Supreme Court No. 93900-4
(COA No. 47328-3-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TROY BELCHER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR COWLITZ COUNTY

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

A. IDENTITY OF PETITIONER

Troy Belcher, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Belcher seeks review of the Court of Appeals decision dated October 4, 2016 and order published on November 22 2016. The opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether continued commitment of a person who has only committed sexually violent acts as a child and has exhibited no such behavior as an adult satisfies due process.

2. Whether the due process requirement of proving future likelihood to commit a sexually violent offense is satisfied where no reliable actuarial evidence supports the expert's opinion of future reoffending because all of the behavior analyzed by the expert occurred when the petitioner was a child and where no reliable actuarial instruments exists to determine whether a juvenile is likely to commit a future sexual offense where there is no evidence of adult offending.

3. Whether a diagnosis for an anti-social personality disorder satisfies the due process requirement that only those who suffer from a

mental abnormality which causes a person to have controlling their sexually violent behavior may be indefinitely confined.

D. STATEMENT OF THE CASE

Troy Belcher was 13 and 15 years old when he committed the sex offenses which predicate his commitment. CP 848.[1] Mr. Belcher's sexual misconduct all occurred when he was a child. *Id.* at 848-49. The State's evidence at trial was that Mr. Belcher has only engaged in a consensual sexual relations as an adult. 5A RP 898.

As a child, Mr. Belcher had no relationship with his biological father. 5A RP 915. His mother who was an alcoholic and physically abusive to him. *Id.* He was moved around a lot, causing school instability and no ability to build relationships with teachers. *Id.* He supported himself and his two younger sisters through drug dealing. *Id.*

Mr. Belcher has been continuously incarcerated since he was 15. CP 849. When he was 23, the State moved to confine him indefinitely under RCW 71.09. Mr. Belcher was committed after a jury trial on February 11, 2011. CP 847.

Mr. Belcher was granted a new unconditional release trial after the court found he had presented prima facie evidence that his condition had

[1] There are nine volumes of transcripts. Counsel will reference them by the volume number designated on the cover sheet, along with the page number referenced. E.g., 1A RP 1. References to the clerk's papers will be by page number only. E.g., CP 1.

so changed because of treatment that he no longer met the requirements of RCW 71.09. CP 847.

Mr. Belcher waived his right to a jury trial in his second trial. The State's expert, Dr. Brian Judd, did not diagnose Mr. Belcher with any type of paraphilic disorder at Mr. Belcher's second trial. 2B RP 430. Dr. Judd ruled out paraphilic disorders was because there was "no current evidence of rape behavior." 2B RP 431-32. Instead, Dr. Judd found Mr. Belcher suffered from an anti-social personality disorder and had a high score on a test for psychopathy.[2] 2A RP 359.

Mr. Belcher's behavior had changed dramatically as he matured, the misbehavior declining so significantly that he had not received a negative behavior management report in the two years prior to trial. 2B RP 526. Mr. Belcher had a history of rules violations when he was younger. CP 848. Mr. Belcher had become treatment compliant and there was an "absolute" decline in his behavioral problems. 2B RP 527. According to both polygraphs and penile plethysmograph tests conduct upon Mr. Belcher, he did not present as a person with deviant sexual interests. He lived in the least restrictive environment on McNeil Island. 3 RP 650.

---

[2] Psychopathy is not defined in the current edition of the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (2013) (Hereafter DSM-5). Instead, it is listed as a synonym for anti-social personality disorder. *Id.* at 659.

Dr. Judd could not apply any actuarial test to Mr. Belcher's likelihood to commit a violent sexual offense, largely because Mr. Belcher was so young when he committed his offenses that none apply to his behavior. 2B RP 468. Instead, Dr. Judd applied a Violence Risk Appraisal, which does not distinguish between sexual and other violent offenses. 3 RP 675. Dr. Judd found Mr. Belcher's likelihood to commit some new offense was high. 2B RP 546.

The trial court found Mr. Belcher suffered from a mental abnormality and was likely to commit a sexually violent offense if released to the community. CP 857. The judge ordered continued confinement under RCW 71.09. CP 858. The Court of Appeals affirmed Mr. Belcher's continued commitment. App. 1.

E. ARGUMENT

1. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER DUE PROCESS IS VIOLATED WHEN A PERSON IS HELD UNDER RCW 71.09 SOLELY UPON SEXUAL MISCONDUCT COMMITTED WHEN THE PETITIONER WAS A CHILD.

This Court should grant review to address the question of whether a juvenile who does not commit sexually deviant acts as an adult may be committed under RCW 71.09.030. RAP 13.4(b) is satisfied because this is a significant question of substantive due process and involves an issue of substantial public interest.

In the State's motion to publish, the State acknowledged this case "both determines new or unsettled question [sic] of law and clarifies an important legal principle of law insofar as it clearly reject's Belcher's argument that civil commitment cannot be constitutionally be based upon juvenile adjudications." Respondent's Motion to Publish at 2. The State argued the opinion should be published because the issue of whether a juvenile offender who has not committed offenses as an adult has "repeatedly been raised in sex predator cases and a published case would provide useful guidance to the lower courts in this area." Respondent's Motion to Publish at 2.

This Court has not yet reached the issues raised here. This Court has, however, recently held juvenile adjudications can be predicate offenses for RCW 71.09.030 commitment. *In re Det. of Anderson*, 185 Wn.2d 79, 85, 368 P.3d 162 (2016). Unlike Mr. Belcher, Mr. Anderson exhibited sexually dangerous behavior as an adult and was diagnosed with pedophilia and sexual sadism. *Id.* at 91.Before Mr. Anderson's commitment under RCW 71.09, he had trouble controlling his sexual impulses. *Id.* at 85. There were at least four times prior to Mr. Anderson's commitment where he committed overt sexual act. *Id.* at 92. Distinct from Mr. Belcher, these characteristics continued after Mr. Anderson had matured and had become an adult. *Id.* at 91.

Mr. Belcher presents a stark contrast to Mr. Anderson. Mr. Belcher was committed because of his history as a juvenile. CP 849 (Finding of Fact 7), 855 (Finding of Fact 22). Mr. Belcher has not exhibited sexually deviant behavior as an adult. 5A RP 898. He does not suffer from paraphilia. 2B RP 430. The State's expert based his opinion Mr. Belcher qualified for commitment upon Mr. Belcher's "history of conduct when he was last at liberty in the community" [as a juvenile], "his behavior when he was at least in custody as a juvenile at Green Hill school," "the persistence of the anti-social personality disorder," and "the level of psychopathy that he's *historically* demonstrated." 2B RP 464 (emphasis added).

And while this Court has addressed whether a juvenile offense may provide the predicate for commitment under RCW 71.09.030, it has not addressed whether it is a violation of substantive due process to hold a person whose sexual misconduct occurred *only* when they were a juvenile. Unlike Mr. Anderson, all of Mr. Belcher's sexual offending and sexually deviant behavior occurred when he was a youth. 5A RP 898. Mr. Belcher has not engaged in the overt sexual acts Mr. Anderson engaged in as an adult, nor has a medical expert diagnosed him with a mental abnormality related to sexual paraphilia. 2B RP 430. His only medically recognized

diagnosis by the State's expert is for anti-social personality disorder. 2A RP 359.

In rejecting Mr. Belcher's appeal, the Court of Appeals distinguished commitment under RCW 71.09 from the sea change which has taken place in the United States Supreme Court since the Court began analyzing juvenile culpability and responsibility. App. at 11. The United States Supreme Court recognizes "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including in "parts of the brain involved in behavior control." *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825 (2010). "[I]mmaturity, impetuosity, and failure to appreciate risks and consequences" are the "hallmark features" of youth. *Miller v. Alabama*, --- U.S. ---, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012).

This Court has acknowledged the same principles. Washington recognizes the particular vulnerabilities of youth including "impulsivity, poor judgment, and susceptibility to outside influence" may be considered at sentencing for persons who have been convicted of crimes they committed as young adults. *State v. O'Dell*, 183 Wn.2d 680, 691, 358 P.3d 359 (2015). Accordingly, youthfulness is a mitigating factor at sentencing, sometimes even for persons who were no longer juvenile offenders when they committed their crimes. *See O'Dell*, 183 Wn.2d at 693.

The conclusions about juvenile offending is especially germane for juvenile sex offenders. The overwhelming evidence demonstrates juvenile offenders do not commit sexually violent offenses as adults. Sue Righthand & Carlann Welch, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature*, 30 (March 2001).[3] The psychosocial deficits of adolescence, including poor impulse control gradually resolve upon maturation. *United States v. Juvenile Male*, 590 F.3d 924, 940 (9th Cir. 2010), *vacated as moot*, 131 S. Ct. 2860, 180 L.Ed.2d 811 (2011). Most juveniles who commit sexual offenses as adolescents cease doing so as adults. *Id.* It is "the exception rather than the rule" for an adolescent sex offender to become an adult sex offender. Ian A. Nisbet, et al., *A Prospective Longitudinal Study of Sexual Recidivism Among Adolescent Offenders 16 Sexual Abuse: A Journal of Research and Treatment* 223, 232 (2004).

These findings are confirmed by the facts of Mr. Belcher's life. Mr. Belcher only engaged in sexually violent behavior as a child. CP 856 (Finding of Fact 27). He was 13 and 15 years old when he committed his sexual offenses. CP 848. The only allegations of other sexual assaults occurred when he was a child. CP 848-49. There are no instances of him

[3] Available at http://www.ncjrs.gov/pdffiles1/ojjdp/184739.pdf.

acting in a sexually violent way as an adult. 5A RP 898. To the contrary, all of his sexual activity since he became an adult is described by the State as consensual. *Id.*

Again, in its motion to publish, the State acknowledges the conflict that exists upon this issue and the need for clarity. Respondent's Motion to Publish at 2. It is Mr. Belcher's position that the State violates the 14th Amendment when it seeks to commit a person whose sexually violent acts occurred when they were a juvenile, where no further sexually violent acts occurred after that person has become an adult. *Kansas v. Hendricks*, 521 U.S. 346, 356-57, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Substantive due process requires that indefinite civil commitment be premised upon a showing of sustained impairment of volitional control. Children are constitutionally different from adults and lack the ability to exercise volitional control, even when they commit serious crimes. *Miller*, 132 S. Ct. at 2464. An indefinite commitment based upon conduct which occurred when a person was a child is therefore insufficient to satisfy principles of substantive due process. This is a significant question of substantive due process and involves an issue of substantial public interest. RAP 13.4(b) is satisfied and Mr. Belcher requests this Court accept review of this important issue.

2. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER THE DUE PROCESS REQUIREMENT OF FINDING A FUTURE LIKELIHOOD TO COMMIT A SEXUALLY VIOLENT OFFENSE IS SATISFIED WHERE THERE IS NO RELIABLE ACTUARIAL EVIDENCE SUPPORTING THE EXPERT'S OPINION AND THE ONLY EVIDENCE USED TO SUPPORT THIS CONCLUSION OCCURRED WHEN THE PETITIONER WAS A YOUTH.

RAP 13.4(b) allows for review where an issue is a significant question of law under the state or federal constitution or when the issue is one of substantial public interest. This Court should accept the question of whether proof Mr. Belcher is likely to commit a future violent offense is sufficient to establish future likelihood to commit a sexually violent offense. As with the question of whether juvenile conduct can provide a basis for continued confinement, the State acknowledges this is a question that requires clarity. Respondent's Motion to Publish at 2. Because the Court of Appeals analyzed this issue as a question of sufficiency rather than due process, the opinion is also in conflict with opinions of this Court and the Supreme Court, including *In re Det. of Thorell* and *Kansas v. Hendricks*.

Principles of substantive due process prohibit indefinite civil commitment except in the narrowest of circumstances. *See Hendricks*, 521 U.S. at 356-57. This requirement necessitates proof "sufficient to distinguish the dangerous sexual offender whose serious mental illness,

abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *In re Det. of Thorell*, 149 Wn.2d 724, 732, 72 P.3d 708 (2003) (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). The State must establish a person not only has difficulty controlling behavior, but has "serious difficulty controlling dangerous, sexually predatory behavior." *Id.* at 735. "That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment." *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring)).

The Court of Appeals analyzed this question as a question of sufficiency. App. at 12. This Court and the United States Supreme Court have held otherwise, recognizing due process is violated where there the State is unable to establish lack of volitional control. *In re Det. of Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993) (citing *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)).

For a juvenile this is an especially important question. Unlike adults, there are no reliable scientific instruments which can measure the likelihood a youth will sexually reoffend as an adult. 2B RP 468. Tools normed for adult sexually offenders are heavily dependent upon past adult

conduct to predict future risk and have been rejected for use by courts and the scientific community. 2B RP 486; *See also In re J.P.*, 339 N.J. Super. 443, 461, 772 A.2d 54 (N.J. Super. Ct. App. Div. 2001).

While this issue has not been addressed in Washington, New Jersey has analyzed a similar question. *In Re J.P.* addresses the use of actuarial instruments for sex offenders whose offenses were committed when they were children. *J.P.*, 339 N.J. Super. at 446. In *J.P.*, the State utilized tools designed for adults to determine likelihood to reoffend. *Id.* at 450. Although the trial court found these tools reliable, the appellate court found that there was reason to doubt the effectiveness of actuarial tools as applied to youthful offenders. *Id.* at 455. RAP 13.4(b) justifies review to address whether it was a violation of Mr. Belcher's due process to not adopt the same standard for him.

In answering this question, it cannot be overstated the evidence the State's expert relied upon to form his opinion of Mr. Belcher's likelihood to commit future sexually violent acts were acts which occurred when Mr. Belcher was a child. Dr. Judd did not find Mr. Belcher suffered from a paraphilic disorder. 2B RP 431-32. There is no current evidence of "rape behavior." *Id.* Instead, Dr. Judd relied on historical information for his diagnosis, examining Mr. Belcher's "history in the community as a child" and his "behavior as a juvenile at Green Hill." 2B RP 522; CP 851. Mr.

Belcher has not acted out in a sexually deviant way as an adult and there are no acts which he has committed which could be described as overt acts or acts of sexual violence. All of his sexual conduct as an adult have been described by the State as consensual. 5A RP 898.

The Court of Appeals relied upon the actuarial evidence to find the State had satisfied its burden, but this Court should recognize the inadequacy of actuarial evidence for juveniles. App. at 12. Social science does not support the theory that juvenile sex offending supports a finding of adult sex offending. *Juvenile Male*, 590 F.2d at 940. The only tools the State utilized to prove Mr. Belcher is likely to commit a violent sexual offense were tools designed to determine likelihood to commit a violent offense, which the State then argued could include sex offenses. 3 RP 675. The State utilized an instrument called the Violence Risk Appraisal Guide Revised, also known as the VRAG-R. 2B RP 466, CP 854 (Finding of Fact 18, 19). This tool is not designed to demonstrate that a person is likely to commit a new sexually violent assault. 3 RP 675. Instead, it is designed to predict whether a person is likely to commit any violent offense. 2B RP 536, 545, CP 854 (Finding of Fact 20). This tool does not establish Mr. Belcher, or any other person, is likely to commit a sexually violent offense.

Where actuarial evidence only demonstrates a future likelihood to commit a violent offense, due process is not satisfied. *Thorell*, 149 Wn.2d at 732; *see also Crane*, 534 U.S. at 413. Due process requires proof "sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Thorell*, 149 Wn.2d at 732 (citing *Crane*, 534 U.S. at 413). Proof of future likelihood to commit a future violent offense generally is insufficient to satisfy the legal definition or due process requirements of indefinite commitment.

Mr. Belcher asks this Court to accept review of whether due process is violated when the State is unable to establish a future likelihood to reoffend. Due process is not satisfied where the State relies upon tools which do not establish future likelihood to commit a sexually violent offense and acts which occurred when Mr. Belcher was a juvenile to establish his future likelihood to commit a sexually violent offense. Because this is significant question of law under the state and federal constitution and an issue is one of substantial public interest RAP 13.4(b) is satisfied. RAP 13.4(b) is also satisfied because the Court of Appeals analysis of this question as a sufficiency issue is in conflict with precedent from this Court and the United States Supreme Court.

3. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER DUE PROCESS IS SATISFIED WHEN THE STATE IS ONLY ABLE TO ESTABLISH THE PETITIONER SUFFERS FROM AN ANTI-SOCIAL PERSONALITY DISORDER.

Due process requires the State to prove the person they are seeking to detain has a serious, diagnosed mental disorder that causes him difficulty controlling his sexually violent behavior. *Thorell*, 149 Wn.2d at 736, 740-41. Again, the State acknowledges that this is a "new or unsettled question of law and modifies or clarifies an established principle of law insofar as it stands for the proposition that the combination of a diagnosis of antisocial personality with the presence of high levels of psychopathy can be an adequate basis for commitment." Respondent's Motion to Publish at 3. The Court of Appeals found the State established Mr. Belcher suffers from a mental abnormality that makes him more likely to engage in predatory acts of sexual violence if he is not confined to a secure facility. App. at 16.

Mr. Belcher seeks review of whether a diagnosis for anti-social personality disorder is sufficient to satisfy due process. Because this is a significant question of law under the state and federal constitution and an issue is one of substantial public interest RAP 13.4(b) is satisfied.

Although states have considerable leeway to define when a mental abnormality or personality disorder makes an individual eligible for

commitment as a sexually violent person, the diagnosis must be medically justified. See *Crane*, 534 U.S. at 413; *Hendricks*, 521 U.S. at 358; *Thorell*, 149 Wn.2d at 732, 740-41. New York has found that without other clear evidence of mental abnormality, "evidence that a respondent suffers from anti-social personality disorder cannot be used to support a finding that he has a mental abnormality." *State v. Donald DD.*, 24 N.Y.3d 174, 177, 21 N.E.3d 239, 996 N.Y.S.2d 610 (2014). New York's commitment law is similar to Washington's as it requires a finding that the detained sex offender suffers from "a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility." N.Y. MHY. LAW § 10.03.

In *Donald DD.*, the court found anti-social personality disorder "simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case." *Donald DD.*, 24 N.Y.3d at 190. The diagnosis of anti-social personality disorder is fatally "[in]sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but

typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413.

The State's expert here agreed anti-social personality disorder is generally insufficient for commitment. 3 RP 584. Because he could not justify this diagnosis for commitment, the expert argued Mr. Belcher's personality disorder was actually something else. 2A RP 358-59, 377, 3 RP 565. Dr. Judd described a classification not found in the scientific literature, describing the mental abnormality as anti-social personality disorder with a "high level" of psychopathy. 2B RP 464, CP 851 (Finding of Fact 12).

Dr. Judd based this diagnosis upon a diagnostic instrument known as the PCL-R. 2b RP 464. This tool is designed to rate a person's psychopathy or anti-social tendencies. David M. Freedman, *False Prediction of Future Dangerousness: Error rates and Psychopathy Checklist-Revised*, 1 Journal of the American Academy of Psychiatry and Law 29, 89-95 (March, 2001). The author of this tool argues the psychopathy and anti-social personality disorder should be considered as distinct diagnoses, which is in contrast to the DSM-5, which categorizes these personality disorders as the same thing. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, 5th ed.* 659 (2013) (Hereafter DSM-5). The DSM-5 finds anti-social

personality disorder and psychopathy have essentially the same "pattern," describing them as synonyms of each other. *Id.* at 660.

More important, a growing body of literature demonstrates that evidence of psychopathy is not a good or consistent predictor of sexual recidivism. 5A RP 950. While a person diagnosed with an anti-social personality disorder with a high PCL-R score may engage in more frequent offending, it does not mean that the person is likely to engage in sexual violence. 5A RP 970-71, *see also*, Stephen Porter, et al, *Crime profiles and conditional release performance of psychopathic and non-psychopathic sexual offenders*, 14 Legal and Criminological Psychology 109–18 (2009). A high PCL-R score is simply not an indicator of whether a person is likely to commit a future sexually violent offense.

This is why Dr. Judd was only able to conclude Mr. Belcher was likely to engage in future violent offenses, which might include sexually violent offenses. 2B RP 536, 546. The Court cannot ignore this important distinction. Likelihood to commit a new offense is not the same as likelihood to commit a sexually violent offense. Especially when social science has established that very few youthful sex offenders like Mr. Belcher commit sex offenses as an adult, this Court cannot be satisfied that the State established a mental abnormality which satisfies RCW 71.09.

The Court of Appeals found the State had satisfied the due process requirement of proving Mr. Belcher had a mental abnormality. Review should be granted because this is a significant question of law under the state and federal constitution and an issue of substantial public interest. RAP 13.4(b). A finding of anti-social personality disorder with a high level of psychopathy is insufficient to establish a mental abnormality and violates due process. The failure of the State to establish a constitutional basis for Mr. Belcher's continued confinement warrants review by this Court and Mr. Belcher requests this Court accept review on this issue.

F. CONCLUSION

"There is currently no published case that addresses any of these issues." Respondent's Motion to Publish at 3. All three of the issue meet the standards for this Court to accept review. Based on the foregoing, Mr. Belcher respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 5th day of December 2016.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

October 4, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Detention of: TROY BELCHER, Petitioner.	No. 47328-3-II UNPUBLISHED OPINION

MELNICK, J. — Troy Belcher appeals the trial court's denial of his petition for unconditional release and order for continued involuntary civil commitment as a sexually violent predator (SVP) under chapter 71.09 RCW. Belcher alleges his commitment violates due process; insufficient evidence existed to prove both that Belcher was likely to commit a sexually violent offense if released and that he suffered from a mental abnormality; and the State's expert lacked the qualifications to testify. We affirm.

FACTS

I. BACKGROUND

Belcher has two juvenile adjudications finding him guilty of sex offenses committed when he was 13 and 15 years old. He committed the first offense in 1998. He approached a 13-year-old girl, L.C., who was babysitting at a park. He spoke with her, followed her to the children's home, and tried to invite himself inside. L.C. would not let him in, but gave him her phone number in an effort to make him leave. A few minutes later, L.C. answered a knock on the door and Belcher forced his way inside the house. Belcher told L.C. he wanted to have sex with her. She

refused and tried to push him away. Belcher raped L.C. Belcher stopped and left the house when one of the children interrupted the assault by knocking on the door. Belcher was subsequently found guilty in juvenile court of rape in the second degree by forcible compulsion. In November 1998, Belcher received a manifest injustice sentence and received a 65-week commitment to the Department of Juvenile Rehabilitation (DJR).

While still on supervision for his first sex offense, Belcher committed his second sexually violent offense. In April 2000, 13-year-old J.A. encountered Belcher while she walked to a friend's house. Belcher offered to show J.A. a shortcut through the woods and J.A. agreed to follow him. Belcher began to kiss J.A. when they arrived in the woods. He pulled her pants and underwear down to her knees and pushed her to the ground. Belcher then pulled down his pants, straddled her, and warned J.A. that she would not get hurt if she did not scream. J.A. managed to push Belcher off of her and run away. Belcher admitted to police that he pulled down J.A.'s pants and underwear, he "planned on having sex with her," and he "had tried to rape J.A." Clerk's Papers (CP) at 5. Belcher was found guilty in juvenile court of attempted rape in the second degree. In January 2001, Belcher received a manifest injustice sentence and was committed to DJR for 256 weeks. They placed Belcher at the Green Hill School institution.

In 2004, Belcher, then 19 years old, approached another Green Hill resident and asked about having L.C. killed or put in a coma. The State charged Belcher as an adult with solicitation to commit murder in the first degree and intimidating a witness. Belcher pleaded guilty to intimidating a witness and received a sentence of 27 months of incarceration in prison and 9 to 18 months of community custody.

In December 2007, while Belcher was still serving his sentence for his 2004 conviction, the State petitioned for Belcher's civil commitment as a SVP. Belcher was transferred to the

McNeil Island Special Commitment Center (SCC) pending his trial on the commitment petition. *In re Det. of Belcher*, noted at 173 Wn. App. 1021, 2013 WL 634536.

Belcher went to trial and the jury returned a verdict finding that the State had proven beyond a reasonable doubt that Belcher was a SVP. The trial court committed him to the SCC. Belcher appealed, and we affirmed. *Belcher*, 2013 WL 634536.

On June 29, 2012, the trial court completed its annual review. It ordered Belcher's continued custody as a SVP until further order from the court.

II. UNCONDITIONAL DISCHARGE TRIAL

In May 2014, Belcher petitioned the trial court for an unconditional discharge trial pursuant to chapter 71.09 RCW. He argued that probable cause existed under RCW 71.09.090 because he made a *prima facie* showing that he no longer met the definition of a SVP. He asserted in the petition that his qualified expert, Dr. Brian Abbott, assessed Belcher as no longer meeting the commitment criteria as a SVP because of his "positive response to continuing treatment." CP at 82. Belcher included Dr. Abbott's evaluation, Dr. Abbott's declaration, and depositions from four SCC staff members as support for his petition.

The State filed a show cause petition on whether probable cause existed to prove Belcher's condition had so changed that he no longer met the definition of a SVP, or whether release to a less restrictive alternative would be in Belcher's best interest and conditions could be imposed to protect the community. The State requested that the trial court continue Belcher's civil commitment as a SVP.

Belcher opposed the State's show cause petition, arguing that the State failed to "establish a *prima facie* case for continued confinement." CP at 304. The trial court held a show cause hearing and granted Belcher's petition for an unconditional discharge trial.

Belcher waived his right to a jury trial and the matter proceeded to a bench trial. The following facts are from the trial court's findings of fact.[1] Belcher did not contest the existence of two sexually violent convictions, nor that they constituted sexually violent offenses pursuant to RCW 71.09.020(17).[2]

Dr. Brian Judd, a certified sex offender treatment provider in Washington who specializes in the evaluation of sex offenders, gave his opinion about Belcher's current condition. Dr. Judd reviewed over 3,789 pages of documentation regarding Belcher, including behavioral management reports, observation reports, progress notes, medical records, infraction records, and observations of his participation in treatment. He also interviewed Belcher twice. Dr. Judd considered Belcher's "mental state, the crimes that had occurred and the crimes that he was responsible for, his general mental capacity and whether there existed a mental disorder. Dr. Judd evaluated [Belcher] using the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the Hare Psychopathy Checklist Revised (PCL-R), as well as the Violence Risk Appraisal Guide-Revised (VRAG-R) actuarial instrument." CP at 850. Dr. Judd no longer diagnosed Belcher with "Paraphilia NOS (Non-consent),"[3] and provisionally diagnosed him with "Specified Paraphilic Disorder (Non-consent), and Rule-Out Other Specified Paraphilic Disorder (Non-consent), In Remission." CP at 851. Dr. Judd opined that Belcher continued to meet the "criteria for Antisocial

---

[1] Belcher assigns error to specific findings of fact but does not address the findings in his argument section of his brief or why the findings are inaccurate. He occasionally cites to a finding of fact. Accordingly, we consider the findings to be verities on appeal because they remain unchallenged. *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663 (2013).

[2] The statute was amended in 2015, however, the amendments do not affect our analysis in this case.

[3] Dr. Judd previously diagnosed Belcher with "Paraphilia NOS (Non-consent)" at the first civil commitment trial. CP at 851.

Personality Disorder with the presence of high levels of psychopathy which meets the definition of a mental abnormality" as defined in RCW 71.09.020(8). CP at 851.

Dr. Judd further testified that his diagnosis of Belcher's mental abnormality, "that being 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." CP at 853. In assessing Belcher's risk of likelihood that he would commit predatory acts of sexual violence if not confined to a secure facility, Dr. Judd based his opinion on the VRAG-R. His evaluation placed Belcher at the 95.5 percentile compared to the standardized sample, which meant that "[s]eventy-six percent of individuals with similar scores recidivated at 5 years of time at risk and 87 percent recidivated at 12 years of time at risk." CP at 853. Dr. Judd also considered other factors empirically associated with risk, including Belcher's level of psychopathy. On the PCL-R, Dr. Judd gave Belcher a score of 31 out of a possible 40, which showed that Belcher had a much higher risk of both general and sexual recidivism. Dr. Judd testified that future acts of sexual violence by Belcher would also likely be predatory.

Dr. Abbott testified on Belcher's behalf. He opined that "Belcher did not suffer from any mental abnormality or personality disorder and has never suffered from one."[4] CP at 855.

[4] The trial court found that Dr. Abbott's testimony "lacked credibility" because his testimony at trial conflicted with his written testimony to the court that indicated Belcher "had previously met the definition of a [SVP], but had undergone a significant change in his mental condition through positive response to continuing participation in treatment, and consequently no longer met the definition of a SVP." CP at 855.

On February 11, 2015, the trial court concluded Belcher continued to meet the definition of a SVP and ordered Belcher to remain committed to the SCC. Belcher appeals.

ANALYSIS

I. RIGHTS AND PROCEDURES AFFORDED TO INDIVIDUALS FACING SVP COMMITMENT

"It is well settled that civil commitment is a significant deprivation of liberty, and thus individuals facing SVP commitment are entitled to due process of law. *In re Det. of Morgan*, 180 Wn.2d 312, 320, 330 P.3d 774 (2014). The "'process due'" to a person subject to a SVP petition is the procedure allocated by "'the statute which authorizes civil incarceration.'" *In re Det. of Strand*, 167 Wn.2d 180, 187, 217 P.3d 1159 (2009) (quoting *In re Det. of Martin*, 163 Wn.2d 501, 511, 182 P.3d 951 (2008)). Individuals facing commitment have, among other rights, the right to a trial, the right to an expert to conduct an evaluation on his or her behalf, and to the right to the assistance of appointed counsel. RCW 71.09.050.

When the Washington Supreme Court "upheld the SVP civil commitment scheme against a substantive due process challenge," it noted the legislature's "'honest recognition of the difficulties inherent in treating those afflicted with the mental abnormalities causing the sex predator condition.'" *Morgan*, 180 Wn.2d at 319 (quoting *In re Pers. Restraint of Young*, 122 Wn.2d 1, 31, 857 P.2d 989 (1993)). Yet, the court reasoned that the "legislature found that 'the exceptional risks posed by sexual predators, and the seemingly intractable nature of their illness, necessitates a specially tailored civil commitment approach.'" *Morgan*, 180 Wn.2d at 319 (quoting *Young*, 122 Wn.2d at 10). The court emphasized that "SVP proceedings focus not on 'the criminal culpability of . . . past actions,' but on 'treating [SVPs] for a current mental abnormality, and protecting society from the sexually violent acts associated with that abnormality.'" *Morgan*, 180 Wn.2d at 319-20 (quoting *Young*, 122 Wn.2d at 21).

Commitments are indefinite, persisting "'until such time as the person's mental abnormality or personality disorder has so changed that the person is safe either (a) to be at large, or (b) to be released to a less restrictive alternative as set forth in RCW 71.09.092.'" *In re Det. of Petersen*, 138 Wn.2d 70, 78, 980 P.2d 1204 (1999) (quoting former RCW 71.09.060(1) (1998)). Once a person has been committed as a SVP, the State is required to conduct an annual review to determine whether the individual continues to meet the definition of a SVP. RCW 71.09.070. A person found to be an SVP has two ways to obtain release from the commitment. First, the State may authorize a detainee to file a petition for either unconditional release or transfer to a less restrictive alternative (LRA) if the detainee has "so changed" that he either no longer meets the definition of SVP or that a LRA is in the individual's best interest. RCW 71.09.090(1). Second, a SVP may petition, on the basis that he has "so changed" that he no longer fits the SVP definition or that a LRA is in his best interest, for unconditional release or transfer to a LRA without the State's agreement. RCW 71.09.090(2)(a).

The trial court holds a show cause hearing to determine whether a hearing shall be held. RCW 71.09.090(2)(a). At the show cause hearing, the State bears the burden of establishing by prima facie evidence "that the committed person continues to meet the definition of a sexually violent predator and that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community." RCW 71.09.090(2)(b).

The trial court must set a hearing under two circumstances. First, when the State fails to meet its burden. RCW 71.09.090(c)(i). Second, when there is probable cause to believe the petitioner's condition has changed and he or she no longer meets the definition of a SVP or a LRA would be in the petitioner's best interest and protection of the community can be accomplished with conditions. RCW 71.09.090(2)(c)(ii). To order a new trial, a licensed professional must

have current evidence that the SVP has had an identified physiological change or the SVP's changed mental condition is a positive response to continuing participation in treatment. RCW 71.09.090(4)(b).

At the hearing, the State must prove beyond a reasonable doubt that the SVP continues to meet the definition of a SVP. RCW 71.09.060(1). A SVP is "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). A sexually violent offense is defined as

> an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion . . . or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

RCW 71.09.020(17).

II. DUE PROCESS VIOLATIONS

Belcher argues that there were numerous violations of his due process rights. First, he claims the State cannot use his juvenile adjudications as predicate offenses for his SVP commitment. Second, he claims the diagnostic tools used by the State's expert that predicted he was likely to commit a sexually violent offense violated his right to due process. Finally, Belcher claims that his commitment, based on the diagnosis of antisocial personality disorder alone, is insufficient to establish a mental abnormality. We disagree.

Belcher does not support his due process violation claims with any argument or analysis as to how or why they are unconstitutional. He does not argue what standard of review we should utilize in our analysis. RAP 10.3(a)(6). We generally consider an assignment of error waived if

the party fails to present argument or authority on the issue in its brief. *State v. Harris*, 164 Wn. App. 377, 389 n.7, 263 P.3d 1276 (2011). In addition, "Where a petitioner makes a due process challenge, '[N]aked castings into the constitutional seas are not sufficient to command judicial consideration and discussion.'" *State v. Johnson*, 179 Wn.2d 534, 558, 315 P.3d 1090 (quoting *State v. Blilie*, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997) (internal quotations removed)), *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014). Belcher's arguments are better characterized as evidentiary challenges, and we address them as such.

A. JUVENILE CONVICTIONS

Belcher argues that the involuntary commitment of individuals for sexually violent acts that occurred when they were juveniles is a violation of substantive due process.[5] "[S]ubstantive due process seems to have been gradually adopted as the shorthand for individual rights which are not clearly textual." Stephen Kanter, *The Griswold Diagrams: Toward A Unified Theory of Constitutional Rights*, 28 Cardozo L. Rev. 623, 669 n.170 (2006). We disagree.

At trial, Belcher did not challenge whether his juvenile adjudications constituted sexually violent offenses pursuant to RCW 71.09.020(17). We need not consider issues that are raised for the first time on appeal unless they are manifest constitutional errors. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a). "Accordingly, an appellant may raise an error for the first time on appeal if he or she demonstrates (1) that the error is manifest and (2) that the error is truly of constitutional dimension." *In re Det. of Brown*, 154 Wn. App. 116, 121, 225 P.3d 1028 (2010). A manifest constitutional error is subject to a constitutional harmless error analysis.

[5] Belcher asserts a due process violation, but he is really challenging the constitutionality of chapter 71.09 RCW and the use of juvenile adjudications as predicate offenses for a SVP commitment.

Brown, 154 Wn. App. at 121. Here, it is clear that Belcher's challenge of a due process violation may constitute manifest constitutional error.

Substantive due process "requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Foucha v. Louisiana*, 504 U.S. 71, 79, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The constitutionality of the State's "police power" to subject certain citizens to involuntary confinement is firmly settled. *Young*, 122 Wn.2d at 27 (quoting *Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)); *see also United States v. Salerno*, 481 U.S. 739, 748-49, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("the government may detain mentally unstable individuals who present a danger to the public."). Washington's "statutory scheme" that allows ongoing confinement of SVPs "comports with substantive due process" because the annual review process serves to identify those detainees who are no longer mentally ill and dangerous. *State v. McCuistion*, 174 Wn.2d 369, 388, 275 P.3d 1092 (2012).

To the extent that Belcher argues that his confinement is unconstitutional because it is based on sexually violent offenses he committed as a juvenile, his challenge is incredibly vague. He seems to equate his detention as a SVP with that of juveniles who are imprisoned or virtually imprisoned for life. However, the criminal cases to which Belcher cites are distinguishable because a SVP commitment is a civil proceeding and the "SVP statute is resolutely civil." *In Det. of Ticeson*, 159 Wn. App. 374, 381, 246 P.3d 550 (2011). Further, the commitment under the SVP statutory scheme will only last as long as the SVP continues to meet the criteria for commitment. A SVP may request show cause hearings for release or a LRA. RCW 71.09.090(2)(a). There are also mandatory annual reviews of an SVP's confinement. RCW 71.09.070. The United States

Supreme Court has upheld SVP involuntary commitment statutes on substantive due process grounds if

> (1) "the confinement takes place pursuant to proper procedures and evidentiary standards," (2) there is a finding of "dangerousness either to one's self or to others," and (3) proof of dangerousness is "coupled . . . with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"

Kansas v. Crane, 534 U.S. 407, 409-10, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)). Washington is in accord. *In re Det. of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003).

In addition, juvenile adjudications have been upheld as proper predicate offenses for commitment under the SVP statutes, as the legislature intended. *In re Det. of Anderson*, 185 Wn.2d 79, 89, 368 P.3d 162 (2016). RCW 71.09.020(17) defines what constitutes a sexually violent offense. There is no exclusion for juvenile offenses.

In support of his argument, Belcher primarily relies on a series of United States Supreme Court cases that addressed how juvenile sentences may violate the Eighth Amendment's ban on cruel and unusual punishment. *Roper v. Simmons*, 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). These cases all involved criminal sentences, i.e. capital punishment or life without parole. They also discussed the general characteristics of juvenile crimes and those who commit them.

These cases are distinguishable from the present situation. A SVP must have not only a prior charge or conviction for a crime of sexual violence; a SVP must also currently suffer 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). Therefore, Belcher's argument fails.

B. LIKELIHOOD TO REOFFEND

Belcher argues that his due process rights were violated because the State presented insufficient evidence to establish that he was more likely than not to commit a sexually violent offense if not confined. Belcher argues the State's expert based his assessment of Belcher's risk on an assessment not intended for analysis of juvenile offenses. Belcher couches this argument as a constitutional violation when it is actually a sufficiency of the evidence argument. And sufficient evidence exists to support his continued commitment.

The same standard is utilized in sufficiency of the evidence challenges in SVP commitment proceedings as is used in criminal cases. *Thorell*, 149 Wn.2d at 744. Sufficient evidence exists if, when viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *Hosier*, 157 Wn.2d at 8. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Deference is given to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004).

On appeal from a bench trial, our review is limited to determining whether substantial evidence supports the trial court's findings of fact, and whether the findings support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Because Belcher has not assigned error to the trial court's findings of fact, they are considered verities on appeal. *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663 (2013). We review challenges to

a trial court's conclusions of law de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

Belcher challenges Dr. Judd's opinion regarding Belcher's risk of recidivism and Dr. Judd's use of the VRAG-R. He argues this tool only demonstrated Belcher's likelihood of committing a future violent offense and not a sexually violent one. We disagree.

Actuarial instruments used in SVP cases appear to be generally accepted by the relevant scientific community. *In re Det. of Strauss*, 106 Wn. App. 1, 8-9, 20 P.3d 1022 (2001), *aff'd sub nom.*, *Thorell*, 149 Wn.2d 724. "[P]sychologists who are knowledgeable about assessing the risk of recidivism among sex offenders generally accept the actuarial instruments used in this case." *Strauss*, 106 Wn. App. at 8. In *Strauss*, the defense's expert "admitted using actuarial instruments such as the VRAG in sexual predator cases." 106 Wn. App. at 8. Further, "[s]cientific literature and secondary legal authority also support the view that the relevant scientific community generally accepts the three actuarial instruments in question as part of an overall risk assessment."[6] *Strauss*, 106 Wn. App. at 8.

Even though Dr. Judd used the VRAG-R, he did not make his assessment of Belcher solely on this tool. The trial court recognized the fact it was merely one piece of Dr. Judd's clinical evaluation. The trial court also found that Dr. Judd relied on extensive records that included behavioral management reports, observation reports, progress notes, medical records, infraction records, observations of Belcher's participation in treatment, as well as two interviews with Belcher.

[6] The three actuarial instruments used were the Minnesota Sex Offender Screening Tool (MnSOST), the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR), and the VRAG. *Strauss*, 106 Wn. App. at 4.

Further, the trial court found that Dr. Judd's testimony expressed that the use of the VRAG-R is accepted in the relevant scientific community and that it did not apply solely to violent recidivism, but applied to sexually violent recidivism as well. Dr. Judd also utilized the PCL-R and the Hare Psychopathy checklist. Dr. Judd utilized all of the above actuarial tools and information in arriving at his professional assessment of Belcher. This information, contained in the trial court's findings of fact, supported its conclusion of law that Belcher was likely to engage in predatory acts of sexual violence if he was not confined in a secure facility. Therefore, when viewing the evidence in the light most favorable to the State, a rational trier of fact could find that Belcher continued to meet the definition of a SVP beyond a reasonable doubt.

C. MENTAL ABNORMALITY

Belcher argues that the trial court violated his right to due process because the State failed to present sufficient evidence of Belcher's mental abnormality to meet the statutory definition of a SVP when Dr. Judd diagnosed him with antisocial personality disorder with a high level of psychopathy. Again, Belcher attempts to couch a sufficiency argument as a due process violation. We disagree.

As previously stated, our review is limited to whether the trial court's findings support its conclusions of law. *Homan*, 181 Wn.2d at 105-06. We review challenges to a trial court's conclusions of law de novo. *Gatewood*, 163 Wn.2d at 539.

To commit an individual as a SVP, the State must prove beyond a reasonable doubt that the person 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) (emphasis added). "'[M]ental abnormality' and 'personality disorder' are two distinct means of establishing the

mental illness element in SVP cases." *In re Det. of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006). RCW 71.09.020(8) defines mental abnormality as "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." Personality disorder is defined by the statute as:

> an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.

RCW 71.09.020(9).

"'A diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a [factfinder] to find a serious lack of control.'" *In re Det. of Post*, 145 Wn. App. 728, 755, 187 P.3d 803 (2008) (quoting *Thorell*, 149 Wn.2d at 761-62), *aff'd*, 170 Wn.2d 302, 241 P.3d 1234 (2010). However, such a diagnosis coupled "with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a [factfinder] to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP." *Thorell*, 149 Wn.2d at 762.

Belcher challenges Dr. Judd's diagnosis of antisocial personality with the presence of high levels of psychopathy as inadequate to satisfy the statute. However, the Washington Supreme Court rejected this argument in *Young*, 122 Wn.2d 1. The court noted that "antisocial personality disorder" is a recognized personality disorder defined by the DSM-III-R. *Young*, 122 Wn.2d at 37 n.12.

Dr. Judd opined that his diagnosis of Belcher's condition "meets the definition of a 'mental abnormality'" as defined in the statute. CP at 851. Dr. Judd further testified that Belcher's mental

abnormality was "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." CP at 853. Even though he testified that an antisocial personality disorder alone would not prove a mental abnormality, he continued to testify that Belcher's condition did meet the standard as defined in the statute particularly because of Belcher's level of psychopathy, which is a mental disorder as defined by the DSM-5.[7] Therefore, the trial court's conclusion of law that Belcher suffered from a mental abnormality was supported by its findings of fact.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence to persuade a fair minded rational person beyond a reasonable doubt that Belcher suffers from a mental abnormality that makes him more likely to engage in predatory acts of sexual violence if he is not confined to a secure facility.

III. SUFFICIENCY OF THE EVIDENCE

Belcher argues for the first time on appeal that even if antisocial personality disorder is a mental abnormality, the State presented insufficient evidence to prove it. He contends Dr. Judd lacked the necessary qualifications to provide the diagnosis. We reject this challenge.

Because Belcher did not object at trial, he has not properly preserved the issue for appeal, and we do not consider it. Issues raised for the first time on appeal need not be considered unless they are manifest constitutional errors. *Kirkman*, 159 Wn.2d at 926; RAP 2.5(a). Washington courts have "'steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error

[7] Antisocial personality disorder satisfies the definition of a personality disorder *In re Det. of Sease*, 149 Wn. App. 66, 79-80, 201 P.3d 1078 (2009). An individual may also be committed as a SVP under the statute if his personality disorder makes him "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

during trial and later, for the first time, urge objections thereto on appeal.'" *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985) (quoting *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)).

The rationale for this rule has been explained as follows:

> "[T]he trial court should be given an opportunity to correct errors and omissions at the trial level, and that it was the obligation of the parties to draw the trial court's attention to errors, issues, and theories, or be foreclosed from relying upon them on appeal.
>
> . . . .
>
> [Additionally,] opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal."

In re Det. of Audett, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006) (quoting 2A Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.5, cmts. at 192 (6th ed. 2004)).

Belcher does not argue that RAP 2.5(a)(3) applies in this situation. Instead, Belcher claims that the evidence is legally insufficient because the trial court relied on the testimony and diagnosis of a psychologist who is not licensed as a forensic psychologist. In fact, Belcher cites no authority for the proposition that such a licensing scheme exists, and the State flatly rejects it. Ch. 18.83 RCW; Ch. 246-924 WAC. We reject Belcher's attempt to recast his evidentiary contention as a manifest constitutional error. *See Post*, 145 Wn. App. at 751 n.13.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Lee, P.J.

Sutton, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 47328-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Sarah Sappington, AAG [sarahs@atg.wa.gov]
[crjsvpef@atg.wa.gov]
Office of the Attorney General – Criminal Justice Division

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 5, 2016

WASHINGTON APPELLATE PROJECT

December 05, 2016 - 3:54 PM

Transmittal Letter

Document Uploaded: 3-473283-Petition for Review.pdf

Case Name: DETENTION OF TROY BELCHER
Court of Appeals Case Number: 47328-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

■ Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

crjsvpef@atg.wa.gov
sarahs@atg.wa.gov