial risk assessment instruments that gauge whether certain static – unchangeable – risk factors apply. "The actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense." Thorell 149 Wn.2d at 753.

The SRA-FV is supposed to assess personality traits (habitual patterns of behavior, thought, and emotion) that relate to risk of sexual offending but are unaccounted for in the Static-99R actuarial risk assessment instrument.

After McGaffee's trial concluded, Division III of the Court of Appeals ruled that the SRA-FV on the whole satisfies Frye. In re Det. of Ritter, 192 Wn.App. 493, 372 P.3d 122 (2016). A Division II opinion did the same, albeit in a case with a one-sided record. In re Det. of Pettis, 188 Wn.App. 198, 211, 352 P.3d 841 (2015).

The Court of Appeals relied on Ritter and Pettis to find the SRA-FV was admissible under Frye in McGaffee's case. Slip Op. at 5-6. However, the record in McGaffee's Frye hearing differs from that presented in the Ritter and Pettis matters, even if a similar legal question is at issue. In particular, the record at McGaffee's trial shows that using the SRA-FV to select a Static-99R normative group – as the State's expert chose to – is not generally accepted in the scientific community.

a. Scientific evidence is inadmissible when it fails reliability or lacks general acceptance

Under Frye, expert testimony is admissible 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. Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn.App. 168, 175, 313 P.3d 408 (2013), rev. denied, 179 Wn.2d 1019

(2014) (quoting State v. Sipin, 130 Wn.App. 403, 414, 123 P.3d 862 (2005)).

"Both the theory underlying the evidence and the methodology used to implement the theory must be generally accepted in the scientific community for evidence to be admissible under Frye." Id. (emphasis added). The court does not decide the correctness of the proposed expert testimony, but "whether the theory has achieved general acceptance in the appropriate scientific community." Id. at 175-76 (quoting State v. Riker, 123 Wn.2d 351, 359-60, 869 P.2d 43 (1994)).

b. There is no valid basis for using the SRA-FV to select a Static-99R reference group and this use of the instrument is not generally accepted in the scientific community.

At McGaffee's trial, the parties presented significantly conflicting evidence regarding the validity, reliability, and general acceptance of the SRA-FV psychometric measure.[2] Dr. Amy Phenix testified for the State, while McGaffee called forensic psychologists Dr. Howard Barbaree and Dr. Brian Abbott.[3]

Dr. Abbott testified that the Static-99R was designed to mechanically order sex offenders by relative risk, not to explain why they

[2] The Frye hearings were held on 8/15/14, 9/2/14, 9/3/14am, 9/3/14pm, 9/4/14, and 10/2/14. The transcripts for these pretrial hearings were not consecutively paginated.

[3] Dr. Abbott and Dr. Phenix were also experts in Ritter. Dr. Barbaree did not participate in either the Ritter or Pettis litigation.

might reoffend. 9/3/14pm 34-36. That instrument is "generally accepted as having some association with sexual recidivism." 9/3/14pm RP38-39. It has gained that acceptance after several cross-validations showing that it consistently sorted recidivists from non-recidivists. 9/3/14pm RP43. The instrument is focused on historical, unchangeable, risk factors.

However, "what's not generally accepted about the Static-99R is the way in which one selects the reference groups." 9/3/14pm RP39. The Static-99R authors have not endorsed the SRA-FV for this purpose. 9/4/14 RP123. Furthermore, there is evidence suggesting that the reference group concept overall just does not work. 9/3/14pm RP39-40. And, there is data showing the SRA-FV does not work in selecting a single Static-99R reference group. 10/2/14 RP43-44.

The State's expert, Dr. Phenix all but conceded that using the SRA-FV to select a Static-99R reference group is unfounded. Dr. Phenix admitted the Static-99R manual does not instruct a user of the instrument to rely on the SRA-FV to select a Static-99R reference group; this is only a suggestion of its inventor. 8/15/14 RP45-47, 55, 69-70. Dr. Phenix ostensibly believes that peer-review is an important first step toward the scientific community evaluating an idea. 8/15/14 RP107. Yet, she conceded no peer-reviewed professional journal article advocates for

turning to the SRA-FV to select a Static-99R reference group. 8/15/14 RP70, 78.

Like Dr. Abbott, Dr. Barbaree refuted the claim that Dr. Goldberg's decision to rely on SRA-FV scoring to select a Static-99R reference group was a "generally accepted" scientific method. Dr. Barbaree called that use of the instrument "speculative at this stage." 9/2/14 RP130-31. It is nothing more than an un-validated "hypothesis." 9/2/14 RP132-33. Because Dr. Abbott's publication has shown that this approach can be wrong, Dr. Barbaree testified: "you shouldn't rely on the SRA-FV [to select a Static-99R reference group.]" 9/2/14 RP134-35; 9/3/14 RP9-10.

Dr. Phenix testified that when a risk prediction instrument is developed, it may initially "work pretty well" on the sample it was developed on, but attempts to cross-validate the instrument "on a wholly different group of individuals" often fail, and there is "shrinkage or a lowering of the predictive accuracy." 8/15/14 RP21-22. There has to be cross-validation. 8/15/14 RP22.

Cross-validation is done to find out if the instrument works with samples of offenders other than the sample upon which it was initially validated, but this has not been done with the SRA-FV. 8/15/15 RP71-75; 9/4/14 RP51; 10/2/14 RP42. Dr. Phenix admitted "research still needs to

be done to validate this – cross-validate this instrument on other types of sex offenders, particularly since it was cross-validated on the same sample, in a split sample." 8/15/14 RP49.[4] The unique make-up of the SRA-FV developmental sample suggests reason for concern. Dr. Phenix admitted the SRA-FV was developed on a dated population of sexual psychopaths, the so-called Bridgewater sample. 8/15/14 RP24. That group has been criticized as unusual and may be different from contemporary populations of sex offenders. 8/15/14 RP26, 73.

The trial court record shows this use of the instrument was based on a suggestion made at a conference training presentation and not in any sort of peer-reviewed scientific journal. To label this untested use of a hypothesis as somehow having general acceptance in the scientific community is to turn a blind eye to the Frye standard. This Court should grant review.

2. The trial court wrongfully allowed the State to bolster claims about McGaffee's risk with prejudicial and confusing relative risk ranking data.

Dr. Goldberg assigned a relative percentile rank of 97% to McGaffee, even though his absolute risk of reoffense was estimated to be only about 43% in ten years. RP1027. Taken at face value, the absolute

[4] In contrast, the Static-99R actuarial risk assessment instrument has been subject to some 65 validations. 8/15/14 RP18, 20-21.

risk estimate indicates that McGaffee's likelihood of committing a sexual offense falls below the statutory threshold. On the other hand, the relative risk ranking suggests he is more dangerous than nearly all other sex offenders. McGaffee moved to exclude mention of relative risk rankings but the trial court denied this motion. RP997-98, 1031.

At the trial, Dr. Goldberg acknowledged the relative risk ranking was confusing and irrelevant to the absolute risk question. RP1507 (emphasis added). The trial court was wrong to permit Dr. Goldberg to offer testimony on this issue. ER 401, 403; Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994); Lockwood v. AC & S, Inc.,109 Wn.2d 235, 257, 744 P.2d 605 (1987); State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983). This Court should accept review.

3. The trial court violated McGaffee's right to present a defense when it set arbitrary limits on how he could criticize the VRAG-revised actuarial risk assessment instrument and when it refused to ask a jury question about Dr. Abbott's risk assessment.

The right to present witnesses in one's own defense is an essential trial right: "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Franklin, 180 Wn.2d 371, 378, 325 P.3d 159 (2014); U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22.

Dr. Abbott held the opinion that Dr. Goldberg's use of the VRAG-R was inappropriate, in part, because it had not been cross-validated on other populations. RP1608-1611, 1615, 1617. The trial court improperly barred Dr. Abbott from testifying to his opinion that using the VRAG-R was generally inappropriate in a forensic evaluation, thereby preventing McGaffee from refuting the approach taken by the State's forensic psychologist, the main witness against him. RP1608. This violated his constitutional right to present a defense.

In addition, the trial court infringed on McGaffee's right to present a defense when it refused to let Dr. Abbott answer a jury question as to his risk assessment methodology. CR 43(k); see United States v. Sutton, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992). This Court should grant review.

4. The prosecutor committed misconduct in closing argument.

An accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. 1, §§ 3, 21, 22; State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id. See also State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); State v. Boehning, 127 Wn.App. 511, 518, 111 P.3d 899 (2005).

a. The prosecutor's argument about the difference between Dr. Goldberg and Dr. Abbott's risk assessment methodologies was misconduct.

In closing argument, the prosecutor addressed the risk element of the statute. RP1832. A PowerPoint presentation accompanied the argument. CP 492-519. One of the PowerPoint slides displays Dr. Goldberg's name and shows four arrows pointing toward the center of the page, where the word "risk assessment" appears. CP 510.

Turning to the next slide, the prosecutor compared the State's expert's approach to that of an able cook. RP1832. The State's PowerPoint actually shows an image of a pot of soup with Dr. Goldberg's name above it. CP 510. The prosecutor contrasted his claim that Dr. Goldberg fed the jury a hearty stew, with an assertion that Dr. Abbott had left them hungry. RP1832 (emphasis added).

The slide accompanying this argument is the same design as what the prosecutor used to depict Dr. Goldberg's approach, but shows nothing except the word "risk assessment." CP 510. Defense objected and moved for a mistrial. RP1832. The objection was overruled and the prosecutor pressed on with the idea that Dr. Abbott's testimony was insufficient:

> He criticized the use of the VRAG, he talked a little bit about the use of the percentile rankings, **but he did not support his conclusion. Dr. Goldberg is the only one that did.**

RP1832 (emphasis added).

Defense counsel's additional objections and request for a mistrial were overruled. RP1833. The prosecutor then suggested the jurors could find for the State based on their subjective beliefs as to McGaffee's risk:

> "More likely than not" is defined as 50 percent, greater than 50 percent, in your instruction. That means that based on the evidence, **you believe** there's at least 50 percent plus something that he will reoffend; **that does not mean that the actuarial percentage has to be above 50 percent.**

RP1834 (emphasis added).

Rather than accept the burden of proof on the question of risk, the prosecutor punted that difficult task to the jury:

> Actuarials cannot predict the future. We don't have a crystal ball. We don't know whether or not he will reoffend or won't reoffend. That's not what you're being asked. **You're being asked to see whether or not it's likely.**

RP1835 (emphasis added).

The State's argument was improper and the defense objections should have been sustained. "Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct." State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) citing State v. Gregory, 158 Wn.2d 759, 859–60, 147 P.3d 1201 (2006). Arguments that compare a critical legal standard to everyday decision making are improper because they minimize and trivialize the State's burden of proof. See Lindsay at 436.

In rebuttal, the State asserted that since McGaffee called a witness to testify in his behalf, the jury "can evaluate what the witness said." RP1868. Defense objected again. RP1868. The State's argument was misconduct and particularly egregious because it was based on directly exploiting the earlier trial court ruling that kept Dr. Abbott from telling the jury about his risk assessment methodology, the tools he used, and how he scored McGaffee. State v. Kassahun, 78 Wn.App. 938, 952, 900 P.2d 1109 (1995) (misconduct to imply in argument that defendant failed to present evidence excluded on the State's motion); see also State v. Pierce, 169 Wn.App. 533, 553, 280 P.3d 1158 (2012); State v. Claflin, 38 Wn.App. 847, 850–51, 690 P.2d 1186 (1984); State v. Jackson, 150 Wn.App. 877, 885, 209 P.3d 553 (2009). Review should be accepted.

b. The prosecutor's argument about the lack of evidence was misconduct because it misstated the law.

Additionally, the prosecutor's "vacuum" analogy in closing argument was misconduct because it constituted a misstatement of the law. See S.H. ex rel. A.H. v. Plano Indep. Sch. Dist., 487 Fed. Appx. 850, 872-73 (5th Cir. 2012). The prosecutor's argument directly contradicted the court's instruction with respect to the definition of reasonable doubt, which specified that "A reasonable doubt is one for which a reason exists

and may arise from the evidence or lack of evidence." CP 526 (Instruction No. 4). This Court should grant review.

5. The cumulative effect of these errors deprived McGaffee of a fair trial.

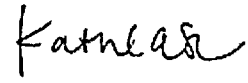
Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together, the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. 1, § 3; e.g., Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). Because the cumulative effect of the trial errors denied McGaffee his right to a fair trial, this Court should accept review. RAP 13.4(b).

E. CONCLUSION

On each of these bases, the Court should grant review of the Court of Appeals opinion affirming McGaffee's continued commitment.

DATED this 13th day of September, 2017.

Respectfully submitted,



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APPENDIX

COURT OF APPEALS, DIVISION I OPINION

August 14, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of PATRICK EVERETT MCGAFFEE, Appellant, v. THE STATE OF WASHINGTON, Respondent.	)	No. 73727-9-I DIVISION ONE UNPUBLISHED OPINION FILED: August 14, 2017

MANN, J. — Patrick McGaffee appeals his continued civil commitment as a sexually violent predator following a jury verdict in an unconditional discharge trial. McGaffee argues that the trial court erred (1) under Frye,[1] by admitting testimony based on the Structured Risk Assessment-Forensic Version (SRA-FV) tool, (2) by allowing testimony of McGaffee's ranking to reoffend as against other sexual offenders, (3) by limiting McGaffee's criticism of one of the risk assessment tests used by the State, and (4) by refusing to ask one of the jury's questions. McGaffee also asserts the State committed prosecutorial misconduct during closing argument.

Finding no error or misconduct, we affirm.

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

FACTS

As a young adult, Patrick McGaffee repeatedly offended against prepubescent boys. In 1992, McGaffee pleaded guilty to residential burglary and attempted second degree rape of a 15-year-old boy after he broke into the boy's home with the intent of raping him. At the conclusion of McGaffee's sentence, the State petitioned for continued civil commitment under the Sexually Violent Predator Act (SVPA), ch. 71.09 RCW. In 1998, McGaffee was committed and has since resided in total confinement at the Special Commitment Center (SCC).

In 2013, McGaffee petitioned for, and was granted, an unconditional release trial pursuant to RCW 71.09.090. McGaffee moved pretrial to exclude testimony from the State's expert witness regarding the use of the SRA-FV tool. The trial court conducted a multi-day Frye hearing and heard testimony from the State's expert, Amy Phenix, Ph.D, and McGaffee's experts, Howard Barbaree, Ph.D, and Brian Abbott, Ph.D. At the conclusion of the Frye hearing, the trial court denied McGaffee's motion and concluded that the testimony concerning the use of the SRA-FV as a measure for risk assessment was admissible.

Clinical psychologist, Harry Goldberg, Ph.D, testified for the State. Dr. Goldberg diagnosed McGaffee with pedophilic disorder and fetishistic disorder and concluded those disorders amounted to a mental abnormality. Dr. Goldberg opined that McGaffee's mental abnormality causes him serious difficulty controlling his sexually violent behavior.

Dr. Goldberg then assessed McGaffee's risk of reoffending using a method known as structured clinical judgment. He used a series of actuarial tools, including the

Static-99R, Static 2002R, and Violence Risk Appraised Guide-Revised (VRAG-R) tools to consider "static" (or unchanging) risk factors. He also used the SRA-FV and STABLE 2007 tools to assess "dynamic" risk factors (also knowns as psychological vulnerabilities). Dr. Goldberg also considered protective factors and case-specific factors. Dr. Goldberg concluded that McGaffee's mental abnormality makes him more likely than not to commit predatory acts of sexual violence if not confined in a secure facility.

Clinical psychologist, Brian Abbott, Ph.D., testified for McGaffee. Dr. Abbott testified that McGaffee does not have a qualifying mental disorder and that McGaffee's risk "falls below the [statutory] threshold of more likely than not." As a result, Dr. Abbott did not assess McGaffee's risk of reoffending. Dr. Abbott criticized Dr. Goldberg's methodology including his use of the VRAG-R and the SRA-FV actuarial tools.

The jury returned a verdict finding McGaffee continues to be a sexually violent predator. The trial court ordered continued commitment at the SCC. McGaffee appeals.

ANALYSIS

Once an individual has been involuntarily committed under the SVPA, they have the right, on an annual basis, to petition for conditional release to a less restrictive alternative or for unconditional discharge. RCW 71.09.090(2). If the issue is whether the individual should be unconditionally discharged, the State bears the burden of proving, beyond a reasonable doubt, that the person continues to meet the definition of a sexually violent predator. RCW 71.09.090(3)(c); RCW 71.09.060(1); In re Det. of Post, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010).

A "sexually violent predator" is defined as 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 that makes the person "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means the person "more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7). This is often referred to as the "more likely than not" standard. See In re Det. of Moore, 167 Wn.2d 113, 119, 216 P.3d 1015 (2009). "The fact to be determined is not whether the defendant will reoffend, but whether the probability of the defendant's reoffending exceeds 50 percent." In re Detention of Brooks, 145 Wn.2d 275, 298, 36 P.3d 1034 (2001), overruled on other grounds by In re Det. of Thorell, 149 Wn.2d 724, 753, 72 P.3d 708 (2003).

Frye Challenge

McGaffee argues first that the trial court erred by allowing Dr. Goldberg to testify based on the SRA-FV tool, because it is a novel risk assessment tool that does not meet the test in Frye v United States, 293 F. 1013, 1014 (D.C. Cir. 1923). We disagree.

Washington courts follow the Frye test in determining the admissibility of novel scientific evidence. State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996). Testimony is admissible under Frye 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 part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results." Lake Chelan

Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 175, 313 P.3d 280 (2013).

The admissibility of evidence under Frye is a mixed question of law and fact that we review de novo. In re Det. of Pettis, 188 Wn. App. 198, 204, 352 P.3d 841 (2015). "We undertake 'a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority.'" Pettis, 188 Wn. App. at 204-05 (quoting Copeland, 130 Wn.2d at 255-56). "We may consider materials that were unavailable until after the Frye hearing." Pettis, 188 Wn. App. at 205.

Since McGaffee's trial concluded, Division Two and Division Three of this court have reviewed and found the use of the SRA-FV tool has gained general acceptance in the scientific community, and that there are generally accepted methods of applying the test in a manner capable of producing reliable results. Both courts concluded that use of the SRA-FV test is admissible under Frye. Pettis, 188 Wn. App. at 209-10, 211; In re Det. of Ritter, 192 Wn. App. 493, 499, 372 P.3d 122 (2016), as amended (Apr. 12, 2016), review denied, 185 Wn.2d 1039 (2016). While McGaffee attempts to circumvent these decisions by arguing that the SRA-FV was applied differently in this case, his argument is unavailing.

Both Pettis and Ritter involved the use of the SRA-FV tool in conjunction with the Static-99R tool, in the same way that it was used in this case. Pettis, 188 Wn. App. at 210; Ritter, 192 Wn. App. at 498. Pettis and Ritter also involved several of the same psychological experts who testified in this case—Dr. Phenix and Dr. Abbott. See Ritter, 192 Wn. App. at 496 (Phenix and Abbot); Pettis, 188 Wn. App. at 202 (Phenix). We find

no reason to diverge from these recent decisions, and concur that the SRA-FV tool is generally accepted by the scientific community, that there are generally accepted methods of applying the tool capable of producing reliable results, and that the tool is admissible under Frye.[2]

Percentile Ranking

The State was required to prove McGaffee's mental abnormality makes him more likely than not to commit predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18). The SVPA does not, however, require the State to prove that any individual actuarial tool estimates the risk of reoffending exceeds 50 percent. In re Meirhofer, 182 Wn. 2d 632, 645, 343 P.3d 731 (2015). Indeed, the SVPA "does not limit experts to the results of actuarial tests." Meirhofer, 182 Wn.2d at 645. When completing a risk assessment in SVP cases, experts generally use tools that test both static and dynamic risk factors and consider their own clinical judgment. In re Det. of

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[2] McGaffee's brief points to the lack of peer reviewed literature supporting use of the SRA-FV tool. But as the court discussed in Pettis, this has changed:

> In December 2013, after Pettis's trial, Dr. Thornton published a peer-reviewed article describing the SRA-FV. David Thornton & Raymond Knight, *Construction and Validation of SRA-FV Need Assessment,* SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT XX(X) 1-16 (2013). The SRA-FV has been described favorably in some books: "For non-disabled clients, the [SRA-FV] (Thornton, 2002) . . . enjoy[s] relative degrees of favor, depending on the jurisdiction in which each is used." Robin J. Wilson & David S. Prescott, *Understanding and* RESPONDING TO PERSONS WITH SPECIAL NEEDS WHO HAVE SEXUALLY OFFENDED, IN RESPONDING TO SEXUAL OFFENDING: PERCEPTIONS, RISK MANAGEMENT AND PUBLIC PROTECTION 128, 134 (Kieran McCartan, ed., 2014); *see also* Alix M. McLearen et al., *Perpetrators of Sexual Violence: Demographics, Assessments, Interventions, in* Violent Offenders: Understanding and Assessment 216, 231 (Christina Pietz, et al., eds., 2014) (describing the SRA-FV as a "research-guided multistep framework for assessing the risk presented by a sex offender and provides a systematic way of going beyond static risk classification").

Pettis, 188 Wn. App. at 208-09.

Sease, 190 Wn. App. 29, 44, 357 P.3d 1088 (2015) (citing Meirhofer, 182 Wn. 2d at 646).

During his testimony concerning McGaffee's risk of reoffending, Dr. Goldberg described the results he obtained using several commonly used actuarial tools. According to the Static-99R test, the most commonly used sex offender risk tool, Dr. Goldberg explained that the results showed McGaffee had a 30.7 percent chance of committing an offense over a period of 5 years and a 42.8 percent chance over a period of 10 years. Dr. Goldberg also explained, that McGaffee scored a seven which placed him in the high category for sexual reoffense. Goldberg then explained that this score placed McGaffee in the 94th percentile of other sexual offenders. Goldberg explained that McGaffee did not have a 94 percent chance of reoffending, "[i]t just means compared to other sex offenders, he's in the 94th percentile meaning that's where he falls." Dr. Goldberg again explained his testimony in response to a question from the jury. The jury asked: "Mr. McGaffee falls into the 94th percentile of sex offender, but it doesn't mean 94 percent chance of reoffending. What does it mean?" Dr. Goldberg reiterated that it meant McGaffee is "94 percent of a higher risk than other sex offenders . . . It doesn't mean he's 94 percent going to reoffend."

McGaffee argues that this testimony was irrelevant and confused the jury by conflating the 94th percentile ranking with the absolute risk of reoffense needed under the statute. McGaffee also argues that the evidence of such a high percentile ranking was prejudicial and was likely to arouse an emotional response in the jury, rather than contribute to a rational decision. We disagree.

We review the trial court's evidentiary rulings for abuse of discretion. "A court abuses its discretion when its evidentiary ruling is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Williams, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). Evidence is relevant and admissible if it has any tendency to make the existence of a fact more or less probable. ER 401. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Evidence is unfairly prejudicial if it is more "likely to arouse an emotional response than a rational decision among the jurors." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). The burden of showing prejudice is on the party seeking to exclude the evidence. Carson, 123 Wn.2d at 225. The trial court sits in the best position to determine the prejudicial effect of evidence. State v. Powell, 166 Wn.2d 73, 81, 206 P.3d 321 (2009).

McGaffee's percentile ranking is certainly relevant. Dr. Goldberg testified that understanding McGaffee's percentile ranking against other offenders is a starting point—it informed him that McGaffee has a higher risk of reoffending than most offenders. Further, instead of just knowing McGaffee had a high risk of offending, knowing where he ranked against other offenders provided more specific information. Dr. Goldberg also explained that the percentile ranking is frequently relied upon by others in his field and that it is "a standard practice." Based on Dr. Goldberg's testimony and argument, the trial court found the evidence relevant and admissible. We agree.

While evidence that McGaffee's risk of reoffending was in the 94th percentile against other offenders might be prejudicial, it is not so highly prejudicial so as to be excluded. Evidence is not inadmissible under ER 403 just because it may be prejudicial, as nearly all evidence will prejudice one side or the other in a lawsuit. Carson, 123 Wn.2d at 224. As Dr. Goldberg was the State's main expert, most of his testimony and evidence was bound to be inherently prejudicial. Dr. Goldberg was free to provide his expert opinion on McGaffee's overall risk of offense and was not limited to discussing the actuarial instrument used to get the absolute recidivism rates. Dr. Goldberg repeatedly explained that the percentile was not the same as the absolute risk of reoffense and testified to two smaller percentages that he specified were indicative of McGaffee's risk of reoffense. Moreover, the record supports the conclusion that the jury was rationally considering this evidence for its appropriate purpose, demonstrated by the clarifying question posed in order to ensure the evidence was properly measured.

The trial court did not abuse its discretion in allowing the testimony concerning percentile rankings.

Dr. Abbott's Opinion of the VRAG-R Instrument

The State's expert, Dr. Goldberg, used three different actuarial tools to consider McGaffee's "static" risk factors for reoffending. McGaffee's expert, Dr. Abbott, held the opinion that Dr. Goldberg's use of VRAG-R was inappropriate. McGaffee claims that the trial court limited Dr. Abbot's criticism of the VRAG-R and consequently violated McGaffee's right to present a defense. McGaffee's argument is without merit.

While a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion, a court "necessarily abuses its discretion by denying a criminal

defendant's constitutional right." State v. Strizheus, 163 Wn. App. 820, 829, 262 P.3d 100 (2011) (internal quotations omitted). A criminal defendant has a right under the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington Constitution to present a defense. Strizheus, 163 Wn. App. at 829-30. However, the right to present a defense is not absolute and does not turn every trial court decision excluding evidence into an error of constitutional magnitude. "The right to present a defense does not extend to irrelevant or inadmissible evidence." Strizheus, 163 Wn. App. at 830.

During his testimony, Dr. Abbott was asked whether he believed the VRAG-R instrument should be used in forensic applications. The State objected, and after argument outside the presence of the jury, the trial court ruled that Dr. Abbott could testify as to why he did not personally use the VRAG-R but could not opine whether the tool should be used.

Despite the court's ruling, Dr. Abbott testified that the VRAG-R was unreliable in part because it had not been cross-validated on other populations, and the developmental sample was not representative of the group of offenders to whom McGaffee belongs. Dr. Abbott also testified that any cross-validation of the VRAG-R would likely show reduced predictive validity. The only objection the trial court sustained during this line of questioning, was an objection to Dr. Abbott predicting how future cross-validations would turn out, stating "you can't predict the future." Dr. Abbott, however, was then able to continue discussing the possibility of "shrinkage" and diminished accuracy in cross-validation.

The trial court's statement that the objection was sustained because "you cannot predict the future," indicates it was excluded because it was speculative. "'It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.'" Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (quoting Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817, P.2d 861 (1991)). "'In addition, when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert.'" Miller, 109 Wn. App. at 148 (quoting Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986)). Dr. Abbott's claims that future cross-validations would most likely show diminished accuracy was clearly speculative, as it assumes an outcome that cannot be verified.

McGaffee was not prevented from presenting a defense and the trial court did not abuse its discretion in limiting Dr. Abbot's speculative testimony.

Jury Question for Dr. Abbott

Dr. Abbott testified that McGaffee did not suffer from a mental abnormality. Because Dr. Abbott did not believe McGaffee had a mental abnormality, he did not address whether McGaffee had difficulty in controlling sexually violent behavior. Dr. Abbott also did not "specifically" address whether McGaffee was more likely than not to engage in predatory acts of sexual violence; he only conducted a risk assessment to contrast Dr. Goldberg's assessment. Dr. Abbott did not testify to which instruments or methods he relied upon in reaching his criticism of Dr. Goldberg's opinion. At the conclusion of Dr. Abbott's testimony, the jury submitted the following question: "You testified you completed a risk assessment to compare with Dr. Goldberg's. What

instruments did you use and what were the scores?" On its own motion, the trial court refused to ask the question. McGaffee now argues the trial court erred. We disagree.

In civil cases, including SVP trials, jurors are permitted to submit questions for the court to ask witnesses during the witness's testimony. CR 43(k); In re Det. Of Greenwood, 130 Wn. App. 277, 286-87, 122 P.3d 747 (2005). The court may rephrase or reword the question. On its own motion, the court may also refuse to allow a particular question from a juror to a witness. CR 43(k). We review the trial court's decision for abuse of discretion. See, e.g., Jarrad v. Seifert, 22 Wn. App. 476, 478, 591 P.2d 809 (1979).[3]

Prior to deciding whether to ask the jury's question, the trial court heard argument outside of the presence of the jury. The State argued the question was outside the scope of the testimony because Dr. Abbott had not testified to conducting a risk assessment or what instruments he had used. McGaffee's counsel agreed that the question was outside the scope of direct and redirect examination but did not take a position "as to whether that's a proper reason to exclude." McGaffee did not argue that he wanted the question asked, or state that the question was necessary.

The trial court agreed that the question was outside the scope because "It appears that this question was never asked by the respondent." The trial court further opined that the question would require spending substantial time going into a topic McGaffee had chosen not to raise, which might interfere with respondent's strategic reasoning for not going into the topic. In the end the trial court ruled, "I am using my

[3] "The trial court has broad discretion in propounding questions to witnesses in order that it may gain all the information possible to aid in correctly determining the disputed questions presented by the respective parties." Jarrad, 22 Wn. App. at 478.

authority under CR 43(k) and I am refusing on my own motion, with not really any objections from either of you, to ask this particular question." McGaffee then objected for the record.

McGaffee argues that the trial court's decision to withhold this question barred him from being able to present a defense. We disagree. The jury submitted this question after Dr. Abbott had testified for two days. McGaffee chose not to ask Dr. Abbott about, or have Dr. Abbott discuss, the assessment he had used. Thus, the question was undoubtedly outside the scope of the testimony. McGaffee did not argue that the question was necessary to their case or even meaningfully argue that the question should be allowed. The trial court then agreed, without any argument to the contrary. The trial court did not abuse its discretion on refusing to ask the question.

Prosecutorial Misconduct

McGaffee next argues that the State committed prosecutorial misconduct during closing arguments. We disagree.

In determining whether prosecutorial misconduct has occurred, we first look at whether the defendant objected to the alleged misconduct. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). "If the defendant objected, we evaluate (1) whether the prosecutor's comments were improper and (2) whether a substantial likelihood exists that the improper comments affected the jury's verdict." Magers, 164 Wn.2d at 174. The defendant bears the burden of showing both prongs of prosecutorial misconduct. Magers, 164 Wn.2d at 191 (citing State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003)). If the appellant failed to object to the improper remark at the trial court, they waived the error "unless the remark is so flagrant and ill intentioned that it causes an

enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

In closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. Magers, 164 Wn.2d at 192. A prosecutor's remarks should be viewed in "context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Magers, 164 Wn.2d at 192 (quoting State v. Brown, 132 Wn.2d 529, 563, 940 P.2d 546 (1997)).

McGaffee assigns error to four comments made during the State's closing argument. We address each in turn.

A. Comments without objections

Three of the four statements McGaffee complains of must be analyzed under the "enduring and resulting prejudice" standard. "Failure to request a curative instruction or move for a mistrial 'strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" In re Det. of Law, 146 Wn. App. 28, 51, 204 P.3d 230 (2008) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

First, McGaffee claims that the State committed misconduct by suggesting that the jurors could rely on their subjective beliefs, when the State said,

> 'More likely than not' is defined as 50 percent, greater than 50 percent, in your instruction. That means that based on the evidence, you believe there's at least 50 percent plus something that he will reoffend; that does not mean that the actuarial percentage has to be above 50 percent.

This statement is not error because it is a correct statement of the standard and the law. The statement clearly limited the juror's decision to being "based on the evidence," and was not arguing that the jury could use their "subjective belief" as McGaffee suggests.

Second, McGaffee argues the State misstated the burden of proof by saying,

> Actuarials cannot predict the future. We don't have a crystal ball. We don't know whether or not he will reoffend or won't reoffend. That's not what you're being asked. You're being asked to see whether or not it's likely.

This statement is also an accurate statement of the standard and the evidence. The State was simply admitting the limitations of the actuarial tools relied on by the experts. Although the statement that the jurors are "being asked to see whether or not it's likely" could have drawn an objection requiring that the State clarify that it must be "more likely than not," this error was not "enduring" as the correct legal standard was repeatedly provided.

Finally, McGaffee argues the State committed misconduct by arguing the absence of evidence of a current pedophilic disorder did not mean it was not there. Using a vacuum analogy, the State said,

> So say a vacuum . . . a vacuum is like the absence of air. It's that sucking that happens. You can't see it, you can't observe the vacuum. That doesn't mean it's not there. Right?
>
> How do we know that it's there? You look at the evidence around the vacuum. You look at what's going on around it, that things are being pulled into it. Right? So you can see what's happening to the feather when you hold it up next to the vacuum, and that's how you know there's a vacuum.
>
> Similarly, you can look at Mr. McGaffee, and in the absence of direct, Mr. McGaffee on the stand saying I continue to be a pedophile, I continue to suffer from pedophilic disorder, you can look at the evidence around it to determine whether the condition still exists.

Considering the State's analogy in the "context of the total argument," as is required, this statement was not a claim that the jury need not rely on the evidence. The statement was a description of the state of the evidence and an argument that the jury may use circumstantial evidence in the absence of direct evidence. This argument was not misconduct, and, though awkward, was not so "flagrant and ill intentioned" that it caused "an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Russell, 125 Wn.2d at 86.

B. Comment with objection

McGaffee did object and request a mistrial during closing argument after the State used a "soup" analogy to describe the evidence that was presented at trial. Because McGaffee did object, the first question is whether the State's comments were improper. Magers, 164 Wn.2d at 174.

During closing argument, the State offered a PowerPoint slide presentation that showed Dr. Goldberg's name, a bowl of soup, and the word "risk assessment" with arrows pointing toward it showing the different measures Dr. Goldberg used to reach his "risk assessment." The next slide showed Dr. Abbott's name, then the word "risk assessment" with no arrows demonstrating he had not provided any testimony to explain his assessment. While the slide was before the jury, the State argued,

> So if we were to go back and look at the risk assessment, if you only have the actuarial tools, you don't have a risk assessment, you don't have soup. If you don't have dynamic risk factors, or you just have case-specific factors, and protective factors, you don't have a risk assessment. The soup has to be completed, and Dr. Goldberg completed the risk assessment. Dr. Abbott, this is his risk assessment.

McGaffee objected and the trial court overruled the objection. The State continued,

> Dr. Abbott took the stand and he told you that Mr. McGaffee is not likely to reoffend, not -- sorry, is not more likely than not to reoffend, but he did not support his conclusion. [Dr. Abbott] criticized the use of the VRAG, he talked a little bit about the use of the percentile rankings, but he did not support his conclusion. Dr. Goldberg is the only one that did.

McGaffee moved for a mistrial. The trial court denied the motion.

McGaffee argues first that the "soup analogy" improperly trivialized a critical legal standard to everyday decision making. Washington courts have found prosecutorial misconduct when a prosecutor "compares the reasonable doubt standard to everyday decision making" because "it improperly minimizes and trivializes the gravity of the standard and the jury's role." State v. Lindsay, 180 Wn.2d 423, 436, 326 P.3d 125 (2014). This rule does not apply here. The State was using the "soup" analogy to describe the evidence, not to explain reasonable doubt, and is thus not relevant under this line of cases.

McGaffee next argues that the argument was misconduct because it improperly transferred the burden onto McGaffee to prove that he was not likely to reoffend, instead of on the State to prove that he was likely to offend. McGaffee argues, "[t]he respondent has no burden to demonstrate that he is safe to be at large. The respondent has the right to expert assistance, but no obligation to present any evidence, and certainly no obligation to develop risk assessment testimony." McGaffee maintains that this error was "particularly egregious" because the State was arguing that "McGaffee should be faulted for not presenting evidence the prosecutor knew to have been earlier excluded by judicial order," citing to State v. Kassahun, 78 Wn. App. 938, 952, 900 P.2d 1109 (1995).

"Arguments by the prosecution that shift the burden of proof onto the defense constitute misconduct." State v. Thorgerson, 172 Wn.2d 438, 466-67, 258 P.3d 43 (2011). "A prosecutor generally cannot comment on the lack of defense evidence because the defense has no duty to present evidence." Thorgerson, 172 Wn.2d at 466-67; State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). But, in closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. Magers, 164 Wn.2d 174 at 192. "An argument about the amount or quality of evidence presented by the defense does not necessarily suggest that the burden of proof rests with the defense.'" Thorgerson, 172 Wn.2d at 466-67 (quoting State v. Gregory, 158 Wn.2d 759, 760, 147 P.3d 1201 (2006)).

Here, the State's argument was not a comment on the amount and quality of the evidence presented by the defense, and did not improperly shift the burden of proof onto the defense. The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009). The State clearly explained to the jury that the State had the burden of proof. The State also explained that the jury was the sole judge of credibility and outlined numerous reasons why it should find the State's witnesses more credible than McGaffee's witness. The prosecutor did not argue that the jury should find McGaffee guilty because he did not present a risk assessment. The State's argument was that McGaffee's witness, who attacked the risk assessments used by the State, admitted to doing one himself, then did not present such an

assessment, was less credible than the State's witnesses. See Jackson, 150 Wn. App. at 886. This was also not misconduct.

Finally, McGaffee argues that the State committed misconduct by benefitting from McGaffee's failure to present a risk assessment after they specifically objected to the trial court admitting the jury question that would have asked Dr. Abbott to discuss the risk assessments he relied on. McGaffee bases this argument on the ruling in Kassahun, in which the State kept the defendant from discovering evidence, and then used the defendant's inability to present that evidence against him in closing argument. Kassahun, 78 Wn. App. at 952.

The facts in this case are readily distinguishable from Kassahun. Here, unlike in Kassahun, the State did not prevent McGaffee from asking Dr. Abbott to list the methods he relied on in reaching his conclusion during the two days in which Dr. Abbott testified. Moreover, McGaffee did nothing to induce the court to allow the jury instruction to be presented to Dr. Abbott. While the State's actions were underhanded, given that they said the question of what instrument Dr. Abbott used was "not needed" and then argued in closing that he was less credible due to not providing such instruments,[4] the State did not keep McGaffee from presenting the evidence of Dr. Abbott's risk assessment.

The State did not commit prosecutorial misconduct.

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[4] "I'm sure we can do it, it will be fairly time consuming, and ultimately I don't know that it would be that illuminating to the jury given that Dr. Abbott's testimony was that Mr. McGaffee is under 50 percent in his assessment. So we're not going to get any new information out of it, other than the fact that he used an instrument, and what that instrument's score was. So the answer is not needed. The evidence that Dr. Abbott has is in."

Cumulative Error

The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Because McGaffee has identified no errors, the cumulative error doctrine does not apply.

We affirm.

Mann, J.

WE CONCUR:

Leach, J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73727-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Washington Appellate Project

Date: September 13, 2017

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