NO. 43757-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of Sheldon Martin:

STATE OF WASHINGTON,

Respondent,

v.

SHELDON MARTIN,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

Where polygraph results are inadmissible in Washington absent a stipulation of the parties, and there was no such stipulation, did the trial court abuse its discretion when it excluded testimony that Martin's expert had relied on Martin's favorable polygraph results in forming his diagnostic opinions?

II. STATEMENT OF THE CASE

A. Procedural History

In March, 2003, the State filed a sexually violent predator (SVP) petition in Thurston County, seeking the involuntary civil commitment of Sheldon Martin as a sexually violent predator, pursuant to RCW 71.09. *In re Detention of Martin*, 133 Wn. App. 450, 452, 136 P.3d 789 (2006) (*Martin* I), *reversed by* 163 Wn.2d 501, 182 P.3d 951 (2008). Martin moved to dismiss the petition, arguing that the Thurston County Superior Court lacked Jurisdiction because he never had been convicted of a sexual offense in that county. 133 Wn. App. at 454. The trial court denied the motion. *Id.* at 452. This Court affirmed, holding that Martin could not challenge the venue on appeal because he had not asked the trial court to change venue. *Id.* at 454.

Martin petitioned for review, which was accepted, and the Washington Supreme Court reversed. *In re Detention of Martin*, 163 Wn.2d 501, 505, 182 P.3d 951 (2008) (*Martin* II). *Martin* II held that the State lacked statutory authority to file the petition in Thurston County. *Id.*

at 515. The Court remanded the case to the Thurston County trial court to grant Martin's motion to dismiss. *Id.* at 516.

On remand, Martin moved to dismiss with prejudice, and the State requested dismissal without prejudice. *State v. Martin*, 2010 WL 928435 at 1 (*Martin* III), *review denied by In re Detention of Martin*, 169 Wn.2d 1013, 236 P.3d 206 (2010). The trial court granted the State's motion and dismissed the petition without prejudice. *Martin* III at 1. This Court affirmed. *Id.* at 2. Martin's petition for review was denied. 169 Wn.2d at 1013.

The State had filed a new petition in Clark County on July 3, 2008. CP at 1-2. On June 25, 2012, a jury returned a verdict finding Martin to be an SVP. CP at 178. The trial court then entered an order civilly committing him. CP at 179. Martin timely appealed.

B. Martin's Sexual History

Martin testified that he will always suffer from pedophilia. CP at 185. He can be sexually aroused by children if he is fantasizing about them or is not using his interventions. CP at 184-85.

Martin began masturbating to deviant fantasies of children when he was young. 5RP at 102-103.[1] When Martin was age ten, he offended

[1] The State adopts the same convention as Martin for referencing the VRPs: 1RP is 6/8/12; 2RP is 6/19/12; 3RP is 6/20/12; 4RP is 6/21/12; 5RP is 6/22/12; and 6RP is 6/25/12.

against a four-year-old girl who lived at his mother's apartment complex. CP at 186-87. He lured her to a laundry room, where he pulled down her pants and fondled her. CP at 188-89. Martin was arrested and sent to Echo Glen. CP at 189.

At approximately age 16, Martin received treatment at the Morrison Center in Portland, Oregon. CP at 193-94. While there, he offended against a girl who was approximately age ten by touching her bare breasts. CP at 196-99.

Also while he was 16 and living with his parents in Portland, Martin offended against a boy who was between age four and seven. CP at 190-91. Martin asked the boy to follow him into a garage. CP at 192. He took the boy's pants down, fondled and then fellated him. CP at 192. Martin was arrested and sent to the MacLaren School for Boys near Salem, Oregon. CP at 193.

Martin masturbated to thoughts of children in the 1980s, when he was in his twenties. 5RP at 103. For example, he masturbated to a girl he saw in a public restroom. 5RP at 104. Martin has an unknown victim that he molested in the 1980s. 5RP at 106-7.

On October 22, 1991, Martin went to a Fred Meyer store in Vancouver, Washington, intending to follow a woman into the bathroom. CP at 200-201. He had done this "quite a few times before," and had also

hidden inside clothing racks so he could look up women's skirts. CP at 201. He saw an attractive woman go into the bathroom and followed her. CP at 201. The woman, K.L., had finished urinating when she heard a noise and saw Martin on the floor outside her stall. 2RP at 30. His pants and underwear were pulled down, he was masturbating with one hand and with the other he reached in and grabbed K.L.'s ankle. 2RP at 30-31. She kicked at him and screamed. 2RP at 32. He pulled up his pants and ran, with K.L. in pursuit. 2RP at 32-33. Martin ran from the store but was caught and arrested. CP at 202-5.

While out on bail from his Clark County charges, Martin again went to a store intending to commit a sexual crime. CP at 206-208. In a Fred Meyer store in Portland, Oregon, he searched for a victim for 20 minutes. CP at 207-208. Lisa Bjork was shopping with her children that day, April 8, 1992, in the children's clothing section of the Fred Meyer store. 2RP at 47-48. She saw a man "thumbing through the kids' clothes" and watching two female children nine to 11 years old. 2RP at 48-49. After observing this behavior for ten or 15 minutes, she went to the optical department and reported what she had seen. 2RP at 49. She then left, but eventually testified before a Grand Jury about her observations that day. 2RP at 49.

Martin, meanwhile, had become sexually attracted to a three-year-old girl who was in the store with her mother and sisters. CP at 208-210. He decided to kidnap and molest her. CP at 210. Martin took her by the hand and led her towards the exit near where his truck was parked. CP at 211-212. Just before he reached the door the child began screaming and crying. CP at 213. Store security stopped Martin and detained him until police arrived. CP at 212-213. He was charged with a number of crimes and pled guilty to kidnapping second degree and attempted sexual abuse first degree. CP at 214.

C. The Trial Court's Exclusion of Polygraph Results

Prior to trial, at the request of Martin's expert, Dr. James Manley, Martin took polygraph tests in which he was asked, among other things, whether he continues to have masturbatory fantasies about children. 1RP at 25-26. Martin's first test was inconclusive, but a second one did not indicate deception. 1RP at 25-26. The State moved to exclude the tests' results and argued its motion prior to trial on June 8, 2012. 1RP at 24-41. The State argued the polygraph results were not admissible pursuant to *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). 1RP at 25. The State also argued that Martin's expert should not be permitted to discuss the results as information he relied upon, because under ER 403

the probative value was substantially outweighed by the danger of unfair prejudice. 1RP at 28-29.

Martin argued that his expert had relied on the polygraph results in forming his opinion about whether Martin suffers from pedophilia. 1RP at 25-26. He sought to introduce the results substantively through the polygrapher, Mr. Seaburg, and also through Dr. Manley, pursuant to ER 703 and 705. 1RP at 25-28. Martin's counsel argued:

> The fact that Mr. Martin has in fact passed a polygraph on that very pointed issue, I think makes it relevant and rebuttal evidence, and given the manner in which we're seeking to introduce it, should be admissible.

1RP at 28.

The trial court excluded the test results, relying on the long-standing rule that polygraph results are inadmissible absent a stipulation. 1RP at 31; CP at 152. The court also considered Martin's request that Dr. Manley be permitted to testify about the results as information he relied upon, and again excluded the test results, under ER 403. 1RP at 31-33. The court ruled that Dr. Manley could testify that Martin was "interviewed" by another person, had denied having fantasies about children, and that he, Dr. Manley, relied on those statements. 1RP at 33-35.

Martin's counsel violated the court's pretrial order by asking Dr. Manley about "objective testing:"

> Q. And then finally, Doctor, considering your clinical review -- oh, just one more question before I go to the final conclusion. With regard to your own evaluation of Mr. Martin, were you concerned about Mr. Martin's current fantasy life and whether it still incorporated children?
>
> A. During my assessment that concern crossed my -- yes, I was concerned about that.
>
> Q. And did you send Mr. Martin out for any objective testing on that particular question?
>
> A. I did.
>
> Q. And were you –
>
> [State]: Objection; move to strike.

5RP at 85.

Outside the presence of the jury, the State argued that "objective testing" was code for polygraph testing and violated the court's pretrial order. 5RP at 86-87. The court agreed and reiterated its pretrial ruling. 5RP at 87-91. The State's objection was sustained and the question and answer were stricken. 5RP at 91. When trial resumed, Dr. Manley testified that another person had interviewed Martin about whether he was "currently having masturbatory fantasies regarding children[,]" that Martin had denied having such fantasies and Dr. Manley had relied on Martin's denial. 5RP at 92-94.

III. ARGUMENT

Martin asserts that the trial court abused its discretion when it excluded evidence about the results of a polygraph test he took at the request of his expert witness. He also asserts that exclusion of polygraph results violated his due process right to present a complete defense. Martin's arguments have no merit. The trial court did not abuse its discretion because polygraph results are inadmissible in Washington, with a few exceptions not applicable here. Nor did the trial court's decision to exclude that evidence infringe on Martin's constitutional rights. The error alleged in this case implicates only the rules of evidence and not the constitution. This Court should affirm Martin's commitment as an SVP.

A. Standard of Review

This Court reviews a trial court's decision to exclude evidence under the abuse of discretion standard. *In re Detention of West*, 171 Wn.2d 383, 396-97, 256 P.3d 302 (2011). Under that standard, a trial court has abused its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

B. The Trial Court Did Not Abuse Its Discretion Because Polygraph Results Are Inadmissible Absent a Stipulation of the Parties

The trial court did not abuse its discretion by excluding polygraph results because that evidence is not admissible in Washington State, with a

few exceptions not applicable in this case. Our courts have consistently recognized that polygraph evidence does not meet the *Frye* standard and is "unreliable and, unless stipulated to by all parties, inadmissible." *In re Det. of Hawkins,* 169 Wn.2d 796, 802, 238 P.3d 1175 (2010).[2] It has been excluded not only because of *Frye*, but because its unreliability fails the tests of other rules, as well. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 607 n.4, 260 P.3d 857 (2011). For example, it has been excluded under ER 702[3] and – just like the decision of the trial court below – it has been excluded under ER 403.[4] *Id.*

The few exceptions to this rule do not apply here. For example, it may be permissible to introduce the fact a test was taken if there is no inference about its results, or if the inference is not prejudicial. *State v. Sutherland,* 94 Wn.2d 527, 529, 617 P.2d 1010 (1980). But even that evidence may be prejudicial and should be admitted only when it is clearly

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[2] In fact, *Frye* itself involved the exclusion of polygraph evidence. 293 F. at 1014; *Hawkins*, 169 Wn.2d at 802.

[3] ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[4] ER 403 provides:

Although 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.

relevant and non-prejudicial. *Id.* at 529-30 (citing *State v. Descoteaux*, 94 Wn.2d 31, 614 P.2d 179 (1980)). Here, the trial court did not abuse its discretion because there was only one possible and prejudicial inference about the results.

At trial below, Dr. Manley opined that Martin did not suffer from pedophilia, in part because Martin denied currently masturbating to children. 5RP at 92-94. Martin argued that Dr. Manley should be able to support his opinion by pointing out that he had relied on the results of a polygraph in which Martin denied masturbating to children:

> Your Honor, I am only trying to ask for the leeway to allow my expert to rightly suggest to this jury that he took the precautionary step of sending Mr. Martin out for some sort of check on the issue of whether he continued to have masturbatory fantasies about children.

5RP at 88. Under the circumstances, the only conceivable inference the jury could have drawn about this "precautionary step" would have been that the results were favorable to Martin. Under *Sutherland*, the evidence was properly excluded both because it unmistakably implied the results of the test and because the inference prejudiced the State. 94 Wn.2d at 529.

Under certain circumstances, the fact that a polygraph was taken may be relevant and admissible for purposes other than establishing the truth or falsity of a disputed fact. The "key question surrounds the

purpose for which the polygraph evidence is sought to be introduced[.]" *State v. Reay*, 61 Wn. App. 141, 149, 810 P.2d 512 (1991).

> If the polygraph evidence is being introduced because it is relevant that a polygraph was administered regardless of the results, . . . then the polygraph evidence may be admissible as an operative fact. If, on the other hand, the polygraph evidence is offered to establish that one party's version of the events is the truth, the polygraph evidence is being introduced for its substantive value and is inadmissible absent a stipulation[.]

Id. at 149-50 (quoting *Brown v. Darcy,* 783 F.2d 1389, 1397 (9th Cir. 1986)).

In *Reay*, relatives of a deceased woman challenged the medical examiner's finding that she had committed suicide. 61 Wn. App. at 144-45. The medical examiner relied in part on polygraph testing of the woman's husband. *Id.* The trial court denied the relatives' motion to exclude the polygraph results. *Id.* at 145. Division I of this Court affirmed, finding the evidence relevant because the issue was whether the medical examiner had acted arbitrarily or capriciously. *Id.* at 150. The fact that the polygraph test was given and relied upon was relevant to show how thoroughly authorities had investigated the case. *Id.*

Reay is distinguishable because the issue there was the thoroughness of the government actors, and the fact of polygraph testing was relevant regardless of the results. Furthermore, the husband who had

taken the test "was not a party to this action, and the jury in this case was not asked to decide whether he was responsible for his wife's death." *Reay*, 61 Wn. App. at 150. In the instant case, Martin was a party whose mental state was at issue, and his credibility was being assessed by the jury. The polygraph results would only support the opinion of Martin's expert if they were favorable to Martin. The proposed testimony would have telegraphed the polygraph results to the jury, to the prejudice of the State. As Martin's attorney argued, "The fact that Mr. Martin has in fact passed a polygraph on that very pointed issue, I think makes it relevant and rebuttal evidence, and given the manner in which we're seeking to introduce it, should be admissible." 1RP at 28.

There are additional reasons in this case to doubt the reliability of Martin's polygraph results. This is not a case where the parties stipulated, prior to testing, that the results would be admissible. Martin privately retained his polygrapher and was essentially given a "practice swing" at the test, when his first effort came up inconclusive. 1RP at 25. Then, for his second effort, Martin only disclosed the results of his answers to questions 43 and 44. 1RP at 24. He argued he would turn over the full results if the court allowed his polygrapher to testify and his expert to discuss the testing. 1RP at 26. That kind of self-serving approach to

testing has caused other courts to view polygraph results as even more unreliable.

In *S.E.C. v. Kopsky*, 586 F.Supp.2d 1077 (E.D.Mo. 2008), the defendant in an insider trading case wanted to introduce evidence of favorable polygraph testing. 586 F.Supp.2d at 1079-80. The trial court excluded it, based in part on FRE 403 and 702. *Id.* at 1082. The court also pointed out other reasons why it had "serious doubts about the probative value" of the proposed evidence. *Id.* The court noted that

> the polygraph was administered *ex parte* without prior notification to or participation by the SEC. As a result, Davis did not have to be concerned with negative consequences for failing the exam, nor did he have to worry about being countered with any questions formulated by the SEC.

Id. This prejudicial defect has been repeatedly recognized by the federal appellate courts, as documented in *Kropsky* at 1082-83.[5]

Martin argues that by the time of trial he was only seeking to introduce the evidence under ER 703[6] and 705[7] as information his expert

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[5] *See United States v. Thomas,* 167 F.3d 299, 309 (6th Cir.1999) (probative value of unilateral polygraph exam is substantially less because defendant had no adverse interest at stake in taking the exam); *United States v. Ross,* 412 F.3d 771, 773 (7th Cir.2005) (privately-commissioned, eleventh hour polygraph conducted without notice to the government is unreliable because it carries no negative consequences and "probably won't see the light of day if a defendant flunks"); *United States v. Gilliard,* 133 F.3d 809, 816 (11th Cir.1998) (the unilateral nature of the polygraph hindered the government's ability to cross examine the polygrapher and to have its own experts conduct an independent review of the results).

relied upon, and the court could have given a limiting instruction. He points out that penile plethysmograph testing is admissible in this manner, and argues that polygraph testing should be as well. *See* Brief of Appellant at 33-37. That argument, however, does not show that the trial court abused its discretion. The threshold issue for admission of expert testimony is whether the witness is qualified as an expert and whether the testimony is helpful to the trier of fact. ER 702; *State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747 (1994). The trial court here could properly exclude the testimony under ER 702 as unhelpful to the jury because of its unreliability. *See Anderson*, 172 Wn.2d at 600-601, 607 n.4 (polygraph results excludable under ER 702 as unreliable). Though the trial court did not rely on that rule, this Court can affirm on any other ground the record supports. *Froats v. State*, 134 Wn. App 420, 434, 140 P.3d 622 (2006) (citing *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004)). Trial courts possess "broad discretion" when deciding the

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[6] ER 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[7] ER 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

admissibility of expert testimony under ER 702. *Id.* *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004).

Even assuming that the polygraph results would have been helpful to the trier of fact, the court must still assess the evidence under ER 403 – as did the trial court here – and has the discretion to exclude the evidence under that rule. 1RP at 32-33; *Anderson*, 172 Wn.2d at 607 n.4 (polygraph results excludable under ER 403). The trial court properly exercised its discretion in finding that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and in its oral decision it explained why a limiting instruction would be insufficient to mitigate the prejudice:

> So my ruling is that if the doctors in this case want to come in and say that they're basing their opinion in part on Mr. Martin's statements or any other witness' statements and that in forming their opinions they assume that those statements were accurate or inaccurate for the purposes of their opinion, then they can do that, but they cannot say: And a machine told me he either was lying or wasn't telling the truth. Because that's not permissible and the jury will take that evidence and do [some]thing with it other than assess the doctor's opinion. It's under a 403 analysis, even if he says that's the basis for my opinion or she says that's the basis for my opinion, the jury will not use it in this court's opinion exclusively to evaluate the opinion. They'll use it to say, well, the person was telling the truth or lying.

1RP at 32-33.

Martin argues that penile plethysmograph results are admissible in Washington under ER 703 and 705, and that polygraph evidence is no different. He asserts, "What is sauce for the goose is sauce for the gander." Brief of Appellant at 37. But the polygraph and plethysmograph are not birds of a feather. The polygraph fails the *Frye* test; the plethysmograph passes it because it involves "no new method of proof or scientific evidence[.]" *In re Detention of Halgren*, 156 Wn.2d 795, 806-7, 132 P.3d 714 (2006) (citing *State v. Riles,* 135 Wn.2d 326, 343-44, 957 P.2d 655 (1998) (plethysmograph testing "is regarded as an effective method for diagnosing and treating sex offenders.")). That key distinction makes all the difference here.

Martin cites the prosecutor's comments during argument about excluding polygraph results, in which the State acknowledged that its experts use the instrument because it tends to increase the candor of the person being tested. Brief of appellant at 5, 32-33. Martin argues that this shows that polygraph results are "highly relevant evidence." *Id.* at 33. Using the test in the hope that it will improve disclosures, however, is not at all the same as relying on the results to determine if someone is lying. As the State noted, "They believe the disclosure is more reliable if the person believes they're going to be caught lying. That's the reason they

like to use a polygraph, and they don't necessarily rely on the results, which really aren't reliable." 1RP at 29-30.

Given the trial court's broad discretion, the unreliability of polygraph testing, the fact that it does not meet the *Frye* test and the few and narrow circumstances in which it is admissible, it is not possible to conclude that the trial court had no tenable reasons for excluding the polygraph results.

Assuming for the sake of argument that the trial court abused its discretion, any error was harmless. This Court reviews allegedly erroneous evidentiary rulings under the non-constitutional harmless error standard. *State v. Ray,* 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). An erroneous ruling amounts to reversible error if the court determines that within reasonable probabilities, the error materially affected the trial outcome. *State v. Calegar,* 133 Wn.2d 718, 727, 947 P.2d 235 (1997). Here, there is no probability that exclusion of the polygraph results materially affected the outcome of the trial.

Martin asserts that his expert, Dr. Manley, "based his contrary opinion – that Martin does not suffer from pedophilia – in large part on the polygraph evidence." Brief of Appellant at 32. The exclusion of the polygraph results, he argues, caused Dr. Manley's opinion to be "stripped of any appearance of objectivity and credibility." *Id.* While that appears

to be a significant overstatement, it is more telling about Dr. Manley's credibility that he extensively relied on an instrument that is so unreliable its results are routinely excluded from evidence in the courts of this state and others. In any event, it is unlikely that the polygraph results could have done anything to improve Dr. Manley's credibility.

In his direct testimony, Dr. Manley explained that Martin was a "child molester" and not someone who suffered from pedophilia. 5RP at 40-41. He asserted that pedophiles often engage in "grooming" their victims, whereas Martin engaged in "situational opportunity." 5RP at 41. Dr. Manley characterized Martin's 1992 offense as having been committed "instantaneously." 5RP at 110. But he was unaware that Martin had searched the Fred Meyer store for his child victim for 20 minutes. 5RP at 111; CP at 207-208; 2RP at 48-49. And he was unaware that Martin had watched two other young girls, ages nine and 11, before selecting a much younger victim. 5RP at 111-112; 2RP at 48-49. Martin had disclosed a previously unreported victim to Dr. Manley, but the doctor apparently asked him no questions about that child and did not know any details about that offense at trial. 5RP at 106-109.

In his direct testimony, Dr. Manley failed to even mention the diagnostic criteria for pedophilia. 5RP at 102. After cross-examination about Martin's criminal sexual history with children and the diagnostic

criteria, Dr. Manley changed his opinion and conceded that Martin had suffered from pedophilia in 1992, when he was last in the community. 5RP at 114-15. After further questioning, he conceded there was evidence Martin was still having fantasies about children in his forties, sometime between approximately 2007 and 2009. 5RP at 117-18. Martin also told Dr. Manley that if he saw a child on television, he would change the channel, to avoid any possibility of arousal. 5RP at 118-19. Martin told Dr. Manley he was attracted to the openness and vulnerability of children. 5RP at 119-20.

Because Dr. Manley changed his opinion during cross-examination when he conceded that Martin had pedophilia in 1992 and there was ongoing evidence of it in recent years, there is no possibility that exclusion of the polygraph results could have materially affected the outcome of the trial. Furthermore, the jury heard Martin's testimony that he will always suffer from pedophilia and can be sexually aroused by children if he is fantasizing about them or is not using his interventions. CP at 184-85. The trial court's order civilly committing Martin should be affirmed.

C. Martin has not Raised a Constitutional Issue

Martin attempts to portray alleged evidentiary error as a constitutional violation. He argues that the trial court's decision to exclude the polygraph results violated his right to due process. Brief of

Appellant at 30-31. Martin's attempt to re-cast this issue as a constitutional question should be rejected as consistent with a "trend that is troublesome—the 'constitutionalization' of most assignments of error in criminal cases." *State v. Turnipseed*, 162 Wn. App. 60, 72, 255 P.3d 843 (2011) (Sweeney, J., concurring).

"Trial courts are afforded broad discretion in deciding whether to admit evidence, including expert testimony." *State v. Wilson*, ___ Wn. App. ___, P.3d ___ (2013 WL 1335162 at 15). The exclusion of the polygraph results fell squarely within the trial court's discretionary powers. Martin's argument is similar to one rejected in *United States v. Waters*, 627 F.3d 345 (9th Cir. 2010). In *Waters*, the district court excluded, under FRE 403, the defendant's proposed evidence that she was a victim of government misconduct. 627 F.3d at 352-53. The defendant appealed her conviction, arguing that the trial court's exclusion of her evidence violated her due process rights. *Id.* The 9th Circuit affirmed, holding that the trial court's decision was a proper exercise of its discretion under FRE 403. *Id.* at 353. The *Waters* court rejected the same argument made here by Martin – that a discretionary decision on the evidence implicated a due process right to present a defense. *Id.* at 353-54; Brief of Appellant at 30:

> Given that the district court's evidentiary ruling was well within its discretion, we reject Waters' attempts to "constitutionalize" her claims. . . . Waters "cannot transform the exclusion of this evidence into constitutional error by arguing that [s]he was deprived of [her] right to present a defense. The right to present a defense is clearly fundamental, but . . . 'the accused . . . must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'"

627 F.3d at 353-54 (quoting *United States v. Perkins,* 937 F.2d 1397, 1401 (9th Cir.1991)). *Waters* is directly on point and Martin's argument should be rejected.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Martin's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 12th day of April, 2013.

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Attorneys for Respondent

NO. 43757-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: SHELDON MARTIN, Appellant.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On April 12, 2013, I deposited in the United States mail true and correct copies of Brief of Respondent, and Declaration of Service, postage affixed, addressed as follows:

Eric Nielsen
1908 East Madison Street
Seattle, WA 98122-2842

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

DATED this 12th day of April, 2013, at Seattle, Washington.

Elizabeth Jackson
ELIZABETH JACKSON

WASHINGTON STATE ATTORNEY GENERAL

April 12, 2013 - 3:01 PM

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