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SUPREME COURT NO. 96453-0  
COA NO. 76137-4-I

IN THE SUPREME COURT OF WASHINGTON

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IN RE DETENTION OF PAUL HARELL:

STATE OF WASHINGTON,

Respondent,

v.

PAUL HARELL,

Petitioner.

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

The Honorable Vickie I. Churchill, Judge

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PETITION FOR REVIEW

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**A. IDENTITY OF PETITIONER**

Paul Harell asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

Harell requests review of the published decision in In re Detention of Paul Harell, Court of Appeals No. 76137-4-I. The opinion and publication order, entered September 18, 2018, are attached as appendix A.

**C. ISSUE PRESENTED FOR REVIEW**

Where the State's expert did not identify the diagnosed personality disorder and alcohol use disorder as a mental abnormality that makes Harell likely to reoffend and the trial court instructed the jury solely on mental abnormality as the basis to commit, whether the trial court erred in permitting the jury to consider evidence of the personality disorder and alcohol use disorder because it was irrelevant under ER 401?

**D. STATEMENT OF THE CASE**

In 2011, Paul Harell stipulated to meeting the definition of a sexually violent predator (SVP) under chapter 71.09 RCW. Ex. 52. In 2016, the court ordered an unconditional release trial. CP 373-75.

**1. Pre-trial Motions**

Before trial, Harell's counsel moved to exclude evidence of Harell's diagnoses for antisocial personality disorder and alcohol use disorder. 365-66. Dr. Goldberg, the State's expert, testified in deposition that other specified paraphilic disorder (nonconsensual sex) constitutes Harell's mental abnormality. CP 360. The issues for the jury were whether this paraphilic disorder caused Harell serious difficulty in controlling his behavior and whether that same disorder makes him likely to commit predatory acts of sexual violence if not confined to a secure facility. CP 365-66. Counsel argued the other diagnosed mental disorders — antisocial personality disorder and alcohol use disorder — should be excluded because they were irrelevant to those issues. CP 366.

The State opposed Harell's motion, arguing each diagnosis was relevant to Goldberg's opinion on mental abnormality and future risk because their combination affected Harell's volitional capacity. CP 642-43, 645-46; RP<sup>1</sup> 56. The court denied Harell's motion to exclude evidence of antisocial personality disorder and alcohol abuse disorder on the ground that the "jury needs to understand how each diagnosis, either individually or in combination with one another, yields a mental abnormality and/or a Personality Disorder." RP 62-63; CP 16.

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<sup>1</sup> This brief cites to the verbatim report of proceedings as follows: eight consecutively paginated volumes consisting of 10/11/16, 10/12/16, 10/13/16, 10/14/16, 10/17/16, 10/18/16, 10/19/16, 10/20/16.



## **2. Unconditional Release Trial**

The last time Harell lived unconstrained in the community was 1993, when he was arrested for rape offenses at the age of 21. RP 304, 307, 314, 318. Harell acknowledged he committed rapes. RP 318-23; RP 314-15, 320-25, 700-40, 768-802, 812-37, 850-900. The last offense occurred in 1993, over 20 years before trial. RP 843. Harell expressed remorse for what he had done. RP 954-55. He engaged sex offender treatment and lived in a less restrictive alternative setting at the time of trial. RP 252-53, 906, 932-33, 958, 1046, 1052-53, 1071-72.

Dr. Goldberg testified that he diagnosed Harell with other specified paraphilic disorder (nonconsensual sex), antisocial personality disorder and alcohol use disorder. RP 422, 428-29, 433, 447. He identified the paraphilic disorder diagnosis as Harell's current mental abnormality, which caused him serious difficulty in controlling sexually violent behavior. RP 443-46, 523-24. He further opined this mental abnormality makes Harell likely to engage in predatory acts of sexual violence if not confined in a secure facility. RP 452, 505.

Dr. Goldberg distinguished between the personality disorder and the mental abnormality. RP 442-43. When asked if Harell suffered from a personality disorder as that term is used in the SVP definition, Goldberg answered "I think it's more of an exacerbating factor. I think the primary

disorder here is a mental abnormality." RP 442. He later testified that the antisocial personality disorder carries traits that "exacerbate the paraphilic disorder," making the paraphilic disorder "more likely to be expressed." RP 446-47. These traits included impulsivity, lack of inhibition regarding social norms, and lack of remorse. RP 446-47. Goldberg did not think the antisocial personality disorder alone would cause Harell to commit future sexual crimes; it was not the driving force behind his rapes. RP 550-51.

When asked how Harell's alcohol use disorder interacted with Harell's mental abnormality, Goldberg said the alcohol use disorder is a risk factor, "that if he started using alcohol again, it would decrease his inhibitions." RP 449. Goldberg continued: "Now, alcohol use is not a requirement for him to rape somebody because there are, as we mentioned, there are --Some of the rapes were done without alcohol, when he wasn't intoxicated. But, like anybody, if you're intoxicated, you're going to be less inhibited, you're going to be more impulsive. And this would be a risk factor for him." RP 444-50. In this manner, the alcohol use disorder interplayed with the mental abnormality in causing Harell serious difficulty in controlling his sexually violent behavior. RP 450.

Harell acknowledged alcohol was a long-term issue in his life, and that he drank during the period when the 1992 and 1993 rapes occurred. RP 334, 848-50. Harell recognized his risk factors, including alcohol. RP

381-82. Goldberg testified that Harell was progressing and motivated to do well in treatment, which was a protective factor in assessing risk. RP 390, 496. Since Goldberg's initial 2009 assessment, Harell had changed through treatment, but it did not negate his mental abnormality and future risk. RP 504. According to Goldberg, treatment had mitigated Harell's risk, but he still had "a way to go." RP 654-55, 677.

Harell's treatment provider, Dr. O'Connell, testified that Harell had progressed in treatment and was working on managing his risk factors. RP 1053, 1075-78, 1084,1090, 1104, 1129-44, 1153-54. Based on risk assessment instruments, O'Connell placed Harell in the low-moderate range of risk. RP 1098. The two highest risk factors based on research are deviant sexual arousal and antisocial behavior. RP 1096. Harell was not regularly antisocial. RP 1097. In the last two and a half years, Harell had not reported sexual urges regarding rape, and polygraph testing supported his assertion about the lack of deviant sexual arousal. RP 1096-97. Harell testified that he was a different person now, having matured and done treatment. RP 955. The jury nonetheless found Harell continued to meet the SVP definition. CP 18.

### **3. Appeal**

Harell argued the trial court committed reversible error in admitting evidence of the antisocial personality disorder and alcohol use

disorder diagnoses because such evidence was irrelevant. The Court of Appeals disagreed, holding "the diagnosis of antisocial personality disorder and alcohol abuse disorder is relevant to whether the mental abnormality makes Harell more likely to engage in predatory acts of sexual violence." In re Detention of Harell, 426 P.3d 260, 265-66 (2018).

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**1. EXPERT TESTIMONY DIAGNOSING HARELL WITH A PERSONALITY DISORDER AND ALCOHOL DISORDER WAS IRRELEVANT.**

In this state people are involuntarily committed based on predictions of future criminality. Courts, as guardians of the integrity of this civil commitment scheme, must ensure it does not stray from its intended purpose. As a matter of due process, someone must be mentally ill and dangerous. Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). As a matter of statutory law, not just any mental illness will do. By statute, the trier of fact is limited to considering whether a statutorily defined mental abnormality or personality disorder causes a person to sexually reoffend. RCW 71.09.020(18). The statute does not authorize consideration of any other mental disorder in assessing risk, such as the alcohol disorder at issue here. Further, the basis of commitment is limited by the court's instructions to the jury under the law of the case doctrine. The "to commit" instruction required the State to prove Harell

suffers from a mental abnormality and that this mental abnormality alone makes him more likely than not to commit predatory acts of sexual violence. CP 26. Expert testimony about Harell's personality disorder and alcohol disorder diagnoses was irrelevant because the jury was not instructed on personality disorder as a means to commit Harell, and neither diagnosis was identified by the State's expert as a mental abnormality. The trial court thus erred in allowing the jury to consider mental conditions that were extraneous to what the jury needed to decide.

A decision that potentially affects numerous proceedings in the lower courts warrants review as an issue of substantial public interest where review will avoid unnecessary litigation and confusion on a common issue. State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). The question of whether the basis of commitment is limited by how the jury is instructed is an issue of substantial public importance because it arises in any SVP case where the jury is instructed on only one alternative means as a basis to commit, to the exclusion of the other means. Further, whether the trier of fact can rely on mental conditions that do not qualify as mental abnormalities or personality disorders in deciding whether someone meets the SVP definition is a recurring issue. For these reasons, review is warranted under RAP 13.4(b)(4).

- a. **Only certain mental disorders qualify for consideration under the statute, and the risk of reoffense must be linked to those disorders in order to justify civil commitment.**

Chapter 71.09 RCW authorizes the initial commitment, and the continued commitment, of those found to meet the SVP definition. RCW 71.09.060(1); RCW 71.09.090(3)(c). An SVP is "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

The third element of the definition is "a compound determination that requires finding both causation (i.e., the abnormality or disorder causes the likelihood of future acts), and that 'the probability of the defendant's reoffending exceeds 50 percent.'" In re Detention of Post, 170 Wn.2d 302, 310, 241 P.3d 1234 (2010) (internal citation omitted) (quoting In re Detention of Brooks, 145 Wn.2d 275, 298, 36 P.3d 1034 (2001), overruled on other grounds by In re Detention of Thorell, 149 Wn.2d 724, 753, 72 P.3d 708 (2003)). The second and third elements are not detached from one another. The jury is not tasked with determining whether a person has a mental abnormality or personality disorder and then determining whether that person is likely to reoffend without regard to the mental

abnormality or personality disorder. The qualifying mental condition must be causally linked to the risk of reoffense. Post, 170 Wn.2d at 310.

"The State does not have to prove both a mental abnormality and a personality disorder." In re of Detention of Monroe, 198 Wn. App. 196, 202, 392 P.3d 1088 (2017). Rather, "mental abnormality" and "personality disorder" are distinct alternative means of establishing the mental illness element in SVP cases. In re Detention of Halgren, 156 Wn.2d 795, 810-11, 132 P.3d 714 (2006). Each has its own statutory definition.<sup>2</sup>

- b. Evidence that Harell had a personality disorder was irrelevant because is not a mental abnormality, and the jury could only find Harell continued to meet the SVP definition if a mental abnormality made him likely to reoffend.**

The jury in Harell's case was not instructed that it could find Harell met the SVP definition on the basis of a personality disorder. Instead, the "to commit" instruction was limited to the mental abnormality means. CP

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<sup>2</sup> "Mental abnormality" means "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). The jury received an instruction defining "mental abnormality," which tracked the statutory definition. CP 27. "Personality disorder" means "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment." RCW 71.09.020(9). The court gave no instruction defining "personality disorder."

26. Under the law of the case doctrine, "instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law." Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 L. Orland & K. Tegland, Wash. Prac., Judgments § 380, at 56 (4th ed. 1986)). The question for the jury, then, was whether the mental abnormality, standing alone, makes Harell likely to reoffend.

Relevant evidence is "evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Irrelevant evidence is inadmissible. ER 402. The existence of the personality disorder in Harell's case does not make it more probable that a mental abnormality makes Harell likely to commit predatory acts of sexual violence if not confined in a secure facility. It is only by considering the personality disorder *in addition to* the mental abnormality that the personality disorder contributes to the risk of re-offense. But this is precisely what the jury instruction prevented because it was limited to whether the mental abnormality makes Harell likely to reoffend. Based on the way the jury was instructed, it could not consider the personality disorder as contributing to risk of reoffense.



Evidence of personality disorder is irrelevant where the State's expert does not rely on personality disorder as one of the alternative means for commitment and the jury is not instructed on personality disorder as a means for commitment. The "to commit" instruction determines the facts of consequence in an unconditional release trial. A personality disorder is not a mental abnormality and Dr. Goldberg did not treat it as such. Goldberg did not think the personality disorder alone would cause Harell to commit future sexual crimes and agreed this disorder was not really the driving force behind Harell's rapes. RP 550-51. Unlike the diagnosed mental abnormality (RP 444-45), Goldberg did not testify that a personality disorder predisposes Harell to commit criminal sexual acts or that it causes him serious difficulty controlling his sexually violent behavior.

Where, as here, the jury is only instructed that it must find a mental abnormality makes the person likely to reoffend (CP 26), the jury has no basis to rely on the existence of a personality disorder as a form of mental illness that increases risk of reoffense. Evidence of Harell's personality disorder was irrelevant to the mental abnormality-focused question the jury had to answer in order to find Harell met the statutory criteria for commitment. It was therefore improper to allow Dr. Goldberg to testify that Harell suffered from a personality disorder and that this disorder contributed to his risk of reoffense. Testimony on the personality disorder was

inadmissible under ER 401 because the "to commit" instruction did not authorize the jury to consider evidence of a personality disorder in deciding whether the State had proven its case. Based on Dr. Goldberg's pre-trial evaluation, it was known at the time of the court's ruling that Goldberg identified the paraphilic disorder as the mental abnormality. The jury was only authorized to consider whether a mental abnormality, standing alone, made Harell more likely than not to sexually reoffend, not whether the personality disorder did, even as a contributing factor. The trial court thus erred in permitting the State to rely on personality disorder evidence to meet its burden that Harell suffered from a mental abnormality that made him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

- c. **Evidence that Harell had an alcohol use disorder was irrelevant because is not a mental abnormality, and the jury could only find Harell continued to meet the SVP definition if a mental abnormality made him likely to reoffend.**

The alcohol use disorder diagnosis was also irrelevant. As a matter of statutory law, the trier of fact cannot rely on a mental condition that does not qualify as a mental abnormality or personality disorder in deciding whether someone is likely to reoffend. The diagnosis was also irrelevant under the "to commit" instruction, which only posited a mental abnormality as a basis to find Harell met the SVP definition.

The statute defining who qualifies as an SVP limits consideration to mental abnormalities and personality disorders. The person must suffer "from a mental abnormality or personality disorder *which makes* the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). SVP cases are not "anything goes" cases. Not just any mental condition qualifies as one to needed to meet the SVP definition. Under the plain language of the statute, a person cannot be committed as an SVP if an alcohol use disorder, which neither qualifies as a mental abnormality or a personality disorder, makes a person likely to reoffend. Because the jury is not allowed to commit on this basis, evidence of the disorder is irrelevant. To hold otherwise would be to rewrite the statute to insert the words "or other mental condition" after "mental abnormality or personality disorder."

Courts assume "the legislature means exactly what it says." State v. Hamedian, 188 Wn. App. 560, 563, 354 P.3d 937 (2015). Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Moreover, civil commitment is a significant deprivation of liberty. In re Detention of Morgan, 180 Wn.2d 312, 320, 330 P.3d 774 (2014). "[S]tatutes that involve a deprivation of liberty must be strictly construed." In re Detention of Hawkins, 169 Wn.2d 796, 801,

238 P.3d 1175 (2010). "Strict construction requires that, 'given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.'" Hawkins, 169 Wn.2d at 801 (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)). Further, "[w]here a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the nile of *expressio unius est exclusion alterius* applies." Washington State Republican Party v. Washington State Public Disclosure Comm'n, 141 Wn.2d 245, 280, 4 P.3d 808 (2000).

Applying these canons of statutory construction to the SVP definition under RCW 71.09.020(18) shows the legislature intended for commitment to be based on a mental abnormality or personality disorder, and no other mental condition, which makes the person likely to commit predatory acts of sexual violence if not confined. The SVP law anchors itself in the principle that civil commitment is justified due to a mental illness that makes the person dangerous. But not just any mental illness. By statute, the only relevant illness is the statutorily defined mental abnormality and personality disorder. RCW 71.09.020(18). No allowance is made for other, non-qualifying mental disorders that interact with the statutorily qualified disorders, or exacerbate the statutory-qualified disorders, or contribute to

risk of reoffense. Dr. Goldberg opined Harell's alcohol use disorder informed his SVP determination. The law, however, does not bend to conform to an expert's opinion. What the doctor thinks is relevant does not control admissibility. An expert does not have authority to expand the range of qualifying mental disorders under the law.

Alcohol use disorder is not a mental abnormality. Dr. Goldberg at no time identified it as such. Goldberg was clear that the only mental abnormality he identified was the paraphilic disorder. RP 443, 523-24. He did not opine alcohol use disorder is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). Because the alcohol use disorder diagnosis proffered by Dr. Goldberg did not qualify as a mental abnormality or a personality disorder, the law did not allow the jury to consider this mental condition as something that "makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

Strict construction of the SVP definition leaves no room for reliance on any other kind of mental condition to commit a person. The alcohol use disorder diagnosed by Dr. Goldberg and presented to the jury cannot be grafted onto the limited statutory means by which a person can

be found to meet the SVP definition. If mental conditions other than mental abnormalities and personality disorders could be considered in making the SVP determination, the separation between typical criminal recidivists and those worthy of being civilly committed collapses.

That poses a constitutional problem. As a matter of substantive due process, evidence of a "serious difficulty in controlling behavior . . . when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." Kansas v. Crane, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

A diagnosis of a mental abnormality or personality disorder, "when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP." In re Detention of Thorell, 149 Wn.2d 724, 761-62, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990, 124 S. Ct. 2015, 158 L. Ed. 2d 496 (2004). The fact finder is therefore required "to find a link between a mental

abnormality and the likelihood of future acts of sexual violence if not confined in a secure facility." Thorell, 149 Wn.2d at 743. It is this link that distinguishes the typical criminal recidivist from those may be civilly committed consistent with due process. Id. at 731-32; In re Detention of Froats, 134 Wn. App. 420, 430, 140 P.3d 622 (2006), review denied, 60 Wn.2d 1022, 163 P.3d 795 (2007).

The alcohol disorder diagnosis is not a mental abnormality or personality disorder. A person cannot be committed as an SVP because he has an alcohol problem. Typical criminal recidivists commit crimes when their inhibitions are lowered due to alcohol. An alcohol disorder lacking a sexual component does not make anyone commit acts of sexual violence. Allowing the jury to consider this diagnosis as evidence that Harell met the SVP definition severs the constitutionally required link between mental illness and risk of sexually violent reoffense.

**d. There is no precedent on the relevancy issue.**

The Court of Appeals believed the diagnosis of antisocial personality disorder and alcohol abuse disorder was relevant to risk of reoffense under the third element, i.e., whether the mental abnormality makes Harell more likely to engage in predatory acts of sexual violence if not confined in a secure facility. Harell, 426 P.3d at 266. For support, the Court of Appeals relied on In re Detention. of Audett, 158 Wn.2d 712, 147

P.3d 982 (2006) and In re Detention of Sease, 149 Wn. App. 66, 201 P.3d 1078, review denied, 166 Wn.2d 1029, 217 P.3d 337 (2009).

In Audett, 158 Wn.2d at 727-28, the State presented sufficient evidence of SVP status where respondent's alcoholism combined with his pedophilia to create a risk of recidivism. In Sease, 149 Wn. App. at 79-80, the State presented sufficient evidence of SVP status where the expert relied on a personality disorder diagnosis and "provided evidence that Sease's borderline and antisocial personality disorders, combined with the risk factors of alcohol dependency and narcissistic personality disorder, caused Sease to be more likely to reoffend if he was not confined to a secure facility." The appellate court in both cases addressed a sufficiency of evidence challenge.

Neither case involved a relevancy challenge to the propriety of admitting such evidence as a basis to commit. And neither case involved the situation where, as here, the "to commit" instruction was limited to one means of proving SVP status but the State relied on evidence of the other means. Audett, 158 Wn.2d at 727-28; Sease, 149 Wn. App. at 5, 78-80.<sup>3</sup>

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<sup>3</sup> See Brief of Appellant in Sease at 7 (confirming jury instructed only on personality disorder, not mental abnormality, as means to commit); Brief of Respondent in Sease at 17 ("At Sease's request, the court eliminated the alternative means of a 'mental abnormality' as a basis for commitment from the jury instructions.") (available at [http://www.courts.wa.gov/appellate\\_trial\\_courts/coaBriefs/index.cfm?fa=coaBriefs.Div2Home&cour](http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.Div2Home&cour)



As such, they are not controlling precedent on the point. Courts "do not rely on cases that fail to specifically raise or decide an issue." In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994). "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Still, cases such as these show reliance on non-qualify disorders reoccurs. Harell's case presents the opportunity to clarify whether diagnosed mental conditions that do not qualify as mental abnormalities or personality disorders can be relied on to prove SVP status.

**e. The error prejudiced the outcome.**

An evidentiary error is prejudicial if, within reasonable probabilities, it materially affected the outcome. In re Detention of Coe, 175 Wn.2d 482, 508, 286 P.3d 29 (2012). Because the trial court allowed the jury to consider both relevant and irrelevant evidence to determine whether the State proved Harell met the commitment criteria, the jury may have relied on irrelevant evidence in reaching its verdict. The jury was instructed to consider all the evidence before it, including Dr. Goldberg's testimony regarding the personality disorder and alcohol use diagnoses, in

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reaching a verdict. CP 20 (Instruction 1) ("In deciding this case, you must consider all of the evidence that I have admitted").

"When the reviewing court is unable to know what value the jury placed on the improperly admitted evidence, a new trial is necessary." Driggs v. Howlett, 193 Wn. App. 875, 903, 371 P.3d 61 (2016), review denied, 186 Wn.2d 1007, 380 P.3d 450 (2016) (citing Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). The State expressly exhorted the jury to consider the personality disorder and alcohol use disorder as contributors to the risk of reoffense. RP 1249, 1253-54, 1291, 1293; CP 630. Under these circumstances, there is a reasonable probability that the jury took the irrelevant expert testimony on the personality disorder and alcohol disorder into account in reaching its verdict that Harell continued to meet the SVP definition. Reversal is therefore required.

**F. CONCLUSION**

For the reasons stated, Harell requests that this Court grant review.

DATED this 18th day of October 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

\_\_\_\_\_  
CASEY GRANNIS  
WSBA No. 67301  
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Attorneys for Petitioner

# APPENDIX A

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

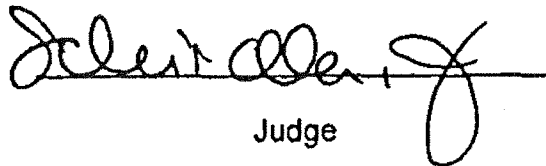
In the Matter of the Detention of PAUL HARELL.	)	No. 76137-4-1
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	ORDER GRANTING MOTION
v.	)	TO PUBLISH
	)	
PAUL HARELL,	)	
	)	
Appellant.	)	

Respondent State of Washington filed a motion to publish the opinion filed on August 6, 2018 in the above case and appellant Paul Harell filed an answer to the motion. A majority of the panel has determined that the motion should be granted.

Now, therefore, it is hereby

ORDERED that respondent State of Washington's motion to publish the opinion is granted.

FOR THE COURT:

  
Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of )  
PAUL HARELL. )  
STATE OF WASHINGTON, )  
Respondent, )  
v. )  
PAUL HARELL, )  
Appellant. )

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No. 76137-4-I  
DIVISION ONE  
  
PUBLISHED OPINION  
  
FILED: August 6, 2018

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2018 AUG -6 AM 8:03

SCHINDLER, J. — A jury found Paul Harell continues to suffer from the mental abnormality of other specified paraphilic disorder, nonconsensual sex, that causes serious difficulty in controlling his sexually violent behavior, and the mental abnormality continues to make him likely to commit predatory acts of sexual violence unless confined to a secure facility. Harell seeks reversal. Harell argues the court erred in denying his motion to exclude the State expert from testifying that antisocial personality disorder and alcohol abuse disorder are risk factors that affect his ability to control himself. We affirm.

FACTS

Sexually Violent Offenses

In 1988, 16-year-old Paul Harell forcibly raped his 18-year-old sister. The State charged Harell with attempted rape but later dismissed the charge.

In 1991, Harell enlisted in the United States Navy. Harell was stationed at the Whidbey Island Naval Air Station. In November 1992, Harell forcibly raped 15-year-old T.W. The State charged Harell with rape in the third degree. Because T.W. declined to testify at trial, the State dismissed the charge.

In December 1992 while "peeping" through a ground level apartment window, Harell saw A.M. lying on the couch in her living room. Harell covered his face with a pair of nylons and entered the apartment through the back door. Harell turned off the power, unplugged the phone, and grabbed a knife from the kitchen. Harell went into the living room, "put [his] hand over [A.M.]'s mouth," pointed the knife at her neck, and raped her. Harell planned to rape A.M. again but fled after he heard someone at the front door.

In June 1993, Harell watched through an outside window as a couple had sex in their living room. Harell masturbated while he watched. Harell returned a week later and entered the house through a window. Harell put nylons over his face and grabbed a knife from the kitchen. As he walked through the house, Harell saw an infant sleeping in a crib. Harell walked into the bedroom where K.C. was lying on the bed. Harell got in the bed and started "kissing and fondling" her. Harell noticed a small child was also asleep in the bed. Harell "brandished the knife" and told K.C. that someone was in the other room with the infant. Harell took off K.C.'s clothes and raped her.

About a week later after leaving a party where he had been drinking, Harell saw an open garage and decided to commit a robbery. Harell found a "broken bayonet" in the garage and entered the house. He grabbed a "pair of stockings" from a hamper in the laundry room to put over his face. Seventeen-year-old M.V. was lying on a bed.

Harell displayed the bayonet and told M.V. to take off her clothes. When M.V. resisted, Harell ripped off her underwear, raped her, and forced her to perform oral sex on him. The police arrested Harell.

Harell admitted he raped M.V. but denied that he raped A.M. and K.C. Harell's DNA<sup>1</sup> profile matched the DNA of the person who raped A.M. and K.C. Harell pleaded guilty to one count of rape in the first degree and two counts of rape in the second degree. The court sentenced Harell to 194 months.

#### Sexually Violent Predator Petition

Before his scheduled release in 2009, the State filed a petition and certification of probable cause alleging Harell is a sexually violent predator.

Dr. Harry Goldberg evaluated Harell. In May 2009, Dr. Goldberg issued a 43-page "Sexually Violent Predator Evaluation." Dr. Goldberg diagnosed Harell with "Paraphilia, Not Otherwise Specified (NOS), nonconsensual sex"; alcohol abuse disorder; and antisocial personality disorder. Dr. Goldberg concluded, "[P]araphilia in combination with [Harell's] antisocial personality and alcohol abuse problem affects his emotional and volitional capacity," and his personality disorder and alcohol abuse "exacerbate his paraphilia." Dr. Goldberg states, "In my opinion, Mr. Harell meets the criteria as a Sexually Violent Predator as described in [chapter] 71.09 [RCW]."

#### Sexually Violent Predator Commitment

In 2011, the court entered a "Stipulation to Civil Commitment as a Sexually Violent Predator and Order Authorizing Conditional Release to Less Restrictive Alternative" (Stipulation). The Stipulation states Harell agrees to the findings in the

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<sup>1</sup> Deoxyribonucleic acid.

certification of probable cause and the May 2009 Sexually Violent Predator Evaluation by Dr. Goldberg. The Stipulation states Harell "has been convicted of three sexually violent offenses as . . . defined in RCW 71.09.020(17)." Harell agreed he "currently suffers from Paraphilia Not Otherwise Specified (nonconsensual sex), Antisocial Personality Disorder, and Alcohol Abuse as those conditions are defined in the Diagnostic and Statistical Manual of Mental Disorder, Fourth Edition, Text Revision."<sup>2</sup> Harell also agreed paraphilia not otherwise specified, nonconsensual sex, is a mental disorder that "causes him to have serious difficulty controlling his sexually violent behavior" and "makes him more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility." The court entered an order that Harell is a sexually violent predator (SVP) and committed him to the custody of the Department of Social and Health Services (DSHS). The order authorized the less restrictive alternative (LRA) of community based treatment and conditions.

Harell engaged in community based treatment with Dr. Michael O'Connell for approximately nine months. When Harell violated the terms of the LRA order, DSHS revoked the community based LRA. Harell continued to "engage in treatment" at the Special Commitment Center (SCC).

In 2014, the State agreed to transfer Harell to the King County Secured Community Transitional Facility (SCTF). Harell resumed treatment with Dr. O'Connell.

In February 2016, Harell filed a petition for an unconditional release trial to determine whether he continues to meet the SVP criteria. Harell submitted the January 2016 report prepared by Dr. Brian Abbott. The court found, "Dr. Abbott's report of

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<sup>2</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR (4th rev. ed. 2000).



Respondent's mental condition establishes probable cause to believe that Respondent's condition has so changed that he no longer meets the definition of a sexually violent predator." The court scheduled an unconditional release trial. Dr. Goldberg evaluated Harell again and in May 2016, issued a report. During his deposition, Dr. Goldberg identified the mental abnormality as "Other Specified Paraphilic Disorder nonconsensual sex."

Unconditional Release Trial

The trial began in October 2016. Harell filed motions in limine. Motion in limine 10 asked the court to prohibit the State from arguing that any condition "other than 'Other Specified Paraphilic Disorder [(nonconsensual sex)]' constitutes Mr. Harell's mental abnormality." But defense counsel conceded the diagnosis of antisocial personality disorder and alcohol abuse disorder were relevant to "risk."

THE COURT: . . . I believe, [Defense Counsel] — If I'm incorrect, tell me — that you do not want the testimony to go into the other diagnosis?

[DEFENSE COUNSEL]: No. They can go into the other diagnosis.

. . . As far as [motion in limine] 10, what I'm suggesting is that the evidence that Dr. Goldberg presented in his deposition that the alleged mental abnormality is Other Specified Paraphilic Disorder only and that the other diagnoses that he makes, for example, alcohol dependency or alcohol abuse, I think it's now called, may affect Mr. Harell in terms of his ultimate risk.

But I don't want the State to suggest that alcohol abuse can now constitute a mental abnormality.

The attorney for the State told the court Dr. Goldberg would testify that personality disorder and alcohol abuse disorder affect volitional control and the likelihood of reoffense.

The court denied motion in limine 10. The court ruled the other diagnosis of personality disorder and alcohol abuse disorder is relevant "to the volitional capacity that affect the mental abnormality."

Defense motion in limine 16 requested the court "exclude evidence of Anti Social Personality Disorder and Alcohol Abuse Disorder." Harell argued evidence of antisocial personality disorder and alcohol abuse disorder is not relevant to whether "Other Specified Paraphilic Disorder continues to . . . make [Harell] likely to commit predatory acts of sexual violence." The State argued the "other diagnoses of Antisocial Personal[ity] Disorder and Alcohol Use Disorder . . . are relevant" to "future risk." The court denied the motion to exclude evidence of antisocial personality disorder and alcohol abuse disorder.

A number of witnesses testified during the seven-day trial, including Dr. Goldberg, SCTF residential rehabilitation counselor Leroy Mack, Harell, and Dr. O'Connell. Harell did not call Dr. Abbott to testify at trial. The court admitted into evidence a number of exhibits, including the 2011 Stipulation to Civil Commitment as a Sexually Violent Predator and Order Authorizing Conditional Release to Less Restrictive Alternative.

Dr. Goldberg testified about the 2009 and 2016 evaluations. Dr. Goldberg said Harell is "always cooperative" and "motivated" to say what is "really on his mind." Harell told Dr. Goldberg that in 2014, he was aroused by "deviant thought" about one of his victims. Harell admitted he "will always" be attracted to coercive sex but he was "sincerely motivated to not reoffend." Harell conceded, "[S]ignificant stressors would increase the sexual desires," and acknowledged "risk factors." Harell told Dr. Goldberg

his risk factors include peeping, and the use of alcohol "decreases his inhibitions." Harell admitted a "risk to reoffend" if he "became hurt or angry with himself" or if he "became moody or secretive." Harell acknowledged "anger" is "a trigger for him, . . . especially . . . if women were making him angry." Harell told Dr. Goldberg that "if he was feeling he was unable to cope" or "was feeling overwhelmed," he would start looking at "pornographic materials" and "engage in voyeuristic behaviors." Dr. Goldberg testified that Harell "did not believe" he had a "sexual disorder."

Dr. Goldberg diagnosed Harell with "Other Specified Paraphilic Disorder, Alcohol Use Disorder, and Antisocial Personality Disorder." Dr. Goldberg testified "paraphilia" is "an intense, . . . recurrent sexual interest." Dr. Goldberg testified paraphilia is not "curable" and is "[I]f it is long." Dr. Goldberg explained that other specified paraphilic disorder "nonconsensual sex" means "an attraction to having sex with someone who is not consenting to the sexual behavior." Dr. Goldberg testified Harell "fits the criteria" for other specified paraphilic disorder, nonconsensual sex; and other specified paraphilic disorder, nonconsensual sex, "constitutes a current mental abnormality." Dr. Goldberg testified the mental abnormality "causes [Harell] serious difficulty in controlling his sexually violent behavior."

[I]f he's out in the community and he's stressed and he's angry, . . . this might lead him into thinking about women. He talks about — about nonconsensual sex with women. Might think- might trigger him to get involved in peeping behavior. And this could lead to sexually violent behavior, as it has in the past.

. . . .  
. . . [H]e continues to have difficulty controlling his emotions at times. He recognizes that that's one of the triggers for engaging in this offense cycle from starting all over again.

Dr. Goldberg testified that Harell's mental abnormality of other specified paraphilic disorder, nonconsensual sex, is the "primary disorder." But his antisocial personality disorder "interplay[s]" with the mental abnormality and "some of those antisocial personality traits exacerbate the paraphilic disorder." Dr. Goldberg testified the antisocial personality disorder means Harell does not "conform to social norms," has "impulsive personality traits," is "deceitful," and demonstrates "[r]eckless disregard," "[i]rritability," and "aggressiveness." Dr. Goldberg testified, "[S]omebody who has an Antisocial Personality Disorder, when in combination with the Paraphilic Disorder, then they have some other traits that make the Paraphilic Disorder more likely to be expressed."

Dr. Goldberg testified the use of alcohol is "more of a risk factor" because "using alcohol . . . would decrease his inhibitions." Dr. Goldberg testified that "even without the alcohol component," Harell has "serious difficulty in controlling his sexually violent behavior" because "he has acted out in a nonconsensual sexual manner without the assistance of alcohol."

SCTF rehabilitation counselor Mack testified that Harell is "more argumentative than most residents." Mack said Harell "seems to resist directions" and has "negative responses." Mack testified Harell could be "combative or belligerent." Mack said, "I'd say over half the times he's asked to do something he doesn't like to do, he has a negative response to it."

Harell admitted he raped his sister, T.W., A.M., K.C., and M.V. Harell testified he had his "first drink . . . [b]efore I was 9-years old." Harell said alcohol "turn[ed] into

something that was . . . a long-term issue in [his] life” and he “came to the conclusion that [he is] an alcoholic” while he was in prison.

Harell testified that he began “peeping” off-and-on when he was 14-years-old. Harell said, “I would go out [at] night and look in people’s windows. And if I saw, you know, women in any different stages of undress or sexual encounters with a person, I would watch. Then at times masturbate to it.” Harell said he started peeping again after he raped T.W. because of “[f]rustrations” with his girlfriend and “living arrangements.” Harell testified that “sexual frustrations led [him] to seek . . . an outlet” because he was “already using pornography” and “[t]hat wasn’t sufficient.”

Dr. O’Connell testified that Harell has “persistent negative emotionality” that “primarily refer[s] to anger issues” that are “dynamic risk factors.”

[T]he source of the problem is the negative emotionality. And if it gets to the point . . . of entitlement, then it becomes more of a problem because he acts out and does things that cause problems.

Dr. O’Connell testified that the “highest risk factors” to reoffend are “deviant sexual arousal and antisocial behavior. It isn’t everything, but those are the two strongest ones. And if you have both of those, it increases risk of reoffense by a substantial amount.” Dr. O’Connell said Harell is “not reporting” deviant arousal and is not “regularly . . . antisocial.”

In closing argument, the attorney for the State argued, “The specific diagnosis here is . . . Other Specified Paraphilic Disorder. . . . ‘Paraphilic’ means sexually related. It’s a disorder. . . . And it’s related to nonconsensual sex. And right now it’s in a controlled environment.” The State argued the antisocial personality disorder and “antisocial traits” are “[f]actors that contribute to risk.” The State presented PowerPoint

slides identifying the "Mental Abnormality" as the "Specific Diagnosis" of "Other Specified Paraphilic Disorder, nonconsensual sex." Consistent with the evidence at trial, a separate slide identifies "Personality Disorder" and "Alcohol Use Disorder" as "Factors Contributing to risk."

The defense attorney argued the State did not prove beyond a reasonable doubt that Harell suffers from other specified paraphilic disorder because he does not have "this disorder anymore" and "doesn't experience intense and recurrent sexually arousing fantasies and urges." Defense counsel argued that Harell's negative emotionality is not a strong factor for recidivism, and there is "no proof beyond a reasonable doubt to suggest that [Harell] is so emotionally dysregulated . . . that he's more likely than not to rape."

In rebuttal, the State reiterated the "diagnosis of Other Specified Paraphilic Disorder, Nonconsensual Sex," is "the mental abnormality that causes Mr. Harell serious difficulty controlling his sexual behavior." The attorney argued, "It's a congenital or acquired condition affecting his emotional or volitional capacity which predisposes him to commit sexual acts in the future." The State noted Dr. Goldberg testified about risk factors and the "interplay" of the "current diagnoses" of "the Antisocial Personality Disorder and the Alcohol Use Disorder and how it affected Mr. Harell's future risk." The State pointed out that Dr. Goldberg also "took into account Mr. Harell's own statements. Mr. Harell doesn't recognize he has a mental disorder. He acknowledges that he has an attraction to coercive sex that will never remit." The State argued, "[T]he evidence demonstrates that Mr. Harell's mental abnormality makes him more likely to engage in predatory acts of sexual violence in the future if not confined to a secured facility."

The jury found the State proved beyond a reasonable doubt that Harell continues to suffer from the mental abnormality of other specified paraphilic disorder, nonconsensual sex, that causes serious difficulty in controlling his sexually violent behavior, and the mental abnormality continues to make him likely to commit predatory acts of sexual violence unless confined to a secure facility. The court entered an order of commitment. Harell appeals.

### ANALYSIS

Harell contends the court erred in denying his motion to exclude evidence of antisocial personality disorder and alcohol abuse disorder. Harell argues the only question at trial was whether he continues to suffer from the mental abnormality of other specified paraphilic disorder, nonconsensual sex.<sup>3</sup>

Harell concedes jury instruction 5 correctly states the burden of proof for unconditional release. Jury instruction 5 states:

To establish that Paul Harell continues to be a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

(1) That Paul Harell was previously found to be a sexually violent predator;

(2) That Paul Harell continues to suffer from a mental abnormality which causes him serious difficulty controlling his sexually violent behavior; and

(3) The mental abnormality continues to make Paul Harell likely to commit predatory acts of sexual violence unless confined to a secure facility.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that Paul Harell continues to be a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of one or more of these elements, then it will

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<sup>3</sup> We reject the State's argument under RAP 2.5(a) that Harell did not preserve the argument he makes on appeal. Harell argued below that evidence of antisocial personality disorder and alcohol abuse disorder is not relevant to whether Harell has a mental abnormality that continues to make him likely to commit predatory acts of sexual violence.

be your duty to return a verdict that Paul Harell is no longer a sexually violent predator.

Harell does not dispute he was previously found to be an SVP. Nor does he dispute that he continues to suffer from the mental abnormality of other specified paraphilic disorder, nonconsensual sex, that causes him serious difficulty to control his sexually violent behavior. Harell claims the statute and the burden of proof jury instruction precluded admission of evidence of antisocial personality disorder and alcohol abuse disorder as not relevant to prove he is likely to reoffend. Because the diagnosis of antisocial personality disorder and alcohol abuse disorder is relevant to whether the mental abnormality makes Harell more likely to engage in predatory acts of sexual violence, we disagree with his argument. Mental abnormality and personality disorder are alternative means of proving that a person continues to meet the definition of an SVP. In re Det. of Halgren, 156 Wn.2d 795, 810, 132 P.3d 714 (2006).

An individual civilly committed as an SVP is entitled to an unconditional release trial if he shows probable cause that his condition has so changed that he “no longer meets the definition of a sexually violent predator.” RCW 71.09.090(2)(a)(i). The State has the burden to prove beyond a reasonable doubt that the individual “continues to meet the definition of a sexually violent predator.” RCW 71.09.090(3)(c). To establish Harell continues to meet the SVP definition, the State must prove beyond a reasonable doubt that (1) Harell has been “convicted of or charged with a crime of sexual violence,” (2) he “suffers from a mental abnormality or personality disorder,” and (3) the mental abnormality or personality disorder makes him more “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.090(3)(c), .020(18); see also In re Det. of Belcher, 189 Wn.2d 280, 288-89, 399 P.3d 1179 (2017).



The third element, whether the mental abnormality or disorder makes Harell more likely to engage in predatory acts of sexual violence if not confined in a secure facility, is “a compound determination.” In re Det. of Post, 170 Wn.2d 302, 310, 241 P.3d 1234 (2010). The jury must find “both causation (i.e., the abnormality or disorder causes the likelihood of future acts), and that ‘the probability of the defendant’s reoffending exceeds 50 percent.’ ” Post, 170 Wn.2d at 310<sup>4</sup> (quoting In re Det. of Brooks, 145 Wn.2d 275, 298, 36 P.3d 1034 (2001), overruled on other ground by In re Det. of Thorell, 149 Wn.2d 724, 753, 72 P.3d 708 (2003)). “The State must prove not only that a crime occurred, but that the SVP continues to suffer from a mental abnormality and that he or she would likely reoffend if released from confinement.” Belcher, 189 Wn.2d at 290.

We review evidentiary decisions for abuse of discretion. Post, 170 Wn.2d at 309. A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. Post, 170 Wn.2d at 309. Relevant evidence is admissible. ER 402. Evidence is “relevant” if the evidence makes “the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. But the court can exclude relevant evidence if the danger of unfair prejudice substantially outweighs the probative value. ER 403.

In an SVP trial, “evidence is relevant only if it increases or decreases the likelihood that a fact exists that is consequential to the jury’s determination whether the respondent is a sexually violent predator.” In re Det. of West, 171 Wn.2d 383, 397, 256

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<sup>4</sup> Citation omitted.

P.3d 302 (2011). “Because relevance is a judgment dependent on the surrounding facts, the trial court enjoys broad discretion in deciding whether evidence is relevant to” the three elements that define an SVP under RCW 71.09.020(18). West, 171 Wn.2d at 397.

The diagnosis of antisocial personality disorder and alcohol abuse disorder is relevant to the third element and the risk of reoffense. In Audett, the Washington Supreme Court held the State proved beyond a reasonable doubt that Audett was more likely to engage in predatory acts if not confined in a secure facility because his mental abnormality caused “ ‘serious difficulty controlling . . . behavior.’ ” In re Det. of Audett, 158 Wn.2d 712, 728, 147 P.3d 982 (2006)<sup>5</sup> (quoting Thorell, 149 Wn.2d at 745). Experts for the State and Audett testified he was diagnosed with pedophilia, a mental abnormality or personality disorder within the meaning of the statute. Audett, 158 Wn.2d at 727-28. In addressing whether the State proved likelihood of reoffense, the court cites the testimony of “both experts” and the evidence of Audett’s inability to control his alcoholism as “a significant additional factor contributing to his risk of reoffense, as was his lack of knowledge regarding his offending patterns.” Audett, 158 Wn.2d at 729.

In In re Detention of Sease, 149 Wn. App. 66, 79, 201 P.3d 1078 (2009), Sease argued the State must establish “ ‘a risk to reoffend which stems from a mental disorder.’ ” Sease asserted the State did not prove he had a current personality disorder that made him more likely to reoffend. Sease, 149 Wn. App. at 79. Because the experts testified Sease suffered from borderline personality disorder and antisocial

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<sup>5</sup> Alteration in original.

personality disorder, we concluded the evidence established Sease “suffered from at least one personality disorder.” Sease, 149 Wn. App. at 79-80. The State's expert also testified that his “borderline and antisocial personality disorders, combined with the risk factors of alcohol dependency and narcissistic personality disorder, caused Sease to be more likely to reoffend if he was not confined to a secure facility.” Sease, 149 Wn. App. at 79-80. We held the State proved beyond a reasonable doubt that Sease “suffers from a mental illness that makes him more likely to engage in predatory acts of sexual violence if he is not confined to a secure facility.” Sease, 149 Wn. App. at 80.

Relying on Thorell, Harell contends that admitting evidence of the other diagnoses “severs the constitutionally required link between mental illness and risk of sexually violent reoffense.” We disagree.

In Thorell, the respondent was diagnosed with borderline personality disorder, antisocial personality disorder, narcissistic personality disorder, and alcohol dependence. Thorell, 149 Wn.2d at 760. The court held the State is required to establish “a link between a mental abnormality and the likelihood of future acts of sexual violence,” but a mental abnormality alone does not prove “serious lack of control” and “serious risk of future sexual violence.” Thorell, 149 Wn.2d at 743, 761-62.

[A] diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a jury to find a serious lack of control. Such a diagnosis, however, when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP.

Thorell, 149 Wn.2d at 761-62; see also Belcher, 189 Wn.2d at 293 (“[T]here is no particular diagnosis that renders someone an SVP. Rather, it is a finding that a

person's diagnosis affects his or her ability to control his or her actions and thereby renders him or her a danger if not confined.”).<sup>6</sup>

Here, evidence of antisocial personality disorder and alcohol abuse disorder was relevant to show risk of reoffense. Dr. Goldberg testified that the antisocial personality disorder, by itself, did not pose a risk that Harell would “commit future sexual crimes.” Dr. Goldberg said antisocial personality disorder “interplay[s]” with and “exacerbate[s]” the paraphilic disorder, which makes it more likely to be expressed.” Dr. Goldberg testified that antisocial personality traits increase Harell's risk of reoffense. Dr. O'Connell also testified that the “highest risk factors” for reoffense are “deviant sexual arousal and antisocial behavior.”

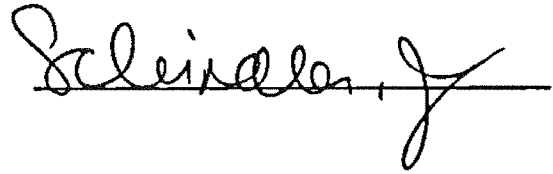
Harell also argues evidence of alcohol abuse disorder is not relevant because it is not a mental abnormality or a personality disorder. Dr. Goldberg did not testify that alcohol abuse disorder was either a mental abnormality or a personality disorder. As noted, Dr. Goldberg testified that alcohol abuse disorder was a contributing factor to Harell's future risk of sexually violent behavior. Dr. Goldberg testified that alcohol lowered Harell's inhibitions and was a “risk factor” to reoffend.

The court did not abuse its discretion in denying the motion to exclude evidence of antisocial personality disorder and alcohol abuse disorder that causes Harell serious difficulty to control his behavior and makes him “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18); see Halgren, 156 Wn.2d at 810 (mental abnormalities and personality disorders may “work in conjunction” to make one more likely to reoffend).

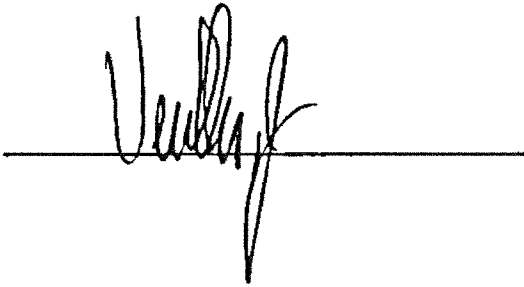
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<sup>6</sup> Citation omitted.

We affirm the jury finding Harell continues to suffer from the mental abnormality of other specified paraphilic disorder, nonconsensual sex, that causes serious difficulty in controlling his sexually violent behavior, and the mental abnormality continues to make him likely to commit predatory acts of sexual violence unless confined to a secure facility.

A handwritten signature in cursive script, appearing to read "Scheindler, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Venable, J.", written over a horizontal line.

A handwritten signature in cursive script, appearing to read "Applegate, J.", written over a horizontal line.

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**October 18, 2018 - 2:16 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 76137-4  
**Appellate Court Case Title:** In re the Detention of Paul Harell, Appellant v. State of Washington, Respondent  
**Superior Court Case Number:** 09-2-00729-7

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