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Division I
State of Washington

NO. 72392-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

IN RE THE DETENTION OF

GREGORY JAEGER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly exercised its discretion in denying Jaeger's motions for mistrial in a case where prospective jurors' remarks during voir dire and a juror's involuntary reaction during opening statements were insignificant in light of the evidence presented at trial, which was graphic, highly disturbing, and overwhelmingly proved that Jaeger is a sexually violent predator.

2. Whether the trial court properly exercised its discretion in making evidentiary rulings when the rulings in question comport with the applicable evidence rules, statutes, and case law from this Court.

3. Whether Jaeger's claims of prosecutorial misconduct fail because the prosecutor's rebuttal arguments were based on the evidence and were a fair reply to defense counsel's closing arguments.

4. Whether Jaeger's civil commitment as a sexually violent predator comports with due process because it is based on Jaeger's current mental condition and dangerousness.

5. Whether this Court is bound by controlling precedent holding that the established standards for finding that a person is a sexually violent predator are constitutional.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

In 2006, Gregory Jaeger pleaded guilty to one count of child molestation in the first degree and one count of attempted child molestation in the first degree for offenses he committed against two young boys on September 5, 2005 at the Family Fun Center in Tukwila when he was 16 years old. CP 965-67. As part of the plea agreement, Jaeger was retained in juvenile court[1] and received a manifest injustice disposition placing him in the custody of the Juvenile Rehabilitation Administration (JRA) until the age of 21. CP 967. Shortly before Jaeger was to be released, the State filed a petition to civilly commit him as a sexually violent predator under chapter 71.09 RCW. CP 1-2. Dr. Harry Hoberman, Ph.D, conducted an extensive evaluation, diagnosed Jaeger with multiple paraphilias and other mental disorders, and concluded that Jaeger meets the definition of a sexually violent predator. CP 991-1043.

Trial proceedings took place in 2014 before the Honorable Bruce Heller. During the pretrial hearings, the parties litigated the issue of whether Jaeger would be permitted to present evidence

[1] If Jaeger had been prosecuted for rape of a child in the first degree, which more accurately describes his conduct, he would have come under the exclusive jurisdiction of the superior court under the "auto-decline" statute. RCW 13.04.030(1)(e)(v)(C).

regarding the Community Protection Program (CPP)[2] in addition to other evidence of Jaeger's release plan. The parties submitted substantial briefing to the trial court on various aspects of this issue. CP 613-21, 788-813, 1078-80, 1091-1340. But because RCW 71.09.060(1) expressly prohibits introducing evidence regarding the CPP in SVP commitment trials, the trial court's inquiry focused on whether Jaeger could demonstrate that the CPP was an option that "would exist" for Jaeger upon release in accordance with RCW 71.09.060(1) and RCW 71.09.015. *See, e.g.,* RP (3/28/14) 238-43 (trial court asks how testimony from an advocate for the developmentally disabled bears on the meaning of "would exist" in RCW 71.09.060(1)).[3]

After considering the evidence presented and the arguments of counsel, the trial court found that Jaeger was only a "potential candidate" for the CPP and that his prospects for acceptance were

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[2] The CPP is a state program for certain criminal offenders with developmental disabilities. *See* RCW 71A.12.200 *et seq.* The CPP statute grants DSHS the authority to reject an application for the CPP because the individual cannot be managed successfully within the program with reasonably available safeguards. RCW 71A.12.230(3)(b). The statute also expressly provides that there is no right to participate in the CPP, and no right to appeal a decision rejecting an application for the CPP. RCW 71A.12.240(5).

[3] As will be discussed in detail below, the trial court focused on this particular issue because, in accordance with this Court's decision in In re Detention of Mulkins, 157 Wn. App. 400, 237 P.3d 342 (2010), review denied, 170 Wn.2d 1032 (2011), unless the CPP is an option that "would exist," there is no standing to challenge the portion of RCW 71.09.060(1) that excludes evidence of the CPP.

speculative. RP (4/4/14) 393-94. Accordingly, the trial court ruled that evidence regarding the CPP would not be admitted because the CPP was not an option that "would exist" for Jaeger, and that Jaeger did not have standing to challenge the constitutionality of the statute prohibiting evidence of the CPP in SVP trials. RP (4/4/14) 395-96.

Jaeger's jury trial took place in July 2014. The trial lasted three weeks, and the jury heard testimony from 15 witnesses. After deliberating for about three days, the jury found beyond a reasonable doubt that Jaeger is a sexually violent predator. CP 928. The trial court entered an order of commitment. CP 956-57. Jaeger now appeals. CP 962-64.

2. SUBSTANTIVE FACTS

Ronald and Cathy Jaeger adopted Gregory Jaeger when he was 11 months old.[4] Jaeger's biological mother had a low IQ and used alcohol during her pregnancy, and there were indications that she was neglectful. RP (7/16/14) 56-62. Jaeger exhibited developmental delays as an infant, and as he grew older, he had poor motor skills and required physical and speech therapy, and he was in special education classes. RP (7/16/14) 63-64, 68, 75.

[4] The Jaegers have two other adopted children, both of whom are older than Gregory Jaeger. RP (7/16/14) 53.

From an early age, Jaeger exhibited serious behavioral problems, including disturbing sexual behavior. Jaeger exhibited rage and aggression at school and at home, including violence against his mother, and he began manifesting sexual attraction to young boys when he was about 5 years old. RP (7/14/14) 38-39, 43. Jaeger performed fellatio on his younger nephew when they were children. RP (7/17/14 a.m.) 39. Jaeger also began masturbating with soiled diapers when he was in elementary school. RP (7/14/14) 44-45. Jaeger was treated by numerous mental health professionals and was given a variety of medications over the years, and he was hospitalized repeatedly for psychiatric care between the ages of 10 and 16. RP (7/14/14) 36, 42. These interventions did not curb Jaeger's increasingly alarming behavior.

Jaeger's parents became aware of Jaeger's diaper fetish when he was still a child, when a neighbor caught him digging in the garbage can for soiled diapers. RP (7/16/14) 76. On another occasion, Jaeger got a diaper out of the trash in a family restroom when he was at the mall with his mother. RP (7/16/14) 76-77. Jaeger got infections from the feces in the diapers, including an infection in his nostril from putting a soiled diaper on his face. RP (7/16/14) 77-78. Jaeger's parents bought him clean diapers, but he

preferred soiled ones. RP (7/16/14) 79-81. By the time Jaeger was 16, he was masturbating "either with diapers or to images of little boys, as often as two or three times a day." RP (7/14/14) 45.

For Jaeger's 16th birthday, his parents took him and some friends to the Family Fun Center in Tukwila. When Jaeger ran out of tokens for the arcade games, he left the others and went to a family restroom to look for a soiled diaper with which to masturbate. Jaeger found a diaper in the trash and rubbed it on his penis, but he found it unsatisfying. Jaeger then began having "obsessive thoughts" about having sex with a child. RP (7/7/14) 118-19.

Jaeger tried to convince a small boy to come with him to the men's restroom, but the boy refused. RP (7/7/14) 122. Jaeger approached a second boy inside the men's restroom and lured him into a stall. Jaeger tried to pull the boy's pants down, but he had trouble with the buttons. The boy pushed Jaeger away and left. RP (7/7/14) 122-25. Jaeger then saw a third boy's small feet under a stall door and heard the boy urinating. Jaeger crawled under the door of the stall, pulled the boy's pants down, and put his mouth on the boy's penis. RP (7/7/14) 125-28. Jaeger then bit the boy's penis, which Jaeger claimed was accidental. RP (7/7/14) 128. Whether accidental or not, Jaeger admitted that he was aroused

when he bit the boy's penis. RP (7/21/14) 12. Jaeger also admitted that he did not intend to let the boy leave the bathroom stall "until [his] need was met." RP (7/7/14) 141.

When the boy cried out in pain from being bitten, a man in the restroom said, "What are you guys doing in there?" RP (7/7/14) 129. At that point, the boy ran out and told his mother what had happened. The man in the restroom detained Jaeger until the police came. RP (7/7/14) 129-30. Jaeger gave a post-arrest statement to the police and confessed to what he had done. RP (7/7/14) 130.

While the juvenile court case was pending, Jaeger was evaluated at his defense attorney's request by Dr. Leslie Rawlings, Ph.D. RP (7/8/14) 102. Jaeger told Dr. Rawlings that he had begun masturbating with diapers when he was 6 or 7 years old, and explained that although his parents bought clean diapers for him, he preferred soiled ones. RP (7/8/14) 129-30. Jaeger said he also viewed pornography involving prepubescent boys, and that his "preferred victim age was about 7 or 8" because he liked the way boys look at that age. RP (7/8/14) 125-26, 132. Dr. Rawlings diagnosed Jaeger with pedophilia, among other mental disorders. RP (7/14/14) 116.

After pleading guilty, Jaeger was sent to Maple Lane School, where he received a large variety and quantity of services, education and treatment. RP (7/7/14) 104-09. Nonetheless, Jaeger continued to have serious behavioral and sexual problems throughout his years at Maple Lane.[5] In addition to the diaper fetish, which did not remit, Jaeger began harming himself while masturbating. Jaeger inserted objects into his urethra, including a lollipop stick, the temple piece of his eyeglasses, shampoo, water, fecal matter, a corn nut, and a crayon. RP (7/8/14) 22-23; RP (7/10/14) 94-96. The crayon broke inside his penis and he had to go to a hospital to have it removed. RP (7/8/14) 23; RP (7/14/14) 151-52. Jaeger also bent or "kinked" his erect penis while masturbating. RP (7/8/14) 22-23.

Jaeger's sexual behavior at JRA was not exclusively self-directed. JRA records reflect that JRA staff made several reports to Child Protective Services as a result of Jaeger acting out sexually with other Maple Lane residents. RP (7/14/14) 55. Maple Lane staff made it clear that sexual contact with other residents was not allowed, but Jaeger did it anyway in spite of negative consequences. RP (7/8/14) 29. Jaeger also continued to have a

[5] Jaeger was frequently verbally abusive to Maple Lane staff, and this behavior continued when he was transferred to the SCC. RP (7/16/14) 23-25.

strong sexual interest in prepubescent boys, and he was sexually aroused when visitors brought young children in diapers. RP (7/7/14) 144, 148-53; RP (7/8/14) 7. Jaeger told his JRA case manager, Paul Luttrell,[6] that his preferred victim would be in the "6-year-old time frame." RP (7/7/14) 114. Just before Jaeger left JRA, he told treatment coordinator Maureen Black that he wanted to be civilly committed as a sexually violent predator because "he was concerned he would harm children in the community and he was concerned about harming himself." RP (7/10/14) 113-14.

Jaeger's problematic behavior continued when he was transferred to the Special Commitment Center (SCC) just before his 21st birthday. Jaeger continued to bend and "kink" his erect penis while masturbating, which caused such damage to his penis that it had to be surgically repaired. RP (7/14/14) 152-54. Sexual contact among residents at the SCC is strictly prohibited, but Jaeger engaged in sexual contact with several residents anyway. RP (7/9/14) 119-22. Jaeger was not allowed to have diapers, but he went into the closet where the used adult diapers were stored for disposal and used them to masturbate. RP (7/9/14) 130. At Jaeger's request, he was given injections of Depo-Lupron in an

[6] Luttrell had a "close collaborative bond" with Jaeger and knew him better than anyone during Jaeger's time at JRA. RP (7/7/14) 103-04.

attempt to curb his sex drive, but he still had high levels of arousal and sexual fantasies about children while on the medication. RP (7/14/14) 155-59.

After considering all of the available information, Dr. Hoberman diagnosed Jaeger with intellectual disability,[7] attention deficit hyperactivity disorder, borderline personality disorder, antisocial personality disorder, pedophilic disorder, fetishistic disorder, masochistic disorder, coprophilic and urophilic disorders, and hypersexuality. RP (7/14/14) 60-61, 70, 84-85, 94-99, 109-10, 118-20; RP (7/15/14) 15, 18-19, 20. Dr. Hoberman also concluded that Jaeger presents a high risk to commit predatory acts of sexual violence against children if not confined due to his mental abnormalities, personality disorders, and numerous risk factors. RP (7/15/14) 28-33, 36-45.

Jaeger presented testimony from two expert witnesses: Dr. Denise Kellaher, M.D., and Dr. Natalie Novick Brown, Ph.D. Dr. Kellaher agreed with Dr. Hoberman that Jaeger has a diaper fetish, but she opined that Jaeger's other behaviors were due to

[7] Dr. Hoberman did not diagnose fetal alcohol spectrum disorder because he did not believe there was enough evidence for a conclusive diagnosis, but he agreed it was a possibility. RP (7/14/14) 84-85.

autism spectrum disorder[8] and side effects from having been given the wrong medication. RP (7/21/14) 98, 120, 147-48. Dr. Brown also agreed that Jaeger has fetishistic disorder, but she opined that Jaeger's other behaviors are due to fetal alcohol spectrum disorder (FASD) in addition to autism. RP (7/23/14) 71.

Jaeger also testified on his own behalf. He testified that he will not reoffend against children, and that he will abide by the terms of the voluntary release plan that his legal team had put together for him. RP (7/17/14) 47-55, 96. However, Jaeger admitted that impulse control continues to be "a serious problem" for him, and that his diaper fetish is "very strong" and "more than just a habit[.]"[9] RP (7/17/14) 103, 106.

C. ARGUMENT

1. JAEGER CANNOT SHOW THAT THE JURY FOUND HIM TO BE A SEXUALLY VIOLENT PREDATOR BASED ON ANYTHING OTHER THAN THE OVERWHELMING EVIDENCE PRESENTED AT TRIAL.

Jaeger claims that he did not receive a fair trial because the jury who found him to be a sexually violent predator beyond a

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[8] Dr. Kellaher conceded that of all of the many mental health professionals who had treated or evaluated Jaeger since he was a young boy, she was the only one who had ever diagnosed him with autism. RP (7/22/14) 20-50.

[9] These admissions were starkly illustrated by the fact that Jaeger lied to the medical staff in the King County Jail and told them that he was incontinent in order to obtain diapers during the trial. RP (7/14/14) 13-16.

reasonable doubt was incurably tainted for two reasons: 1) three prospective jurors, none of whom served on the jury, expressed negative opinions about sex offenders during voir dire; and 2) a sitting juror fainted during opening statements when the prosecutor was describing Jaeger's disturbing masochistic behavior. Accordingly, Jaeger argues that the trial court should have declared a mistrial. Appellant's Opening Brief at 14-23. These arguments should be rejected.

A mistrial should be granted only if it is the only way to ensure a fair trial, and jurors are presumed to follow their instructions to decide a case based solely on the evidence produced during trial. The prospective jurors' remarks during voir dire and the juror's involuntary physiological reaction during opening statements were insignificant—indeed, they were very likely forgotten—in light of the graphic, intensely disturbing, yet highly probative evidence regarding Jaeger's sexual fetishes, fantasies, and behaviors that was presented throughout this lengthy trial. In light of the record, Jaeger cannot show that anything that happened during voir dire or opening statements was so prejudicial that a mistrial trial was necessary or that the jury was unable to follow the court's instructions, and thus, his claim fails.

Deciding whether to grant a mistrial is a matter addressed to the trial court's sound discretion. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). The trial court abuses its discretion only if no reasonable person would have ruled as the trial court did. Id. A mistrial is warranted in SVP civil commitment proceedings only if the respondent "has been so prejudiced that nothing short of a new trial can insure that [he] will be tried fairly." In re Detention of Griffith, 136 Wn. App. 480, 485, 160 P.3d 577 (2006), review denied, 161 Wn.2d 1027 (2007). Reversal is required "only when there is a substantial likelihood that the prejudice affected the verdict." Id. When reviewing a claim that a mistrial should have been granted, the appellate court gives "great deference" to the trial judge because he or she is in the best position to gauge whether irreparable prejudice has occurred. State v. Smith, 124 Wn. App. 417, 428, 102 P.3d 158 (2004), *aff'd on other grounds*, 159 Wn.2d 778, 154 P.3d 873 (2007). In addition, "[a] jury is presumed to follow jury instructions," and "[t]hat presumption will prevail until it is overcome by a showing otherwise" by the appellant. Nichols v. Lackie, 68 Wn. App. 904, 907, 795 P.2d 722 (1990), review denied, 116 Wn.2d 1024 (1991); *see also* Hizey v. Carpenter, 119 Wn.2d 251, 269-70, 830 P.2d 646 (1992).

In sum, in order to prevail on appeal, Jaeger must show that the trial court abused its discretion by not granting a mistrial because what occurred during voir dire and opening statements was so incurably prejudicial that the jurors were unable to follow the trial court's repeated instructions to decide the case based solely on the evidence produced at trial. RP (7/7/14) 3-13; CP 930-32, 949, 960-61. Jaeger cannot make this showing.

As a preliminary matter, Jaeger casts his claim in light of the constitutional trial rights afforded to criminal defendants, and he suggests that what occurred during voir dire and opening statements undermined the presumption of innocence. Appellant's Opening Brief at 14-15 (citing, *inter alia*, Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution). Washington appellate courts have repeatedly held that the trial rights expressly conferred upon criminal defendants by the state and federal constitutions do not apply in SVP proceedings, which are "resolutely civil in nature." *See* In re Detention of Reyes, 184 Wn.2d 340, 347-48, 358 P.3d 394 (2015) (reaffirming two decades of case law holding that constitutional

rights that apply in criminal cases do not apply in SVP cases); In re Detention of Law, 146 Wn. App. 28, 48-49, 204 P.3d 230 (2008), review denied, 165 Wn.2d 1028 (2009) (citing multiple cases holding that the presumption of innocence does not apply in SVP cases). This Court should not consider Jaeger's claims under constitutional standards that do not apply, as there is no presumption of innocence in SVP cases.

a. The Trial Court Properly Denied Jaeger's Motion For A Mistrial During Voir Dire.

Jaeger first identifies remarks by three prospective jurors expressing negative views of sex offenders that he claims should have merited a mistrial. Jaeger describes these remarks as "expert-like," and contends that they had the effect of depriving him of an impartial jury. Appellant's Opening Brief at 16-20. These arguments are without merit for the reasons that follow.

The first juror in question, Juror 61, was a veteran deputy sheriff for King County who stated that he had experience doing community notification and home checks for registered sex offenders. RP (7/1/14) 32-33. Juror 61 said that he was "cynical"

and "jaded" about sex offenders, and that it was his belief that sex offenders "band together" and he needed "to watch out for these guys." RP (7/1/14) 33. Defense counsel moved for a mistrial based on Juror 61's remarks, contending that he had expressed the opinion that "he believes [sex offenders] are more likely than not to re-offend," and "that bell [cannot] be unrung." RP (7/1/14) 45-46. The trial court denied the motion, observing that the remarks in questions were "one man's opinion," and that there was no indication that Juror 61 stating he was "jaded" would deprive Jaeger of a fair trial. RP (7/1/14) 46-47.

This ruling was well within the trial court's discretion for multiple reasons. First, contrary to what Jaeger's trial counsel stated, Juror 61 did *not* say that he thought sex offenders are more likely than not to reoffend. Rather, he said that he was "cynical" and "jaded," that he thought sex offenders would "band together," and that he felt like he needed "to watch out for these guys"—hardly surprising statements for a police officer. Further, Juror 61 was only one of many prospective jurors who made negative remarks about sex offenders, including many who espoused the

belief that sex offenders are likely to reoffend.[10] It is difficult to see how Juror 61's remarks in particular had such an impact on the entire venire that a new trial is necessary.

In addition, and perhaps most importantly, the evidence produced at trial regarding the details of Jaeger's aggressive sexual offenses against multiple children at the Family Fun Center, his intense sexual preoccupation with children from an early age, his extreme diaper fetish, and his deeply disturbing sexual practices (including practices that caused serious injuries to his own penis) was both graphic and overwhelming. When viewed against this evidentiary backdrop, Jaeger cannot show that the jury was so prejudiced by Juror 61's remarks that they were unable to follow their instructions to decide the case based on the evidence.

Jaeger next highlights additional remarks by two other prospective jurors (Juror 117 and Juror 2) that he claims deprived him of a fair trial. Appellant's Opening Brief at 19-20. But as

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[10] For example, Jurors 33, 36, 46, 55, 58, 79, 88, 108 and 110 endorsed a belief that repeat offenders in particular are likely to reoffend. RP (7/2/14) 60-65. Juror 122 indicated that he or she would apply "a different burden of proof" in a case involving sex offenses committed against a child. RP (7/2/14) 70-71. Juror 106 said that he or she would not "respect" a sex offender's testimony. RP (7/2/14 a.m.) 31-33. Throughout voir dire, which lasted several days, the record is replete with prospective jurors expressing negative opinions regarding sex offenders, which is neither unusual nor surprising in these cases. In fact, Jaeger's defense attorneys filed substantial briefing in support of expanded voir dire questioning in anticipation of prospective jurors' negative opinions about sex offenders. CP 260-92.

Jaeger acknowledges, defense counsel did not move for a mistrial after these additional remarks were made. Appellant's Opening Brief at 20 n.3. Jaeger suggests that making another motion for a mistrial was not required to preserve this issue because the trial court indicated—much later in the proceedings, during the trial—that Jaeger had a "standing objection" whenever the trial court ruled against him. Appellant's Opening Brief at 20 n.3 (citing RP (7/10/14) 14).

But the trial court did not grant a "standing objection" during voir dire. Rather, the trial court granted Jaeger's defense counsel a "standing objection" after the court made an evidentiary ruling outside the presence of the jury during the trial. This is the proper context in which to grant a "standing objection" rather than requiring counsel to object again in the presence of the jury.[11] Jaeger's initial motion for a mistrial regarding Juror 61's remarks did not create a continuing motion for a mistrial as to all other statements made by all other prospective jurors. Also, both Juror 117 and Juror 2 made the statements that Jaeger now claims were incurably prejudicial in

[11] As the Washington Supreme Court has held, the losing party to an evidentiary ruling "is deemed to have a standing objection where a judge has made a final ruling on the motion" unless the trial court requires otherwise. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). Thus, when a proper record for a standing objection is made, the issue is preserved for appeal; otherwise, the issue is not preserved.

direct response to questioning by Jaeger's trial counsel. RP (7/2/14) 47-48, 66-67. Trial counsel did not move for a mistrial as a result of these remarks. Rather, counsel asked the trial court to excuse Juror 2 for cause (which was denied), and did not ask to excuse Juror 117 at all. RP (7/2/14) 78-79. Any issue regarding these two prospective jurors has not been preserved for appeal, and these arguments should not be addressed further.[12]

b. The Trial Court Properly Denied Jaeger's Motion For A Mistrial During Opening Statements.

Jaeger also argues that the trial court erred by denying his second motion for mistrial after Juror 5 fainted during opening statements, when the trial prosecutor was describing Jaeger's masochistic sexual practices involving harming his penis. Appellant's Opening Brief at 20-22. Although a juror fainting is not a common event, this is not an ordinary case. In this case, the record reflects that the juror fainting did not affect Jaeger's ability to receive a fair trial in light of the evidence that was presented.

[12] Jaeger also suggests that the remarks by Juror 117 and Juror 2 constitute manifest error affecting a constitutional right under RAP 2.5(a)(3). Appellant's Opening Brief at 20 n.3. For the same reasons that Juror 61's remarks are insignificant in light of the entire record, the remarks made by Juror 117 and Juror 2 are insignificant as well, and thus, not "manifest" within the meaning of the rule. *See* State v. Kirkman, 159 Wn.2d 918, 934-35, 155 P.3d 125 (2007) (explaining the standards for "manifest constitutional error").

The subject matter the prosecutor was discussing when Juror 5 fainted was indeed not for the faint of heart.[13] RP (7/7/14) 32. But as the prosecutor explained, he was not describing Jaeger's sexual practices merely for shock value, but because they were relevant to Dr. Hoberman's opinion. RP (7/7/14) 32. Further, as graphic as the prosecutor's description of the evidence may have seemed at the time, the evidence itself was worse. As the record reflects, the jury heard from numerous witnesses over the course of a lengthy trial about the various aspects of Jaeger's profound sexual deviancies. The fact that one of the jurors experienced an involuntary physiological reaction[14] upon hearing what the evidence would show is not what caused the jury to reach its verdict. Rather, the evidence itself is what led the jury to reach its verdict. Moreover, despite the distressing nature of the evidence, the jury deliberated for several days before reaching a verdict. RP (7/29/14), RP (7/30/14), RP (7/31/14). Thus, the

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[13] Juror 14 also reported to the bailiff that she felt anxious and nauseated when she was listening to the opening statements. RP (7/7/14) 88. Frankly, it is difficult to imagine a juror who would not have been disturbed upon hearing for the first time exactly what the evidence would show.

[14] The fainting episode experienced by Juror 5 is known as "vasovagal syncope," which occurs when the body "overreacts to certain triggers, such as the sight of blood or extreme emotional distress." *See* http://www.mayoclinic.org/diseases-conditions/vasovagal-syncope/basics/definition/con-20026900, last accessed 1/27/16.

record shows that the jurors deliberated carefully and thoughtfully, not that they reached a snap decision on an improper basis.

To sum up, Jaeger cannot show that the trial court abused its discretion in denying his motions for a mistrial because the record does not show that what occurred during voir dire and opening statements caused the jury to disregard their instructions and reach a verdict based on anything other than the evidence that was properly admitted during the trial. Indeed, in light of the evidence produced at trial, it is likely that voir dire and opening statements were forgotten by the time deliberations began. Jaeger's claim is without merit, and this Court should affirm.

2. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ITS EVIDENTIARY RULINGS AND JAEGER CANNOT DEMONSTRATE OTHERWISE.

Jaeger next claims that he is entitled to a new trial due to two evidentiary errors. More specifically, he claims that the trial court erred by excluding testimony by one of his experts that he was prone to being groomed and victimized by other residents at the Special Commitment Center, and by excluding evidence regarding the Community Protection Program on grounds that it was not a condition that "would exist" under RCW 71.09.060(1) and

RCW 71.09.015. Jaeger also contends that RCW 71.09.060(1) is unconstitutional because it excludes evidence regarding the CPP in SVP cases. Appellant's Opening Brief at 23-31. These arguments are without merit. First, disallowing irrelevant expert testimony that was not supported by the evidence was a ruling well within the trial court's discretion. Second, this Court has already held that evidence regarding the CPP is inadmissible under the circumstances presented in this case, and the trial court's ruling consistent with that precedent was a sound exercise of discretion as well.

Evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have made the evidentiary ruling that the trial judge made. Atsbeha, 142 Wn.2d at 914. Each of Jaeger's claims of evidentiary error, which are discussed in turn below, should be examined in light of these standards.

a. The Trial Court Properly Excluded Expert Testimony Regarding "Grooming" And "Victimization."

Jaeger tried to present testimony from Dr. Natalie Novick Brown, his expert on fetal alcohol spectrum disorder, that Jaeger was prone to being "groomed" and "victimized" by other "inmates"[15] at the SCC because of FASD. RP (7/23/14) 14-17. The trial court excluded this testimony on grounds that there had been no evidence that Jaeger was being groomed or victimized, and because this evidence was "shorthand" for "'[the SCC] is a bad place' as compared to living at home, which is not before the jury." RP (7/23/14) 16. This ruling is correct.

First, as the trial court observed, the evidence did not support an expert opinion that Jaeger's sexual contact with other residents at the SCC was the result of grooming or victimization. To the contrary, the evidence presented—including Jaeger's own statements—showed that Jaeger's sexual contact with other SCC residents was consensual and often initiated by Jaeger. *See* RP (7/9/14) 120-22 (Jaeger told SCC staff member Hayley Shepard that having sexual contact with resident Christopher Mulkins was

[15] The proposed PowerPoint slide on this topic used the word "inmates," which is incorrect because the SCC is not a prison. The verbiage stricken from the slide by the trial court was properly excluded for this reason as well.

Jaeger's idea); RP (7/9/14) 160-61 (Jaeger wrote a letter to resident Brian Taylor Rose in which Jaeger addressed Rose as "my love" and asked Rose to write back and to smear semen on his reply letter with his "sex penis"). This is a valid basis for the trial court's ruling, and Jaeger's claim fails.

Further, Jaeger's claim is also without merit because the excluded testimony was irrelevant to the issues before the jury. As the trial court observed, the jury in an initial SVP commitment trial does not consider whether confinement at the SCC is in the person's best interests as compared with a proposed placement in the community.[16] Rather, the jury decides only whether the person meets the definition of a sexually violent predator. RCW 71.09.060(1). Although the jury may consider "placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention," such evidence is relevant only because the jury must consider the level of risk the person poses *to the community* if he is *not* confined, not because the jury should consider any risk posed *to the person* if he *is* confined. RCW 71.09.060(1). Excluding Dr. Brown's testimony regarding Jaeger's purported susceptibility to "grooming" or

[16] This is a proper consideration at a trial on the issue of whether a person should be conditionally released to a less restrictive alternative. RCW 71.09.090(3)(d).

"victimization" at the SCC was a proper exercise of the trial court's discretion for this reason as well.

Lastly, although Dr. Brown's testimony regarding grooming and victimization was excluded, Dr. Brown was allowed to testify that Jaeger and others with FASD "are very susceptible to peer pressure and easily led." RP (7/23/14) 14. Therefore, the jury heard essentially the same opinion from Dr. Brown without reference to conditions at the SCC. Jaeger cannot demonstrate an abuse of discretion, and his argument is without merit.

b. The Trial Court Properly Excluded Evidence Regarding The Community Protection Program.

Jaeger's arguments regarding the Community Protection Program are also unavailing. As a preliminary matter, Jaeger attempts to recast his argument on appeal regarding the CPP as something different from what he presented to the trial court. More specifically, Jaeger now contends that the only evidence he offered at trial was that he would *apply for* the CPP if he were released from the SCC, not that he would be *accepted* into the program. *See* Appellant's Opening Brief at 26. Jaeger likely reframes the issue this way on appeal in order to avoid the express requirement in RCW 71.09.060(1) and RCW 71.09.015 that only treatment

options and conditions that "would exist" if the person were released may be presented at trial.

But Jaeger's trial counsel argued that the CPP itself "would exist" for Jaeger, not just that Jaeger would *apply for* the CPP. *See, e.g.,* CP 792 (stating that Jaeger "has a complete plan for the short-term which includes getting into the CPP – the CPP itself is Mr. Jaeger's long-term plan"); CP 1109 (stating that "[i]f Greg Jaeger can show via the CPP that he is not a danger to the community, then he does not meet commitment criteria and must be unconditionally released). This is why the trial court ruled that Jaeger had no standing to challenge the constitutionality of the statute excluding CPP evidence in SVP cases, *i.e.,* because Jaeger's *acceptance* into the CPP was not an option that "would exist," not because Jaeger could not *apply for* the CPP in the first instance. RP (4/4/14) 393-96. In colloquial terms, Jaeger attempts to "change doctrinal partners in the middle of the cotillion." Stoddard v. State, 157 Md. App. 247, 282, 850 A.2d 406, *reversed on other grounds*, 389 Md. 681, 887 A.2d 564 (2004). This Court

should decline Jaeger's invitation to consider a different issue on appeal than was considered by the trial court.[17]

The issue that was considered by the trial court was whether Jaeger has standing to challenge the constitutionality of the portion of RCW 71.09.060(1) that excludes evidence of the CPP in SVP initial commitment trials. As the trial court ruled, this question depends on whether Jaeger had demonstrated that the CPP was an option that "would exist" for him in the community under that statute and under RCW 71.09.015. As the trial court correctly concluded, this Court has already answered that question in the negative.

In In re Detention of Mulkins, 157 Wn. App. 400, 237 P.3d 342 (2010), review denied, 170 Wn.2d 1032 (2011), this Court addressed whether an SVP respondent had shown that the CPP was an option that "would exist" upon his release, and therefore, whether he had standing to challenge the constitutionality of the portion of that statute that excludes evidence of the CPP in all initial commitment trials. In re Mulkins, 157 Wn. App. at 401. This Court analyzed the issue as follows:

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[17] Moreover, any intent on Jaeger's part to apply for the CPP is not relevant, because merely submitting an application has no impact on the risk Jaeger poses to the community.

As set forth above, RCW 71.09.060(1) permits the fact finder to consider "only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition." Our courts have construed the language "would exist" to mean conditions "that would actually exist" if the respondent was released from custody, not hypothetical evidence. Thus, the statutory provision that excludes evidence of the CPP only applies to adversely affect Mulkins if the CPP is an option that would exist for him upon his release.

Mulkins asserts that the CPP is an existing option for him, relying on the letter from DSHS and noting that offenders who have been identified by DSHS as meeting the criteria for the program are notified by the form letter that was sent to him. But at most, this letter only indicated that he was identified as a potential candidate for the program and directed him to follow up with his case manager if he was interested in the program. Mulkins points to nothing else in the record establishing that he has in fact been through the application process, has been accepted as a suitable candidate for the program, and has agreed to participate in the program. Without further information about his actual placement in the program, Mulkins fails to establish that the CPP is an option that in fact "would exist" for him upon his release. Thus, even if evidence of the CPP were admissible under the statute, he fails to show that it would be admissible in his case. He therefore cannot demonstrate that, by excluding evidence of the CPP, RCW 71.09.060(1) applies to adversely affect his case. Accordingly, he lacks standing to challenge its constitutional validity.

In re Mulkins, 157 Wn. App. at 406-07 (footnotes omitted).

In accordance with Mulkins, the threshold question here is whether the trial court erred in ruling that the CPP was not an option that "would exist" for Jaeger if he were released. Although Jaeger presented more evidence than Mulkins did regarding his potential eligibility for the program, that evidence also unequivocally established that Jaeger's potential *acceptance* into the program was wholly speculative.

The regional coordinator for the CPP, Lori Gianetto Bare, testified that that no one who had been sent to the SCC on a pending SVP petition had ever been placed in the CPP. RP (3/27/14, vol. 1) 55. In fact, Ms. Bare expressly agreed that Jaeger's potential for placement in the CPP if he were released from the SCC was "uncertain and essentially hypothetical[.]" RP (3/27/14, vol. 1) 70. Additionally, the person who oversees the CPP statewide, Marci Arthur, submitted a declaration confirming that "there is no guarantee that Mr. Jaeger would be accepted into the CPP." CP 1089. Given this testimony from witnesses with firsthand knowledge, the trial court's ruling is supported by substantial evidence in the record and cannot be disturbed on appeal. *See* Organization to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793 (1996) (when the trial

court has weighed the evidence in making a factual finding necessary for a legal ruling, appellate review is limited to whether that finding is supported by substantial evidence). That being the case, the trial court's ruling that Jaeger lacked standing to challenge the constitutionality of the portion of the statute excluding CPP evidence in SVP commitment trials is correct under Mulkins, and this Court's analysis need not proceed further.

But even if Jaeger had standing to challenge the exclusion of evidence of the CPP on grounds of procedural due process and equal protection, these arguments fail nonetheless.

As a preliminary matter, a party challenging the constitutionality of a statute bears the burden of showing that statute's unconstitutionality beyond a reasonable doubt. In re Detention of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). In addition, "unless First Amendment freedoms are involved, this court will only determine whether a statute is unconstitutional as applied to the facts of the case." In re Mulkins, 157 Wn. App. at 405-06. Jaeger cannot meet these standards on grounds of either procedural due process or equal protection.

As Jaeger correctly notes, Washington courts use the three-factor test from Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893,

47 L. Ed. 2d 18 (1976), to analyze procedural due process claims in civil cases.[18] In sexually violent predator cases, the first Mathews factor—the private interest that will be affected—favors the person the State seeks to commit, as the person's liberty is at stake. In re Detention of Coe, 175 Wn.2d 482, 510, 286 P.3d 29 (2012). Conversely, the third factor—the governmental interest—favors the State, as the State has a compelling interest in ensuring that sexually violent predators receive treatment and in protecting the public from their actions. In re Detention of Morgan, 180 Wn.2d 312, 322, 330 P.3d 774 (2014). Accordingly, the second factor—the risk of an erroneous deprivation of liberty under existing procedures—is the factor that tips the balance one way or the other.

In this case, the second factor favors the State. As the Washington Supreme Court has stated repeatedly, chapter 71.09 RCW provides "extensive procedural safeguards" to protect against the erroneous deprivation of liberty. State v. McCuistion, 174 Wn.2d 369, 393, 275 P.3d 1092 (2012); *see also* In re Morgan, 180

[18] The three factors are: 1) the private interest that will be affected by the government's action; 2) the risk of an erroneous deprivation of that interest through the procedures used; and 3) the government's interest, including the importance of the function involved and the burdens that additional or different procedures would impose. Mathews, 424 U.S. at 335.

Wn.2d at 321 (describing the "[r]obust statutory guaranties" that "provide substantial protection against an erroneous deprivation of liberty" in SVP cases). These protections include the statutory rights to counsel at public expense, a jury trial, proof beyond a reasonable doubt, and a unanimous verdict. RCW 71.09.050(1) and (3); RCW 71.09.060(1). In addition, although evidence regarding the CPP is not admissible under the statute, evidence of other release plans that "would exist" are admissible; indeed, evidence of Jaeger's existing release plan was presented and discussed at length during the trial. Furthermore, excluding evidence regarding the CPP did not change the State's burden of proving beyond a reasonable doubt that Jaeger is a sexually violent predator. As set forth above, the evidence proving that Jaeger is an SVP is overwhelming, and the risk of an erroneous civil commitment is nil. Jaeger's procedural due process argument fails.

Jaeger's equal protection argument is similarly unavailing. Washington courts apply the rational basis test when considering equal protection claims involving less restrictive alternatives in SVP cases, and that standard should apply in this situation as well. In re Detention of Thorell, 149 Wn.2d 724, 748-49, 72 P.3d 708 (2003). Rational basis review is satisfied if there is a legitimate government

interest at stake and the challenged legislation bears a rational relationship to achieving that interest. Id. The party challenging the statute must show that it is "purely arbitrary." Id. at 749. Accordingly, as the State explained in its briefing to the trial court, "the question before the court is whether Jaeger has proven beyond a reasonable doubt that [RCW 71.09.060(1)] treats some SVPs differently from others for a purely arbitrary reason that is wholly irrelevant to the achievement of legitimate state objectives." CP 1259-60. The answer to this question is "no" for several reasons.

First, the statute treats all potential SVPs the same way, *i.e.,* all are able to present evidence of conditions and treatment options that "would exist" if they were released, and none are able to present evidence regarding the CPP. RCW 71.09.060(1). In addition, the legislature has determined that SVPs comprise a "small but extremely dangerous group" of individuals who are unamenable to traditional forms of mental health treatment and who require long-term treatment in a secure facility where they will not have access to potential victims. RCW 71.09.010. This in itself is a rational basis to treat those the State seeks to commit as SVPs differently from other offenders, including others who may qualify

for the CPP due to their developmental disabilities. In that same vein, another rational basis for the statute is to protect other developmentally disabled people in the CPP from those who meet the definition of a sexually violent predator. As the regional coordinator of the CPP testified during the pretrial hearing, no one who has been referred for civil commitment as an SVP has ever been placed in the CPP. RP (3/27/14, vol. 1) 55-56, 76-77. The safety risks that SVPs pose is doubtless the main reason for this. *See* RP (3/27/14, vol. 1) 63-68 (discussing the risks and challenges Jaeger would pose if referred for a CPP placement).

In sum, there are a number of rational bases for the legislature's decision to exclude CPP evidence in SVP trials, and for excluding SVPs from the CPP entirely once they are found to meet the statutory definition of an SVP. Jaeger cannot demonstrate otherwise, and his claim is without merit.

3. THE PROSECUTOR'S REMARKS IN REBUTTAL WERE BASED ON THE EVIDENCE AND WERE A FAIR REPLY TO JAEGER'S DEFENSE; THEREFORE, NO MISCONDUCT OCCURRED.

Jaeger next asserts that he should be granted a new trial because of prosecutorial misconduct during rebuttal closing argument. Appellant's Opening Brief at 31-37. This claim should

also be rejected. The prosecutor's rebuttal arguments were based on the evidence and were a fair reply to defense counsel's arguments. Accordingly, this Court should affirm.

In order to prevail on a claim of prosecutorial misconduct, a criminal defendant[19] bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire record and all of the circumstances present at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), review denied, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who claims prosecutorial misconduct during closing argument "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The defendant meets the burden of showing prejudice by proving that there is "a substantial likelihood that the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, 132 Wn.2d at 727. Also, arguments in rebuttal that would

[19] This Court applies the same standards for prosecutorial misconduct in SVP cases as in criminal cases. *See, e.g.,* In re Law, 146 Wn. App. at 50-51.

otherwise be improper are nonetheless permissible when they are a fair reply to the defense attorney's arguments; accordingly, the defendant must show that the prosecutor's arguments are beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). The appellate court cannot view the prosecutor's remarks in isolation, but must consider them "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561. Under these standards, the prosecutor's remarks in rebuttal were neither improper nor prejudicial.

First, Jaeger argues that the prosecutor's rebuttal arguments regarding Dr. Kellaher's qualifications and testimony were improper because they expressed the prosecutor's personal opinion and were "inflammatory." Appellant's Opening Brief at 32-33. As a preliminary matter, Jaeger contends that defense counsel objected to all of these arguments, thus triggering a less demanding standard of review. Appellant's Opening Brief at 32. The record shows otherwise. The portion of the prosecutor's rebuttal that addresses the experts' testimony comprises five and a half pages of the transcript. RP (7/28/14) 180-85. For nearly four of those

pages, the prosecutor discussed Dr. Kellaher's lack of qualifications and her attempts to "fluff up" her resume as compared with Dr. Hoberman's substantial qualifications and experience. RP (7/28/14) 180-83. None of these remarks drew any objections from defense counsel.

For the next page and a half, the prosecutor discussed a portion of his cross-examination where he had confronted Dr. Kellaher with handwritten notes she had made about a conversation she had had with Jaeger. Although Dr. Kellaher's notes indicated that Jaeger had discussed "killing mom and dad," Dr. Kellaher testified that Jaeger was worried about other people killing his parents, not that he would murder them himself as the notes suggested. RP (7/28/14) 183-85. These remarks by the prosecutor were also made without objection until the very end, when the prosecutor said that Dr. Kellaher had "disgraced herself":

> Are you accepting that [*i.e.,* Dr. Kellaher's explanation that Jaeger was concerned about someone else killing his parents, not murdering them himself] as an explanation? It doesn't make any sense. If that were true, even that would be of psychological significance, wouldn't it? Wouldn't she be expected to record that the unwanted thoughts were of somebody murdering his parents?

She cleaned that. She scrubbed that. And she put it in her formal report. She disgraced herself in this courtroom by doing that.

MS. FALLER: Objection, your honor.

THE COURT: Sustained.

Mr. Porter, you have two minutes.

RP (7/28/14) 185.

The record reflects that the only remark in these five pages of rebuttal that drew an objection was the remark that Dr. Kellaher had "disgraced herself."[20] The preceding arguments about Dr. Kellaher's lack of qualifications and efforts to pad her resume, Dr. Hoberman's far more substantial qualifications and experience, and Dr. Kellaher's dubious explanation for the apparent discrepancy between her notes and her testimony were all made without objection. Thus, Jaeger bears the additional burden of showing that these arguments were "so flagrant and ill intentioned" that they caused "an enduring and resulting prejudice that could not

[20] As the prosecutor explained after the jury was excused to begin deliberations, "the only issue with my saying that she disgraced herself was it was phrased in the form of an opinion. I could go back and say jurors you would have every right under this evidence to conclude that she disgraced herself, which I could have said." RP (7/28/14) 190. Again, Jaeger's suggestion that the prosecutor conceded that the entire section of his rebuttal regarding the experts was an expression of his personal opinion is contrary to the record; the record plainly demonstrates that everyone was focused on the "disgraced herself" remark.

have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Arguments regarding an expert's qualifications or lack thereof are certainly fair game in closing argument and in rebuttal, as are arguments regarding any discrepancies in a witness's testimony that may bear on his or her credibility. *See* State v. Furman, 122 Wn.2d 440, 455-56, 858 P.2d 1092 (1993) (holding that it is proper for a prosecutor to challenge the credibility of an expert's opinion). Therefore, Jaeger cannot show flagrant and ill-intentioned misconduct. Additionally, Jaeger's objection to the prosecutor's remark that Dr. Kellaher had "disgraced herself" was sustained by the trial court, and the prosecutor promptly moved on to another topic. In light of the entire record, this remark was not so prejudicial that it affected the jury's verdict, particularly given the strength of the evidence presented by the State.

Jaeger also argues that the prosecutor's rebuttal arguments shifted the burden of proof to the defense. Appellant's Opening Brief at 33-35. Jaeger contends that this burden-shifting occurred twice: 1) when the prosecutor argued that "the most glaring weakness in the defense case" was a "refusal to face head on in any substantive way" the State's evidence of Jaeger's extreme

sexual deviancies; and 2) when the prosecutor noted that the defense had not called Dr. Steven Becker as a witness, even though he was a primary architect of Jaeger's release plan. RP (7/28/14) 177-78, 186-87. These claims should also be rejected.

Jaeger is correct that a prosecutor "generally cannot comment on the defendant's failure to present evidence because the defendant has no duty to present evidence." State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). However, once the defense presents a case, it is proper for the prosecutor to comment on the weaknesses in that case, including the defense's failure to call a necessary witness. *See* State v. Brett, 126 Wn.2d 136, 176-77, 892 P.2d 29 (1995) (a prosecutor may comment on evidence being unrefuted by the defense); State v. Blair, 117 Wn.2d 479, 484-88, 816 P.2d 718 (1991) (a prosecutor may comment on the defense's failure to produce evidence or call a witness on a central issue in the case). As this Court very recently stated, "a prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case," and does not commit misconduct by doing so. State v. Osman, ___ Wn. App. ___ (No. 71844-4-I, filed 1/25/16), Slip Op. at 10 (citing Russell, 125 Wn.2d at 87). That is precisely what occurred here.

The prosecutor's argument regarding "the most glaring weakness in the defense case" was exactly that—a criticism of the evidence presented by the defense, not a suggestion that the defense had a burden of proof. RP (7/28/14) 177-78. Moreover, defense counsel told the jury in opening statement that the defense would be calling Dr. Becker as a witness,[21] and their failure to do so was unexplained. The prosecutor's remarks highlighting that fact were proper, particularly as a fair reply to the defense closing argument questioning the State's failure to call Dr. Demaso, Jaeger's psychiatrist at Children's Hospital, as a witness.[22] The trial court correctly overruled Jaeger's objections on grounds of burden-shifting because no burden had been improperly shifted. This Court should affirm.

Lastly, Jaeger argues that the prosecutor's remark that the likelihood of re-offense increases when a person's level of sexual deviance is high was also improper and prejudicial. Appellant's Opening Brief at 35-36. But Dr. Hoberman testified that there is a correlation between a person's level of sexual deviance and the risk

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[21] RP (7/7/14) 81. Jaeger's defense attorneys also identified Dr. Becker as a defense witness in their trial memorandum. CP 298.

[22] Defense counsel argued: "[The State] had a lot to say about Dr. Demaso. Why didn't they call her? They got Dr. Rawlings out of retirement. So why not Dr. Demaso if she's so important to their case?" RP (7/28/14) 138.

of re-offense, and thus, the prosecutor's argument was properly based on the evidence. Dr. Hoberman testified that relevant research shows that having multiple paraphilic disorders and being highly sexually preoccupied are factors that increase a person's risk of re-offense, and that these factors are present in Jaeger's case. RP (7/15/14) 36. Highlighting this evidence for the jury was entirely appropriate, because deciding whether Jaeger presents a high risk of re-offense was one of the jury's duties in this case.

To sum up, Jaeger cannot show that any of the prosecutor's rebuttal arguments were improper or prejudicial, and therefore, his prosecutorial misconduct claim fails.

4. JAEGER'S CIVIL COMMITMENT IS BASED ON HIS CURRENT MENTAL CONDITION AND DANGEROUSNESS, NOT HIS MENTAL CONDITION AND DANGEROUSNESS AS A JUVENILE.

Jaeger next claims that his civil commitment as a sexually violent predator violates substantive due process because juveniles do not have fully-developed brains, and therefore, they should not be held responsible for a lack of volitional control in SVP cases. Appellant's Opening Brief at 37-44. This claim should be rejected. Even assuming that Jaeger's arguments regarding juvenile brain development and legal consequences have merit—a point the

State does not concede[23]—Jaeger was not civilly committed based on his mental condition as a juvenile. Rather, Jaeger was civilly committed based on ample evidence proving that he is currently mentally ill and dangerous as an adult. Therefore, Jaeger's arguments are misdirected and without merit. In addition, Jaeger's own expert testified that Jaeger's brain function is seriously impaired, and that his brain damage is permanent. Jaeger's arguments regarding juvenile brain development are misplaced for this reason as well.

As is true with any form of civil commitment, civil commitment as a sexually violent predator comports with due process if the person is found to be both mentally ill and dangerous. In re Detention of Young, 122 Wn.2d 1, 27, 857 P.2d 989 (1993). By definition, this finding concerns the person's *current* mental condition and likelihood of re-offense, regardless of when the person's prior crimes of sexual violence were committed:

> 'Sexually violent predator' means any person who has been convicted of or charged with a crime of sexual violence and who *suffers* from a mental abnormality or personality disorder which *makes* the person likely

[23] *See* Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 Notre Dame L. Rev. 89 (2009) (discussing practical difficulties and policy concerns with using juvenile brain development as a defense or a mitigating factor in criminal cases, including significant variation in findings among research studies).

> to engage in predatory acts of sexual violence if not confined in a secure facility.

RCW 71.09.020(18) (emphasis supplied). Accordingly, although the person's behavior and development as a juvenile may well be relevant evidence in an SVP case, the person's brain development as a juvenile is not the issue the jury must address in determining whether the person *currently* meets the definition of an SVP. In addition, although an element in the SVP definition is a prior sexually violent offense, which may be a juvenile offense, the Washington Supreme Court has very recently upheld the use of juvenile sex offenses as predicate offenses in SVP cases. In re Detention of Anderson, ___ Wn.2d ___ (No. 91385-4, filed 2/4/16).

Juvenile offenses are used as predicate offenses in a number of contexts in criminal cases as well. For example, juvenile offenses count towards an adult felon's offender score for purposes of increasing punishment for a current adult offense. RCW 9.94A.525(2)(g). In addition, a prior juvenile offense can be used as a predicate for a charge of unlawful possession of a firearm, even if the prior juvenile crime has "washed out" for scoring purposes. State v. Sweeney, 125 Wn. App. 77, 82-83, 104 P.3d 46 (2005). A prior sex offense committed as a juvenile can be used to

elevate indecent exposure from a misdemeanor to a felony under RCW 9A.88.010(2)(c). State v. Benitez, 175 Wn. App. 116, 122-23, 302 P.3d 877 (2013). And in some circumstances, an offense committed as a juvenile may be used as a prior "strike" for purposes of imposing a life-without-parole sentence under the Persistent Offender Accountability Act. State v. Knippling, 166 Wn.2d 93, 99-100, 206 P.3d 332 (2009). If a prior offense committed as a juvenile can be used in all of these contexts, it strains reason to suggest that a sexually violent offense committed as a juvenile cannot be used as evidence in the SVP civil commitment context. Jaeger's suggestion to the contrary should be rejected.

Nonetheless, Jaeger cites Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), and State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), in support of his argument that civilly committing Jaeger as a sexually violent predator violates due process. Appellant's Opening Brief at 28-39. But these cases do not support Jaeger's argument; rather, these cases show why Jaeger's argument is misplaced.

In Roper v. Simmons, the defendant was sentenced to death for a murder he committed when he was 17 years old, and the Supreme Court held that this violated the Eighth Amendment. Roper, 543 U.S. at 555-58. In Graham v. Florida, the defendant was sentenced to life in prison without parole for non-homicide crimes he committed when he was 16 years old, and the Supreme Court held that this violated the Eighth Amendment as well. Graham, 560 U.S. at 53-57. In State v. O'Dell, the trial court ruled that the defendant's relative youth (he committed the crime one week after his eighteenth birthday) was not a proper consideration for deciding whether to impose a mitigated exceptional sentence for child rape, and five justices of the Washington Supreme Court disagreed. O'Dell, 183 Wn.2d at 366-67.

In each of these cases, the defendant's punishment was the direct result of his youthful conduct. Jaeger's civil commitment is neither punishment nor a direct result of his behavior as a juvenile; rather, it is the direct result of his current mental condition and dangerousness.[24] The circumstances presented here are very

[24] In addition, although Jaeger committed his predicate offenses when he was 16, the record overwhelmingly shows that Jaeger's deviant sexual behavior continued at JRA to the age of 21 and at the SCC after that.

different than in Roper, Graham and O'Dell, and Jaeger's reliance on these cases is misplaced.

In summary, Jaeger's argument fails because it focuses on the wrong issue. Although Jaeger's juvenile sex offenses served as predicate offenses in the SVP proceeding, and although evidence regarding the commission of those offenses was admitted at trial because it was highly relevant, Jaeger was not civilly committed based on his mental condition and dangerousness as a juvenile at the time he committed those crimes. Rather, Jaeger was civilly committed because he currently suffers from mental abnormalities and personality disorders as an adult that make him likely to commit sexually violent acts in the future. Jaeger's civil commitment comports with due process, and his claim based on juvenile brain development fails.

But even if Jaeger's argument regarding juvenile brain development were squarely on point, and even if the trial record were sufficiently developed to review this claim, the evidence shows that Jaeger's mental condition as an adult is not substantially different from his mental condition as a juvenile. Therefore, the sex offenses he committed as a juvenile were not a product of youthful impulsiveness, but rather a direct result of the

mental abnormalities and personality disorders he continues to suffer. Jaeger's claim is off-target for this reason as well.

Indeed, Jaeger's own expert on fetal alcohol spectrum disorder, Dr. Natalie Novick Brown, testified that fetal alcohol exposure causes permanent brain damage resulting in serious developmental, behavioral, and emotional impairments. More specifically, Dr. Brown testified that FASD causes impulsivity, inability to appreciate consequences, impaired executive function, difficulties with emotional and behavioral control, lack of insight, and poor judgment. RP (7/23/14) 47-48, 58-60, 69. Accordingly, Dr. Brown opined that Jaeger—*as an adult*—would need constant supervision with no access to children, pornography, or diapers in order for him to be safe in the community. RP (7/23/14) 83. Although Dr. Brown supported Jaeger's release plan, she agreed that people with FASD generally have problems with impulse control, and that Jaeger in particular has "a major problem with managing sexual impulsivity[.]" RP (7/23/14) 102-05. Therefore, even according to his own expert, Jaeger's brain development as a juvenile is not the issue in this case because his brain function as an adult is substantially impaired. Jaeger's claim fails for this reason as well.

5. CONTROLLING AUTHORITY HOLDS THAT THE STANDARD FOR LIKELIHOOD OF RE-OFFENSE IN SEXUALLY VIOLENT PREDATOR CASES IS CONSTITUTIONAL.

Jaeger also claims that the standard for civil commitment as a sexually violent predator—specifically, that the State must prove beyond a reasonable doubt that the person is more likely than not to commit a future act of sexual violence—violates due process. Appellant's Opening Brief at 44-48. But as Jaeger acknowledges and as this Court has held, this argument was rejected by the Washington Supreme Court in In re Detention of Brooks, 145 Wn.2d 275, 293-98, 36 P.3d 1034 (2001), *overruled on other grounds*, In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003). *See* In re Mulkins, 157 Wn. App. at 406 (recognizing the rejection of this argument in In re Brooks). As noted in Mulkins, this Court is bound by the Brooks decision, and there is no reason to address this argument further.

6. CUMULATIVE ERROR DID NOT DEPRIVE JAEGER OF A FAIR TRIAL.

Lastly, Jaeger argues that he is entitled to a new trial based on cumulative error. Appellant's Opening Brief at 49-50. The cumulative error doctrine applies in criminal cases when multiple errors occurred that would not merit reversal individually, but their

cumulative effect deprived the defendant of a fair trial. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004). Jaeger's claims are without merit whether considered individually or as a whole. Therefore, the cumulative error doctrine does not provide a basis for reversal.

D. CONCLUSION

For the reasons stated above, this Court should affirm the jury's verdict that Jaeger is a sexually violent predator and the resulting order of commitment entered by the trial court.

DATED this 5th day of February, 2016.

Respectfully submitted,

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By: _____
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Certificate of Service by Electronic Mail

Today, in accordance with a standing electronic service agreement, I directed electronic mail addressed to the attorney for the appellant, Marla Zink, at wapofficemail@washapp.org, containing a copy of the Brief of Respondent IN RE THE DETENTION OF GREGORY JAEGER, Cause No. 72392-8-I, in the Court of Appeals, Division I, for the State of Washington.

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

Kelly Doerzer — 2-5-16

Name — Date

Done in Seattle, Washington