NO. 32762-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of:

SCOTT HALVORSON,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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

C. Did the trial court err by admitting evidence of the Structured Risk Assessment – Forensic Version (SRA-FV) under *Frye*?

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

II. STATEMENT OF THE CASE

A. Procedural History

In April 2012, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Scott Halvorson[1] pursuant to RCW 71.09. CP 1-2. On August 27, 2014, a jury returned a verdict finding that Halvorson is an SVP, and the trial court entered an order committing him to the custody of the Department of Social and

[1] Scott Halvorson goes by the name Raymond Scott Reynolds. RP 185, 354-56. However, the majority of records refer to him as Scott Halvorson, and the State filed the SVP petition under this name. RP 185, CP 1-2. During the trial, he is referred to as both Halvorson and Reynolds.

Health Services for control, care, and treatment. CP 1418, 1428; RP 1081.[2] Halvorson timely appealed.

B. Pre-Trial Motions

1. *Frye* Hearing

Prior to trial, Halvorson objected to admission of SRA-FV evidence under *Frye*. CP 55-75. The State argued that the SRA-FV meets *Frye*. CP 1903-11. After conducting a *Frye* hearing, the trial court concluded that the SRA-FV is generally accepted in the community of experts who evaluate sex offenders and is capable of producing reliable results. CP 1432-35. The court held that the SRA-FV satisfies *Frye* and that any limitations or potential errors related to the use of the SRA-FV due to limited cross-validation or inter-rater reliability are matters for the factfinder. CP 1435; RP 170-74.

2. Dr. Judd's Diagnoses

Prior to trial, Halvorson moved to exclude Dr. Judd from testifying about his Antisocial Personality Disorder, Alcohol Dependence, and Cannabis Abuse diagnoses because they do not predispose him to commit crimes of sexual violence. RP 226-32. The trial court ruled that the diagnostic testimony was appropriate and admissible. *See* RP 312. The

[2] For the Court's convenience, the State will use the Verbatim Report of Proceedings (RP) citation system used by Appellant as outlined in the Brief of Appellant at page 3, footnote 3.

court explained that testimony of a person's alcohol or drug dependence does not carry the kind of prejudice the evidence rule is talking about and that it does not outweigh the relevance of the testimony. RP 312-13.

3. ER 412 and Rape Shield Evidence

Prior to trial, Halvorson moved to admit evidence under ER 412 that the now-deceased rape victim, D.S., (1) had a nickname connoting promiscuity ("Debbie-Do"); (2) exchanged sex for money with another man at a bar approximately one week after the rape; and (3) asked another man to "choke" her during a sexual encounter at an unknown date. *See* RP 268-79; CP 1622-50.

Although a jury convicted Halvorson of rape in the third degree and assault in the second degree for the incident involving D.S., he maintained that the sexual contact and asphyxiation of D.S. was consensual. Ex. P-11; *see also* RP 269, 274. Halvorson argued the evidence was admissible as to his defense of consent. RP 275-77. Tabatha Anstine would have testified that she once overheard D.S. tell a "trick"[3] to choke her during sexual intercourse. RP 288. However, she could not

[3] A "trick" is when "you pick up a dude and they give you money for some type of sexual act." CP 1799.

remember what year this occurred, nor did she know the name of the alleged "trick". *See* CP 1836-50; RP 288-89.[4]

The State argued that even if one believed this testimony, it is improper under ER 412 to use a rape victim's sexual history to bolster Halvorson's version of events and that it was too remote and irrelevant to what happened between Halvorson and D.S. *See* RP 289-92. The court excluded testimony about the prior asphyxiation incident as speculative and somewhat remote in time. RP 314-15. The court also explained that it was not relevant to the issue of the motivation for sex, which was an alleged trade of sex for drugs. RP 315. The court admitted testimony that D.S. exchanged sex for money with another man near the time of the rape. RP 314-15; *see also* RP 279, 287. The court excluded the nickname testimony. RP 313.

C. Sexually Violent Predator Trial

1. Halvorson's Sexual Offending History

Halvorson has a lengthy history of sexually assaulting females of all ages. Halvorson's sister, J.S., testified that Halvorson, who is nine years older, sexually assaulted her continuously when she was between the

[4] Halvorson's counsel "suggested" the incident "probably" happened "around 2006." CP 1631-32; RP 295. However, no witness could testify that this was the case and the estimation of the date was based on counsel's own research. *See id.; see also* App. Br. at 17-18.

ages of four and eleven. RP 576-91.[5] The sexual assaults consisted of fondling, fellatio, sodomy, vaginal penetration, and anal penetration. RP 581-82. On one occasion, Halvorson forced her to have sexual intercourse with another brother as they both cried. RP 587-88.

Halvorson's half-sister, K.S., testified that Halvorson, who is thirteen years older, sexually assaulted her numerous times when she was five years old. RP 609-12.[6] He would fondle her and simulate intercourse until ejaculation. RP 611-18. At trial, Halvorson admitted to sexually assaulting both sisters. RP 384, 441-46. He also admitted that he had lied to Dr. Judd when he denied sexually assaulting them. RP 423-26.

C.O. testified that in 1980, when she was fifteen years old, Halvorson, who was an acquaintance, snuck into her bedroom in the middle of the night and started to cut off her underwear while she was sleeping. CP 2171-84. Halvorson denied any sexual intent. RP 542. He claimed he was drunk and just wanted to collect her underwear to show his friends. RP 456-59, 463, 471. He pled guilty to criminal trespass for this incident. RP 470-71.

In 1987, Halvorson lured a four-year-old stranger girl into his house to "play doctor." CP 2197-2203; RP 671. E.M. testified that

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[5] J.S. was born in 1969, so the sexual assaults occurred from approximately 1973 to 1980. *See* RP 596.

[6] K.S. was born in 1973, so the sexual assaults occurred in approximately 1978. *See* RP 610-11.

Halvorson took her into his bedroom, removed her clothing, and touched her private parts. CP 2205-06. Halvorson denied touching E.M. in a sexual manner. RP 383, 541-42.[7] He pled guilty to indecent liberties against a child under age fourteen. Ex. P2, P3.

Less than three months after pleading guilty to this crime, and while on supervision and awaiting sentencing, Halvorson raped ten-year-old D.H. RP 671, 722-23. In 1988, Halvorson abducted D.H. from her bedroom in the middle of the night at knifepoint. RP 660-61, 671; CP 2133-34, 2141-42. D.H. testified that he took her into a neighbor's yard where he performed oral sex on her and digitally penetrated her vagina. CP 2146-47. Halvorson then took her to his home where he vaginally, orally, and anally raped her over several hours. RP 731-33; CP 2148-54. He threatened to kill D.H. if she told anyone. RP 732-33. Halvorson testified that he was in an alcoholic blackout and had no memory of the incident, but believed he was responsible for the crime. RP 394-95, 410-11, 541. He pled guilty to rape in the first degree. Ex. P6.

Halvorson's next sexual assault occurred in 2007 against D.S., who suffered petechial hemorrhaging and other bruising from Halvorson

[7] Halvorson testified that E.M. followed him into his apartment to help look for his cat. RP 367-70. He noticed she had some bruises and scrapes so he decided to treat them. RP 370. He told her to lay down on his bed and remove her dress so he "could get a better look at her." RP 371-72. He pulled down her underpants and applied Neosporin to a rash on her buttocks area. RP 372-73.

strangling her during the rape. *See* RP 541, 548-53, 573, 655, 661, 731-34, 785; Ex. P25, P26. Halvorson was convicted of rape in the third degree and assault in the second degree for this offense. RP 470; Ex. P11. At the SVP trial, Halvorson claimed the sex and strangulation were consensual. RP 495-97.

2. Expert Witness Testimony

The State's expert, Dr. Judd, diagnosed Halvorson with Paraphilia Not Otherwise Specified (Nonconsent), also referred to as Other Specified Paraphilic Disorder, 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 Disorder and Other Specified Paraphilic Disorder constitute a mental abnormality and are chronic conditions. RP 672-73, 747.

Dr. Judd diagnosed Antisocial Personality Disorder based on Halvorson's following behaviors: pervasive disregard for and violation of the rights of others; deceitfulness; impulsivity; irritability and aggressiveness; reckless disregard for the safety of self and others; repeated failure to adhere to responsibilities of 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, 746-47, 752. Dr. Judd testified that the interaction between Halvorson's personality disorder and paraphilic disorders "increases the probability" that he will likely commit predatory acts of sexual violence. *See* RP 680-81.

Dr. Judd testified that it is well established that recidivism is linked to deviant sexual interest and antisocial orientation. RP 705-06. He conducted a risk assessment using several actuarial instruments and other outside factors associated with recidivism, including dynamic risk factors. RP 700-13, 759, 805-06, 817. Halvorson received a high psychopathy score on the Hare Psychopathy Checklist (PCL-R). *See* RP 701-05, 713, 754, 816. Dr. Judd testified that individuals with higher levels of psychopathy have a higher risk of reoffending. RP 702. He testified that psychopathy and Antisocial Personality Disorder generally place a person at a higher risk of reoffending. RP 713.

Dr. Judd testified that Halvorson made numerous reports over the years about having issues with sexual deviancy. *See* RP 661. In 1988, Halvorson realized he had a sexual problem and admitted to having an attraction to young girls. RP 662-64. He knew he needed treatment and wanted to live "without fear of the monster that lives in me." RP 413-14, 663-64, 800. In 1994, Halvorson appeared to openly describe his deviancy. RP 663-65. He wrote to the Sentence Review Committee,

"Anger fuels the rages prior, a sense of stability and love keep it in check. If my marriage fails and I have no positive goals to focus on, my chances of reoffending multiple at an alarmingly astronomical rate." RP 668-69, 749. In 1996, an inmate reported that Halvorson admitted he would reoffend because he cannot stop himself. RP 668.

Despite these admissions over the years, when Dr. Judd interviewed Halvorson in 2011, he denied having any kind of deviancy or any history of deviancy. RP 665-66. Dr. Judd concluded that Halvorson has a mental abnormality that causes him serious difficulty controlling his behavior and 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.

Dr. Donaldson, Halvorson's expert witness, testified that there was insufficient evidence to conclude that Halvorson suffers from a mental abnormality, but that it is "a little complicated" as to whether he suffers from a personality disorder. RP 861-62. He testified that Antisocial Personality Disorder has poor diagnostic reliability. RP 862. He also testified that Halvorson has a narcissistic personality and an "enormous sense of entitlement that runs all through the record." RP 875. Such individuals tend "to think they deserve whatever they want when they want it." RP 875. Dr. Donaldson noted that all of Halvorson's accounts of

his offending "are very self-serving" and deviate considerably from the police reports. RP 848.[8]

III. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion By Admitting Testimony About Halvorson's Antisocial Personality Disorder, Alcohol Dependence, And Cannabis Abuse Diagnoses Because They Are Relevant To His Overall Risk And Offending

Halvorson argues that the trial court erred by allowing the State's expert to testify about his Antisocial Personality Disorder, Alcohol Dependence, and Cannabis Abuse diagnoses because they were irrelevant. App. Br. at 8. Halvorson's argument is without merit because the diagnoses are relevant to his overall risk and offending behavior. The trial court did not abuse its discretion by admitting the testimony.

1. Standard Of Review

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); *see also In re Young,* 122 Wn.2d 1, 57, 857 P.2d 989 (1993) (determination of whether expert testimony is admissible is within the discretion of the trial court).[9] A trial court abuses its discretion when the reason for its decision is manifestly unreasonable or based on untenable grounds. *Hyder,* 159

[8] Halvorson presented testimony from several other witnesses in his defense, including his girlfriend, a pastor, and his mother's best friend. *See* RP 958-999.

[9] *Young* has been superseded by statute on other grounds unrelated to this issue.

Wn. App. at 246; *see also State v. Castellanos,* 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) ("An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court.").

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

The trial court properly admitted evidence of Halvorson's personality disorder because it contributed to his overall risk of committing acts of sexual violence. A sexually violent predator means "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). "Mental abnormality" and "personality disorder" are defined in the SVP statute[10] and are alternative means by which the State can prove a person meets criteria as an SVP. *See In re Detention 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

[10] RCW 71.09.020(8), RCW 71.09.020(9).

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.

Based on Dr. Judd's testimony, Halvorson objected to including "personality disorder" in the State's proposed "to commit" instruction. RP 937-38. The State agreed to remove "personality disorder" from the instruction. RP 944. The jury was instructed that the mental abnormality was the only basis for commitment. RP 1011; CP 1397.

Evidence of Halvorson's personality disorder was relevant to Halvorson's risk.[11] All relevant evidence is admissible. ER 402. 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. ER 403. The personality disorder was relevant because it interacted with Halvorson's mental abnormality and increased the probability that he would sexually reoffend. *See* RP 680, 746-47, 752-53. Thus, the jury was entitled to consider evidence of the personality disorder as contributing to Halvorson's overall risk and decide what value or weight to give it. *See* CP 1392.

[11] Relevant evidence is "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401 (emphasis added).

In explaining the interaction between the personality disorder and paraphilic disorders, Dr. Judd noted Halvorson's lack of remorse and lack of concern about the impact of his behavior would open up the opportunity for him to act out. RP 680. He testified that it is well established that recidivism is linked to deviant sexual interest and antisocial orientation. RP 705-06. Because of this, Dr. Judd selected actuarial risk assessment instruments that addressed deviant sexual behavior, 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 for reoffending. RP 713. The lack of remorse, callousness, and other attributes that go along with Antisocial Personality Disorder and psychopathy affect the person's risk. *See id.* Dr. Judd testified that he integrates all of this information into his overall risk assessment. *Id.* Thus, the trial court did not abuse its discretion by admitting the testimony.

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

The trial court properly admitted evidence of Halvorson's Alcohol Dependence and Cannabis Abuse because the evidence indicated a relationship between his alcohol and drug usage and his offending

behavior. Dr. Judd diagnosed Halvorson with Alcohol Dependence based on Halvorson's extensive history of alcohol use, multiple DUIs, and his alcohol use during both non-sexual and sexual offending, including the offenses against C.O., E.M., D.H., and D.S. RP 467-70, 491-98, 715-16.

Halvorson testified in detail about his alcohol use during his offending. He testified that he had been drinking a lot of Jack Daniels and was "obviously cognitively impaired" and "drunk" during the 1980 incident with C.O. *See* RP 455-58, 463, 471. He testified that he drank two or three beers and was "cognitively impaired" prior to the 1987 incident with E.M. *See* RP 368, 374-75. At that time, he was a practicing alcoholic who was concerned about "where can I get another drink, and how much can I drink today." RP 377. He testified that he was in an alcoholic blackout during the 1988 rape of D.H. RP 394-95, 410-11, 541. He said that he had been drinking heavily with friends and then woke up in the morning with a knife and knew something bad had happened. RP 384, 388-90. At sentencing, he reported being "so horrified by my latest act of sexual deviancy, I swear never to use any drugs ever again." RP 412-13. Halvorson also testified that had been drinking and had "a pretty good buzz" prior to the 2007 rape of D.S. *See* RP 469-70, 491-98. 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.

Dr. Judd testified that the alcohol and drug diagnoses are supported by the facts and constitute areas that would need to be monitored and controlled in treatment because there appears to be a relationship between Halvorson's alcohol and drug usage and his offending behavior. RP 717. Dr. Judd explained that alcohol can lower inhibitions in a person who has an interest in sexual acting out. *Id.* Even Halvorson blamed part of his "issues" on his alcohol and drug usage. *See* RP 414-15. He testified that alcohol and drugs are "triggers without a doubt" and alcohol "definitely is a huge problem in that area." RP 414-15. Thus, the jury was entitled to consider this evidence in assessing his 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

Halvorson argues that in light of the "to commit" instruction, testimony about the personality disorder and drug and alcohol diagnoses was misleading and confusing under ER 403. App. Br. at 8. The testimony was relevant to risk and not misleading or confusing under ER 403. Further, the trial court properly instructed the jury as to the elements the State was required to prove.

The "to commit" instruction given to the jury only referenced mental abnormality as a basis for commitment. RP 1011; CP 1397. The

jury was not instructed that it could commit Halvorson on the basis of a personality disorder because Dr. Judd did not testify that the personality disorder *alone* made him likely to commit predatory acts of sexual violence. *See* RP 680, 746-47, 752-53. The jury was instructed that the State must prove each of the following elements beyond a reasonable doubt: (1) That Scott Halvorson has been convicted of a crime of sexual violence, to wit: Rape in the First Degree; (2) That Scott Halvorson suffers from a mental abnormality which causes serious difficulty in controlling his sexually violent behavior; and (3) That this mental abnormality makes Scott Halvorson likely to engage in predatory acts of sexual violence if not confined to a secure facility. CP 1397. Jurors are presumed to follow the trial court's instructions. *State v. Imhoff,* 78 Wn.App. 349, 351, 898 P.2d 852 (1995).

Dr. Judd testified that it is Halvorson's mental abnormality that predisposes him to commit sexually violent offenses. RP 746. However, this does not mean evidence of his personality disorder becomes irrelevant. The personality disorder testimony is still relevant to Dr. Judd's overall risk assessment and the jury could properly consider the testimony for this basis.

The jury was instructed that, "In deciding this case, you must consider all of the evidence that I have admitted." CP 1392. This same

instruction indicated, "You are also the sole judges of the value or weight to be given to the testimony of each witness." *Id.* The jury was instructed that "In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue." CP 1400. 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 applicable law and proper basis for commitment in its closing argument. The State argued that it was Halvorson's mental abnormality that was the basis for commitment. *See* RP 1027, 1055-57, 1060, 1063, 1067-69, 1077. The prosecutor explained, "And then you are going to have to decide, well, does that mental abnormality cause him serious difficulty controlling his sexually violent behavior?" RP 1055-56. The State addressed the relevance of the personality disorder because it folds into Halvorson's overall risk. RP 1068-70. Thus, the jury was properly instructed and there was nothing confusing or misleading about the testimony.

B. The Trial Court Did Not Abuse Its Discretion By Excluding Evidence Of The Rape Victim's Prior Sexual Behavior With An Unknown Male At An Unknown Date

Halvorson argues that the trial court abused its discretion by excluding evidence that the rape victim told a man on a previous occasion to choke her during sex. App. Br. at 16. He also argues this deprived him of a constitutional right to present a complete defense. *Id.* The trial court acted within its discretion when it excluded this irrelevant evidence.

1. Evidence That The Rape Victim Allegedly Consented To Asphyxiation During A Prior Sexual Encounter With An Unknown Male At An Unknown Date Was Irrelevant And Inadmissible Under ER 412

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402; *In re Detention of Twining,* 77 Wn. App. 882, 893, 894 P.2d 1331 (1995). The admissibility of evidence under the rape shield statute is within the sound discretion of the trial court and is reviewed only for manifest abuse of discretion. *State v. Aguirre,* 168 Wn.2d 350, 361-63, 229 P.3d 669 (2010). It is within the trial court's discretion to balance the danger of prejudice against the probative value of the evidence, and a trial court's decision should be overturned only if no reasonable person could take the view adopted by the court. *State v. Hudlow,* 99 Wn.2d 1, 18, 659 P.2d 514 (1983). An erroneous ruling

requires reversal only if there is a reasonable probability that the testimony would have changed the outcome of the trial. *Aguirre,* 168 Wn.2d at 361.

SVP proceedings are civil proceedings. *Young,* 122 Wn.2d at 23, 59. Under ER 412(b), the following evidence of alleged sexual misconduct is not admissible in any civil case: (1) Evidence offered to prove a victim engaged in other sexual behavior; and (2) Evidence offered to prove a victim's sexual predisposition. ER 412(b). There is an exception that evidence of the sexual behavior or predisposition of a victim is admissible if it is otherwise admissible under the evidence rules and its probative value substantially outweighs the danger of harm to the victim and of unfair prejudice to any party. ER 412(c). Evidence of the victim's reputation is admissible only if placed in controversy by the victim. *Id.*[12]

The inquiry as to the relevancy of prior sexual behavior is whether, under ER 401, the victim's consent to sexual activity in the past, without more, makes it more probable or less probable that she consented to sexual activity on the occasion in question. *State v. Gregory,* 158 Wn.2d 759, 785, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.,* 181 Wn.2d 757, 336 P.3d 1134 (2014); *Hudlow,* 99 Wn.2d at 10, 17.[13] The

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[12] The victim's reputation was not placed in controversy at Halvorson's trial because she was deceased. CP 1618-21; RP 269, 291.

[13] There do not appear to be any published cases addressing the admissibility of evidence in civil cases under ER 412(b). However, criminal cases involving the rape shield statute, RCW 9A.44.020, provide some guidance as to the issue of consent.

Supreme 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. *Hudlow,* 99 Wn.2d at 10; *see also Brewer v. U.S.,* 559 A.2d 317, 321 (D.C. 1989) ("The fact that a woman is a prostitute, which may prove that she has had consensual sex with others, has nothing to do with whether she consented to sexual intercourse with a particular defendant.")

There are three factors necessary before evidence of prior sexual conduct is admissible on the issue of consent: (1) it must be relevant; (2) its probative value must substantially outweigh the probability that its admission will create a substantial danger of unfair prejudice; and (3) its exclusion will result in denial of substantial justice to the defendant. *Hudlow,* 99 Wn.2d at 7. A "particularized factual showing" of similarity between the prior consensual sexual acts and the acts claimed by the defendant to be consensual is required. *Id.* at 10-11; *see also State v. Morley,* 46 Wn. App. 156, 158-59, 730 P.2d 687 (1986). However, even if such similarity is shown, the probative value must also substantially outweigh the danger of undue prejudice. *Id.*

In *Hudlow,* the Court found that the proffered evidence concerned only the "general promiscuity" of the victims and lacked further indicators showing any factual similarities between the past consensual sexual activity and the current incident. *Hudlow,* 99 Wn.2d at 17. Without such

particularized factors, the relevancy of the evidence was limited at best. *Id.* The Court held that the trial court did not abuse its discretion by excluding the evidence because it was "of little or no probative worth on the issue of consent[.]" *Id.* at 17-19

The presumption of inadmissibility of prior sexual behavior on the issue of consent is because such evidence "is usually of little or no probative value in predicting the victim's consent to sexual conduct on the occasion in question." *Id.* at 9; *see also State v. Cecotti,* 31 Wn. App. 179, 182, 639 P.2d 243 (1982) ("Only in the extreme case of the indiscriminately promiscuous woman can it be argued that past sexual behavior with third persons is even minimally relevant to consent.")

Halvorson sought to admit testimony that a witness observed D.S. ask another man to "choke" her during a sexual encounter. RP 288. The witness, Ms. Anstine, would have testified that she was at a bar called "The Flame" when a man picked her up to "party." CP 1836-37.[14] They went to his hotel room where the man's friend had "already started the party" with D.S. CP 1837. They partied, drank alcohol, smoked crack, got paid for sex, and left. *See* CP 1837-41. She saw D.S. engage in oral sex and sexual intercourse with the man and heard D.S. say, "Choke me.

[14] Ms. Anstine claimed that both she and D.S. had a history of prostitution. CP 1798-1800, 1808, 1837-41. Other than Halvorson's testimony and Ms. Anstine's proffered testimony, there was no other evidence that D.S. ever worked as a prostitute and the State did not concede this version of events at trial.

Choke me." CP 1848-49. She did not know what year this happened. RP 288-89; CP 1838-39. Halvorson argued that this testimony was relevant to his theory that D.S. asked him to choke her during the 2007 incident. *See* RP 275-77.

The trial court ruled the evidence was speculative, somewhat remote in time, and not relevant. RP 314-15. The trial court did not abuse its discretion in excluding the evidence. Under *Hudlow,* Halvorson has not made a "particularized factual showing" of similarity between the alleged prior sexual act with an unknown male at an unknown date and the 2007 rape. *See Hudlow,* 99 Wn.2d at 10-11.

The incident at the hotel, occurring at some unknown date, is not factually similar to the 2007 rape. We know nothing about the identity of the man or the circumstances of his involvement with D.S. We know nothing about the nature of their relationship or how they ended up in a hotel room. There is no indication that the alleged statement was said because D.S. enjoyed being choked, as opposed to something the "trick" paid her to say or paid her to do.[15] It is completely speculative that D.S. actually enjoyed being "choked" during sex. There was no offer of proof from the witness that D.S. ever said she enjoys being choked during sex.

[15] If the hotel incident was an act of prostitution by D.S. as Ms. Anstine claimed, it is unclear why the "trick" would be doing what the prostitute found pleasurable as opposed to what he paid her to do.

See CP 1769-1854. Moreover, there is no indication that the man actually choked D.S., and there is no indication that D.S. had any injuries, let alone to the level of injury she suffered from 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 rule that this testimony was speculative and not relevant. *See* RP 314-15.

First and foremost, a jury already convicted Halvorson of two crimes for his acts against D.S. Ex. P11; RP 470. His guilt or innocence was not the issue before the jury in these proceedings. Halvorson's mental conditions and risk for re-offense were the issues this jury was deciding. Second, the circumstances of the rape of D.S. are nothing like the alleged hotel incident. Halvorson testified that he met D.S. in 2005 after she ran up to him and asked for a ride after fleeing from two men. RP 471-72. They exchanged first names and he gave her a ride home, where they smoked cigarettes and drank beer. RP 472-73. Approximately five or six months later, he ran into D.S. at "The Flame" and she invited him to party at her home. RP 473-74. That evening, Halvorson gave D.S. $20 to buy crack. RP 476-78. He spent the night, but did not make any sexual advances because he has erectile dysfunction issues when he drinks to excess. RP 479-80. Halvorson testified that he next saw D.S. in August 2006 when he stopped by her house. RP 484. They drank alcohol and

smoked cigarettes, but Halvorson refused to buy her crack. RP 485-86. After four hours, Halvorson left after D.S. became surly. RP 486-87.

Halvorson next saw D.S. in April 2007, on the night of the rape. *See* RP 488-89. He testified that he went to D.S.'s home in the middle of the night "to have fun" and "hoping to have some sex." *See* RP 481-84, 489-94. He had been drinking and had a "pretty good buzz." RP 489-93. According to Halvorson, D.S. agreed to have sex with him in exchange for $40 to buy crack. RP 495-97. He testified that after 10-15 minutes of "regular" intercourse, D.S. asked him to "softly choke" her because it "gets [her] off." RP 500. He agreed, but requested anal sex. RP 500-01. During anal sex, he put his left hand around her throat and "started softly to the best of [his] ability cutting off her air supply." RP 501. After ten minutes, her head started bobbing up and down like she was losing consciousness and she was making odd, gurgling noises. RP 501. She repeatedly told him she was okay, but he was uncomfortable and started losing his erection. RP 501-02, 535-36. They returned to "regular" intercourse and he ejaculated. ER 502. When Halvorson left, he took back the $40 he had given D.S. RP 503-05.[16]

[16] Halvorson's claim that he and D.S. were acquaintances who had several encounters 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 scene. *See* RP 531, 546-47.

Even if Halvorson were able to articulate some sort of particularized similarity between the incidents, the probative value does not substantially outweigh the danger of unfair prejudice. *See Hudlow,* 99 Wn.2d at 11. Admitting evidence that D.S. asked another man to choke her during sex to bolster Halvorson's consent claim would be akin to allowing evidence that a victim must have consented to having sex in a particular sexual position with one man because she did so in the past with a different man. This does not rise to the level of a particularized factual showing and does not make it more probable that the victim consented. *See Hudlow,* 99 Wn.2d at 17. The evidence is too prejudicial to the fact-finding process and would mislead the jury and potentially lead to a decision on an improper or emotional basis. *See id.* at 13-15.

Further, the trial court did not err by excluding the evidence based on remoteness. Questions of remoteness are matters within the sound discretion of the trial court. *State v. Kalamarski,* 27 Wn. App. 787, 790, 620 P.2d 1017 (1980). In *Kalamarski,* the Court held that the trial court did not abuse its discretion by excluding evidence that the victim and defendant had consensual sex eighteen months prior to the rape. *Id.*

In *Gregory*, the trial court excluded 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. *Gregory,* 158

Wn.2d at 782-86. The Supreme Court held that the trial court did not abuse its discretion by excluding the prior conviction where at least two years separated the incidents. *Id.* at 786. The Court noted that Gregory was properly allowed to argue that the victim consented to have sex with him on the night in question for money. *Id.* at 787. First, Halvorson was unable to even establish when the prior alleged prostitution incident occurred.[17] Second, similar to *Gregory,* Halvorson was allowed to testify in detail that D.S. consented to having sex with him for money and consented to being choked during sex. *See* RP 495-502, 534-36. The trial court did not abuse its discretion in excluding the evidence.

2. The Trial Court Did Not Deprive Halvorson Of The Right To Present A Defense

Halvorson argues that the trial court violated his due process right to present a complete defense by excluding testimony about the rape victim's previous sexual encounter with another man. App. Br. at 16. 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.

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[17] As previously discussed, counsel suggested it "probably" occurred in 2006, approximately one year before the rape. CP 1631-32; RP 295. The trial court ruled this was somewhat remote. RP 314-15. However, as there were no witnesses to testify as to when the incident occurred, Halvorson cannot possibly meet the remoteness test.

Finally, the Court permitted Halvorson to testify in detail about his version of events, which included his consent defense.

Appellate courts review a claim of a denial of a Sixth Amendment right to present a defense de novo. *State v. Jones,* 168 Wn.2d 713, 719, 230 P.3d 576 (2010). The United States Supreme Court has acknowledged its reluctance to impose constitutional restraints on ordinary evidentiary rulings by state trial courts. *Crane v. Kentucky,* 476 U.S. 683, 689, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). The Constitution leaves judges with "wide latitude" to exclude evidence that is repetitive, marginally relevant, or poses undue risk of harassment, prejudice, or confusion of the issues. *Id.* at 689-90 ("In any given criminal case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of evidence.")

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.* "There is no right, constitutional or otherwise, to have irrelevant evidence admitted." *State v. Darden,* 145 Wn2d 612, 624, 41 P.3d 1189 (2002) *citing Hudlow,* 99 Wn.2d at 15; *see also Aguirre,* 168 Wn.2d at 362-63.

The State must have a compelling state interest to exclude *relevant* evidence. *Hudlow,* 99 Wn.2d at 15-16. The defendant's right to put on

relevant evidence is counterbalanced by the State's interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the fact-finding process. *Id.* at 15. The court should consider the prejudice to the fact-finding process to determine if the victim's past sexual conduct would confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis. *Id.* at 13-14.

First, Halvorson did not have a right to present the proffered testimony because it was simply not relevant. However, even if the evidence was relevant, the State had a compelling interest in barring evidence that would distract and inflame jurors that was of little to no probative worth. *See id.* at 16; *see also Morley,* 46 Wn. App. at 160.

Second, Halvorson's constitutional right to present a defense was satisfied by the trial court allowing him to testify that the encounter was consensual and that the victim asked him to choke her. *See Aguirre,* 168 Wn.2d at 363. Unlike the defendant in *Jones,* Halvorson was permitted to testify in detail about his version of events involving D.S. and his claim that the entire encounter, including asphyxiation, was consensual. *See* RP 489-505, 534-36; *see also Jones,* 168 Wn.2d 713 (trial court violated defendant's right to present a defense by refusing to let him testify or introduce evidence as to the circumstances surrounding the charged rape).

In *Morley,* Morley's defense was that the victim offered him sex in exchange for $20 when he gave her a ride. *Id.* at 157. He sought to introduce evidence that the rape victim told his fiancé about prior acts of prostitution and that the victim offered another man sex in exchange for $40 when he gave her a ride shortly before the incident. *Id.* at 157-59. The trial court admitted testimony about the victim offering sex in exchange for $40, but excluded the prostitution evidence as not relevant, lacking similarity, and no indication of time. *Id.* The Court of Appeals held that the trial court did not abuse its discretion, especially in light of admitting testimony about the offer of sex in exchange for $40. *Id.* at 160. The Court noted that the defendant "had ample opportunity to present his theory", but the jury chose not to believe it. *Id.*

Similar to *Morley,* Halvorson had ample opportunity to present his defense. *See Morley,* 46 Wn. App. at 160. Halvorson testified in detail about the circumstances surrounding the incident with D.S. *See* RP 489-505, 534-36. Further, the trial court admitted testimony from a witness that she had observed D.S. exchange money for sex with another man at a bar 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.

Finally, the question before the jury was not whether Halvorson forcibly raped and choked D.S. A jury already found beyond a reasonable doubt that Halvorson was guilty of raping and assaulting D.S. Ex. P-11; *see also* RP 470. At Halvorson's SVP trial, the fact finder must resolve one question: "Has the State proved beyond a reasonable doubt that Scott Halvorson is a sexually violent predator?" CP 1418. This question involves only three elements: (1) That Halvorson has been convicted of a crime of sexual violence; (2) That Halvorson suffers from a mental abnormality which causes serious difficulty in controlling his sexually violent behavior; and (3) That this mental abnormality makes him likely to engage in predatory acts of sexual violence if not confined to a secure facility. CP 1397. In order to challenge the trial court's exercise of its discretion, Halvorson must show that the excluded evidence was relevant to one of these elements. *See In re Detention of Post,* 170 Wn.2d 302, 310-12, 241 P.3d 1234 (2010). In this endeavor, he fails.

Even assuming arguendo, that the trial court erred in excluding testimony of D.S.'s alleged prior sexual encounter, 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 Detention of West,* 171 Wn.2d 383, 410, 256 P.3d 302 (2011). An error is harmless if the evidence is of minor significance in

reference to the evidence as a whole. *State v. Neal,* 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

Dr. Judd considered and relied on a variety of information to support his opinion that Halvorson suffered from a mental abnormality, including other sexual assaults against multiple females and Halvorson's numerous admissions over the years acknowledging his sexual deviance. *See e.g.,* RP 413-14, 653-72, 711, 730-34, 746-50, 776-86, 800. Moreover, Dr. Judd testified that even if one accepts the premise that the encounter was consensual, the severity of injuries D.S. suffered is "indicative of a behavior that got out of control" and suggests "more than just a playful sexual encounter." RP 784-86. Halvorson's rape and assault of D.S. was just one piece of information that Dr. Judd considered in reaching his opinion that Halvorson has a mental abnormality that makes him likely to reoffend. The excluded testimony was of minor significance in light of the evidence as a whole. *See Neal,* 144 Wn.2d at 611.

C. The Trial Court Properly Admitted Testimony Related To The Use Of The SRA-FV

Halvorson argues that the trial court erred by admitting testimony about the SRA-FV. He argues that the SRA-FV is inadmissible under *Frye* because the State failed to show its acceptance in the relevant scientific community. App. Br. at 30-33. He also argues that construct validity has

not been established, that it has not been cross-validated, and that it has low inter-rater reliability. *Id.* at 38-43. Halvorson misunderstands the *Frye* test. The SRA-FV meets *Frye*, and Halvorson's arguments go to the weight of the evidence, not admissibility. The trial court's findings and conclusions are well-supported by the evidence.

Division II recently decided the precise issue before this Court. *In re Detention of Pettis,* 188 Wn. App. 198, 352 P.3d 841 (2015). In *Pettis,* the trial court admitted evidence about the SRA-FV after conducting an evidentiary hearing and concluding the instrument satisfied the *Frye* test. *Id.* at 202. The *Pettis* Court held that the SRA-FV is both generally accepted in the relevant scientific community *and* uses generally accepted methods in its application that are capable of producing reliable results. *Id.* at 210-11. The *Pettis* Court concluded that the SRA-FV satisfies the *Frye* test and that the trial court did not abuse its discretion by admitting testimony about the SRA-FV. *Id.* at 211.[18]

1. Standard Of Review

The question of whether evidence meets *Frye* is a mixed question of law and fact that is reviewed de novo. *State v. Copeland,* 130 Wn.2d 244, 255, 922 P.2d 1304 (1996). The reviewing court takes a searching

[18] Although Division II decisions are not binding authority on this Court, they are still persuasive authority. *See State v. Simmons,* 117 Wn. App. 682, 687, 73 P.3d 380 (2003)

review that may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority. *Id.* at 255-56. Courts examine expert testimony, scientific writings subject to peer review and publication, secondary legal sources, and legal authority from other jurisdictions to determine whether a consensus of scientific opinion has been achieved. *Eakins v. Huber,* 154 Wn. App. 592, 599, 225 P.3d 1041 (2010).

The *Frye* test is: (1) whether the underlying theory is generally accepted in the scientific community; and (2) whether there are techniques, experiments, or studies utilizing that theory which are *capable* of producing reliable results and are generally accepted in the scientific community. *State v. Riker,* 123 Wn.2d 351, 359, 869 P.2d 43 (1994). "The court does not itself assess the reliability of the evidence." *Copeland,* 130 Wn.2d at 255. The Court's task is not to determine if the scientific theory is correct, but rather to determine if it has achieved *general* acceptance in the relevant scientific community. *Riker,* 123 Wn.2d at 359-60.

"*Frye* requires only general acceptance, not *full* acceptance, of novel scientific methods." *State v. Russell,* 125 Wn.2d 24, 41, 882 P.2d 747 (1994) (emphasis in original). "If there is a *significant* dispute among *qualified* scientists in the relevant scientific community, then the evidence may not be admitted[.]" *Gregory,* 158 Wn.2d at 829 (emphasis in

original). "The core concern of *Frye* is only whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory." *Riker,* 123 Wn.2d at 360 *quoting State v. Cauthron,* 120 Wn.2d 879, 889, 846 P.2d 502 (1993).

2. The Underlying Theoretical Basis Of The SRA-FV Has Long Been Accepted In The Community Of Experts Conducting Evaluations Of Sexual Offenders

The use of dynamic risk factors in SVP evaluations has long been accepted as part of a broader assessment of risk for sexual offenders.[19] The SRA-FV was released in 2010 and is a tool that uses a variety of dynamic risk factors, also known as long-term vulnerabilities, which have been empirically linked to recidivism risk. *See* RP 34-35, 62; *see also* CP 1916-17; *see also Pettis,* 188 Wn. App. at 206-07.[20] The SRA-FV assigns an empirically-derived numerical weight to each factor, which in turn provides a more consistent and empirical approach to evaluation of risk. CP 1917. The notion that dynamic risk is empirically related to recidivism

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[19] *See e.g. In re Detention of Jacobson,* 120 Wn. App. 770, 86 P.3d 1202 (Div. 1, 2004); *In re Detention of Lewis,* 134 Wn. App. 896, 906, 143 P.3d 833 (Div. 3, 2006); *In re Detention of Reimer,* 146 Wn. App. 179, 196, 190 P.3d 74 (Div. 2, 2008); *In re Detention of Danforth,* 153 Wn. App. 833, 839-40, 223 P.3d 1241 (Div. 1, 2009). *Detention of Ritter v. State,* 177 Wn. App. 519, 521, 312 P.3d 723 (Div. 3, 2013). *In re Meirhofer,* 182 Wn.2d 632, 641, 343 P.3d 731 (2015).

[20] The SRA-FV looks at dynamic risk factors associated with recidivism. RP 805. It also informs treatment decisions by providing guidance on addressing an offender's antisocial orientation and deviant sexual interest. *See* RP 805-06.

is not new. RP 28-29. Further, evaluators gain incremental information by considering dynamic risk and static risk. RP 29.

There has been a long interest in the scientific community in the types of risk factors that the SRA-FV assess, which are stable dynamic risk factors that can be viewed as enduring (but changeable) psychological characteristics of an individual.[21] As early as 2001, research has identified: (1) sexual self-regulation; (2) general self-regulation; (3) intimacy deficits; (4) compliance and understanding the need for treatment and control; (5) existence of supportive significant others; and (6) distorted attitudes or attitudes tolerant of sexual violence as stable dynamic risk factors for sexual offenders.[22] The Association for the Treatment of Sexual Abusers (ATSA) Practice Guidelines informs clinicians that treatment interventions should primarily be focused on research-supported dynamic risk factors linked to recidivism, such as general self-regulation, sexual self-regulation, attitudes supportive of sexual abuse, intimate relationships, and social and community supports. ATSA Adult Practice Guidelines (2014) at 35-38; RP 30-33. These are the general categories of dynamic

[21] *See* Eher, R., et. al. (2011). *Dynamic Risk Assessment in Sexual Offenders Using STABLE 2000 and the STABLE-2007: An Investigation of Predictive and Incremental Validity.* Sexual Abuse: A Journal of Research and Treatment, 1-24.

[22] *Id.* at 2.

risk factors examined by the SRA-FV. *See* RP 32-35.[23] Further, ATSA indicates that clinicians conducting risk assessments on sexual offenders should be "well versed in the contemporary research regarding static and dynamic factors linked to recidivism[.]" ATSA at 24.

The SRA-FV incorporates and is based on the two bedrock theoretical principles of risk assessment: (1) that structured assessment[24] is generally preferable to unstructured clinical judgment;[25] and (2) that risk assessment should rely on factors empirically statistically shown to be associated with recidivism risk. *See* RP 27-36, 52.[26] First, the weights assigned to the applicable risk factors are dictated by the scoring manual, and not left to the evaluator's whim. *See* CP 1917. Second, the dynamic risk factors used in the SRA-FV come from the landmark meta-analysis that showed which factors best predicted recidivism risk.[27]

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[23] The SRA-FV looks at three domains: sexual self-regulation, relationship management, and general self-regulation. RP 35; *see also* Thornton, D. and Knight, R.A. (2013). *Construction and Validation of SRA-FV Need Assessment.* Sexual Abuse: A Journal of Research and Treatment, 1-16.

[24] Structured assessment identifies specific factors that have been empirically associated with risk, so the weight given to individual factors is preassigned as opposed to being left to the clinician's judgment. *See* RP 52.

[25] Hanson, R.K. and Morton-Bourgon, K.E. (2009). *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Predictions Studies.* Psychological Assessment, 21, 1-21.

[26] Mann, R., Hanson, R.K., and Thornton, D. (2010). *Assessing Risk for Sexual Recidivism: Some Proposals on the Nature of Psychologically Meaningful Risk Factors.* Sexual Abuse: A Journal of Research and Treatment, 22(2), 191-217.

[27] Mann, Hanson, and Thornton (2010).

3. The SRA-FV Is A Tool That Utilizes Well Accepted Scientific Theory That is Capable Of Producing Reliable Results And Is Generally Accepted In The Scientific Community

Halvorson bases his objection on what he perceives as sources of excessive error. He argues that construct validity has not been established, that it has not been cross-validated, and that it has low inter-rater reliability. App. Br. at 38-43. These are not appropriate bases for a challenge to admissibility under *Frye.* If the methodology is generally accepted, concerns about the possibility of error or mistakes by the expert can be argued to the jury. *Russell,* 125 Wn.2d at 41.

a. The SRA-FV Was Validated Using Well-Established Scientific Principles And Provides Evaluators With Incremental Information About Sex Offender Recidivism Risk

The SRA-FV was validated at the time of its development in 2010. *Pettis,* 188 Wn. App. at 207; *see* RP 34, 44-47, 58-59; CP 1918.[28] "The cross-validation of SRA-FV is measured statistically and shows moderate predictive accuracy similar to static actuarial instruments and similar to the other available instruments that assess dynamic risk factors." CP 1918. This split sample validation has been peer reviewed and published in a scientific journal.[29] While it is undisputed that further study of the SRA-

[28] Thornton and Knight (2013).
[29] *See* Thorton and Knight (2013).

FV is desirable and anticipated, that in no way implies that the instrument is not appropriate for use.

The predictive validity of the SRA-FV is comparable to the predictive validity of the most widely used actuarial risk assessment instrument.[30] The SRA-FV has "moderate" and "very acceptable" predictive accuracy. CP at 1920; *Pettis,* 188 Wn. App. at 207.[31] According to Dr. Phenix, once an instrument shows "moderate predictability or above, then generally it's accepted in my field." *Pettis,* 188 Wn. App. at 208.

Research literature indicates that evaluators gain incremental validity by considering dynamic risk as well as static risk. RP 29. The SRA-FV provides increased predictive validity over use of actuarial instruments alone. *See* RP 51; CP 1918. As Dr. Judd testified, the SRA-FV "adds incremental validity to a developed established instrument, such as the Static-99R. In other words, it provides an official umph, if you will, with regard to the ability to predict future recidivism or nonrecidivism." RP 51. The peer reviewed article that documents the validation process indicates that the logistic analysis showed the SRA-FV Need score added significant predictive validity to the Static-99R and that

[30] Thornton, and Knight (2013).

[31] Even Halvorson's expert, Dr. Abbott, conceded that the literature indicates that certain dynamic risk factors have a "low to moderate association in predicting sexual recidivism risk." *See* RP 91-93.

the Area Under the Curve (AUC) statistic showed the SRA-FV Need score added to the predictive accuracy of the Static-99R alone.[32]

Thus, the SRA-FV has been validated using a generally accepted methodology, it has demonstrated the ability to discriminate between recidivists and non-recidivists at a rate comparable to the most commonly used instruments in the field, and it has been shown to increase the information available to evaluators beyond that of actuarial instruments alone. Further, the SRA-FV is uniquely well suited for use in SVP evaluations because it was specifically designed to provide ratings on a detained sample such as the SVP population. *See* RP 34; *see also* CP 1920. Finally, the SRA-FV has been shown that it is an instrument capable of producing reliable results in a peer reviewed article. Thus, the trial court did not err by entering the following Conclusions of Law: (1) "The use of a split sample for validation of a risk assessment instrument is supported by scientific theory that is generally accepted in the relevant scientific community." and (2) "The SRA-FV is an instrument that is capable of producing reliable results and is generally accepted in the scientific community." *See* CP 1435.

[32] Thornton and Knight (2013).

b. The SRA-FV Is A Structured Empirically Guided Instrument That Has Been Generally Accepted In The Community Of Experts Conducting Assessments Of Sexual Offenders

ATSA dictates that clinicians should use structured empirically validated instruments to assess both static and dynamic risk, as opposed to unstructured clinical judgment. *See* RP 36; ATSA at 25. Dr. Judd testified that the SRA-FV is a structured risk assessment instrument that identifies specific factors that have been empirically associated with risk and provides a mechanism to score an individual on those factors. RP 52. Even Dr. Abbott conceded that ATSA recommends clinicians use structured, empirically guided risk assessment, and that the SRA-FV is such an instrument. RP 131-32, 155-61.[33]

Dr. Judd testified that the SRA-FV is routinely used by experts conducting SVP evaluations. RP 12. He testified that most panel members in Washington use it and that California evaluators were required to use it between 2011 and 2014. RP 66. It is also used in *all* Adam Walsh Child Safety and Protection Act cases for the federal government. CP 1919; *see also* RP 66. According to Dr. Phenix, the SRA-FV is widely used and

[33] Dr. Abbott is a member of ATSA. RP 131. He agrees that it is not acceptable for clinicians to use unstructured clinical judgment. RP 137. Dr. Abbott uses only the Static-99R in his risk assessment, which *always* results in a finding that the person is not likely to reoffend. *See* RP 137-42. Dr. Abbott overrides such a finding only if the person directly tells Dr. Abbott that he will reoffend. *See id.* at 138-42. Despite ATSA guidelines, Dr. Abbott does not consider any dynamic risk factors in his SVP evaluations. *See* RP 142-44.

accepted in the field of sex offender evaluations. CP 1919; *see also Pettis,* 188 Wn. App. at 208 (Dr. Phenix testified, "It's been accepted by – and most people are – are using it."). Clinical trainings on how to use and score the SRA-FV have been ongoing in multiple states since December 2010. *See* CP 1919. Dr. Judd has been using the SRA-FV since he was trained on how to use it in approximately 2011 or early 2012. *See* RP 43.[34] The SRA-FV has reached general acceptance in the appropriate scientific community. Thus, the trial court did not err in finding that "The SRA-FV is generally accepted within the community of experts who evaluate sex offenders and assess their recidivism risk." *See* CP 1434.

Halvorson attempts to distinguish his case from *Pettis*, which referenced testimony from Dr. Phenix that the SRA-FV is widely accepted and that criticisms of the SRA-FV only come from "a handful of experts that testify only for the defense in these cases, and Dr. Abbott is one of

[34] Similarly, Dr. Judd testified that he started using the Static-99 and Static-99R instruments as soon as they were released. *See* RP 24. They are now the most widely used risk assessment instruments in his field. RP 26. Dr. Judd testified that research is still being done on the Static-99 and Static-99R. RP 25-26. He uses evidence from the literature to inform his choices of which instruments to use over the years. RP 25.

them." *See Pettis,* 188 Wn. App. at 209-10.[35] Halvorson claims that Division 2 "reduced the number of scientists in the filed [sic] that criticized the SRA-FV to two people" and from that concluded the instrument was generally accepted. *See* App. Br. at 47. This is an inaccurate and misleading interpretation of the *Pettis* decision. In explaining that *Frye* does not require unanimity, the *Pettis* Court noted that there has been some criticism from Dr. Abbott and Dr. Fisher, but that there "does not appear to be a *significant* dispute about the acceptance of the SRA-FV." *Pettis,* 188 Wn. App. at 210. (emphasis in original). Moreover, the Court noted that Dr. Fisher, who was Pettis' own expert at trial, conceded that some experts rely on the SRA-FV and that he himself used it in his own risk evaluation of Pettis. *See id.* 203, 209.

[35] Dr. Abbott testified as Halvorson's expert in the *Frye* Hearing. RP 83-162. He testified that he talked to approximately twenty defense experts and none of them use the SRA-FV. RP 127-28. He testified that "half to a little less than half" of the Petitioner's evaluations that he reviewed in the past year used the SRA-FV. RP 126-27. However, those evaluations involved *three* different states, including California. *See* RP 126-27. California no longer uses the SRA-FV because of a tool that has been validated on a sample population better suited to its population. *See* RP 66-69. Thus, it is entirely possible that all evaluations from the other two states used the SRA-FV.

4. Halvorson's Criticisms Of The SRA-FV Should Not Be Part Of The *Frye* Analysis

a. Once A Methodology Is Accepted In The Relevant Scientific Community, Any Application Of It Is A Matter Of Weight Under ER 702

Frye is not concerned with the acceptance of the results of a particular testing procedure because such concerns are addressed under the ER 702 inquiry. *Russell,* 125 Wn.2d at 51. Once a methodology is accepted in the scientific community, application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified experts to testify if the information would be helpful to the trier of fact. *Gregory,* 158 Wn.2d at 829-30; *see also State v. Kalakosky,* 121 Wn.2d 525, 543, 852 P.2d 1064 (1993) (alleged irregularities in testing procedures go to the weight of the evidence, not admissibility). A trial court's decision whether to admit expert testimony under ER 702 is reviewed for an abuse of discretion. *Pettis,* 188 Wn. App. at 205. Halvorson's arguments regarding construct validity, inter-rater reliability, and cross-validation are not relevant to the question of whether or not the SRA-FV is generally accepted in the relevant scientific community. Rather, these are questions for the factfinder at trial.

b. Criticisms Based On Construct Validity Are A Matter Of Weight For The Jury

Halvorson argues that the SRA-FV does not meet *Frye* based on construct validity having not been demonstrated. *See* App. Br. at 38. This demonstrates a fundamental misunderstanding of the instrument's purpose. The SRA-FV measures the construct of a heterogeneous group of long-term vulnerabilities, not a particular factor. *See* RP 51-52. Dr. Judd testified that "we're not looking at individual factors, we're looking at the cumulative number of factors that are examined. While each individual factor may not have a strong weight, when they are examined together, they add incremental validity to each other, then that is where you look at the overall instrument and not the specific factor." RP 51-52. Dr. Judd testified that the instrument was designed to enhance our ability to predict a dichotomous outcome: recidivism or non-recidivism; it was not designed as "a stand-alone measure in terms of assessing a particular trait or attribute[.]" RP 63-64.

The instrument is not and cannot be used to measure particular vulnerabilities; rather, it is used to gauge an overall level of risk. *See* RP 51-52. Irrespective of whether or not it accurately measures any particular trait, the ultimate score obtained on the SRA-FV is useful in that it has been demonstrated to be capable of producing reliable results by

distinguishing between recidivists and non-recidivists. The role of construct validity in assessing the SRA-FV's performance is a question of weight for the jury.

c. Criticisms Based On Inter-rater Reliability Are A Matter Of Weight For The Jury

Halvorson argues that the SRA-FV does not meet *Frye* based on low inter-rater reliability.[36] *See* App. Br. at 42-43. First, Dr. Judd testified that the SRA-FV has "fair" inter-rater reliability. *See* RP 48-49.[37] Second, clinical trainings on how to use and score the SRA-FV have been available throughout the country since December 2010. CP 1919. A scoring manual adds to clinical agreement for scoring items. *Id.; see also* RP 41. Further, the developers have instituted better training techniques, provided better supports for ratings such as guidance on scoring issues, and created ongoing reliability exercises.[38] Evaluators who have not been trained on the SRA-FV should not use it in their risk assessment. CP 1919.

Halvorson implies that the fact that California no longer requires use of the SRA-FV is somehow a reflection on the efficacy of the

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[36] Inter-rater reliability is the probability that two different evaluators evaluating the same person would reach the same or similar score. RP 47-48.

[37] Dr. Judd testified that he bent over backwards to identify the basis for his score on each item so that anyone reviewing it could understand how he arrived at a particular score on any given item. RP 49.

[38] Thornton and Knight (2013).

instrument. *See* App. Br. at 44. However, as Dr. Judd testified, California returned to using the Stable-2007 to assess dynamic risk factors after it was finally validated on a sample population that was better suited to California's population. RP 66-69.[39] When no community-based instrument was available, California required evaluators to use the SRA-FV for years. *See* RP 66-68.

Instead of a criticism of the instrument, this demonstrates three relevant points. First, incremental validity (not construct validity) is the correct test by which to measure the ability to produce reliable results. Second, the detained population that the SRA-FV was validated on makes it a good match for the SVP population upon which it is used. Finally, California's global adoption of the instrument for years is yet another indication of its general acceptance. *See* RP 66-69. Ultimately, none of the criticisms raised by Halvorson are about either the fundamental theory behind the SRA-FV or its ability to produce reliable results. Rather, they are questions about error rates and what weight a jury should give a risk assessment that relies, in part, on the information that the SRA-FV provides. They have no relevance to the *Frye* question. Thus,

[39] The California population being evaluated is a population of offenders who are releasing to the "community", as opposed to Washington's "detained" population. *See* RP 33-34, 68-69.

the trial court did not err in concluding that "The SRA-FV satisfies the *Frye* evidentiary standard." *See* CP 1435.

5. The SRA-FV Testimony At Trial Was Very Limited And Of Minor Significance In Light Of The Evidence As A Whole

Halvorson argues that reversal is required because the SRA-FV evidence was not of minor significance in this case and the outcome of the trial might reasonably have been different if the court had excluded the evidence. App. Br. at 48-49. An error is harmless if the evidence is of minor significance in reference to the evidence as a whole. *Neal,* 144 Wn.2d at 611. Without conceding any error, the SRA-FV testimony at trial was of minor significance in light of the evidence as a whole. *See id.*.

Halvorson argues that Dr. Judd relied on the SRA-FV as "an integral part of his risk assessment involving dynamic risk factors" and that this testimony "cannot be considered of minor significance". *See* App. Br. at 48. On the contrary, Dr. Judd's testimony on the SRA-FV was very limited and brief. Dr. Judd testified that he used the SRA-FV, which looks at dynamic risk factors related to recidivism, to determine which reference group to use for the Static-99R. RP 696-99, 709. Halvorson's score placed him in the high risk/high needs norms for the Static-99R, which is indicative of a higher level of risk than indicated on the Static-99R. *Id.* Dr. Judd also testified that the SRA-FV informs

treatment decisions for clinicians working with offenders. RP 805-06. This was essentially the extent of his testimony on the SRA-FV.[40]

Halvorson argues that Dr. Judd was able to "impress the jury" with this structured calculation of risk. App. Br. at 48. However, it was undisputed at trial, even by Halvorson's own expert, that structured risk assessment is better than unstructured risk assessment. *See* RP 28, 132, 137. Moreover, the Static-99R was not the only actuarial instrument Dr. Judd used in his risk assessment. He used two additional actuarial instruments, the SORAG and VRAG, both of which indicated high risk. *See* RP 707-08. Halvorson scored in the 93rd percentile on the SORAG. RP 707. Seventy-five percent of individuals with a similar score reoffended within seven years and 99% reoffended within ten years. RP 708. On the VRAG-R, approximately 60% recidivated within five years and 82% reoffended within fifteen years. RP 708. Thus, Dr. Judd's use of the SRA-FV simply indicates that the Static-99R shows a similar high risk as the other risk assessment instruments used.[41] Testimony regarding the SRA-FV was of minor significance in light of the overwhelming

[40] Dr. Judd's testimony on the SRA-FV involved only seven pages of a nearly two hundred page transcript. *See* RP 696-99, 709, 805-07; RP 630-828. Dr. Judd was also cross-examined about the SRA-FV. *See* RP 760-62.

[41] Halvorson scored between the 95th and 98th percentile on the Static-99R, which is high risk. RP 700, 817. Forty-two percent of individuals with a similar score reoffended within ten years. RP 700.

evidence at trial indicating that Halvorson has a mental abnormality that makes him likely to reoffend.

D. The Circumstances Discussed Above Do Not Amount To Cumulative Error Warranting Reversal

Halvorson argues that cumulative error deprived him of the right to a fair trial. App. Br. at 49-50. Halvorson has failed to establish any error, let alone cumulative error justifying a new trial.

The cumulative error doctrine is limited to situations where a combination of trial errors denies the accused a fair trial when any one error, taken individually, may not justify reversal. *In re Detention of Coe,* 175 Wn.2d 482, 515, 286 P.3d 29 (2012). Reversal is not warranted if the claims of error are "largely meritless". *State v. Korum,* 157 Wn.2d 614, 141 P.3d 13 (2006). "The 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). Given these standards, and the above discussion of Halvorson's claimed errors, the cumulative error doctrine does not apply. The trial court properly used its discretion in making evidentiary rulings. This Court should reject Halvorson's claim and hold that the cumulative error doctrine is inapplicable in this case.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the civil commitment of Halvorson as a sexually violent predator.

RESPECTFULLY SUBMITTED this 6th day of November, 2015.

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WASHINGTON STATE COURT OF APPEALS, DIVISION III

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

I, Lissa Treadway, declare as follows:

On the 6th day of November, 2015, pursuant to the Electronic Service Agreement between the parties, I sent via electronic mail true and correct copies of the Brief of Respondent and Declaration of Service, addressed as follows:

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

DATED this 6th day of November, 2015, at Seattle, Washington.

LISSA TREADWAY