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No. 67826-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of

EVERETTE BURD

STATE'S RESPONSE BRIEF

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I. INTRODUCTION

Appellant Burd was committed as a sexually violent predator following a jury trial. He raises a number of challenges to the order of commitment, including due process challenges. However, the issues he raises are largely disposed of by existing and well-established authority, which authority Burd sometimes acknowledges in footnotes to his arguments. Because Burd's appeal lacks merit, it should be denied and the trial court should be affirmed.

II. ISSUES

1. Should the court depart from established precedent on the admissibility of Paraphilia NOS and Anti-Social Personality Disorder? No.

2. Did the trial court err by excluding further improper defense testimony about a discussion between attendees of a professional conference? No.

3. Is the State required to unanimous prove a "means within a means" when an SVP respondent suffers from multiple paraphilias and personality disorders? No.

4. Is the SVP danger standard constitutional? Yes.

5. Did the prosecutor commit misconduct by quoting Burd's own relevant statements? No.

III. STATEMENT OF THE CASE

Burd was born on October 12, 1975 in the Seattle area. CP 8. He was placed in special education classes at an early age due to his mild mental retardation. RP 1215-16. Throughout his youth, his parents had great difficulty managing his violent behavior. CP 14. Throughout adulthood, he has not maintained steady employment or married. CP 15.

On August 27, 1996, Burd (20 years old at the time), sexually assaulted a 17 year old stranger, D.B. at the Highland Community Church. RP 660. D.B. went inside the church to use the restroom. *Id.* She briefly encountered Burd outside the restroom. *Id.* While using the bathroom stall, she heard another stall door open and noticed men's shoes. *Id.* She quickly zipped her pants and ran for the door. *Id.* Burd grabbed her by the crotch, placed her in a choke hold, and drug her into another room. RP 661. He forced her to the floor and tore off her shirt and bra, squeezed her breasts, and placed his hands down her pants, repeating "come on baby, want to fuck." RP 660-61. D.B. screamed loud enough that another female, P.T, who was inside the church, heard her cry for help. RP 661. P.T. saw Burd on top of D.B. and pulled him off, telling D.B. to run for help. *Id.*

Burd was arrested at the church and confessed to portions of the assault. RP 434. He pled guilty to Attempted Rape in the First Degree. CP 10. He received a 90 month sentence. *Id.*

Over the years, Burd has engaged in other sexually motivated behaviors and offenses. CP 16-17. He also has a history of non-sexual offenses, including Theft (age 15), Malicious Mischief (age 16), Assault in the Fourth Degree (age 17), and five convictions for Custodial Assault. RP 395-98, 378, 707-08. His most recent conviction Custodial Assault conviction was in 2002 and ran consecutive to the Attempted Rape. CP 3.

In 1991, at the age of 15, Burd sexually assaulted a 26 year old woman, S.G., who was a neighbor's houseguest. RP 656. Burd opened the front door, uninvited, and S.B confronted him and told him to leave. RP 435. Burd pushed S.G. to the floor and grabbed her crotch. S.G. managed to escape through the front door and called the police from another neighbor's home. RP 656. Several days earlier Burd had broken into the same home and rummaged through the bedroom dresser drawers, handling her undergarments. *Id.*

Burd was ultimately adjudicated for the crimes of Burglary in the First Degree, Indecent Liberties, and Criminal Trespass. RP 435, CP 11. Burd was sentenced to serve 168 weeks. CP 11. He was out pending appeal and, after violating his conditions of release, including sexual deviancy requirements, he was placed at Maple Lane School. RP 657.

While serving time at Maple Lane, Burd pinched a staff member, S.B., on her buttocks, then grabbed her arm as she attempted to run from

him. *Id.* Burd was convicted of Assault in the Fourth Degree. CP 11. He was 18 at the time. RP 657.

In 1989, at age 14, Burd unlawfully entered into a neighbor's home and rummaged through their 12-year-old daughter's bedroom, handling her undergarments and masturbating. RP 664. Burd was convicted of Criminal Trespass in the First Degree. RP 742.

During Burd's teenage years, he also made over $8000 worth of phone calls to 800 sex hotline numbers. RP 681.

Since his incarceration in 1997, Burd has received over 100 serious infractions, ranging from assaults on staff and inmates to throwing objects. RP 707-08. He also received infractions for Indecent Exposure and Sexual Harassment of Staff. *Id.* At the Special Commitment Center, he continued to expose himself and frequently attempted to have sexual contact with other inmates in violation of facility rules. RP 673.

In connection with his juvenile behaviors, Burd attempted sexual deviancy treatment between 1992 and 1994, but was disruptive and had to be taken out of group because of his escalating threats of violence. RP 335. During treatment, he continued to exhibit deviant behavior. RP 323 - 24, 330-34.

In 1997, DOC found him non-amendable to treatment due to his refusal to accept that his attempted Rape of D.B. was sexual, as well as his

ongoing sexually related threats to staff and inmates. RP 670, CP 21.

Burd was admitted to the Special Commitment Center in 2006, but refused treatment until 2009. RP 675, 977-78. During his brief treatment at SCC, he was unable to grasp the most basic treatment concepts. RP 674-75. Burd admitted to his therapist that he had active rape fantasies and substantial masturbation to those fantasies. RP 675.

At trial, the State presented the testimony of the Joint Forensic Unit expert, Dr. Douglas Tucker. RP 621. Dr. Tucker is a licensed psychiatrist with substantial qualifications to evaluate sex offenders. RP 621-628. He is a member of the Joint Forensic Unit. RP 63 -32.

Dr. Tucker opined to a reasonable degree of medical certainty that Burd suffers from the following: Paraphilia (Not Otherwise Specified), Fetishism, Schizoaffective disorder, Depressive Type, Mild Mental Retardation, Antisocial Personality Disorder, and Borderline Personality Disorder. RP 650-651. He testified that these diagnosis combined to fit the form a statutory "mental abnormality." RP 650. RP 718-19.

Dr. Testified that Burd's mental abnormality causes him serious difficulty controlling his behavior. RP 723 -24. Burd's lack of volitional capacity is evidenced, in part, by his drive to engage in coercive sexual acts with females, despite their protests and his detection. Dr. Tucker was particularly concerned with Burd's escalating pattern of sexual deviancy.

RP 668. Dr. Tucker noted Burd's "pathologically elevated level of sexual preoccupation and drive and behavior." RP 674.

Dr. Tucker further opines to a reasonable degree of medical certainty that Burd is more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility. RP 725, 787. In assessing Burd's risk, Dr. Tucker utilized actuarial measures, considered other static risk factors and dynamic risk factors. RP 784-87.

IV. BOTH PARAPHILIA NOS AND ANTISOCIAL PERSONALITY DISORDER SATISFIES *FRYE* AND SUBSTANTIVE DUE PROCESS

Burd claims that the Paraphilia NOS and Antisocial Personality Disorder violate due process and requires a *Frye* hearing. These arguments were rejected by the Supreme Court in the seminal case of *In re Young*, 122 Wn.2d 1 (1993) and by all subsequent appellate decisions. Most recently, this court rejected the arguments raised by Burd in *In re Det. of Berry,* 160 Wn.App. 374, 248 P.3d 592, *review denied,* 172 Wn.2d 1005 (2011). As such, the trial court should be affirmed.

A. BURD HAS FAILED TO PRESERVE HIS *FRYE* CHALLENGE

The court should decline to review this issue because Burd failed to preserve error by requesting a *Frye* hearing. Opening Brief at 7. Under RAP 2.5, an "appellate court may refuse to review any claim of error

which was not raised in the trial court." In general, "an issue not briefed or argued in the trial court will not be considered on appeal." *Brower v. Ackerley,* 88 Wn.App. 87, 96, 943 P.2d 1141 (1997). A litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. *State v. Guloy*, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986).

In proceedings below, Burd did not request a *Frye* hearing. The record is simply devoid of any timely objections to the diagnostic testimony based on a *Frye* theory.

Absent an objection, Burd cannot raise his claimed *Frye* error for the first time on appeal. The Washington Supreme Court recently applied the preservation of error doctrine to sexually violent predator cases because, among other reasons:

> [O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

In re the Detention of Audett, 158 Wash.2d 712, 725, 147 P.3d 982 (2006) (citing 2A Karl B. Teglund, Washington Practice: Rules Practice RAP 2.5(1), at 192 (6th ed. 2004).

In *In re Post*, 145 Wash.App. 728, 755-756, 187 P.3d 803 (2008),

this court held that the appellant had failed to preserve error by not requesting a *Frye* hearing or objecting under ER 702 in response to admission of testimony on Paraphilia NOS Rape/Nonconsent. The court found that Mr. Post's failure to preserve error was not cured by the effort to frame the evidentiary issue in due process terms:

> Post rests his substantive due process argument on his contention that the evidence he now challenges "fails to satisfy fundamental principles of sound science." Br. of Appellant at 54. By doing so, Post improperly attempts to transform that which should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal. In point of fact, Post attempts to sidestep the fact that he did not seek a *Frye* hearing in the trial court, and, thus, has not preserved an evidentiary challenge for review. *In re Det. of Taylor,* 132 Wash.App. 827, 836, 134 P.3d 254 (2006), *rev. denied,* 159 Wash.2d 1006, 153 P.3d 196 (2007).

Id. (footnotes omitted).

In *State v. Florczak*, 76 Wash.App. 55, 72-73, 882 P.2d 199, 209 (1994), this court similarly ruled that a *Frye* challenge cannot be raised for the first time on appeal and that it was necessary to preserve the claim of error with a proper objection. An evidentiary matter could be raised for the first time on appeal only if it was a "manifest error affecting a constitutional right." *Id.* The failure to request a *Frye* hearing falls outside the "manifest error" doctrine, and thus will not be reviewed on appeal absent preservation of error below:

Failure to object to the admissibility of evidence at trial precludes

> appellate review of that issue unless the alleged error involves manifest error affecting a constitutional right. *State v. Lynn,* 67 Wash.App. 339, 342, 835 P.2d 251 (1992); *State v. Stevens,* 58 Wash.App. 478, 485-86, 794 P.2d 38, *review denied,* 115 Wash.2d 1025, 802 P.2d 128 (1990). Such error is not created by the failure to lay an adequate foundation under *Frye.* For example, in *State v. Jones,* 71 Wash.App. 798, 820, 863 P.2d 85 (1993), the court concluded that the admission of a CPS caseworker's testimony was improper because it included "generalized assertions about common behaviors of sexually abused children" and thus exceeded the limits of the caseworker's personal experience. However, because the defendant failed to specifically object to an inadequate foundation under *Frye* for the caseworker's testimony, the issue was not preserved for review. 71 Wash.App. at 821, 863 P.2d 85. Terrell similarly failed to preserve for review any challenge to Wilson's expert status or to the foundation for her testimony regarding post-traumatic stress syndrome.[FN11]

Id. Accord State v. Russell 141 Wash.App. 733, 742, 172 P.3d 361 (2007) (failure to object to a foundation under *Frye* is not a manifest constitutional error that allows consideration for the first time on appeal).

The failure to preserve the *Frye* issue raised by appellate counsel cannot be overcome by claiming ineffective assistance of counsel on the trial level. The petitioner has the burden of establishing ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 682, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel the petitioner must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) that he was prejudiced, meaning there is a reasonable probability that

the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Burd has failed in his burden to demonstrate ineffective assistance of counsel. He has not overcome the presumption that counsel acted effectively, nor has he provided the record necessary to prove ineffective assistance of counsel:

> Courts engage in a strong presumption counsel's representation was effective. *State v. Brett,* 126 Wash.2d 136, 198, 892 P.2d 29 (1995); *Thomas,* 109 Wash.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *State v. Crane,* 116 Wash.2d 315, 335, 804 P.2d 10, *cert. denied,* 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); *State v. Blight,* 89 Wash.2d 38, 45-46, 569 P.2d 1129 (1977). *Accord State v. Stockton,* 97 Wash.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.

State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251, 1256 - 1259 (1995).

Indeed, given the plethora of case law allowing admission of Antisocial Personality Disorder and Paraphilia NOS to support civil commitment, *see below*, it is likely that defense counsel made the strategic choice not to wage this battle and to retain his credibility for other matters. Defense counsel might also have had legitimate strategic purpose in using the materials described in Burd's appeal to cross-examine the State's

expert on diagnostic issues. If the jury found that the State's expert was relying on a questionable diagnosis, the jury might find against the State's position. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Such strategic decisions by defense counsel are entirely possible in this case. The more important point is that Burd has failed to satisfy his burden of demonstrating ineffective assistance of counsel by *demonstrating* that defense counsel did not act for reasonable strategic purposes. In the absence of such a record, Burd cannot prevail on this claim. *See McFarland*, 127 Wn.2d at 322 (noting appellant's burden to provide record materials supporting an ineffective assistance of counsel claim). "The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below." *Id.* at 36.

B. THE TRIAL COURT WAS NOT REQUIRED TO HOLD A *FRYE* PROCEEDING

The Washington Supreme Court has addressed the admissibility of psychological testimony in RCW 71.09 proceedings through a number of opinions, including *In re Young*, 122 Wn.2d 1, 56 (1993); *In re Campbell*,

139 Wn.2d 341, 356-58 (1999), *In re Thorell*, 149 Wash.2d 724, 756, 72 P.3d 708, 725 (2003), and *In re Halgren,* 156 Wash.2d 795, 806, 132 P.3d 714, 719 (2006). No Washington appellate court has ever excluded psychological testimony on diagnosis in a sexually violent predator matter. Instead, it is widely held that the types of issues raised by Burd "go to weight and not admissibility."

In setting out the "*Frye* test," Burd misses the important pre-condition that *Frye* applies to scientific testimony only when the science is "novel." As the Supreme Court explained in *Halgren*:

> The *Frye* test allows a court to admit novel scientific evidence only if the evidence is generally accepted in the relevant scientific community. *State v. Copeland,* 130 Wash.2d 244, 255, 922 P.2d 1304 (1996). *However, the Frye test is unnecessary if the evidence does not involve new methods of proof or new scientific principles. State v. Baity,* 140 Wash.2d 1, 10-11, 991 P.2d 1151 (2000); *State v. Ortiz,* 119 Wash.2d 294, 311, 831 P.2d 1060 (1992).

156 Wash.2d at 806 (emphasis added).

As noted in *In re Young,* the *Frye* inquiry applies only to "evidence based on ***novel*** scientific procedures." 122 Wn.2d at 56 (emphasis added). There is no basis under the *Frye* test to exclude testimony of Anti-Social Personality Disorder or Paraphilia NOS Rape/Nonconsent in a sexually violent predator proceeding because this testimony is not "novel." Even if "novel," the courts have routinely found such testimony admissible to prove a "personality disorder" or "mental abnormality" under RCW

71.09.020, .060.

C. THE PARAPHILIA NOS DIAGNOSIS IS ADMISSIBLE

If the court does decide to consider the *Frye*/ER 702 issue despite Burd' failure to preserve, the case law firmly supports the admission and use of a Paraphilia NOS Rape/Nonconsent diagnosis to support an RCW 71.09 civil commitment. States retain considerable leeway in defining the mental abnormalities and disorders that make an individual eligible for SVP commitment. *In re the Detention of Thorell*, 149 Wash.2d 724, 735, 72 P.3d 708 (2003) (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 857 (2002).

As long ago as 1993, the Washington Supreme Court upheld the diagnosis of paraphilia NOS against a constitutional challenge. "The specific diagnosis offered by the State's experts at each commitment trial was 'paraphilia not otherwise specified'." *In re the Detention of Young*, 122 Wash.2d 1, 29-30, 857 P.2d 989, 1002 (1993). It was as clear 19 years ago as it is today that the "[t]he weight of scientific evidence, therefore, supports rape of adults as a specific category of paraphilia."[1] *Id.*

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[1] Burd offers the curious claim – citing what is essentially a self-published vanity article by a regular defense expert – that the diagnosis of Paraphilia NOS (nonconsent) was "invented by a single psychiatrist." Opening Br. at 8, 13. However, the book by Dr. Dennis Doren that supposedly "invented" this diagnosis post-dates the *Young* decision and several other

Since the 1993 *In re Young* decision, the Court has upheld numerous commitments based on diagnoses of paraphilia NOS by countless qualified professionals. *See e.g. In re the Detention of Halgren*, 156 Wash.2d 795, 132 P.3d 714, (2006) (Dr. Robert Wheeler testified that the sexually violent predator suffered from Paraphilia NOS); *In re the Detention of Stout*, 159 Wash.2d 357, 363, 150 P.3d 86, 90 (2007) (Dr. Richard Packard opined that Stout suffered from the mental disorder "paraphilia not otherwise specified (NOS), non-consent."); *In re the Detention of Marshall*, 156 Wash.2d 150, 155, 125 P.3d 111, 113 (2005) (Dr. Amy Phenix determined that Mr. Marshall suffers from pedophilia, sexual sadism, and paraphilia not otherwise specified (nonconsenting adults or rape-like behavior.); *In re Detention of Campbell*, 139 Wash.2d 341, 357, 986 P.2d 771, 779 (1999) (Dr. Roger Wolfe diagnosed Campbell as suffering from the condition of "paraphilia").[2]

Washington cases noting a Paraphilia NOS category characterized by nonconsensual rape behaviors by nearly 10 years. *See Young*, 122 Wn.2d at 29 (discussing paraphilia NOS).

[2] The Court of Appeals has also upheld commitments predicated on paraphilia not otherwise specified numerous times. *See In re Detention of Paschke*, 136 Wash. App. 517, 520, 150 P.3d 586, 587 (2007) (Dr. Les Rawlings, a psychologist, testified Mr. Paschke suffered from a mental abnormality known as "[r]ape, paraphilia not otherwise specified rape."); *In re Detention of Taylor*,132 Wash. App. 827, 832, 134 P.3d 254, 257 (2006) (Dr. Richard Packard diagnosed a mental abnormality paraphilia not otherwise specified (non-consenting persons); *In re Detention of Broten*,130 Wash. App. 326, 332, 122 P.3d 942, 945 (2005)

The recent *Post* decision determined that a diagnosis of Paraphilia NOS rape/nonconsent was sufficient to support civil commitment and admissible under *Frye*. As with Burd, Post argued that a diagnosis of Paraphilia NOS rape/nonconsent "fails to satisfy fundamental principles of sound science." *In re Post*, 145 Wn.App. at 755. The court noted testimony that the Paraphilia NOS diagnosis is "generally accepted in the scientific community of people who treat serious sex offenders" despite some controversy in the forensic community who testify in SVP actions. *Id.* at 757. The court found that testimony regarding Paraphilia NOS was sufficient to support civil commitment. *Id.* at 756.

Burd's argument was recently squarely rejected by this court in *In re Det. of Berry,* 160 Wn.App. 374, 248 P.3d 592, *review denied,* 172

(Dr. Brian Judd testified that he diagnosed Broten, among other things, paraphilia (not otherwise specified.); *In re Detention of Skinner*,122 Wash. App. 620, 633, 94 P.3d 981, 987 (2004) (The evidence adduced at trial shows that Skinner was diagnosed with the mental abnormality of paraphilia (non-consent/rape); *In re the Detention of Hoisington*, 123 Wash. App. 138, 143, 94 P.3d 318, 320 (2004) (Dr. Dennis Doren testified that in his professional opinion Mr. Hoisington suffered from a mental abnormality, paraphilia.); *In re Detention of Strauss*, 106 Wash. App. 1, 6, 20 P.3d 1022, 1024 (2001) (Dr. Dennis Doren testified that Strauss suffers from paraphilia (not otherwise specified) non-consent.); *In re the Detention of Mathers*, 100 Wash. App. 336, 336, 998 P.2d 336, 337 (2000) (Roger Wolfe, diagnosed Paraphilia Not Otherwise Specified: Rape, and an Antisocial Personality Disorder. And these disorders, according to Wolfe, made Mathers likely to engage in future acts of sexual violence.); *In re the Detention of Aqui*, 84 Wash. App. 88, 94, 929 P.2d 436, 441 (1996) (Dr. Irwin Dreiblatt testified that Aqui suffered from paraphilia disorder, that he was likely to re-offend.)

Wn.2d 1005 (2011). The proper focus of *Frye* "is the science upon which the expert's opinion is founded," and there was no question that "the science at issue is standard psychological analysis." *Berry,* 160 Wn.App. at 379. Although Berry had "identified scientific criticism of the criteria and reliability" of the paraphilia diagnosis, he did not establish that it was no longer generally accepted. *Berry,* 160 Wn.App. at 380. The court concluded that challenges to the reliability of a diagnosis of paraphilia NOS nonconsent went "to the weight of the evidence, not its admissibility." *Berry,* 160 Wn.App. at 382.

D. THE ASPD DIAGNOSIS IS ADMISSIBLE

In *In re Young*, 122 Wash.2d 1, 37-38, 857 P.2d 989 (1993), the Washington Supreme Court upheld RCW 71.09 against a due process challenge and rejected the argument that it somehow violated the *Foucha v. Louisiana,* 504 U.S. 71 (1992) decision to base a civil commitment on anti-social personality disorder. In *Young,* the State's expert testified that Young suffered from antisocial personality disorder. Like paraphilia, antisocial personality disorder is classified as a mental disorder in the DSM. *Young* at 30. The court in *Young* recognized that antisocial personality disorder falls under the SVP statute as a "personality disorder" and thus is sufficient to commit an individual when all other elements are met. *Id.* at 37-38. "What is critical for our purposes is that psychiatric and

psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are real and meaningful as other pathologies listed in the DSM." *Young* at 28(citation omitted).

In *Young*, the Supreme Court held that psychological testimony is not novel for purposes of a *Frye* inquiry:

> *[T]he sciences of psychology and psychiatry are not novel*; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect petitioners seek, the level of acceptance is sufficient to merit consideration at trial. As Justice White pointed out in *Foucha*, "such opinion is reliable enough to permit courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous". 112 S. Ct. at 1783

122 Wn.2d at 57 (emphasis in original).

The appellants in *Young* argued for exclusion of the State's expert testimony under the *Frye* standard. In particular, they argued that "the experts had no basis for their testimony that any particular mental abnormality or personality disorder exists which makes a person likely to rape, or that Young or Cunningham was in fact likely to re-offend." *Id.* An amicus brief from the Washington State Psychiatric Association supported their claim. The Supreme Court, however, concluded "that the testimony was properly admitted." *Id.*

The Supreme Court noted that it was particularly important in the area of psychological testimony to defer to legislative determinations in

RCW 71.09 that mental abnormalities and personality disorders where conditions subject to diagnostic support:

> Our position is supported by the Legislature's determination, following numerous hearings, that the sexually violent predator condition is not only recognized, but treatable *and* capable of diagnosis. *See* RCW 71.09 . As Justice O'Connor pointed out in *Foucha v. Louisiana,* 504 U.S. 71, ----, 112 S.Ct. 1780, 1789, 118 L.Ed.2d 437 (1992), the inherent uncertainty involved in making psychological judgments requires courts to " '... pay particular deference to reasonable legislative judgments' about the relationship between dangerous behavior and mental illness." (O'Connor, J., concurring) (quoting *Jones v. United States,* 463 U.S. 354, 365 n. 13, 103 S.Ct. 3043, 3050 n. 13, 77 L.Ed.2d 694 (1983).

Id. at 57. The court also rejected claims that diagnostic testimony on mental abnormalities and personality disorders failed ER 702: "the expert testimony was certainly helpful to the trier of fact-psychiatric testimony is central to the ultimate question here: whether petitioners suffer from a mental abnormality or personality disorder." *Id.*

Expert testimony on diagnosis was also challenged under *Frye* in *In re Aguilar*, 77 Wash.App. 596, 601-602, 892 P.2d 1091, 1094 (1995). There, Aguilar argued that "the presence of certain personality disorders" was not well accepted in clinical and empirical research. *Id.* The court rejected Aguilar's challenge to the expert testimony and affirmed admission of an ASPD diagnosis:

> Whether expert testimony is admissible is within the sound discretion of the trial court. *Young,* at 57, 857 P.2d 989; *State v.*

> *Ortiz,* 119 Wash.2d 294, 310, 831 P.2d 1060 (1992). An expert's opinion is admissible if the witness qualifies as an expert and the testimony would be helpful to the trier of fact. ER 702; *State v. Cauthron,* 120 Wash.2d 879, 890, 846 P.2d 502 (1993). Dr. Rawlings' qualifications are not in dispute. Further, his diagnosis of Mr. Aguilar's antisocial personality disorder and opinion of the likelihood Mr. Aguilar would be sexually violent in the future were central to the issues of this case.

Id.

In 2009, this court affirmed that civil commitment can be based on a personality disorder alone when supported by expert testimony. In *In re Sease*, 149 Wn. App. 66, 201 P.3d 1078, 1080 (2009), appellant Sease challenged the State's use of Borderline Personality Disorder and Antisocial Personality Disorder to support his civil commitment as a sexually violent predator. The State relied on expert testimony on Mr. Sease's personality disorders:

> [Dr.] Doren then testified that "each of [Sease's] personality disorders caused him serious difficulty in controlling his behavior" and that the antisocial personality disorder and borderline personality disorder "predispose him to commit criminal sexual acts and make him likely to commit a criminal sexual act in the future if not confined." RP (July 2, 2007) at 173. He noted that not all people with these disorders manifest sexually violent behavior but that Sease did.

Id. at71-72. The court determined that such evidence of a personality disorder was sufficient to uphold civil commitment: "Viewing the evidence in the light most favorable to the State, there was sufficient

evidence to persuade a fair minded rational person beyond a reasonable doubt that Sease suffers from a mental illness that makes him more likely to engage in predatory acts of sexual violence if he is not confined to a secure facility." *Id.* at 80.

Similarly, a decision from the Pennsylvania Supreme Court, *Commonwealth v. Dengler*, 586 Pa. 54, 890 A.2d 372 (2005), supports the admission of Antisocial Personality Disorder to support civil commitment.. In *Dengler*, the court addressed whether expert testimony that a person met criteria as a sexually violent predator, including testimony that the person suffered from Personality Disorder NOS, was subject to the *Frye* test. 586 Pa. *at 69.* Similar to *Young*, the Pennsylvania Supreme Court rejected the *Frye* challenge because the expert psychological testimony "did not involve science which could properly be deemed novel under *Frye*." *Id.* at 71.

Under the above authorities, appellant Burd has failed in his burden to demonstrate that Antisocial Personality Disorder is either novel or inadmissible under the *Frye* test. Even without an appropriate objection from Burd, the trial court did not err.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REJECTING HEARSAY TESTIMONY REGARDING DISCUSSIONS BETWEEN ATTENDEES OF A CONFERENCE

At the outset, it is important to note that Burd must overcome a highly deferential standard of review before he can prevail on appeal. A trial court's ruling on the admissibility of evidence is subject to the "abuse of discretion" standard. *State v. Darden,* 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A trial court abuses only its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 p.2d 775 (1971).

Abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97 935 P.2d 1353 (1997). To state it more positively, a trial judge does not abuse his or her discretion when the decision falls within the broad range of decisions that any reasonable trial judge might adopt. "[T]he trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did." *State v. Thomas*, 150 Wash.2d 821, 856, 83 P.3d 970 (2004).

On cross examination, the defense was allowed to elicit detailed testimony from Dr. Tucker regarding his participation in a small forum at

the American Academy of Psychiatry and Law where there was a debate regarding pending DSM-V proposals for a paraphilic coercive disorder diagnostic category. RP 895. Dr. Tucker was present at the debate. *Id.* Dr. Tucker primarily agreed with the defense attorney's long, testimonial questions, including the hearsay results of a vote by forum participants. *See id.* at 895-898. Dr. Tucker disagreed with the defense attorney only when necessary to point out that the audience was not composed exclusively of – as the defense attorney claimed – "professionals, listening to the debate and making up their mind as to whether or not it's a valid diagnosis." RP 897 (quoting the defense question). Dr. Tucker pointed out that it was a political debate with an audience that included attorneys who were attending the conference. CP 897.

When the defense attorney took the stand several days later, the defense attempted to further explore this topic. The defense attorney acknowledged that his expert, Dr. Saleh, was not present at forum that Dr. Tucker attended. RP 1091. When pressed by the court, defense counsel admitted in his offer of proof that Dr. Saleh "was not at this particular debate." RP 1092. In opposing this testimony, the prosecutor pointed out that ER 703 is generally limited to professional writings that experts rely upon, not oral presentations that an expert did not attend. *Id.*

The trial court ruled precluded the defense from exploring this

topic with Dr. Saleh because "he wasn't at the debate." The court did not find reasonable reliance under ER 703, which would be necessary to allow Dr. Saleh to relate the atomospere and results of a debate that he learned third hand from some third or fourth hand source. The court noted that the prior testimony from Dr. Tucker "frankly should not have come in at all and wouldn't have come in except for the defense cross-examination trying to focus on it." RP 1094-95. The court pointed out that the defense framed the questions to Dr. Tucker and could have "clarified" any misconceptions "at that time."

On appeal, Burd complains that "the trial court excluded Dr. Saleh's testimony about the nature of the debate surrounding the paraphilia NOS (nonconsent diagnosis)." Opening Br. at 32. However, Dr. Saleh could offer no such testimony because he was not present to either observe or participate in the debate. If this truly was "crucial to the respondent's case" -- as claimed in the Opening Brief – Dr. Saleh was not a witness to the incident and could not testify with any reliability. The trial court did not abuse its discretion by excluding further testimony, of marginal relevance, from a person with no ability to explain the particular proceeding that Dr. Tucker related in cross-examination.

Moreover, Burd cannot show any prejudice. The jury was well informed through several days of testimony on the Paraphilia NOS

dispute. As correctly noted in the Opening Brief, Burd's trial counsel "vigorously cross-examined Dr. Tucker regarding the reliability of his paraphilia NOS (nonconsent) diagnosis)." Opening Br. at 7.

VI. THE JURY WAS PROPERLY INSTRUCTED ON UNANIMITY REQUIREMENTS

Under the Constitution, the state may exercise its civil commitment power based upon a showing of mental illness and dangerousness. *In re Young*, 122 Wash.2d 1, 27, 857 P.2d 989, 1001 (1993). The sexually violent predator civil commitment law satisfies this requirement through the following elements:

> (1) That the respondent had been convicted of or charged with a crime of sexual violence; and
>
> (2) That the respondent suffers from a mental abnormality or personality disorder; and
>
> (3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility.

In re Audett, 158 Wash.2d 712, 727, 147 P.3d 982, 989 (2006). Element one is frequently referred to as the "predicate offense," element two requires proof of the person's "mental condition," and element three addresses "dangerousness."

The statute allows for two alternative methods of proving the mental condition element, either through a "mental abnormality" or a

"personality disorder." *See* RCW 71.09.020. On appeal, Burd argues that there was insufficient evidence to support each alternative means.

Burd's primary complaint is that "the supporting mental abnormalities and personality disorders were . . . insufficient." Opening Brief at 37. He acknowledges that Dr. Tucker testified to the various paraphilias and personality disorders, but claims insufficient evidence because Dr. Saleh disagreed with Dr. Tucker. See Opening Brief at 37-40. Burd's arguments are easily resolved by *In re Sease*, 149 Wn.App. 66, 201 P.3d 1078 (2009).

In *Sease*, this court points out that the SVP statute creates only two alternative means of proof for civil commitment – a mental abnormality *or* a personality disorder. 149 Wn. App. at 76. The alternative means analysis does not, however, extent to particular diagnosis in an SVP case: "*Halgren* makes it clear that the actual diagnosed mental abnormalities or personality disorders are not the alternative means which the State must prove beyond a reasonable doubt; it is whether the person suffers from a mental abnormality or a personality disorder." 149 Wash.App. at 76-77.

Like Burd, Mr. Sease suffered from multiple diagnosed conditions, namely two personality disorders. Sease argued that the State's case failed because it "was required to obtain a unanimous jury verdict on which one of the two diagnosed personality disorders made him an SVP." *Id.* at 77.

The *Sease* opinion rejects this argument and holds that the State is not required to obtain a unanimous jury verdict on the particular diagnosis that supports either a mental abnormality or a personality disorder. The State is not required to demonstrate "*which* abnormality or personality disorder causes a person difficulty in controlling their behavior such that they are likely to engage in predatory acts of sexual violence if not confined to a secure facility." *Id.* The *Sease* opinion holds that the State is not required to obtain unanimity on the "means within a means":

> ¶ 26 The SVP statute delineates two alternatives for satisfying the State's burden of establishing a mental condition "which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility"—mental abnormality or personality disorder. RCW 71.09.020(16). There is no dispute that Sease suffered from one or, possibly, two personality disorders.
>
> ¶ 27 As in *Jeffries,* the jury here need only have unanimously found that the State proved that Sease suffered from a personality disorder that made it more likely that he would engage in acts of sexual violence if not confined to a secure facility. The jury need not have unanimously decided whether Sease suffered from borderline personality disorder or antisocial personality disorder. Therefore, the trial court did not err in failing to give a unanimity instruction and it is not an error that Sease can raise for the first time on appeal.

149 Wash.App. at 78-79.

Burd's argument also fails because he cannot cite the defense expert's testimony to overcome Dr. Tucker's diagnosis of Burd. The jury

rejected the defense testimony in order to reach a verdict for the State. Citation to the contrary testimony of the defense expert cannot create insufficient evidence and negate the verdict:

> ¶ 31 It is inconsequential that Doren [JFU expert] and Donaldson [defense expert] disagreed on whether Sease's borderline personality disorder and antisocial personality disorder caused Sease to be more likely to reoffend. Weighing the expert witnesses' testimony requires a determination of their credibility and credibility determinations are for the trier of fact and are not subject to our review. *State v. Thomas,* 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004). Therefore, we do not consider whether the jury properly weighed the experts' testimony.
>
> ¶ 32 Viewing the evidence in the light most favorable to the State, there was sufficient evidence to persuade a fair minded rational person beyond a reasonable doubt that Sease suffers from a mental illness that makes him more likely to engage in predatory acts of sexual violence if he is not confined to a secure facility.

Id. at 80. Burd provides no reason to reverse the order of civil commitment.

VII. THE SVP DANGER STANDARD IS CONSTITUTIONAL

Burd argues that the "more likely than not" danger standard fails constitutional due process standards. This argument was squarely rejected by the Washington Supreme Court in *In re Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001) and by the Court of Appeals in *In re Mulkins*, 157 Wn.App. 400, 408, 237 P.3d 342 (2010). This court is bound by both

cases.

VIII. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT

Burd claims prosecutorial misconduct because the prosecutor highlighted Burd's own comments about Caucasian women satisfying his "predator." See RP 1479-80. The prosecutor's comments were entirely appropriate. Burd has no reviewable claim of prosecutorial misconduct because he failed to object to the argument during rebuttal closing and the argument properly reflected Burd's own relevant statements.

During trial, the jury viewed an interview of Burd with Dr. Tucker. Exhibit 72 (transcript of interview), 78A-C (audio CD of interview)[3]. During the interview, Dr. Tucker and Burd had the following exchange:

> DR. TUCKER: . . .Were all of the women that you were charged of raping, were they all white?
> MR. BURD: Yeah.
> DR. TUCKER: Okay. And was that any part of it for you? Were you interested in white women more than black women or other races?
> MR. BURD: I like white women better.
> DR. TUCKER: Better?
> MR. BURD: Yes.

[3] The Report of Proceedings also contains a sketchy transcription of the interview where much of the interview is "inaudible." The official transcript was by video and no court reporter was present in the courtroom. The RP is thus a transcription of a video with a CD playing in the background, which makes for a problematic transcription. The State has designated Exhibits 72 and 78A-C for the court's consideration. Exhibit 78A-C was admitted into evidence. Exhibit 72 is a transcription (that was not presented to the jury) of Exhibit 78A-C.

23 DR. TUCKER: And can you say why?
24 MR. BURD: *Because nowadays black women don't*
25 *satisfy my hung- -- my ther- -- my predator.*

Exhibit 72 at 116 (emphasis added).

After the defense claimed in closing that Burd has been manipulated by Dr. Tucker and made up various diagnoses, the prosecutor responded that Burd's own words were sufficient to demonstrate the predatory nature of his sexual offending. The prosecutor argued that:

> In fact, what did he say? He said that he is, um, – well, what did he say? He said, from his own mouth, that take it from me – or if, if you don't take it from – don't take it from me take it from the words of Mr. Burd and that is he said, "White women satisfy his predator." That's what he said. He's a predator.

RP 1479-80. The defense made no objection to this argument. *Id.*

As an initial matter, the court should reject Burd's misconduct argument because he failed to preserve error. Burd failed to object at trial to the prosecutor's argument.[4] Burd allowed his interview with Dr. Tucker into evidence without objection to the "predator" portion. Again without objection, he allowed the prosecutor to highlight this testimony in rebuttal closing. By failing to object, he has waived any claim of error.[5]

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[4] Burd does not and cannot claim ineffective assistance of counsel regarding the lack of an objection.

[5] The failure to object is forgiven only where the comment causes an "incurable prejudice" and "a mistrial and a new trial is the only and the mandatory remedy." *Id.* at *27-30 (citing *State v. Case,* 49 Wn.2d 66, 74, 298 P.2d 500 (1956)). Burd offers no argument toward overcoming his

State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); See also, *State v. Emery,* ___ Wn.2d ___, No. 86033-5, 2012 Wash. LEXIS 453, at *26-27 (June 14, 2012). As recently held in *State v. Turner*, ___ Wn.App. ___, 275 P.3d 356, 362 (2012):

> Appellate review is not as rigorous if counsel did not object in the trial court where something could have been done about it. *See State v. Russell,* 125 Wash.2d 24, 86, 882 P.2d 747 (1994). Failure to object to improper argument waives any claim of error on appeal "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." *Id.*

The court should refuse to review this issue due to Burd's failure to preserve error.

Even if this issue were somehow preserved, Prosecutor Bogar engaged in no misconduct. To establish prosecutorial misconduct, the appellant must prove that the prosecutor's argument was both improper and had a prejudicial effect. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 42 (2011). A statement is considered not in isolation, but in the context of the full trial. *State v. Monday,* 171 Wn.2d 667, 675, 257 P.3d 551 (2011); *State v. Yates,* 161 Wn.2d 714, 774, 168 P.3d 359 (2007). In a sexual predator commitment proceeding, a prosecutor is entitled to argue the SVP respondent's future dangerousness. *In re Detention of Gaff,* 90 Wn. App. 834, 842, 954 P.2d 943 (1998).

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failure to object and should not be allowed to do so in his reply brief.

The prosecutor made an appropriate rebuttal closing argument by arguing matters directly and inferentially supported by the evidence. It is proper for a prosecutor to argue evidence that was admitted before the jury. *See State v. Keenealy,* 151 Wn. App. 861, 891-92, 214 P.3d 200 (2009)(prosecutor granted wide latitude of argument that was supported by admitted evidence.); *State v. Harvey,* 34 Wn. App. 737, 739-40, 664 P.2d 1281 (1983) (It is not improper for a prosecutor to comment upon evidence which may bear upon a defendant's credibility.); *State v. Papadopoulos,*34 Wn. App. 397, 400, 662 P.2d 59 (1983) (Prejudicial error does not occur until it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.). Simply put, Burd cannot claim an improper argument when the prosecutor quoted Burd's own statement about satisfying his "predator."[6]

The prosecutor's argument was a reasonable inference of Burd's statements and was directly related to Burd's future dangerousness. *Kennealy,* 151 Wn. App. 861, 982; *Gaff,* 90 Wn. App. 834, 842. The question before the jury was whether he was a "predatory" rapist, which

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[6] Although the prosecutor's statement was an accurate paraphrase of Burd's comments, it is not a fully accurate quote. Under *State v. Turner,* ___ Wn.App. ___, 275 P.3d 356, 362 (2012), a misquote "does not reach the level of prejudice that requires a new trial." Even though the transcript inserts quote marks (without attribution to the prosecutor saying "quote" or other similar words), it appears far more likely that the prosecutor was paraphrasing Burd.

Burd's statement freely acknowledges. The prosecutor's argument was intended to remind the jury of Burd's own highly relevant words and dangerousness, and as such, was not ill-intentioned. *Gaff,* 90 Wn. App. 834, 842. His comment reflected both his danger to commit predatory rapes and his paraphilic need to focus his sexual offending on women of a particular race.

Even if the prosecutor's reference to Burd's statement was somehow improper, this court may reverse only when there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. *Monday,* 171 Wn.2d 667, 675. The lack of an objection suggests that it was not a particularly momentous event at the trial.

There is no indication that the prosecutor's argument engendered an "incurable" feeling of prejudice in the jury. The prosecutor's argument was a proper inference from the evidence. *Kennealy,* 151 Wn. App. 861, 892; State's Exhibit 72 at 116. Because the prosecutor argued Burd's own admitted statement, it cannot have had an "inflammatory effect" on the jury. *Emery,* 2012 Wash. LEXIS 453, at *28 (citing *State v. Perry,* 24 Wn.2d 764, 770, 167 P.2d 173 (1946)).

There is also no indication that the prosecutor's argument prejudicially affected the jury's verdict beyond a reasonable doubt.

Monday, 171 Wn.2d 667, 680.[7] The prosecutor's argument was drawn from the admitted evidence. Removing the argument would not eliminate the underlying evidence. State's Exhibit 72 at 116. The prosecutor's argument did not "ring a bell" because it had already been rung. *Id.*

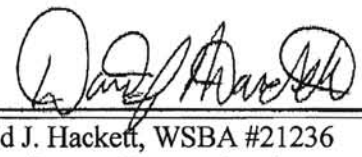
[7] Although the prosecutor's statement references the race of Burd's preferred victims, it is not a "racially motivated" statement of the type disapproved in *State v. Monday.* The prosecutor accurately paraphrased Burd's own statement to Dr. Tucker. *Kennealy,* 151 Wn. App. 861, 892; State's Exhibit 72 at 116.

IX. CONCLUSION

For the foregoing reasons, appellant Burd's civil commitment as a sexually violent predator should be affirmed.

DATED this 19th day of July 2012.

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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Attorneys for Petitioner

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In Re the Detention of	)	No. 67826-4-I
	)	
Everette Burd ,	)	
	)	
Appellant,	)	DECLARATION OF SERVICE
	)	
	)	
	)	
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ADAM BOYD, being first duly sworn on oath, deposes and says:

On this day, I arranged for service a copy of the State's Response Brief to be delivered by ABC messenger service upon the following:

Marla Zink
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

DATED this 19th day of July, 2012

ADAM BOYD