NO. 93815-6

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Ronald Love:

STATE OF WASHINGTON,

Respondent.

v.

RONALD LOVE,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Ronald Love (Love), a psychopathic serial rapist, was civilly committed as a sexually violent predator (SVP) in 2005. He denies ever committing a sex offense and refuses sex offender treatment. At his unconditional release trial in 2014, the State proved he suffers from a rape disorder, antisocial personality disorder, high psychopathy, and alcohol use disorder. The State's expert recounted Love's criminal history for the jury. Love's 1991 victim, D.L., a man he attempted to rape, testified, and the jury heard the former testimony of A.P., a woman Love raped in 1978.

Love now argues the "to commit" instruction required the jury to find that either his rape or personality disorder - but not both - makes him dangerous. Pointing to expert testimony that Love's disorders interact to make him dangerous, Love claims error. He also claims that the former testimony of A.P. was wrongly admitted and prejudiced the outcome.

The Court of Appeals rejected Love's arguments. Evidence that his disorders interact to make him dangerous proved he suffers from a "mental abnormality or personality disorder." Any error admitting testimony of A.P., a resident of Puerto Rico, was harmless; it merely repeated facts the jury had heard from the expert. Ultimately, Love's continuing denials of his criminal history, blaming of his victims, and refusal to engage in treatment made the trial's outcome nearly inevitable.

II. ISSUES PRESENTED FOR REVIEW

The State does not seek review because the decision below does not meet any of the RAP 13.4(b) criteria. However, if the Court were to accept review, the following issues would be presented:

1. **Whether the Court of Appeals correctly determined that the evidence was sufficient to continue Love's commitment as a sexually violent predator, where the jury was instructed to determine whether Love suffered from a mental abnormality or personality disorder, and the State's evidence established that he suffered from both.**
2. **Whether Love invited any error by agreeing to the language of the jury instruction he now challenges.**
3. **Whether admission of former testimony under ER 804(b)(1) without a showing of unavailability was harmless in light of the substantial evidence establishing that Love is a sexually violent predator.**

III. COUNTERSTATEMENT OF THE CASE

Love has a lengthy criminal history in Stanislaus County, California, beginning at age 16, when he committed Sex Perversion. Ex. 6 at 2 (attached as App. 1). He continued committing crimes at an annual rate: The following year he committed Armed Robbery, the next year he committed Sodomy and Assault with intent to commit rape, and the year after that he was convicted of receiving stolen property. *Id*.

In 1978 Love was charged with rape, oral copulation, sodomy, and burglary for offenses against two women, A.P. and G.L., committed on the evening of October 28, 1978. Ex. 1 (attached as App. 2). He pled guilty to

two counts of forcible rape, one for each victim. Ex. 2 (attached as App. 3); CP 954-55; *In re Detention of Love*, 2016 WL 3398535 at *3, *recon. denied* October 4, 2016 (COA No. 32555-5-III, attached as App. 4). Released from prison, Love travelled to Washington and in 1991 attacked and attempted to rape D.L., a 19-year-old man. 1RP 784-804; App. 1.

In 2001 the State petitioned for Love's commitment as an SVP. CP 549-52. After a 2005 bench trial, Franklin County Superior Court Judge Robert G. Swisher concluded the State had proved Love to be an SVP and ordered his civil commitment to the Special Commitment Center (SCC) on McNeil Island. CP 954-60. The Court of Appeals affirmed in an unpublished opinion. 2007 WL 1087558 (attached as App. 5).

Love petitioned for unconditional release in 2013. His retained expert opined that Love's condition had changed due to his "residency" at the SCC, participation in Native American religious activities, and declining health. CP 805-8. The trial court found probable cause to order an unconditional release trial under RCW 71.09.090(2) and .090(4)(b), concluding in part that Love's residency at the SCC and participation in religious activities constituted "treatment" as that term is used in RCW 71.09.090. CP 808; App. 4 at *1. The Court of Appeals denied the

State's motion for discretionary review and subsequent motion to modify (COA No. 31872-9-III, attached as Apps. 6 and 7, respectively).[1]

At the 2014 trial, the State's expert, Amy Phenix, Ph.D., testified she diagnosed Love with (1) other specified paraphilic disorder, nonconsent, (2) alcohol use disorder, and (3) antisocial personality disorder. 1RP 869. Dr. Phenix described a paraphilia as a condition causing a person to have intense, recurrent sexual arousal, fantasies, or behaviors involving abnormal sexual activities that distress or impair a person's social or interpersonal environments. 1RP 869-70. Love's paraphilia involves deviant arousal to nonconsent, or rape. 1RP 874. It constitutes a "mental abnormality" as that term is defined in RCW 71.09.020 because it is congenital or acquired, it affects his emotional and volitional capacities, and it predisposes him to commit criminal sexual acts to the extent that he is a menace to the health and safety of others. 1RP 909-912. Dr. Phenix opined that, in conjunction with his other disinhibiting disorders, Love's mental abnormality causes him to have serious difficulty controlling his sexually violent behavior. 1RP 912-13.

Dr. Phenix testified that Love's antisocial personality disorder has been "an integral part of his life, all of his life, from such a very early age

[1] In 2015 the Legislature clarified the term "treatment" in RCW 71.09.090 by defining it as "the sex offender specific treatment program at the special commitment center or a specific course of sex offender treatment pursuant to RCW 71.09.092 (1) and (2)." Laws of 2015, ch. 278, § 2.

throughout his adulthood." 1RP 907. She opined it is a current condition because "he still has antiauthority attitudes" and "feels very victimized and is not in touch with the hurt and harm he's perpetrated on other people[.]" 1RP 907. She testified that Love "is so antisocial, in my opinion, that he can blame the victims who were so violated and traumatized in a blink. . . . those kind of attitudes that can allow you to re-victimize your victims are quite antisocial in nature." 1RP 907. Dr. Phenix opined that Love's personality disorder contributes to his serious difficulty controlling his behavior because it disinhibits his criminal behavior and "doesn't allow him to have the stops that a normal person would have." 1RP 912-13. It "allows him to violate the rights of others so in that way it contributes to his sexual offending." 1RP 913.

Dr. Phenix also scored Love on the Hare Psychopathy Checklist – Revised (PCL-R), and opined that he suffers from psychopathy. 1RP 928-32. Love scored high on characteristics such as pathological lying and lack of remorse or guilt. 1RP 931-32. She opined Love's psychopathy makes him "at risk for general violent behavior, nonsexual violent behavior." 1RP 934. She concluded that his mental condition made him likely to commit predatory acts of sexual violence if he was released. 1RP 913.

On June 2, 2014, the jury found that Love remains an SVP. CP 8. The trial court ordered Love's continuing civil commitment. CP 7. Love appealed and the Court of Appeals affirmed. App. 4. Love timely petitioned for review by this Court.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The Court should deny review because Love does not establish a significant constitutional question, an issue of substantial public interest, or a conflict in Washington appellate law warranting review. RAP 13.4(b).

A. Neither Experts Nor Juries Are Required To Precisely Determine Which Of Several Mental Disorders Make An SVP Sexually Dangerous, And The Jury Instruction Here, Like The Statute, Was Correctly Worded As An Inclusive Disjunctive

Love argues there was insufficient evidence to prove he suffers from a mental abnormality "or" a personality disorder. He bases his argument on the law of the case doctrine and asserts that the trial court should have instructed the jury to find that he suffers from a mental abnormality "and" a personality disorder, because the State's expert testified that his combination of mental disorders made him likely to reoffend. He further asserts that he can raise this issue for the first time on appeal.

The Court of Appeals concluded that the trial court properly instructed the jury because the statute's mental disorder element is stated as an inclusive disjunctive, and the instruction's language mirrored the

statute. App. 4 at *3. The Court of Appeals is correct. As this Court's previous decisions have established, the statute defines an SVP as someone who suffers from a mental abnormality, a personality disorder, or both, and the two types of disorders are alternative means for establishing mental illness under the SVP statute.

1. Standard of Review

This Court applies the criminal standard when reviewing the sufficiency of the evidence in an SVP case. *In re Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* The court upholds the commitment if any rational trier of fact could have found the essential elements beyond a reasonable doubt. *In re Detention of Audett*, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006). All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the appellant. *Id*. at 727. Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Detention of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005).

2. Love's Argument Would Require Experts and Juries to do the Impossible

Love asserts the "to commit" instruction contained a disjunctive "or" and required the jury to find that either his mental abnormality or his personality disorder, but not both, made him sexually dangerous. The Court of Appeals rejected his argument, holding that the instruction mirrored the statutory language and the word "or," interpreted in context, was an inclusive disjunctive.[2] App. 4 at *3-*4 (citing *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010)). Consequently, "one or more of the unlike things can be true." *Lake*, 169 Wn.2d at 528.

This Court has previously treated the word "or" in the definition of "sexually violent predator" as though it were an inclusive disjunctive:

> The Legislature intended that all dangerous sex offenders be incapacitated and treated. Frequently, as Young's case amply demonstrates, an individual will suffer from multiple mental abnormalities and personality disorders which make violent rape likely. It would thwart the legislative purpose if the Statute only allowed the commitment of those who suffer from one or the other, while prohibiting the commitment of more seriously afflicted sexually violent predators. Thus, the showing that Young suffers both a mental abnormality *and* a personality disorder meets the requirements of the Statute.

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

In re Personal Restraint of Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993). The Court of Appeals cited *Young* when rejecting Love's argument. App. 4 at *3.

This Court has also interpreted the SVP definition as creating alternative means. Where there is testimony at trial that an offender suffers from both a mental abnormality and personality disorder and sufficient evidence supports each, the two conditions "are alternative means for making the SVP determination." *In re Detention of Halgren*, 156 Wn.2d 795, 810, 132 P.3d 714 (2006) (*Halgren* II).

> To force the State to elect or the jury to rely on only one … would unnecessarily introduce a requirement that is not present in the statute. It would also compromise the value of the clinical judgments of expert witnesses in this difficult area. Neither the constitution nor the statute requires this.

In re Detention of Halgren, 124 Wn. App. 206, 215, 98 P.3d 1206 (2004) (*Halgren* I). Affirming the Court of Appeals' decision on this issue, this Court noted that, "because both mental illnesses are predicates for the SVP determination, the two mental illnesses are closely connected…" and that "these two means of establishing that a person is an SVP may operate independently or may work in conjunction." *Halgren* II at 810.

Here, the State's expert explained how Love's mental abnormality impairs his volitional controls and causes him serious difficulty controlling his sexually violent behavior. 1RP 910-13. Regarding his

personality disorder, Dr. Phenix testified that Love "is so antisocial, in my opinion, that he can blame the victims who were so violated and traumatized in a blink." 1RP 907. She opined that his personality disorder "doesn't allow him to have the stops that a normal person would have" and "allows him to violate the rights of others so in that way it contributes to his sexual offending." 1RP 913. Such testimony constitutes sufficient evidence under *Halgren* II to support a verdict on alternative means.

To the extent Love's argument and proposed instruction would have required the State's expert and the jury to precisely determine which of several mental disorders made Love sexually dangerous, he misapprehends the nature of mental health expert opinion testimony and the role of the jury in evaluating it. This Court and others have never required such specificity. "[T]estimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek[.]" *Young*, 122 Wn.2d at 57.[3] Undoubtedly, the Legislature incorporated "mental abnormality" and "personality

[3] *See also Matter of Maricopa Cty. Cause No. MH-90-00566*, 173 Ariz. 177, 185, 840 P.2d 1042, 1050 (Ariz. Ct. App. 1992) ("Thus, to require in mental health statutes the precision required in criminal statutes would be impossible and only undermine the state's interest with regard to mentally-ill persons."); *Baker v. United States*, 226 F.Supp. 129, 132 (S.D. Iowa 1964), *aff'd*, 343 F.2d 222 (8th Cir. 1965) ("It is particularly recognized in the treatment of mental patients that diagnosis is not an exact science. Diagnosis with absolute precision and certainty is impossible."; *United States v. Royal*, 902 F.Supp. 268, 272 (D.D.C. 1995) ("The human psyche is not a neat piece of graph paper on which we can chart its emotions with great exactitude and precision.").

disorder" into the definition of "sexually violent predator" inclusively, to forestall defenses based on diagnostic loopholes, and not to require specificity from experts or juries. RCW 71.09.020(18).[4]

Fact-finders have the same discretion over expert testimony as over other evidence. "It is within the province of the jury to accept or reject, in whole or in part, an expert's opinion, and this court will not second-guess the jury's credibility determinations." *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 42, 931 P.2d 911, 915 (1997). Some jurors may have found only the mental abnormality diagnosis credible, some only the personality disorder, and some may have believed both. That is why the statute and instruction that mirrored it were crafted as inclusive disjunctives, creating alternative means. Love's argument and proposed instruction would require the jury to precisely determine the extent to which one or more of several diagnoses made him likely to reoffend.

3. Any Error was Invited and not of Constitutional Magnitude

Assuming *arguendo* that Jury Instruction No. 5 was error, it was an error that Love invited the Court to make. When Love proposed a "to

[4] Another example is the Legislature's definition of "mental abnormality," which is in part "a congenital or acquired condition[.]" Since all conditions are one or the other, and neither experts nor juries can be expected to determine which, the inclusive definition was obviously designed to forestall an exclusion argument. RCW 71.09.020(8); *see* 1RP 909 ("Q: Is it possible to know which one it is? A: No, not really.").

commit" instruction that changed "continues to suffer" to "currently suffers," his proposal also included the word "or" between the two alternative means:

> Well, my suggestion is, Your Honor, is that we modify this instruction, that, "Ronald Love *currently* suffers from a *mental abnormality or personality* which causes him serious difficulty controlling his sexually violent behavior." That's what we're really here to make a determination on.

1RP 1817 (emphasis added).

Under the doctrine of invited error, a party may not materially contribute to an error of law at trial and then complain of it on appeal. *In re Dependency of K.R.,* 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). The record reflects that Love himself proposed the very language to which he now assigns error. This Court should decline to address his argument because Love invited any error in the instruction.

Love also should not be allowed to raise this argument on appeal because he does not identify a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Walsh,* 143 Wn.2d 1, 7, 17 P.3d 591 (2001). Not all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3): "The exception actually is a narrow one, affording review only of 'certain constitutional questions.'" *State v. Scott,* 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988) (*Scott* II). Exceptions to RAP 2.5(a) must be construed narrowly. *State v. WWJ Corp.,*

138 Wn.2d 595, 603, 980 P.2d 1257 (1999). Love must first identify a constitutional error and then show how it actually affected his rights at trial. It is that showing that makes the error "manifest." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Even if a court determines that a claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *Id*. at 333.

Here, the instruction was consistent with the statute, with Washington Pattern Jury Instruction Civil (WPI) 365.10, with *Halgren* II and the evidence. Love cannot show that the instruction in any way affected the outcome of the trial. There was no error, and certainly not a manifest constitutional error.

Love argues his counsel was ineffective by not objecting to the instruction. The record demonstrates Love's counsel proposed a "to commit" instruction that included the word "or" to which Love now objects. Love's counsel was not ineffective. To prove ineffective assistance Love must show that his counsel performed below an objective standard of reasonableness and he was prejudiced. *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Courts reviewing such claims begin by assuming that counsel's assistance was effective, and the claimant bears the burden of showing otherwise. *Id*. Here, Love's counsel, like counsel for the State and the trial court, relied

on the statutory language, WPI 365.10 and *Halgren* II, and believed that the instruction's inclusion of the word "or" was correct. Love's counsel was not ineffective where significant authority supported their decision.

B. Where The Jury Heard Extensive Testimony About Love's Criminal History, Deviant Behavior And Psychopathic Personality, And Where The Evidence Proved Love Was An Untreated Sex Offender Who Denied Ever Committing A Sex Offense, Any Error Admitting The Former Testimony Of A.P. Was Harmless

Love argues that the Court of Appeals erred when it found the admission of A.P.'s testimony under ER 804(b)(1) to be harmless.[5] The court was correct; the totality of the evidence overwhelmingly supported the jury's verdict and there was no reasonable probability that the testimony of A.P., which repeated what the jury had already heard from the State's expert, altered the outcome of the trial.

1. Standard of Review

The admission of testimony under ER 804(b)(1) is within the discretion of the trial court and is reviewed for an abuse of discretion. *Acord v. Pettit*, 174 Wn. App. 95, 104, 302 P.3d 1265, *review denied*, 178 Wn.2d 1005, 308 P.3d 641 (2013); *State v. DeSantiago*, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003). Error in applying a rule of evidence is subject to the non-constitutional harmless error analysis.

[5] In 2005 A.P. testified under her maiden name and is identified elsewhere as "A.T." In 2014 the parties referred to her as "A.P.," her married name.

State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error may be harmless even in a criminal case, where the erroneous admission of former testimony can violate both ER 804 and the confrontation clause.[6] *State v. Benn*, 161 Wn.2d 256, 266, 165 P.3d 1232 (2007); *State v. Scott*, 48 Wn. App. 561, 566, 739 P.2d 742 (1987) (*Scott* I), *aff'd by Scott* II; *United States v. Duenas*, 691 F.3d 1070, 1091 (9th Cir. 2012). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

2. A.P.'s Former Testimony as a Hearsay Exception Under ER 804(b)(1) and 804(a)(5)

ER 804(b)(1) provides that a witness's former testimony is an exception to the hearsay rule if the witness is unavailable.[7] Pertinent to

[6] Love suggests that the erroneous admission of former testimony under ER 804(b)(1) is *per se* reversible error, relying on *Rice v. Janovich*, 109 Wn.2d 48, 58, 742 P.2d 1230 (1987). Pet. for Review. at 18. His argument is unsupported by any other authority and is contrary not only to well-established precedent, but to the rule recognized by *Rice* itself: "Absent a showing of prejudice to the outcome of the trial, an error does not constitute grounds for reversal." *Id.* at 63. In *Rice*, the multiple errors were not harmless and it is clear that *in that case* they constituted reversible error.

[7] ER 804(b)(1) provides, in pertinent part:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

this case, a witness is unavailable under ER 804(a)(5) if she is absent from the trial and the State is unable to procure her attendance by "process or other reasonable means."[8] "Process or other reasonable means" has been interpreted as requiring that, where a witness's attendance cannot be obtained by subpoena, the party offering the testimony "should at least be required to represent to the court that it made an effort to secure the voluntary attendance of the witnesses at trial. *Rice*, 109 Wn.2d at 57 (citing K. Tegland, 5A Wash. Prac., *Evidence* § 393, at 271 (2d ed. 1982)).

In 2005, Love's 1978 victim A.P. travelled from Puerto Rico to Pasco to testify at Love's first SVP trial. 1RP 1024-27; learned at *3. The record is silent as to whether the State asked her to voluntarily make that trip a second time in 2014; the State concedes it did not. Under oath at the 2014 trial, and despite having pled guilty to forcibly raping A.P. in 1978, Love denied ever committing a sex offense. 1RP 810; App. 3. He falsely testified that A.P. had been one of his prostitutes. 1RP 1472. In fact, A.P. had worked for the Superior Court and the District Attorney in Modesto, California. CP 901-902.

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[8] ER 804(a)(5) provides, in pertinent part:

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

. . . . .

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

3. Any Error was Harmless

Evidentiary error warrants reversal only if there is a reasonable probability it materially affected the outcome of the trial. *In re Detention of West*, 171 Wn.2d 383, 410, 256 P.3d 302 (2011). Here, the issues were whether Love was currently mentally ill and dangerous. RCW 71.09.020(18). The State did not have to prove Love raped A.P. While his criminal history was probative of his mental health, the primary evidence in a civil commitment trial is expert testimony establishing mental illness and dangerousness. *Young*, 122 Wn.2d at 58. A.P.'s testimony about one out of several crimes Love committed from 1973 through 1991 was repetitive of Dr. Phenix's testimony about that crime, as Love's own counsel argued. *See* 1RP 1023 (Love's counsel argues A.P.'s testimony "merely emphasizes or accents what's already been testified to.").

Even in criminal cases, erroneous admission of former testimony can be harmless, beyond a reasonable doubt. *Scott* I at 563. In *Scott* I, the State obtained a witness' perpetuation deposition and then released him from his subpoena. *Id*. At trial, the defense argued the witness was available, but the trial court admitted the testimony under ER 804(b)(1). *Id*. On appeal, admission of the testimony was error because the State's releasing the witness from the subpoena was not a good faith effort to obtain the witness's attendance at trial. *Id*. at 564-66. Unlike here, the

defendant in *Scott* I had a Sixth Amendment right of confrontation, and the error had to be harmless beyond a reasonable doubt.[9] Yet, even under that heightened standard, the admission of the testimony *was* harmless. *Id*. at 566-67 (citing *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, 24 A.L.R.3d 1065 (1967); *State v. Evans*, 96 Wn.2d 1, 4, 633 P.2d 83 (1981)). *Scott* I so held because, within the totality of evidence at trial, the testimony did not materially affect the outcome. *Id*.

The lesser non-constitutional standard applies here. The jury first learned that Love had already been adjudicated to be a sexually violent predator in 2005. Ex. 7 (attached as App. 8). They then heard extensive testimony, including expert testimony recounting the facts of A.P.'s rape. There was no reasonable probability that the verdict would have been different and any error was harmless.

The State recounted evidence supporting the jury's verdict in the Br. of Resp. at 15-21. Evidence about his criminal history can be found at 1RP 878-886, 889-90; App. 1 at 2. Testimony by D.L., Love's last victim, is at 1RP 784-804. Testimony about Love's allegedly improved behavior in the year prior to trial backfired when cross-examination revealed that, based on his self-reported pain over that same period, medical staff had

[9] Love does not have a due process right to confront a live witness at trial. *In re Detention of Stout*, 159 Wn.2d 357, 374, 150 P.3d 86 (2007).

prescribed Love – a psychopathic substance abuser – an unusually high dose of twice-daily narcotics. 1RP 1373-74, 1381-82. Most significantly, when the jury learned that Love (1) had refused sex offender treatment, (2) denied ever committing a sex offense, and (3) blamed his victims, the trial was essentially over. 1RP 810, 907, 1432-37, 1472. There is no reasonable probability that testimony about a 1978 crime prejudiced the outcome, where Love's currently compromised, untreated mental state was on brazen display in the courtroom.[10]

Lastly, had the State instead offered A.P.'s deposition, it would have been admissible under CR 32(a)(3)(B).[11] Thus, any error was "merely one of form rather than substance." App. 4 at *4. "Hearsay is not admissible except as provided by these rules, *by other court rules*, or by statute." ER 802 (emphasis added). The civil rules apply in SVP cases. *In re Detention of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002). CR 32 constitutes "other court rules" referred to by ER 802 and independently provides for the admission of hearsay in civil cases. *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 914-15 (9th Cir. 2008).[12]

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[10] At one point Love interrupted Judge Swisher to yell at another person in the courtroom, "Why do you keep staring at me, man?" 1RP 832.

[11] Love's former trial counsel, the late Carl Sonderman, deposed A.P. by telephone on Wednesday, March 2, 2005. It was reported by Diane D. Nicholson.

[12] *See also* 5 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, § 8:114 (3d ed. 2007); 5D Tegland, Washington Practice, *Courtroom Handbook on Evidence* § 804:4, at 436 (2015-2016 ed.) ("Depositions may be admissible under

Love relies on *Kinsman v. Englander*, 140 Wn. App. 835, 167 P.3d 622 (2007). *Kinsman* incorrectly applied ER 804 because it relied on *Scott* I. *Kinsman*, 140 Wn. App. at 840. The civil rules were inapplicable in *Scott* I, a criminal case. Moreover, CrR 4.6(d) requires the proponent of admitting deposition testimony in a criminal case to comply with the rules of evidence. *Scott* I at 564.

This Court does not interpret rules in a way that renders them superfluous. *State v. Chhom*, 162 Wn.2d 451, 472, 173 P.3d 234 (2007). Love's argument would render CR 32(a)(3)(B) superfluous because it does not matter where a witness lives if that witness is unavailable under ER 804(a). The Court of Appeals correctly found any error to be harmless.

V. CONCLUSION

Love has not established a basis for review by this Court. The State respectfully requests that the Court deny his Petition for Review.

RESPECTFULLY SUBMITTED this 6th day of January, 2017.

ROBERT W. FERGUSON
Attorney General

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provisions in the civil and criminal rules even though they do not meet the requirements of Rule 804.").

Appendix 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

STATE OF WASHINGTON, Plaintiff, vs. **RONALD D. LOVE,** D.O.B.: 05/24/57 SID NO.: WA15019009 FBI NO.: 0644893P2 Defendant.	NO. 91-1-50024-9 JUDGMENT AND SENTENCE (State Institution) 91 9 50304 2

THIS MATTER, having come before the Court for a sentencing hearing, the State of Washington being represented by Ann Marie DiLembo, Deputy Prosecuting Attorney for Franklin County, the defendant, **RONALD D. LOVE**, appearing in person and with his attorney, Linda Edmiston, the defendant having been afforded an opportunity to make a statement on his own behalf and to present information in mitigation of punishment, the defendant having been asked if there was any legal cause why judgment should not be pronounced and none having been shown, and the Court having reviewed and considered the statements presented, the pre-sentence report, the arguments of counsel and the files and case records to date, and having been fully advised, makes the following:

FINDINGS OF FACT

A. CURRENT OFFENSES:

1. On April 9, 1991, defendant was found guilty by plea of guilty of the crime of:

ATTEMPTED RAPE IN THE FIRST DEGREE, [RCW 9A.28.020(1)(3)(b) and 9A.44.040], A Class "B" Felony, committed on or about January 8, 1991, in Franklin County, Washington; Incident No. 91-CF-01052;

DENNIS DEFELICE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

B. CRIMINAL HISTORY:

1. The Court finds that the defendant has the following convictions which shall be counted as criminal history in computing the Offender Score:

Crime	Court/Cause No.	ADULT: Sentence Date	Felony Class	Parole/Release Date
1. Sex Perversion	Stanislaos County	08/23/73		
2. Armed Robbery	Stanislaos County	07/01/74		
3. A) Sodomy B) Assault with intent to commit rape	Stanislaos County	04/09/75		
4. Receiving Stolen Property	Stanislaos County	03/01/76		
5. Forcible Rape	Stanislaos County	10/31/78		
6. Forcible Rape	Stanislaos County	10/31/78		
7. Burglary in the First Degree	Stanislaos County	12/28/83		

2. The Court finds that the offender score, seriousness level, standard sentence range and maximum term for the current offense is as follows:

Offender Score	Seriousness Level	Standard Range	Maximum Term

DENNIS DEFELICE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

16	XI	157.5 - 210 Months	20 years/ $50,000.00

3. The defendant is an offender who shall be sentenced to a felony term or a combination of terms of more than one year of confinement. Pursuant to RCW 9.94A.190 and RCW 70.48.400 defendant shall be committed to a state penal institution under authority of the Department of Corrections to serve the sentence herein imposed.

4. The defendant has previously served 116 days in confinement which was solely in regard to the offense for which defendant is being sentenced.

5. The Court finds the defendant is liable for restitution in the amounts and to those persons as hereinafter ordered.

JUDGMENT

Based upon the foregoing Finds of Fact and the files and records herein,

IT IS HEREBY ADJUDGED AND DECREED that the defendant is guilty of the crime of:

ATTEMPTED RAPE IN THE FIRST DEGREE, [RCW 9A.28.020(1)(3)(b) and 9A.44.040], A Class "B" Felony, committed on or about January 8, 1991, in Franklin County, Washington; as charged in the Information herein.

SENTENCE

IT IS THE SENTENCE AND ORDER of the Court that:

1. Commencing 5-14, 1991, the defendant shall serve a term of total confinement in the custody of the Department of Corrections as follows:

120 months.

2. Defendant shall be given credit for 116 days served

DENNIS DEFELICE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

in total confinement for this offense, prior to date of this sentence.

3. Defendant shall pay to the Clerk of this Court:

(a) $ 420.00 Court costs;
(b) $ 100.00 Crime Victim Assessment
(c) $ TBD Restitution
(d) $ 400.00 Court appointed attorney's fees
(e) $ _____ Fine
(f) $ _____ Tri-City METRO Drug Enforcement Fund
(g) $ _____ Franklin County Drug Fund

$ 920.00 TOTAL

Commencing one month after release from confinement, defendant shall pay not less than $ TBD per month to the Clerk of the court until the total monetary obligation is paid in full.

4. Upon receipt, the Clerk of the Court shall distribute restitution to the injured party or parties as follows:

$ TBD David Lair
1302 Babs
Benton City, WA. 99350

5. The Court hereby retains jurisdiction over defendant for the greater of ten (10) years from the date of this Judgment and Sentence or from defendant's last date of release from confinement pursuant to a felony conviction to assure payment of the above-monetary obligations, and the Department of Corrections shall be responsible for assuring defendant's compliance with this provision.

6. Having been convicted of a sex offense, Chapter 9A.44 R.C.W. requires that the defendant register with the Sheriff of the County in which he resides (a) within forty-five (45) days of establishing residence in Washington, or (b) if a current resident within thirty (30) days of release from confinement, if any, or (c) within thirty (30) days of sentencing if no confinement is ordered. The defendant, shall, upon registering with the Sheriff, provide the following information; name; address; place of employment; crime for which convicted; date and place of conviction; aliases

DENNIS DEFELICE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160
Phone (509) 545-3543

used; and social security number. The Sheriff shall photograph and fingerprint the defendant. Any subsequent change of address within the county shall be submitted to the Sheriff in writing within ten (10) days of establishing the new address. Any change of address to a new county shall require full registration, as described above, with the sheriff of the new county within ten (10) days of establishing the new residence, as well as written notice of the change of address to the new county to the Sheriff with whom the person last registered.

7. Having been convicted of a sex offense under Chapter 9A.44 RCW, the defendant shall submit to the drawing of blood for purposes of DNA testing in accordance with Laws of 1990, Chapter 230, Section 3.

8. In addition to the other terms and conditions of this Judgment and Sentence, is sentenced to a period of community placement of either two years or up to the period of earned early release awarded pursuant to RCW 9.9A.150(1) and (2), whichever is longer, to begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release. If this court has sentenced defendant to the statutory maximum period of confinement, then community placement shall consist entirely of such community custody as defendant may become eligible. Any period of community custody actually served shall be credited against this term of community placement.

In addition to the other terms and conditions of this Judgement and Sentence, during the term of community placement, defendant shall abide by the following terms and conditions:

1. Report to and be available for contact with the assigned community corrections officer as directed.

2. Work at Department of Corrections approved education, employment, and/or community service.

3. Not consume controlled substances except pursuant to lawfully issued prescription.

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PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

4. Not unlawfully possess controlled substances.

5. Pay community placement fees as determined by the Department of Corrections.

The Court waives the imposition of the above-referenced conditions one (1) through five (5) listed hereafter: _____.

The Court also imposes the terms and conditions checked below:

[ ] 6A. Shall remain within the following described geographical boundary _____.

[ ] 6B. Shall remain outside of the following described geographical boundary _____.

[X] 7. Shall not have direct or indirect contact with the victims of this crime, David Lair.

[X] 8. Shall participate in sex offender treatment, or such other crime-related treatment or counseling services as directed by the assigned community corrections officer.

[X] 9. Shall not consume alcohol.

[ ] 10. Shall not commit the following offenses _____, and shall not _____, which are prohibitions relating to the crime for which defendant has been convicted.

[X] 11. Shall have prior written approval by the Department of Corrections of residence location and living arrangements.

[X] 12. Shall submit to a polygraph and/or penile plethysmograph as directed by the Community Correction's Officer.

Violations of any of the requirements, terms, or

DENNIS DEFELICE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

conditions of this Judgment and Sentence may be punished by confinement for a period of up to sixty (60) days for each violation, pursuant to RCW 9.94A.200(2), except that violation of the terms and conditions relating to community placement as set forth in this sentence that occur during the period of community custody shall be determined by the Department of Corrections as an inmate disciplinary hearing and the Department may order defendant to serve the remaining portion of the sentence in a more restrictive confinement status.

DONE IN OPEN COURT this 14 day of May, 1991.

SUPERIOR COURT JUDGE

Presented by:

Ann Marie DiLembo #17123
Deputy Prosecuting Attorney

FINGERPRINT FORM ATTACHED

DENNIS DEFELICE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

Defendant LOVE, RONALD D. SID NO. WA15019009

Cause No. 91-1-50024-9 ORI

Date of Birth 05/24/57 OCA

Sex M OIN

Race Caucasian DOA

The below impressed fingerprints are those of the defendant, taken this 14th day of MAY, 1991, by the undersigned

Jailer, Franklin County Sheriff's Office

	INDEX	MIDDLE	RING	LITTLE
RIGHT HAND				

STATE OF WASHINGTON)
) ss.
County of Franklin)

CLERK'S ATTESTATION

I, BEVERLY FINKE, Franklin County Clerk and Ex-Officio Clerk of the Superior Court, hereby attest that the above impressed fingerprints are those of the defendant herein.

BEVERLY FINKE

CLERK

Deputy

I, Michael J. Killian, the duly elected, qualified and acting Clerk of the Superior Court of the State of Washington, in and for said County, do hereby certify that the annexed and foregoing is a true and correct copy of the same as it now appears on file of record in my office. IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this

1 day of Oct 20 13

MICHAEL J. KILLIAN

By _____ Deputy

Appendix 2

FILED

1978 NOV 29 AM 10 11

ANISLAUS COUNTY MUNICIPAL COU...
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
vs.
RONALD DALE LOVE
(AT LARGE)
NO. 30646 DEFENDANT

Complaint - Criminal

CPD 78-3162
78-3161

14 CR R D

156010

State of California, County of Stanislaus } ss.

Personally appeared before me, this 31st day of October, 19 78,
DON TILLEY, CERES POLICE DEPARTMENT

who, first being duly sworn, upon information and belief, makes complaint, and accuses RONALD DALE LOVE of having committed the crimes of CT.I: VIOLATION OF §261, Subdivision 3, CALIFORNIA PENAL CODE; CT.II: VIOLATION OF §288a, Subdivision (c); CT.III: VIOLATION OF §286(c), CALIFORNIA PENAL CODE; CT.IV: VIOLATION OF §261, Subdivision 3, CALIFORNIA PENAL CODE; CT.V: VIOLATION OF §288a, Subdivision (c); CT. VI: VIOLATION OF §286(c), CALIFORNIA PENAL CODE; CT.VII: VIOLATION OF §459, CALIFORNIA PENAL CODE; ALL FELONIES

as herein set forth, and deposes and says:

COUNT I: That said RONALD DALE LOVE on or about the 28th day of October, 19 78, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully, feloniously, and with force and violence, have and accomplish an act of sexual intercourse with and upon ALMA MERCEDES PIAZZA, a female person, who was not then and there the wife of said RONALD DALE LOVE, without the consent and against the will of the said ALMA MERCEDES PIAZZA, and she, the said ALMA MERCEDES PIAZZA, then and there resisted the accomplishment of said act of sexual intercourse but her resistance was then and there overcome by force and violence used upon and against the said ALMA MERCEDES PIAZZA by said defendant.

COUNT II: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully and feloniously participate in an act of oral copulation with ALMA MERCEDES PIAZZA, and did compel the participation of said person in said act by force, violence, duress, menace, and threat of great bodily harm.

COUNT III: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully and feloniously participate in an act of sodomy with ALMA MERCEDES PIAZZA, and did compel the participation of said pers n in said act by force, violence, duress, menace, and threat of great bodily harm.

2016-7L

COUNT IV: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully, feloniously, and with force and violence, have and accomplish an act of sexual intercourse with and upon GERALDINE (NMN) LE MAY, a female person, who was not then and there the wife of said RONALD DALE LOVE, without the consent and against the will of the said GERALDINE (NMN) LE MAY, and she, the said GERALDINE (NMN) LE MAY, then and there resisted the accomplishment of said act of sexual intercourse but her resistance was then and there overcome by force and violence used upon and against the said GERALDINE (NMN) LE MAY by said defendant.

COUNT V: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully, and feloniously participate in an act of oral copulation with GERALDINE (NMN) LE MAY, and did compel the participation of said person in said act by force, violence, duress, menace, and threat of great bodily harm.

COUNT VI: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully, and feloniously participate in an act of sodomy with GERALDINE (NMN) LE MAY, and did compel the participation of said person in said act by force, violence, duress, menace, and threat of great bodily harm.

COUNT VII: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully enter the building and residence occupied by ALMA MERCEDES PIAZZA, at 2553 Fourth Avenue, Ceres, County and State aforesaid, with the intent then and there and therein unlawfully and feloniously to commit theft.

All of which is contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the people of the State of California.

Said Complainant therefore prays that a warrant may be issued for the arrest of the said

RONALD DALE LOVE

and that .....he..... may be dealt with according to law.

Subscribed and sworn to before me this

31st day of October 19 78

D. Miller
Complainant

DON R. VERA, ACTING CLERK
Clerk

Deputy Clerk

EVS/sg

I hereby certify the foregoing instrument, consisting of 2 page(s), is a true and correct copy of the original on file in this office.

ATTEST: Dated: 10/28/13

Stanislaus County Superior Court

By _____ Deputy Clerk

Appendix 3

4

FORM CR : 90

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Stanislaus
COURT ID. 5 0 | | |
BRANCH

FOR COURT USE ONLY
FILED
1978 DEC 21 AM 9 28
STEVE H. NELSON, CLERK
By [illegible] Deputy

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: RONALD DALE LOVE ☒ Present ☐ Not Present
AKA:

COMMITMENT TO STATE PRISON P.C. § 1170
ABSTRACT OF JUDGMENT CASE NUMBER: 156040

Hearing 12-20-78 (Mo. Day Yr.) Dept. No. 4 Judge Francis W. Halley Clerk Jo Ann Harris
Reporter Rudy Garcia Counsel for People Donald N. Scott
Counsel for Defendant Dallas Cole Probation Number or Probation Officer Roy Orlando

1. Defendant was convicted of the commission of the following crimes:
☐ Additional counts are listed on attachment 1.a.

Count	Code	Section No.	Crime	Date of Conviction Mo. Day Yr.	Conviction by Jury Trial	Conviction by Court Trial	Conviction by Plea	Count Stayed PC § 654	ENHANCEMENTS Charged and Found PC § 12022 Weapon	PC § 12022.5	PC § 12022 Weapon	PC § 12022.7	PC § 12022	PC § 12022.5	PC § 12022.6	PC § 12022.7	Additional term stricken due to circumstances in mitigation
1	PC	261 Subd 3	Forcible Rape	12-20-78			X										
4	PC	261 Subd 3	Forcible Rape	12-20-78			X										

2. A. Number of prior prison terms charged and found: ___ 667.5(c) felonies; ___ other than 667.5(c) felonies.
B. Punishment for prior prison terms stricken: ___ 667.5(c) felonies; ___ other than 667.5(c) felonies.
3. The crime with the greatest "principal" term of imprisonment (including § 12022-series enhancements) is:
A. ☒ In the present proceeding, Count 1 B. ☐ In a prior uncompleted sentence identified on next line.
DATE OF CONVICTION Mo. Day Year
(County) (Case Number) (Court Code) (Section Number) (Crime and Degree)
4. Defendant is sentenced on the crime with the greatest "principal" term to state prison for the ☐ lower ☐ middle ☒ upper base term of 5 / years.
5. Unstayed and unstricken enhancements imposed:
A. ☐ Penal Code § 12022(a) ☐ Penal Code § 12022(b) ☐ Penal Code § 12022.5 ☐ Penal Code § 12022.7 . . . . ___ years.
B. ☐ Penal Code § 12022.6(a) ☐ Penal Code § 12022.6(b) . . . . ___ years.
C. ☐ Penal Code § 667.8(a) . . . . ___ years.
D. ☐ Penal Code § 667.8(b) . . . . ___ years.
E. Terms for consecutive sentences:
(1) ☐ Other convictions in the present case for felonies not listed in § 667.5(c) on counts ___ ___ ___ ___ . . . . ___ / years.
(2) ☐ Other convictions in prior uncompleted sentences for felonies not listed in § 667.5(c)
(County) (Case Number) ___, (Counts) ___ . . . . ___ / years.
(3) ☒ Other convictions in the present case for felonies listed in § 667.5(c) on counts 4 ___ ___ . . . . 1 1/3 years.
(4) ☐ Other convictions in prior uncompleted sentences for felonies listed in § 667.5(c)
(County) (Case Number) ___, (Counts) ___ . . . . ___ / years.
6. Concurrent Sentences (to be served with sentence on count identified on line 3):
A. ☐ For convictions of the present case, counts ___ ___ ___ ___. B. ☐ For convictions of prior uncompleted sentence.
7. Of years imposed above on lines 4 through 5.E.(4), number of years stayed pursuant to California Rules of Court, Rule 447, to comply with Penal Code §§ 1170.1(a) (5-year limit) and 1170.1(f) (double-base-term limit) . . . . 6 / years)
8. The total unstayed prison term imposed by this judgment is . . . . 6 1/3 years.
9. Execution of sentence imposed: A. ☒ at initial sentencing hearing B. ☐ at resentencing pursuant to decision on appeal
C. ☐ after revocation of probation D. ☐ at resentencing pursuant to recall of commitment (P.C. § 1170(d))
10. The court pronounced sentence on 12/20/78 (Mo. Day Year). Defendant is credited for time spent in custody, 51 total days, including:
Actual Local Time 51 P.C. § 4019(b) credit ___, State Institutions Time ___ (specify dates of admission and release in oral proceedings and minutes).
11. Defendant is remanded to the custody of the Sheriff to be delivered: ☒ forthwith ☐ after 48 hours, excluding Saturdays, Sundays and Holidays into the custody of the Director of Corrections at the Reception-Guidance Center located at ☐ Calif. Institution for Women – Frontera
☒ Calif. Medical Facility – Vacaville ☐ Calif. Institution for Men – Chino ☐ Other: (specify) ___

CLERK OF SUPERIOR COURT
I hereby certify the foregoing to be a correct abstract of the judgment made in this action.
By Jo Ann Harris Deputy
Date DEC 20 1978

This form is prescribed pursuant to Penal Code § 1213.5 to satisfy the requirements of Penal Code § 1213 (Abstract of Judgment and Commitment) for determinate sentences under Penal Code § 1170. A copy of probation report shall accompany the Department of Corrections' copy of this form pursuant to Penal Code § 1203c. A copy of the sentencing proceedings and any supplemental probation report shall be transmitted to the Department of Corrections pursuant to Penal Code § 1203.01. Attachments may be used but must be incorporated by reference.

Form Adopted by the Judicial Council of California Revised Effective October 1, 1978

ABSTRACT OF JUDGMENT-COMMITMENT
FORM CR 290

Pen C. 667.5, 1170, 1170.1, 1213.5, 12022, 12022.5, 12022.6, 12022.7.

Pink original • Court File — Yellow copy • Department of Corrections — White copy • Administrative Office of the Courts

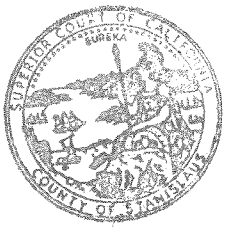
63433-453 9-78 OSP 230

I hereby certify the foregoing instrument, consisting of 1 page(s), is a true and correct copy of the original on file in this office.

ATTEST: Dated: 10/28/13

Stanislaus County Superior Court

By _____ Deputy Clerk



Appendix 4

194 Wash.App. 1032

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

In the Matter of the Detention
of Ronald D. Love, Appellant.

No. 32555–5–III
|
Filed June 14, 2016

Appeal from Franklin Superior Court, 01–2–50028–0, Honorable Robert G. Swisher.

Attorneys and Law Firms

Eric J. Nielsen, Casey Grannis, Nielsen Broman & Koch, PLLC, 1908 E Madison St., Seattle, WA, 98122–2842, Counsel for Appellant.

Thomas D. Howe, Malcolm Ross, Attorney General of Washington, 800 5th Avenue Suite 2000, Seattle, WA, 98104–3188, Counsel for Respondent.

Opinion

Korsmo, J.

***1** ¶ 1 Ronald Love appeals from a jury's determination that he remains a sexually violent predator (SVP) despite his evidence to the contrary. We conclude that there were no evidentiary errors of consequence and that the evidence supported the jury's verdict. We thus affirm.

FACTS

¶ 2 Mr. Love was originally committed as a sexually violent predator in 2005. Evidence adduced at that trial included a recitation of Mr. Love's history of sexually violent assaults committed in California during the 1970s. In 1973, Mr. Love, then 16, was convicted of attempting to rape a six-year-old. Two years later he sodomized a juvenile male and attempted to rape a juvenile female. In 1978, he and some accomplices attempted to kidnap a 16-year-old; that incident did not lead to a criminal prosecution. Later that year, in separate incidents he raped two women on the same night. He pleaded guilty to one count of forcible rape for each of the two women. After release from custody in California he moved to Pasco. In 1991, Mr. Love was convicted of attempting to rape a 19-year-old boy.

¶ 3 SVP proceedings were filed in 2005 as Mr. Love was nearing the end of his Washington prison sentence. That matter proceeded to a bench trial. Among the evidence considered at trial was the testimony of A.P., one of the 1978 rape victims. She traveled to Pasco from Puerto Rico to describe Mr. Love's entry into her home and ensuing sexual assault. After considering expert testimony and the testimony of some of the victims, the court found that Mr. Love was a sexually violent predator and committed him to the Special Offender Center.

¶ 4 In 2013, Mr. Love brought a petition for an evidentiary hearing, asserting he no longer met the requirements to be considered an SVP. Clerk's Papers (CP) at 805. To support that petition he presented declarations from Dr. Robert Halon and Brad Mix, a Native American Healer, indicating that during his commitment, he had been an active participant in Native American culture, rituals, and healing, that serve as equivalents to treatment, and that through those programs he has gained control over his impulses and eliminated his antisocial behaviors. He also submitted evidence of increasing health problems. The court granted a new trial after determining Mr. Love presented probable cause that he no longer met the definition of an SVP.

¶ 5 In the ensuing trial, the State presented evidence from Dr. Amy Phenix concerning Mr. Love's past crimes as well as her psychological assessment of him. She diagnosed Mr. Love with alcohol dependence, rape paraphilia, and antisocial personality disorder. She gave substantial information about all three of these disorders; her ultimate conclusion was that they worked in combination to render him dangerous to the community. She also applied several actuarial instruments to Mr. Love, including a dynamic risk assessment, the Structured Risk Assessment–Forensic Version (SRA–FV), and concluded he was more likely than not to commit future acts of sexual violence.

***2** ¶ 6 In his defense, Mr. Love presented evidence from psychologists challenging the bases for Dr. Phenix's diagnoses and assessment that he was likely to reoffend, evidence from Native leaders involved in religious and

healing practices at the commitment center to the effect that he was no longer likely to engage in criminal activities, and medical evidence that his current physical state made it unlikely he would engage in acts of violence. He also testified in his own defense and denied ever having committed any acts of sexual violence. He also asserted he had only pleaded guilty as part of plea deals to get reduced charges on non-sexual, violent crimes that he did commit. He also testified that A.P. had been a prostitute. [1]

¶ 7 Apparently surprised by Mr. Love's testimony, the State offered the previous testimony of A.P. to rebut it. The defense objected on the basis that the testimony was cumulative to that of Dr. Phenix, who already had described the incident, and that the State had made no effort to seek A.P.'s presence from Puerto Rico before offering the transcript of her previous testimony. The State argued that A.P. lived in Puerto Rico and was therefore unavailable because she was not amenable to a subpoena. The trial judge admitted the testimony.

¶ 8 The court instructed the jury that to commit Mr. Love as a sexually violent predator, it needed to find that he had previously been found to be an SVP, he continued to suffer from "a mental abnormality or personality disorder" that made it difficult to control his sexually violent behavior, and that the "mental abnormality or personality disorder" continues to make it more likely that he would reoffend. CP at 16. Defense counsel did not object to instruction 5 and had proposed an instruction containing similar language. CP at 64.

¶ 9 The jury returned a verdict that Mr. Love remained an SVP. CP at 8. The court entered an order committing Mr. Love to the Special Offender Center. CP at 7. Mr. Love then timely appealed to this court.

ANALYSIS

¶ 10 This appeal raises multiple challenges that we address as three issues, but the only two discussed in any detail involve Mr. Love's challenges to the sufficiency of the evidence and use of the prior testimony of A.P. After briefly discussing general principles governing review of SVP cases and Mr. Love's challenge to the SRA–FV dynamic risk assessment tool, we then address the sufficiency of the evidence and A.P.'s testimony.

¶ 11 Appellate courts apply the criminal standard to sufficiency challenges made to SVP civil commitments. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004). A commitment order is reviewed to see if, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the State has proven each required element beyond a reasonable doubt. *Id.* A claim of insufficiency admits the truth of the State's evidence, along with all reasonable inferences that may be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

¶ 12 An SVP is someone "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). A "mental abnormality" is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). A mental abnormality, when coupled with an individual's history of sexually predatory acts, supports the conclusion that the person has serious difficulty controlling his or her behavior. *Thorell*, 149 Wn.2d at 742.

***3** ¶ 13 The one issue we summarily address is the challenge to Dr. Phenix's use of the SRA-FV to support her opinion that Mr. Love continued to be an SVP. This court has concluded that the test satisfies the standard of *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). *See In re Det. of Ritter*, 192 Wn. App. 493, —— P.3d —— (2016); *In re Det. of Pettis*, 188 Wn. App. 198, 352 P.3d 841, *review denied*, 184 Wn.2d 1025 (2015). We will not revisit those decisions.

Sufficiency of the Evidence

¶ 14 Mr. Love's primary remaining contention is a claim that the evidence is not sufficient to support the jury's verdict given the instructions. His challenge combines a traditional sufficiency of the evidence argument with a law of the case argument predicated on his construction of the definition of the term "sexually violent predator." As the Washington Supreme Court did nearly a quarter century earlier, we reject his reading of the statutory language [2] and conclude that the evidence did support the jury's verdict. [3]

¶ 15 "Sexually violent predator" is defined as a 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). The elements instruction provided to the jury largely tracked this definition. CP at 16. In particular, the second element required the jury to find that Mr. Love "continues to suffer from a mental abnormality or personality disorder." *Id.* (emphasis added). Mr. Love contends that use of the word "or" renders the evidence insufficient to support the verdict because Dr. Phenix testified it was the *combination* of Mr. Love's mental abnormalities and personality disorders, rather than a single one of them, that established his future dangerousness.

¶ 16 This argument is largely semantic, but it turns on a not uncommon problem of construing the meaning of the word "or." In common English usage, the word "or" can be either exclusive or inclusive. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010). The meaning of the term typically is derived from the context in which it is used. *Id.* Mr. Love argues that the instruction (and hence the statute) apply an exclusive "or," but the Washington Supreme Court already has construed this statutory language as meaning "and." *In re Det. of Young*, 122 Wn.2d 1, 58, 857 P.2d 989 (1993) *superseded by statute on other grounds as stated in In re the Det. of Thorell*, 149 Wn.2d at 746. The terms "mental abnormality" and "personality disorder" are both defined by statute, and nothing indicates that an individual might not suffer from both. *Young* recognizes that both can work in conjunction to satisfy the statutory definition. [4] *Id.* Consequently, evidence that the combination of Mr. Love's personality disorders and his mental abnormalities made it likely that he would commit future acts of sexual violence was properly considered by the jury.

***4** ¶ 17 Thus viewed, the evidence was sufficient to support the jury's verdict. The evidence established that Mr. Love had previously been found to be an SVP. There was testimony from Dr. Phenix that he continues to suffer from mental abnormalities and personality disorders. She also opined that the combination of Mr. Love's current problems made it likely that he still will engage in acts of predatory sexual violence. The jury was free to credit that testimony and therefore find that each of the statutory elements was proven.

¶ 18 The evidence supported the jury's verdict.

Admission of Prior Testimony of A.P.

¶ 19 Mr. Love also argues that the trial court committed error when it admitted the transcript of A.P.'s testimony from the first trial. If error, it was harmless.

¶ 20 Typically, rulings admitting or excluding evidence are reviewed for an abuse of discretion. *In re Det. of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Error in the admission of evidence is harmless if "within reasonable probabilities" it did not affect the outcome of the trial. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). [5]

¶ 21 Former testimony is exempted from the reach of the hearsay rule if the witness is unavailable and the opposing party previously had the opportunity to develop the testimony. ER 804(b)(1). A declarant is unavailable if she is absent from the proceedings and the proponent was not able to procure her attendance. ER 804(a)(5). In addition, a deposition is admissible if the witness resides out of the county more than 20 miles from the site of the trial. CR 32(a)(3).

¶ 22 Given that A.P. lived in Puerto Rico and could not be subpoenaed, the State contends she was unavailable. Additionally, the State contends any error was harmless since (1) her deposition governing the same discussion of the facts of the 1978 case could have been used, and (2) the substance of those facts were already before the jury from the testimony of Dr. Phenix. We agree that A.P.'s substantive description of the event was not critical to the outcome of this action.

¶ 23 First, we note that while A.P. was outside the subpoena power of the court, the rule still requires the State as proponent of the testimony to make a good faith effort to secure the voluntary attendance of the witness. *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987). Given that A.P. did appear to testify at the 2005 SVP trial, there certainly was the possibility that she would voluntarily appear if asked, even though the mid-

trial request would not have amounted to much advance notice.

¶ 24 Nonetheless, any error was harmless for the reasons noted. The evidence could have been admitted through the prior deposition, making the problem merely one of form rather than substance. While A.P.'s version of the events was already before the jury through Dr. Phenix, that evidence was admitted for the limited purpose of explaining Dr. Phenix's evaluation of Mr. Love. ER 703. Here, the primary purpose of using A.P.'s testimony was to rebut Mr. Love's new version of the 1978 attack. The only element seriously at issue in this trial was whether Mr. Love was currently dangerous or not in light of his progress in treatment. The 1978 incident did not seriously impact the jury's ultimate decision in this case.

***5** ¶ 25 Accordingly, we conclude that the error was harmless since it did not realistically impact the verdict. The judgment is affirmed.

¶ 26 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.140.

WE CONCUR:

Fearing, C.J.

Pennell, J.

All Citations

Not Reported in P.3d, 194 Wash.App. 1032, 2016 WL 3398535

Footnotes

1 A.P. testified in the 2005 trial that she had worked for the Superior Court and the District Attorney in Modesto, California at the time of the attack.

2 Although cast as a jury instructional issue, his true challenge is to the construction of the statute since the challenged aspect of the jury instruction merely recites the statutory definition.

3 In light of our conclusion, we need not address the State's argument that Mr. Love invited the alleged error or his rejoinder that counsel performed ineffectively by proposing similar language. There was no instructional error.

4 The Legislature intended that all dangerous sex offenders be incapacitated and treated. Frequently ... an individual will suffer from multiple mental abnormalities and personality disorders which make violent rape likely. It would thwart the legislative purpose if the Statute only allowed the commitment of those who suffer from one or the other, while prohibiting the commitment of more seriously afflicted sexually violent predators.
In re the Det. of Young, 122 Wn.2d at 58.

5 Even constitutional error, such as the omission of an element from a "to convict" instruction, is harmless error if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *State v. Thomas*, 150 Wn.2d 821, 845, 83 P.3d 970 (2004).

Appendix 5

138 Wash.App. 1001

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

In the Matter of the Detention of
Ronald D. LOVE, Respondent.

No. 24509–8–III.
|
April 12, 2007.

Appeal from Franklin Superior Court; Honorable Robert G. Swisher, J.

Attorneys and Law Firms

Susan Marie Gasch, Gasch Law Office, Spokane, WA, for Appellant.

Malcolm Ross, Attorney General of Washington, Sarah Sappington, Office of the Atty. General, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

SCHULTHEIS, J.

***1** Ronald D. Love appeals the order that civilly committed him as a sexually violent predator. His contentions focus on the admission of actuarial instrument evidence, due process challenges to the sexually violent predatory statutory scheme, and the sufficiency of evidence. We affirm.

FACTS

On January 17, 2001, the State filed a petition to commit Mr. Love to a secure facility as a sexually violent predator under chapter 71.09 RCW. After an order affirming probable cause was entered on February 6, Mr. Love was transferred to the special commitment center at McNeil Island where he has been held since 2001. At a seven-day bench trial in 2005, the following facts were developed.

Mr. Love was almost 48 years old at the time of trial. His relevant criminal history includes a 1975 California guilty plea to a misdemeanor (reduced from attempted rape of a juvenile girl), a 1978 California conviction by guilty plea to two counts of forcible rape involving separate attacks on female victims in different locations on the same day, and a 1991 Franklin County conviction for attempted first degree rape of a male.

Dr. Amy Phenix, a clinical psychologist, conducted an evaluation of Mr. Love on behalf of the State. Although Dr. Phenix did not personally interview Mr. Love, she felt that the records were adequate for the evaluation and to form opinions. Dr. Phenix testified that Mr. Love has a mental abnormality and his volitional control is "seriously impaired." Report of Proceedings (RP) at 190. She concluded that Mr. Love is likely to reoffend in a violent, sexually predatory manner.

Two doctors testified on Mr. Love's behalf. Dr. Robert Halon, a clinical psychologist, met with Mr. Love, tested him, and reviewed his records. Dr. Halon conceded that Mr. Love has an antisocial personality disorder, but found no evidence of a mental disorder "that's been making him do anything." RP at 331. Dr. Richard Wollert, a clinical psychologist, did not evaluate Mr. Love. Instead, he testified to a "drop-off" in recidivism and antisocial behaviors that occurs with age, which peaks at age 18 and drops off to a very low rate by ages 45, 50, and 55. RP at 444. Dr. Wollert determined there was a 31 percent probability that a person of Mr. Love's age, and who tested at his high risk for future dangerousness, would commit a sex offense in the future.

After hearing the evidence, the court entered findings of fact, conclusions of law, and an order of commitment on August 18, 2005.

DISCUSSION

A. Actuarial Instruments

Mr. Love contends that the trial court improperly admitted Dr. Phenix's testimony concerning the actuarial instruments she used to assess Mr. Love for future dangerousness. He asserts that because of new information in the scientific community concerning reduced risk of sexual recidivism, the evidence would not

have withstood a *Frye* [1] challenge and the court erred by not holding a *Frye* hearing.

[1] *Frye v. United States,* 54 App. D.C. 46, 293 F. 1013, 1014 (D.C.Cir.1923). "The *Frye* standard requires a trial court to determine whether a scientific theory or principle 'has achieved general acceptance in the relevant scientific community' before admitting it into evidence." *In re Det. of Thorell,* 149 Wn.2d 724, 754, 72 P.3d 708 (2003) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Young,* 122 Wn.2d 1, 56, 857 P.2d 989 (1993)). " '[T]he core concern ... is only whether the evidence being offered is based on established scientific methodology.' " *Id.* (alterations in original) (internal quotation marks omitted) (quoting *Young,* 122 Wn.2d at 56).

A reviewing court need not review a *Frye* challenge that is not raised before the trial court. *In re Det. of Taylor,* 132 Wn.App. 827, 836, 134 P.3d 254 (2006), *review denied,* 159 Wn.2d 1006 (2007); *see In re Det. of Thorell,* 149 Wn.2d 724, 754–55, 72 P.3d 708 (2003); *State v. Jones,* 71 Wn.App. 798, 821, 863 P.2d 85 (1993). Mr. Love did not seek a *Frye* hearing below. Nonetheless, the actuarial instruments satisfy the *Frye* standard. *Thorell,* 149 Wn.2d at 756. The reliability of the instruments is therefore tested under ER 702 and 703. *Id.* at 754–55. But Mr. Love did not object to Dr. Phenix's testimony. He has not, therefore, preserved the issue for appeal. *See State v. Thomas,* 150 Wn.2d 821, 856, 83 P.3d 970 (2004) (failure to raise an evidentiary objection at trial precludes the party from raising the issue on appeal).

***2** Mr. Love presented rebuttal evidence from an expert, Dr. Wollert, who testified that recidivism for violent crime —including sex offenses, antisocial behavior, and even traffic offenses—peaks in males in their 20s and then drops off. Dr. Wollert cited two studies of sex offenders that showed such a trend.

Dr. Phenix recognized that there is new research concerning the connection between age and risk of recidivism. She believed, however, in light of evidence of "strong antisocial attitudes" held by Mr. Love, that his age would not mitigate the risk. RP at 235. Mr. Love's clinical expert, Dr. Halon, testified that research has not progressed to the point that the potential for reduction in recidivism associated with aging can be quantified. This cast doubt on the 31 percent probability of reoffense that Dr. Wollert accorded to age. Significantly, Dr. Wollert conceded that he used the Static–99 to assess risk for future commission of sex offenses and that many experts rely on it for that purpose.

The experts' disagreement as to the reliability of actuarial assessments goes to the weight of this evidence, not its admissibility. *Thorell,* 149 Wn.2d at 756 (citing *In re Det. of Campbell,* 139 Wn.2d 341, 358, 986 P.2d 771 (1999)). The court heard the evidence and weighed it. There is no error.

B. Due Process Challenges

Mr. Love raises four due process challenges to the sexually violent predator laws. Constitutional challenges to a statute are reviewed de novo. The party challenging the statute must prove it is unconstitutional beyond a reasonable doubt. *In re Det. of Brock,* 126 Wn.App. 957, 963, 110 P.3d 791 (2005) (citing *State v. Mertens,* 148 Wn.2d 820, 826, 64 P.3d 633 (2003)).

The court may civilly commit a person if it determines that he or she is a sexually violent predator beyond a reasonable doubt. RCW 71.09.060. A sexually violent predator 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." Former RCW 71.09.020(12) (2001).

"Likely to engage in predatory acts of sexual violence" means "that the person more probably than not will engage in such acts." Former RCW 71.09.020(3) (2001). Thus, the State must prove beyond a reasonable doubt that the person will more likely than not engage in predatory acts of sexual violence unless confined.

In the first challenge, Mr. Love argues that the due process clause requires this statutory scheme to be narrowly tailored by limiting the State's ability to deprive him of his liberty with the requirement that the probability of future sexually violent behavior be proven beyond a reasonable doubt.

As the State correctly observes, the challenge Mr. Love asserts has been previously asserted and rejected. *In re Det. of Turay,* 139 Wn.2d 379, 407–08, 986 P.2d 790 (1999)

(standard of proof is constitutional) (citing *In re Pers. Restraint of Young,* 122 Wn.2d 1, 32 n. 9, 59, 857 P.2d 989 (1993)). *See also In re Det. of Brooks,* 145 Wn.2d 275, 294, 36 P.3d 1034 (2001) (noting the United States Supreme Court has found that our statutory standard satisfies due process requirements) (citing *Kansas v. Hendricks,* 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)), *overruled on other grounds by Thorell,* 149 Wn.2d 724.

***3** Second, Mr. Love argues that due process requires that the statutory scheme be narrowly tailored by limiting the risk of reoffense period to the foreseeable future, rather than his lifetime. This issue does not require constitutional analysis because the record does not support Mr. Love's claim that the court relied on a risk of reoffense over his lifetime. *See In re Impoundment of Chevrolet Truck,* 148 Wn.2d 145, 160, 60 P.3d 53 (2002) (" 'A reviewing court should not pass on constitutional issues unless absolutely necessary to the determination of the case.' ") (quoting *State v. Hall,* 95 Wn.2d 536, 539, 627 P.2d 101 (1981)).

The court found that Dr. Phenix's opinion was supported by the actuarial tools. According to one actuarial instrument, the Static–99, the probability of reconviction, which underestimates reoffense, was 39 percent within 5 years of release from custody, 45 percent within 10 years, and 52 percent within 15 years. Dr. Phenix corroborated the Static–99 results with a MnSOST–R test, on which Mr. Love's score indicated that he was statistically similar to a group of offenders who sexually recidivated at a rate of 72 percent over 6 years. All of the evidence narrowed the time for likelihood of reoffense. Nowhere in the findings of fact or the conclusions of law did the court address reoffense in terms of Mr. Love's lifetime.

Third, Mr. Love asserts that due process requires that the statutes be narrowly tailored by limiting the State's ability to deprive him of his liberty with the requirement that he could not be committed on the strength of a single witness's opinion as to the statistical probability of his likelihood to reoffend. Again, the record does not support Mr. Love's claim that the court's finding was based solely on Dr. Phenix's actuarial testimony.

Dr. Phenix testified concerning Mr. Love's mental abnormalities: paraphilia [2] and severe antisocial personal disorder. [3] She also explained that Mr. Love meets the criteria for a classification as a psychopath, which does not predispose a person to sexually violent offenses, but in Mr. Love facilitates paraphilic behaviors because it creates self-justification, making it easier to act out deviant sexual urges. She found that Mr. Love also suffers from alcohol dependence and other substance abuse that promotes criminal behavior because it impairs his judgment and disinhibits him. Dr. Phenix also testified that Mr. Love has difficulty controlling his sexually violent behavior.

2 This is an abnormal sexual arousal, which manifests in recurrent intense sexual fantasies, urges, or behaviors toward children and nonconsenting persons, and the pain and humiliation of another person and/or nonhuman objects.

3 The doctor explained: "Antisocial personality disorder is about criminality. It's ... associated with violating the rights of others. It's associated with long-term jail/prison incarceration, and basically, not abiding by prosocial rules, feeling like they can take what they want when they want even if it breaks the law." RP at 194. This diagnosis is not disputed.

The court was further aware of the details of Mr. Love's history of predatory behavior. The court heard testimony from one of Mr. Love's victims who recalled in vivid detail his assault on her almost 30 years prior. Mr. Love was a stranger to this woman when he pushed his way into her California home in 1978; stripped her naked; orally, anally, and vaginally raped her; threatened to bash in her head; and spoke of kidnapping her before she escaped to a neighbor's home as Mr. Love followed, cursing her. The record of another forcible rape Mr. Love committed less than one hour prior to this attack was admitted through an exhibit.

***4** Evidence of a third victim—a 16–year–old girl whom Mr. Love attempted to rape in 1975—was entered into the record. Mr. Love accepted a plea bargain to a misdemeanor.

Mr. Love was also convicted of the attempted rape of a 19–year–old Franklin County man, a fourth victim, in 1991. The man testified by video deposition that Mr. Love, who he did not know, threatened him by claiming he had a gun, beat him severely about the face and head, and attempted to anally rape him.

All of this evidence was before the court, not just Dr. Phenix's testimony and statistical evidence.

In his fourth due process challenge, Mr. Love argues that due process requires that the statutes be narrowly tailored by limiting the State's ability to deprive him of his liberty with the requirement that the criminal offense that he would have the likelihood of committing in the future be specified. The State correctly points out that the predatory acts of sexual violence referred to in former RCW 71.09.020(12), which the sexually violent predator statutes intend to prevent, are expressed in former RCW 71.09.020(11) (2001).

None of Mr. Love's due process claims have merit.

C. Sufficiency of Evidence

Mr. Love challenges the sufficiency of the evidence of his lack of volitional control. Proof is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found those elements beyond a reasonable doubt. *Thorell,* 149 Wn.2d at 744–45. The State presented ample evidence concerning lack of control.

The State must provide some proof that individuals subject to the sexually violent predator statute have a serious lack of control over their behavior. *Id.* at 735–36 (citing *Kansas v. Crane,* 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002)). The existence of that proof together with a history of predatory behavior permits a finding of future dangerousness and justifies the civil commitment. *Id.* This distinguishes the sexually violent predator from dangerous but typical criminal recidivists. *Id.*

There is no need to make a separate finding on lack of control.[4] *Id.* at 742. Instead, according to *Thorell,* "the jury's finding that [a sexually violent predator] suffers from a mental illness, defined under our statute as a 'mental abnormality' or 'personality disorder,' coupled with the person's history of sexually predatory acts, must support the conclusion that the person has serious difficulty controlling behavior." *Id.* "[T]his evidence need not rise to the level of demonstrating the person is completely unable to control his or her behavior." *Id.*

4 The court nonetheless made a finding of fact and a conclusion of law concerning Mr. Love's lack of control.

Dr. Phenix testified that Mr. Love's mental disorders would impact his ability to control his behavior. She observed that two forcible rapes like Mr. Love committed within 30 minutes of each other was "highly unusual." RP at 183. She testified that such conduct demonstrates "serious impairment" of his volitional control. RP at 183. Significantly, Mr. Love committed sexual crimes within one to eight months of his release from confinement. According to Dr. Phenix, this is a more rapid recidivism than other offenders. Further, he continued to reoffend even though his past incarcerations warned him that his behavior was socially unacceptable. Dr. Phenix explained that this lack of behavioral controls facilitates Mr. Love's offense conduct because he lacks conscience and does not care about violating the law or harming others. Further, Dr. Phenix testified that Mr. Love's psychopathic detachment allowed him to remain aroused while anally raping one of his victims, even though he injured her and caused her excruciating pain.

***5** Mr. Love argues that he does not have difficulty controlling his behavior. He cites the lack of evidence of sexual infractions during his incarceration. Dr. Phenix, however, explained that the controlled setting of a prison constrained Mr. Love in his conduct and prevented him from using disinhibiting substances. But his paraphilic behavior (fantasizing, masturbation, etc.) likely continued undetected. The trial court noted the conflicting testimony of the experts and found that of Dr. Phenix to be credible.

Viewed in a light most favorable to the State, the evidence of Mr. Love's inability to control his behavior was sufficient for the trial court to find, beyond a reasonable doubt, that Mr. Love has serious difficulty controlling his sexually violent behavior. The evidence is sufficient.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: SWEENEY, C.J., and KULIK, J.

138 Wash.App. 1001

All Citations

Not Reported in P.3d, 138 Wash.App. 1001, 2007 WL 1087558

Appendix 6

The Court of Appeals
of the
State of Washington
Division III

In re the Detention of:	)	COMMISSIONER'S RULING
	)	NO. 31872-9-III
RONALD LOVE.	)	

Having considered the State of Washington's motion for discretionary review of a Franklin County Superior Court decision that Mr. Love established probable cause so as to warrant an unconditional release trial, the response, reply and Mr. Love's supplemental opposition to the motion, the record, file, and oral argument of counsel, and being of the opinion that in light of *State v. McCuistion*, 174 Wn.2d 369, 383, 275 P.3d 1092 (2012) (under probable cause standard of proof, to which a sex offender is held at a show cause hearing on his petition for unconditional discharge or conditional release to a less restrictive alternative pursuant to the sexually violent predator (SVP) statute, a court must assume the truth of the evidence presented, and may not weigh and measure asserted facts against potentially competing ones; at the same time, the court can and must determine whether the asserted evidence, if believed, is sufficient to

establish the proposition its proponent intends to prove, RCW 71.09.090(2)(a)), and *In Re Petersen*, 145 Wn.2d 789, 798, 42 P.3d 952 (2002) (trial court does not "weigh evidence" to determine probable cause), the State has failed to establish that the trial court committed obvious or probable error rendering further proceedings useless or substantially altering the status quo or limiting the freedom of a party to act as contemplated by RAP 2.3(b)(1) and (2); now, therefore,

IT IS ORDERED, the motion for discretionary review is denied.

December 5, 2013.

Joyce J. McCown
COMMISSIONER

Appendix 7

FILED

January 31, 2014

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In re the Detention of:	)	No. 31872-9-III
	)	
	)	
RONALD LOVE.	)	ORDER DENYING
	)	MOTION TO MODIFY

THE COURT has considered petitioner's motion to modify the Commissioner's Ruling of December 5, 2013, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to modify is hereby denied.

DATED: January 31, 2014.

PANEL: Judges Korsmo, Brown, Siddoway.

FOR THE COURT:

KEVIN M. KORSMO, Chief Judge

Appendix 8

FILED
FRANKLIN CO CLERK
2005 AUG 18 A 8:52
MICHAEL J. KILLIAN
BY DEPUTY

STATE OF WASHINGTON
FRANKLIN COUNTY SUPERIOR COURT

In re the Detention of:	NO. 01-2-50028-0
RONALD D. LOVE,	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COMMITMENT
Respondent.	

This matter was tried to the Court on May 4, 5, and July 14, 15, and 18 – 20, 2005, pursuant to RCW 71.09 *et seq.*, to determine whether the respondent, Ronald Love, should be involuntarily civilly committed as a sexually violent predator (SVP). The Court heard the testimony of the following witnesses: The respondent, Mr. Love; A. T. (victim); Don Tilley (by videotaped deposition); Michael Excell; D. L. (victim, by videotaped deposition); Sergeant David Allen; Corporal John Probasco; Dr. Amy Phenix; Jacque Martinson; Dr. Robert Halon; and Dr. Richard Wollert. Having considered this testimony and the exhibits entered into evidence, as well as the arguments of counsel, the Court now enters the following:

I. FINDINGS OF FACT

[redacted]

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

205

[redacted]

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent, RONALD D. LOVE, is a sexually violent predator as defined in RCW 71.09.020(16). Having so

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ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

found the Court therefore ORDERS that the Respondent be committed to the custody of the Department of Social & Health Services for placement in a secure facility for control, care, and treatment until further order of this Court.

DATED this 16th day of August, 2005.

THE HONORABLE ROBERT G. SWISHER
Judge of the Superior Court

Presented by:

ROB MCKENNA
Attorney General

MALCOLM ROSS, WSBA #22883
Assistant Attorney General
Attorneys for Petitioner

Approved as to form only:

CARL SONDERMAN, WSBA #4111
Attorney for Respondent

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

I, Michael J. Killian, Franklin County Clerk, and by virtue of the laws of the State of Washington ex-officio Clerk of the Superior Court of the State of Washington, in and for said County, do hereby certify that the annexed and foregoing is a true and correct copy as the same now appears on file of record in my office. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this

16 day of April 20 14

Michael J. Killian

Clerk

By Amy Tuttle

Deputy

NO. 93815-6

WASHINGTON STATE SUPREME COURT

In re the Detention of: RONALD LOVE, Petitioner.	DECLARATION OF SERVICE

I, Joslyn Wallenborn, declare as follows:

On January 6, 2017, I sent via electronic mail, per service agreement, a true and correct copy of Answer to Petition for Review and Declaration of Service, postage affixed, addressed as follows:

Law Offices Of Nielsen, Broman, & Koch, PLLC
sloanej@nwattorney.net
nielsene@nwattorney.net
grannisc@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 6th day of January, 2017, at Seattle, Washington.

Joslyn Wallenborn

JOSLYN WALLENBORN