Supreme Court No.: 93920-2
Court of Appeals No.: 72392-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF

GREGORY JAEGER,

Petitioner.

PETITION FOR REVIEW

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Courts

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Gregory Jaeger, appellant below, requests this Court grant review of the decision of the Court of Appeals in *In re Detention of Gregory Jaeger*, No. 72392-8-I (Sept. 6, 2016). The opinion was amended on November 2 when the court denied Mr. Jaeger's motion to reconsider. A copy of the opinion and the order denying the motion for reconsideration and amending opinion are attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review where the lower courts interpreted RCW 71.09.060(1) overbroadly to prevent the admission of evidence of conditions that would exist if Mr. Jaeger was released and that was deemed relevant by this Court in *In re Detention of Post*, 170 Wn.2d 302, 241 P.3d 1234 (2010)? RAP 13.4(b)(1), (4).

2. Whether the Court should grant review and hold Mr. Jaeger's right to a fair trial before an impartial jury was violated when the venire heard professional-experience-based opinions from three fellow jurors that sexual offenders are certain to reoffend, which was the ultimate question for the jury at Mr. Jaeger's commitment trial, and where a juror fainted during the prosecutor's opening statement? RAP 13.4(b)(1), (3), (4).

3. This Court held recently, under principles of statutory interpretation, that a juvenile adjudication can be a predicate offense for

indefinite civil commitment. *In re Det. of Anderson*, 185 Wn.2d 79, 368 P.3d 162 (2016). The Court should grant review to resolve the unanswered issue whether indefinite civil commitment premised on conduct occurring prior to maturity of a young, developmentally delayed adult's volitional functioning violates substantive due process. RAP 13.4(b)(3), (4).

4. Whether the Court should grant review to determine whether RCW 71.09.020 violates due process by allowing for the involuntary commitment of a person who is merely "likely" to reoffend where due process requires proof that a person is mentally ill and dangerous by at least clear and convincing evidence? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

Adopted at almost one year old, Gregory Jaeger's biological mother abused alcohol and drugs and had Attention Deficit Hyperactivity Disorder (ADHD), low intellect, learning disabilities, and possible borderline personality disorder. 7/16/14 RP 54-61; 7/14/14 RP 37-38.

Mr. Jaeger's differences were soon noticed. He is cognitively delayed; he had trouble crawling, holding a bottle, and developing motor skills generally.[1] At age 12 or 13, he still requested a "sippy cup."

[1] 7/16/14 RP 63-68, 85 (mother testifies he lags about two to four years behind peers), 103; 7/17/14 a.m. RP 4, 7; 7/10/14 RP 138-39.

7/16/14 RP 66-67. He was also resistant to being held or engaging with people. 7/16/14 RP 68-69. He is particularly sensitive to noise and light.[2] From a young age he got frustrated and threw tantrums or acted out physically. 7/16/14 RP 69, 73, 81-82. His behavioral issues persisted in school, and he was generally incapable of making friends.[3] Meanwhile, he enjoyed art, which seemed to exert a calming influence, clung to structure and rules, and, in high school, realized he was homosexual.[4]

Mr. Jaeger developed two uncommon habits that do not involve other people. He is interested in diapers, particularly soiled diapers. 7/16/14 RP 75-79; 7/17/14 p.m. RP 11-13, 106-11. He also inserts objects into his urethra. *See* 7/17/14 p.m. RP 38-39.

From a young age, Mr. Jaeger was enrolled in physical and speech therapy; he saw doctors and counselors; and he has been diagnosed with varying conditions and prescribed many different medications.[5]

For his 16th birthday, the Jaegers threw Gregory his first birthday party, at the Family Fun Center. 7/16/14 RP 98; 7/17/14 a.m. RP 13-15.

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[2] 7/16/14 RP 69-70, 73, 86-87; 7/17/14 a.m. RP 12-13; 7/24/14 RP 122.

[3] 7/16/14 RP 73-75, 81, 94; 7/17/14 a.m. RP 30-31.

[4] 7/9/14 RP 18; 7/16/14 RP 82-85, 87-89; 7/17/14 a.m. RP 4-10; 7/17/14 p.m. RP 7-8; 7/24/14 RP 118-21.

[5] Exhibit 214, pp.5-6 (listing evolving diagnoses); 7/16/14 RP 68, 78-81, 93-98, 129 (participated in medication trial), 128-34; 7/17/14 a.m. RP 3; 7/17/14 p.m. RP 161; 7/21/14 RP 142-49 (prescriptions changed among aderall, ritalin, seroquel, concerta; medication changes at time of 16th birthday); 7/22/14 RP 37-39, 112-13; 7/24/14 RP 135.

Towards the end of the party, Mr. Jaeger excused himself to use the restroom, began looking for a diaper and then attempted to engage a nine-year-old male in oral sex, but the boy exited the restroom. 7/17/14 a.m. RP 15-24. Mr. Jaeger then approached a younger boy who entered the neighboring stall. 7/17/14 a.m. RP 25-26. He put his mouth on that boy's penis and then the boy exited the stall. 7/17/14 a.m. RP 26-27.

After pleading guilty to attempted child molestation and child molestation, Mr. Jaeger was confined at Maple Lane for five years, where he engaged in various services, was motivated to do better, improved over time, worked hard and completed high school.[6] Prior to his release in 2010, the State filed a petition for indefinite commitment pursuant to Chapter 71.09 RCW and he has since been held at the SCC. CP 1-2.

The commitment proceedings that followed were closely contested. At trial, the State and Mr. Jaeger's experts presented different diagnoses: Natalie Novick Brown diagnosed Mr. Jaeger with alcohol-related neurodevelopmental disorder (part of the fetal alcohol spectrum disorder (FASD)), which causes frontal lobe brain damage and, along with autism spectrum disorder, accounts for Mr. Jaeger's executive functioning limitations. 7/23/14 RP 28-61, 71-72, 134-49; Exhibit 214. According to

[6] 7/7/14 RP 104-06; 7/8/14 RP 14-21, 68, 72-73; 7/9/14 RP 3; 7/9/14 RP 115. He also engaged in some consensual sexual relationships with peers. 7/8/14 RP 27-28; 7/9/14 RP 10-13; *see* 7/9/14 RP 119-27 (engaged in age-appropriate relationships at SCC); 7/10/14 RP 41-42.

Dr. Brown, "People with FASD are at risk of making sexual mistakes. Sexually offending is included among those sexual mistakes. . . . but the research does not indicate that those individuals are prone to repeating those sexual mistakes and reoffending essentially after they have made sexual mistakes and been sanctioned for it." 7/23/14 RP 63. Denise Kellaher diagnosed Mr. Jaeger with autism spectrum disorder (asperger's syndrome), fetishistic disorder (diapers), and a moderate level intellectual disability, finding that none of these diagnoses make Mr. Jaeger more likely than not to reoffend if released. 7/21/14 RP 50-51, 97-99, 101-116, 184-86.

The State's witness, Harry Hoberman, diagnosed Mr. Jaeger with ADHD, intellectual disability, borderline personality disorder, antisocial personality disorder, fetishistic disorder (diapers), sexual masochism disorder, other specified paraphilic disorder (coprophilic and urophilic), and pedophilia. 7/14/14 RP 18, 7/14/14 RP 59-101, 109-27; 7/15/14 RP 14-18. Dr. Hoberman testified these conditions make it more difficult for Mr. Jaeger to control his behavior, and he is more likely than not to reoffend if released from SCC. 7/14/14 RP 35-36, 118; 7/15/14 RP 27-45.

Mr. Jaeger also presented evidence of a comprehensive release plan to show he could live in the community without reoffending. Exhibit 332; *see, e.g.*, 7/23/14 RP 80-81; 7/24/14 RP 47-49. Upon release from

the SCC, Mr. Jaeger intended to return to his parents' home where he would be under 24-hour supervision in an alarmed house; the release plan also detailed steps to de-escalate situations; crisis management; individualized treatment; therapy and skills training in many areas; a weekly schedule and task list; and copious rules.[7]

Mr. Jaeger was prevented from telling the jury that upon release he would live under these conditions while applying for fulltime housing from a residential housing provider for developmentally disabled persons through this state's community protection program. Mr. Jaeger showed he was eligible for the program and committed to applying and attending if admitted. Motions Vol I RP 18, 35-38, 46; Motions Vol II RP 207-09, 214. He also demonstrated the community protection program would conduct a risk assessment that took into account how he was doing in the community prior to admitting him. Motions Vol I RP 105. The court granted the State's motion to exclude all evidence related to the community protection program.[8]

The jury indefinitely committed Mr. Jaeger. CP 956-57, 962-64. The Court of Appeals affirmed in an unpublished decision, which was amended after reconsideration was denied. Slip Op. at Appendix.

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[7] 7/16/14 RP 52-53, 114-21; 7/17/14 p.m. RP 48-55, 145-49; 7/21/14 RP 47-48; 7/22/14 RP 123-25, 137-41; 7/23/14 RP 82-89, 105-13; 7/24/14 RP 50-63, 154-61; 7/28/14 RP 29-33.

[8] Motions Vol IV RP 392-402; CP 788-813; CP 965-1053, 1057-1340.

D. ARGUMENT

1. **The Court should grant review because the lower courts' decisions are inconsistent with *In re Detention of Post* and the plain language of RCW 71.09.060(1) because Mr. Jaeger's application to the community placement program and its deterrent effect would exist upon release.**

In *Post*, this Court held evidence that a respondent who is subsequently released could be subject to another commitment proceeding if he commits a recent overt act is relevant because the knowledge of the consequences of committing a recent over act "may well serve as a deterrent to such conduct." 170 Wn.2d at 316-17. The evidence therefore "has some tendency to diminish the likelihood of [the respondent] committing another predatory act of sexual violence." *Id.* at 317. The likelihood of the respondent reoffending if released is a main question before the jury in RCW 71.09 cases, making the evidence relevant.

Like evidence of a recent overt act, which may well have a deterrent effect, evidence that Mr. Jaeger would be applying to the community protection program[9] would have demonstrated his motivation to comply with his release plan. Mr. Jaeger could show he was eligible for the program, would apply if released, and would be subject to an

[9]The community protection program is a state-sponsored services program for individuals with developmental disability who have been charged with or convicted of certain crimes or pose a risk to others under defined criteria. *See* RCW 71A.12.200 through RCW 71A.12.280.

additional risk assessment that would take into account his behavior in the community before being admitted. Motions Vol I RP 18, 35-38, 46, 105; Motions Vol II RP 207-09, 214. Thus evidence that Mr. Jaeger would apply for this program is relevant to the likelihood he would not reoffend, but would comply with his release plan, so as not to jeopardize his application to the program. *See Post*, 170 Wn.2d at 313. Nonetheless, the trial court excluded all evidence related to the program,[10]

RCW 71.09.060(1) precludes evidence of the community protection program only "as a placement condition or treatment option." RCW 71.09.060(1); *see State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (in statutory interpretation, courts look first to plain language of statute). In relevant part, that subsection provides,

> In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may 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. The community protection program under RCW 71A.12.230 may not be considered as a placement condition or treatment option available to the person if unconditionally released from detention on a sexually violent predator petition.

Evidence that Mr. Jaeger would apply to the community placement program is admissible under the statute's plain language. The application

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[10] Motions Vol IV RP 392-402.

is a fact that "would exist" upon release because Mr. Jaeger testified he would apply if released and the evidence showed he was eligible to apply. Motions Vol I RP 18, 35-38, 46, 105; Motions Vol II RP 207-09, 214.

Moreover, Mr. Jaeger did not seek to admit evidence of his application as a placement condition or treatment option. It was relevant to show his incentive to comply with his release plan. Applying to the community placement program is plainly not part of treatment, and thus does not qualify as a "treatment option." Likewise, applying to the program is not included in Mr. Jaeger's release plan. It is not a condition of his placement in the community. Also, evidence of an application to the program does not require the jury to consider the program itself, either as a placement condition or treatment option.

The trial court's construction of the statute, upheld by the Court of Appeals, violates procedural due process.[11] The private interest at stake here is paramount. *See Young*, 122 Wn.2d at 26 (liberty is important and fundamental interest). "[T]he most elemental of liberty interests [is] in

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[11] In determining what procedures must be followed prior to depriving a person of due process, courts consider: (1) the private interest at stake, (2) the risk of erroneous deprivation of that interest under current procedures, and the probable value of substitute procedures, and (3) the government's interest, including fiscal and administrative burdens, in providing substitute procedures. *Mathews v. Eldridge*, 424 U.S. 319, 333, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *In re Det. of Young*, 122 Wn.2d 1, 43-44, 857 P.2d 989 (1993), *superseded by statute on other grounds as recognized in In re Det. of Thorell*, 149 Wn.2d 724, 746, 72 P.3d 708 (2003).

being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). In these proceedings, Mr. Jaeger was facing indefinite confinement. The private interest is extraordinarily high.

The risk of error presented by the categorical exclusion of evidence is also high. As discussed, the evidence that Mr. Jaeger would apply to the program is relevant to the main question before the jury—is Mr. Jaeger more likely than not to reoffend unless confined at the SCC? This evidence is at least as relevant as the recent overt act evidence held admissible in *Post*, 170 Wn.2d at 317. *See also Thorell*, 149 Wn.2d at 751 (evidence regarding details of release relates directly to whether the definition of sexually violent predator is met for initial commitment). Total exclusion of the evidence creates a high risk of erroneous deprivation of respondents' liberty.

Finally, there is virtually no fiscal or administrative burden because minimal additional evidence was necessary to show Mr. Jaeger intended to apply to the community protection program upon release. On balance, to the extent RCW 71.09.060(1) precludes evidence of a forthcoming application to the program, it violates due process.

The wholesale exclusion of community protection program evidence also violates Mr. Jaeger's right to equal protection. RCW

71.09.060(1) singles out one type of voluntary treatment available only to people with developmental disabilities. *See* RCW 71.09.060(1); RCW 71A.12.210(2). The statute thus treats similarly situated persons, respondents in civil commitment proceedings, differently based on whether they have a developmental disability. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1986); U.S. Const. amend. XIV. This classification is constitutional only if it is rationally related to a legitimate state interest. *Id.* at 440. An application to the community protection program does not pose a threat to state interests in a way that evidence of other voluntary treatment programs does not.

Review should be granted to decide this important issue that affects commitment trials of developmentally disabled individuals like Mr. Jaeger.

2. The Court should grant review to determine whether expert-laden comments during voir dire, which opine on the central issue in the case, infringe on the respondent's constitutional right to a fair and impartial jury.

"[A]n essential element of a fair trial is an impartial trier of fact—a jury capable of deciding the case based on the evidence before it."[12] A

[12] *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009); *see In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007) (discussing civil

jury must be "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). The right to a fair trial by an impartial jury is violated if any juror is unduly biased or prejudiced by extrinsic evidence. *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1997).

Here, three jurors told the panel that their (or a friend's) professional experience taught them that sex offenders are incapable of remaining crime free if not confined.

Veteran King County Sheriff, juror 61, told the venire he had worked with the sexual assault unit for 25 years, writing letters and attending meetings about registered sex offenders and regularly checking on them in their homes. 7/1/14 RP 32- 33. This experience, he continued, would cause him to be unfair and partial in this case. 7/1/14 RP 33. He said he felt he "need[ed] to watch out for these guys." 7/1/14 RP 33. The very likely impression this gave to the jurors eventually seated is that they, too, needed to "watch out for these guys" like Mr. Jaeger. Mr. Jaeger accordingly moved for a mistrial, which was denied. 7/1/14 RP 45-47.[13]

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committee's right to due process); *Young*, 122 Wn.2d at 42-49 (civil committee's right to due process includes the right to jury unanimity).

[13] Although counsel did not renew the motion, the seating of a biased jury is a manifest constitutional error that can be reviewed for the first time on appeal. RAP 2.5(a)(3); *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958

Juror 2 reinforced Juror 61's professional viewpoint, by telling the venire that a deputy sheriff friend "had said if someone, as a young person stealing cars, when they get older most likely won't be doing that and could quit. But he said when it's something sexual there is no cure for that. And I have always kind of held those feelings." 7/2/14 RP 66-67.

Juror 117 related an additional disturbing experience with a repeat pedophile that arose during the juror's career working at an institution:

> I worked in an institution a number of years ago, and we worked with a man that was a pedophile, serial abuser. And he was in the institution for two to three years. . . . and he was discharged, released from the hospital. And within that week he was found with a boy, little boy in the front seat of his car ready to commit again.

7/2/14 RP 47-48. By relating this experience to the venire, juror 117 provided additional, untested information about sex offenders' likelihood to reoffend that was related to pedophiles specifically and that painted an alarming portrait of reentry and harm to the community.

Because jurors are not subject to cross-examination, the venire never learned the falsity of the notion that sex offenders have a propensity to reoffend and these statements contravened the principle that no witness may opine on guilt, directly or inferentially, because such opining "invade[s] the fact finder's exclusive province." *Johnson*, 152 Wn. App.

(2009) (manifest constitutional error where lay witness testimony invaded right to impartial jury).

at 930-31; *see, e.g.*, Alissa R. Ackerman & Marshall Burns, "Bad Data: How government agencies distort statistics on sex crime recidivism," Justice Pol'y J. Vol. 13, No. 1 at 18, 19 (Spring 2016).[14]

The source of two of the extrinsic opinions, police officers, carries "a special aura of reliability." *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). This makes it even more likely that the jurors credited the extra-record opinions.

Like in *Mach*, each of the three jurors shared purported expertise on the very issue of whether Mr. Jaeger is likely to reoffend. Both the source and the content of the broadcasted information were highly prejudicial. 137 F.3d 630; *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (impermissible opinion testimony on defendant's guilt may be reversible error because it violates the right to a jury trial, including a jury's independent determination of the facts).

Beyond even these major events, the seated jury also witnessed Juror 5's physical, fainting response to opening statements. The court did not excuse Juror 5, grant a requested mistrial, or otherwise ensure the fainting did not infect the jury's perception of the evidence. Before any evidence had been presented, this jury had a panoply of extrinsic matters to use to commit Mr. Jaeger.

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[14] Available at http://www.cjcj.org/news/10396#Bad Data.

Without providing an admonition or any inquiry into whether it impacted other jurors, this Court cannot be confident in the jury's verdict. The Court should grant review and hold that these errors necessitate a new trial.

3. The Court should grant review to determine whether indefinite civil commitment of a young adult with developmental disabilities is constitutional if premised on conduct that occurred while his volitional capacity continued to develop.

Science now conclusively demonstrates that young adults as a class temporarily lack volitional control while their brain continues to develop. *State v. O'Dell*, 183 Wn.2d 680, 691-96, 358 P.3d 359 (2015). "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Indeed, "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (internal citation omitted).

"[N]eurological differences make young offenders, in general, less culpable for their crimes." *O'Dell*, 183 Wn.2d at 692. As a result, a juvenile's actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." *Roper*, 543 U.S. at 570. Juveniles who demonstrate an

inability to control their behavior or act in a risky manner generally do so not because of an entrenched characteristic but because of developmental and hormonal changes that will subside with age. As Dr. Hoberman testified here, "Most of them grow out of it." 7/15/14 RP 155.

Development of volitional control moves even more slowly where the individual is developmentally delayed. 7/21/14 RP 130-31 (testimony of Dr. Kellaher). Research shows juveniles with FASD are even more prone to impulsivity, an inability to link cause and effect, poor boundary sense, memory and attention difficulties, and susceptibility to peer pressure all stemming from executive functioning damage in frontal lobe, the prefrontal cortex. 7/23/14 RP 59-61, 101-05. In other words, 16-year-old Gregory Jaeger was facing both typical adolescent impairment to volitional control and congenital frontal lobe deficits.

"From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570.[15] "Combining the physical immaturity of the brain with the underdevelopment of cognitive and psychological skills, adolescents are at

[15] *Accord* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003) ("Making predictions about the development of relatively more permanent and enduring traits on the basis of patterns of risky behavior observed in adolescence is an uncertain business.").

a severe disadvantage compared to adults." Michele Deitch et al., The Univ. of Tex. at Austin, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, at 15 (2009).[16]

Indefinite confinement must be premised upon a finding of serious difficulty controlling behavior to pass constitutional muster. Further, the serious difficulty controlling behavior must derive from a mental illness that distinguishes the respondent from the "typical recidivist in an ordinary criminal case." *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). But such a finding cannot be scientifically proven based upon conduct prior to mature brain development. Accordingly, this State cannot indefinitely confine individuals whose predicate conduct derives from the period of time when their volitional capacity was immature or continuing to develop.

The Court should grant review to resolve this constitutional issue not decided by *Anderson*, 185 Wn.2d at 85-89 (holding juvenile adjudication for sexually violent offense is predicate conviction under statutory construction of RCW 71.09.030(1)(e)).

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[16]Available at http://www.campaignforyouthjustice.org/documents /NR_TimeOut.pdf.

4. This Court should grant review to reexamine *Brooks* and the constitutionally insufficient statutory standard that allows indefinite civil commitment upon a mere preponderance of the evidence.

A person may not be committed indefinitely unless the State proves beyond a reasonable doubt he is a sexually violent predator. RCW 71.09.060. A "sexually violent predator" is a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). "'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention." RCW 71.09.020(7) (emphasis added). This is the preponderance of the evidence standard.

This standard conflicts with the constitutionally-required standard of proof in civil commitment proceedings, which requires proof of present dangerousness by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 427, 433, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

"Clear and convincing evidence" means the fact in issue must be shown to be "highly probable." *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). Thus, civil commitment is unconstitutional absent a finding

that it is "highly probable" the person will reoffend. The "more probable than not" standard of RCW Ch. 71.09 violates due process.

Though this Court rejected the argument in *In re Det. of Brooks*, that opinion should be reexamined in light of subsequent caselaw. 145 Wn.2d 275, 36 P.3d 1034 (2001). Since *Brooks* was decided, both the U.S. Supreme Court and this Court have held that involuntary commitment is unconstitutional absent a showing that a defendant has "serious difficulty" controlling dangerous, sexually predatory behavior. *Crane*, 534 U.S. at 413; *Thorell*, 149 Wn.2d at 735. The evidence must be sufficient to distinguish a sexually violent predator "from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413; *Thorell*, 149 Wn.2d at 731.[17]

The "serious difficulty" standard of *Crane* and *Thorell* is akin to the "highly probable" standard, not the "more likely than not" standard outlined in the statute.[18] The elevated standard of proof is necessary to support the "requirement that an SVP statute substantially and adequately narrows the class of individuals subject to involuntary civil commitment."

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[17] The Court of Appeals disposed of Mr. Jaeger's argument in a two-sentence paragraph that relies on *Brooks*. Appendix (Slip Op. at 25).

[18] *See Thorell*, 149 Wn.2d at 742 (the State must prove the person "has serious difficulty controlling behavior"); *see also In re Commitment of Laxton*, 647 N.W.2d 784 (Wis. 2002) (upholding Wisconsin's civil-commitment statute with "substantially probable" standard because it means "much more likely than not").

Thorell, 149 Wn.2d at 737 (internal citation omitted). The State must "demonstrate[] the cause and effect relationship between the alleged SVP's mental disorder and a high probability the individual will commit future acts of violence." *Id.* at 737 (emphasis added).

Chapter 71.09 RCW violates due process because it requires only that the risk of danger be "likely" or "probable"—not substantial. This Court should grant review and hold that the "likely" and "more probably than not" standards of RCW 71.09.020 are unconstitutional.

E. CONCLUSION

The Court should grant review because these issues concern conflict with this Court's opinions and present substantial constitutional issues that relate to the indefinite civil commitment of our citizens.

DATED this 1st day of December, 2016.

Respectfully submitted,
s/ Marla L. Zink
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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Detention of GREGORY S. JAEGER.	)	No. 72392-8-I
STATE OF WASHINGTON,	)	
Respondent,	)	ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION
v.	)	
GREGORY S. JAEGER,	)	
Appellant.	)	

The appellant Gregory S. Jaeger filed a motion for reconsideration. The respondent State of Washington filed an answer. The panel has determined that the motion should be denied but the opinion amended. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied. The opinion of this court in the above-entitled case filed September 6, 2016 shall be amended as follows:

1. On Page 11, the second paragraph that states:

> In a footnote, Jaeger claims manifest error affecting a constitutional right warrants review under RAP 2.5(a). Because Juror 117 and Juror 2 were excused, Jaeger cannot show "manifest" error within the meaning of RAP 2.5(a). See O'Hara, 167 Wn.2d at 99 ("manifest" requires showing of actual prejudice).

shall be deleted and replaced with the following:

> In a footnote, Jaeger claims manifest error affecting a constitutional right warrants review under RAP 2.5(a). Because Juror 117 and Juror 2

were excused and the jurors' remarks were insignificant in light of the record as a whole, Jaeger cannot show "manifest" error within the meaning of RAP 2.5(a). See O'Hara, 167 Wn.2d at 99 ("manifest" requires showing of actual prejudice).

The remainder of this opinion shall remain the same.

Dated this 2nd day of November, 2016.

Schindler, J.

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of GREGORY S. JAEGER.	)	No. 72392-8-I
	)	DIVISION ONE
STATE OF WASHINGTON,	)	
Respondent,	)	
	)	UNPUBLISHED OPINION
v.	)	
GREGORY S. JAEGER,	)	
Appellant.	)	FILED: September 6, 2016

SCHINDLER, J. — Following a three-week trial, a jury found the State proved beyond a reasonable doubt that Gregory S. Jaeger is a sexually violent predator under chapter 71.09 RCW. The trial court entered an order of commitment to the custody of the Department of Social and Health Services. Jaeger argues denial of motions for a mistrial, evidentiary rulings, and misconduct during closing argument requires reversal. Jaeger also challenges his civil commitment on constitutional grounds. We affirm.

FACTS

Gregory S. Jaeger exhibited cognitive and behavioral deficiencies throughout his childhood. Since the age of seven, Jaeger has been diagnosed with attention deficit hyperactivity disorder, pervasive development disorder, bipolar disorder, obsessive-compulsive disorder, general anxiety disorder, fetal alcohol syndrome, and alcohol related neurodevelopmental disorder. A number of mental health providers have

provided treatment to Jaeger. Jaeger was enrolled in special education classes at school.

The State filed charges against 16-year-old Jaeger in juvenile court alleging child molestation and attempted child molestation in the first degree. Jaeger pleaded guilty. The court ordered Jaeger remain at a juvenile rehabilitation administration (JRA) facility until age 21. Shortly before his scheduled release from Maple Lane School, the State filed a petition to civilly commit Jaeger as a sexually violent predator and transferred him to the Department of Social and Health Services Special Commitment Center Program (SCC).

At trial, the State had the burden to prove beyond a reasonable doubt Jaeger "has been convicted of a crime of sexual violence," he "suffers from a mental abnormality or a personality disorder which cause(s) him serious difficulty controlling his sexually violent behavior," and "his mental abnormality or personality disorder makes [him] likely to engage in predatory acts of sexual violence if not confined to a secure facility."[1]

The State called several witnesses including Dr. Harry Hoberman, Paul Luttrell, and Hayley Shepard. Dr. Hoberman was the State's main witness. Dr. Hoberman is a clinical and forensic psychologist specializing in evaluating individuals considered for civil commitment as sexually violent predators.

Dr. Hoberman testified that Jaeger suffers from multiple psychotic conditions affecting his ongoing ability to control his sexual behavior.

> I guess what I would say is Mr. Jaeger is a young man who is characterized by multiple psychiatric conditions, multiple problems.

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[1] See RCW 71.09.020(18).

> They're long-standing problems. They mostly, almost all of them have implications or consequences for his self-control.
>
> They have implications for his ability to manage his behavior generally, as well as his sexual behavior, and lead to his having ongoing problems with both actually acting out and his risk for future sexually acting out.
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> I think you can think of Mr. Jaeger as someone who has a high level of urges, desires, things of that sort, pushes from inside as well as pulls from his environment that stimulate him. And then someone who lacks brakes, if you will, things to regulate or modulate those things, that he's got really very significant deficits in self-control.

Dr. Hoberman testified that Jaeger has a history of serious problems managing his behavior generally and his sexual behavior. Jaeger would engage in aggressive outbursts at home and in school. Jaeger exhibited sexualized behaviors from a young age including sexual behavior with younger boys and fetishism associated with soiled diapers. With regard to his juvenile conviction, Jaeger used soda pop "as a mechanism . . . to lure" the first victim and crawled under a locked bathroom stall to reach the second victim.

Dr. Hoberman testified that Jaeger struggled to correct his behavior. For example:

> [O]ne of the really significant things about Mr. Jaeger is that he really does the same things over and over again. He is verbally aggressive to people, he's physically aggressive to peers, he gets in trouble for it, he gets suspended, he does it again.

Jaeger's problematic behavior continued while detained at the SCC. Jaeger also continued fantasizing about sexual contact with young boys. Dr. Hoberman testified that while at the JRA facility, Jaeger "was marked by a high level of impulsive behaviors generally so that he was aggressive towards residents, [and] he was verbally aggressive in a fairly extreme way to the staff." Jaeger was repeatedly removed from the sex offender treatment program due to "lack of compliance [and] acting out."

Dr. Hoberman concluded Jaeger suffers from several mental abnormalities and personality disorders that prevent him from controlling his sexually violent behavior. Dr. Hoberman testified Jaeger suffers from attention deficit hyperactivity disorder and meets the criteria for several personality disorders including borderline personality disorder, antisocial personality disorder, and narcissistic personality disorder. Dr. Hoberman testified these disorders result in impulsivity, disregard for rules and consequences, lack of empathy, and an obsessive desire to fulfill his own needs. Dr. Hoberman diagnosed Jaeger with pedophilic disorder, fetishism, and sexual masochism disorder. Dr. Hoberman testified that in his opinion, Jaeger "is more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility."

Paul Luttrell was Jaeger's case manager for four years at Maple Lane School. During counseling sessions, Jaeger said he began looking at pornography around age 10 and "preferred finding pre-aged school [boys]" because "he found that more arousing for him." Jaeger told Luttrell that he masturbated with diapers because it made him think about having sexual contact with children. Luttrell testified that throughout the four years at the Maple Lane School, Jaeger "would make generalized comments about having fantasies about an attraction to boys." Jaeger told Luttrell that he "was really fearful that he did not have control over his urges; and that, when he returned to the community, he was worried about re-offending."

Jaeger also told a Maple Lane School administrator he was concerned he "would harm children in the community." Jaeger asked the administrator to help civilly commit him.

Jaeger's SCC case manager Hayley Shepard testified Jaeger struggles to follow the rules and exhibits aggressive behavior. Jaeger had problems following staff directives and tearing up his room. Jaeger is "very impulsive" and "struggles to stop and think before he acts." On one occasion, Jaeger attacked a disabled resident confined to a wheelchair. Shepard testified that although Jaeger is "quick to say . . . when he's done something wrong [and] that he will never do it again," he continues to violate the rules.

Shepard testified Jaeger repeatedly engaged in sexual activity with other residents at the SCC. Shepard said Jaeger admitted taking used diapers worn by other SCC residents for masturbation. Jaeger told Shepard that "he felt he wouldn't be able to control that fetish in the community." Jaeger admitted he does not have control over his emotions or behavior.

Jaeger called several witnesses including Dr. Denise Kellaher and Dr. Natalie Brown. Dr. Kellaher testified that Jaeger exhibited an intellectual disability and autism. Dr. Kellaher testified these disorders do not make Jaeger more likely to engage in predatory acts of sexual violence. Dr. Brown testified Jaeger's behavior is consistent with autism and his intellectual and behavioral deficits are consistent with with fetal alcohol spectrum disorder.

The jury found the State proved beyond a reasonable doubt that Jaeger is a sexually violent predator. The trial court entered an order of commitment to the custody of the Department of Social and Health Services at the SCC. Jaeger appeals.

ANALYSIS

Motions for Mistrial

Jaeger argues the trial court erred in denying the motion for mistrial he made during voir dire and after a juror fainted during the opening statement.

The decision to deny a motion for mistrial is within the sound discretion of the trial court and is reviewed for an abuse of discretion. In re Det. of Broten, 130 Wn. App. 326, 336, 122 P.3d 942 (2005). A court abuses its discretion if the decision is based on untenable grounds or manifestly unreasonable. Broten, 130 Wn. App. at 336. The trial court is in the best position to discern prejudice and determine whether a juror can be fair. State v. Noltie, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1991). A mistrial is warranted only when nothing short of a new trial can ensure a fair trial. In re Det. of Griffith, 136 Wn. App. 480, 485, 150 P.3d 577 (2006).

(1) Motion for Mistrial During Voir Dire

Jaeger contends the response of Juror 61 during voir dire tainted the jury pool and the court erred in denying his motion for a mistrial. We disagree.

The court summoned 100 potential jurors. The jurors completed individual questionnaires prior to voir dire. The court conducted jury voir dire in two sessions with 50 jurors each.

Jaeger's attorney requested the court ask a number of specific questions during voir dire about sex crimes and sex offenders "to get true answers." The trial court agreed to do so.

At the beginning of voir dire, the court explained the importance of giving an honest answer.

> I want to make a comment on why we require you to take the oath. The jury selection process can only work if you are open and candid with us. . . . .
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> . . . .
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> Now, we will be asking you questions not to pry into your personal affairs or to embarrass you, but to determine if you are unbiased and without preconceived ideas that might have an effect on the case. Please do not withhold any information in order to be seated on this particular jury.
>
> This is actually important, and I want to spend just a minute on this. Is that, don't worry about what we might think of your answer, don't worry about whether your answer is the right answer or the wrong answer. The reason why I am talking to you about this is it's natural for people that are in a formal setting like a courtroom, people who may not feel comfortable speaking in public, that they [c]ensor themselves in order not to embarrass themselves by giving an answer that they think we might regard as inappropriate. . . . We are asking you about the judicial system and we are trying to determine ultimately whether you can be fair and impartial. It might be that — I think most of you are fair people. But sometimes people may, because of their own personal experiences, not be able to be impartial in a particular kind of case. I don't know if this is that kind of case. But it's very important for you to be forthcoming with us about what you are actually feeling as you are being asked these questions.

In response to whether any prospective jurors had "any specialized training, education or work experience related to sexual offenders," six prospective jurors, including Juror 61, responded affirmatively. Juror 61 stated he had been a police officer with the King County Sheriff's Office for 25 years. The court then asked the prospective jurors if anything about their training, education, or work experience "would make it difficult for you to be fair and impartial in this case." Juror 61 responded, "Everything pertaining to the last [25] years in law enforcement investigations of hundreds of abuse cases."

In response to whether "anybody had received a community notification letter informing the community that a registered sex offender was moving into the neighborhood," 11 prospective jurors, including Juror 61, responded affirmatively. The court then asked, "[W]as there anybody who received the notice who felt extremely strongly about the fact that somebody was moving into the neighborhood that was a registered sex offender, so much so you actually thought you might want to move?" A number of jurors responded affirmatively. The trial court asked whether anyone who "answered that question in the affirmative . . . reacted very strongly to that information in a way that might somehow affect you as a juror in this case." In response, Juror 61 indicated his experience had "jaded" him "a little bit" and made him "a little cynical in my outlook and belief that . . . they are more likely . . . to band together and I need to watch out for these guys."

> JUROR NO. 61: Over the last twenty-five years, I've worked with our sexual assault unit, both in writing the letters we send out to the public as well as attending all the meetings we have for the public. In the districts I patrolled, it was common practice that we go by the registered sex offender's homes and check on them as part of my daily work.
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> THE COURT: The question that I'd asked was whether this type of experience, exposure to registered sex offenders or hearing about registered sex offenders, elicited such a strong feeling that it might affect your ability to be fair and impartial in this case.
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> JUROR NO. 61: I would say yes, that has jaded me a little bit.
>
> THE COURT: When you say it's jaded you, can you explain what that means.
>
> JUROR NO. 61: I would say that the jading has made me a little cynical in my outlook and belief that, okay, they are more likely that they are going to band together and I need to watch out for these guys.
>
> THE COURT: Thank you.

Jaeger moved for a mistrial. Jaeger argued Juror 61's statement that sex offenders "are more likely than not to re-offend" tainted the jury pool.

> You have a police officer who on several occasions has talked about his lengthy experience, his great knowledge and in this particular area and said that because of that great experience of twenty-five years of going and visiting sex offenders he believes they are more likely than not to re-offend, which is the question here. I don't think that bell can be unrung.

Contrary to Jaeger's assertion, the record shows Juror 61 never stated sex offenders are likely to reoffend. The court denied the motion for a mistrial. "It's one man's opinion. And I don't think that there's any indication that because . . . he has a certain opinion that he is jaded, that it so prejudices the case that Mr. Jaeger cannot receive a fair trial."

Before resuming voir dire with the jury venire, the parties identified several jurors, including Juror 61, to question outside the presence of the other jurors. During questioning, the court asked Juror 61 if he believed there was a likelihood that sex offenders would reoffend. Juror 61 answered, "Yes." The court asked Juror 61 if it would be difficult for him to "let go of whatever assumptions you might bring to this trial." Juror 61 said he "would not be able to." The court excused Juror 61 for cause.

Jaeger relies on Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997), to argue the comments of Juror 61 tainted the jury pool and denied him the right to an impartial jury. Mach does not support his argument.

In Mach, the government charged Mach with sexual conduct with a minor. Mach, 137 F.3d at 631. During jury selection, a prospective juror said she had a psychology background, currently worked for child protective services, and had confirmed child sexual assault in every case where a client reported it. Mach, 137 F.3d at 631-32. The

juror repeatedly stated that in her three years as a social worker, she never found a case where a child lied about sexual assault. Mach, 137 F.3d at 632. The court denied the motion for a mistrial. Mach, 137 F.3d at 632.

The Ninth Circuit reversed. Mach, 137 F.3d at 634. The court held the juror's statements tainted the jury. The statements were "highly inflammatory and directly connected to Mach's guilt." Mach, 137 F.3d at 634. The juror's comments had an "expert-like" quality given the juror's years of experience and degree of certainty. Mach, 137 F.3d at 633. The court reversed because the outcome of the trial was "principally dependent on whether the jury chose to believe the child or the defendant." Mach, 137 F.3d at 634. The court concluded the juror's repetition of the statements created an especially high risk they would affect the jury's verdict. Mach, 137 F.3d at 633. The court held:

> Given the nature of [the juror]'s statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused.

Mach, 137 F.3d at 633.

Unlike in Mach, Juror 61 did not make repeated, confident assertions directly addressing the fundamental issue of whether Jaeger is a sexually violent predator. We conclude the trial court did not abuse its discretion in denying the motion for a mistrial.

For the first time on appeal, Jaeger argues the responses of Juror 117[2] and Juror 2[3] constitute "expert-like" opinion testimony that warranted a mistrial. But defense counsel did not object to the response of Juror 117 or Juror 2 and did not move for a mistrial. Jaeger's claim that he had a "standing objection" is not supported by the record. The standing objection Jaeger refers to did not occur until eight days later and was related to the extent the parties could inquire into the history of other SCC residents. We will not review a claim of error not raised in the trial court. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).

In a footnote, Jaeger claims manifest error affecting a constitutional right warrants review under RAP 2.5(a). Because Juror 117 and Juror 2 were excused, Jaeger cannot show "manifest" error within the meaning of RAP 2.5(a). See O'Hara, 167 Wn.2d at 99 ("manifest" requires showing of actual prejudice).

(2) Motion for Mistrial During Opening Statement

Jaeger argues the trial court erred in denying his motion for mistrial after Juror 5 fainted during opening statement. The trial court has broad discretion in addressing irregularities that arise during trial. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). The record supports the decision to deny the motion for a mistrial.

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[2] In the context of the State's "very high burden" of proof beyond a reasonable doubt, Juror 117 stated:

> I worked in an institution a number of years ago, and we worked with a man that was a pedophile, serial abuser. And he was in the institution for two to three years at least. And I — while I was working with him I did talk with him occasionally and he was discharged, released from the hospital. And within that week he was found with a boy, little boy in the front seat of his car ready to commit again. To violate the little boy. So there has to be some protection for society without abusing the abuser.

[3] In response to defense counsel asking whether offenders are likely to reoffend, Juror 2 stated:

> A few years ago in conversation with a friend who is a deputy sheriff, he had said if someone, as a young person stealing cars, when they get older most likely won't be doing that and could quit. But he said when it's something sexual, that there is no cure for that. And I have always kind of held those feelings.

During opening statement, the prosecutor described how Jaeger "repeatedly acted out sexually in bizarre and deviant ways." The prosecutor described "deviant practices" that "Dr. Hoberman will put . . . into a psychological context for you." Juror 5 fainted.

After a brief recess, the court questioned Juror 5 outside the presence of the other jurors. Juror 5 explained why he fainted: "It's just the combination . . . of being in a courtroom and hearing some graphic details about the case." Juror 5 was "worr[ied] about it" and concerned it "might happen again." Nevertheless, Juror 5 told the court he could continue to serve as a juror in the case.

At the conclusion of the opening statements, the court excused all the jurors for the noon recess except Juror 5. In follow-up questioning, Juror 5 said he was "feeling fine at the moment." Juror 5 said he was able to pay attention during the opening statements and believed he could continue as a juror in the case.

Jaeger moved for a mistrial arguing the reaction of Juror 5 might "taint the other jurors." The court denied the motion for a mistrial. "[The jurors are] all individuals and they are all going to have their reactions."

Nothing in the record shows that Juror 5 fainting during opening statement tainted the other jurors. The trial lasted three weeks and we presume the jury followed the court's instructions. Nichols v. Lackie, 58 Wn. App. 904, 907, 795 P.2d 722 (1990). At the conclusion of trial, the court instructed the jury that the attorneys' remarks are not evidence and the jury must base its verdict on only the evidence presented at trial.

> The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during trial. If evidence was not admitted or

> was stricken from the record, then you are not to consider it in reaching your verdict.
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> . . . .
>
> . . . You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.
>
> . . . .
>
> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

The court did not abuse its discretion in denying the motion for a mistrial.

Evidentiary Rulings

Jaeger claims the trial court abused its discretion by (1) excluding expert testimony that he was prone to being victimized or groomed and (2) excluding evidence about the Department of Social and Health Services Community Protection Program (CPP).

We review evidentiary rulings for abuse of discretion. City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). Trial courts have discretion to consider the relevancy of evidence and balance the probative value of the evidence against prejudice. State v. Barry, 184 Wn. App. 790, 801, 339 P.3d 200 (2014). A trial court abuses its discretion when the decision is based on untenable grounds or is manifestly unreasonable. Broten, 130 Wn. App. at 336. An erroneous evidentiary decision requires reversal only if " 'it materially affected the outcome of the trial.' " State v. Beadle, 173 Wn.2d 97, 120-21, 265 P.3d 863 (2011) (quoting State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994)).

(1) Exclusion of Victimization and Grooming Testimony

According to Dr. Natalie Brown, Jaeger's behavior could be explained by autism and fetal alcohol syndrome disorder (FASD). Dr. Brown planned to use PowerPoint during her testimony. One slide stated youth with FASD "are very susceptible to peer pressure, easily led, and prone to be victimized by other inmates." The State objected to a slide that used the phrase "prone to be victimized by other inmates" and to other slides containing similar themes.

Jaeger argued the evidence explained his behavior and was necessary to rebut the evidence that "he's going to fail in the community."

> We are bringing in — the State is bringing in all of Greg Jaeger's past behavior at the SCC as a reason why he's going to fail in the community.
>
> We are showing that there are all these things that he's gone through while at the SCC that have created, in large part, the behavior that he has done while at the SCC. That — we are not saying anything about what's going to happen if he's kept at the SCC.
>
> . . . We are talking about an explanation for his behavior.

The trial court sustained the State's objection because there had been no testimony of either victimization or grooming.

> I am going to strike the last clause, "and prone to being victimized by other inmates." There has been no testimony about that in this case. There has been testimony about sexual activity at the SCC, but I don't believe that that is relevant to this particular case, and we spent a lot of time on what the boundary is between legitimate inquiry as to what has happened at the SCC and which — and illegitimate, what we have referred to, I think, in shorthand form as "this is a bad place" as compared to living at home, which is not what is before the jury.
>
> So I am going to strike that clause and any similar language in any of the other slides.

The trial court acted within its discretion in sustaining the objection. There must be sufficient factual foundation for expert testimony for the testimony to be relevant. See, e g., State v. Kunze, 97 Wn. App. 832, 850 n.67, 988 P.2d 977 ("When an expert

desires to apply scientific knowledge to the facts of the particular case, his or her opinion must also, of course, rest on appropriate case related facts."). There was no evidence at trial that other SCC residents "victimized" or "groomed" Jaeger. To the contrary, the record showed Jaeger initiated consensual sexual relationships with other residents while detained at the SCC.

Further, in In re Detention of Turay, 139 Wn.2d 379, 404, 986 P.2d 790 (1999), the court held the "conditions at a particular [Department of Social and Health Services] facility . . . are irrelevant to the determination of whether a person fits within the statutory definition of [a sexually violent predator]." Jaeger attempts to distinguish Turay by arguing he did not directly challenge the conditions of the SCC. Jaeger contends Dr. Brown's testimony was relevant to show Jaeger's susceptibility to victimization and grooming was an explanation for his allegedly predatory behavior. The record supports the ruling that the testimony was essentially "shorthand" for conditions at the SCC.

In any event, Jaeger was able to make the argument that he is highly susceptible to victimization and grooming. Without objection, Dr. Brown testified that an individual with FASD is "very susceptible to peer pressure and easily led." Dr. Brown also testified at length that FASD made Jaeger "highly suggestible."

> [T]here have been others who have published research on suggestibility in this population [of individuals with FASD] as well.
>
> The reason why it's relevant to this particular case is because Mr. Jaeger is [a] very suggestible young man and prone to saying things, reporting information that might be affected by his suggestibility, might be affected by what he's heard other people say or suggest to him.
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> So I don't rely on his self-report when I evaluated him. I didn't take anything he said at face value. And this is particularly problematic when you have a young man who is in treatment and he's hearing all these sexual stories and histories from other young people in treatment. There's some tendency to kind of adopt some of that as his own history. . . .
>
> . . . .

> . . . This is a young man, who, according to my review of the records, is extremely open, tells on himself a lot, sometimes after the fact, but many times before the fact he will tell on himself. So I don't get a sense that he is deliberately lying but, rather, that he is either responding in terms of suggestibility to something that someone has suggested actually did occur, and he's incorporating that as his own memory, which is called confabulation. He is filling the gaps in his memory essentially with something that makes sense that he heard from somebody else.

(2) Exclusion of Community Protection Program Evidence

Pretrial, Jaeger argued he was eligible for the CPP as a placement condition or voluntary treatment option on release under RCW 71.09.060(1).

The CPP is a state-funded program that provides 24-hour supervision of developmentally disabled individuals "who have committed serious crimes and served their prison time." In re Det. of Mulkins, 157 Wn. App. 400, 402, 237 P.3d 342 (2010). In addition to supervision, the CPP provides treatment and other support. "The program is voluntary and participants may refuse services and live without support or supervision." Mulkins, 157 Wn. App. at 402.

Jaeger presented evidence that he communicated regularly with CPP staff and intended to apply for the program after his release. But the evidence also showed his acceptance into the program was not certain. The regional coordinator testified that if released, Jaeger's acceptance into the CPP was "uncertain and essentially hypothetical."

The trial court excluded evidence of the CPP because it is not a condition that "would exist" upon Jaeger's release under RCW 71.09.060(1). RCW 71.09.060(1) states that in determining whether an individual is likely to engage in predatory acts of sexual violence, the jury may consider the existence of placement conditions and

voluntary treatment options that "would exist" if the person is unconditionally released.

> In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may 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.

RCW 71.09.060(1).[4]

In Mulkins, we upheld the decision to exclude evidence that the CPP was a treatment option because there was no evidence the respondent "was actually accepted into . . . the program." Mulkins, 157 Wn. App. at 402.

> A respondent in a sexually violent predator . . . proceeding is not entitled to present evidence that he or she may be eligible to participate in the . . . CPP . . . unless the evidence establishes that this option would in fact exist for the respondent as a placement condition or voluntary treatment option upon an unconditional release. Here, the respondent failed to show that he was actually accepted into and agreed to participate in the program upon his release; he simply presented a letter indicating that he was a potential candidate for the program.

Mulkins, 157 Wn. App. at 401-02.

Here, as in Mulkins, there is no evidence Jaeger was "actually accepted" into the CPP. Mulkins, 157 Wn. App. at 402. Jaeger presented evidence only that "he was a potential candidate for the program." Mulkins, 157 Wn. App. at 402. The trial court did not abuse its discretion in excluding CPP evidence.

Jaeger argues that unlike in Mulkins, he is not seeking to show the CPP is a condition that would exist upon his release, but rather, that applying to the CPP is a condition that would exist upon his release. Below, Jaeger did not frame the argument in this way. His attorney argued evidence of the CPP was relevant because "[i]f Greg Jaeger can show via the CPP that he is not a danger to the community, then he does

[4] Emphasis added.

not meet commitment criteria and he must be unconditionally released." Nonetheless, evidence that Jaeger "would apply" to the CPP has no bearing on whether the condition would exist or that he would actually be accepted into the program.

Even if the CPP evidence is not admissible under RCW 71.09.060(1), Jaeger asserts the statute violates his constitutional right to due process. In Mulkins, we considered and rejected the same argument and held the respondent did not have standing to challenge the constitutionality of the statute. Mulkins, 157 Wn. App. at 406-07.

> Mulkins asserts that the CPP is an existing option for him, relying on the letter from [the Department of Social and Health Services] and noting that offenders who have been identified by [the Department of Social and Health Services] 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.

Mulkins, 157 Wn. App. at 406-07. We adhere to the decision in Mulkins and conclude Jaeger does not have standing to challenge RCW 71.09.060(1).

Closing Argument

Jaeger argues four instances of prosecutorial misconduct during rebuttal argument violated his right to a fair trial.

We have applied the prosecutorial misconduct standard used in criminal cases to sexually violent predator cases. In re Detention of Law, 146 Wn. App. 28, 50-51, 204 P.3d 230 (2008).

To prevail on a claim of prosecutorial misconduct, Jaeger bears the burden of proving the comments were improper and prejudicial. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Comments are prejudicial only if "there is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

The prejudicial effect of improper comments during closing argument must be viewed not in isolation, but "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. Where the defense fails to object to an improper remark during closing argument, error is waived unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Brown, 132 Wn.2d at 561. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on the credibility of the witnesses based on the evidence. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Remarks, even if improper, are not grounds for reversal if invited or provoked by defense counsel or are in pertinent reply unless the remarks are so prejudicial that a curative instruction would be ineffective. Russell, 125 Wn.2d at 86.

Jaeger's attorney argued in closing that the State did not prove beyond a reasonable doubt that "Jaeger is more likely than not — more than 50 percent likely —

to commit sexually violent predatory acts." Jaeger addressed the testimony of Dr. Kellaher and Dr. Brown at length. The attorney argued the testimony of Dr. Kellaher and Dr. Brown was more credible than the testimony of Dr. Hoberman. The attorney also argued that unlike Dr. Hoberman, Dr. Kellaher and Dr. Brown do not "rely on sexually violent predator cases for their livelihood."

Jaeger contends the prosecutor improperly disparaged Dr. Kellaher in rebuttal. In rebuttal, the attorney pointed out the discrepancy between Dr. Kellaher's written notes and her testimony.

> I confronted [Dr. Kellaher] with the contemporaneous notes, her hand-scrawled doctor notes of those interviews that she did with Mr. Jaeger. And what she had actually written when she was interviewing him and asking about his unwanted, intrusive thoughts that he couldn't control, she had written, "Mom dying and killing mom and dad. Suicide if parents dying."
>
> So there was kind of a mad scramble on redirect examination when she tried to explain that discrepancy. She said, "Oh, I just — I didn't have time to accurately write down what he had truly told me. What he told me was that he had been having unwanted thoughts about other people killing his parents." She said other people killing, she also said other people murdering his parents.
>
> Are you accepting that 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.

Jaeger objected after the last comment that Dr. Kellaher "disgraced herself in this courtroom by doing that." The court sustained the objection. The comment was improper. State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (a prosecutor may not state a personal belief as to the credibility of a witness). But Jaeger cannot show a substantial likelihood that the comment affected the verdict. Jaeger also challenges comments in rebuttal contrasting the credentials of Dr. Hoberman and Dr.

Kellaher and the remark that Dr. Kellaher "fluff[ed] up a resumé." But Jaeger did not object to these remarks and cannot show prejudice that could not have been neutralized by a curative instruction to the jury.

Jaeger argues the prosecutor impermissibly shifted the burden of proof by arguing he did not rebut the State's evidence and did not call a witness to testify about the release plan. Because a defendant has no duty to present evidence, a prosecutor cannot argue the burden of proof rests with the defendant or "comment on the defendant's failure to present evidence." State v. Thorgersen, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). However, a prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case. Russell, 125 Wn.2d at 87. The "mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009). And a prosecutor can "state that certain testimony is not denied, without reference to who could have denied it, and may comment that evidence is undisputed." State v. Morris, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009).[5]

Here, the prosecutor argued, in pertinent part:

> [T]he most glaring weakness in the defense case was their abject, complete refusal to face head on in any substantive way the enormous volume of evidence that the State presented in this case that establishes these tremendous sexual deviancies of Mr. Jaeger.
>
> Pedophilia, of course, being the most important, the diaper fetish being very important, but the coprophilia and urophilia.

The argument that the expert witness who testified on behalf of Jaeger did not address pedophilia, coprophilia, or urophilia did not improperly shift the burden of proof.

[5] Citation omitted.

Under the "missing witness" doctrine, a prosecutor can comment on the failure to call a witness where the defense:

> [F]ails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party.

State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003) (citing State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991)). The inference arises only where "the witness is peculiarly available to the party" and "within the party's power to produce," and "the testimony must concern a matter of importance." Cheatam, 150 Wn.2d at 652-53.

The prosecutor noted Jaeger did not call Dr. Steve Becker.

> Dr. Becker, the one that they hired to give them a treatment plan, said you need to hire four outside staff members, three eight-hour shifts to watch him 24[hours a day]/7[days a week]. One is to sit outside the door even when he sleeps at night and to make sure that door doesn't open.
>
> That's what their professional, who wasn't called to testify, thinks about the risk that is posed by this person sitting in front of you. You all know what's sitting in front of you.

Noting the failure to call Dr. Becker was not improper. Jaeger's attorney told the jury during opening statement that Dr. Becker would testify about the release plan.

> Dr. Steve Becker is in charge of the training of the members of the support group. You will hear from him. He has been providing home-based parent training and behavior management services for over twenty-five years. He has served on the board of directors for the Autism Society in Washington. He has a twelve-year career as a special education teacher with developmental disabilities and impulses.
>
> You will hear from [Dr. Becker] about the comprehensive release plan.

Jaeger argues the attorney committed misconduct by arguing sexual deviancy enhances the "likelihood of reoffense."

> [A]s Dr. Hoberman testified, multiple paraphilias are a huge risk factor for enhanced risk of reoffense sexually.
>
> And that just comports with your common sense. The more deviant somebody is, the more they dwell on these various deviant practices and urges, the more sick they are, the greater likelihood of reoffense. That's the connection.

Jaeger contends that because the likelihood of reoffense must be connected to the type of mental abnormality and not simply the number of deviancies or the degree of the deviancy, the argument misstated the law. Jaeger also claims the prosecutor's statement relies on facts not in evidence.

The comments did not misstate the law. To meet the burden of proving that Jaeger meets the definition of "sexually violent predator," the State must prove he "suffers from a mental abnormality or personality disorder which makes [him] likely to engage in predatory acts of sexual violence." RCW 71.09.020(18). The attorney did not rely on facts that were not in evidence. The attorney accurately summarized Dr. Hoberman's testimony.[6]

Substantive Due Process

Jaeger argues his civil commitment violates substantive due process because juveniles are scientifically incapable of volitional control. Jaeger relies on Roper v.

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[6] Dr. Hoberman testified, in pertinent part:

Q. What does the research indicate in terms of persons who are actually diagnosed with a paraphilic disorder relative to those who are not, in terms of risk of future reoffense?

A. Presence of a paraphilic disorder is associated with an increased risk of sexual offending.

Q. And the second is multiple paraphilias. What does the research indicate about persons who have multiple diagnosed sexual paraphilias?

A. It indicates that people who have more than one paraphilia or paraphilic disorder are, again, more likely to commit future sexual offenses, to reoffend.

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 Roper and Graham, the Supreme Court addressed whether imposition of harsh punishment for crimes committed by juveniles without taking into consideration lack of volitional control violates the Eight Amendment to the United States Constitution. Roper, 543 U.S. at 578; Graham, 560 U.S. at 82. In O'Dell, the Supreme Court held a trial court "must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender." O'Dell, 183 Wn.2d at 696.

Unlike a criminal prosecution, a commitment proceeding does not raise an issue of cruel and unusual punishment under the Eight Amendment. And the Washington Supreme Court recently held that "a juvenile adjudication for a sexually violent offense is a predicate conviction for purposes" of the sexually violent predator statutes. In re Det. Anderson, 185 Wn.2d 79, 85, 368 P.3d 162 (2016).

Because a juvenile adjudication is only evidence and not a basis for punishment, and the inability to control sexual conduct while a juvenile is not relevant to his present or future inability to control behavior, Jaeger cannot show a violation of substantive due process. Although an individual must commit a crime of sexual violence to be civilly committed, the State must prove the individual is a sexually violent predator and the jury must find beyond a reasonable doubt that the individual currently "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).

Jaeger also claims a civil commitment is unconstitutional absent a finding that it is "highly probable" he will reoffend. The Washington Supreme Court considered and rejected this same argument in In re Detention of Brooks, 145 Wn.2d 275, 293-98, 36 P.3d 1034 (2001).

Cumulative Error

Jaeger argues cumulative error warrants reversal. Because the cumulative error doctrine "does not apply where the errors are few and have little or no effect on the outcome of the trial," we disagree. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

We affirm the jury verdict finding the State proved beyond a reasonable doubt that Jaeger is a sexually violent predator under chapter 71.09 RCW.

Schindler, J.

WE CONCUR:

Appelwick, J.

Becker, 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. 72392-8-I**, 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 or residence address as listed on ACORDS:

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