NO. 93641-2

THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Scott Halvorson:

STATE OF WASHINGTON,

Respondent,

v.

SCOTT HALVORSON,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In an unpublished opinion, the Court of Appeals correctly held that the trial court did not abuse its discretion by admitting diagnostic testimony from the State's expert at Halvorson's Sexually Violent Predator (SVP) trial. The testimony was relevant to Halvorson's sexual offending and risk, and consistent with this Court's precedent. This Court has upheld SVP commitments based on evidence of additional factors, including diagnostic evidence, which contribute to the person's risk. The Court of Appeals also correctly held that the trial court did not abuse its discretion by excluding testimony that a rape victim allegedly told an unknown male at an unknown date to choke her during a sexual encounter. The testimony was properly excluded as speculative and irrelevant. The State respectfully requests that this Court deny review as these correct evidentiary rulings present neither an issue of substantial public interest nor a significant question of constitutional law.

II. RESTATEMENT OF THE ISSUES

For the reasons stated below, this Court should deny review because none of the issues warrant review under RAP 13.4(b). If the Court accepts review, the issues for review would be:

A. **Did the trial court abuse its discretion by allowing the State's expert to testify about Halvorson's Antisocial Personality Disorder, Alcohol Dependence, and Cannabis Abuse Diagnoses**

where the diagnoses were relevant to Halvorson's overall risk and offending behavior?

B. Did the trial court abuse its discretion by excluding speculative, remote, irrelevant hearsay evidence about a rape victim's alleged prior sexual behavior with an unknown male at an unknown time?

C. Did the above circumstances amount to cumulative error requiring reversal of the jury's verdict?

III. STATEMENT OF THE CASE

Prior to Sexually Violent Predator (SVP) trial, Scott Halvorson[1] moved to exclude the State's expert from testifying about his personality disorder and alcohol and drug abuse diagnoses on the basis that they do not predispose him to commit crimes of sexual violence. RP 226-32.[2] The trial court ruled that the testimony was admissible. RP 312-13. Halvorson also moved to admit testimony from a witness who claimed she overheard the now-deceased rape victim, D.S., tell a man to choke her during a sexual encounter. *See* RP 268-79, 288-89; CP 1622-50, 1836-50. Halvorson argued the testimony was relevant to his defense that D.S. consented to being choked during their sexual encounter. RP 268-77. The trial court excluded the testimony on the basis that it was speculative, somewhat remote in time, and not relevant. RP 314-15.

At trial, the jury heard extensive testimony about Halvorson's lengthy history of sexually assaulting females of all ages. Halvorson's sisters testified

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[1] Scott Halvorson also goes by the name Raymond Scott Reynolds. RP 185, 354-56. During the trial, he was referred to as both Halvorson and Reynolds.

[2] The State will use the same Verbatim Report of Proceedings (RP) citation system used by Halvorson. See Petition for Review at 2.

that Halvorson sexually assaulted them repeatedly when they were children. RP 576-96, 609-18. C.O. testified that in 1980, when she was fifteen years old, Halvorson snuck into her bedroom in the middle of the night and cut off her underwear while she was sleeping. CP 2171-84. In 1987, Halvorson lured four-year-old E.M. into his house and removed her clothing and touched her private parts. CP 2197-2206; RP 671. He was convicted of indecent liberties against a child under age fourteen for this offense. Ex. P2, P3. In 1988, Halvorson abducted ten-year-old D.H. from her bedroom at knifepoint and repeatedly raped her vaginally, orally, and anally over several hours. RP 660-61, 671, 722-23, 731-33; CP 2133-34, 2141-54. He threatened to kill D.H. if she told anyone. RP 732-33. He was convicted of rape in the first degree for this offense. Ex. P6. In 2007, Halvorson raped and assaulted D.S., causing petechial hemorrhaging and other bruising from strangling her during the rape. RP 541, 548-53, 573, 655, 661, 731-34, 785; Ex. P25, P26. He was convicted of rape in the third degree and assault in the second degree for this offense. RP 470; Ex. P-11. At the SVP trial, Halvorson denied most of the sexual assaults or claimed to have no memory of them. *See* RP 367-73, 383, 394-95, 410-11, 456-59, 463, 470-71, 495-97, 541-42.

The State's expert, Dr. Judd, diagnosed Halvorson with Paraphilia Not Otherwise Specified (Nonconsent), Pedophilia, Antisocial Personality Disorder, Alcohol Dependence in a controlled environment, and Cannabis

Abuse Disorder. RP 649-61, 669-80, 715-17, 752-55, 816. Dr. Judd testified that the Pedophilic and Paraphilic disorders constitute a mental abnormality and are chronic conditions. RP 672-73, 747.

Dr. Judd diagnosed Halvorson with Antisocial Personality Disorder based on the following behaviors: pervasive disregard for and violation of the rights of others; deceitfulness; impulsivity; irritability and aggressiveness; reckless disregard for the safety of others; repeated failures on supervision; and lack of remorse. RP 674-79. Dr. Judd testified that although Halvorson's personality disorder does not specifically cause him to commit sexually violent offenses, it still contributes to his overall risk and the probability that he will sexually reoffend. *See* RP 680, 746-52.[3] Dr. Judd testified that the interaction between Halvorson's personality disorder and paraphilic disorders "increases the probability" that he will commit predatory acts of sexual violence. *See* RP 680-81.

Dr. Judd conducted a risk assessment using actuarial instruments and other factors associated with recidivism, including dynamic risk factors. RP 700-13, 759, 805-06, 817. He testified that psychopathy and Antisocial Personality Disorder generally place a person at a higher risk of reoffending.

[3] Halvorson's expert, Dr. Donaldson, testified that it is "a little complicated" as to whether Halvorson suffers from a personality disorder. RP 861-62. He testified that Halvorson has a narcissistic personality and an "enormous sense of entitlement that runs all through the record" and that such individuals tend "to think they deserve whatever they want when they want it." RP 875.

RP 713. He also testified that Halvorson's high psychopathy score places him at a higher risk to reoffend. RP 701-05, 713, 754, 816.

Dr. Judd testified that Halvorson made numerous reports over the years about having issues with sexual deviancy. *See* RP 413-14, 661-69, 749, 800. Dr. Judd concluded that Halvorson has a mental abnormality that makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. *See* RP 710-11, 722-25, 826. On August 27, 2014, a jury returned a verdict finding that Halvorson is an SVP. CP 1418, 1428. The Court of Appeals affirmed the commitment. *In re Det. of Halvorson,* No. 32762-1, 2016 WL 4259134 (Wash. Ct. App. 2016).

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Correctly Found that the Court Did Not Abuse its Discretion by Admitting Evidence of Halvorson's Personality Disorder and Substance Abuse Diagnoses

Halvorson's argument that evidence of his Antisocial Personality Disorder, Alcohol Dependence, and Cannabis Abuse diagnoses was inadmissible lacks merit because the diagnoses were relevant to his overall risk and offending behavior. This Court should deny review because this is not an issue of substantial public interest.

1. This Court Has Upheld SVP Commitments Based on Evidence of Additional Factors that Contribute to Risk

Established case law supports the Court of Appeals' holding that the State was entitled to introduce evidence of "Halvorson's general personality

and history to place his mental abnormality in context and meet its burden to prove future risk of recidivism." *See In re Det. of Audett,* 158 Wn.2d 712, 147 P.3d 982 (2006); *see also In re Det. of Sease,* 149 Wn. App. 66, 201 P.3d 1078 (2009), *petition for review denied,* 166 Wn.2d 1029, 217 P.3d 337 (2009). In *Audett,* this Court held that the State presented sufficient evidence to support Audett's commitment as an SVP by presenting evidence of a mental abnormality or personality disorder and by testimony that "Audett's inability to control his alcoholism was a *significant additional factor* contributing to his risk of reoffense, as was his lack of knowledge regarding his offending patterns." *Audett,* 158 Wn.2d at 729 (emphasis added).

Similarly, in *Sease,* the State's expert testified that Sease's Antisocial Personality Disorder and Borderline Personality Disorder made him likely to reoffend. *Sease,* 149 Wn. App. at 71-72. The expert characterized Sease's Narcissistic Personality Disorder and alcohol dependency diagnoses as "other risk considerations" for re-offense. *Id.* at 72. As part of the risk assessment, the State's expert considered multiple actuarial instruments, Sease's level of psychopathy, and several protective factors. *Id.* The Court held that all of these risk considerations were sufficient to support Sease's SVP commitment. *See id.* at 80. Thus, *Audett* and *Sease* demonstrate unequivocally that a factfinder is permitted to consider a variety of factors, including other diagnostic information, as part of an offender's risk. This is exactly what

Dr. Judd did in assessing Halvorson's risk. The diagnostic testimony was relevant to risk and was properly admitted.

Sease and *Audett* are not distinguishable as claimed by Halvorson. *See* Petition at 10. Both of these cases involved testimony from the State's expert about additional diagnoses or other risk factors that were not part of the mental abnormality or personality disorder, but were still relevant as "other risk considerations" for re-offense. *See Audett,* 158 Wn.2d at 729; *see also Sease,* 149 Wn. App. at 71-72.

Halvorson mischaracterizes the issue on appeal by incorrectly asserting that the State relied on inadmissible diagnostic evidence as a basis for commitment. The State did not "rely on" the personality disorder and the substance abuse diagnoses as "a basis for commitment." The State relied only on the mental abnormality and reiterated this in closing argument. RP 1027, 1063-77. Further, the jury was properly instructed that Halvorson could only be committed if he suffered from a mental abnormality. *See* RP 1011; CP 1397.

2. Evidence Of Halvorson's Antisocial Personality Disorder Is Relevant To Risk

The admission of evidence is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of discretion. *State v. Hyder,* 159 Wn. App. 234, 246, 244 P.3d 454 (2011). The trial court properly admitted evidence of Halvorson's Antisocial Personality Disorder because it was relevant to his overall risk.

"Mental abnormality" and "personality disorder" are defined by statute[4] and are alternative means by which the State can prove a person meets criteria as an SVP.[5] *See In re Det. of Halgren,* 156 Wn.2d 795, 810, 132 P.3d 714 (2006). Dr. Judd testified that Halvorson's mental abnormality predisposes him to commit sexually violent offenses. RP 746. He testified that although Halvorson's personality disorder, standing alone, does not necessarily predispose him to commit sexually violent offenses, it still contributes to his overall risk. *See* RP 680, 746-47, 752-53. He testified that the interaction between the personality disorder and paraphilic disorders "increases the probability" that Halvorson will commit predatory acts of sexual violence. *See* RP 680-81, 752-53.

At trial, the jury was properly instructed that the mental abnormality was the only basis for commitment. RP 1011; CP 1397. However, this does not mean that the personality disorder then becomes irrelevant in assessing Halvorson's overall risk. Halvorson's personality disorder was relevant because it interacted with his mental abnormality and *increased* the probability that he would sexually reoffend. *See* RP 680, 746-47, 752-53. Thus, the jury was

[4] RCW 71.09.020(8); RCW 71.09.020(9).

[5] An SVP is "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

entitled to consider this relevant evidence as part of the risk assessment and decide what value or weight to give the evidence. *See* CP 1392.

Dr. Judd testified that it is well established that recidivism is linked to deviant sexual interest and antisocial orientation. RP 705-06. In explaining the interaction between Halvorson's personality disorder and his paraphilic disorders, Dr. Judd noted that Halvorson's lack of remorse and lack of empathy would open up the opportunity for him to act out and increase the probability that he would reoffend. *See* RP 680-81. Because of this, Dr. Judd specifically selected actuarial risk assessment instruments that addressed not only deviant sexual behavior, but also antisocial behavior and psychopathy. RP 705-09.

Dr. Judd testified that Halvorson's psychopathy and Antisocial Personality Disorder fold into his risk assessment analysis because they generally place a person at a *higher* level of risk. RP 713. The lack of remorse, callousness, and other attributes associated with Antisocial Personality Disorder and psychopathy affect a person's risk. *See id.* Dr. Judd testified that he integrates all of this information into his overall risk assessment. *Id.* Thus, the diagnosis was directly relevant to Halvorson's overall risk, and the trial court did not abuse its discretion by admitting the testimony as it directly related to an element the State had to prove. As the Court of Appeals correctly explained, the State was entitled to draw upon Halvorson's general personality

and history to meet its burden to prove future risk of recidivism. *See Audett,* 158 Wn.2d at 729; *see also Sease,* 149 Wn. App. at 71-72.

3. Evidence Of Halvorson's Alcohol Dependence And Cannabis Abuse Is Relevant To His Offending Behavior

The trial court properly admitted testimony of Halvorson's Alcohol Dependence and Cannabis Abuse because the evidence indicated a relationship between his substance use and his sexual offending. Dr. Judd diagnosed Halvorson with Alcohol Dependence based on his extensive history of alcohol use, including during the offenses against C.O., E.M., D.H., and D.S. RP 467-70, 491-98, 715-16. Dr. Judd noted that Halvorson continued to use alcohol and drugs despite making statements over the years that he would never use again. RP 716.[6]

Prior to Dr. Judd's testimony, Halvorson testified in detail about his alcohol use during his offending. He testified that he was "obviously cognitively impaired" and "drunk" during the 1980 incident with C.O. RP 456-57, 463, 471. He testified that he was a "practicing alcoholic" and cognitively impaired during the 1987 incident with E.M. RP 368, 374-77. He testified that he was in an alcoholic blackout during the 1988 rape of D.H. and woke up with a knife and knew "something bad had happened[.]"

[6] After raping D.H. in 1988, Halvorson said, "I have been so horrified by my latest act of sexual deviancy, I swear never to use any drugs ever again." RP 412-13.

RP 384-95, 410-11, 541. He also testified that he had been drinking and had "a pretty good buzz" prior to the 2007 rape of D.S. *See* RP 469-70, 491-98.

The Court of Appeals' decision indicates that the trial court "probably should have granted" Halvorson's motion to exclude the substance abuse testimony because "Dr. Judd did not find Mr. Halvorson's substance abuse relevant to the recidivism risk," but that this changed at trial because Halvorson testified about his substance abuse issues *prior* to Dr. Judd's testimony. *Halvorson,* 2016 WL 4259134 at *3. The court ruled that admission of Dr. Judd's testimony was not reversible error. *Id.*

First, as the Court of Appeals noted, Halvorson introduced evidence of his struggles with substance abuse prior to Dr. Judd's testimony. Halvorson blamed part of his "issues" on his alcohol and drug usage and testified that alcohol and drugs are "triggers without a doubt." RP 414-15. Halvorson's testimony made Dr. Judd's diagnostic testimony relevant to his offending. Evidence is relevant if it has "any tendency" to make a fact of consequence to the action more or less probable. ER 401. All relevant evidence is admissible. ER 402.

Second, Dr. Judd did not explicitly testify that Halvorson's substance abuse was irrelevant to risk. Rather, Dr. Judd testified that Halvorson's substance abuse diagnoses are supported by the facts and do not have any particular relevance in assessing risk *beyond* the fact that there is a relationship

between his substance use and offending and it would need to be monitored and controlled in treatment. RP 716-17. Dr. Judd testified that alcohol can lower inhibitions in a person who has an interest in sexual acting out. RP 717. Thus, alcohol use *does* affect Halvorson's risk because he has been diagnosed with multiple paraphilias and alcohol lowers whatever control Halvorson might be able to muster. *See* RP 672-73, 747. The substance abuse testimony was relevant to Halvorson's offending behavior, which was a central issue at trial. The jury was entitled to consider this evidence in assessing Halvorson's offending behavior and overall risk. The trial court did not abuse its discretion by admitting the evidence.

4. The Jury Was Properly Instructed That Halvorson's Mental Abnormality Was The Only Basis For Commitment

The trial court properly instructed the jury that the State must prove Halvorson has a mental abnormality in order to commit him as an SVP. *See* RP 1011, CP 1397. The "to commit" instruction only referenced mental abnormality as a basis for commitment. *Id.* The jury was not instructed that it could commit Halvorson on the basis of a personality disorder. *Id.* As the Court of Appeals correctly explained, the "court's instructions protected Mr. Halvorson against the risk the jury would improperly [commit] him on the personality disorder prong of the SVP statute." *See Halvorson,* 2016 WL 4259134 at *2.

Jurors are presumed to follow the court's instructions. *State v. Imhoff,* 78 Wn. App. 349, 351, 898 P.2d 852 (1995). Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. *State v. Aguirre,* 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). Moreover, the State reiterated the proper basis for commitment in its closing argument and argued that it was Halvorson's mental abnormality that must serve as the basis for commitment. *See* RP 1027, 1063-69, 1077. The State also explained the limited relevance of the personality disorder as folding into Halvorson's risk. RP 1068-70. As the Court of Appeals correctly explained, this was "consistent with Dr. Judd's testimony and the court's instructions" and "there is no basis for reversal." *See Halvorson,* 2016 WL 4259134 at *3.

B. The Court of Appeals Correctly Found that the Trial Court Did Not Abuse its Discretion by Excluding Hearsay Evidence of a Rape Victim's Alleged Prior Sexual Behavior with an Unknown Male at an Unknown Date

Halvorson argues that the trial court violated his due process right to present a complete defense by excluding evidence that his rape victim allegedly told a man on a previous occasion to choke her during sex. Petition at 14. He argues that this evidence was relevant to his theory that D.S. consented to being choked. *Id.* The Court of Appeals correctly found that the trial court did not abuse its discretion by excluding this speculative

and irrelevant evidence. *See Halvorson,* 2016 WL 4259134 at *3. This Court should deny review because this is neither a significant question of constitutional law nor an issue of substantial public interest.

1. Evidence that the Rape Victim Allegedly Consented to Being Choked During a Prior Sexual Encounter Was Irrelevant and Inadmissible

Halvorson argues that ER 412(c) allows him to admit evidence that D.S. said "choke me" during a previous sexual encounter with an unknown male to support his argument that D.S. consented to being choked by him. *See* Petition at 16. The trial court did not abuse its discretion in excluding this evidence as speculative, remote in time, and not relevant. *See* RP 314-15.

This Court has emphasized that evidence of consensual sex with others in the past, without more, does not meet the bare relevancy test of ER 401. *State v. Hudlow,* 99 Wn.2d 1, 10, 659 P.2d 514 (1983). In order for evidence of prior sexual conduct to be admissible on the issue of consent, Halvorson must show not only that it is relevant and its probative value substantially outweighs the danger of unfair prejudice, but also that its exclusion would result in denial of substantial justice to him. *Id.* at 7. Further, Halvorson must show a "particularized factual showing" of similarity between the prior consensual sexual act and the act he claims was consensual. *See id.* at 10-11.[7]

[7] Halvorson relies on *State v. Jones,* 168 Wn.2d 713, 723, 230 P.3d 576 (2010), for his claim that "distinctive sexual patterns showing consent are relevant." Petition at 16. *Jones* does not say this. Rather, *Jones* explains, "Evidence of past sexual conduct, such as

Halvorson fails to make a "particularized factual showing" of similarity between the alleged prior sexual act with an unknown male at an unknown date and his rape of D.S. *See Hudlow,* 99 Wn.2d at 10-11. First and foremost, a jury already found beyond a reasonable doubt that Halvorson was guilty of assaulting and raping D.S. Ex. P-11, RP 470. The State was not required to prove that he choked or raped D.S. at the SVP trial as that was not the issue before the jury. Halvorson's mental condition and risk were the issues at trial.

Second, the circumstances of the rape of D.S. are nothing like the alleged hotel incident. Halvorson testified that he first met D.S. in 2005 after she ran up to him and asked for a ride after fleeing from two men. RP 471-72. He drove her home, where they smoked cigarettes and drank beer. RP 472-73. Several months later, he ran into her at a bar and they returned to her home where he gave her money to buy crack. RP 473-80. He next saw D.S. in August 2006 at her home where they smoked cigarettes and drank alcohol. RP 484-87. Halvorson next saw D.S. in April 2007, on the night of the rape. *See* RP 488-89. He testified that he had been drinking and went to her home in the middle of the night "hoping to have some sex." *See* RP 481-84, 489-94. He testified that D.S. agreed to have sex with him in exchange for $40 to buy crack. RP 495-97. During "regular" intercourse, D.S. asked him to "softly choke" her because it

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meeting men in bars before consenting to sex or other distinctive sexual patterns, *could be* relevant if it demonstrates 'enough similarity between the past consensual sexual activity and defendant's claim of consent.'" *Id.* (emphasis added).

"gets [her] off." RP 500. He agreed, but requested anal sex. RP 500-01. He claimed that during anal sex, he put his hand around her throat and started to "softly" cut off her air supply. RP 501. Her head started "bobbing up and down like she was losing consciousness" and she was making odd, gurgling noises. RP 501. He was uncomfortable, so they returned to "regular" intercourse and he ejaculated. RP 501-02, 535-36. When Halvorson left, he took back the $40 he had given her. RP 503-05.[8] D.S. suffered bruising and petechial hemorrhaging from the strangulation. *See* RP 541, 549-53, 734, 785.

The evidence Halvorson sought to introduce about the incident at the hotel with an unknown man at an unknown date is not factually similar to Halvorson's rape of D.S. Halvorson's witness would have testified that at some unknown date in the past, she went to a hotel with a man to engage in acts of prostitution and that the man's friend had "already started the party"[9] with D.S. RP 288-89; CP 1836-39. She claimed she saw D.S. engage in oral sex and sexual intercourse with the man and heard D.S. say, "Choke me. Choke me." CP 1848-49. The trial court correctly found this evidence was speculative and too remote in time to be relevant.

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[8] Halvorson's claim that he and D.S. were acquaintances who had several encounters at D.S.'s home over the years is arguably not supported by the evidence in light of the fact that detectives had to identify him by fingerprints left at the rape scene. *See* RP 531, 546-47.

[9] She said they partied, drank alcohol, smoked crack, got paid for sex, and left. CP 1837-41.

The offer of proof included no information about the identity of the man, the nature of his relationship with D.S., or how they ended up at a hotel together. It is completely speculative that the alleged statement was made because D.S. enjoyed being choked, as opposed to something the man either paid her to say or paid her to do. There was no offer of proof that D.S. ever said she enjoys being choked during sex. *See* CP 1769-1854. The witness merely claimed she heard D.S. utter the words "Choke me. Choke me." CP 1848-49. If D.S. was engaged in an act of prostitution as the witness claimed, it is unclear why the man would be doing what the prostitute found pleasurable as opposed to what he paid her to do.

Moreover, there is no indication that the man actually choked D.S., and there is no indication that D.S. had any injuries similar to those she suffered at the hands of Halvorson. *See* RP 470, 541, 548-53, 573, 734, 785-86; Ex. P-25, Ex. P-26. It was within the trial court's discretion to exclude this speculative and irrelevant testimony. *See State v. Gregory,* 158 Wn.2d 759, 782-86, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.,* 181 Wn.2d 757, 336 P.3d 1134 (2014) (trial court did not abuse its discretion by excluding evidence of the rape victim's prior 1995 prostitution conviction because it was too remote in time and too different in character to be relevant to the 1998 rape).

Furthermore, as the Court of Appeals correctly noted, the "choke me" testimony was also inadmissible hearsay. *See Halvorson,* 2016 WL 4259134 at

*3. Halvorson wanted to offer the "choke me" statement to prove the very thing that D.S. asserted -- that she liked being choked. This is the very definition of hearsay. *See* ER 801. "A trial court's ruling on the admissibility of evidence will not be disturbed on appeal if it is sustainable on alternative grounds." *Thomas v. French*, 99 Wn.2d 95, 103-04, 659 P.2d 1097 (1983). The Court of Appeals' further analysis is not "unprecedented" as Halvorson claims. *See* Petition at 19. The court did not inject an additional requirement that the declarant be available. Rather, the court merely mused that if the victim was still alive and able to respond to the allegation that she told a man to choke her, the analysis might be different with additional information beyond mere speculation.

2. Halvorson Does Not Have a Constitutional Right to Admit Irrelevant Evidence

Halvorson argues that the court violated his due process right to present a complete defense by excluding testimony that the rape victim consented to being choked during a prior sexual encounter. Petition at 14. Halvorson's claim lacks merit. First, Halvorson does not have a constitutional right to admit irrelevant evidence. Second, even if the evidence was relevant, the State had a compelling interest in excluding it. Finally, the court permitted Halvorson to testify in detail about his version of events, which included testimony that D.S. consented to being choked.

Although a defendant has the right to present a defense, that right is not absolute. *Jones,* 168 Wn.2d at 720. Defendants have a right to present only

relevant evidence. *Id., see also State v. Darden,* 145 Wn.2d 612, 624, 41 P.3d 1189 (2002) ("There is no right, constitutional or otherwise, to have irrelevant evidence admitted."). Halvorson did not have a right to present the proffered testimony because it was not relevant. Even if the evidence was relevant, the State had a compelling interest in excluding evidence that would distract and inflame jurors that was of little to no probative worth. *See Hudlow,* 99 Wn.2d at 16. Any constitutional right Halvorson may have had to present a "defense" was satisfied by the court allowing him to testify that the encounter was consensual and that D.S. asked him to choke her. *See Aguirre,* 168 Wn.2d at 363.

Halvorson had ample opportunity to present his defense when he testified in detail about his version of events with D.S. and his claim that the entire encounter, including asphyxiation, was consensual. *See* RP 489-505, 534-36. Furthermore, the court admitted testimony from a witness who said she saw D.S. exchange money for sex with another man within a week of the incident between Halvorson and D.S. RP 314-15, 976-89. Thus, the jury heard evidence that corroborated Halvorson's claim of prostitution and consensual sex.

Even assuming arguendo that the trial court erred in excluding the testimony, the error was harmless. Evidentiary error warrants reversal only if it results in prejudice and there is a reasonable probability that the error materially affected the outcome of the trial. *In re Det. of West,* 171 Wn.2d 383, 410, 256 P.3d 302 (2011). First, the testimony was not relevant to any of the

elements the State had to prove at trial.[10] Second, the rape and assault of D.S. was just one of many sexual assaults relied on by Dr. Judd in forming his opinions. *See e.g.,* RP 413-14, 653-72, 711, 730-34, 746-50, 776-86, 800. Finally, Dr. Judd testified that even if one accepts the premise that the encounter was consensual, the severity of D.S.'s injuries is "indicative of a behavior that got out of control" and suggests "more than just a playful sexual encounter." RP 784-86. Halvorson has not shown that exclusion of the evidence materially affected the outcome of the trial.

C. There was no Cumulative Error Warranting Reversal

The cumulative error doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Halvorson has failed to establish any error, let alone cumulative error justifying a new trial. The trial court properly exercised its discretion in making evidentiary rulings.

V. CONCLUSION

For the foregoing reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 4th day of November, 2016.

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[10] The State was not required to prove that Halvorson raped D.S. at the SVP trial.

NO. 93641-2

WASHINGTON STATE SUPREME COURT

In re the Detention of: SCOTT HALVORSON, Petitioner.	DECLARATION OF SERVICE

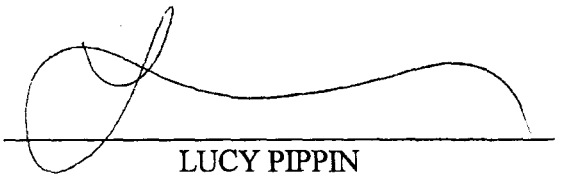
I, Lucy Pippin, declare as follows:

On November 14, 2016, pursuant to the Electronic Service Agreement, I served a true and correct copy of Answer to Petition for Review and Declaration of Service via electronic mail, addressed as follows:

Casey Grannis
grannisc@nwattorney.net
sloanej@nwattorney.net

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

DATED this 14th day of November, 2016, at Seattle, Washington.



LUCY PIPPIN